

## Sidner, Regan

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**From:** Ellie Hudson-Heck <ehudsonheck@idahoconservation.org>  
**Sent:** Thursday, January 13, 2022 3:42 PM  
**To:** DEQ BER Secretary  
**Cc:** Stephen Pfeiffer  
**Subject:** [EXTERNAL] ICL and IRU Comments RE Stringency Review of ARM 17.30.632.  
**Attachments:** 1.13.22 ICL and IDU Comments RE Stringency Review of ARM 17.30.632..pdf

Hi Ms. Sidner,

On behalf of the Idaho Conservation League and Idaho Rivers United, I would like to submit the attached comments regarding the stringency review of ARM 17.30.632.

Please feel free to reach out to me or Stephen Pfeiffer (cc'd) with any questions you may have.

Have a good weekend,

--

**Ellie Hudson-Heck, Ph.D.**

She|Her|Hers ([what's this \[mypronouns.org\]](https://www.mypronouns.org/)?)

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IDAHO  
CONSERVATION  
LEAGUE



Regan Sidner  
Board Secretary  
Department of Environmental Quality  
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Submitted via email to [degbersecretary@mt.gov](mailto:degbersecretary@mt.gov)

January 13th, 2022

**Subject: Comments opposing Petitions to weaken Montana's EPA-approved selenium water quality standards in the Kootenai River watershed.**

Dear Chairman Ruffatto and Members of the Board:

We are writing on behalf of the Idaho Conservation League and Idaho Rivers United to provide comments opposing the petitions filed by Teck Coal Limited (Teck) and the Board of County Commissioners of Lincoln County (Lincoln County) with the Board of Environmental Review (the Board or BER) seeking stringency review pursuant to Mont. Code Ann. § 75-5-203 of Montana's EPA-approved water quality standards for the toxic pollutant selenium, ARM 17.30.632(7)(a).

The Idaho Conservation League has been a voice for conservation since 1973. As a state-based conservation organization, we represent over 30,000 supporters, many of whom have a deep personal interest in protecting human health and the environment, including in the Kootenai River watershed. The Idaho Conservation League works to protect these values through public education, outreach, advocacy, and policy development.

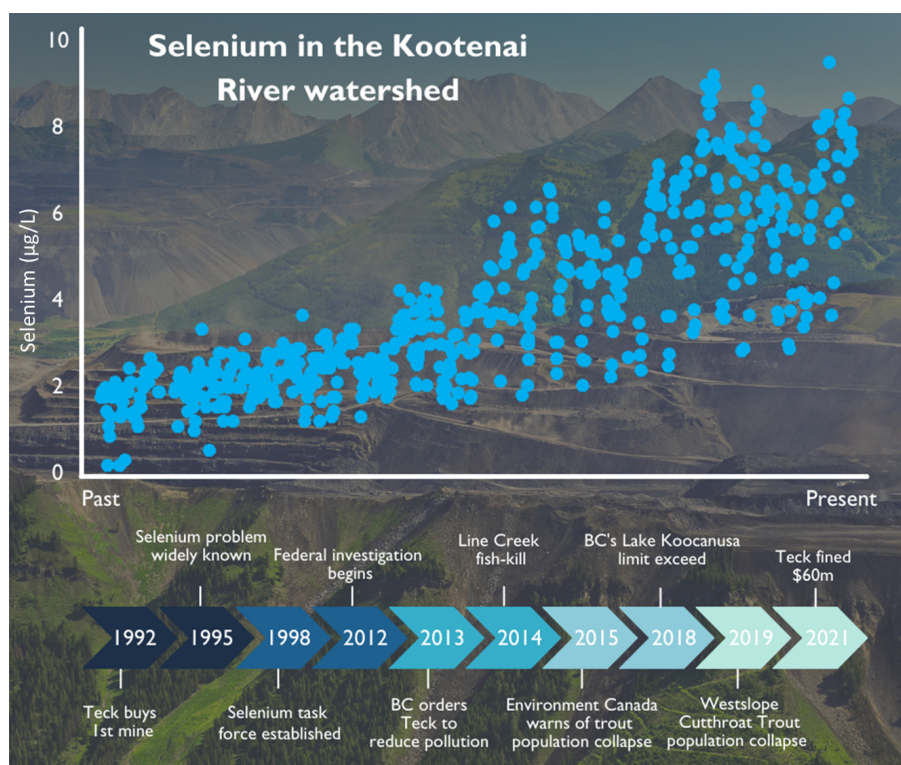
Idaho Rivers United is a nonprofit environmental advocacy organization that is dedicated to protecting and restoring the rivers and streams of Idaho. For over 30 years, IRU has been working to defend Wild and Scenic Rivers, recover native fish populations, reform hydropower policy, and promote enhanced water quality in all of Idaho's rivers. IRU represents 3,500 members throughout Idaho and beyond, who enjoy, depend on, and advocate for healthy, intact rivers.

As set forth below, Montana's new EPA-approved water quality criteria are a critical and long-overdue step toward restoring and maintaining water quality in the Kootenai River watershed, as required by the federal Clean Water Act (CWA). Montana correctly determined that these criteria (specifically ARM 17.30.632) are no more stringent than those required by EPA, and EPA already approved them under the CWA. Furthermore, new information shows that even these standards are likely not stringent enough to satisfy the CWA. Should the Board decide to initiate further proceedings to revise ARM 17.30.632, the Idaho Conservation League and Idaho Rivers United intend to seek more stringent selenium criteria

necessary to protect the Kootenai River watershed and comply with the CWA. For these and additional reasons discussed below, the Board should uphold their previous decision and deny the relief requested by Teck and Lincoln County.

## Background

The Kootenai River watershed is a transboundary waterbody, encompassing the original lands of the Ktunaxa peoples, including the Ktunaxa Nation Council (KNC), Kootenai Tribe of Idaho (KTOI), and the Confederated Salish and Kootenai Tribes (CSKT), as well as what is now known as the province of British Columbia (B.C) and the states of Montana and Idaho. In Southeast B.C. Teck owns and operates four mountaintop removal coal mines. Due to Teck's invasive mining practices, their mines have leached selenium, a toxic pollutant, into this transboundary watershed for decades. Selenium pollution flows from these mines, down the Elk River into Lake Koocanusa, and ultimately, the Kootenai River in northern Idaho. This pollution has steadily increased since the mid-1990s (Figure 1).



**Figure 1.** Selenium levels in the Canadian portion of this watershed. Data source: Teck Coal accessed via B.C. Environmental Monitoring System.

Congress passed the Clean Water Act (CWA) in 1972. The purpose of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” through the reduction and eventual elimination of the discharge of pollutants into those waters. 33 U.S.C. § 1251(a). In addition, the CWA establishes an “interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife.” 33 U.S.C. § 1251(a)(2).

To meet these goals, the CWA requires the establishment of water quality standards. Water quality standards are promulgated by the states and establish the *desired condition* of each waterway within the state’s regulatory jurisdiction. 33 U.S.C. § 1313(a) (emphasis added). While states are given the opportunity to develop water quality standards in the first instance, they require EPA approval. 33 U.S.C. § 1313(c). EPA must reject any water quality standards that fail to satisfy the CWA, and ultimately EPA must promptly promulgate adequate water quality standards if a state fails to do so. *Id.*

In December 2020, the Board established the “desired condition” of Lake Koocanusa and the Kootenai River by approving new selenium criteria for both of these waterways (Table 1).

**Table 1.** The Montana selenium criteria compared to the federal 304(a) selenium criteria recommended by the EPA.

	Lake Koocanusa		Kootenai River	
	Montana	EPA	Montana	EPA
<b>Egg/ovary (mg/kg dw)</b>	15.1	15.1	15.1	15.1
<b>Whole body (mg/kg dw)</b>	8.5	8.5	8.5	8.5
<b>Muscle (mg/kg dw)</b>	11.3	11.3	11.3	11.3
<b>Water column (µg/L)</b>	0.8	1.5	3.1	3.1

The selenium water quality criteria for Lake Koocanusa consists of four individual concentration values which, when combined, act to protect the lake’s beneficial uses (RR\_000046; 000089). Through this action, the Board committed to ensuring that Montana waters would be clean, healthy, and ultimately protected from Canadian coal mining pollution. Importantly, this decision also exemplified that Montana is committed to protecting the Idaho portion of this watershed, downstream of Lake Koocanusa.

As you know, Teck and the Lincoln County have petitioned the Board to review the new selenium criteria to determine whether the rule, specifically ARM 17.30.632(7)(a), which sets a water quality criterion for selenium in Lake Koocanusa of 0.8 µg/L, is more stringent than the comparable federal guideline for selenium of 1.5 µg/L (Table 1). First and foremost, Teck has no standing to challenge a U.S. law under the CWA. They are a Canadian company that operates completely and solely in Canada. There is no precedence for a Canadian corporation to challenge a law that was set forth in the U.S. However, even if Teck did have a legal grounds to support this endeavor, we strongly disagree with the arguments presented in the petitions and offer the following responses:

**The Montana selenium criteria are not more stringent than the federal recommendations or guidelines**

*The arguments presented in the Petitions are a red herring.*

The arguments presented in the Petitions act as a red herring by drawing attention to the water column value (0.8 µg/L) and away from the other three fish tissue criteria (Table 1), which happen to hold more weight. The four-part selenium criteria were derived to create a system of protection that is composed of both values for the water column and for the fish. Focusing solely on the magnitude of the water column



criterion completely misdirects the true purpose of these criteria: to protect the designated beneficial uses of water bodies.

With the ultimate goal of protecting aquatic life (RR\_000046), it was important to adopt criteria that ultimately work to protect fish from selenium bioaccumulation. Because the eggs/ovaries of fish are the most susceptible to selenium bioaccumulation it was determined that the EPA recommended egg/ovary criteria of 15.1 mg/kg dw would apply to Lake Koocanusa. However, it is also important to have an accompanying water column value. Ultimately the selenium water column criterion is designed to limit accumulation in fish tissue. It is protective towards the fish tissue standards in a non-steady state system due to the delay between increased selenium loading in a water body and increased selenium levels in fish tissue being detected, which can be months or even years (RR\_000073). Therefore, using the egg/ovary criterion of 15.1 mg/kg dw, Montana back-calculated what the maximum selenium concentration in the water would have to be to meet the egg/ovary criterion. They arrived at 0.8 µg/L: a value that is inherently derived from the EPA 304(a) recommended criteria.

The egg/ovary criteria is exactly equal to the EPA criteria (Table 1). Therefore, because the 15.1 mg/kg dw is not more stringent than federal regulations, and the new water column standards were derived from the numeric value necessary to comply with the EPA recommended egg/ovary criteria, Mont. Code Ann. Section 75-5-203, does not apply.

*The site-specific criteria are derived from EPA recommended procedures*

The 0.8 µg/L is a site-specific criterion. By definition, this criterion is specific to the water quality and aquatic life conditions of Lake Koocanusa. According to the 2016 EPA guidance document;

*“Because the factors that determine selenium bioaccumulation vary among aquatic systems, site-specific water column criterion element values may be necessary at aquatic sites with high selenium bioaccumulation to ensure adequate protection of aquatic life (Appendix K).” (RR\_000311).*

Six years of data collection between the EPA, USGS, KTOI, CSKT, and Montana’s own Department of Environmental Quality (DEQ) demonstrated that Lake Koocanusa is a water body that is highly susceptible to selenium bioaccumulation, and therefore, a site-specific selenium criterion is required to protect the designated beneficial uses:

*“In this regard, we find that the EPA (2016) lentic water column value is not protective of the aquatic life beneficial uses in Lake Koocanusa and a more stringent standard is required.” (RR\_002485).*

As described in the 2016 EPA guidance document, states can develop site-specific criteria for all four parts of the selenium criterion in order to ensure beneficial uses are protected:

*“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.” (RR\_000418)*

The site-specific water column criterion of 0.8 µg/L was determined following the EPA protocol for deriving site-specific selenium criteria. Therefore, the site-specific standard cannot be more stringent

than the federal recommendations, because it was calculated using the federally recommended, and approved protocol (Table 2).

**Table 2.** Excerpts from the rulemaking record that concludes the Montana selenium criteria is not more stringent than the federal recommendations.

Authoring Entity	Rulemaking Citation	Text
Montana Board of Environmental Review	RR_000001-02	<i>"However, the selenium standards in 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. NEW RULE I also includes three fish-tissue standards (egg/ovary, muscle, and whole body, expressed as mg/kg dry weight) which correspond exactly 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. "</i>
Montana Board of Environmental Review	RR_001330	<i>"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; therefore, it is more accurate than the generally applicable national lentic (lake) number."</i>
DEQ Presentation - Myla Kelly	RR_002333	<i>"And in alignment and following State statute, the proposed Lake Koocanusa water column standard is no more stringent than the recommended RR_002333 41 1 EPA 304(a) criteria, because it was developed using 304(a) site-specific procedures. Therefore, it is a more accurate criteria than the generally applicable national lentic or lake number of 1.5 micrograms per liter."</i>
Montana Board of Environmental Review - Response to Comments	RR_002544	<i>"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</i>

		<i>choose to adopt the results of site-specific water column translations as site-specific criteria..."</i> <i>Montana chose this approach."</i>
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### **Teck and Lincoln County Misinterpret MCA 75-5-203 and EPA's Guidance**

The Montana Water Quality Act requires stringency review only when Montana adopts a water quality standard "that is more stringent than the comparable federal regulations or guidelines that address the same circumstances." Mont. Code Ann. § 75-5-203 (underscore added). To address the varied "circumstances" of selenium pollution and its impacts on designated uses in waters throughout the United States, EPA guidance provides both: (a) generic recommended standards; and (b) methods for developing site-specific standards to be used in certain circumstances, including when "may be necessary at aquatic sites with high selenium bioaccumulation." (underscore added; RR\_000311).

The "circumstances" at issue in the Kootenai River watershed, unfortunately, are those in which it is "necessary" under EPA guidance to develop site-specific selenium standards due to high selenium bioaccumulation. Montana, thus, developed site-specific criteria, as called for in EPA's guidance for this same circumstance. And when it developed the site-specific criteria, Montana followed the methods set forth in EPA's guidance and went with the selenium value that resulted from those methods (as discussed in the previous section above). Montana did not select alternative methods, nor did it otherwise deviate from what EPA guidance calls for in this circumstance.

Teck and the County argue that anything that deviates from the generic recommended numeric standards in the EPA guidance triggers stringency review, while wholly ignoring the language in MCA 75-5-203 about "the same circumstances." The generic numeric standards in EPA's guidance apply in some circumstances, but not in other circumstances, like those here: where there is high selenium bioaccumulation. In "the same circumstances" present here, EPA's guidance calls for site-specific selenium standards and provides methods--methods Montana followed--for developing those standards.

### **Federal regulations require Montana to ensure downstream water quality standards will be met, and Montana's 0.8 standard is the minimally stringent necessary to meet downstream Idaho standards.**

Teck and Lincoln County erroneously assume that EPA's selenium guidance is the only "comparable federal regulations or guideline" under MCA 75-5-203 that apply here. But EPA's CWA regulations, which apply to all water quality standards including the selenium standards at issue, explicitly require: "In designating uses of a water body and the appropriate criteria for those uses, [a state] shall take into consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters." 40 C.F.R. Part 131.10(b) (underscore added). Relying on the CWA and this specific CWA regulation, the Eighth Circuit Court of Appeals upheld EPA's denial of Arkansas' revised water quality standards based on EPA's finding of possible effects to downstream waters. *El Dorado Chemical Co. v. U.S. EPA*, 763 F.3d 950 (8th Cir. 2014). Thus, federal regulations require Montana to set selenium standards in the Kootenai River watershed at a minimum to be at least as stringent as necessary to protect downstream standards, including in the downstream Kootenai River in Idaho. That is what Montana did here.

The Idaho Department of Environmental Quality (IDEQ) recently underwent a water quality rulemaking to develop state-wide and site-specific selenium criteria for water bodies in Idaho. Pursuant to this, Idaho adopted state-wide egg-ovary criteria of 15.1 mg/kg dw and site-specific egg-ovary criteria of 19.0 mg/kg dw for waters where this was deemed appropriate. Through the course of this rulemaking, it was discussed and agreed that the presence or absence of sturgeon was an important factor in determining whether a waterbody would utilize the 19.0 mg/kg dw site-specific criteria or the more stringent 15.1 mg/kg dw state-wide criteria. Idaho's proposed selenium criteria were approved by EPA on July 9, 2019.

IDEQ determined that the 15.1 mg/kg dw egg-ovary criteria should apply to the Kootenai River because the waterway is inhabited by endangered Kootenai white sturgeon (*Acipenser transmontanus*). This species was listed as endangered in 1994 by the U.S. Fish and Wildlife Service, and a Recovery Plan for Kootenai River white sturgeon was approved in 2019.

The water quality criteria established in Lake Koocanusa directly affect the water quality and fish health of the downstream, Idaho portion of the Kootenai River. The current, EPA approved site-specific criteria of 0.8 µg/L for Lake Koocanusa is based on six years of data collection, in a collaborative effort between the EPA, USGS, KTOI, CSKT, and Montana's own DEQ. Through this rigorous process, it was determined that a water column concentration of 0.8 µg/L is required to ensure that the egg-ovary criteria of 15.1 mg/kg dw (the superseding criteria) are met.

Thus, Montana's EPA-approved selenium standards are the minimum necessary to ensure attainment and maintenance of Idaho's downstream selenium standards in the Kootenai River. Because this is the minimum stringency required by federal regulations (40 C.F.R. Part 131.10(b)), Montana did not adopt a standard more stringent than federal regulations require. Rather, adopting weaker selenium standards in Montana--which appears to be Teck's ultimate goal--would fail to ensure Idaho's EPA-approved selenium standards will be attained and maintained, would run afoul of 40 C.F.R. Part 131.10(b) and the CWA, and could not be approved by EPA under 33 U.S.C. § 1313(c).

### **Teck's coal mines are not being targeted**

In its Petition, Teck complains that its Elk Valley coal mining operations are being targeted by Montana's selenium standards. This is false. The fact that Teck, at present, appears to be the sole cause of excessive and damaging selenium pollution in the Kootenai River watershed is irrelevant to developing water quality standards under the CWA.

CWA water quality standards, including the selenium standards at issue here, are developed by states and EPA based on the designated uses of the water body and the water quality necessary to achieve those designated uses, not based on pollution sources. Water quality standards "define[] the water the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses." 40 C.F.R. Part 131.2. Under the CWA, water quality standards "shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of [the CWA]." 33 U.S.C. § 1313(c)(2)(A).

Existing sources of pollution, like Teck's Elk Valley coal mines, are not relevant to this stage of the CWA process. Only later, after water quality standards are set by a state and approved by EPA, do the sources of pollution come into play. After setting water quality standards, the states and/or EPA adopt TMDLs,

issue discharge permits, and take other actions aimed at achieving compliance with water quality standards.

### Granting the Petitions would be meaningless

Teck and Lincoln County seek a paper exercise that will change neither the final outcome nor the interim selenium water quality standards that apply to the Kootenai River watershed. As Teck concedes on pages 10-11 of “Teck’s Response to Comments on the Petition Process” (Sep. 29, 2021), the Petition only seeks compliance with a process requiring written findings, and “nothing in the Petition prevents the water column standard for Lake Koocanusa to be set at 0.8 micrograms per liter.”

First, even if the Board grants the Petitions, Montana can easily re-approve the selenium standards by making the specific written findings that Teck claims are required, including: whether the standards are needed to protect Montana’s health or environment; whether the standard can mitigate such harm; whether the standard is achievable; and at what cost.

Montana undertook a 6-year process, including by gathering data, analyzing the data, doing studies, and developing a voluminous record that easily supports making these findings.

Table 3 illustrates that the record is replete with evidence that high levels of selenium pollution in the Kootenai River watershed have the potential to harm both public health and the environment, and that lower levels of selenium pollution will alleviate these harms.

**Table 3.** Excerpts from rulemaking record that concludes the levels of selenium in the Kootenai River watershed are harming aquatic life, water quality, and human health.

Understanding and Documenting the Scientific Basis of Selenium Ecological Protection in Support of Site-Specific Guidelines Development for Lake Koocanusa, Montana, U.S.A., and British Columbia, Canada	RR_002983	<i>“Since 1984, selenium concentrations in the Elk River measured at a station 2.2 mi above its discharge into Lake Koocanusa (that is, at Highway 93) show a continuing increase as mines have expanded (<a href="https://www.canada.ca/en/environmentclimate-change/services/freshwater-quality-monitoring/online-data.html">https://www.canada.ca/en/environmentclimate-change/services/freshwater-quality-monitoring/online-data.html</a>) (fig. 2A).”</i>
Understanding and Documenting the Scientific Basis of Selenium Ecological Protection in Support of Site-Specific Guidelines Development for Lake Koocanusa, Montana, U.S.A., and British Columbia, Canada	RR_002983	<i>“Selenium concentrations in the Elk River have exceeded BCMOE’s Provincial guideline of 2 micrograms per liter (µg/L) for protection of aquatic life (Nagpal and Howell, 2001; BCMOE, 2014) since 1993 and the USEPA’s guideline of 3.1 µg/L for lotic waters (USEPA, 2016a) since 2002 on a seasonal basis.”</i>
Understanding and Documenting the Scientific Basis of Selenium Ecological Protection in Support of Site-Specific Guidelines Development for Lake Koocanusa, Montana, U.S.A., and British Columbia, Canada	RR_002983	<i>“Expansion of mining is ongoing, and management plans for selenium call for a doubling of the amount of waste-rock storage by 2023 (Teck Coal Ltd., 2014).”</i>
Councils of Confederated Salish and Kootenai Tribes and Kootenai Tribe’s of	RR_005285	<i>“The U.S. members of the International Joint Commission have also expressed concerns about selenium pollution caused by the</i>

Idaho Comment Letter to WPIC		<i>mines. In their 20 June 2018 letter, the U.S. Commissioners wrote that "[i]n addition to documented short-term impacts, it is well understood that high concentrations of selenium will have long lasting impacts on water quality, fish, other aquatic species, wildlife and human health in southeast BC and northwestern Montana communities."</i>
Wildsight Comment Letter	RR_001337	<i>"Selenium builds up in fish tissue, causing birth defects, growth problems and complete reproductive failure. Humans can also suffer health effects from excess selenium if they drink contaminated water or eat fish from contaminated waterbodies."</i>
Selenium Technical Sub-Committee letter to SeSTC and Co-Chairs	RR_004077	<i>"Burbot populations declined over two decades ago when the ambient reservoir Se concentrations were below what is currently seen today. In published literature, burbot have been shown to be particularly sensitive and susceptible to the bioaccumulation of selenium. Muscatello and Janz observed significant bioaccumulation in burbot (10 ug/g dw WB) at low aqueous (&lt;0.5 µg/L) and benthic invertebrate (0.5-3 µg/g) selenium concentrations. This is reinforced with the general knowledge that the burbot population decline and eventual functional-extirpation in Koocanusa Reservoir coincides with the Elk River Coal Mines operational history and subsequent water pollution caused by those coal mines; and severely complicates the restoration of burbot above Libby Dam."</i>
Selenium Technical Sub-Committee letter to SeSTC and Co-Chairs	RR_004077	<i>"Limited KTOI data is also showing that burbot in the mainstem Kootenai River are accumulating selenium at rates that are known to cause significant negative physiological effects on other fish species. Those effects include reproductive failure, reduced growth, and mortality (KTOI, unpublished data)."</i>
Selenium Technical Sub-Committee letter to SeSTC and Co-Chairs	RR_004077 - 004078	<i>"Further, mining contaminant inputs into Koocanusa Reservoir present a critical uncertainty in the Kootenai River Ecosystem Restoration program, and will continue to act in synergy with the habitat alterations perpetuating white sturgeon and burbot recruitment failure below Libby Dam."</i>
Montana DEQ Presentation	RR_001353	<i>"Standards are necessary to prevent impacts to aquatic life"</i>
Derivation of a Site-Specific Water Column Selenium Standard for Lake Koocanusa	RR_004031	<i>"Fish are considered the most sensitive ecological end point in Lake Koocanusa as determined by the SeTSC (see Section 3.7), therefore, fish are the focus of this report and the development of the Se standards for Lake Koocanusa."</i>

The record and other available information also easily supports finding that the standard is achievable. In its filings, Teck repeatedly touts its water quality plans, the money it has spent on those, and the successes it expects to achieve in reducing selenium levels. See Teck's Response to Comments on the Petition Process (Sep. 29, 2021) at pp. 3-4. Similarly, Teck's website includes extensive information about

these efforts, some of which we attach to these comments. For example, the “Teck Elk Valley - Water Quality Fact Sheet” (available at <https://www.teck.com/media/Teck-Water-Quality-Fact-Sheet.pdf>) lays out what Teck calls a “significant increase in treatment capacity” from 2021 to 2031. The Fact Sheet also quotes Dr. Lisa Kirk, affiliate professor at Montana State University: “Teck’s use of saturated rock fills to treat mine-affected water is leading-edge sustainable technology. Saturated rock fill is extremely effective at removing selenium and nitrate from mine affected water and improving water quality.”

Second, EPA already reviewed and approved Montana’s selenium standards under the CWA and the Endangered Species Act (ESA), so even if the Board grants the Petitions, the EPA-approved selenium standards will remain in effect under the federal CWA. This is true even if after granting the Petitions Montana reinstated the old weaker standards or adopted new weaker standards.

Any change to selenium standards EPA already approved would require EPA review under CWA 33 U.S.C. § 1313(c) to determine whether the standards satisfy the minimum requirements of the CWA before they could become effective. And while states are given the initial opportunity to establish water quality standards, EPA has the final say and has a duty to promptly promulgate substitute water quality standards that satisfy the CWA when a state fails to do so. *See* 33 U.S.C. § 1313(c). EPA would also have to complete mandatory ESA consultation with the U.S. Fish and Wildlife Service under 16 U.S.C. 1536(a)(2) to ensure that approving any weakened selenium standards would not jeopardize the continued existence of, or destroy or adversely modify the critical habitat of, ESA-listed bull trout and white sturgeon.

EPA would have no rational or lawful basis for approving or issuing standards weaker than the ones it recently approved. As already discussed above, rigorous studies based on years of data show that Montana’s current, EPA-approved selenium standards are necessary to achieve designated uses in Montana’s Kootenai River watershed, to comply with Idaho’s downstream standards, and to meet other minimum requirements of the CWA.

### **More stringent selenium standards are needed to comply with the CWA and protect the Kootenai River watershed**

Recent water quality and fish tissue data (USGS <https://doi.org/10.5066/P9YYVV7R>) demonstrate that the Kootenai River is not in compliance with Idaho’s selenium criteria. In fact, 100% of fish sampled from the Kootenai River had levels of selenium in their system that exceeded the egg/ovary criterion (Table 3).

**Table 3.** Egg-ovary selenium data from nine Mountain whitefish collected from the Kootenai River (ID17010104PN031\_08). All fish collected had levels of selenium over the egg/ovary criterion of 15.1 mg/kg dw. Table originally published in Idaho 2018/2020 integrated report.

Individual Mountain whitefish Egg/ovary concentration (mg/kg dw)	Value								
	#1	#2	#3	#4	#5	#6	#7	#8	#9
	17	29.3	17.2	18.7	16.9	26.3	18.1	21	19.4



Indeed, this waterbody has been designated as 303(d) for selenium, requiring the development of a TMDL to achieve water quality standards and protect designated beneficial uses, including Kootenai white sturgeon. Further, in public comment on Idaho's 2018/2020 Integrated Report, the USGS urged IDEQ to make a judgement of representativeness for several other Kootenai River assessment units, based on the findings shown in Table 3. Mountain whitefish muscle selenium concentrations sampled along river sections downstream to Shorty's Island were higher than those sampled along (ID17010104PN031\_08), which had egg/ovary exceedances referenced above. The correlation between mountain whitefish muscle tissues and egg/ovary tissues has been found to be a median ratio of 5.8 (EPA Selenium criteria document, appendix B). Selenium concentration exceedances in mountain whitefish muscle tissue can therefore be extrapolated to mean exceedances in the egg/ovary criterion. This suggests that river segments as far downstream as Shorty's Island meet the criteria for 303(d) listing due to selenium impairment.

In addition, various studies conducted by KTOI have shown that Burbot collected from the Idaho portion of the Kootenai River have levels of selenium in their system that are elevated compared to levels required under the CWA.

The water column concentration in Lake Koocanusa is already required to be below 0.8 µg/L per the Montana CWA. Yet, we are seeing levels of selenium in fish downstream in Idaho that are far beyond what the CWA requires (Table 3). These new data sets raise serious concerns that Montana's new selenium standards are actually not stringent enough to comply with the CWA. Should Montana or the EPA reconsider the selenium standards, the Idaho Conservation League and Idaho Rivers United intend to advocate for even stricter selenium standards to meet the minimum requirements of the CWA. Without more stringent standards, the Kootenai River watershed in Montana and Idaho and the fish and people that depend on it will continue to suffer from the effects of excessive selenium pollution.

Thank you for your consideration.

Sincerely,



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## Sidner, Regan

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**From:** Stu Levit <Stu.Levit@cskt.org>  
**Sent:** Thursday, January 13, 2022 4:52 PM  
**To:** DEQ BER Secretary  
**Cc:** Billy Barquin; Richard Janssen; Sue Ireland; Genny Hoyle; Erin Sexton  
**Subject:** [EXTERNAL] Selenium Criteria BER Review CSKT-KTOI Comments  
**Attachments:** CSKT-KTOI Se Criteria Cumulative Docs 13Jan2022.pdf; Elk BER Se Appeal CSKT-KTOI Comments 13Jan2022-Final-s.pdf

Please accept the attached two documents as the response and recommendation on behalf of the Confederated Salish and Kootenai Tribes (CSKT) and the Kootenai Tribe of Idaho (KTOI) (collectively "Tribes"), constituent governments of the transboundary Ktunaxa Nation, in response to the BER's invitation to comment on the petitions of Teck Coal Limited (Teck) and the Lincoln County Commissioners to review the stringency of the Selenium Standard Rule for Lake Koocanusa.

We strongly recommend and request that the Board immediately reject the petition review the stringency of the Rule and uphold the site-specific selenium standard of 0.8 ug/l selenium for Koocanusa Reservoir and associated standards described below for the mainstem Kootenai River.

Thank you in advance for considering our comments.

Please contact me or Billy Barquin of the KTOI if you have any questions or need assistance with our comments.

Best,  
Stu

Stu Levit  
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**28<sup>th</sup> August, 2020**

**Tim Davis | Administrator, Water Quality Division, Montana Department of Environmental Quality | LKMRC Co-Chair**

**Sean Moore | Director, Watershed Science and Adaptation, Environmental Sustainability and Strategic Policy Direction, BC Ministry of Environment | LKMRC Co-Chair**

[TimDavis@mt.gov](mailto:TimDavis@mt.gov)

[Sean.Moore@gov.bc.ca](mailto:Sean.Moore@gov.bc.ca)

Dear LK MRC Co-Chairs and Members,

Please accept this recommendation on behalf of the Confederated Salish and Kootenai Tribes (CSKT) and the Kootenai Tribe of Idaho (KTOI), constituent governments of the transboundary Ktunaxa Nation. You will find herein our scientific justification and rationale, regarding the request to provide written recommendation on the inputs to the model developed by US Geological Survey (USGS), in support of a site-specific selenium criteria for Koocanusa Reservoir.<sup>1</sup>

The Transboundary Kootenai watershed sits entirely within the transboundary Ktunaxa Nation Territory and provides critical habitat for rare and threatened fish species including bull trout, burbot, westslope cutthroat trout, and endangered Kootenai River white sturgeon. Unabated selenium inputs from the Elk Valley mines into Koocanusa Reservoir demonstrate a clear, increasing trend dating back to 1984.<sup>2</sup> Selenium leaching from the Teck Ltd. mines in the Elk Valley of British Columbia is resulting in degradation of water quality and presenting unacceptable impairment and risks to Ktunaxa Territory resources. As noted in our previous

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<sup>1</sup> Presser, T.S., Naftz, D.L. Naftz, 2020, Understanding and documenting the scientific basis of selenium ecological protection in support of site-specific guidelines development for Lake Koocanusa, Montana, U.S.A. and British Columbia, Canada: U.S. Geological Survey Open-File Report 2020-1098, 40 p., <https://doi.org/10.3133/ofr20201098>.

<sup>2</sup> Unpublished data from 2019 collected by the U.S. Environmental Protection Agency, U.S. Geological Survey and Kootenai Tribe of Idaho for the Kootenai River and tributaries. 2019.

letters, we are specifically concerned about impacts on the water quality, fish and fish habitat, species at risk, impacts to other species and resources that depend on those waters and fish, and traditional cultural values, including human health impacts from consumption of contaminated fish, in the entire transboundary Kootenai watershed.

Based on historical and recent data for water quality and fish tissue, it is imperative that Montana work now to adopt a site-specific selenium criteria for the health and protection of all fish species in Koocanusa Reservoir and downstream in the Kootenai watershed. We recognize that existing data documents increasing selenium in several species of fish in Koocanusa Reservoir, including three species that exceed the 2016 EPA recommended criteria for selenium in fish tissue. Further, Koocanusa Reservoir is currently unprotected, given that Montana did not adopt the national recommended selenium criteria, as revised and released by EPA in 2016.<sup>3</sup> The best available science, including the 2020 USGS model and report, demonstrates that there are historical, on-going, and projected future inputs of selenium into Koocanusa Reservoir, and it is the responsibility of the State of Montana to adopt a selenium criteria that is sufficiently protective to ensure the immediate and long-term protection and restoration of Koocanusa Reservoir, and downstream uses in the Kootenai River, from the ecological impacts of selenium contamination. Given the current impacts and risk to Ktunaxa territory resources, the KTOI and CSKT are in full support of the commitment by the State of Montana to adopt a site-specific selenium criterion by December, 2020, including initiation of the formal rule-making process in September, 2020.

In addition, we support the scientifically defensible and peer-reviewed report and model developed by USGS in support of criteria development, including the approach of the USGS to base the model on a conservative and protective approach. The authors of the model are among the top selenium experts in North America, with decades of experience in the field of selenium toxicology, and the model they have developed is peer-reviewed and capable of generating a defensible, protective criterion for the reservoir, based on the factors that influence selenium in the reservoir.

Given that Koocanusa Reservoir is already degraded due to input of contaminants from mining in the Elk Valley of British Columbia, we support a criterion that manages the reservoir to improve and restore from the already degraded condition. Current levels of selenium contamination caused by Elk River coal mining above and below Libby Dam is with high probability already causing, and threatens to continue, negative physiological effects to organisms dependent on aquatic resources, including birds, and possibly humans. A conservative site-specific criterion is needed to support management that improves and restores the water quality and aquatic life in the reservoir.

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<sup>3</sup> U.S. Environmental Protection Agency [USEPA], 2016a, Aquatic life ambient water quality criterion for selenium—Freshwater: Washington, D.C., U.S. Environmental Protection Agency, EPA 822-R-16-006), 807 p., accessed May 2020 at [https://www.epa.gov/sites/production/files/2016-07/documents/aquatic\\_life\\_awqc\\_for\\_selenium\\_-\\_freshwater\\_2016.pdf](https://www.epa.gov/sites/production/files/2016-07/documents/aquatic_life_awqc_for_selenium_-_freshwater_2016.pdf).

There is evidence of significant bioaccumulation of selenium already occurring across the Kootenai ecosystem, including the Idaho and BC portions of the Kootenai.<sup>4</sup> This bioaccumulation has been occurring and will continue even at current water column selenium concentrations that are below the current criteria/exceedance limits. Literature provides evidence that body burden concentrations found in Kootenai River white sturgeon, burbot, mountain whitefish, and freshwater mussels are likely already having significant physiological effects. This is a critical concern to the Ktunaxa Nation governments, given the cultural significance of these species, as well as the tremendous effort and resources dedicated to ecosystem restoration.

The selection of a conservative and protective site-specific selenium criterion is necessary to, at minimum; prevent further increases in selenium into the Kootenai ecosystem. Current data is showing increasing concentrations of selenium in larger portions of the reservoir, which in turn will increase selenium concentrations below Libby Dam.<sup>5</sup> This trend will continue until effective mine impact mitigation is implemented at an appropriate scale.

**The overall selenium loading into the reservoir from the Elk River needs to be stabilized and reduced in order to prevent near-future partitioning and release of selenium into the reservoir and also the downstream Kootenai River.**

**After reviewing the model outputs for the differing variables, CSKT and KTOI highlight that, at minimum, the recommended water column selenium criteria needs to be below 1.0 µg/L. Therefore, based on the specific framework of the USGS model W6, Model run #2, the CSKT and KTOI are specifically recommending a water column selenium concentration criterion of 0.61 µg/L selenium.**

Based on the attached background, modeling recommendations and rationale, the KTOI and CSKT recommends using a 5.6 mg/kg dw whole-body threshold. The 5.6 mg/kg dw whole-body threshold accounts for the potentially sensitive fish species of mountain whitefish and burbot and incorporates the Ktunuxa Nation Council's preferred fish consumption rates.

In summary, we are recommending a conservative site-specific criterion for selenium in Koocanusa Reservoir, based on the following uncertainties;

1. Koocanusa Reservoir currently demonstrates system degradation and impairment. This is demonstrated by the following:
  - a. Fish tissue concentrations (muscle, whole body, and/or egg ovaries) at times exceed USEPA and B.C. recommend thresholds.

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<sup>4</sup><https://governmentofbc.maps.arcgis.com/apps/webappviewer/index.html?id=0ecd608e27ec45cd923bdcfeefba00a7>

<sup>5</sup> Presser, TS, and DL Naftz. 2020. Understanding and documenting the scientific basis of selenium ecological protection in support of site-specific guidelines development for Lake Koocanusa, Montana, USA, and British Columbia, Canada: US Geological Survey Open-File Report 2020-1098, 40 p. <https://doi.org/10.3133/ofr20201098>.

- b. The reservoir has increasing pollutant loads, as demonstrated by B.C. long-term monitoring station on the Elk River at HWY 93.
  - c. The reservoir has an increasing mass of selenium over an increasing reservoir area (Presser and Naftz, Figure 17).
  - d. The reservoir has declining burbot populations.
  - e. Fish populations demonstrate gonadal disfunction and dysfunctional selenium dietary bioaccumulation.
2. Water quality monitoring data indicate the Koocanusa Reservoir is a dynamic system and it is possible that current monitoring efforts have not defined nor captured critical time periods or critical portions of the reservoir.
3. A delay or lag in uptake of selenium into the food web, from the water column, is highly likely and at a magnitude that presents a significant risk. The outcome is increasing and perpetuated bioaccumulation of selenium in benthos and fish above elevated levels.
4. To return to a restored condition, MT DEQ must avoid normalizing current degraded conditions and strive for a condition that is improved from current conditions.
5. On-going revisions to the modeling in the Elk and Fording River, including the Implementation Plan Adjustment to the Elk Valley Water Quality Plan, that increases the observed and modeled future contaminant delivery into Koocanusa Reservoir from the Elk Valley Mines.<sup>6</sup>

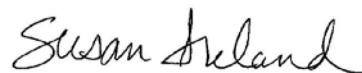
In conclusion, the KTOI and CSKT support a conservative approach to the adoption of a site-specific selenium criteria that is protective of all species of fish and wildlife at all times of the year, throughout the reservoir, and protective of the downstream ecosystem.

Thank you very much for your consideration,

Sincerely,



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<sup>6</sup> 2019 Implementation Plan Adjustment Annex B - Regional Water Quality Model Modifications  
<https://www.teck.com/media/Annex-B-Regional-Water-Quality-Model-Modifications.pdf>

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**August 28, 2020**

Dear SeSTC Committee Members and Co-Chairs,

Selenium Technical Sub-Committee members were requested to submit written recommendations to the SeTSC Co-Chairs for the site-specific selenium criteria. Below you will find our recommendations, serving as a representatives of the Kootenai Tribe of Idaho (KTOI) and the Confederated Salish and Kootenai Tribes (CSKT). Please see below for background, recommendations and rationale for the site-specific criteria.

We based on our recommendation on a site-specific criterion that protects burbot (*Lota lota*), the fish species that are most sensitive to selenium bioaccumulation in Koocanusa Reservoir. Burbot have been functionally extirpated from the reservoir and are culturally important to the Ktunaxa Nation community. Burbot populations declined over two decades ago when the ambient reservoir Se concentrations were below what is currently seen today. In published literature, burbot have been shown to be particularly sensitive and susceptible to the bioaccumulation of selenium.<sup>1</sup> Muscatello and Janz observed significant bioaccumulation in burbot (10 ug/g dw WB) at low aqueous (<0.5 µg/L) and benthic invertebrate (0.5-3 µg/g) selenium concentrations.<sup>2</sup> This is reinforced with the general knowledge that the burbot population decline<sup>3</sup> and eventual functional-extirpation in Koocanusa Reservoir coincides with the Elk River Coal Mines operational history and subsequent water pollution caused by those coal mines; and severely complicates the restoration of burbot above Libby Dam.<sup>4</sup>

The burbot population declined when the ambient reservoir Se concentrations were below the aqueous concentrations that are currently seen today. Limited KTOI data is also showing that burbot in the mainstem Kootenai River are accumulating selenium at rates that are known to cause significant negative physiological effects on other fish species. Those effects include reproductive failure, reduced growth, and mortality (KTOI, unpublished data). Further, mining contaminant inputs into Koocanusa Reservoir present a critical uncertainty in the Kootenai River Ecosystem Restoration program<sup>5</sup>, and will continue to act in synergy with

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<sup>1</sup> Muscatello, JR, and DM Janz. 2009. Selenium accumulation in aquatic biota downstream of a uranium mining and milling operation. *Sci Tot Environ* 407:1318-1325.

<sup>2</sup> Muscatello, JR, and DM Janz. 2009. Selenium accumulation in aquatic biota downstream of a uranium mining and milling operation. *Sci Tot Environ* 407:1318-1325.

<sup>3</sup> Dunnigan, J., J. DeShazer, T. Ostrowski, M. Benner, J. Lampton, L. Garrow, and M. Boyer. 2018. Mitigation for the Construction and Operation of Libby Dam, 1/1/2017 – 12/31/2017 Annual Report, 1995-004-00. 252 pp.

<sup>4</sup> Cope, A. 2018. Upper Kootenay River Burbot Conservation Strategy, Draft Report. 59 pp.

<sup>5</sup> [www.http://restoringthekootenai.org](http://restoringthekootenai.org)



the habitat alterations perpetuating white sturgeon and burbot recruitment failure below Libby Dam.

In addition to burbot, it is critically important that the criterion is based on considerations for protection and restoration of the Kootenai River white sturgeon (*Acipenser transmontanus*) downstream of Libby Dam given their sensitivity to reproductive impacts from selenium toxicity. We note that white sturgeon are the most toxicologically sensitive fish as ranked by the US EPA in its national guidance.<sup>6</sup>

With respect to birds and wildlife, the Kootenai River Basin was once one of the more ecologically productive inter-montaine ecosystems, supporting resident and migratory bird populations; however, Koocanusa Reservoir currently does not support robust shorebird populations. Shorebirds are particularly vulnerable to selenium toxicity, as they are highly sensitive to selenium exposures.<sup>7</sup> Skorupa et al found reproductive failure in aquatic birds with 3.0 µg/g selenium concentrations in their eggs.<sup>8</sup> Birds have been shown to be particularly sensitive to selenium exposures due to their feeding habits that are linked to the aquatic environment.<sup>9</sup> Stanley et al found that a 7 mg Se/kg dietary exposure in mallard ducks caused a >30% embryo mortality.<sup>10</sup>

Hamilton reviewed approximately 40 different studies investigating selenium toxicity for fish, aquatic birds, phytoplankton, and zooplankton.<sup>11</sup> Several tables within this paper provided a comprehensive compilation of species tested, tissues sampled, selenium concentrations tested for effects, corresponding physiological effects, and study citations. The physiological effects concluded by the individual studies listed throughout the review tables are “Mortality”, “Reduced Growth”, “Reproductive Failure”, “Reduced Weight”, and “Reduced Cell Replication”.

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<sup>6</sup> U.S. Environmental Protection Agency [USEPA], 2016a, Aquatic life ambient water quality criterion for selenium—Freshwater: Washington, D.C., U.S. Environmental Protection Agency, EPA 822–R–16–006), 807 p., accessed May 2020 at [https://www.epa.gov/sites/production/files/2016-07/documents/aquatic\\_life\\_awqc\\_for\\_selenium\\_-\\_freshwater\\_2016.pdf](https://www.epa.gov/sites/production/files/2016-07/documents/aquatic_life_awqc_for_selenium_-_freshwater_2016.pdf).

<sup>7</sup> Stewart, R., M. Grosell, D. Buchwalter, N. Fisher, S. Luoma, T. Mathews, P. Orr, and W. Wang. 2010. Bioaccumulation and trophic transfer of selenium. In Ecological assessment of selenium in the aquatic environment; proceedings. SETAC Workshop on Ecological Assessment of Selenium in the Aquatic Environment (2009: Pensacola, FL) Ed. by Pellston M. Chapman et al. CRC Press. 339 pages.

<sup>8</sup> Skorupa, JP, HM Ohlendorf, and RL Hothem. In press. Interpretive guidelines for selenium-exposed waterbirds. J. Wildlife Management.

<sup>9</sup> Stewart, R., M. Grosell, D. Buchwalter, N. Fisher, S. Luoma, T. Mathews, P. Orr, and W. Wang. 2010. Bioaccumulation and trophic transfer of selenium. In Ecological assessment of selenium in the aquatic environment; proceedings. SETAC Workshop on Ecological Assessment of Selenium in the Aquatic Environment (2009: Pensacola, FL) Ed. by Pellston M. Chapman et al. CRC Press. 339 pages.

<sup>10</sup> Stanley, TR Jr, GJ Smith, DJ Hoffman, H Heinz, and R Rosscoe. 1996. Effects of boron and selenium on mallard reproduction and duckling growth and survival. Environ Toxicol Chem 15:1124-1132

<sup>11</sup> Hamilton, SJ. 2003. Review of residue-based selenium toxicity thresholds for freshwater fish. Ecotoxicology and Environmental Safety 56:201-210.

For several fish and aquatic bird studies listed, the selenium toxicity levels causing mortality, reduced growth, reproductive failure, and/or reduced weight were whole body tissue and/or egg concentrations as low as 1-4 ppm.

Thorley cites data collected from water and fish tissue (whole body and egg/ovary) Se concentrations for Koocanusa Reservoir.<sup>12</sup> Water concentrations ranged 0.5 -1.5 µg/L, and corresponding fish tissues from several fish species ranged from 1.0 – 6.0 ppm for whole body, and ~2.0 to 80.0 for egg/ovary. Even if the 80.0 µg/g observation is an outlier, results from peamouth chub (*Mylocheilus caurinus*), reidside shiner (*Richardsonius balteatus*), and Northern pikeminnow (*Ptychocheilus oregonensis*) were predominantly 10.0 – 40.0 µg/g for egg/ovary samples. These are tissue concentrations at water concentrations of 0.5-1.5 µg/L.

Thorley also presents data collected from zooplankton and benthic macroinvertebrate Se concentrations for sample sites located within Koocanusa Reservoir.<sup>13</sup> Zooplankton selenium concentrations ranged between <1 to 5 µg/g, with some samples upwards of 14 µg/g Se. Benthic macroinvertebrate tissue concentrations ranged between <1 to 12.5 µg/g Se, with the mean Se concentration near 5 µg/g Se.

The EPA whole-body threshold of 8.5 mg/kg dw is based upon the known sensitivity of white sturgeon. This is scientifically defensible and appropriate on the national level. However, the 8.5 mg/kg dw whole-body criterion does not account for other potentially sensitive and susceptible fish species or protection of the most sensitive designated use, which includes tribal harvest treaty rights. Whitefish (*Prosopium williamsoni*) and burbot are culturally important fish species that are consumed by Ktunaxa citizens from all three Ktunaxa Nation governments. A minimum whole-body threshold of 5.6 mg/kg dw should be considered. Using the BC MOE egg/ovary guideline of 22 mg/kg dw, and factoring in the safety/assessment factor of 2, and using the EC10 egg/ovary to whole-body conversion for rainbow trout of 1.9, this leads to a more conservative 5.6 mg/kg dw whole-body recommendation. The KTOI and CSKT recommend using a 5.6 mg/kg dw whole-body threshold. The 5.6 mg/kg dw whole-body threshold accounts for the potentially sensitive fish species of mountain whitefish and burbot and incorporates the Ktunuxa Nation Council's preferred fish consumption rates. The KTOI and CSKT recommend a conservative site-specific criterion for Koocanusa Reservoir until additional science and data collection demonstrate otherwise.

Current reservoir selenium outflows are approximately 1.0 µg/L (range between 0.8 and 1.2 µg/L, depending upon dam operations, time of year, and hydrologic conditions within the basin). Kootenai River white sturgeon egg selenium concentrations in the mainstem river

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<sup>12</sup> Thorley, JL. 2020. Koocanusa Reservoir Water and Fish Tissue Selenium Concentrations 2019. A Poisson Consulting Analysis Appendix. <https://www.poissonconsulting.ca/f/1298248550>.

<sup>13</sup> Thorley, JL. 2020. Koocanusa Reservoir Water and Fish Tissue Selenium Concentrations 2019. A Poisson Consulting Analysis Appendix. <https://www.poissonconsulting.ca/f/1298248550>.

below Libby Dam range between 3.0 and 6.0 mg/kg dw. Of the five whole-body burbot tissue samples collected by the KTOI, one was above the 8.5 mg/kg dw EPA threshold, and mountain whitefish egg concentrations exceed EPA's 15.1 mg/kg dw threshold, with some of these values almost double the EPA recommended criteria (KTOI 2020; unpublished data). These measurements indicate that, like Koocanusa Reservoir, the Kootenai River requires the development of a site-specific water column selenium criterion. KTOI and CSKT understand that this will likely require a multi-year effort to collect adequate data and develop a site-specific criterion for the Kootenai River, and we encourage DEQ to begin this effort immediately in collaboration with both Tribes. For now, KTOI and CSKT support MT DEQ setting an interim criterion for the Kootenai River that is equal to EPA's national recommended value for water column, fish tissue, and egg/ovaries. In summary, we support the adoption of a conservative site-specific criterion for Koocanusa Reservoir now, to reduce uncertainty and risk in the Kootenai River downstream, and the subsequent initiation of a rigorous, scientific process to develop a site-specific criterion for the Kootenai River.

After evaluating multiple scenarios using a reasonable range of variable values within the USGS models provided to the SeTSC, the KTOI and CSKT recommends using the 'W6. TFM with TL3 100% Aquatic Insects' model. This model is conservative and protective of the most selenium-susceptible trophic levels; and is also considered the most protective, as it incorporates whitefish and burbot.

We recognize the variability of TTF's, conversion factors, and  $K_d$  values. Given the uncertainty and wide fluctuations in  $K_d$  throughout the reservoir (values ranging between 400 and 7000), a conservative  $K_d$  should be used. In order to be protective of the reservoir ecosystem across time and location, the 90<sup>th</sup> percentile  $K_d$  should be used to capture the worst-case scenario. The use of the median  $K_d$  value is also supported in literature. The use of the 1.1 TTF is supported by literature and is scientifically defensible. To manage the uncertainty in the water concentration guideline, Jenni, Naftz, and Presser (2017) suggested triangular distributions with a TTF for invertebrates (aquatic insects and zooplankton combined) between 1 and 3.5 with a mode of 1.3, a TTF for fish between 0.6 and 1.6 with a mode of 1.1 and a  $K_d$  between 800 and 6,500 with a mode of 3,000.

### **Model Input Recommendations**

With respect to the specific model inputs, we provide the following recommendations and rationale; Given the varying  $K_d$  values within the reservoir, and the two recommended TTF values for aquatic insects, we ran six variations of the W6 model that incorporate the different  $K_d$  and TTF values. Listed below are the outputs from the six model runs.

1. Model W6 (TFM with TL3 100% Aquatic Insects) with the 5.6 mg/kg dw whole-body threshold, a TTF of 1.1 for fish, a TTF of 2.8 for aquatic invertebrates, and a maximum  $K_d$ , water concentrations of 0.22 µg/L (given the model correction of 100% Se bioavailability) to 0.37 µg/L Se are produced as the criteria (given the model correction of 60% Se bioavailability).

2. Model W6 (TFM with TL3 100% Aquatic Insects) with the 5.6 mg/kg dw whole-body threshold, a TTF of 1.1 for fish, a TTF of 2.8 for aquatic invertebrates, and a median  $K_d$  of 4500, water concentrations of 0.37 µg/L (given the model correction of 100% Se bioavailability) to 0.61 µg/L Se are produced as the criteria (given the model correction of 60% Se bioavailability).
3. Model W6 (TFM with TL3 100% Aquatic Insects) with the 5.6 mg/kg dw whole-body threshold, a TTF of 1.1 for fish, a TTF of 2.8 for aquatic invertebrates, and a  $K_d$  of 3100, water concentrations of 0.53 µg/L (given the model correction of 100% Se bioavailability) to 0.89 µg/L Se are produced as the criteria (given the model correction of 60% Se bioavailability).
4. Model W6 (TFM with TL3 100% Aquatic Insects) with the 5.6 mg/kg dw whole-body threshold, a TTF of 1.1 for fish, a TTF of 2.1 for aquatic invertebrates, and a maximum  $K_d$ , water concentrations of 0.29 µg/L (given the model correction of 100% Se bioavailability) to 0.49 µg/L Se are produced as the criteria (given the model correction of 60% Se bioavailability).
5. Model W6 (TFM with TL3 100% Aquatic Insects) with the 5.6 mg/kg dw whole-body threshold, a TTF of 1.1 for fish, a TTF of 2.1 for aquatic invertebrates, and a median  $K_d$  of 4500, water concentrations of 0.49 µg/L (given the model correction of 100% Se bioavailability) to 0.82 µg/L Se are produced as the criteria (given the model correction of 60% Se bioavailability).
6. Model W6 (TFM with TL3 100% Aquatic Insects) with the 5.6 mg/kg dw whole-body threshold, a TTF of 1.1 for fish, a TTF of 2.1 for aquatic invertebrates, and a  $K_d$  of 3100, water concentrations of 0.71 µg/L (given the model correction of 100% Se bioavailability) to 1.18 µg/L Se are produced as the criteria (given the model correction of 60% Se bioavailability).

**After reviewing the model outputs for the differing variables, CSKT and KTOI highlight that, at minimum, the recommended water column selenium criteria needs to be below 1.0 µg/L.**

**Based on the specific framework of the USGS model W6, Model run #2 as described above, the CSKT and KTOI is specifically recommending a water column selenium concentration criterion of 0.61 µg/L selenium.**

Current whole-body fish tissue samples from Northern pikeminnow, peamouth chub, redbreasted shiner, and largescale sucker in Koocanusa Reservoir exceed, and in many individuals sampled, greatly exceed, the EPA whole-body criteria in the current aqueous conditions in the reservoir.<sup>14</sup> This clearly indicates to KTOI and CSKT that to be protective of all fish species in the reservoir, the site-specific criterion should be lower than the current selenium concentrations

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<sup>14</sup> Thorley, JL. 2020. Koocanusa Reservoir Water and Fish Tissue Selenium Concentrations 2019. A Poisson Consulting Analysis Appendix. <https://www.poissonconsulting.ca/f/1298248550>.

sampled in the reservoir. Also, as noted in Presser and Naftz, 2020, it is important to determine where Koocanusa Reservoir is in an impairment-restoration cycle so as not to base protection on survivor bias, the maintenance of a currently degraded ecosystem, or normalized toxicity. In a broader context, one of the overall consequences of revised selenium regulations is that their derivation is now dependent on being able to define and understand the status of the ecosystem on which protection is based. And, as described in Presser and Naftz, 2020, the Koocanusa Reservoir system demonstrates traits of a currently degraded system (see Table 1 in the report and subsequent discussions). This further illustrates to CSKT and KTOI that a protective site-specific water column selenium criterion should be lower than existing conditions in the reservoir.

Given that there may be a lag in the biological uptake and detection of selenium across the food web in the reservoir, it is important to adopt a more conservative criterion at this time, to ensure protection under unknown future selenium levels and the increasing contaminant trends. Any selenium concentrations above the background concentrations represent an increase from baseline conditions for the Kootenai Basin and are likely already having, and will perpetuate negative impacts upon the ecosystem. According to Chapman et al<sup>15</sup> in the Selenium Risk Characterization chapter 7, Lentic systems were identified to be at an increased risk of Se-caused adverse effects due to the maximized mobility of selenium into the food web, thereby increasing the chance for elevated exposures.

Continuing downriver into the altered lower-river ecosystem driven by Libby Dam operations, the food web in the mainstem Kootenai River is quite different than the reservoir; therefore the movement of selenium from Koocanusa Reservoir through Libby Dam and into the lower-river is relatively unknown. Water and tissue sampling in the Kootenai River below Libby Dam suggests the current selenium concentrations and loading into the river are already having negative impacts on the ecosystem.

In conclusion, the KTOI and CSKT support a conservative approach to the adoption of a site-specific selenium criteria that is protective of all species of fish and wildlife at all times of the year, throughout the reservoir, and protective of the downstream ecosystem.

Thank you very much for your consideration,

Genny Hoyle, Kootenai Tribe of Idaho [genhoyle@kootenai.org](mailto:genhoyle@kootenai.org) 208 610-9293

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<sup>15</sup> Chapman PM, Adams WJ, Brooks ML, Delos CG, Luoma SN, Maher WA, Ohlendorf HM, Presser TS, Shaw DP. 2009. Ecological assessment of selenium in the aquatic environment: Summary of a SETAC Pellston Workshop. Pensacola FL (USA): Society of Environmental Toxicology and Chemistry (SETAC).



October 8, 2020

Dear Honorable Members of the Water Policy Interim Committee:

The Councils of the Confederated Salish and Kootenai Tribes and Kootenai Tribe of Idaho (“Councils” or “Tribes”) submit these comments to support the Montana Department of Environmental Quality’s (“MDEQ”) processes and outcomes that have led to the recommendation of site-specific criteria of 0.8 ug/L for Lake Koocanusa. The Tribes also support comprehensive monitoring to confirm that the number is protective over time for all species of fish in the reservoir. The site-specific criteria are consistent with numbers arrived at by British Columbia and Montana. We support the rule-making adoption process for a site-specific criterion of 0.8 ug/L. After five (5) years British Columbia and Montana arrived at very similar numbers. The British Columbia co-chairs recommended 0.9 ug/L.

Water quality in Lake Koocanusa is an issue that affects the Tribes’ natural and cultural resources and practices. We share these interests in water quality with the peoples of Montana and Idaho, as well as those downriver from us in British Columbia. The bull trout, burbot, westslope cutthroat trout and endangered Kootenai River white sturgeon important to all our constituents rely on water quality in Lake Koocanusa and the Kootenai River.

For this reason, the Tribes, State of Montana, State of Idaho, Province of British Columbia, and the United States Federal government have been actively working for years toward ensuring contamination from coal mines in British Columbia is addressed, especially with regard to contamination that flows across the international boundary into Lake Koocanusa. The coal mining companies have also been part of these discussions.

However, despite the Province of British Columbia’s 2013 Ministerial Order No. M113 recognizing evidence of “increasing concentrations of contaminants, such as selenium..., in water and/or biota, which may exceed provincial Water Quality Guidelines, and may be causing impairment of ecosystem health” and requiring the mining companies to “stabilize and reverse increasing trends in water contaminant concentrations”, selenium inputs from the Elk Valley mines into Koocanusa Reservoir demonstrate a clear, increasing trend. Selenium leaching from the mines is resulting in degradation of water quality and presenting unacceptable impairment to our shared natural resources.



The best available science collected in a collaborative effort across State, Federal, Provincial and industry, including the 2020 USGS model and report, demonstrates that there are historical, on-going and projected future inputs of selenium into Lake Koocanusa. Moreover, the Province of British Columbia and coal mining companies are currently planning to expand the biggest mine and create three new mines, even while exceeding healthy levels of selenium in fish.

It is the responsibility of the State of Montana to adopt selenium criterion that is sufficiently protective to ensure the immediate and long-term protection and restoration of Lake Koocanusa, and downstream uses in the Kootenai River in Montana and Idaho, from the ecological impacts of selenium contamination.

The State of Montana is not alone in this effort. We note that the State of Idaho is proceeding with listing the Kootenai River as impaired due to selenium thresholds being exceeded in several species of fish in the Kootenai. The State of Idaho is also pursuing a site-specific water quality criterion for the Kootenai River, because fish tissue already exceeds selenium thresholds even while well below the water quality thresholds for the River.

The U.S. members of the International Joint Commission have also expressed concerns about selenium pollution caused by the mines. In their 20 June 2018 letter, the U.S. Commissioners wrote that “[i]n addition to documented short-term impacts, it is well understood that high concentrations of selenium will have long lasting impacts on water quality, fish, other aquatic species, wildlife and human health in southeast BC and northwestern Montana communities.”<sup>1</sup> The International Joint Commission remains concerned about this issue and is receiving a briefing from the U.S. State Department and Global Affairs Canada about transboundary contamination issues specifically relating to the Elk/Kootenai River watershed. A review of the numerous comment letters from State, Tribal, First Nation and Federal governments in support of a site-specific selenium criteria for Lake Koocanusa indicate widespread acceptance that a protective selenium criterion is in order and justified. The Tribes’ and others have also submitted scientific evidence showing selenium contamination is already impacting fish in Lake Koocanusa and the Kootenai River.

The evidence is clear that despite *years* of working to address water quality in Lake Koocanusa, the lack of site-specific selenium criterion has negatively impacted our ability to address the continuing contamination from B.C. mines.

Once the State of Montana adopts the criterion, however, the full force of the United States Federal government can be brought under the Boundary Waters Treaty to force the Government of Canada to take steps to rein in the pollution. There is no other way, except to adopt site-specific criterion, for the United States to hold the foreign mining companies accountable.

The Tribes appreciate the coordination with the State of Montana and the incredible work we have done together to protect Montana waters and the fish important to us all. The Tribes respectfully urge the Water Policy Interim Committee to respect the years of effort MDEQ has

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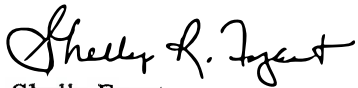
<sup>1</sup> The IJC Letter also states: “This issue is not new to the IJC” and references a 1985 Flathead reference letter that resulted in recommendations ultimately rejected by the B.C. and Canadian governments.



placed in developing this criterion, follow the science and vote to allow the Board of Environmental Review to consider the issue at its December 2020 meeting.

Thank you and we look forward to continuing our work together.

Sincerely,



Shelly Fyant  
Tribal Council Chairwoman  
Confederated Salish and Kootenai Tribes  
PO Box 278  
Pablo, MT 59855  
(406) 675-2700  
[Shelly.Fyant@cskt.org](mailto:Shelly.Fyant@cskt.org)

 on behalf of

Gary Aitken Jr.  
Chairman, Tribal Council  
Kootenai Tribes of Idaho  
PO BOX 1269  
Bonners Ferry, ID 83805  
(208) 267-3519  
[garyjr@kootenai.org](mailto:garyjr@kootenai.org)



30 October, 2020

Montana Department of Environmental Quality  
ATTN: Sandy Scherer, Legal Secretary  
PO Box 200901  
Helena, Montana 59620-0901  
Fax: (406) 444-4386  
Email: [sscherer@mt.gov](mailto:sscherer@mt.gov)

Re: Proposed amendment to ARM 17.30.605 and proposed new rule (New Rule I) pertaining to selenium standards for Koocanusa Reservoir and the Kootenai River

Dear Ms. Scherer:

We are writing to recommend and request that the State of Montana immediately adopt the currently considered site-specific selenium standard of 0.8 ug/l selenium for Koocanusa Reservoir and associated standards described below for the mainstem Kootenai River.

Please accept this recommendation on behalf of the Confederated Salish and Kootenai Tribes (CSKT) and the Kootenai Tribe of Idaho (KTOI) (collectively “Tribes”), constituent governments of the transboundary Ktunaxa Nation, in support of the proposed amendment to ARM 17.30.605 and the proposed New Rule I pertaining to selenium standards for Koocanusa Reservoir and the Kootenai River. Specifically, we recommend adoption of the Montana Department of Environmental Quality (“MT DEQ”) proposed fish tissue standards applicable to Koocanusa Reservoir and the mainstem Kootenai River of 15.1 mg/kg (egg/ovary), 11.3 mg/kg (muscle), and 8.5 mg/kg (whole body) and water column numeric standards for total dissolved selenium of 3.1 u/L for the mainstem Kootenai River and 0.8 u/L for Koocanusa Reservoir. The Tribes also support comprehensive monitoring to confirm that the number is protective over time for all species of fish in the Reservoir and in the Kootenai River downstream.

Based on historical and recent data for water quality and fish tissue, it is imperative that Montana work now to adopt site-specific selenium standards for the health and protection of all fish species in Koocanusa Reservoir and downstream in the Kootenai River. We recognize that

existing data documents increasing selenium in several species of fish in Koocanusa Reservoir, including three species that exceed the 2016 EPA recommended criteria for selenium in fish tissue. Further, Koocanusa Reservoir is currently unprotected, given that Montana did not adopt the national recommended selenium criterion, as revised and released by EPA in 2016.<sup>1</sup>

The best available science, including the 2020 USGS model and report, demonstrates that there are historical, on-going, and projected future inputs of selenium into Koocanusa Reservoir. It is the State of Montana's responsibility to adopt selenium standards that are sufficiently protective to ensure the immediate and long-term protection and restoration of Koocanusa Reservoir, and downstream uses in the Kootenai River, from the ecological impacts of selenium contamination. Given the legacy impacts and ongoing risk to Ktunaxa Territory resources, the KTOI and CSKT fully support the State of Montana's commitment to adopt site-specific selenium standards by December 2020.

In addition, we support the scientifically defensible and peer-reviewed report and model developed by USGS as part of standard development, including the approach of the USGS to base the model on a conservative and protective approach. The authors of the model are among the top selenium experts in North America, with decades of experience in the field of selenium toxicology. The model they developed was peer-reviewed and generated a defensible, protective standard for the Reservoir, based on the factors that influence selenium in the Reservoir.

Given that Koocanusa Reservoir is already degraded due to input of contaminants from mining in the Elk Valley of British Columbia, we support standards that manage the Reservoir to improve and restore it from an already degraded condition. Current levels of selenium contamination above and below Libby Dam caused by Elk River coal mining is with high probability already causing, and threatens further, negative physiological effects to organisms dependent on aquatic resources, including birds and possibly humans. Conservative site-specific standards are essential to improve and restore and then maintain the Reservoir's water quality and aquatic life.

There is evidence of significant bioaccumulation of selenium already occurring across the entire transboundary Kootenai ecosystem, including the Idaho and B.C. portions of the Kootenai/y River.<sup>2</sup> This bioaccumulation has been occurring and will continue even at water column selenium concentrations that are below the current standards and exceedance limits. Literature provides evidence that body burden concentrations found in Kootenai River white sturgeon, burbot, mountain whitefish, and freshwater mussels are likely already having significant physiological effects. This is a critical concern to the Ktunaxa Nation governments given the cultural significance of these species as well as the tremendous effort and resources dedicated to ecosystem restoration by the Tribes in partnership with the States of Montana and Idaho.

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<sup>1</sup> U.S. Environmental Protection Agency [USEPA], 2016a, Aquatic life ambient water quality criterion for selenium—Freshwater: Washington, D.C., U.S. Environmental Protection Agency, EPA 822-R-16-006), 807 p., accessed May 2020 at [https://www.epa.gov/sites/production/files/2016-07/documents/aquatic\\_life\\_awqc\\_for\\_selenium\\_-\\_freshwater\\_2016.pdf](https://www.epa.gov/sites/production/files/2016-07/documents/aquatic_life_awqc_for_selenium_-_freshwater_2016.pdf).

<sup>2</sup> <https://governmentofbc.maps.arcgis.com/apps/webappviewer/index.html?id=0ecd608e27ec45cd923bdcfeefba00a7>

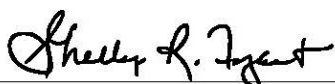
The selection of conservative and protective site-specific selenium standards are essential now to prevent further increases in selenium into the Kootenai ecosystem. Current data shows increasing concentrations of selenium in larger portions of the Reservoir, which in turn will increase selenium concentrations below Libby Dam.<sup>3</sup> This trend will continue until effective mine impact mitigation is implemented at an appropriate scale.

In conclusion, the evidence is clear that despite years of efforts by British Columbia's regulators to address mining impacts to Koocanusa Reservoir and to address water quality contamination trends, Montana's lack of protective, site-specific selenium standards are hindering our ability to address the continuing contamination from B.C. mines and protect our fish and water quality in U.S. waters downstream.

The Tribes participated in and support the robust science that informed the transparent and collaborative process yielding the 0.8 ug/l draft standard. We appreciate the coordination with the State of Montana and the incredible work that we have done together to protect U.S., Tribal and State waters and the fish and other important species that depend on these waters. We support the proposed amendment to ARM 17.30.605 and the proposed New Rule I pertaining to selenium standards for Koocanusa Reservoir and the Kootenai River. We urge immediate action to adopt the proposed selenium standards for water quality and fish tissue in Koocanusa Reservoir and the Kootenai River, and comprehensive monitoring to ensure that the number is protective over time for all species of fish in the lake and the river downstream.

We look forward to continuing our work together.

Sincerely,



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Shelly Fyant  
Confederated Salish and Kootenai Tribes  
Chairwoman



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Gary Aitken, Jr.  
Kootenai Tribe of Idaho  
Chairman

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<sup>3</sup> Presser, TS, and DL Naftz. 2020. Understanding and documenting the scientific basis of selenium ecological protection in support of site-specific guidelines development for Lake Koocanusa, Montana, USA, and British Columbia, Canada: US Geological Survey Open-File Report 2020-1098, 40 p. <https://doi.org/10.3133/ofr20201098>.



13 January 2022

Montana Board of Environmental Review  
Regan Sidner, Board Secretary  
Department of Environmental Quality  
*Submitted Digitally- to [deqbersecretary@mt.gov](mailto:deqbersecretary@mt.gov)*

Re: Comments to Board of Environmental Review Regarding Teck Coal's Request for Stringency Review of the Selenium Standard for Lake Koocanusa.<sup>1</sup>

Dear Chair Ruffato and Members of the Board of Environmental Review:

Please accept this response and recommendation on behalf of the Confederated Salish and Kootenai Tribes (CSKT) and the Kootenai Tribe of Idaho (KTOI) (collectively "Tribes"), constituent governments of the transboundary Ktunaxa Nation, in response to the BER's invitation to comment on the petitions of Teck Coal Limited (Teck) and the Lincoln County Commissioners to review the stringency of the Selenium Standard Rule for Lake Koocanusa. We strongly recommend and request that the Board immediately reject the petition to review the stringency of the Rule and uphold the site-specific selenium standard of 0.8 ug/l selenium for Koocanusa Reservoir and associated standards described below for the mainstem Kootenai River.

These comments are part of the CSKT and KTOI response to the Board of Environmental Review's Notice of Schedule for Implementation of Review 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. With the submission of these comments the CSKT and KTOI do not expressly or impliedly waive any of their collective or independent legal rights, causes of actions, or the right to raise additional matters or supporting information in any fora that are relevant to this matter.

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<sup>1</sup> This letter responds to the January 13 component of the BER's notice:  
<https://deq.mt.gov/files/DEQAdmin/BER/Documents/Notice-Schedule.pdf>.



The new selenium standard does not violate MT state law because it is not more stringent than the federal standard - the new criteria adopted the federal standard for fish tissue (15.1 ug/g) and then back-calculated the water column number to protect fish, based on current data for selenium in fish tissue in the reservoir. The process and results are consistent with applicable Montana and Federal law.

Additionally, EPA guidance on the development of site-specific selenium criterion specifically states that, “*when implementing the criterion, the fish tissue elements take precedence over the water column elements, except in certain circumstances.*”<sup>2</sup> This is because chronic exposure to selenium in fish can result in reproductive impairments, including deformity and mortality. The EPA guidance also recommends that states and tribes develop site-specific recommendations to account for local conditions. This is precisely the process that was undertaken, over six years, by state, provincial, local, and tribe/First Nation governments to jointly develop the selenium standard of 0.8 ug/L for Koocanusa Reservoir. In fact, over the last ten years, data from Koocanusa Reservoir demonstrate that several species of fish exceed the egg-ovary toxicity threshold for selenium, providing scientific basis for adopting the federal standard of 15.1 ug/g for egg-ovary, and 0.8 ug/L for the water column.

Below Libby Dam in the Kootenai River, the Kootenai Tribe of Idaho has measured elevated Se concentrations in both burbot and sturgeon egg tissue, along with other native fish species that are culturally important to the Kootenai Tribe. Egg criteria exceedances of native Mountain Whitefish have been documented. Se water concentrations throughout the canyon reach and lower river range between 0.8 and 1.1 ug/L. Selenium is both persistent and pervasive throughout the lower Kootenay/Kootenai River. Currently, the Kootenai River in Idaho is listed as 'impaired' for selenium.

It is further relevant to note in November 2021 at the last meeting of the joint MT-BC Lake Koocanusa Monitoring and Research Working Group, the Province of British Columbia announced its proposed revised selenium objective of 0.85 ug/L, arrived at based on the site-specific fish tissue data for Koocanusa Reservoir.

As a matter of context, this criterion is one criterion with multiple elements (a “multi-media criterion”). All of the elements must work together, and they currently do. If the Board determines to change positions without including all of the elements (fish tissue and water column selenium concentrations), it risks developing a new standard that is ecologically unsound, not scientifically legitimate, and legally indefensible. The Board’s role therefore should be limited to determining whether the standard is more stringent than the federal standard, which it is not, and is reasonable and consistent with the law. Notwithstanding objections and rhetoric from Teck, the Tribes assert that the State of Montana and the US EPA both employed a robust and inclusive process that is consistent with scientific and legal standards, and fully supported by the package submitted to BER when the Rule was adopted in December 2020 and approved as law under the Clean Water Act in February 2021.

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<sup>2</sup> EPA Aquatic Life Ambient Water Quality Criterion for Selenium in Freshwater 2016-Fact Sheet.  
[www.epa.gov/wqc/aquatic-life-criterion-selenium](http://www.epa.gov/wqc/aquatic-life-criterion-selenium).

The CSKT and KTOI herein submit the attached documents in support of these comments and thereby incorporate them into the record for Board consideration.

For the reasons above, the CSKT and KTOI urge the Board to reject Teck and the Lincoln County Commissioners' scientifically and legally indefensible petition for a stringency review of the selenium Rule.

Sincerely,



Tom McDonald  
Council Chairman  
Confederated Salish and  
Kootenai Tribes



Jennifer Porter  
Council Chairwoman  
Kootenai Tribe of Idaho



## Sidner, Regan

---

**From:** Megan Schneckloth <MSchneckloth@jmgm.com>  
**Sent:** Thursday, January 13, 2022 3:13 PM  
**To:** Sidner, Regan  
**Subject:** [EXTERNAL] FW: Lincoln County Board of County Commissioners' Comments  
**Attachments:** 2022.1.13 Lincoln County Board Comments.pdf

Good afternoon Regan,  
I forgot to include your email address, please see attached.

Thank you,

Megan L. Schneckloth, Paralegal  
JACKSON, MURDO & GRANT, P.C.  
Direct: 406-513-1118  
Fax: 406-443-7033

---

**From:** Megan Schneckloth  
**Sent:** Thursday, January 13, 2022 3:09 PM  
**To:** 'BER@MT.GOV' <BER@MT.GOV>  
**Cc:** Murry Warhank <MWarhank@jmgm.com>; 'aforney@hollandhart.com' <aforney@hollandhart.com>  
**Subject:** Lincoln County Board of County Commissioners' Comments

Good afternoon,  
Please see the attached *Comments on the Stringency Review of the Selenium Rule*. The original will follow in the mail. Thank you.

Megan L. Schneckloth, Paralegal  
JACKSON, MURDO & GRANT, P.C.  
Direct: 406-513-1118  
Fax: 406-443-7033

Murry Warhank  
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[mwarhank@jmgm.com](mailto:mwarhank@jmgm.com)

*Attorneys for the Board of County  
Commissioners of Lincoln County*

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

<b>IN THE MATTER OF:</b>  <b>ADOPTION OF NEW RULE I PERTAINING TO SELENIUM STANDARDS FOR LAKE KOOCANUSA</b>	<b>CAUSE NO. BER 2021-04 WQ</b>  <b>COMMENTS ON THE STRINGENCY REVIEW OF THE SELENIUM RULE</b>
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The Board of County Commissioners of Lincoln County, Montana (“Lincoln County”) provides these comments in support of its petition to the Board of Environmental Review (“Board”) to review ARM 17.30.632 (the “selenium rule”) under Montana Code Annotated § 75-5-203(4)(a) and Administrative Rule of Montana 1.3.227.

**INTRODUCTION**

This matter is not about environmental protection; it is about a mandatory process that the Board did not follow. The Board may only enter water quality standards that are more stringent than those imposed federally after investigating and making findings to support the need for such criteria. The law provides important protections to local governments and citizens against rushed processes that can negatively impact local economies. The Board enacted the selenium rule that the EPA recognizes as substantially more stringent than its own. The Board failed to thoroughly

investigate or make findings regarding the need for or impact of the rule. This action violates Montana law, and the Board should reverse it.

## **ARGUMENT**

### **I. The selenium rule is more stringent than its federal counterpart.**

The parties agree that Mont. Code Ann. § 75-5-203 applies. The statute provides that the Board may only adopt a water quality standard that is more stringent than the federal standard if it:

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.

(the “stringency statute”).

Teck provided the Board with a thorough and well-researched analysis of this issue. As it correctly notes, the EPA has found that the new selenium rule promulgated for Lake Koocanusa is “more stringent” than the federal standard. *See* Letter of 25 February 2021, from EPA to the Board, attached to Teck’s Comments as Exhibit H. To avoid repetition, Lincoln County adopts and incorporates by reference the comments provided by Teck and the detailed analysis provided in its petition.

### **II. The adoption of the selenium rule violated the intention of Montana law and could cause significant, unforeseen consequences for Lincoln County and its citizens.**

Lake Koocanusa is in Lincoln County. *See* RR\_001342. The Lincoln County Board of County Commissioners participated in developing the selenium rule. It has steadfastly recognized the importance of clean waters and the responsibility of Teck to ensure that Lake Koocanusa is not polluted with selenium. RR\_000041. Lincoln County also recognizes that the

rule will create a situation where Lake Koocanusa is considered impaired for selenium. That can and likely will have significant down-range consequences for development in Lincoln County. The Department has been dismissive of Lincoln County's concerns throughout this process. Since the Board did not undertake the investigations and factfinding required by the stringency statute, the public remains in the dark about what this rule means for the future of Lincoln County's economy and whether it is even necessary. The Board must act to remedy this situation.

The Legislature made essential findings regarding economic competitiveness and public participation when enacting the stringency statute. It recognized 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." 1995 MT HB 521. The Legislature concluded that "Montana's administrative agencies should analyze whether analogous federal standards sufficiently protect the health, safety, and welfare of Montana's citizens" before enacting more onerous restrictions. *Id.* It also found that "the public should be advised of the agencies' conclusions about whether analogous federal standards sufficiently protect the health, safety, and welfare of Montana citizens." *Id.*

Here, the Board has failed to implement either of the Legislature's policy aims appropriately. First, it has not adequately considered the economic impacts on Lincoln County. Instead, the Board declared that "existing or proposed permitting or development activities within the State of Montana, are irrelevant to the development of the criteria." 24 Mont. Admin. Register, Not. 17-414, Bd. Resp. to Cmt. No. 96. DEQ also argued that "By law—economic data is not used in establishing the standard," even though it must consider economics when "formulat[ing] adopt[ing] standards of water quality." RR\_001503 (Presentation to Lincoln County, slide 3 (November 12, 2020)); Mont. Code Ann. § 75-5-301(1).

What is more, the Board failed to perform the investigation and factfinding required by the stringency statute. Instead, the Board enacted the selenium standard to indirectly regulate a foreign company, potentially at the expense of future industry and development locally. Without a more detailed investigation into the need for the new selenium rule and its feasibility, the Board has violated the Legislature's intention to prevent overzealous environmental regulation from endangering local economic competitiveness. The Board should vacate the selenium standard unless and until the legally mandated investigations and factfinding occur.

Second, the Board's failure to follow the stringency standard is, in and of itself, a fatal flaw in any data developed in the rulemaking process. As the Legislature found, public participation is critical when the Board considers a more stringent standard than the federal analog. Public participation is necessary to provide the Board with an appropriately broad spectrum of viewpoints regarding the federal standard's efficacy in protecting public health.

Moreover, the Board should not presume that economic data is valid if it was developed without providing appropriate notice to the public. For instance, DEQ analyzed impacts to small businesses in the Board's December 11, 2020, meeting materials. The Board assumed construction activities would continue under the new rule. 24 Mont. Admin. Register, Not. 17-414, Bd. Resp. to Cmt. No. 51. However, the Board did not notify construction experts in Lincoln County of the potential that the Board would be implicitly considering the impact of this new standard on their livelihood. Per the stringency statute, they are entitled to public notice that such an issue is under consideration to provide their experience and knowledge to the Board.

### **III. The selenium standard is invalid.**

Lincoln County has argued that the Board rushed implementation of the selenium standard. As discussed above, in Lincoln County's petition, and in Teck's detailed comments, the Board failed to meet the requirements of the stringency statute. The standard, then, is

invalid, and the Board should declare it so. With regards to the future of selenium standards in Lake Koocanusa. Lincoln County continues to welcome thorough review and analysis of the needs of the local community and ecosystem. It does not oppose continued efforts to develop facts and encourage the public participation required by the stringency statute. It leaves the issue of how and if the proceedings will continue to the discretion of the Board.

### **CONCLUSION**

The Board should recognize that it failed to follow the process required to enact the selenium standard for Lake Koocanusa. The selenium standard is invalid under the stringency statute. Any future rulemaking regarding this issue should thoroughly investigate the potential risks to future development in Lincoln County after appropriate consultation with the public.

DATED this 13<sup>th</sup> day of January, 2022.

JACKSON, MURDO & GRANT, P.C.

/s/ Murry Warhank

Murry Warhank

Attorneys for the Lincoln County Board of County  
Commissioners

## **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing *Comments on the Stringency Review of the Selenium Rule* was mailed postage pre-paid, via U.S. mail and e-mailed on this 13th day of January, 2022, and directed to:

Regan Sidner, Board Secretary (**original**)  
Board of Environmental Review  
1520 E. Sixth Avenue  
P.O. Box 200901  
Helena, MT 59620-0901  
Regan.Sidner@mt.gov  
[BER@MT.GOV](mailto:BER@MT.GOV)

Arlene Forney  
Assistant to William W. Mercer and Victoria A. Marquis  
[aforney@hollandhart.com](mailto:aforney@hollandhart.com)

By: /s/ Murry Warhank  
JACKSON, MURDO & GRANT, P.C.

## Sidner, Regan

---

**From:** Armstrong, Catherine  
**Sent:** Thursday, January 13, 2022 4:22 PM  
**To:** DEQ BER Secretary; Orr, Katherine; Hagen, Elena; wwmerc@hollandhart.com; 'Vicki A. Marquis'; Arlene Forney; Murry Warhank  
**Cc:** Colamaria, Angie; Bowers, Kirsten  
**Subject:** DEQ's Comments - Case Nos. BER 2021-04 WQ and BER 2021-08 WQ  
**Attachments:** DEQ Comments on Petitions.pdf

Good afternoon,

Per the instructions of Kirsten Bowers, please see the attached DEQ's Comments Addressing the Issues Presented by Petitions in the above-named cases. Copies will be sent per the Certificate of Service. If you have any questions, please do not hesitate to contact me.

Best regards,

**Catherine Armstrong** | *Paralegal*  
Montana Department of Environmental Quality  
Office: 406-444-2630  
Mailing Address: P.O. Box 200901, Helena, MT 59620-0901



**How did we do? >>**

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Kirsten H. Bowers  
Montana Department of  
Environmental Quality  
1520 East Sixth Avenue  
P.O. Box 200901  
Helena, MT 59620-0901  
Telephone: (406) 444-4222  
kbowers@mt.gov

*ATTORNEY FOR DEQ*

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

<b>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</b>	<b>Case Nos. BER 2021-04 WQ and BER 2021-08 WQ</b>
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**MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY’S  
WRITTEN COMMENTS ADDRESSING THE ISSUES PRESENTED BY  
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) FOR COMPLIANCE WITH § 75-5-203,  
MONTANA CODE ANNOTATED (STRINGENCY REVIEW)**

**I. INTRODUCTION**

On December 11, 2020, the Montana Board of Environmental Review (“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 §§75-5-201 and 75-5-301, MCA (2019). The Lake Koocanusa and Kootenai River selenium standards are now codified at Administrative Rule of Montana (ARM) 17.30.632. 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 and 17.30.623.

Upon adoption of ARM 17.30.632, the Board considered the requirement at § 75-5-203, MCA that the Board may not adopt rules more stringent than “comparable federal regulations or guidelines that address the same circumstances.” *See* 75-5-203(1), MCA; BER Rulemaking Record (hereinafter “RR”) at 002294 (BER December 11, 2020 Hearing Transcript adopting selenium standards for Lake Koocanusa and the Kootenai River and adopting DEQ’s stringency analysis under § 75-5-203, MCA). The Board determined that the selenium standards for Lake Koocanusa and the Kootenai River are consistent with EPA’s current recommended selenium guidelines for freshwater bodies because they correspond to federal guidelines or were developed using federally recommended site-specific procedures. 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 and the Board was, therefore, not required to make the written findings in §75-5-203(2) and (3), MCA.

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

The Petitions ask the Board to reconsider its December 11, 2020 determination that the selenium water column standard for Lake Koocanusa at ARM 17.30.632(7)(a) is not more stringent than comparable federal guidelines. DEQ provides the following written comments addressing the issues presented by the Petitions Pursuant to II.2 of the Notice of Schedule for Implementation of Review by the Board of Environmental Review, which provides a Stringency Review Process for the Lake Koocanusa Selenium Standard.

## II. DEQ COMMENTS ADDRESSING ISSUES PRESENTED BY THE PETITIONS

DEQ opposes the Petitions and provides the following comments and responses to the issues raised by the Petitions:

A. Teck is not a “person affected by” the standard who may petition the Board to review ARM 17.30.632(7)(a) because the rule does not apply to and DEQ has no jurisdiction to regulate Teck’s mining operations in Canada.

The Petitions acknowledge the Board is an executive branch board attached to DEQ for administrative purposes. *See* § 2-15-3502, Teck Petition at ¶18, Lincoln County Petition at ¶18. Standing before an administrative board or agency is governed by the statute designating those permitted to initiate an action. *Molnar v. Fox*, 2013 MT 132, \*P29, 370 Mont. 238, 245, 301 P.3d 824, 830. Therefore, 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.” Teck has not shown they are affected by ARM 17.30.632(7)(a). The plain language of the challenged rule 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.

(b) Kootenai River mainstem from the outflow below the Libby Dam to the Montana-Idaho border: 3.1 µg/L.

ARM 17.30.632

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. In comments at the September 24, 2020 BER meeting initiating rulemaking Teck emphasized that it is "wholly regulated by a foreign government" and initiation of the rulemaking based on Teck's operations in Canada is "ultra vires." *See* RR001271.

Teck is not registered to conduct business in the State of Montana and 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" are speculative and attenuated. Teck claims 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. *See Williamson v. Mont. PSC*, 2012 MT 32, PP 34-35, 364 Mont. 128, 141, 272 P.3d 71, 82.

Teck's Petition should be dismissed because Teck lacks standing under §75-5-203(4)(a), MCA. *See Id.*

B. The Board cannot grant the relief requested in the Petitions.

As of July 1, 2021, DEQ rather than the Board has sole authority to adopt rules for the administration of the Montana Water Quality Act, subject to the provisions of §75-5-203, MCA. *See* Senate Bill 233 (SB 233), Sections 31, 32, and

34. Under § 75-5-203, MCA, as amended by SB 233, DEQ may not adopt a rule that is more stringent than the comparable federal regulations or guidelines that address the same circumstances unless DEQ makes the written findings in § 75-5-203(2) and (3), MCA.

A person affected by a rule that the person believes to be more stringent than comparable federal regulations or guidelines may petition the Board to review the rule. If the Board determines that the rule is more stringent than comparable federal regulations or guidelines, DEQ, rather than the Board, must either revise the rule to conform to federal regulations or guidelines or make the written findings in § 75-5-203(2) and (3), MCA. *See* SB 233, Sec. 32 (now codified as § 75-5-203, MCA).

C. The Board did not adopt a standard more stringent than the comparable federal guideline and was not required to make the written findings in 75-5-203(2) and (3), MCA.

The Petitions ask the Board to reconsider its determination that the site-specific water column selenium standard for Lake Koocanusa of 0.8 micrograms per liter (µg/L) is consistent with EPA's current recommended selenium criterion guidelines for freshwater bodies. The federally recommended 304(a) selenium criteria consists of one single selenium criteria comprised of four criterion elements. Two of the 304(a) selenium criterion elements are fish tissue and two are water column based. *See* RR000002, RR003032. The four 304(a) criterion

elements include: 1) a fish egg/ovary element, 2) a fish or whole body or muscle tissue element, 3) a water column element (one for lentic or non-flowing water and one for lotic or flowing water), and 4) an intermittent exposure element. *See* RR003032.

The 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* RR002165 (Response to Comment 200). The ARM 17.30.632 selenium standards are fish tissue-based, not water column-based to account for dietary exposure and bioaccumulation as the primary pathway for selenium exposure, rather than exposure from the water column. *See* RR000073-76, 001520, 1525

The federal selenium egg/ovary criterion element of 15.1 mg/kg dry weight (dw), which Montana adopted, is the foundation for the EPA's criteria structure, whereby reproductive tissue data has primacy over data for other fish tissue and water column criterion elements. *See* RR000075, 120, 000312-313. The water column criterion element is translated from the egg/ovary criterion. *See* RR000375-407. Consequently, it is EPA's egg/ovary criterion element that the Board must look to in its stringency analysis.

The Lake Koocanusa water column value of 0.8 µg/L is a translation of the federal whole-body criterion of 8.5 mg/kg dw, which is translated from the federal egg/ovary standard of 15.1 mg/kg dry weight (dw) and toxicity data. *See* RR000312-313, 375-407, 1525. The water column standard for Lake Koocanusa was developed in accordance with EPA's guidance set forth in the 304(a) criteria document. *See* RR00000113-129, 1525. Therefore, to be more stringent than the federal criteria, the site-specific standard for Lake Koocanusa would have to be based on an egg/ovary criterion that is less than 15.1 mg/kg dw.

From the EPA's selenium work, a water column range from 0.27 - 52.02 µg/L was found to be protective for lentic waterbodies depending on the environmental factors at the study site. *See* RR000402-407. Ultimately, EPA selected the 80th percentile of the distribution resulting in the current 304(a) criteria of 1.5 µg/L. This criterion may leave some sites in the United States overprotected and some sites under protected. *See* RR002354. Recognizing this, EPA developed Appendix K to provide site-specific translation guidance. DEQ followed the guidance in Appendix K in developing the standards in ARM 17.30.632. *See* RR003764.

The Lake Koocanusa value of 0.8 µg/L falls within the range of EPA's translations from the egg/ovary criteria. To be more stringent than federal, Montana's water column value would be less than 0.27 µg/L. In Lake Koocanusa,



the egg/ovary fish tissue criteria have exceedances at water column levels below 1.5 µg/L, suggesting Lake Koocanusa is under protected by a water column standard of 1.5 µg/L. The 0.8 µg/L water column value meets the protection goals put forward by the bi-national Lake Koocanusa Working Group and Selenium Technical Subcommittee, whereas 1.5 µg/L does not meet those protection goals. *See* RR002352-2355.

DEQ acknowledges 0.8 µg/L is mathematically less than the federal 304(a) water column criterion of 1.5 µg/L for lentic or non-flowing waters (set at the 80th percentile), but the Lake Koocanusa water column criteria adopted in ARM 17.30.632(7)(a) is not more stringent than federal guidance because it was developed in accordance with the translation provided in Appendix K from the federal egg/ovary standard and is supported by the sound science outlined above.

D. Written findings under § 75-5-203, MCA, were not triggered by the Board's adoption of ARM 17.30.632(7)(a) because the Board correctly determined the Lake Koocanusa selenium standard is not more stringent than corresponding federal standards or guidelines.

Under the version of § 75-5-203, MCA in effect at the time ARM 17.30.632(7)(a) was adopted by the Board, except as provided in subsections (2) through (5) of § 75-5-203, MCA, the Board may not adopt a rule to implement 75-5-301, 75-5-302, 75-5-303, or 75-5-310 that is more stringent than comparable federal regulations or guidelines that address the same circumstances. The Board considered its statutory obligation under § 75-5-203, MCA and determined the

adopted selenium standards for Lake Koocanusa and the Kootenai River were not more stringent than comparable federal guidelines addressing site-specific selenium criteria. *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. The Board should decline the Petitioners' request that the Board reconsider its stringency determination, which concluded that ARM 17.30.632(7)(a) is not more stringent than comparable federal guidelines. *See* Teck Petition at pages 16 – 17; Lincoln County Petition at page 15.

E. EPA did not determine that ARM 17.30.632(7)(a) is more stringent than corresponding federal standards or guidelines.

The February 25, 2021 EPA approval letter determined ARM 17.30.632 was based on sound science and protects the most sensitive beneficial uses. *See* EPA Rationale for Approval of ARM 17.30.632 page 6, footnote 11 attached as Exhibit B to Teck's Petition. The EPA approval letter does not make a stringency determination under § 75-5-203, MCA as asserted by the Petitions. *See* Teck Petition at ¶ 12 on page 6-7; Lincoln County Petition at ¶ 12 on page 6. Under the federal Clean Water Act, the states (and eligible tribal governments) are responsible for reviewing, establishing, and revising water quality standards. *See* 40 CFR § 131.4.

EPA's February 25, 2021 approval letter points out that the federal Clean Water Act and its implementing regulations preserve the states' right to develop water quality standards that are more stringent than federal requirements. *Id.*, EPA Rationale for Approval of ARM 17.30.632 page 6, footnote 11 attached as Exhibit B to Teck's Petition. However, EPA did not make a stringency analysis as represented by the Petitioners. A stringency determination under § 75-5-203, MCA is solely a question of state law and not within the purview of EPA.

F. If the Board determines that ARM 17.30.632(7)(a) is more stringent than comparable federal regulations or guidelines, it is not necessary that DEQ reference peer reviewed studies in the rulemaking record to make the written findings in § 75-5-203(2) and (3), MCA.

If the Board determines ARM 17.30.632(7)(a) is more stringent than comparable federal requirements or guidelines, § 75-5-203(4), MCA, requires DEQ to either revise the rule to conform to federal regulations or guidelines or make the written findings in § 75-5-203(2) and (3), MCA. *See* § 75-5-203(4)(a), MCA (effective July 1, 2021). Petitioners allege DEQ's written findings must "reference pertinent, ascertainable, and peer-reviewed scientific studies contained in the record." *See* § 75-5-203(3); Teck Petition at ¶ 2 on page 2; Lincoln County Petition at ¶ 2 on page 2. However, § 75-5-203(3), MCA does not require peer-reviewed studies to be contained in the rulemaking record anytime the agency adopts a rule that is more stringent than comparable federal rules or guidelines. Instead, § 75-5-203(3), MCA provides:

The written finding must reference pertinent, ascertainable, and peer-reviewed scientific studies contained in the record that forms the basis for the department's conclusion. The written finding must also include information from the hearing record regarding the costs to the regulated community that are directly attributable to the proposed state standard or requirement. (emphasis added)

DEQ interprets this requirement to mean peer-reviewed studies are not a prerequisite to adopting a more stringent than federal requirement, but any studies contained in the record that form the basis of the agency's conclusion must be referenced in the agency's findings. Petitioners' interpretation that peer-reviewed studies are required to adopt a more stringent requirement would lead to absurd results because the stringency requirements in § 75-5-203, MCA apply to procedural requirements of the Montana Water Quality Act that are not susceptible to peer-reviewed scientific study.

If the Legislature had intended to require peer-reviewed scientific studies in all instances where a state agency adopts a stricter than federal requirement, it could have provided that a more stringent than federal rule may not be adopted unless there is a peer-reviewed study to support it. Any ambiguity or vagueness in the language of § 75-5-203(3), MCA may be resolved by reference to the preamble to 1995 Montana House Bill 521, which provides guidance to the state boards and agencies charged with implementing and complying with the Legislature's direction:

If the rules are more stringent than comparable federal law, 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 the public health or the environment and are achievable under current technology. The department is not required to show that the federal regulation is inadequate to protect public health. The written finding must also include information from the hearing record regarding the costs to the regulated community directly attributable to the proposed state standard or requirement. 1995 Mt. Ch. 471.

The preamble to 1995 Montana House Bill 521 says nothing about referencing peer-reviewed scientific studies in the findings required to support rules that are more stringent than federal. Therefore § 75-5-203(3), MCA cannot be interpreted to mean peer-reviewed scientific studies are necessary in all cases where a state agency adopts a stricter than federal requirement.

G. DEQ considered naturally occurring and background sources of selenium when it adopted ARM 17.30.632(7)(a).

DEQ disagrees that natural sources of a pollutant are relevant to a determination under § 75-5-203(2)(a), MCA. Contrary to Petitioners' allegations, the Board took background or natural sources of selenium into account when it adopted ARM 17.30.637(7)(a). *See* Teck Petition at ¶13, Lincoln County Petition at ¶13; RR002139-2140 (Response to Comment 129-130), and RR002165 (Response to Comment 199). The Board acknowledged selenium water quality data suggests selenium contribution from tributaries to the Lake Koocanusa and the

Kootenai River are very low and would not contribute to standards exceedances. See RR002139.

The Board record contains calculations by the department demonstrating shoreline erosion along the reservoir is likely not a significant source of selenium in the watershed. *See* RR002140 – 2141 (Response to Comment 133). The Board considered other potential natural and background source of selenium such as fluctuating water elevations from Libby Dam operations, bank sloughing events along the reservoir which may contribute selenium from soil to the lake, and tributary contributions of selenium and found no significant sources of background selenium. *See* RR002103, 2140-2141.

H. If the Board determines that ARM 17.30.632(7)(a) is more stringent than comparable federal regulations or guidelines, DEQ can 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.

Water quality standards are not set once harm occurs, but rather in advance of that, to protect beneficial uses before irreversible impacts occur. *See* RR002144-2145 (Response to Comment 145). Existing data in the record shows certain species of both cyprinid and non-cyprinid fish exceed the egg/ovary standard, which suggests impacts could already be occurring. Some species show elevated levels of selenium in egg/ovary concentrations. *See* RR002145 (Response to Comment 146). Adoption of the standards in ARM 17.30.632 are necessary to

adopt effective pollutant reduction plans, achieve the site-specific selenium standard, and protect aquatic life in Lake Koocanusa and the Kootenai River. *See* RR00002126 (Response to Comment 76).

If the Board determines that ARM 17.30.632(7)(a) is more stringent than comparable federal regulations or guidelines, DEQ can make the written findings that the proposed standard is achievable under current technology. Existing data in the record show the Board considered available treatment technology and the cost of treatment. *See* RR002118, 2122, 2126-2127 (Response to Comments 51, 62, and 78). The Board acknowledged there are no sources of selenium in the portion of Lake Koocanusa within Montana's jurisdiction to regulate. *See* RR002126-2127.

I. If the Board determines that ARM 17.30.632(7)(a) is more stringent than comparable federal regulations or guidelines, DEQ can make the written findings in § 75-5-203(3) regarding the costs to the regulated community that are directly attributable to the adoption of ARM 17.30.632.

The Board acknowledged there are no public or private entities currently discharging to the Kootenai River or Lake Koocanusa with Montana Pollutant Discharge Elimination System (MPDES) permit effluent limits for selenium. At this time, no permittee will be required to incur additional costs to treat wastewater for selenium to meet water quality-based effluent limits based on ARM 17.30.632. Land development activities, such as surface mining and construction, are already subject to general discharge permit requirements including implementation and maintenance of best management practices (BMPs). There are no foreseeable

additional treatment requirements associated with these land disturbing activities due to the adoption of ARM 17.30.632. *See* RR002110 and 2611 (Response to Comments 26 and 45).

### III. CONCLUSIONS

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 should be dismissed and given no further consideration by the Board.

ARM 17.30.632 is not more stringent than comparable federal regulations or guidelines and the Board was not required to make the written findings in 75-5-203(2) and (3), MCA. Therefore, the Board should deny all relief requested by both the Petitions.

As of July 1, 2021, DEQ rather than the Board has sole authority to adopt rules for the administration of the Montana Water Quality Act, subject to the provisions of §75-5-203, MCA. *See* Senate Bill 233 (SB 233), Sections 31, 32, and 34. Should the Board determine that ARM 17.30.632(7)(a) is more stringent than comparable federal regulations or guidelines, the department will make the written findings under §75-5-203(2) and (3), MCA.



Respectfully submitted this 13th day of January 2022.

/s/ Kirsten H. Bowers

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### Certificate of Service

I hereby certify that on this 13th day of January 2022, I caused a true and correct copy of the foregoing to be e-mailed to the following:

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## Sidner, Regan

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**From:** Emily Qiu <equiu@earthjustice.org>  
**Sent:** Thursday, January 13, 2022 2:07 PM  
**To:** DEQ BER Secretary  
**Cc:** shernandez@earthjustice.org; andrew@clarkfork.org; djohnson@meic.org  
**Subject:** [EXTERNAL] Public Comments re Selenium Rule Stringency Review-Earthjustice, MEIC, and CFC Comments  
**Attachments:** 2022-1-13 MEIC CFC Comment on Se Rule Stringency Review.pdf

Hi Regan,

I hope your week is going well.

Earthjustice submits the attached comments together with the Montana Environmental Information Center and Clark Fork Coalition regarding the Matter of the Petitions of Teck Coal Limited and the Board of County Commissioners of Lincoln County, Montana, for Stringency Review of Rule Pertaining to Selenium Standard for Lake Koocanusa.

Thank you,  
Emily

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January 13, 2022

Montana Board of Environmental Review  
Regan Sidner, Board Secretary  
Department of Environmental Quality  
deqbersecretary@mt.gov

**Re: In the Matter of the Petitions of Teck Coal Limited and the Board of County Commissioners of Lincoln County, Montana, for Stringency Review of Rule Pertaining to Selenium Standard for Lake Koocanusa**

To Chairman Ruffatto and Members of the Board,

Pursuant to the Board of Environmental Review's (Board) notice regarding stringency review of the Selenium Standard Rule—setting the water column selenium criterion at 0.8 µg/L—for Lake Koocanusa (Selenium Rule) in response to Teck Coal Limited's (Teck) and the Board of County Commissioners of Lincoln County's (Lincoln County) petitions to weaken Montana's Selenium standards, Earthjustice submits these comments together with the Montana Environmental Information Center (MEIC) and Clark Fork Coalition (CFC). These comments address the issues presented by Teck's and Lincoln County's petitions.

In short, the Board should reject the brazen invitation of Teck and Lincoln County to weaken the Selenium Rule for Lake Koocanusa. Any decision to weaken this standard would be arbitrary and not based in science. It would also be a wasted effort because the U.S. Environmental Protection Agency (EPA) cannot approve such an arbitrarily weakened standard because scientific data do not support a weakened standard.

**I. THE BOARD ALREADY DETERMINED THAT THE SELENIUM RULE IS NO MORE STRINGENT THAN THE FEDERAL STANDARD.**

Teck asks the Board to determine whether the Board's Selenium Rule is more stringent than the freshwater selenium criteria established by EPA. But the Board already determined that the Selenium Rule is no more stringent than the federal standard. Teck and Lincoln County misrepresent the federal standard and provide no legitimate basis for revisiting this rule. Any review of the Selenium Rule by the Board would be arbitrary and capricious and therefore unlawful.

As we have previously stated in our comments, Teck raised the identical stringency issue with the Board in 2020, and the Board specifically determined that the Selenium Rule was no more stringent than the federal standard. Teck now attempts to recycle this unsuccessful argument—without justification—to undermine the Selenium Rule that was developed in a thorough multi-



year transboundary effort involving multiple state, federal, provincial, and tribal governments, and that is based on the best available science.

It is arbitrary and capricious for an agency to make an administrative decision or change its position without adequate justification. 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))). 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)). This 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)).

In 2020, the Board determined the Selenium Rule “is no more stringent than the recommended EPA” standard. Rulemaking Record, RR\_001330. In particular, the Board concluded that “although the 0.8 µg/L standard for Lake Koocanusa is lower than EPA’s national criteria value of 1.5 µg/L for lakes, 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; therefore, it is more accurate than the generally applicable national lentic (lake) number.’” RR\_001343. 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.



Teck and Lincoln County provide no new basis to revisit the Board's previous determination that the Selenium Rule is no more stringent than the federal standard. Thus, the Board's prior determination must stand, and it should reject Teck's and Lincoln County's efforts to compel the Board to act arbitrarily and capriciously.

## **II. THE SELENIUM RULE IS NO MORE STRINGENT THAN THE FEDERAL STANDARD.**

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, continues to misrepresent the federal standard by claiming that the Selenium Rule is more stringent than the federal standard. Teck's and Lincoln County's empty claims are unequivocally false because they rely on an illogical and inaccurate interpretation of the federal standard. As the Board 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[.]" RR\_001330.

Teck and Lincoln County claim that the Selenium Rule is more stringent than the federal standard. Yet, EPA expressly 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. In its 2016 Selenium Fact Sheet, EPA makes clear that, "States must adopt into their standards water quality criteria that protect the designated uses of the water bodies within their area. These can include scientifically defensible site-specific criteria that are different from EPA's national recommended criteria, as long as the site-specific criteria are protective of the designated use." EPA, Aquatic Life Ambient Water Quality Criterion for Selenium in Freshwater 2016 – Fact Sheet (2016 EPA Selenium Fact Sheet) 1 (June 2016), [https://www.epa.gov/sites/default/files/2016-06/documents/se\\_2016\\_fact\\_sheet\\_final.pdf](https://www.epa.gov/sites/default/files/2016-06/documents/se_2016_fact_sheet_final.pdf) (emphasis added). As the Board's own response to 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 column translations as site-specific criteria[.]'" 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 “[i]f 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.

The Montana Department of Environmental Quality (DEQ) chose to develop a site-specific water column criterion as expressly permitted by 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. Geological Survey, DEQ, Kootenai Tribe of Idaho, and the Confederated Salish & Kootenai Tribes demonstrate the need for a site-specific selenium criterion to protect Lake Koocanusa’s designated uses because the lake is highly susceptible to selenium bioaccumulation. Thus, the Board concluded that “the EPA (2016) lentic water column value is not protective of the aquatic life beneficial uses in Lake Koocanusa” and chose to develop a site-specific water column criterion. Montana Board of Environmental Review, RR\_002485. 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. As 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.

As discussed above, EPA also recognizes that site-specific water column standards may be necessary to protect threatened and endangered species susceptible to bioaccumulation. RR\_001036-37. DEQ saw this need given the existence of Endangered Species Act (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.

Teck’s and Lincoln County’s arguments ignore the relationship between the different selenium criteria and how these criteria relate to the overall goal of protecting Lake Koocanusa’s designated uses when they incorrectly argue that the Selenium Rule is more stringent than the federal standard. For egg-ovary criteria, DEQ adopted the 15.1 mg/kg dw national egg-ovary criterion. The Selenium Rule—0.8 µg/L water column criterion—is based on site-specific data for fish tissue. Data show that the national selenium water column criterion of 1.5 µg/L is not protective of the aquatic life beneficial use, and there are several species of fish in Lake Koocanusa that currently exceed the 15.1 mg/kg dw toxicity threshold. Any weakening of the Selenium Rule is scientifically indefensible because the site-specific data for Lake Koocanusa



support the 15.1 mg/kg dw /0.8 µg/L criteria, and a standard lower than the Selenium Rule would be weaker than the federal standard. Therefore, a standard weaker than the Selenium Rule would not comply with EPA's direction that "[s]tates must adopt into their standards water quality criteria that protect the designated uses of the water bodies within their area." 2016 EPA Selenium Fact Sheet at 1.

Ultimately, EPA's Aquatic Life Ambient Water Quality Criterion for Selenium sets the protocol for developing site-specific criteria and is the federal standard. EPA approved the Selenium Rule, thus establishing that the Selenium Rule was developed in accordance with EPA protocol and cannot be more stringent than the federal standard. This Board should reject Teck's and Lincoln County's attempts to reverse this Board's prior decisions without justification, and the Board should determine that the Selenium Rule is no more stringent than the federal standard and that a weaker rule is scientifically indefensible.

### **III. TECK'S AND LINCOLN COUNTY'S EFFORTS ARE UNSUPPORTED BY EPA AND A WEAKER SELENIUM RULE WILL BE REJECTED.**

Any selenium standard weaker than the Selenium Rule would be rejected by EPA, which must review any new criterion, for failing to protect Lake Koocanusa's designated uses. A weaker water column selenium criterion for Lake Koocanusa would not be protective of the aquatic life beneficial use and would likely run afoul of the ESA, 16 U.S.C. § 1536, and the Clean Water Act (CWA), 33 U.S.C. § 1313.

EPA approved the Selenium Rule. Changes to the Selenium Rule would require EPA to review any new criterion under the CWA, 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."). EPA must also engage in consultation as required under the ESA, 16 U.S.C. § 1536(a)(2), due to presence of ESA-protected bull trout and white sturgeon.

Given that the site-specific selenium criterion was developed to protect the aquatic life beneficial use in Lake Koocanusa and is based on site-specific data for fish tissue, any weakening of the Selenium Rule is scientifically indefensible and could not be approved by EPA. The site-specific data for Lake Koocanusa support the 15.1 mg/kg dw egg-ovary and 0.8 µg/L water column criteria, and in fact, show that the national 1.5 µg/L water column criterion is not protective of the aquatic life beneficial use. As previously noted in section II, several fish species in Lake





Koocanusa currently exceed the 15.1 mg/kg dw toxicity threshold. Therefore, EPA cannot approve a weaker standard, which would not be protective of the aquatic life beneficial use.

Furthermore, a site-specific criterion developed to be protective of aquatic life includes ESA-protected bull trout and white sturgeon. By approving a weakened standard, a federal agency could open itself up to ESA liability for failure to protect ESA-listed species if it approved a weaker water column selenium criterion for Lake Koocanusa. Nw. Env't Advocs. v. U.S. E.P.A., 268 F. Supp. 2d 1255, 1273 (D. Or. 2003) (holding that federal agency's determination that state's revised water quality standards for temperature and intergravel dissolved oxygen criteria would not jeopardize ESA-listed threatened salmonid and bull trout species was arbitrary and capricious under the ESA).

As noted, before, EPA has the ultimate authority and obligation to disapprove any changes to the Selenium Rule. If the Board shirks its duty under the CWA and arbitrarily weakens the Selenium Rule, EPA must promulgate substitute water quality standards in order to meet its CWA obligations. Thus, EPA may still promulgate the already approved Selenium Rule. 40 C.F.R. § 131.22 ("If the State does not adopt the changes specified by the Regional Administrator within 90 days after notification of the Regional Administrator's disapproval, the Administrator shall promptly propose and promulgate such standard."). Further, weakening the Selenium Rule would encourage petitions for Montana's decertification under the CWA. 42 U.S.C. § 1342(c)(3) ("Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program."). Teck's and Lincoln County's petitions ask the Board to behave arbitrarily and capriciously in a meaningless exercise where the ultimate result will be the same: the Selenium Rule will remain the water column selenium criterion for Lake Koocanusa because EPA will have no reasoned basis to approve a weaker standard.

Moreover, according to EPA guidance, egg-ovary concentrations take primacy over the suite of multi-media, including the site-specific water column criterion. 2016 EPA Selenium Fact Sheet at 1 n.1. ("A note on hierarchy of table: when fish egg/ovary concentrations are measured, the values supersede any whole-body, muscle, or water column elements except in certain situations. Whole body or muscle measurements supersede any water column element when both fish tissue and water concentrations are measured, except in certain situations. Water column values are derived from the egg & ovary concentrations via bioaccumulation modeling. Water column values are the applicable criterion element in the absence of fish tissue measurements, such as waters where fish have been extirpated or where physical habitat and/or flow regime cannot sustain fish populations, or in waters with new discharges of selenium where steady state has not been achieved between water and fish tissue at the site.") (emphasis added). Because the egg-ovary criterion is paramount and the Selenium Rule is based on site-specific fish tissue data and



derived to meet the egg-ovary standard, the Selenium Rule is the federal standard, and there is no scientific justification for weakening the rule.

If the Board weakens the Selenium Rule at the behest of industry, EPA will reject a weaker selenium standard for Lake Kootenai. Moreover, such a needless assault on water quality invites challenges to Montana's ability to administer its own clean water program. The Board should reject Teck's and Lincoln's siren call to weaken the Selenium Rule and should determine—as it has done before—that the Selenium Rule is based on robust site-specific fish tissue data and consequently, is no more stringent than the federal standard.

### CONCLUSION

Teck's and Lincoln County's petitions ask the Board to arbitrarily and unlawfully undo years of coordinated efforts to establish the Selenium Rule that is protective of Montana's fisheries from toxic pollution and was developed according to EPA protocols and based on the best available science. The Selenium Rule is no more stringent than the federal standard, and this Board cannot arbitrarily remake a determination it has already made. The Board should reject Teck's and Lincoln County's petitions and reaffirm its determination that the Selenium Rule is no more stringent than the federal standard.

Respectfully,

/s/ Emily Qiu

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/s/ Shiloh Hernandez

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## Sidner, Regan

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**From:** Fish, Tonya (she/her) <Fish.Tonya@epa.gov>  
**Sent:** Thursday, January 13, 2022 10:27 AM  
**To:** DEQ BER Secretary  
**Cc:** Kelly, Myla; Sullivan, Lauren  
**Subject:** [EXTERNAL] Comments on Selenium Petitions  
**Attachments:** EPA Comments on Selenium Petitions final.pdf

Regan,

EPA is submitting the attached comments 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.

Thank you for your work,  
Tonya



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 8

1595 Wynkoop Street  
Denver, CO 80202-1129  
Phone 800-227-8917  
[www.epa.gov/region8](http://www.epa.gov/region8)

January 13, 2022

Ref: 8WP-CWQ

Steven Ruffatto  
Chair, Montana Board of Environmental Review  
Montana Department of Environmental Quality  
Metcalf Building, 1520 East Sixth Avenue  
P.O. Box 200901  
Helena, Montana 59620-0901

Subject: EPA's comments 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

Dear Mr. Ruffatto:

The U.S. Environmental Protection Agency (EPA) is providing the following comments on the matter of the Petitions to help inform the Board's decision.

The following statement in EPA's February 2021 action letter is at issue in the Petitions: "Although this criterion element is more stringent than the recommended water column criterion element for lentic aquatic systems in EPA 2016 (1.5 µg/L), based on the state's technical documentation included in its submission, summarized above, EPA concludes that it is supported by a sound scientific rationale."

As explained more fully below, Montana met the federal requirements and followed EPA's guidance for deriving a site-specific water column element.

**EPA's Recommended Selenium Criterion**

Pursuant to the Clean Water Act (CWA) section 304(a), EPA publishes criteria recommendations for water quality that accurately reflect the latest scientific knowledge. These criteria recommendations do not impose legally binding requirements and are not regulations themselves. EPA's Water Quality Standards (WQS) regulation requires that criteria adopted by states and authorized tribes "be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use." 40 C.F.R. § 131.11(a)(1). Such numeric criteria may be based on EPA's CWA section 304(a) guidance, modifications to the CWA section 304(a) guidance to reflect site-specific conditions, or other scientifically defensible methods. 40 C.F.R. § 131.11(b).

The latest scientific knowledge indicates that selenium toxicity to aquatic life is primarily based on organisms consuming selenium contaminated food rather than by being exposed only to selenium dissolved in water. In addition, fish are more sensitive to selenium than other aquatic life. Toxicity data indicate that the selenium concentration in fish eggs and ovaries is the most robust and consistent measurement endpoint directly tied to adverse reproductive effects. Therefore, EPA's recommended selenium criterion (EPA 2016)<sup>1</sup> is a single criterion with multiple elements. The egg-ovary criterion element was derived directly from toxicity data. EPA also included the whole-body, muscle tissue, and water column criterion elements, so that states and authorized tribes could more readily implement the criteria. The whole-body and muscle tissue elements were derived from a combination of direct toxicity measurements and conversions of the egg-ovary criterion element. The water column criterion element was derived from conversions of the egg-ovary element. EPA 2016 also includes guidance that states can use to derive a site-specific water column criterion element from one of the fish tissue criterion elements.

Montana adopted a single selenium criterion for Lake Koocanusa with three criterion elements: two fish tissue criterion elements (egg-ovary and whole-body or muscle); and a water column criterion element. It is important to note that although only the water column criterion element is at issue in the Petitions, it is not, by itself, a criterion – it is one part of a three-part criterion. The two fish tissue criterion elements are the same as those in EPA 2016 and the site-specific water column criterion element was derived consistent with EPA 2016.

When evaluating the requirements of 40 C.F.R. § 131.11(a)(1), what is important is whether 0.8 µg/L will result in fish tissue concentrations at least as protective as EPA's recommended fish tissue concentrations. The state concluded 0.8 µg/L was necessary based on site-specific data from Lake Koocanusa to achieve EPA's recommended fish tissue concentrations, or stated another way, that 1.5 µg/L would not protect the aquatic life use. Montana met the federal requirements and followed EPA's guidance for deriving a site-specific water column element.

### **Lake Koocanusa Selenium Water Column Element in Effect for CWA Purposes**

EPA's WQS regulation (40 C.F.R. § 131.21) requires that standards adopted by states on or after May 30, 2000 must be approved by EPA before they can be used as the basis for actions under the CWA, such as establishing water quality-based effluent limitations in Montana Pollutant Discharge Elimination System (MPDES) permits or total maximum daily loads (TMDLs). EPA approved ARM 17.30.632(7)(a) and it remains in effect for CWA purposes unless and until EPA approves a new state submission consistent with the CWA and EPA's WQS regulation.

If the Board determines that the state process for adopting ARM 17.30.632(7)(a) was inconsistent with Montana Code Annotated (MCA) 75-5-203, EPA's understanding is that DEQ may either revise the rule "to conform to the federal regulations or guidelines" or make the written finding consistent with MCA

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<sup>1</sup> See the BER's record posted December 15, 2021 at RR\_000299 and RR\_004237. Also available at [www.epa.gov/wqc/aquatic-life-criterion-selenium](http://www.epa.gov/wqc/aquatic-life-criterion-selenium).



75-5-203(2). If the state proceeds with a rulemaking to revise ARM 17.30.632(7)(a), this revised WQS must be submitted to EPA for review consistent with the CWA and EPA's WQS regulation. State adoption of 1.5 µg/L as the selenium water column criterion element for Lake Koocanusa based on EPA 2016 would not guarantee EPA approval, especially given that the state concluded 1.5 µg/L would not protect the aquatic life use. The state would also need to provide a site-specific demonstration that a 1.5 µg/L water column criterion element protects the designated uses of Lake Koocanusa and the downstream uses in the Kootenai River where white sturgeon occur, which is the most sensitive species in the EPA 2016 dataset. 40 C.F.R. §§ 131.10(b) and 131.11.

## **Conclusion**

We thank the Board for your work to protect Montana's waters. If you have any questions, please contact Tonya Fish on my staff at [fish.tonya@epa.gov](mailto:fish.tonya@epa.gov).

Sincerely,

JUDY  
BLOOM

Digitally signed  
by JUDY BLOOM  
Date: 2022.01.13  
09:35:48 -07'00'

Judy Bloom  
Manager, Clean Water Branch

## Sidner, Regan

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**From:** Clayton Elliott <clayton@montanatu.org>  
**Sent:** Wednesday, January 12, 2022 3:24 PM  
**To:** DEQ BER Secretary; DEQ BER  
**Cc:** David Brooks  
**Subject:** [EXTERNAL] MT Trout Unlimited comments on BER Selenium stringency review  
**Attachments:** 2022-01-13 MTUCommentsSeleniumStringencyReview FNL.pdf

Ms. Sidner,

Please find attached comments on behalf of Montana Trout Unlimited 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 Montana Code Annotated Section 75-5-203 – Stringency Review of Rule Pertaining to Selenium Standard for Lake Koocanusa. Please do not hesitate to contact me if you need additional documents or have questions.

Thank you,

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**Clayton Elliott**  
*Conservation and Government Affairs Director*  
**Montana Trout Unlimited**  
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January 12, 2022

Montana Trout Unlimited  
312 North Higgins, Suite 200  
P.O. Box 7186  
Missoula, Montana 59807

Board of Environmental Review  
ATTN: Regan Sidner  
P.O. Box 200901  
Helena, Montana 59620-0901  
Submitted via email to [deqbersecretary@mt.gov](mailto:deqbersecretary@mt.gov)

Re: Comments opposing Petitions on Stringency Review of Rule Pertaining to Selenium Standard for Lake Koocanusa

Board of Environmental Review members:

Thank you for the opportunity to provide comments on issues presented by the Petitions regarding the stringency review (ARM 17.30.632(7)(a) pursuant to MCA 75-5-208) of the rule pertaining to the selenium standard for Lake Koocanusa. Montana Trout Unlimited (MTU) has monitored, participated in and commented on the development of the Lake Koocanusa selenium standard for the more than half a decade during which it was developed by stakeholders in conjunction with Department of Environmental Quality (DEQ), as well as supported the Board of Environmental Review's (BER) approval of the rule.

Founded in 1964, Montana Trout Unlimited (MTU) is the only statewide grassroots organization dedicated solely to conserving, protecting, and restoring Montana's coldwater fisheries. MTU is comprised of 13 chapters across the state, including in Northwest Montana, and it represents approximately 4,500 Trout Unlimited members in the state.

MTU strongly believes that the long, thorough and public process that led to the establishment of the current selenium standard does not violate any stringency review criteria in state or federal law. The standard itself is based on the best use of a wealth of science and, more important to the question at hand, it is based on following EPA guidelines recommending that states do exactly what Montana DEQ has done – set a site specific standard.

To be more specific, the Petition in question is misguided and BER should reject it out of hand. Teck raised the issue of stringency with the BER in 2020. At that time, the BER explicitly determined that the selenium standard was no more stringent than the federal standard. Nothing in the record has changed since then regarding the federal standard, the state standard or the



state's stringency review law(s). ARM 17.30.632(7)(a) sets the site specific selenium standard in Lake Koocanusa at 0.8 micrograms per liter. While the federal "guideline" (not a hard and fast standard) for selenium is 1.5 micrograms per liter, that federal guideline explicitly permits more protective "site-specific water column criterion," which is exactly what the 0.8 micrograms per liter standard for Lake Koocanusa is. Furthermore, the EPA guidelines regarding site specific selenium standards states that: "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."<sup>1</sup>

The EPA guidelines also state that site specific standards should account for designated or desirable uses of downstream waters, including if that means adopting a selenium standard more stringent than might otherwise be warranted for the upstream waterbody.

*EPA regulations at 40 CFR 131.10(b) provide that "[i]n designating uses of a waterbody and the appropriate criteria for those uses, the state shall take into consideration the water quality standards of downstream waters and ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters." Especially in cases where downstream waters are lentic waterbody types (e.g., lakes, impoundments), or harbor more sensitive species, a selenium criterion more stringent than that required to protect in-stream uses may be necessary to ensure that water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters.<sup>2</sup>*

Montana's approved standard for selenium in the Kootenai River now matches that of Idaho's state standard downstream. Thus, maintaining the approved standard in Montana ensures "that its water quality standards provide for the attainment and maintenance of the water quality of standards of downstream waters," as per the EPA regulations quoted above. Relaxing the stringency of Montana's standards would fail to ensure Idaho's EPA-approved selenium standards will be achieved or maintained and would, hence, violate 40 C.F.R Part 131.10(b) and the Clean Water Act. Because of these potential downstream violations, EPA under 33 U.S.C. § 1313(c) would not be able to approve a less stringent standard for the Kootenai in Montana.

In 2020, the BER confirmed that Montana's new standards for Lake Koocanusa and the Kootenai River comported with federal guidelines and Montana law. In response to Teck raising false concerns about stringency violations, BER responded that "selenium standards in proposed NEW RULE I are not more stringent than currently recommended federal criteria." BER emphasized that the proposed Kootenai River water column standard of 3.1 microgram per liter corresponded with the EPA's criteria for flowing water and that the Lake Koocanusa standard of 0.8 micrograms per liter were soundly and legally based on EPA's fish tissue criteria and site-specific bioaccumulation modeling following procedures set out in Appendix K of EPA's guidance document for setting selenium standards. In short, DEQ precisely followed EPA's

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<sup>1</sup> RR\_000418

<sup>2</sup> RR\_000417

guidance in setting its proposed (now approved) selenium standards for Koocanusa and the Kootenai River.<sup>3</sup>

BER hammered home this point by ending its response to Teck's erroneous stringency challenge with the conclusion that:

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.<sup>4</sup>

MTU agrees with BER's assessment from 2020 that the new standards in no way violate Montana stringency review (75-5-203(2), MCA) and we strongly support BER maintaining that analysis by rejecting the current petition. There have been no changes in law or facts relevant to BER's prior determination regarding stringency, so it would be arbitrary and violate an adherence to precedent for BER to change its decision on this matter simply because Teck or a few other individuals do not like the answer BER fairly and legally settled on the first time the petitioners raised this issue.

Furthermore, the record includes ample reiterations of the fact that DEQ's site specific standard is legal in regard to Montana's stringency review. For example, Montana Legislative Services staff attorney in a letter to the Montana Legislature's Water Policy Interim Committee reported that the "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."<sup>5</sup>

Meanwhile, as Teck and a few other individuals are making unsupported challenges to this scientifically-sound and legal standard, new fish tissue data from Koocanusa and the Kootenai river show increasing levels of selenium that, perhaps, warrant an even more stringent standard than DEQ has set.

Please do not hesitate to contact us with any questions, or if you need additional information regarding the comments that we have submitted (via email at [david@montanatu.org](mailto:david@montanatu.org) or [clayton@montanatu.org](mailto:clayton@montanatu.org) or by phone at 406-543-0054). Again, we thank you for the opportunity to comment.

Respectfully,

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<sup>3</sup> RR\_002544

<sup>4</sup> RR\_002545

<sup>5</sup> RR\_001343



David Brooks  
Executive Director  
Director  
Montana Trout Unlimited



Clayton Elliott  
Conservation and Government Relations  
Montana Trout Unlimited

## Sidner, Regan

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**From:** Tamara J. Johnson <tjohnson@montanamining.org>  
**Sent:** Thursday, January 13, 2022 4:51 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Montana Mining Association Comments RE: Stringency Review of Rule Pertaining to Selenium Standard for Lake Koocanusa  
**Attachments:** MMA Comments to BER Selenium 1-13-22.pdf

Dear Chairman Ruffato and members of the Board of Environmental Review,

Please find attached the Montana Mining Association comments on the petition of the Board of County Commissioners of Lincoln County and Teck Coal Limited for review of ARM 17.30.632(7)(a) pursuant to MCA Section 75-5-203 – Stringency Review of the Rule Pertaining to Selenium Standard for Lake Koocanusa.

Thank you for the opportunity to comment.

Best regards,  
Tammy

“Everything's impossible until someone does it.” – Batman

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**Tammy Johnson, Executive Director**

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# MONTANA MINING ASSOCIATION

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Website: <http://www.montanamining.org>

January 13, 2022

Mr. Steven Ruffato, Chairman  
Montana Board of Environmental Review  
Department of Environmental Quality  
Helena, MT 59620  
Submitted via email: [deqbersecretary@mt.gov](mailto:deqbersecretary@mt.gov)

Dear Chairman Ruffato,

Thank you for providing the opportunity to submit comments on behalf of the Montana Mining Association. The Montana Mining Association (MMA) supports the petitions submitted by the Board of County Commissioners of Lincoln County and Teck Coal Limited for review of ARM 17.30.632(7)(a) pursuant to MCA Section 75-5-203 – Stringency Review of the Rule Pertaining to Selenium Standard for Lake Koocanusa.

The Montana Mining Association is a Montana trade association of mineral developers, producers, and vendors from fifteen states, including Montana dedicated to helping mining companies, small miners and allied trade members succeed, understand, comply, and function in a complex business and regulatory world. The mining industry is a major employer and taxpayer in Montana, and we believe the continued viability and growth of our members' operations are significant factors in the economic health of our state and its citizens. Most of our members are small businesses who are critically important to the health and vibrancy of our rural communities. The MMA member producers include those that produce metals and industrial minerals including cement, limestone, and talc.

We rise today to support the petitioners because the provisions of §75-5-203 are a fundamental premise which our membership has supported during and since its adoption in 1995. The MMA was a member of the Western Environmental Trade Association, who led the supporting effort for the 'no more stringent' statute in § 75-5-203.

We have tremendous respect for our DEQ employees. Nonetheless, the state of Montana is much too small to have the human and financial resources that the federal government has at its disposal. It is appropriate that standards are developed at the federal level and put through a lengthy process before adoption.

Further, when standards are set at the federal level there is ample opportunity for stakeholders in every state to comment on how the suggested standard affects their personal, professional, or business interests. As such, there is faith that federal standards are promulgated in a very

conservative fashion and are protective of human health and the environment. Montana should not set standards that are stricter than federal standards except for a critically important situation.

DEQ has stated that the level of Selenium in the Lake currently is about 1.0 micrograms per liter, which is quite a bit below the EPA guideline of 1.5 micrograms per liter. The new standard goes even lower than the existing condition, requiring the lake to meet a level set at 0.8 micrograms per liter. DEQ is obligated to prepare the written finding as required by law. This should have been completed and made available to the public and was required to be published with the rule. DEQ does not have anything or anyone to regulate to bring Lake Koocanusa into compliance with this low standard. The lake could be forever impaired with no way to mitigate any harm to the environment.

The MMA believes the relief sought by the petitioners be granted and the DEQ be required to provide a written finding from the rulemaking record that would demonstrate that adopting a more stringent standard is justified or promulgate the federal requirement. It must demonstrate that the proposed state standard or requirement protects public health or the environment of the state; and the state standard or requirement to be imposed can mitigate harm to the public health or environment and is achievable under current technology.

Sincerely,

A handwritten signature in black ink, appearing to read "Tamara J. Johnson", written over a thin horizontal line.

Tamara J. Johnson  
Executive Director

## Sidner, Regan

---

**From:** Peggy Trenk <ptrenk@tsria.net>  
**Sent:** Wednesday, January 12, 2022 2:11 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Written Comments regarding Petitions for Stringency Review of ARM 17.30.632(7)(a)  
**Attachments:** TSRA BER Stringency Review Comments 1.12.2220220112\_14060160.pdf

Regan,

Thank you for your assistance earlier today. Please find written comments from the Treasure State Resources Association attached regarding the above-referenced matter.

Peggy

--

**Peggy Olson Trenk**  
Executive Director  
[ptrenk@tsria.net](mailto:ptrenk@tsria.net)  
Cell: 406-461-9945





P.O. Box 1700  
Helena, MT 59624  
(406) 443-5541  
treasurestateresources.org  
Email: info@treasurestateresources.org

January 12, 2022

Steven Ruffato, Chairman  
Montana Board of Environmental Review  
Department of Environmental Quality  
Helena, Montana 59620

Dear Chairman Ruffato,

On behalf of the Treasure State Resources Association (TSRA), I would like to offer our support for the petitions submitted by the Board of County Commissioners of Lincoln County and Teck Coal Limited for review of ARM 17.30.632(7)(a) pursuant to Mont. Code Annotated Section 75-5-203 – Stringency Review of Rule Pertaining to Selenium Standard for Lake Koocanusa.

TSRA, then known as the Western Environmental Trade Association, was the lead advocate for the “no more stringent” statute referenced above. Passed during the 54<sup>th</sup> Legislative Session, the legislation stemmed from an awareness that our current regulatory regime represents an effort to deal with microscopic particles measured in parts-per-billion or smaller. Risks are determined by complex formulas in a process that calls for setting priorities in terms of how much protection we can achieve or afford as a society. “Stricter” standards cannot be presumed to be “better” standards without first evaluating the questions of “how” and “why”. The statute, and the rules adopted to implement the law, give us a way to make that determination.

Montana Code Annotated Section 75-5-203 (2) requires that a written finding summarizing the policy reasons for the adoption of the stricter standard be made. The Department must document that the more stringent requirements protect public health or the environment and are achievable under current technology. The Department must also include information from the hearing record regarding the costs to those being regulated that are directly attributable to the higher standards. The written finding must be published with the rules so that the public can access that information and understand the purpose served. Both the public and the agency can benefit from having built a solid record for regulatory decisions.

To the specifics of the selenium rulemaking, another statute (SB 325 passed in 2015) identified stricter “site-specific” water quality standards as being subject to the provisions of Montana Code Annotated Section 75-5-203 (2). The rulemaking that resulted in the more stringent selenium standard did not comply.



Montana Board of Environmental Review  
Stringency Review Comments  
Page 2

As a result, we believe the relief sought by the Lincoln County Commissioners and Teck Coal Limited be granted and the Department be required to provide a written finding from the rulemaking record that clearly sets forth the case for adopting the more stringent standard or adopt the federal guideline.

Thank you for your consideration of our comments.

Sincerely,



Peggy Trenk  
Executive Director  
Treasure State Resources Association

## Sidner, Regan

---

**From:** Wyatt Petryshen <wyatt@wildsight.ca>  
**Sent:** Thursday, January 13, 2022 4:00 PM  
**To:** DEQ BER Secretary  
**Subject:** [EXTERNAL] Wildsight comments opposing Petitions to weaken Montana's EPA-approved selenium water quality standards for Lake Koocanusa  
**Attachments:** Wildsight\_Comments\_opposing\_Petitions\_ARM17.30.632(7)(a).pdf

Dear Secretary Regan Sidner,

Please see the attached letter with Wildsight's written comments addressing the issues presented by the Petitions of Teck Coal Limited and the Board of County Commissioners of Lincoln County, Montana.

Sincerely,

Wyatt

—

**Wyatt Petryshen (he/him), M.Sc.**

Mining Coordinator, Wildsight

<https://wyattsp.github.io/Wyatt-Petryshen/> [[wyattsp.github.io](https://wyattsp.github.io)]

<https://wildsight.ca/people/wyatt-petryshen/> [[wildsight.ca](https://wildsight.ca)]

[wyatt@wildsight.ca](mailto:wyatt@wildsight.ca)



**Comments opposing Petitions to weaken Montana's EPA-approved selenium water quality standards for Lake Koocanusa**

**January 13<sup>th</sup>, 2022**

250.427.9325 • 2-495 Wallinger Avenue Kimberley BC V1A 1Z6 • [www.wildsight.ca](http://www.wildsight.ca)

---

Regan Sidner  
Board Secretary  
Department of Environmental Quality  
P.O. Box 2000901  
Helena, MT 59620-0901  
Submitted by email to [deqbersecretary@mt.gov](mailto:deqbersecretary@mt.gov)

January 13<sup>th</sup>, 2022

**Subject:** Comments opposing Petitions to weaken Montana's EPA-approved selenium water quality standards for Lake Koocanusa

Dear Chairman Ruffatto and Members of the Board:

I am writing on behalf of Wildsight, a leading conservation organization in the Kootenay Region of British Columbia representing some 35,000 supporters and home to Teck Coal Limited's (Teck) coal mining operations, to oppose the petitions filed by Teck and the Board of County Commissioners of Lincoln County (Lincoln County) with the Board of Environmental Review (Board) seeking stringency review of Montana's EPA-approved water quality standard for selenium in Lake Koocanusa. As our organization is located within Canada, I do not want to comment on the specific rulemaking processes in the state of Montana or its relationship to federal regulations. Instead, I would like to comment on the necessity for such rules to exist and provide an example of what may occur to aquatic species in Lake Koocanusa if the current site-specific water column water quality criteria for Lake Koocanusa is changed. Both the health and well-being of aquatic life in Lake Koocanusa, and the personal and economic uses within the lake depend on the currently approved standards.

The degree of environmental harm occurring from selenium pollution in Lake Koocanusa is likely widespread and severe, although not immediately evident. Lemly (2014)<sup>1</sup>, in a government-commissioned report on the effects of selenium to fish reproduction and survival, predicted the likely collapse of Westslope Cutthroat Trout (WCT) populations living in selenium polluted waterways. In 2019, a population collapse of WCT was observed in the upper Fording River<sup>2</sup> and Harmer Creek<sup>3</sup>, whereby population declines of 70% in juveniles and 83% in adults occurred in the upper Fording River, and 98% in juveniles and 25% in adults in Harmer Creek. Although the *Evaluation of Cause*<sup>4</sup> final report on the upper Fording River WCT population collapse primarily attributed the decline to "*the interaction of extreme ice conditions (due to extreme prolonged cold air temperatures, seasonal winter low flows, and low winter snowpack), sparse overwintering habitats and restrictive fish passage conditions during the preceding migration period in fall 2018*"<sup>4</sup>, the report commissioned by Teck acknowledged selenium pollution contributed to the collapse. Over this same period, a catastrophic population collapse of WCT in

Harmer Creek occurred, along with a more modest decline in WCT in Grave Creek<sup>3</sup>. In this case, Harmer Creek saw a population decline of 98% in juveniles and 25% in adults compared to Grave Creek, which saw WCT population declines of 20% in juveniles and 38% in adults. Grave Creek in this case represents a reference condition<sup>3</sup>, identified by Teck, although mine related effects are likely still occurring in this watershed.

The divergence in the population trends between Harmer Creek and Grave Creek must then indicate a severe chronic difference between these two watersheds. In the Thorley, Kortello, and Robinson (2021)<sup>3</sup> report compiled for Teck, they go as far as to state that there are “*chronic impacts specific to the Harmer Creek watershed*” and “*this population faces the potential for functional extirpation within the lifespan of an adult WCT*”. The consequences of mine pollution entering Harmer Creek must be substantial to account for the differences with Grave Creek, and despite the *Evaluation of Cause*<sup>4</sup> final report on the upper Fording River WCT population collapse, chronic impacts must be responsible for a substantial proportion of the fish decline. Otherwise, WCT declines in both the upper Fording River and Harmer Creek would’ve been much more similar to what was observed in Grave Creek. Although extreme prolonged cold air temperatures, seasonal winter low flows, and low winter snowpack may have initiated the population declines in the upper Fording River, and likely Harmer Creek, chronic selenium pollution and other mine related contaminants and disturbances likely exacerbated WCT declines.

Despite the chronic impacts of selenium contamination in Lake Koocanusa and the Kootenai River not being immediately evident, the above example illustrates how imperilled these populations really are. Furthermore, this example highlights how a single extreme weather event, in combination with the already existing high concentrations of selenium in Lake Koocanusa can threaten the health of the entire ecosystem. As contamination continues to increase and flow across the Canada/US border this issue will only worsen, and since water exiting Lake Koocanusa eventually re-enters Canada near Creston BC, aquatic species in Canada may become threatened if water quality is not protected.

The province of BC will soon be updating the water quality guideline for the Canadian portion of Lake Koocanusa. This new guideline will likely set the limit of total dissolved selenium in the water column to be 0.85 ug/L, nearly identical to the current standard in Montana. Don’t let what is already occurring in Canadian rivers and streams occur in your home. Population collapses predicated by Lemly (2014)<sup>1</sup> are already occurring in selenium-contaminated waters of the Elk Valley. If selenium concentrations continue to occur above 0.8 ug/L in Lake Koocanusa, a concentration back calculated from the federal egg/ovary limit of 15.1 (mg/kg dw) using methodologies provided by the EPA, you can expect what has occurred in the Elk Valley to occur in Montana and Idaho.

Sincerely,



Wyatt Petryshen, M.Sc.  
Mining Coordinator, Wildsight  
[wyatt@wildsight.ca](mailto:wyatt@wildsight.ca)

---

<sup>1</sup> Lemly D.A. 2014. Review of Environment Canada's Teck Coal Environmental Assessment and Evaluation of Selenium Toxicology Tests on Westslope Cutthroat Trout in the Elk and Fording Rivers in Southeast British Columbia. [https://www.teck.com/media/2014-Water-review\\_environment\\_canada-T3.2.3.2.1.pdf](https://www.teck.com/media/2014-Water-review_environment_canada-T3.2.3.2.1.pdf)

<sup>2</sup> Cope, S. 2020. Upper Fording River Westslope Cutthroat Trout Population Monitoring Project: 2019. Report Prepared for Teck Coal Limited, Sparwood, BC. Report Prepared by Westslope Fisheries Ltd., Cranbrook, BC. 48 p. + 2 app.

<sup>3</sup> Thorley, J.L., Kortello, A.K. & M. Robinson. (2021). Grave Creek and Harmer Creek Westslope Cutthroat Trout Population Monitoring 2020. A Poisson Consulting report prepared by Poisson Consulting, Grylloblatta and Lotic Environmental for Teck Coal Ltd., Sparwood, BC.

<sup>4</sup> Evaluation of Cause Team. (2021). *Evaluation of Cause – Decline in upper Fording River Westslope Cutthroat Trout population*. Final report prepared for Teck Coal Limited by Evaluation of Cause Team. December 2021.

## Sidner, Regan

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**From:** Vicki A. Marquis <VAMarquis@hollandhart.com>  
**Sent:** Thursday, January 13, 2022 4:20 PM  
**To:** Arlene Forney; DEQ BER Secretary; DEQ BER  
**Cc:** Bill Mercer  
**Subject:** [EXTERNAL] RE: In The Matter Of: Adoption of New Rule I Pertaining to Selenium Standards for Lake Koocanusa, Cause No. BER 2021-04 WQ

Hello Regan, our submission today bounced back and Arlene is now sending it by BDS transfer. It is 22MB, so it is too large to send by email. We are cognizant of the strict timing and want to be sure we hit the deadline. Please let us know when you receive the BDS transfer or if we need to transmit it differently.

Many thanks,

Vicki

---

### Victoria A. Marquis

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**From:** Arlene Forney <AForney@hollandhart.com>  
**Sent:** Thursday, January 13, 2022 4:16 PM  
**To:** deqbersecretary@mt.gov; BER@MT.GOV  
**Cc:** Vicki A. Marquis <VAMarquis@hollandhart.com>; Bill Mercer <WWMercer@hollandhart.com>  
**Subject:** In The Matter Of: Adoption of New Rule I Pertaining to Selenium Standards for Lake Koocanusa, Cause No. BER 2021-04 WQ

Attached are the Comments on the Stringency Review of the Selenium Rule, on behalf of Teck Coal Limited, for the above-captioned case. Copies will be distributed as noted on the Certificate of Service.

---

### Arlene S. Forney

Legal Assistant  
T 406.896.4637



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ATTORNEYS FOR TECK COAL  
LIMITED

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

<b>IN THE MATTER OF:</b>  <b>ADOPTION OF NEW RULE I PERTAINING TO SELENIUM STANDARDS FOR LAKE KOOCANUSA</b>	<b>CAUSE NO. BER 2021-04 WQ</b>  <b>COMMENTS ON THE STRINGENCY REVIEW OF THE SELENIUM RULE</b>
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Pursuant to Montana Code Annotated § 75-5-203(4)(a) and Administrative Rule of Montana 1.3.227, on June 30, 2021, Teck Coal Limited (“Teck”) petitioned the Board of Environmental Review (“Board”) to review its new rule ARM 17.30.632 to determine whether the rule, specifically ARM 17.30.632(7)(a) (the “New Selenium Rule”), 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 Lincoln County Commissioners 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 and requested “written comments addressing the issues presented by the Petitioners” submitted by January 13, 2022. In accordance with that schedule and in consideration of the Record Supporting the Promulgation of ARM 17.30.632 (the “Record”),<sup>1</sup> Teck offers these comments in support of both its Petition and the Lincoln County Commissioners’ Petition.

## **I. INTRODUCTION**

In the twilight of Governor Bullock’s administration, the Board promulgated a selenium water quality standard of 0.80 micrograms per liter—nearly one-half the federal guideline of 1.5 micrograms per liter. The Board made no attempt to comply with Montana law that requires specific written findings prior to promulgation of a water quality standard more stringent than federal guidelines. Worse, the Board misled the public and failed to inform them that it was enacting a standard more stringent than the federal guideline. The Board’s promulgation of the New Selenium Rule violated Montana Code Annotated § 75-5-203 (the “Stringency Statute”) and was contrary to clear legislative intent.

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<sup>1</sup> The Record was posted on the Board’s website on December 15, 2021 and is cited in this brief by the Bates Numbers in the lower right of each Record page (i.e.: RR\_000001).

Review of the Record reveals that it cannot support the written finding required to comply with the Stringency Standard. Because the Record is the Board’s rulemaking record and the New Selenium Rule was promulgated by the Board, the Board is well-situated to make conclusive determinations about both the New Selenium Rule and the Record. Given the Board’s violation of the Stringency Statute, issues with public notice, and the fact that the Record lacks evidence to support compliance with the Stringency Statute, this Board should correct its violation by declaring the New Selenium Rule null and void due to its violation of state law and declaring that its Record does not support compliance with the Stringency Statute.

## **II. LEGAL BACKGROUND**

Teck incorporates, but does not restate the Legal and Factual Backgrounds presented in its Petition and the Lincoln County Commissioners’ Petition. Additional legal and factual background are provided within the Argument section below.

## **III. ARGUMENT**

### **A. The Stringency Statute Governs and was Violated During the Board’s Rulemaking.**

Both petitions require the Board to review and interpret the meaning of the Stringency Statute. As a rule, when district courts and the Montana Supreme Court interpret statutes, their “goal is to ascertain the intent of the Legislature.” *Friends of the Wild Swan v. Dep’t of Nat. Res. & Conservation*, 2005 MT 351, ¶ 13, 330 Mont. 186, 127 P.3d 394.<sup>2</sup> When the “plain language of a statute is clear and unambiguous, we need not engage in further construction.” *Mont. Indep. Living Project v. City of Helena*, 2021 MT 14, ¶ 15, 403 Mont. 81, 479 P.3d 961. Here, the plain language clearly and unambiguously directs that the New Selenium Rule is more stringent than

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<sup>2</sup> Cases cited throughout are provided in alphabetical order in Exhibit K.

the federal guideline. Although further statutory construction is not necessary, consideration of the legislative history affirms that interpretation.

**1. The New Selenium Rule Violates the Plain Language of the Stringency Statute.**

The Stringency Statute requires that the Board “may not adopt a rule ... that is more stringent than the comparable federal regulations or guidelines that address the same circumstances.” § 75-5-203(1), MCA. In the only Montana case that has interpreted this language, the District Court held that the plain language of the Stringency Statute means that it is “triggered” when a “federal regulation, guideline or criteria” exists “addressing the particular parameter involved” or the relevant discharge generally. *Pennaco Energy v. Mont. Bd. of Env'tl. Review*, 2007 Mont. Dist. LEXIS 516, ¶ 69 (affirmed by *Pennaco Energy, Inc. v. Mont. Bd. of Env'tl. Review*, 2008 MT 425, 347 Mont. 415, 199 P.3d 191). In this case, the “particular parameter involved” is selenium and EPA has adopted criteria for “selenium in fresh water.” Exhibit G (81 FR 45285 (July 13, 2016)). “EPA’s recommended water quality *criteria* are scientifically derived *numeric values*,” three are fish tissue numbers and one is a water column number. *Id.*, at p. 45286 (emphasis added). EPA did not say that site-specific modeling was a criterion or standard. A written finding is required in this case because the water column standard of 0.8 micrograms per liter is more stringent than the federal criterion of 1.5 micrograms per liter. The plain language interpretation of the statute and elementary math prove that the New Selenium Rule is more stringent than federal and therefore the Stringency Statute’s written finding requirement has been triggered.

**2. The New Selenium Rule is Contrary to the Legislative Intent of the Stringency Statute.**

Although the Board need go no further than the plain language of the Stringency Statute, the legislative history confirms legislative intent has also been violated. Here, the intent of the

legislation was that the public be informed of the rule's stringency in the *original* publication of the proposed rule and that *all* water quality standards, whether fish tissue or water quality, must comply with the Stringency Statute.

**a. 1995 Legislation - House Bill 521**

With broad support from a variety of organizations and interests, the 54th Montana Legislature passed House Bill 521, which was codified as the Stringency Statute in Part 2 of the Montana Water Quality Act. Exhibits A (1995 Mt. HB 521) and B (Partial Montana Legislative History, 1995 Mt. HB 521, pp. 26-28). The concept of “no more stringent than federal” was important enough that the Legislature provided laws for inclusion not just in the Montana Water Quality Act, but also in the air quality, public water supply, and waste and litter control statutes. *See* Mont. Code Ann. §§ 75-5-203 (Montana Water Quality Act); 75-2-207 (Clean Air Act of Montana); 75-2-301(4) (Clean Air Act of Montana); 75-6-116 (Public Water Supply Statutes); 75-10-107 (Waste and Litter Control Statutes). Montana was not alone in putting side boards on how state government could regulate beyond federal requirements. At least twenty-six other states have enacted similar provisions; thirteen of those have absolutely prevented any state standards from being enacted that are more stringent than the federal requirements.<sup>3</sup>

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<sup>3</sup> *See* Ala. Code 22-35-10, 22-36-7; Alaska Stat. 46.03.365; Ariz. Rev. Stat. 49-255.01, 49-1009; Ark. Code Ann. 8-7-803; Colo. Rev. Stat. 25-8-202(8)(a); Fla. Stat. Chs. 403.061(7), (32), 403.804(2); Idaho Code 39-3601; Iowa Code §§ 459.311(2), 455B.173(2)(b), 455B.105(3); Ky. Rev. Stat. Ann. 13A.120, 224.16-050(4); Me. Rev. Stat. Ann. Ti. 38, 341-D(1-B); Exec. Order No. 01.01.1996.03, 23-4 Md. Reg. 193 (1996); Minn. Stat. § 155.03(9)(4) and 103G.127; Miss. Code Ann. 49-17-34; Neb. Rev. Stat. 81-1505(22); Nev. Rev. Stat. 459.824; N.D. Cent. Code 23-01-04.1(1); Ohio Rev. Code Ann. 121.39; Okla. Stat. 27A, 1-1-206; Or. Rev. Stat. 468B.110(2); Penn. Exec. Order No. 1996-1; S.D. Codified Laws § 1-41-3.4; Tenn. Code Ann. 4-5-226(l); Utah Code Ann. 19-5-105; Va. Code Ann. 62.1-44.15:1; W. Va. Code 22-1-3; Wis. Board Pol. NR 1.52(3); Wyo. Stat. Ann. 35-11-1416.

Within House Bill 521, the Legislature expressly noted 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.” Exhibit A, p. 1. To do so, the Legislature directed that “Montana’s administrative agencies should analyze whether analogous federal standards sufficiently protect the health, safety, and welfare of Montana’s citizens.” Exhibit A, p. 2. Further, “the public should be advised of the agencies’ conclusions about whether analogous federal standards sufficiently protect the health, safety, and welfare of Montana citizens.” *Id.*

The agency 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.” Exhibit A, p. 2 (emphasis added). That “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 the public health or the environment and are achievable under current technology.” Exhibit A, p. 2.

Thus, Montana citizens and their Legislature made clear, through House Bill 521, that: (1) *any* standard proposed to be more stringent than the federal guideline was subject to the Stringency Statute, (2) the public must be informed of such stringency in the initial publication of the proposed standard, and (3) the agency must make the required written finding before adopting the proposed standard. The New Selenium Rule’s water column standard is subject to the Stringency Statute, but the initial rule publication did not inform the public of that fact and

the Board failed to make the required written finding. Therefore, the New Selenium Rule is contrary to all three intentions.

**b. 1995 Legislation – Senate Bill 331**

While House Bill 521 was being enacted, Senate Bill 331 was also navigating through the Legislature. Section One of Senate Bill 331 also provided a no-more-stringent-than-federal provision, but specific to Part 3 the Montana Water Quality Act. Senate Bill 331, codified at § 75-5-309, MCA provided “a similar requirement employing different language” and required a similar written finding prior to setting a standard more stringent than federal. *Pennaco* (District Court Ruling), ¶ 66. The statute was later repealed in 2015 when the requirement was incorporated into the Stringency Standard in Part 2 of the Water Quality Act (*see supra* § III.A.2.c. below). § 75-5-309, MCA; Exhibit E (2015 Mt. SB 325).

Section Two of Senate Bill 331 provided a new statute allowing for “Site Specific Standards for Protection of Aquatic Life.” Exhibit C, 1995 Mt. SB 331 (codified as § 75-5-310, MCA, the “Site-Specific Standards Statute”). Like House Bill 521, rather than preventing stringent standards, Senate Bill 331 sought to ensure that standards were appropriate and well-considered:

The legislature intends that, in promulgating rules under this bill, the board of health and environmental sciences<sup>4</sup> should seriously consider the impact of proposed rules and that the rules should be adopted only on the basis of sound, scientific justification and never on the basis of projections or conjecture. The legislature is specifically concerned that water quality must reflect concentrations that can be reliably measured, or the rules will, as a practical matter, be unenforceable.

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<sup>4</sup> The Board of Health and Environmental Sciences is this Board’s predecessor.



Exhibit C, pp. 1-2. The Legislature specifically called out the only situation when the no-more-stringent-than-federal provision would not apply, stating section one “is not intended to prohibit the adoption of ground water quality standards.” Exhibit C, p. 2. The legislative history is void of any indication that site-specific standards would be exempt from the no-more-stringent-than-federal provision. Exhibit D, Legislative History, 1995 Mt. SB 331.

The presence of both provisions in one bill demonstrates that the two are not competing or contradictory. Further, language in the Statement of Intent clarifies that when “promulgating rules under this bill” (including rules under the “Site-Specific Statute”), the rules “should be adopted only on the basis of sound, scientific justification.” Exhibit C, p. 2. The Legislature then used the same words in the no-more-stringent-than-federal provision (requiring a finding “based on sound scientific or technical evidence in the record”). *Id.* Thus, the Legislature intended that water quality standards, including site-specific water quality standards, would be subject to the no-more-stringent-than-federal provision.

**c. 2015 Legislation – Senate Bill 325**

The Stringency Statute’s applicability to site-specific standards was again confirmed in 2015 when DEQ-supported legislation specifically identified site-specific standards as subject to the Stringency Statute. Senate Bill 325 repealed the no-more-stringent-than-federal provision from the 1995 Senate Bill 331 (previously codified at § 75-5-309, MCA) and amended the Stringency Statute as follows (deleted language in strike-out, added language underscored):

**75-5-203. State regulations no more stringent than federal regulations or guidelines.**

(1) ~~After April 14, 1995, except~~Except as provided in subsections (2) through (5) or unless required by state law, the board may not adopt a rule to implement ~~this chapter~~75-5-301, 75-5-302, 75-5-303, or 75-5-310 that is more stringent than the comparable federal regulations or guidelines that address the same circumstances. The board may incorporate by reference comparable federal regulations or guidelines.

Exhibit E (2015 Mt. SB 325, Section 2).

The Site-Specific Standards Statute, Mont. Code Ann. § 75-5-310, was specifically added to the Stringency Statute in 2015, with DEQ's support. During the final House Natural Resources Hearing on Senate Bill 325, DEQ testified as a bill proponent. Exhibit F, p. 3 (transcription of proponent testimony portion of Audio file of the House Natural Resources Hearing on Senate Bill 325 (March 30, 2015)). Site-specific standards are not exempt from the Stringency Statute and DEQ specifically supported applying the Stringency Statute to site-specific standards. Any argument that the New Selenium Rule is a site-specific standard, and therefore exempt from compliance with the Stringency Statute, fails.

**B. The New Selenium Rule Must Comply with the Stringency Statute.**

Various statements and arguments have erroneously hypothesized that the Stringency Statute can be ignored with regard to the New Selenium Rule. Those arguments may be summarized into two categories:

1) The Stringency Statute may be ignored because the New Selenium Rule was developed as a site-specific standard using federally recommended site-specific procedures, making it “more accurate” than the federal guideline and translating the federal egg/ovary fish tissue standard into a water column standard. RR\_000001 (DEQ Memo to Board, *Re: HB 521 Analysis and Takings Checklist* (September 9, 2020));<sup>5</sup> RR\_000006 (DEQ Presentation to WPCAC, slide 2); RR\_001329 (MAR Notice 17-414, p. 1793). *DEQ's Response to Teck's Petition to Review ARM 17.30.632*, p. 2 (filed with the Board under this docket on September 28, 2021).

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<sup>5</sup> The memo is not found in either the September 24, 2020 or December 11, 2020 Board Meeting Packets, making it unclear whether or how the public had opportunity to review and consider it.

2) The Stringency Statute may be ignored because the federal guideline recommends site-specific standards “*whenever possible*, due to local environmental factors affecting selenium bioaccumulation in aquatic ecosystems” therefore, site specific standards are not subject to the Stringency Statute. RR\_001328 (MAR Notice No. 17-414, p. 1791).

Neither of those arguments succeeds in exempting the New Selenium Rule from the Stringency Statute and both arguments are contrary to legislative intent.

**1. The Stringency Statute Cannot be Ignored.**

**a. The Legislature Intended that the Stringency Statute Apply to All Standards, Even Site-Specific Standards and Even Standards with Multiple Elements for Fish Tissue and Water Quality.**

The Legislature intended that the Stringency Statute apply “if the rule in question contains *any* standards or requirements that exceed the standards or requirements imposed by comparable federal law.” Exhibit A, p. 2 (emphasis added). Also, in 1995, the Legislature enacted a no-more-stringent-than-federal statute applicable to site-specific standards. Exhibit C (1995 Mt. SB 331). In 2015, DEQ supported legislation to combine the two no-more-stringent-than-federal provisions and expressly included site-specific standards within the universe of standards subject to the Stringency Statute. Exhibit E (2015 Mt. SB 325).

The Stringency Statute does not differentiate among types of water quality standards, but instead applies to “any” water quality standard. None of the four separate numeric standards in the New Selenium Rule is exempt from the Stringency Statute. The Stringency Statute requirement for a written finding has been triggered because the 0.8 micrograms per liter water column standard is plainly more stringent than the federal guideline of 1.5 micrograms per liter.

**b. The New Selenium Rule Itself Clarifies that its Water Column Standard is a Water Quality Standard Subject to the Stringency Statute.**

The New Selenium Rule does not refer to the separate fish tissue and water column elements as criteria, but as “standards.” ARM 17.30.632(1) (“For Lake Koocanusa and the Kootenai River mainstem, the *standards* specified in (6) [for fish tissue] and (7) [for water column] supersede the otherwise applicable water quality standards found elsewhere in state law” (emphasis added); ARM 17.30.632(2) (“Numeric selenium *standards* for Lake Koocanusa and the Kootenai River mainstem from the US-Canada international boundary to the Montana-Idaho border are expressed as *both* fish tissue and water column concentrations” (emphasis added)). Further, the New Selenium Rule specifies that “water column *standards* [set at 0.8 micrograms per liter for Lake Koocanusa] are the numeric *standards* for total dissolved selenium.” ARM 17.30.632(7) (emphasis added).

The New Selenium Rule also applies the water column standard as an enforceable water quality standard. ARM 17.30.632(2) (providing that for Lake Koocanusa, which is in non-steady state, “both the fish tissue and water column standards apply”); ARM 17.30.632(5) (“No person may violate the numeric water quality standards in (6) [for fish tissue] through (7) [for water column]”). Because the New Selenium Rule refers to the water column standard as a “water quality standard” and because that water column standard is enforceable, the New Selenium Rule itself verifies that the water column standard of 0.8 micrograms per liter selenium in Lake Koocanusa is a “water quality standard” subject to the Stringency Statute.

**c. Federal Law Affirms that All Criteria in the New Selenium Rule are Standards Subject to the Stringency Statute.**

A water quality standard “shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses.” 33 U.S.C.

§ 1313(c)(2)(A). For selenium, the 2016 EPA Guideline provides that the “criterion has four elements, and EPA recommends that states include all four elements in their standards.”

Exhibit G, 81 FR at 45286. Whether and how the criteria relate to each other does not mean that any one criterion is not a water quality standard. Nor does it exempt any one of the criteria from compliance with statutes governing water quality standards, including the Stringency Statute.

Indeed, if the water column standard was not considered a “water quality standard” then EPA would have no authority to approve or disapprove it. *Id.*; 40 C.F.R. § 131.20(c). But here, EPA did exercise its authority to review and approve the New Selenium Rule as a water quality standard, including both the fish tissue and water column standards in its review. The water column standard is a water quality standard, subject to the Stringency Statute.

EPA’s review and approval of the New Selenium Rule is documented in its February 25, 2021 letter to the Board and rationale for the approval. Exhibit H. The letter and rationale document EPA’s determination that the New Selenium Rule is more stringent than the 2016 EPA Guideline:

- Federal requirements “allow states to adopt water quality standards that are more stringent than may be strictly necessary under federal law.” Ex. H, pdf p. 5.
- “EPA notes that its charge under federal law is to review state water quality criteria submissions only to ensure that sound science shows they are protective of the designated use, not to determine whether the precise value selected by the state is the most scientifically rigorous number possible.” Ex. H, pdf p. 9, n. 11 (citing case law holding that “If the proposed standards are more stringent than necessary to comply with the Clean Water Act’s requirements, the EPA may approve the standards without reviewing the scientific support for the standards”).
- The New Selenium Rule “**is more stringent than the recommended water column criterion element for lentic aquatic system in EPA 2016 (1.5 mg/L).**” Ex. H, pdf p. 15 (emphasis added).

EPA, as the drafter and developer of the federal guideline and as the reviewing and approval authority for the New Selenium Rule, is expertly situated to determine whether the New

Selenium Rule is more stringent than the federal guideline. EPA reviewed the New Selenium Rule and concluded that yes, in fact, it “**is more stringent**” than the federal guideline. Ex. H, pdf p. 15 (emphasis added). EPA’s conclusion makes clear that the Board erred when it promulgated the New Selenium Rule without the required written finding, causing a violation of the Stringency Statute.

**d. State Law Affirms that All Criteria in the New Selenium Rule are Standards Subject to the Stringency Statute.**

In the one case specifically addressing the same statute at issue here, the Montana Supreme Court relied, in part, on EPA’s determination that the standard at issue was not more stringent than the federal guideline, but was instead “consistent with” it. *Pennaco Energy, Inc. v. Mont. Bd. of Envrtl. Review*, 2008 MT 425, ¶ 46. In *Pennaco*, the Montana Supreme Court affirmed the District Court holding that Montana’s salinity standards did not violate the Stringency Statute because EPA had “not adopted a corresponding standard” and because Montana’s salinity standards were “consistent with” other EPA requirements. *Pennaco*, ¶ 44. In contrast, here, EPA expressly noted that the New Selenium Rule “**is more stringent**” than the federal guideline. As in *Pennaco*, EPA’s conclusion about how the standard compares to the federal guideline is conclusive. EPA concluded that the New Selenium Rule is more stringent than federal, so should the Board.

**2. The 2016 EPA Guidelines Do Not “Recommend” Site-Specific Standards “Whenever Possible” and Even if They Did, That Would not Exempt the New Selenium Rule from Compliance with Montana’s Stringency Statute.**

DEQ and the Board repeatedly represented to the public that the 2016 EPA Guideline recommended site-specific standards “whenever possible.” RR\_000001; RR\_000006; RR\_001328. No such recommendation is found in the 2016 EPA Guideline. In reality, the 2016 EPA Guideline states that “site-specific water column criterion element values *may* be necessary

at aquatic sites with high selenium bioaccumulation.” RR\_003033 (2016 EPA Guideline, p. xiii (emphasis added)). Further, the New Selenium Rule is neither legally justified nor properly authorized as a site-specific standard, negating any saving grace that may be conferred by referring to it as a site-specific standard.

**a. The Public was Misled.**

The difference between DEQ’s and the Board’s words (“whenever possible”) and the 2016 EPA Guideline (“may be necessary”) is important for two reasons. First, the Legislature specifically noted that “the public should be advised of the agencies’ conclusions about whether analogous federal standards sufficiently protect the health, safety, and welfare of Montana citizens.” Exhibit A, p. 2. Here, neither DEQ nor the Board ever addressed whether the federal guideline of 1.5 micrograms per liter “sufficiently protect[s] the health, safety, and welfare of Montana citizens.” Promulgating a more stringent, and hence more protective, water quality standard does not satisfy the legislature’s intent that the adequacy of the federal guideline be considered first, before launching into rulemaking for a more stringent standard. The relevant question is not whether the New Selenium Rule is protective of aquatic life—indeed, any lower standard may arguably be protective just as a standard set at zero is protective. But that is not the analysis intended by the Legislature. Instead, the Legislature directs that the relevant question is whether the 2016 EPA Guideline is “sufficiently” protective of the “health, safety and welfare of Montana citizens.” That question has been neither considered nor answered such that the public was advised of the Board’s conclusions.

Second, the Legislature specifically noted that the Board 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.” Exhibit A, p. 2 (emphasis added). Here, the initial publication of the

rule occurred by notice in the Montana Administrative Register on October 9, 2020. RR\_001326 – 001331. That initial publication expressly states in two places that the proposed water quality standard “is *no more stringent than* the recommended EPA 304(a) criteria.” RR\_001330 (emphasis added). The Board acted contrary to the legislative intent because it failed to inform the public, in the *original publication*, that the New Selenium Rule was more stringent than the federal guideline. The Board’s public notice misled the public to believe that the proposed standard was not more stringent than the federal guideline.

When the public is “denied their right to participate effectively in the governmental process” the rulemaking is invalid. *Rosebud Cty. v. Dep’t of Revenue*, 257 Mont. 306, 311, 849 P.2d 177, 180 (1993). Here, the public was misled to believe that (1) EPA recommends site-specific standards “whenever possible,” (2) the Stringency Statute did not apply to site-specific standards, and (3) the New Selenium Rule was not more stringent than the federal guideline. Presenting the public with misleading information denies the public the right to participate effectively in the rulemaking. The Board need go no further in its analysis: the New Selenium Rule should be declared illegal because the public was not informed that the Stringency Statute was triggered and therefore could not participate effectively in the rulemaking.

**b. The New Selenium Rule is Neither Justified nor Authorized as a Site-Specific Standard.**

The actual language of the 2016 EPA Guideline is that “site-specific water column criterion element values *may* be necessary at aquatic sites with high selenium bioaccumulation.” RR\_003033 (emphasis added). Neither DEQ nor the Board attempted to justify the New Selenium Rule by explaining why Lake Koocanusa is an aquatic site “with high selenium bioaccumulation” relative to other sites throughout Montana. In fact, Montana’s statewide chronic aquatic life standard for selenium remains set at 5 micrograms per liter—more than six



times greater than the New Selenium Rule. Circular DEQ-7, p. 64 (incorporated into the Montana Water Quality Act by ARM 17.30.619(1)(a)). Yet the Record does not explain how Lake Koocanusa, which is currently well below the statewide standard, not subject to any fish consumption advisory and exhibits no true evidence of harm (*see supra*, § III.D.2 below), has any higher selenium bioaccumulation rate than any other Montana waterbody. Therefore the “high selenium bioaccumulation” prerequisite for site-specific standards pursuant to the 2016 EPA Guideline has not been met in this case.

At the state level, the Site-Specific Standards Statute provides authority for promulgating standards to protect aquatic life based on site-specific conditions. § 75-5-310, MCA. Neither DEQ, nor the Board, invoked the Site-Specific Standards Statute as the basis for the New Selenium Rule. RR\_001326; RR\_001328 (MAR Notice No. 17-414, providing the Authority (“AUTH”) for the New Selenium Rule as only Sections 75-5-201 and 75-5-301, MCA). Additionally, the New Selenium Rule could not have legally been promulgated based on the Site-Specific Standards Statute because it was not requested “by a permit applicant, permittee, or person potentially liable under any state or federal environmental remediation statute” as required by law. Mont. Code Ann. § 75-5-310.

Here again, the public was misled to believe that the New Selenium Rule was promulgated as a site-specific standard when in reality, it does not comply with either the 2016 EPA Guideline prerequisites for a site-specific standard or the Montana Site-Specific Standards Statute. This too is a fatal flaw and, by itself, supports invalidation of the New Selenium Rule.

**c. Even if the New Selenium Rule Could Be Justified or Authorized as a Site-Specific Standard, Compliance with the Stringency Statute is Required.**

The Stringency Statute clearly applies to water quality standards promulgated pursuant to both Section 75-5-301, MCA (invoked by the Board) and Section 75-5-310, MCA (the Site-

Specific Standards Statute). Mont. Code Ann. § 75-5-203(1). As noted above (*see supra* § III.A.2.c) DEQ supported 2015 legislation that specifically included both statutes within the Stringency Statute. Therefore, it cannot credibly be argued that any “site-specific” characteristic in the New Selenium Rule exempts it from the Stringency Statute.

**C. The Required Written Finding Was Not Made.**

In the final rule promulgation, the Board asserted that it “is not required to make written findings required by 75-5-203(2), MCA.” RR\_002544-45 (Bd. Resp. to Cmt. No. 200). Therefore, it is undisputed that the written finding required by the Stringency Statute was never made for the New Selenium Rule.

The Board’s analysis may stop here, and the New Selenium Rule should be declared illegal. Not only was the public misled, but the Board admitted that it did not provide the written finding required by the Stringency Statute. This clear violation of state law supports invalidation of the New Selenium Rule.

**D. The Required Written Finding Cannot Be Made Based on the Record.**

Even if the Board or DEQ looks to the Record for evidence to support compliance with the Stringency Statute, none can be found, demonstrating the need to invalidate the New Selenium Rule. If further selenium regulation is desired, a new rulemaking process must be initiated to properly inform the public, as necessary, in the original publication and seek evidence that might support a rule set more stringent than the federal guideline.

**1. The Record Does Not Support a Finding that the New Selenium Rule Protects Public Health or the Environment.**

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. Public health and the environment are protected when

beneficial uses of the water are not impaired. In turn, beneficial uses are not impaired when water quality standards are met. §§ 75-5-103(12) and (13), MCA (defining “High-quality waters” and “Impaired water body”). But when the water quality standard is more stringent than the natural or nonanthropogenic condition of the waterbody, then the natural/nonanthropogenic condition becomes the water quality standard for that waterbody. § 75-5-222, MCA (State regulation for natural conditions). As DEQ explained when that statute was enacted, “natural cannot impair existing uses.” Exhibit F, p. 3 (DEQ testifying that “natural conditions cannot impair an existing use; otherwise, that use simply would not exist”). Thus, the natural condition protects beneficial uses and therefore protects public health and the environment.

Here, evidence in the Record indicates that the natural condition may already exceed or be very near the water column standard in the New Selenium Rule. As pointed out by a majority of the Legislature’s Water Policy Interim Committee, despite DEQ’s “indicat[ion] that selenium does not occur naturally within the Lake Koocanusa watershed in Montana,” the legislators “recently became aware of a 2016 study completed by DEQ in collaboration with the University of Montana which indicates that selenium does exist in the tributaries to the lake, some at levels near the proposed standard.” RR\_001891. In fact, the 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. Therefore, DEQ’s own data validate concerns raised during the

rulemaking, indicating a need for more analysis of the natural conditions, before any conclusion regarding protection of public health or the environment can be made.<sup>6</sup>

**2. The Record Does Not Support a Finding that the New Selenium Rule Can Mitigate Harm to the Public Health or the Environment.**

The Stringency Statute requires there to be evidence in the Record that the proposed standard can mitigate harm to the public health or environment. § 75-5-203(2)(b), MCA. Legally, the standard cannot mitigate harm because, as the Board confirmed, there is nothing Montana can regulate with the New Selenium Rule. Board Members noted that there are no alleged sources of selenium within the state’s regulatory jurisdiction; thus, even if harm is occurring (which it is not) the standard cannot be used by Montana to mitigate any alleged harm. RR\_001904-16; RR\_002400-01; RR\_002421.

Further, the Record is void of any evidence of harm. Evidence in the Record reveals that it is more likely that no harm is occurring, such that no mitigation is needed, making the New Selenium Rule a nullity—a rule established to mitigate a harm that does not exist.

**a. Water Quality Data Do Not Indicate Harm.**

The six most recent years of data reveal selenium levels in Lake Koocanusa that are within the Montana state-wide selenium standard of 5 micrograms per liter, within the 2016 EPA Guideline of 1.5 micrograms per liter selenium, and within the British Columbia Water Quality Guideline of 2.0 micrograms per liter selenium. RR\_000106; RR\_002481. The Board acknowledged Lake Koocanusa’s compliance with the various selenium standards and that

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<sup>6</sup> Those concerns and others were the genesis of 2021 House Joint Resolution 37, which is an interim study being conducted by a subcommittee of the Legislature’s Water Policy Interim Committee and the Environmental Quality Council to conduct a “collaborative review” of the New Selenium Rule, specifically analyzing “the data and processes referenced in and used to support rulemaking.” Exhibit I (2021 Mt. HJ 37).

“[t]here have been no documented reproductive effects on fish in Lake Koocanusa.”

RR\_002520; RR\_002523 (Bd. Resp. to Cmt. No. 136; 143). No harm is indicated by the water quality data.

**b. Fish Tissue Data Do Not Indicate Harm.**

Fish tissue criteria are an important part of the New Selenium Rule (*see* ARM 17.30.632(6)), but Montana does not have a vetted, approved, or written methodology for using fish tissue data to assess water quality pursuant to Title 75, Section 5, Part 7 of the Water Quality Act (requiring assessment of water quality for support of beneficial uses). Thus, it is impossible for a Water Quality Act-compliant assessment to show harm based on fish tissue data.

Even though there is no approved assessment methodology, review of fish tissue data in compliance with the New Selenium Rule and the 2016 EPA Guideline<sup>7</sup> indicates no harm caused by selenium. When considering fish tissue samples, both the New Selenium Rule and the 2016 EPA Guideline require use of an “average” or a “composite sample” of “a minimum number of five individuals from the same species.” ARM 17.30.632(6). Instead of considering average or composite samples, the Board focused on three *individual* egg/ovary samples for redbside shiner and one for peamouth chub. RR\_002524 (Bd. Resp. to Cmt. No. 146); RR\_000111 (Derivation Document). Conclusions about harm based on individual samples are contrary to the New Selenium Rule and the 2016 EPA Guideline and are therefore inherently flawed. Instead, consideration of the fish tissue data in compliance with the New Selenium Rule and the 2016 EPA Guideline (using averages or composites of five or more individual samples) reveals no

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<sup>7</sup> Neither the New Selenium Rule nor the 2016 EPA Guideline were applicable under Montana’s Water Quality Act in 2020 when the rule was adopted; therefore, neither was appropriate for assessing impairment. However, this analysis is provided to illustrate the utter lack of basis for the rulemaking.

exceedances; therefore, no harm is shown. Again, the New Selenium Rule is proven to be a nullity because it over-protects from an imaginary harm. Here, no mitigation is required or would be effective because there is no demonstrated harm to public health or the environment.

Additionally, for egg/ovary fish tissue samples, the “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.” RR\_001164 (USGS Open File Report 2020-1098). If unripe tissue is used, the results “will not be representative for monitoring and assessment.” *Id.* The Board acknowledged problems with egg/ovary fish tissue sampling, specifically that “it has been a challenge to collect eggs from gravid females” but did the Board did not explain its reliance on unripe ovary data. RR\_002523 (Bd. Resp. to Cmt. No. 141; 143). Even so, individual egg/ovary samples collected for the most sensitive species in Lake Koocanusa (Cutthroat trout) remain below the EPA criteria. *Id.* Thus, no credible evidence of harm based on fish tissue samples exists in the Record; therefore, no finding can be made that the New Selenium Rule mitigates any harm.

**c. No Record Evidence Indicates that Harm is Threatened.**

The Board acknowledged the lack of harm and staked out a position based on theoretical harm, stating “detrimental impacts *may* have already begun.” RR\_002520 (Bd. Resp. to Cmt. No. 136 (emphasis added)). No fish tissue samples exceeded the 2016 EPA Guideline’s muscle criterion and “of the four whole body samples collected on the Montana portion of the reservoir, all were below [the 2016 EPA Guideline’s whole body criterion].” RR\_002524 (Bd. Resp. to

Cmt. No. 146); RR\_000111 (Derivation Document). Thus, the fish tissue data does not indicate any present or threatened harm.<sup>8</sup>

DEQ's previous 2012 assessment of Lake Koocanusa as "threatened" does not contribute any credible evidence to the analysis because it was premised on projections that have proven wrong over time. RR\_0018888; RR\_001902. In 2012, DEQ "estimated that by 2015 the lake will be exceeding Montana's chronic aquatic life standard for total selenium," which was 5 micrograms per liter at that time. Exhibit J, p. 27 (DEQ Water Quality Standards Attainment Record for Lake Koocanusa). Therefore, the "threatened" listing is based on a prediction made in 2012 that by 2015, the lake would exhibit selenium concentrations exceeding 5 micrograms per liter. That never happened. As evidenced in the Record, selenium levels in Lake Koocanusa through the year 2020 have not even reached one-half of the statewide 5 micrograms per liter standard. RR\_000106; RR\_002481. In fact, most samples are between 1.0 and 1.5 micrograms per liter – a far cry from any threat that it will reach 5 micrograms per liter any time in the near or far future. *Id.* No data supports listing Lake Koocanusa as either threatened or impaired, further demonstrating the lack of evidence supporting the New Selenium Rule.

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<sup>8</sup> While the Board correctly noted that Montana 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 supporting the rulemaking. *Mont. Env'tl. Info. Ctr. v. Dep't of Env'tl. Quality*, 1999 MT 248, ¶ 78, 296 Mont. 207, 988 P.2d 1236. In *MEIC*, the Court relied on a "demonstration" that the challenged activity "would have added a known carcinogen such as arsenic to the environment in concentrations greater than the concentrations present in the receiving water." *MEIC*, ¶ 79. The Court also relied on DEQ's previous conclusion that such a discharge would have "a significant impact." *Id.* Here, there are no facts or evidence to support the Board's assumptions about threatened harm; therefore, the assumptions are invalid and insufficient to support the New Selenium Rule.

**3. The Record Does Not Support Finding that the New Selenium Rule Is Achievable Under Current Technology.**

The Stringency Statute requires there to be evidence in the Record that the proposed standard “is achievable under current technology.” § 75-5-203(2)(b), MCA. No such evidence exists in the Record. The Board made no attempt to describe or consider the “current technology” available to treat selenium discharges or what levels such treatment could achieve. Instead, the Board stated 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). Not only does this statement demonstrate the inability of Montana to regulate anything with the New Selenium Rule, such that any alleged harm could be mitigated, it also proves that the Board made no attempt to demonstrate that the New Selenium rule is achievable. There is no evidence in the Record by which any finding about achievability of the New Selenium Rule may be made.

Additionally, naturally occurring selenium levels in Lake Koocanusa, as well as selenium contributions from other tributaries and other sources, were not considered; therefore, the standard might never be achievable. In response to comments about tributary and background selenium contributions, the Board contradicted itself, stating that “all available data suggest that [tributary] contributions are lower than the proposed standards,” but also admitting 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). Because that reporting level of 0.9 micrograms per liter is greater than the new standard of 0.8 micrograms per liter, there is no assurance that the tributaries do not contribute selenium at levels near, at, or even slightly higher than the new standard. The Board also referenced DEQ’s 2016 tributary data, which indicates that the Montana tributaries contributing



to Lake Koocanusa contain between 0.04 and 0.5 micrograms per liter selenium. RR\_001908. The Record evidence suggest that natural background conditions may indicate that the New Selenium Rule is not achievable.

Additionally, selenium contributions and impacts from operation of the Libby Dam, including bank sloughing within the reservoir, were not considered. Despite the significant water flow fluctuations caused by operation of Libby Dam and comments emphasizing the variable and drastic flows, the Board did not consider how the operation of Libby Dam affects water-column selenium levels in Lake Koocanusa. RR\_002526-28 (Bd. Resp. to Cmt. No. 152-155); RR\_000101 (Derivation Document); RR\_001822-28 (written comments from Sen. Mike Cuffe); RR\_001906; RR\_001908 (referencing 2013 DEQ analysis and information that Libby Dam drawdowns average 111 feet and significantly impact aquatic life). Nor did the Board consider how bank-sloughing along the shores of Lake Koocanusa affects sediment and water-column selenium levels in Lake Koocanusa, despite evidence collected by DEQ indicating the presence of selenium in soils along the banks and shoreline of the lake. RR\_002068 – 002091 (RR002080 reveals shoreline soil with selenium levels at 0.21 micrograms per gram<sup>9</sup>). Given the background and operational characteristics of Lake Koocanusa, the New Selenium Rule might not be achievable. The Board failed to address these valid concerns; therefore, the Record does not establish that the New Selenium Rule is achievable.

#### **4. The Record Contains No Information Regarding Costs to the Regulated Community.**

The Stringency Statute requires there to be “information from the hearing record regarding the costs to the regulated community,” yet no such information was provided for

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<sup>9</sup> 1 microgram per gram equals 1 part per million; but it takes 1000 micrograms per liter to equal 1 part per million.

public review and comment. § 75-5-203(3), MCA. Instead, the Board 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 (emphasis added)).

Similarly, DEQ misinformed the Lincoln County Commissioners that “By law – economic data is not used in establishing the standard.” RR\_001503 (Presentation to Lincoln County, slide 3 (November 12, 2020)). That statement is directly contrary to state law requiring “the economics of waste treatment and prevention” be considered when “formulat[ing] and adopt[ing] standards of water quality.” § 75-5-301(1), MCA.

An analysis of impacts to small businesses was provided within the Board’s December 11, 2020 meeting materials, but the public had no meaningful opportunity to review and comment on the document.<sup>10</sup> The Board assumed, without any supporting analysis, that construction activities would be able to meet the standard using existing best management practices. RR\_002497-98 (Bd. Resp. to Cmt. No. 51).

The Board’s declaration that development activities were “irrelevant,” and its scant analysis of economic impacts, flies in the face of the Legislative intent of the Stringency Statute:

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.

Exhibit A, p. 1. DEQ’s and the Board’s failure to meaningfully consider the economics of waste treatment and prevention is contrary to Montana law. The only “information from the hearing regarding costs” are questions and concerns raised by local officials. The Board failed to

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<sup>10</sup> The only opportunity was by oral comment at the public meeting on December 11, 2020, but public comments regarding the entire universe of the New Selenium Rule (including economics and the small business impact analysis) were limited to just one minute per person. RR\_002357-58.

meaningfully address those concerns or gather any information to support the New Selenium Rule. Therefore, compliance with the Stringency Statute cannot be met.

**5. The Record Fails to Reference an Appropriate Pertinent, Ascertainable, and Peer-Reviewed Scientific Study.**

The Stringency Statute requires the Board to reference “pertinent, ascertainable, and peer-reviewed scientific studies.” § 75-5-203(3), MCA. Many technical issues with the rule remain unresolved, as evidenced by the 2021 Legislature’s passage of House Joint Resolution 37, calling for a review of the New Selenium Rule. While the generic model provided by the U. S. Geological Survey was peer-reviewed, the New Selenium Rule’s technical support and derivation documents, including the model *as it was applied to Lake Koocanusa*, have *not* been peer-reviewed. RR\_001907-08. Therefore, a key peer-review needed to support the New Selenium Rule is missing, leaving the Stringency Statute unsatisfied.

**E. The Appropriate Remedy is Invalidation of the New Selenium Rule.**

Pursuant to Montana Code Annotated § 2-15-3502, the Board serves a “quasijudicial 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.* In this case, the Board must interpret and apply the Stringency Statute to the New Selenium Rule, evaluating the facts contained in the Record. The Board specifically has authority to determine whether the Stringency Statute applies to the New Selenium Rule and whether the New Selenium Rule complies with it. § 75-5-203(4), MCA.

Additionally, because the Board created the Record and promulgated the New Selenium Rule, the Board has authority to interpret the New Selenium Rule and declare what may not be supported by the Record. In this case, the Board has authority to, and should, declare the New

Selenium Rule in violation of the Stringency Statute, such that it cannot be applied or enforced. Further, the Board has authority to, and should, review its own Record and declare it void of the evidence required to comply with the Stringency Statute.

#### **IV. CONCLUSION**

Montana, like many other states, enacted a Stringency Statute, not to prevent standards from being set more stringent than the federal guideline, but to ensure that when standards are set that low, they are appropriately considered and well-supported with evidence presented in a written finding available for public review and comment. Here, the Board admitted that the required written finding was not made. The only dispute raised is that the Stringency Statute somehow does not apply to this situation. That argument fails at least five times over. The plain language of the Stringency Statute proves the New Selenium Rule violates state law. The legislative intent of the Stringency Statute proves the New Selenium Rule violates state law. The language of the New Selenium Rule itself demonstrates that it violates state law. Federal law and guidance demonstrate that the New Selenium Rule violates state law. State case law confirms that the New Selenium Rule violates state law. The Board should admit its error, recognize the invalidity of the New Selenium Rule, declare it illegal, unenforceable and inapplicable and find that the Record does not support compliance with the Stringency Statute.

DATED this 13th day of January 2022.

/s/ Victoria A. Marquis

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ATTORNEYS FOR TECK COAL LIMITED

## CERTIFICATE OF MAILING

I hereby certify that on this 13th day of January, 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:

Regan Sidner, Board Secretary ( <b>original</b> ) Board of Environmental Review 1520 E. Sixth Avenue P.O. Box 200901 Helena, MT 59620-0901 Regan.Sidner@mt.gov deqbersecretary@mt.gov	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail
Arlene Forney Assistant to William W. Mercer and Victoria A. Marquis aforney@hollandhart.com	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

/s/ Victoria A. Marquis

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# EXHIBIT A

## 1995 Mt. HB 521

Enacted, April 14, 1995

### Reporter

1995 Mt. ALS 471; 1995 Mt. Ch. 471; 1995 Mt. HB 521

MONTANA LEGISLATIVE SERVICE > MONTANA 54TH LEGISLATIVE SESSION (1995) > CHAPTER 471 >  
HOUSE BILL 521

### Notice

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▶ [A> UPPERCASE TEXT WITHIN THESE SYMBOLS IS ADDED <A]

[D> Text within these symbols is deleted <D]

### Synopsis

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AN ACT REQUIRING CERTAIN STATE ADMINISTRATIVE AND LOCAL AGENCIES TO JUSTIFY THE ADOPTION OF RULES THAT ARE MORE STRINGENT THAN CORRESPONDING FEDERAL REGULATIONS; REQUIRING THE BOARD OF HEALTH AND ENVIRONMENTAL SCIENCES, THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES, AND LOCAL UNITS OF GOVERNMENT TO REVIEW AND REVISE CERTAIN RULES TO ENSURE COMPLIANCE WITH THIS ACT; AMENDING SECTIONS 50-2-116, 75-2-111, 75-2-301, 75-2-503, 75-3-201, 75-5-201, 75-5-311, 75-6-103, 75-10-204, 75-10-405, 75-10-603, 76-3-501, 76-3-504, 76-4-104, AND 80-15-105, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND APPLICABILITY PROVISIONS.

### Text

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WHEREAS, the federal government frequently regulates areas that are also subject to state regulation; and

WHEREAS, differing state and federal policy goals and unique state prerogatives frequently result in different levels of regulation, different standards, and different requirements being imposed by state and federal programs covering the same subject matter; and

WHEREAS, 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; and

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WHEREAS, Montana's administrative agencies should consider applicable federal standards when adopting, readopting, or amending rules with analogous federal counterparts; and

WHEREAS, Montana's administrative agencies should analyze whether analogous federal standards sufficiently protect the health, safety, and welfare of Montana's citizens; and

WHEREAS, as part of the formal rulemaking process, the public should be advised of the agencies' conclusions about whether analogous federal standards sufficiently protect the health, safety, and welfare of Montana citizens.

STATEMENT OF INTENT

A statement of intent is required for this bill in order to provide guidance to the board of health and environmental sciences, the department of health and environmental sciences, and local units of government in complying with [this act].

The legislature intends that in addition to all requirements imposed by existing law and rules, the board or the department include as part of the initial publication and all subsequent publications of a rule a written finding if the rule in question contains any standards or requirements that exceed the standards or requirements imposed by comparable federal law.

If the rules are more stringent than comparable federal law, 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 the public health or the environment and are achievable under current technology. The department is not required to show that the federal regulation is inadequate to protect public health. The written finding must also include information from the hearing record regarding the costs to the regulated community directly attributable to the proposed state standard or requirement.

*BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:*

Section 1. State regulations no more stringent than federal regulations or guidelines. (1) After [the effective date of this act], except as provided in subsections (2) through (5) or unless required by state law, the board may not adopt a rule to implement this chapter that is more stringent than the comparable federal regulations or guidelines that address the same circumstances. The board may incorporate by reference comparable federal regulations or guidelines.

(2) The board may adopt a rule to implement this chapter that is more stringent than comparable federal regulations or guidelines only if the board 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



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

(3) The written finding must reference information and peer-reviewed scientific studies contained in the record that forms the basis for the board's conclusion. The written finding must also include information from the hearing record regarding the costs to the regulated community that are directly attributable to the proposed state standard or requirement.

(4) (a) A person affected by a rule of the board adopted after January 1, 1990, and before [the effective date of this act] that that 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 board 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 12 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 board may charge a petition filing fee in an amount not to exceed \$ 250.

(b) A person may also petition the board for a rule review under subsection (4)(a) if the board adopts a rule after January 1, 1990, in an area in which no federal regulations or guidelines existed and the federal government subsequently establishes comparable regulations or guidelines that are less stringent than the previously adopted board rule.

(5) This section does not apply to a rule adopted under the emergency rulemaking provisions of 2-4-303(1).

Section 2. State regulations no more stringent than federal regulations or guidelines. (1) After [the effective date of this act], except as provided in subsections (2) through (5) or unless required by state law, the board or department may not adopt a rule to implement this chapter that is more stringent than the comparable federal regulations or guidelines that address the same circumstances. The board or department may incorporate by reference comparable federal regulations or guidelines.

(2) The board or department may adopt a rule to implement this chapter that is more stringent than comparable federal regulations or guidelines only if the board or 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.

(3) The written finding must reference information and peer-reviewed scientific studies contained in the record that forms the basis for the board's or department's conclusion. The written finding must also include information from

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the hearing record regarding the costs to the regulated community that are directly attributable to the proposed state standard or requirement.

(4) (a) A person affected by a rule of the board or department adopted after January 1, 1990, and before [the effective date of this act] that that person believes to be more stringent than comparable federal regulations or guidelines may petition the board or department to review the rule. If the board or department determines that the rule is more stringent than comparable federal regulations or guidelines, the board or 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 12 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 board or department may charge a petition filing fee in an amount not to exceed \$ 250.

(b) A person may also petition the board or department for a rule review under subsection (4)(a) if the board or department adopts a rule after January 1, 1990, in an area in which no federal regulations or guidelines existed and the federal government subsequently establishes comparable regulations or guidelines that are less stringent than the previously adopted board or department rule.

(5) This section does not apply to a rule adopted under the emergency rulemaking provisions of 2-4-303(1).

Section 3. State regulations no more stringent than federal regulations or guidelines. (1) After [the effective date of this act], except as provided in subsections (2) through (5) or unless required by state law, the department may not adopt a rule to implement this chapter that is more stringent than the comparable federal regulations or guidelines that address the same circumstances. The department may incorporate by reference comparable federal regulations or guidelines.

(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.

(3) The written finding must reference information and peer-reviewed scientific studies contained in the record that forms the basis for the department's conclusion. The written finding must also include information from the hearing record regarding the costs to the regulated community that are directly attributable to the proposed state standard or requirement.

(4) (a) A person affected by a rule of the department adopted after January 1, 1990, and before [the effective date of this act] that that person believes to be more stringent than comparable federal regulations or guidelines may petition the department to review the rule. If the department determines that the rule is more stringent than

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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 12 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.

(b) A person may also petition the department for a rule review under subsection (4)(a) if the department adopts a rule after January 1, 1990, in an area in which no federal regulations or guidelines existed and the federal government subsequently establishes comparable regulations or guidelines that are less stringent than the previously adopted department rule.

(5) This section does not apply to a rule adopted under the emergency rulemaking provisions of 2-4-303(1).

Section 4. Local regulations no more stringent than state regulations or guidelines. (1) After [the effective date of this act], except as provided in subsections (2) through (4) or unless required by state law, the local board may not adopt a rule under 50-2-116(1)(i), (2)(k)(iii), or (2)(k)(v) that is more stringent than the comparable state regulations or guidelines that address the same circumstances. The local board may incorporate by reference comparable state regulations or guidelines.

(2) The local board may adopt a rule to implement 50-2-116(1)(i), (2)(k)(iii), or (2)(k)(v) that is more stringent than comparable state regulations or guidelines only if the local board makes a written finding, after a public hearing and public comment and based on evidence in the record, that:

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

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

(3) The written finding must reference information and peer-reviewed scientific studies contained in the record that forms the basis for the local board's conclusion. The written finding must also include information from the hearing record regarding the costs to the regulated community that are directly attributable to the proposed local standard or requirement.

(4) (a) A person affected by a rule of the local board adopted after January 1, 1990, and before [the effective date of this act] that that person believes to be more stringent than comparable state regulations or guidelines may petition the local board to review the rule. If the local board determines that the rule is more stringent than comparable state regulations or guidelines, the local board shall comply with this section by either revising the rule to conform to the state regulations or guidelines or by making the written finding, as provided under subsection (2), within a reasonable period of time, not to exceed 12 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 local board may charge a petition filing fee in an amount not to exceed \$ 250.

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(b) A person may also petition the local board for a rule review under subsection (4)(a) if the local board adopts a rule after January 1, 1990, in an area in which no state regulations or guidelines existed and the state government subsequently establishes comparable regulations or guidelines that are less stringent than the previously adopted local board rule.

Section 5. Local regulations no more stringent than state regulations or guidelines. (1) After [the effective date of this act], except as provided in subsections (2) through (4) or unless required by state law, a governing body may not adopt a rule under 76-3-501 or 76-3-504(5)(c) that is more stringent than the comparable state regulations or guidelines that address the same circumstances. The governing body may incorporate by reference comparable state regulations or guidelines.

(2) The governing body may adopt a rule to implement 76-3-501 or 76-3-504(5)(c) that is more stringent than comparable state regulations or guidelines only if the governing body makes a written finding, after a public hearing and public comment and based on evidence in the record, that:

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

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

(3) The written finding must reference information and peer-reviewed scientific studies contained in the record that forms the basis for the governing body's conclusion. The written finding must also include information from the hearing record regarding the costs to the regulated community that are directly attributable to the proposed local standard or requirement.

(4) (a) A person affected by a rule of the governing body adopted after January 1, 1990, and before [the effective date of this act] that that person believes to be more stringent than comparable state regulations or guidelines may petition the governing body to review the rule. If the governing body determines that the rule is more stringent than comparable state regulations or guidelines, the governing body shall comply with this section by either revising the rule to conform to the state regulations or guidelines or by making the written finding, as provided under subsection (2), within a reasonable period of time, not to exceed 12 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 governing body may charge a petition filing fee in an amount not to exceed \$ 250.

(b) A person may also petition the governing body for a rule review under subsection (4)(a) if the governing body adopts a rule after January 1, 1990, in an area in which no state regulations or guidelines existed and the state government subsequently establishes comparable regulations or guidelines that are less stringent than the previously adopted governing body rule.

Section 6. Section 50-2-116, MCA, is amended to read:

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"50-2-116. Powers and duties of local boards. (1) Local boards shall:

- (a) appoint a local health officer who is a physician or a person with a master's degree in public health or the equivalent and with appropriate experience, as determined by the department, and shall fix his salary;
- (b) elect a chairman and other necessary officers;
- (c) employ necessary qualified staff;
- (d) adopt bylaws to govern meetings;
- (e) hold regular meetings quarterly and hold special meetings as necessary;
- (f) supervise destruction and removal of all sources of filth that cause disease;
- (g) guard against the introduction of communicable disease;
- (h) supervise inspections of public establishments for sanitary conditions;
- (i) **[A> SUBJECT TO THE PROVISIONS OF [SECTION 4], <A]** adopt necessary regulations that are no less stringent than state standards for the control and disposal of sewage from private and public buildings that is not regulated by Title 75, chapter 6, or Title 76, chapter 4. The regulations must describe standards for granting variances from the minimum requirements that are identical to standards promulgated by the board of health and environmental sciences and must provide for appeal of variance decisions to the department as required by 75-5-305.

(2) Local boards may:

- (a) quarantine persons who have communicable diseases;
- (b) require isolation of persons or things that are infected with communicable diseases;
- (c) furnish treatment for persons who have communicable diseases;
- (d) prohibit the use of places that are infected with communicable diseases;
- (e) require and provide means for disinfecting places that are infected with communicable diseases;
- (f) accept and spend funds received from a federal agency, the state, a school district, or other persons;
- (g) contract with another local board for all or a part of local health services;
- (h) reimburse local health officers for necessary expenses incurred in official duties;
- (i) abate nuisances affecting public health and safety or bring action necessary to restrain the violation of public health laws or rules;

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- (j) adopt necessary fees to administer regulations for the control and disposal of sewage from private and public buildings (fees must be deposited with the county treasurer);
- (k) adopt rules that do not conflict with rules adopted by the department:
- (i) for the control of communicable diseases;
- (ii) for the removal of filth that might cause disease or adversely affect public health;
- (iii) [A] SUBJECT TO THE PROVISIONS OF [SECTION 4], <A] on sanitation in public buildings that affects public health;
- (iv) for heating, ventilation, water supply, and waste disposal in public accommodations that might endanger human lives; and
- (v) [A] SUBJECT TO THE PROVISIONS OF [SECTION 4], <A] for the maintenance of sewage treatment systems that do not discharge an effluent directly into state waters and that are not required to have an operating permit as required by rules adopted under 75-5-401."

Section 7. Section 75-2-111, MCA, is amended to read:

"75-2-111. Powers of board. The board shall [A] , SUBJECT TO THE PROVISIONS OF [SECTION 2] <A] :

- (1) adopt, amend, and repeal rules for the administration, implementation, and enforcement of this chapter, for issuing orders under and in accordance with 42 U.S.C. 7419, and for fulfilling the requirements of 42 U.S.C. 7420 and regulations adopted pursuant thereto;
- (2) hold hearings relating to any aspect of or matter in the administration of this chapter at a place designated by the board. The board may compel the attendance of witnesses and the production of evidence at hearings. The board shall designate an attorney to assist in conducting hearings and shall appoint a reporter who [D] shall <D] [A] MUST <A] be present at all hearings and take full stenographic notes of all proceedings [D] thereat <D] , transcripts of which will be available to the public at cost.
- (3) issue orders necessary to effectuate the purposes of this chapter;
- (4) by rule require access to records relating to emissions;
- (5) by rule adopt a schedule of fees required for permits and permit applications, consistent with this chapter;
- (6) have the power to issue orders under and in accordance with 42 U.S.C. 7419."

Section 8. Section 75-2-301, MCA, is amended to read:

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"75-2-301. Local air pollution control programs. (1) After public hearing, a municipality or county may establish and administer a local air pollution control program if the program is consistent with this chapter and is approved by the board.

(2) If a local air pollution control program established by a county encompasses all or part of a municipality, the county and each municipality shall approve the program in accordance with subsection (1).

(3) [A] (A) [A] Except as provided in subsection (4), the board by order may approve a local air pollution control program that:

[D] (a) [D] [A] (I) [A] provides by ordinance or local law for requirements compatible with, more stringent than, or more extensive than those imposed by 75-2-203, 75-2-204, 75-2-211, 75-2-212, 75-2-215, 75-2-217 through 75-2-219, and 75-2-402 [D] , [D] and rules adopted under these sections;

[D] (b) [D] [A] (II) [A] provides for the enforcement of requirements established under subsection (3)(a) [A] (I) [A] by appropriate administrative and judicial processes; and

[D] (c) [D] [A] (III) [A] provides for administrative organization, staff, financial resources, and other resources necessary to effectively and efficiently carry out the program. As part of meeting these requirements, a local air pollution control program may administer the permit fee provisions of 75-2-220. The permit fees collected by a local air pollution control program must be deposited in a county special revenue fund to be used by the local air pollution control program for administration of permitting activities.

[A] (B) BOARD APPROVAL OF AN ORDINANCE OR LOCAL LAW THAT IS MORE STRINGENT THAN THE COMPARABLE STATE LAW IS SUBJECT TO THE PROVISIONS OF [SECTION 2]. [A]

(4) Except for those emergency powers provided for in 75-2-402, the board may not delegate to a local air pollution control program the authority to control any air pollutant source that:

(a) requires the preparation of an environmental impact statement in accordance with Title 75, chapter 1, part 2;

(b) is subject to regulation under the Montana Major Facility Siting Act, as provided in Title 75, chapter 20; or

(c) has the potential to emit 250 tons [D] per [D] [A] A [A] year or more of any pollutant subject to regulation under this chapter, including fugitive emissions, unless the authority to control the source was delegated to a local air pollution control program prior to January 1, 1991.

(5) If the board finds that the location, character, or extent of particular concentrations of population, air pollutant sources, or geographic, topographic, or meteorological considerations or any combination of these [D] are such as to [D] make impracticable the maintenance of appropriate levels of air quality without an areawide air pollution control program, the board may determine the boundaries within which the program is necessary and require it as the only acceptable alternative to direct state administration.

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- (6) If the board has reason to believe that any part of an air pollution control program in force under this section is either inadequate to prevent and control air pollution in the jurisdiction to which the program relates or is being administered in a manner inconsistent with this chapter, the board shall, on notice, conduct a hearing on the matter.
- (7) If, after the hearing, the board determines that any part of the program is inadequate to prevent and control air pollution in the jurisdiction to which it relates or that it is not accomplishing the purposes of this chapter, it shall require that necessary corrective measures be taken within a reasonable time, not to exceed 60 days.
- (8) If the jurisdiction fails to take these measures within the time required, the department shall administer within that jurisdiction all of the provisions of this chapter, including the terms contained in any applicable board order, that are necessary to correct the deficiencies found by the board. The department's control program supersedes all municipal or county air pollution laws, rules, ordinances, and requirements in the affected jurisdiction. The cost of the department's action is a charge on the jurisdiction.
- (9) If the board finds that the control of a particular air pollutant source because of its complexity or magnitude is beyond the reasonable capability of the local jurisdiction or may be more efficiently and economically performed at the state level, it may direct the department to assume and retain control over that air pollutant source. A charge may not be assessed against the jurisdiction. Findings made under this subsection may be either on the basis of the nature of the sources involved or on the basis of their relationship to the size of the communities in which they are located.
- (10) A jurisdiction in which the department administers all or part of its air pollution control program under subsection (8) may, with the approval of the board, establish or resume an air pollution control program that meets the requirements of subsection (3).
- (11) A municipality or county may administer all or part of its air pollution control program in cooperation with one or more municipalities or counties of this state or of other states."

Section 9. Section 75-2-503, MCA, is amended to read:

"75-2-503. Rulemaking authority -- issuance of permits. (1) The department shall [A> , SUBJECT TO THE PROVISIONS OF [SECTION 2], <A] adopt rules establishing standards and procedures for accreditation of asbestos-related occupations and control of the work performed by persons in asbestos-related occupations. The rules must be consistent with federal law and include but are not limited to:

- (a) standards for training course review and approval;
- (b) standards for accreditation of applicants for asbestos-related occupations;
- (c) examination requirements for accreditation of applicants for asbestos-related occupations;
- (d) requirements for renewal of accreditation, including periodic refresher courses;



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- (e) revocation of accreditation;
- (f) inspection requirements for asbestos projects and asbestos-related occupations credentials;
- (g) criteria to determine whether and what type of control measures are necessary for an asbestos project and whether a project is completed in a manner sufficient to protect public health, including criteria setting allowable limits on indoor airborne asbestos. A determination of whether asbestos abatement of a structure is necessary may not be based solely upon the results of airborne asbestos testing.
- (h) requirements for issuance of asbestos project permits and conditions that permit holders shall meet;
- (i) standards for seeking injunctions, criminal and civil penalties, or emergency actions;
- (j) advance notification procedures and issuance of permits for asbestos projects; and
- (k) fees, which must be commensurate with costs, for:
  - (i) review and approval of training courses;
  - (ii) application for and renewal of accreditation by a person seeking to pursue an asbestos-related occupation;
  - (iii) issuance of asbestos project permits; and
  - (iv) requested inspections of asbestos projects.
- (2) For asbestos projects having a cost of \$ 3,000 or less, the department shall issue asbestos project permits within 7 calendar days following the receipt of a properly completed permit application and the appropriate fee."

Section 10. Section 75-3-201, MCA, is amended to read:

- "75-3-201. State radiation control agency. (1) The department is the state radiation control agency.
- (2) Under the laws of this state, the department may employ, compensate, and prescribe the powers and duties of the individuals [D] which <D> [A] THAT <A> are necessary to carry out this chapter.
- (3) The department may [A] , SUBJECT TO THE PROVISIONS OF [SECTION 3], <A> for the protection of the occupational and public health and safety:
- (a) develop and conduct programs for evaluation and control of hazards associated with the use of sources of ionizing radiation;
  - (b) develop programs and adopt rules with due regard for compatibility with federal programs for licensing and regulation of byproduct, source, radioactive waste, and special nuclear materials and other radioactive materials. These rules [D] shall <D> [A] MUST <A> cover equipment and facilities, methods for transporting, handling, and storage of radioactive materials, permissible levels of exposure, technical qualifications of personnel, required

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notification of accidents and other incidents involving radioactive materials, survey methods and results, methods of disposal of radioactive materials, posting and labeling of areas and sources, and methods and effectiveness of controlling individuals in posted and restricted areas.

(c) adopt rules relating to control of other sources of ionizing radiation. These rules ~~[D]~~ shall ~~<D>~~ ~~[A]~~ MUST ~~<A>~~ cover equipment and facilities, permissible levels of exposure to personnel, posting of areas, surveys, and records.

(d) advise, consult, and cooperate with other agencies of the state, the federal government, other states, interstate agencies, political subdivisions, and groups concerned with control of sources of ionizing radiation;

(e) accept and administer loans, grants, or other funds or gifts, conditional or otherwise, in furtherance of its functions, from the federal government and from other sources, public or private;

(f) encourage, participate in, or conduct studies, investigations, training, research, and demonstrations relating to control of sources of ionizing radiation;

(g) collect and disseminate information relating to control of sources of ionizing radiation, including:

(i) maintenance of a file of all license applications, issuances, denials, amendments, transfers, renewals, modifications, suspensions, and revocations;

(ii) maintenance of a file of registrants possessing sources of ionizing radiation requiring registration under this chapter and any administrative or judicial action pertaining ~~[D]~~ thereto ~~<D>~~ ~~[A]~~ TO THIS CHAPTER ~~<A>~~ ;

(iii) maintenance of a file of all rules relating to regulation of sources of ionizing radiation, pending or adopted, and proceedings ~~[D]~~ thereon ~~<D>~~ ."

Section 11. Section 75-5-201, MCA, is amended to read:

"75-5-201. Board rules authorized. (1) The board shall ~~[A]~~ , SUBJECT TO THE PROVISIONS OF [SECTION 1], ~~<A>~~ adopt rules for the administration of this chapter.

(2) The board's rules may include a fee schedule or system for assessment of administrative penalties as provided under 75-5-611."

Section 12. Section 75-5-311, MCA, is amended to read:

"75-5-311. Local water quality districts -- board approval -- local water quality programs. (1) A county that establishes a local water quality district according to the procedures specified in Title 7, chapter 13, part 45, shall, in consultation with the department, undertake planning and

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information-gathering activities necessary to develop a proposed local water quality program.

(2) A county may implement a local water quality program in a local water quality district if the program is approved by the board after a hearing conducted under 75-5-202.

(3) In approving a local water quality program, the board shall determine that the program is consistent with the purposes and requirements of Title 75, chapter 5, and that the program will be effective in protecting, preserving, and improving the quality of surface water and ground water, considering the administrative organization, staff, and financial and other resources available to implement the program.

(4) Subject to the board's approval, the commissioners and the governing bodies of cities and towns that participate in a local water quality district may adopt local ordinances to regulate the following specific facilities and sources of pollution:

(a) onsite waste water disposal facilities;

(b) storm water runoff from paved surfaces;

(c) service connections between buildings and publicly owned sewer mains;

(d) facilities that use or store halogenated and nonhalogenated solvents, including hazardous substances that are referenced in 40 CFR 261.31, United States environmental protection agency hazardous waste numbers F001 through F005, as amended; and

(e) internal combustion engine lubricants.

(5) ~~[A]~~ (A) ~~<A>~~ For the facilities and sources of pollution included in subsection (4) and consistent with the provisions of subsection (6), the local ordinances may:

~~[D]~~ (a) ~~<D>~~ ~~[A]~~ (I) ~~<A>~~ be compatible with or more stringent or more extensive than the requirements imposed by 75-5-304, 75-5-305, and 75-5-401 through 75-5-404 and rules adopted under those sections to protect water quality, establish waste discharge permit requirements, and establish best management practices for substances that have the potential to pollute state waters;

~~[D]~~ (b) ~~<D>~~ ~~[A]~~ (II) ~~<A>~~ provide for administrative procedures, administrative orders and actions, and civil enforcement actions that are consistent with 75-5-601 through 75-5-604, 75-5-611 through 75-5-616, 75-5-621, and 75-5-622 and rules adopted under those sections; and

~~[D]~~ (c) ~~<D>~~ ~~[A]~~ (III) ~~<A>~~ provide for civil penalties not to exceed \$ 1,000 per violation, provided that each day of violation of a local ordinance constitutes a separate violation, and criminal penalties not to exceed \$ 500 per day of violation or imprisonment for not more than 30 days, or both.

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[A] (B) BOARD APPROVAL OF AN ORDINANCE OR LOCAL LAW THAT IS MORE STRINGENT THAN THE COMPARABLE STATE LAW IS SUBJECT TO THE PROVISIONS OF [SECTION 1]. <A]

(6) The local ordinances authorized by this section may not:

(a) duplicate the department's requirements and procedures relating to permitting of waste discharge sources and enforcement of water quality standards;

(b) regulate any facility or source of pollution to the extent that the facility or source is:

(i) required to obtain a permit or other approval from the department or federal government or is the subject of an administrative order, a consent decree, or an enforcement action pursuant to Title 75, chapter 5, part 4; Title 75, chapter 6; Title 75, chapter 10; the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 through 9675, as amended; or federal environmental, safety, or health statutes and regulations;

(ii) exempted from obtaining a permit or other approval from the department because the facility or source is required to obtain a permit or other approval from another state agency or is the subject of an enforcement action by another state agency; or

(iii) subject to the provisions of Title 80, chapter 8 or chapter 15.

(7) If the boundaries of a district are changed after the board has approved the local water quality program for the district, the board of directors of the local water quality district shall submit a program amendment to the board and obtain the board's approval of the program amendment before implementing the local water quality program in areas that have been added to the district.

(8) The department shall monitor the implementation of local water quality programs to ensure that the programs are adequate to protect, preserve, and improve the quality of the surface water and ground water and are being administered in a manner consistent with the purposes and requirements of Title 75, chapter 5. If the department finds that a local water quality program is not adequate to protect, preserve, and improve the quality of the surface water and ground water or is not being administered in a manner consistent with the purposes and requirements of Title 75, chapter 5, the department shall report to the board.

(9) If the board determines that a local water quality program is inadequate to protect, preserve, and improve the quality of the surface water and ground water in the local water quality district or that the program is being administered in a manner inconsistent with Title 75, chapter 5, the board shall give notice and conduct a hearing on the matter.

(10) If after the hearing the board determines that the program is inadequate to protect, preserve, and improve the quality of the surface water and ground water in the local water quality district or that it is not being administered in a manner consistent with the purposes of Title 75, chapter 5, the board shall require that necessary corrective measures be taken within a reasonable time, not to exceed 60 days.

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(11) If an ordinance adopted under this section conflicts with a requirement imposed by the department's water quality program, the department's requirement supersedes the local ordinance.

(12) If the board finds that, because of the complexity or magnitude of a particular water pollution source, the control of the source is beyond the reasonable capability of a local water quality district or may be more efficiently and economically performed at the state level, the board may direct the department to assume and retain control over the source. A charge may not be assessed against the local water quality district for that source. Findings made under this subsection may be based on the nature of the source involved or on the source's relationship to the size of the community in which it is located."

Section 13. Section 75-6-103, MCA, is amended to read:

"75-6-103. Duties of [D> the <D] board. (1) The board has general supervision over all state waters [D> which <D] [A> THAT <A] are directly or indirectly being used by a person for a public water supply system or domestic purposes or as a source of ice.

(2) The board shall [A> , SUBJECT TO THE PROVISIONS OF [SECTION 1], <A] adopt rules and standards concerning:

- (a) maximum contaminant levels for waters that are or will be used for a public water supply system;
  - (b) fees, as described in 75-6-108, for services rendered by the department;
  - (c) monitoring, recordkeeping, and reporting by persons who own or operate a public water supply system;
  - (d) requiring public notice to all users of a public water supply system when a person has been granted a variance or exemption or is in violation of this part or a rule or order issued pursuant to this part;
  - (e) the issuance of licenses by the department to laboratories that conduct analysis of public water supply systems;
  - (f) the siting, construction, operation, and modification of a public water supply system or public sewage system;
  - (g) the review of financial viability of a proposed public water supply system or public sewage system, as necessary to ensure the capability of the system to meet the requirements of this part;
  - (h) the collection and analysis of samples of water used for drinking or domestic purposes;
  - (i) the issuance of variances and exemptions as authorized by the federal Safe Drinking Water Act and this part;
  - (j) administrative enforcement procedures and administrative penalties authorized under this part; and
  - (k) any other requirement necessary for the protection of public health as described in this part.
- (3) The board may issue orders necessary to fully implement the provisions of this part."

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Section 14. Section 75-10-204, MCA, is amended to read:

"75-10-204. Powers and duties of department. The department shall [A] , SUBJECT TO THE PROVISIONS OF [SECTION 3], <A> adopt rules governing solid waste management systems [D] which shall <D> [A] THAT MUST <A> include but are not limited to:

- (1) requirements for the plan of operation and maintenance that must be submitted with an application under this part;
- (2) the classification of disposal sites according to the physical capabilities of the site to contain the type of solid waste to be disposed of;
- (3) the procedures to be followed in the disposal, treatment, or transport of solid wastes;
- (4) the suitability of the site from a public health standpoint when hydrology, geology, and climatology are considered;
- (5) requirements relating to ground water monitoring, including but not limited to:
  - (a) information that owners and operators of municipal solid waste landfills and other disposal sites specified in 75-10-207 must submit to the department to enable the department to prepare the priority compliance list authorized by 75-10-207(3);
  - (b) the content of plans for the design, construction, operation, and maintenance of monitoring wells and monitoring systems; and
  - (c) recordkeeping and reporting;
- (6) fees related to the review of solid waste management system license applications;
- (7) the renewal of solid waste management system licenses and related fees;
- (8) a quarterly fee based on the justifiable direct and indirect costs to the state of administering Title 75, chapter 10, parts 1 and 2, for solid waste generated outside Montana and disposed of or incinerated within Montana [D] . <D> [A] ; <A> [D] These rules must be adopted by August 1, 1993. <D>
- (9) any other factors relating to the sanitary disposal or management of solid wastes."

Section 15. Section 75-10-405, MCA, is amended to read:

"75-10-405. Administrative rules. (1) The department may [A] , SUBJECT TO THE PROVISIONS OF [SECTION 3], <A> adopt, amend, or repeal rules governing hazardous waste, including but not limited to the following:

- (a) identification and classification of those hazardous wastes subject to regulation and those that are not;

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- (b) requirements for the proper treatment, storage, transportation, and disposal of hazardous waste;
  - (c) requirements for siting, design, operation, maintenance, monitoring, inspection, closure, postclosure, and reclamation of hazardous waste management facilities;
  - (d) requirements for the issuance, denial, reissuance, modification, and revocation of permits for hazardous waste management facilities;
  - (e) requirements for corrective action within and outside [D] of <D] facility boundaries and for financial assurance of that corrective action;
  - (f) requirements for manifests and the manifest system for tracking hazardous waste and for reporting and recordkeeping by generators, transporters, and owners and operators of hazardous waste management facilities;
  - (g) requirements for training of facility personnel and for financial assurance of facility owners and operators and for liability of guarantors providing financial assurance;
  - (h) requirements for registration of generators and transporters;
  - (i) establishing a schedule of fees and procedures for the collection of fees for:
    - (i) the filing and review of hazardous waste management facility permits as provided in 75-10-432;
    - (ii) hazardous waste management as provided in 75-10-433;
    - (iii) the reissuance and modification of hazardous waste management facility permits; and
    - (iv) the registration of hazardous waste generators;
  - (j) a schedule of fees to defray a portion of the costs of establishing, operating, and maintaining any state hazardous waste management facility authorized by 75-10-412;
  - (k) requirements for availability to the public of information obtained by the department regarding facilities and sites used for the treatment, storage, and disposal of hazardous wastes;
  - (l) procedures for the assessment of administrative penalties as authorized by 75-10-424; and
  - (m) other rules [D] which <D] [A] THAT <A] are necessary to obtain and maintain authorization under the federal program.
- (2) [D] The <D] [A] NOTWITHSTANDING THE PROVISIONS OF [SECTION 3], THE <A] department may not adopt rules under this part that are more restrictive than those promulgated by the federal government under the Resource Conservation and Recovery Act of 1976, as amended, except that the department:

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- (a) may require the registration of transporters not otherwise required to register with the state of Montana pursuant to the federal Resource Conservation and Recovery Act of 1976, as amended;
- (b) may require generators and facilities to report on an annual rather than on a biennial basis;
- (c) may adopt requirements for the prevention and correction of leakage from underground storage tanks, including:
  - (i) reporting by owners and operators;
  - (ii) financial responsibility;
  - (iii) release detection, prevention, and corrective action;
  - (iv) standards for design, construction, installation, and closure;
  - (v) development of a schedule of fees, not to exceed \$ 50 for a tank over 1,100 gallons and not to exceed \$ 20 for a tank 1,100 gallons or less, per tank, for tank notification and permits to defray state and local costs of implementing an underground storage tank program;
  - (vi) a penalty schedule and a system for assessment of administrative penalties, notice, and appeals under 75-10-423, and
  - (vii) delegation of authority and funds to local agents for inspections and implementation. The delegation of authority to local agents must complement and may not duplicate existing authority for implementation of rules adopted by the department of justice that relate to underground storage tanks.
- (d) may adopt regulatory requirements for hazardous waste transfer facilities;
- (e) shall require the owner or manager of any proposed commercial facility for the storage, collection, or transfer of hazardous waste to conduct a public hearing, as provided for in 75-10-441; and
- (f) may adopt rules and performance standards for industrial furnaces and boilers that burn hazardous wastes. The rules and performance standards:
  - (i) may be adopted if there are no federal regulations; or
  - (ii) may be more restrictive than federal regulations."

Section 16. Section 75-10-603, MCA, is amended to read:

"75-10-603. Cooperative agreement -- authority of department. (1) In order to assist in implementation of CERCLA, the department may **[A>** , SUBJECT TO THE PROVISIONS OF [SECTION 3] **<A]** :

- (a) participate in the determination of appropriate remedial action to deal with the release or threatened release within Montana of:



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- (i) any contaminant presenting an imminent and substantial danger to public health or welfare; or
- (ii) any hazardous substance;
- (b) in the event of the release or threatened release of any of the substances described in subsection (1)(a), negotiate the terms of a cooperative agreement with the federal government containing mutual commitments of each party to remedial action, including the elements required by subsection (2).
- (2) A cooperative agreement may contain the following assurances:
  - (a) the state of Montana will [D> assure <D] [A> ENSURE <A] the future maintenance of the removal and remedial actions agreed upon for the expected life of the actions;
  - (b) a hazardous waste disposal facility is available to the state of Montana that meets the specifications of the president and complies with the requirements of subtitle C of the federal Solid Waste Disposal Act for necessary offsite storage, destruction, treatment, or secure disposition of the hazardous substances; and
  - (c) the state of Montana will pay or [D> assure <D] [A> ENSURE <A] payment of a share of the costs of the remedial action, including all future maintenance."

Section 17. Section 76-3-501, MCA, is amended to read:

"76-3-501. Local subdivision regulations. (1) Before July 1, 1974, the governing body of every county, city, and town shall adopt and provide for the enforcement and administration of subdivision regulations reasonably providing for the orderly development of their jurisdictional areas; for the coordination of roads within subdivided land with other roads, both existing and planned; for the dedication of land for roadways and for public utility easements; for the improvement of roads; for the provision of adequate open spaces for travel, light, air, and recreation; for the provision of adequate transportation, water, [A> AND <A] drainage [D> , and <D] [A> ; SUBJECT TO THE PROVISIONS OF [SECTION 5], FOR THE REGULATION OF <A] sanitary facilities; for the avoidance or minimization of congestion; and for the avoidance of subdivision which would involve unnecessary environmental degradation and the avoidance of danger of injury to health, safety, or welfare by reason of natural hazard or the lack of water, drainage, access, transportation, or other public services or would necessitate an excessive expenditure of public funds for the supply of such services.

(2) Review and approval or disapproval of a subdivision under this chapter may occur only under those regulations in effect at the time an application for approval of a preliminary plat or for an extension under 76-3-610 is submitted to the governing body."

Section 18. Section 76-3-504, MCA, is amended to read:

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"76-3-504. Minimum requirements for subdivision regulations. The subdivision regulations adopted under this chapter shall, at a minimum:

- (1) require the subdivider to submit to the governing body an environmental assessment as prescribed in 76-3-603;
- (2) establish procedures consistent with this chapter for the submission and review of subdivision plats;
- (3) prescribe the form and contents of preliminary plats and the documents to accompany final plats;
- (4) provide for the identification of areas which, because of natural or [D] man-caused <D> [A] HUMAN-CAUSED <A] hazards, are unsuitable for subdivision development and prohibit subdivisions in these areas unless the hazards can be eliminated or overcome by approved construction techniques;
- (5) prohibit subdivisions for building purposes in areas located within the floodway of a flood of 100-year frequency as defined by Title 76, chapter 5, or determined to be subject to flooding by the governing body;
- (6) prescribe standards for:
  - (a) the design and arrangement of lots, streets, and roads;
  - (b) grading and drainage;
  - (c) [A] SUBJECT TO THE PROVISIONS OF [SECTION 5], <A] water supply and sewage and solid waste disposal [D] which <D] [A] THAT <A] , at a minimum, meet the regulations adopted by the department of health and environmental sciences under 76-4-104;
  - (d) the location and installation of utilities;
- (7) provide procedures for the administration of the park and open-space requirements of this chapter;
- (8) provide for the review of preliminary plats by affected public utilities and those agencies of local, state, and federal government having a substantial interest in a proposed subdivision; such utility or agency review may not delay the governing body's action on the plat beyond the time limits specified in this chapter, and the failure of any agency to complete a review of a plat may not be a basis for rejection of the plat by the governing body."

Section 19. *Section 76-4-104, MCA*, is amended to read:

"76-4-104. Rules for administration and enforcement. (1) The department shall [A] , SUBJECT TO THE PROVISIONS OF [SECTION 3], <A] adopt reasonable rules, including adoption of sanitary standards, necessary for administration and enforcement of this part.

(2) The rules and standards shall provide the basis for approving subdivision plats for various types of water, sewage facilities, and solid waste disposal, both public and private, and shall be related to size of lots, contour of land, porosity of soil, ground water level, distance from lakes, streams, and wells, type and construction of private

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water and sewage facilities, and other factors affecting public health and the quality of water for uses relating to agriculture, industry, recreation, and wildlife.

(3) The rules shall provide for the review of the following divisions of land by a local department or board of health, as described in Title 50, chapter 2, part 1, if the local department or board of health employs a registered sanitarian or a registered professional engineer and if the department certifies under subsection (4) that the local department or board is competent to review these divisions of land:

(a) divisions of land containing five or fewer parcels, whenever each parcel will contain individual onsite water and sewage disposal facilities; and

(b) divisions of land proposed to connect to existing municipal water and waste water systems previously approved by the department, if no extension of the systems is required.

(4) The department shall also adopt standards and procedures for certification and maintaining certification to ensure that a local department or board of health is competent to review the divisions of land described in subsection (3).

(5) The department shall review those divisions of land described in subsection (3) if:

(a) a proposed division of land lies within more than one jurisdictional area and the respective governing bodies are in disagreement concerning approval of or conditions to be imposed on the proposed subdivision; or

(b) the local department or board of health elects not to be certified.

(6) The rules shall further provide for:

(a) the furnishing to the reviewing authority of a copy of the plat and other documentation showing the layout or plan of development, including:

(i) total development area;

(ii) total number of proposed dwelling units;

(b) adequate evidence that a water supply that is sufficient in terms of quality, quantity, and dependability will be available to ensure an adequate supply of water for the type of subdivision proposed;

(c) evidence concerning the potability of the proposed water supply for the subdivision;

(d) adequate evidence that a sewage disposal facility is sufficient in terms of capacity and dependability;

(e) standards and technical procedures applicable to storm drainage plans and related designs, in order to insure proper drainage ways;

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- (f) standards and technical procedures applicable to sanitary sewer plans and designs, including soil percolation testing and required percolation rates and site design standards for on-lot sewage disposal systems when applicable;
  - (g) standards and technical procedures applicable to water systems;
  - (h) standards and technical procedures applicable to solid waste disposal;
  - (i) requiring evidence to establish that, if a public sewage disposal system is proposed, provision has been made for the system and, if other methods of sewage disposal are proposed, evidence that the systems will comply with state and local laws and regulations which are in effect at the time of submission of the preliminary or final plan or plat.
- (7) If the reviewing authority is a local department or board of health, it shall, upon approval of a division of land under this part, notify the department of the approval and submit to the department a copy of the approval statement.
- (8) Review and certification or denial of certification that a division of land is not subject to sanitary restrictions under this part may occur only under those rules in effect at the time plans and specifications are submitted to the department, except in cases where current rules would preclude the use for which the lot was originally intended, the applicable requirements in effect at the time such lot was recorded must be applied. In the absence of specific requirements, minimum standards necessary to protect public health and water quality will apply."

Section 20. Section 80-15-105, MCA, is amended to read:

"80-15-105. Rulemaking. (1) The board shall [A> , SUBJECT TO THE PROVISIONS OF [SECTION 1], <A] adopt rules for the administration of this chapter for which the board and the department of health and environmental sciences have responsibility. These rules must include but are not limited to:

- (a) standards and interim numerical standards for agricultural chemicals in ground water as authorized by 80-15-201;
- (b) procedures for ground water monitoring as authorized by 80-15-202 and 80-15-203;
- (c) field and laboratory operational quality assurance, quality control, and confirmatory procedures as authorized by 80-15-107, 80-15-202, and 80-15-203, which may include, through adoption by reference, procedures that have been established or approved by EPA for quality assurance and quality control;
- (d) standards for maintaining the confidentiality of data and information declared confidential by EPA and the confidentiality of chemical registrant data and information protected from disclosure by federal or state law as required by 80-15-108, and
- (e) administrative civil penalties as authorized by 80-15-412.

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(2) The department shall adopt rules necessary to carry out its responsibilities under this chapter. These rules must include but are not limited to:

- (a) procedures for ground water monitoring as authorized by 80-15-202 and 80-15-203,
- (b) the content and procedures for development of agricultural chemical ground water management plans, including the content of best management practices and best management plans, procedures for obtaining comments from the department of health and environmental sciences on the plans, and the adoption of completed plans and plan modifications as authorized by 80-15-211 through 80-15-218,
- (c) standards for maintaining the confidentiality of data and information declared confidential by EPA and of chemical registrant data and information protected from disclosure by federal or state law as required by 80-15-108,
- (d) field and laboratory operational quality assurance, quality control, and confirmatory procedures as authorized by 80-15-107, 80-15-202, and 80-15-203, which may include, through adoption by reference, procedures that have been established or approved by EPA for quality assurance and quality control;
- (e) emergency procedures as authorized by 80-15-405,
- (f) procedures for issuance of compliance orders as authorized by 80-15-403, and
- (g) procedures for the assessment of administrative civil penalties as authorized by 80-15-412."

Section 21. Codification instructions. (1) [Section 1] is intended to be codified as an integral part of Title 75, chapter 5; Title 75, chapter 6; and Title 80, chapter 15, and the provisions of Title 75, chapter 5; Title 75, chapter 6; and Title 80, chapter 15, apply to [section 1].

(2) [Section 2] is intended to be codified as an integral part of Title 75, chapter 2, and the provisions of Title 75, chapter 2, apply to [section 2].

(3) [Section 3] is intended to be codified as an integral part of Title 75, chapter 3; Title 75, chapter 10; and Title 76, chapter 4, and the provisions of Title 75, chapter 3; Title 75, chapter 10; and Title 76, chapter 4, apply to [section 3].

(4) [Section 4] is intended to be codified as an integral part of Title 50, chapter 2, and the provisions of Title 50, chapter 2, apply to [section 4].

(5) [Section 5] is intended to be codified as an integral part of Title 76, chapter 3, and the provisions of Title 76, chapter 3, apply to [section 5].

Section 22. Applicability. (1) [Sections 1 through 3] are intended to apply to any rule that is in effect, adopted, or amended, and that regulates those resources or activities for which the state has been given primary authority to

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regulate by federal authority pursuant to Title 75, chapter 2; Title 75, chapter 3; Title 75, chapter 5; Title 75, chapter 6; or Title 75, chapter 10, as of [the effective date of this act].

(2) [Sections 4 and 5] apply to local units of government when they attempt to regulate the control and disposal of sewage from private and public buildings.

(3) [This act] does not apply to the establishment of fees or public participation requirements.

Section 23. Effective date. [This act] is effective on passage and approval.

## History

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Approved April 14, 1995

## Sponsor

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Wagner

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# EXHIBIT B

MONTANA LEGISLATIVE HISTORY

Chapter 471 19 95

Bill H 521 S \_\_\_\_\_ Original bill & history X c

H. Committee on NATURAL RESOURCES

Hearing Date(s) 2/15 X c

2/17 X c

EXEC. ACTION 3/13 X c

\_\_\_\_\_ c

Date Out \_\_\_\_\_ c

S. Committee on NATURAL RESOURCES

Hearing Date(s) 3/27 X c

EXEC. ACTION 3/28 X c

\_\_\_\_\_ c

\_\_\_\_\_ c

Did this bill originate in an interim committee? \_\_\_\_\_ Yes \_\_\_\_\_ No

Committee \_\_\_\_\_

Report \_\_\_\_\_



HB 521	1995 HISTORY AND FINAL STATUS	434	HOUSE BILLS AND RESOLUTIONS	HB 524
2/11	FIRST READING		INTRODUCED BY TUSS, ET AL.	
2/11	REFERRED TO AGRICULTURE, LIVESTOCK & IRRIGATION		REQUIRE DISABILITY INSURANCE COVERAGE FOR RESPIRATORY CARE	
2/13	FISCAL NOTE REQUESTED		PRACTITIONERS FOR ALL POLICIES OF DISABILITY INSURANCE	
2/14	HEARING			
2/17	COMMITTEE REPORT—BILL PASSED AS AMENDED			
2/17	FISCAL NOTE RECEIVED			
2/17	FISCAL NOTE PRINTED			
2/18	2ND READING PASSED	90		
2/20	3RD READING PASSED	93		
	TRANSMITTED TO SENATE			
2/21	FIRST READING			
2/21	REFERRED TO AGRICULTURE, LIVESTOCK & IRRIGATION			
3/06	HEARING			
3/08	COMMITTEE REPORT—BILL CONCURRED	49		
3/13	2ND READING CONCURRED	49		
3/14	3RD READING CONCURRED			
	RETURNED TO HOUSE			
3/15	SIGNED BY SPEAKER			
3/18	SIGNED BY PRESIDENT			
3/20	TRANSMITTED TO GOVERNOR			
3/23	SIGNED BY GOVERNOR			
	CHAPTER NUMBER 206			
	EFFECTIVE DATE: 10/01/95			
HB 521	INTRODUCED BY WAGNER, ET AL.		INTRODUCED BY MCKEE, ET AL.	
	REQUIRE CERTAIN STATE ADMINISTRATIVE AND LOCAL AGENCIES TO		REVISE POPULATION AND ECONOMIC WELL-BEING REQUIREMENTS TO	
	JUSTIFY ADOPTION OF RULES THAT ARE MORE STRINGENT THAN		QUALIFY AS A RESORT COMMUNITY	
	CORRESPONDING FEDERAL REGULATIONS			
2/11	INTRODUCED			
2/11	FIRST READING			
2/11	REFERRED TO NATURAL RESOURCES			
2/13	FISCAL NOTE REQUESTED			
2/15	HEARING			
2/18	FISCAL NOTE RECEIVED			
2/20	FISCAL NOTE PRINTED			
3/15	COMMITTEE REPORT—BILL PASSED AS AMENDED			
3/21	REVISED FISCAL NOTE RECEIVED			
3/21	REVISED FISCAL NOTE PRINTED			
3/22	2ND READING PASSED	65		
3/23	3RD READING PASSED	65		
	TRANSMITTED TO SENATE			
3/24	FIRST READING			
3/24	REFERRED TO NATURAL RESOURCES			
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3/28	COMMITTEE REPORT—BILL CONCURRED AS AMENDED	31		
3/29	2ND READING CONCURRED AS AMENDED	35		
3/30	3RD READING CONCURRED	15		
	RETURNED TO HOUSE WITH AMENDMENTS			
4/04	2ND READING AMENDMENTS CONCURRED	65		
4/05	3RD READING AMENDMENTS CONCURRED	69		
4/07	SIGNED BY SPEAKER			
4/08	SIGNED BY PRESIDENT			
4/10	TRANSMITTED TO GOVERNOR			
4/14	SIGNED BY GOVERNOR			
	CHAPTER NUMBER 471			
	EFFECTIVE DATE: 04/14/95			
HB 522	INTRODUCED BY TUSS, ET AL.		INTRODUCED BY MCKEE, ET AL.	
	REQUIRE DISABILITY INSURANCE COVERAGE FOR RESPIRATORY CARE		REVISE POPULATION AND ECONOMIC WELL-BEING REQUIREMENTS TO	
	PRACTITIONERS FOR ALL POLICIES OF DISABILITY INSURANCE		QUALIFY AS A RESORT COMMUNITY	
2/11	INTRODUCED			
2/11	FIRST READING			
2/11	REFERRED TO HUMAN SERVICES & AGING			
2/15	HEARING			
2/22	MISSED TRANSMITTAL DEADLINE			
	DIED IN COMMITTEE			
HB 523	INTRODUCED BY MCKEE, ET AL.		INTRODUCED BY MCKEE, ET AL.	
	GENERALLY REVISE THE MONTANA COMMUNITY SERVICE ACT		REVISE POPULATION AND ECONOMIC WELL-BEING REQUIREMENTS TO	
	BY REQUEST OF THE GOVERNOR		QUALIFY AS A RESORT COMMUNITY	
2/11	INTRODUCED			
2/11	FIRST READING			
2/11	REFERRED TO STATE ADMINISTRATION			
2/13	FISCAL NOTE REQUESTED			
2/15	HEARING			
2/16	FISCAL NOTE RECEIVED			
2/16	FISCAL NOTE PRINTED			
2/23	MISSED TRANSMITTAL DEADLINE			
	DIED IN COMMITTEE			
HB 524	INTRODUCED BY WAGNER, ET AL.		INTRODUCED BY MCKEE, ET AL.	
	REQUIRE CERTAIN STATE ADMINISTRATIVE AND LOCAL AGENCIES TO		REVISE POPULATION AND ECONOMIC WELL-BEING REQUIREMENTS TO	
	JUSTIFY ADOPTION OF RULES THAT ARE MORE STRINGENT THAN		QUALIFY AS A RESORT COMMUNITY	
	CORRESPONDING FEDERAL REGULATIONS			
2/11	INTRODUCED			
2/11	FIRST READING			
2/11	REFERRED TO NATURAL RESOURCES			
2/13	FISCAL NOTE REQUESTED			
2/15	HEARING			
2/18	FISCAL NOTE RECEIVED			
2/20	FISCAL NOTE PRINTED			
3/15	COMMITTEE REPORT—BILL PASSED AS AMENDED			
3/21	REVISED FISCAL NOTE RECEIVED			
3/21	REVISED FISCAL NOTE PRINTED			
3/22	2ND READING PASSED	65		
3/23	3RD READING PASSED	65		
	TRANSMITTED TO SENATE			
3/24	FIRST READING			
3/24	REFERRED TO NATURAL RESOURCES			
3/27	HEARING			
3/28	COMMITTEE REPORT—BILL CONCURRED AS AMENDED	31		
3/29	2ND READING CONCURRED AS AMENDED	35		
3/30	3RD READING CONCURRED	15		
	RETURNED TO HOUSE WITH AMENDMENTS			
4/04	2ND READING AMENDMENTS CONCURRED	65		
4/05	3RD READING AMENDMENTS CONCURRED	69		
4/07	SIGNED BY SPEAKER			
4/08	SIGNED BY PRESIDENT			
4/10	TRANSMITTED TO GOVERNOR			
4/14	SIGNED BY GOVERNOR			
	CHAPTER NUMBER 471			
	EFFECTIVE DATE: 04/14/95			

House BILL NO. 521

INTRODUCED BY

ORR

Wagner

Sliter

Burtless

Cobb

Mundt

GRINDE Josh Storal  
Grady Jim Nelson for  
HARP

A BILL FOR AN ACT ENTITLED: "AN ACT PROHIBITING CERTAIN STATE ADMINISTRATIVE AGENCY RULES FROM BEING MORE STRINGENT THAN CORRESPONDING FEDERAL REGULATIONS; REQUIRING THE BOARD OF HEALTH AND ENVIRONMENTAL SCIENCES AND THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES TO REVIEW AND REVISE CERTAIN RULES TO ENSURE COMPLIANCE WITH THIS ACT; CREATING AN AFFIRMATIVE DEFENSE FOR VIOLATIONS OF CERTAIN RULES MORE STRINGENT THAN CORRESPONDING FEDERAL RULES; AMENDING SECTIONS 75-2-111, 75-2-301, 75-2-503, 75-3-201, 75-5-201, 75-5-311, 75-6-103, 75-10-204, 75-10-405, AND 75-10-603, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

WHEREAS, the federal government frequently regulates areas that are also subject to state regulation; and

WHEREAS, differing state and federal policy goals and unique state prerogatives frequently result in different levels of regulation, different standards, and different requirements being imposed by state and federal programs covering the same subject matter; and

WHEREAS, 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; and

WHEREAS, Montana's administrative agencies should consider applicable federal standards when adopting, readopting, or amending rules with analogous federal counterparts; and

WHEREAS, Montana's administrative agencies should analyze whether analogous federal standards sufficiently protect the health, safety, and welfare of Montana's citizens; and

WHEREAS, as part of the formal rulemaking process, the public should be advised of the agencies' conclusions about whether analogous federal standards sufficiently protect the health, safety, and welfare of Montana citizens.

## STATEMENT OF INTENT

A statement of intent is required for this bill in order to provide guidance to the board of health and

1 environmental sciences and to the department of health and environmental sciences in complying with [this  
2 act].

3 The legislature intends that in addition to all requirements imposed by existing law and rules, the  
4 board or the department include as part of the initial publication and all subsequent publications of a rule  
5 a statement as to whether the rule in question contains any standards or requirements that exceed the  
6 standards or requirements imposed by federal law.

7 If the rules are more stringent than federal law, the statement must include but is not limited to a  
8 discussion of the policy reasons and a risk-cost analysis that supports the board's or department's decision  
9 to impose the standards or requirements and also supports the fact that the state standards or requirements  
10 to be imposed are achievable under current technology, notwithstanding the federal government's  
11 determination that lesser standards or requirements are appropriate.

12 The risk-cost analysis must address the probability of harm to public health or the environment  
13 under the conditions imposed by the federal standards, the reduction in that probability of harm because  
14 of imposition of stricter state standards, and the costs required of the regulated community to mitigate the  
15 harm to public health or the environment via the stricter state standards.

16 [This act] is intended to apply to any rule that is adopted, readopted, or amended under the  
17 authority of or in order to implement, comply with, or participate in any program established under federal  
18 law or under a state statute that incorporates or refers to federal law, federal standards, or federal  
19 requirements under Title 75, chapter 2; Title 75, chapter 5; Title 75, chapter 6; or Title 75, chapter 10.

20  
21 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

22  
23 **NEW SECTION. Section 1. State standards no more stringent than federal standards.** (1) Except  
24 as provided in subsections (2) through (6), unless required by state law, the board may not adopt a rule  
25 to implement this chapter that is more stringent than the corresponding federal regulations that address the  
26 same circumstances. The board may incorporate by reference corresponding federal regulations.

27 (2) The board may adopt a rule to implement this chapter that is more stringent than corresponding  
28 federal regulations or adopt rules when there are no corresponding federal regulations only if the board  
29 makes a written finding after a public hearing and public comment and based on evidence in the record that  
30 the corresponding federal regulations are not adequate to protect public health or the environment of the

1 state. This finding must be accompanied by a summarizing conclusion statement referring to and evaluating  
2 the probability of harm to public health or the environment at the level of the federal rule or regulation and  
3 the specific improvement in the public health or environment from the stricter state rule. The statement  
4 must reference information and studies contained in the record that form the basis for the board's  
5 conclusion.

6 (3) The summarizing conclusion statement must include but is not limited to a discussion of the  
7 policy reasons and a risk-cost analysis that supports the board's decision to impose the standards or  
8 requirements and also supports the fact that the state standard or requirement to be imposed can mitigate  
9 the increased probability of harm to the public health or environment and is achievable under current  
10 technology, notwithstanding the federal government's determination that lesser standards or requirements  
11 are appropriate and protective of public health or the environment.

12 (4) If the board, upon petition by any person affected by a rule of the board, identifies rules more  
13 stringent than federal regulations or identifies rules for which there are no corresponding federal regulations,  
14 the board shall review and revise those rules to comply with this section within 9 months of the filing of  
15 the petition.

16 (5) a person who is issued a notice of violation or a denial of a permit or other approval based on  
17 a rule that is more stringent than a corresponding federal regulation or for which there is no corresponding  
18 regulation may assert a partial defense to that notice or a partial challenge to that denial on the basis and  
19 to the extent that the rule violates this section because it imposes requirements more stringent than the  
20 federal regulations, unless the more stringent rule was adopted in compliance with this section.

21 (6) (a) The board shall review and propose revisions to its rules to ensure compliance with this  
22 section by October 1, 1995. The board shall revise its rules to comply with this section by October 1,  
23 1996.

24 (b) The board may propose and adopt revisions to its rules prior to the dates specified in subsection  
25 (6)(a) upon petition for rulemaking by a person as provided under 2-4-315 and subsection (4) of this  
26 section.

27  
28 **NEW SECTION. Section 2. State standards no more stringent than federal standards.** (1) Except  
29 as provided in subsections (2) through (6), unless required by state law, the board or department may not  
30 adopt a rule to implement this chapter that is more stringent than the corresponding federal regulations that

1 address the same circumstances. The board or department may incorporate by reference corresponding  
2 federal regulations.

3 (2) The board or department may adopt a rule to implement this chapter that is more stringent than  
4 corresponding federal regulations or adopt rules when there are no corresponding federal regulations only  
5 if the board or department makes a written finding after a public hearing and public comment and based  
6 on evidence in the record that the corresponding federal regulations are not adequate to protect public  
7 health or the environment of the state. This finding must be accompanied by a summarizing conclusion  
8 statement referring to and evaluating the probability of harm to public health or the environment at the level  
9 of the federal rule or regulation and the specific improvement in the public health or environment from the  
10 stricter state rule. The statement must reference information and studies contained in the record that form  
11 the basis for the board's or department's conclusion.

12 (3) The summarizing conclusion statement must include but is not limited to a discussion of the  
13 policy reasons and a risk-cost analysis that supports the board's or department's decision to impose the  
14 standards or requirements and also supports the fact that the state standard or requirement to be imposed  
15 can mitigate the increased probability of harm to the public health or environment and is achievable under  
16 current technology, notwithstanding the federal government's determination that lesser standards or  
17 requirements are appropriate and protective of public health or the environment.

18 (4) If the board or department, upon petition by any person affected by a rule of the board or  
19 department, identifies rules more stringent than federal regulations or identifies rules for which there are  
20 no corresponding federal regulations, the board or department shall review and revise those rules to comply  
21 with this section within 9 months of the filing of the petition.

22 (5) A person who is issued a notice of violation or a denial of a permit or other approval based on  
23 a rule that is more stringent than a corresponding federal regulation or for which there is no corresponding  
24 regulation may assert a partial defense to that notice or a partial challenge to that denial on the basis and  
25 to the extent that the rule violates this section because it imposes requirements more stringent than the  
26 federal regulations, unless the more stringent rule was adopted in compliance with this section.

27 (6) (a) The board or department shall review and propose revisions to its rules to ensure compliance  
28 with this section by October 1, 1995. The board or department shall revise its rules to comply with this  
29 section by October 1, 1996.

30 (b) The board or department may propose and adopt revisions to its rules prior to the dates

1 specified in subsection (6)(a) upon petition for rulemaking by a person as provided under 2-4-315 and  
2 subsection (4) of this section.

3  
4 **NEW SECTION. Section 3. State standards no more stringent than federal standards.** (1) Except  
5 as provided in subsections (2) through (6), unless required by state law, the department may not adopt a  
6 rule to implement this chapter that is more stringent than the corresponding federal regulations that address  
7 the same circumstances. The department may incorporate by reference corresponding federal regulations.

8 (2) The department may adopt a rule to implement this chapter that is more stringent than  
9 corresponding federal regulations or adopt rules where there are no corresponding federal regulations only  
10 if the department makes a written finding after a public hearing and public comment and based on evidence  
11 in the record that the corresponding federal regulations are not adequate to protect public health or the  
12 environment of the state. This finding must be accompanied by a summarizing conclusion statement  
13 referring to and evaluating the probability of harm to public health or the environment at the level of the  
14 federal rule or regulation and the specific improvement in the public health or environment from the stricter  
15 state rule. The statement must reference information and studies contained in the record that form the basis  
16 for the department's conclusion.

17 (3) The summarizing conclusion statement must include but is not limited to a discussion of the  
18 policy reasons and a risk-cost analysis that supports the department's decision to impose the standards or  
19 requirements and also supports the fact that the state standard or requirement to be imposed can mitigate  
20 the increased probability of harm to the public health or environment and is achievable under current  
21 technology, notwithstanding the federal government's determination that lesser standards or requirements  
22 are appropriate and protective of public health or the environment.

23 (4) If the department, upon petition by any person affected by a rule of the department, identifies  
24 rules more stringent than federal regulations or identifies rules for which there are no corresponding federal  
25 regulations, the department shall review and revise those rules to comply with this section within 9 months  
26 of the filing of the petition.

27 (5) A person who is issued a notice of violation or a denial of a permit or other approval based on  
28 a rule that is more stringent than a corresponding federal regulation or for which there is no corresponding  
29 regulation may assert a partial defense to that notice or a partial challenge to that denial on the basis and  
30 to the extent that the rule violates this section because it imposes requirements more stringent than the

1 federal regulations, unless the more stringent rule was adopted in compliance with this section.

2 (6) (a) The department shall review and propose revisions to its rules to ensure compliance with  
3 this section by October 1, 1995. The department shall revise its rules to comply with this section by  
4 October 1, 1996.

5 (b) The department may propose and adopt revisions to its rules prior to the dates specified in  
6 subsection (6)(a) upon petition for rulemaking by a person as provided under 2-4-315 and subsection (4)  
7 of this section.

8

9 **Section 4.** Section 75-2-111, MCA, is amended to read:

10 **"75-2-111. Powers of board.** The board shall, subject to the provisions of [section 2]:

11 (1) adopt, amend, and repeal rules for the administration, implementation, and enforcement of this  
12 chapter, for issuing orders under and in accordance with 42 U.S.C. 7419, and for fulfilling the requirements  
13 of 42 U.S.C. 7420 and regulations adopted pursuant thereto;

14 (2) hold hearings relating to any aspect of or matter in the administration of this chapter at a place  
15 designated by the board. The board may compel the attendance of witnesses and the production of  
16 evidence at hearings. The board shall designate an attorney to assist in conducting hearings and shall  
17 appoint a reporter who ~~shall~~ must be present at all hearings and take full stenographic notes of all  
18 proceedings ~~thereat~~, transcripts of which will be available to the public at cost.

19 (3) issue orders necessary to effectuate the purposes of this chapter;

20 (4) by rule require access to records relating to emissions;

21 (5) by rule adopt a schedule of fees required for permits and permit applications, consistent with  
22 this chapter;

23 (6) have the power to issue orders under and in accordance with 42 U.S.C. 7419."

24

25 **Section 5.** Section 75-2-301, MCA, is amended to read:

26 **"75-2-301. Local air pollution control programs.** (1) After public hearing, a municipality or county  
27 may establish and administer a local air pollution control program if the program is consistent with this  
28 chapter and is approved by the board.

29 (2) If a local air pollution control program established by a county encompasses all or part of a  
30 municipality, the county and each municipality shall approve the program in accordance with subsection

1 (1).

2 (3) (a) Except as provided in subsection (4), the board by order may approve a local air pollution  
3 control program that:

4 ~~(a)~~(i) provides by ordinance or local law for requirements compatible with, more stringent than, or  
5 more extensive than those imposed by 75-2-203, 75-2-204, 75-2-211, 75-2-212, 75-2-215, 75-2-217  
6 through 75-2-219, and 75-2-402, and rules adopted under these sections;

7 ~~(b)~~(ii) provides for the enforcement of requirements established under subsection (3)(a)(i) by  
8 appropriate administrative and judicial processes; and

9 ~~(c)~~(iii) provides for administrative organization, staff, financial resources, and other resources  
10 necessary to effectively and efficiently carry out the program. As part of meeting these requirements, a  
11 local air pollution control program may administer the permit fee provisions of 75-2-220. The permit fees  
12 collected by a local air pollution control program must be deposited in a county special revenue fund to be  
13 used by the local air pollution control program for administration of permitting activities.

14 (b) Board approval of an ordinance or local law that is more stringent than the corresponding state  
15 law or for which no state law exists is not subject to the provisions of [section 2].

16 (4) Except for those emergency powers provided for in 75-2-402, the board may not delegate to  
17 a local air pollution control program the authority to control any air pollutant source that:

18 (a) requires the preparation of an environmental impact statement in accordance with Title 75,  
19 chapter 1, part 2;

20 (b) is subject to regulation under the Montana Major Facility Siting Act, as provided in Title 75,  
21 chapter 20; or

22 (c) has the potential to emit 250 tons ~~per~~ a year or more of any pollutant subject to regulation  
23 under this chapter, including fugitive emissions, unless the authority to control the source was delegated  
24 to a local air pollution control program prior to January 1, 1991.

25 (5) If the board finds that the location, character, or extent of particular concentrations of  
26 population, air pollutant sources, or geographic, topographic, or meteorological considerations or any  
27 combination of these ~~are such as to~~ make impracticable the maintenance of appropriate levels of air quality  
28 without an areawide air pollution control program, the board may determine the boundaries within which  
29 the program is necessary and require it as the only acceptable alternative to direct state administration.

30 (6) If the board has reason to believe that any part of an air pollution control program in force under



1 this section is either inadequate to prevent and control air pollution in the jurisdiction to which the program  
2 relates or is being administered in a manner inconsistent with this chapter, the board shall, on notice,  
3 conduct a hearing on the matter.

4 (7) If, after the hearing, the board determines that any part of the program is inadequate to prevent  
5 and control air pollution in the jurisdiction to which it relates or that it is not accomplishing the purposes  
6 of this chapter, it shall require that necessary corrective measures be taken within a reasonable time, not  
7 to exceed 60 days.

8 (8) If the jurisdiction fails to take these measures within the time required, the department shall  
9 administer within that jurisdiction all of the provisions of this chapter, including the terms contained in any  
10 applicable board order, that are necessary to correct the deficiencies found by the board. The department's  
11 control program supersedes all municipal or county air pollution laws, rules, ordinances, and requirements  
12 in the affected jurisdiction. The cost of the department's action is a charge on the jurisdiction.

13 (9) If the board finds that the control of a particular air pollutant source because of its complexity  
14 or magnitude is beyond the reasonable capability of the local jurisdiction or may be more efficiently and  
15 economically performed at the state level, it may direct the department to assume and retain control over  
16 that air pollutant source. A charge may not be assessed against the jurisdiction. Findings made under this  
17 subsection may be either on the basis of the nature of the sources involved or on the basis of their  
18 relationship to the size of the communities in which they are located.

19 (10) A jurisdiction in which the department administers all or part of its air pollution control  
20 program under subsection (8) may, with the approval of the board, establish or resume an air pollution  
21 control program that meets the requirements of subsection (3).

22 (11) A municipality or county may administer all or part of its air pollution control program in  
23 cooperation with one or more municipalities or counties of this state or of other states."

24  
25 **Section 6.** Section 75-2-503, MCA, is amended to read:

26 "75-2-503. **Rulemaking authority -- issuance of permits.** (1) The department shall, subject to the  
27 provisions of [section 2], adopt rules establishing standards and procedures for accreditation of  
28 asbestos-related occupations and control of the work performed by persons in asbestos-related  
29 occupations. The rules must be consistent with federal law and include but are not limited to:

30 (a) standards for training course review and approval;

- (b) standards for accreditation of applicants for asbestos-related occupations;
- (c) examination requirements for accreditation of applicants for asbestos-related occupations;
- (d) requirements for renewal of accreditation, including periodic refresher courses;
- (e) revocation of accreditation;
- (f) inspection requirements for asbestos projects and asbestos-related occupations credentials;
- (g) criteria to determine whether and what type of control measures are necessary for an asbestos project and whether a project is completed in a manner sufficient to protect public health, including criteria setting allowable limits on indoor airborne asbestos. A determination of whether asbestos abatement of a structure is necessary may not be based solely upon the results of airborne asbestos testing.
- (h) requirements for issuance of asbestos project permits and conditions that permitholders shall meet;
- (i) standards for seeking injunctions, criminal and civil penalties, or emergency actions;
- (j) advance notification procedures and issuance of permits for asbestos projects; and
- (k) fees, which must be commensurate with costs, for:
- (i) review and approval of training courses;
- (ii) application for and renewal of accreditation by a person seeking to pursue an asbestos-related occupation;
- (iii) issuance of asbestos project permits; and
- (iv) requested inspections of asbestos projects.
- (2) For asbestos projects having a cost of \$3,000 or less, the department shall issue asbestos project permits within 7 calendar days following the receipt of a properly completed permit application and the appropriate fee."

**Section 7.** Section 75-3-201, MCA, is amended to read:

**"75-3-201. State radiation control agency.** (1) The department is the state radiation control agency.

(2) Under the laws of this state, the department may employ, compensate, and prescribe the powers and duties of the individuals ~~which~~ that are necessary to carry out this chapter.

(3) The department may, subject to the provisions of [section 3], for the protection of the occupational and public health and safety:

- (a) develop and conduct programs for evaluation and control of hazards associated with the use

1 of sources of ionizing radiation;

2 (b) develop programs and adopt rules with due regard for compatibility with federal programs for  
3 licensing and regulation of byproduct, source, radioactive waste, and special nuclear materials and other  
4 radioactive materials. These rules ~~shall~~ must cover equipment and facilities, methods for transporting,  
5 handling, and storage of radioactive materials, permissible levels of exposure, technical qualifications of  
6 personnel, required notification of accidents and other incidents involving radioactive materials, survey  
7 methods and results, methods of disposal of radioactive materials, posting and labeling of areas and  
8 sources, and methods and effectiveness of controlling individuals in posted and restricted areas.

9 (c) adopt rules relating to control of other sources of ionizing radiation. These rules ~~shall~~ must cover  
10 equipment and facilities, permissible levels of exposure to personnel, posting of areas, surveys, and records.

11 (d) advise, consult, and cooperate with other agencies of the state, the federal government, other  
12 states, interstate agencies, political subdivisions, and groups concerned with control of sources of ionizing  
13 radiation;

14 (e) accept and administer loans, grants, or other funds or gifts, conditional or otherwise, in  
15 furtherance of its functions, from the federal government and from other sources, public or private;

16 (f) encourage, participate in, or conduct studies, investigations, training, research, and  
17 demonstrations relating to control of sources of ionizing radiation;

18 (g) collect and disseminate information relating to control of sources of ionizing radiation, including:

19 (i) maintenance of a file of all license applications, issuances, denials, amendments, transfers,  
20 renewals, modifications, suspensions, and revocations;

21 (ii) maintenance of a file of registrants possessing sources of ionizing radiation requiring registration  
22 under this chapter and any administrative or judicial action pertaining ~~thereto~~ to this chapter;

23 (iii) maintenance of a file of all rules relating to regulation of sources of ionizing radiation, pending  
24 or adopted, and proceedings ~~thereon~~."

25

26 **Section 8.** Section 75-5-201, MCA, is amended to read:

27 **"75-5-201. Board rules authorized.** (1) The board shall, subject to the provisions of [section 1],  
28 adopt rules for the administration of this chapter.

29 (2) The board's rules may include a fee schedule or system for assessment of administrative  
30 penalties as provided under 75-5-611."

1           **Section 9.** Section 75-5-311, MCA, is amended to read:

2           **"75-5-311. Local water quality districts -- board approval -- local water quality programs.** (1) A  
3 county that establishes a local water quality district according to the procedures specified in Title 7, chapter  
4 13, part 45, shall, in consultation with the department, undertake planning and information-gathering  
5 activities necessary to develop a proposed local water quality program.

6           (2) A county may implement a local water quality program in a local water quality district if the  
7 program is approved by the board after a hearing conducted under 75-5-202.

8           (3) In approving a local water quality program, the board shall determine that the program is  
9 consistent with the purposes and requirements of Title 75, chapter 5, and that the program will be effective  
10 in protecting, preserving, and improving the quality of surface water and ground water, considering the  
11 administrative organization, staff, and financial and other resources available to implement the program.

12           (4) Subject to the board's approval, the commissioners and the governing bodies of cities and  
13 towns that participate in a local water quality district may adopt local ordinances to regulate the following  
14 specific facilities and sources of pollution:

15           (a) onsite waste water disposal facilities;

16           (b) storm water runoff from paved surfaces;

17           (c) service connections between buildings and publicly owned sewer mains;

18           (d) facilities that use or store halogenated and nonhalogenated solvents, including hazardous  
19 substances that are referenced in 40 CFR 261.31, United States environmental protection agency  
20 hazardous waste numbers F001 through F005, as amended; and

21           (e) internal combustion engine lubricants.

22           (5) (a) For the facilities and sources of pollution included in subsection (4) and consistent with the  
23 provisions of subsection (6), the local ordinances may:

24           ~~(a)~~(i) be compatible with or more stringent or more extensive than the requirements imposed by  
25 75-5-304, 75-5-305, and 75-5-401 through 75-5-404 and rules adopted under those sections to protect  
26 water quality, establish waste discharge permit requirements, and establish best management practices for  
27 substances that have the potential to pollute state waters;

28           ~~(b)~~(ii) provide for administrative procedures, administrative orders and actions, and civil  
29 enforcement actions that are consistent with 75-5-601 through 75-5-604, 75-5-611 through 75-5-616,  
30 75-5-621, and 75-5-622 and rules adopted under those sections; and

1        ~~(e)(iii)~~ provide for civil penalties not to exceed \$1,000 per violation, provided that each day of  
2 violation of a local ordinance constitutes a separate violation, and criminal penalties not to exceed \$500  
3 per day of violation or imprisonment for not more than 30 days, or both.

4        (b) Board approval of an ordinance or local law that is more stringent than the corresponding state  
5 law or for which no state law exists is not subject to the provisions of [section 1].

6        (6) The local ordinances authorized by this section may not:

7        (a) duplicate the department's requirements and procedures relating to permitting of waste  
8 discharge sources and enforcement of water quality standards;

9        (b) regulate any facility or source of pollution to the extent that the facility or source is:

10        (i) required to obtain a permit or other approval from the department or federal government or is  
11 the subject of an administrative order, a consent decree, or an enforcement action pursuant to Title 75,  
12 chapter 5, part 4; Title 75, chapter 6; Title 75, chapter 10; the federal Comprehensive Environmental  
13 Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 through 9675, as amended; or federal  
14 environmental, safety, or health statutes and regulations;

15        (ii) exempted from obtaining a permit or other approval from the department because the facility  
16 or source is required to obtain a permit or other approval from another state agency or is the subject of an  
17 enforcement action by another state agency; or

18        (iii) subject to the provisions of Title 80, chapter 8 or chapter 15.

19        (7) If the boundaries of a district are changed after the board has approved the local water quality  
20 program for the district, the board of directors of the local water quality district shall submit a program  
21 amendment to the board and obtain the board's approval of the program amendment before implementing  
22 the local water quality program in areas that have been added to the district.

23        (8) The department shall monitor the implementation of local water quality programs to ensure that  
24 the programs are adequate to protect, preserve, and improve the quality of the surface water and ground  
25 water and are being administered in a manner consistent with the purposes and requirements of Title 75,  
26 chapter 5. If the department finds that a local water quality program is not adequate to protect, preserve,  
27 and improve the quality of the surface water and ground water or is not being administered in a manner  
28 consistent with the purposes and requirements of Title 75, chapter 5, the department shall report to the  
29 board.

30        (9) If the board determines that a local water quality program is inadequate to protect, preserve,

1 and improve the quality of the surface water and ground water in the local water quality district or that the  
2 program is being administered in a manner inconsistent with Title 75, chapter 5, the board shall give notice  
3 and conduct a hearing on the matter.

4 (10) If after the hearing the board determines that the program is inadequate to protect, preserve,  
5 and improve the quality of the surface water and ground water in the local water quality district or that it  
6 is not being administered in a manner consistent with the purposes of Title 75, chapter 5, the board shall  
7 require that necessary corrective measures be taken within a reasonable time, not to exceed 60 days.

8 (11) If an ordinance adopted under this section conflicts with a requirement imposed by the  
9 department's water quality program, the department's requirement supersedes the local ordinance.

10 (12) If the board finds that, because of the complexity or magnitude of a particular water pollution  
11 source, the control of the source is beyond the reasonable capability of a local water quality district or may  
12 be more efficiently and economically performed at the state level, the board may direct the department to  
13 assume and retain control over the source. A charge may not be assessed against the local water quality  
14 district for that source. Findings made under this subsection may be based on the nature of the source  
15 involved or on the source's relationship to the size of the community in which it is located."  
16

17 **Section 10.** Section 75-6-103, MCA, is amended to read:

18 **"75-6-103. Duties of the board.** (1) The board has general supervision over all state waters ~~which~~  
19 that are directly or indirectly being used by a person for a public water supply system or domestic purposes  
20 or as a source of ice.

21 (2) The board shall, subject to the provisions of [section 1], adopt rules and standards concerning:

22 (a) maximum contaminant levels for waters that are or will be used for a public water supply  
23 system;

24 (b) fees, as described in 75-6-108, for services rendered by the department;

25 (c) monitoring, recordkeeping, and reporting by persons who own or operate a public water supply  
26 system;

27 (d) requiring public notice to all users of a public water supply system when a person has been  
28 granted a variance or exemption or is in violation of this part or a rule or order issued pursuant to this part;

29 (e) the issuance of licenses by the department to laboratories that conduct analysis of public water  
30 supply systems;

- 1 (f) the siting, construction, operation, and modification of a public water supply system or public  
2 sewage system;
- 3 (g) the review of financial viability of a proposed public water supply system or public sewage  
4 system, as necessary to ensure the capability of the system to meet the requirements of this part;
- 5 (h) the collection and analysis of samples of water used for drinking or domestic purposes;
- 6 (i) the issuance of variances and exemptions as authorized by the federal Safe Drinking Water Act  
7 and this part;
- 8 (j) administrative enforcement procedures and administrative penalties authorized under this part;  
9 and
- 10 (k) any other requirement necessary for the protection of public health as described in this part.
- 11 (3) The board may issue orders necessary to fully implement the provisions of this part."  
12

13 **Section 11. Section 75-10-204, MCA, is amended to read:**

14 **"75-10-204. Powers and duties of department.** The department shall, subject to the provisions of  
15 [section 3], adopt rules governing solid waste management systems ~~which shall~~ that must include but are  
16 not limited to:

- 17 (1) requirements for the plan of operation and maintenance that must be submitted with an  
18 application under this part;
- 19 (2) the classification of disposal sites according to the physical capabilities of the site to contain  
20 the type of solid waste to be disposed of;
- 21 (3) the procedures to be followed in the disposal, treatment, or transport of solid wastes;
- 22 (4) the suitability of the site from a public health standpoint when hydrology, geology, and  
23 climatology are considered;
- 24 (5) requirements relating to ground water monitoring, including but not limited to:
- 25 (a) information that owners and operators of municipal solid waste landfills and other disposal sites  
26 specified in 75-10-207 must submit to the department to enable the department to prepare the priority  
27 compliance list authorized by 75-10-207(3);
- 28 (b) the content of plans for the design, construction, operation, and maintenance of monitoring  
29 wells and monitoring systems; and
- 30 (c) recordkeeping and reporting;

1 (6) fees related to the review of solid waste management system license applications;

2 (7) the renewal of solid waste management system licenses and related fees;

3 (8) a quarterly fee based on the justifiable direct and indirect costs to the state of administering  
4 Title 75, chapter 10, parts 1 and 2, for solid waste generated outside Montana and disposed of or  
5 incinerated within Montana; ~~These rules must be adopted by August 1, 1993.~~

6 (9) any other factors relating to the sanitary disposal or management of solid wastes."  
7

8 **Section 12.** Section 75-10-405, MCA, is amended to read:

9 **"75-10-405. Administrative rules.** (1) The department may, subject to the provisions of [section  
10 31, adopt, amend, or repeal rules governing hazardous waste, including but not limited to the following:

11 (a) identification and classification of those hazardous wastes subject to regulation and those that  
12 are not;

13 (b) requirements for the proper treatment, storage, transportation, and disposal of hazardous  
14 waste;

15 (c) requirements for siting, design, operation, maintenance, monitoring, inspection, closure,  
16 postclosure, and reclamation of hazardous waste management facilities;

17 (d) requirements for the issuance, denial, reissuance, modification, and revocation of permits for  
18 hazardous waste management facilities;

19 (e) requirements for corrective action within and outside of facility boundaries and for financial  
20 assurance of that corrective action;

21 (f) requirements for manifests and the manifest system for tracking hazardous waste and for  
22 reporting and recordkeeping by generators, transporters, and owners and operators of hazardous waste  
23 management facilities;

24 (g) requirements for training of facility personnel and for financial assurance of facility owners and  
25 operators and for liability of guarantors providing financial assurance;

26 (h) requirements for registration of generators and transporters;

27 (i) establishing a schedule of fees and procedures for the collection of fees for:

28 (i) the filing and review of hazardous waste management facility permits as provided in 75-10-432;

29 (ii) hazardous waste management as provided in 75-10-433;

30 (iii) the reissuance and modification of hazardous waste management facility permits; and



- 1 (iv) the registration of hazardous waste generators;
- 2 (j) a schedule of fees to defray a portion of the costs of establishing, operating, and maintaining
- 3 any state hazardous waste management facility authorized by 75-10-412;
- 4 (k) requirements for availability to the public of information obtained by the department regarding
- 5 facilities and sites used for the treatment, storage, and disposal of hazardous wastes;
- 6 (l) procedures for the assessment of administrative penalties as authorized by 75-10-424; and
- 7 (m) other rules ~~which~~ that are necessary to obtain and maintain authorization under the federal
- 8 program.
- 9 (2) The department may not adopt rules under this part that are more restrictive than those
- 10 promulgated by the federal government under the Resource Conservation and Recovery Act of 1976, as
- 11 amended, except that the department:
- 12 (a) may require the registration of transporters not otherwise required to register with the state of
- 13 Montana pursuant to the federal Resource Conservation and Recovery Act of 1976, as amended;
- 14 (b) may require generators and facilities to report on an annual rather than on a biennial basis;
- 15 (c) may adopt requirements for the prevention and correction of leakage from underground storage
- 16 tanks, including:
- 17 (i) reporting by owners and operators;
- 18 (ii) financial responsibility;
- 19 (iii) release detection, prevention, and corrective action;
- 20 (iv) standards for design, construction, installation, and closure;
- 21 (v) development of a schedule of fees, not to exceed \$50 for a tank over 1,100 gallons and not
- 22 to exceed \$20 for a tank 1,100 gallons or less, per tank, for tank notification and permits to defray state
- 23 and local costs of implementing an underground storage tank program;
- 24 (vi) a penalty schedule and a system for assessment of administrative penalties, notice, and appeals
- 25 under 75-10-423; and
- 26 (vii) delegation of authority and funds to local agents for inspections and implementation. The
- 27 delegation of authority to local agents must complement and may not duplicate existing authority for
- 28 implementation of rules adopted by the department of justice that relate to underground storage tanks.
- 29 (d) may adopt regulatory requirements for hazardous waste transfer facilities;
- 30 (e) shall require the owner or manager of any proposed commercial facility for the storage,

1 collection, or transfer of hazardous waste to conduct a public hearing, as provided for in 75-10-441; and

2 (f) may adopt rules and performance standards for industrial furnaces and boilers that burn  
3 hazardous wastes. The rules and performance standards:

4 (i) may be adopted if there are no federal regulations; or

5 (ii) may be more restrictive than federal regulations.

6 (3) If the department adopts rules under subsection (2) that are more restrictive than those  
7 promulgated by the federal government under the Resource Conservation and Recovery Act of 1976, as  
8 amended, the department shall comply with the provisions of [section 3] if it receives a petition as provided  
9 under [section 3(4)]."

10  
11 **Section 13.** Section 75-10-603, MCA, is amended to read:

12 **"75-10-603. Cooperative agreement -- authority of department.** (1) In order to assist in  
13 implementation of CERCLA, the department may, subject to the provisions of [section 3]:

14 (a) participate in the determination of appropriate remedial action to deal with the release or  
15 threatened release within Montana of:

16 (i) any contaminant presenting an imminent and substantial danger to public health or welfare; or

17 (ii) any hazardous substance;

18 (b) in the event of the release or threatened release of any of the substances described in  
19 subsection (1)(a), negotiate the terms of a cooperative agreement with the federal government containing  
20 mutual commitments of each party to remedial action, including the elements required by subsection (2).

21 (2) A cooperative agreement may contain the following assurances:

22 (a) the state of Montana will ~~assure~~ ensure the future maintenance of the removal and remedial  
23 actions agreed upon for the expected life of the actions;

24 (b) a hazardous waste disposal facility is available to the state of Montana that meets the  
25 specifications of the president and complies with the requirements of subtitle C of the federal Solid Waste  
26 Disposal Act for necessary offsite storage, destruction, treatment, or secure disposition of the hazardous  
27 substances; and

28 (c) the state of Montana will pay or ~~assure~~ ensure payment of a share of the costs of the remedial  
29 action, including all future maintenance."

1        **NEW SECTION.** **Section 14. Codification instructions.** (1) [Section 1] is intended to be codified  
2        as an integral part of Title 75, chapter 5; and Title 75, chapter 6, and the provisions of Title 75, chapter  
3        5; and Title 75, chapter 6, apply to [section 1].

4           (2) [Section 2] is intended to be codified as an integral part of Title 75, chapter 2, and the  
5   provisions of Title 75, chapter 2, apply to [section 2].

6 (3) [Section 3] is intended to be codified as an integral part of Title 75, chapter 3; and Title 75,  
7 chapter 10, and the provisions of Title 75, chapter 3; and Title 75, chapter 10, apply to [section 3].

**9 NEW SECTION. Section 15. Effective date.** [This act] is effective on passage and approval.

10 -END-

STATE OF MONTANA - FISCAL NOTE

Fiscal Note for HB0521, as introduced

DESCRIPTION OF PROPOSED LEGISLATION:

An act prohibiting certain state administrative agency rules from being more stringent than corresponding federal regulations, and requiring the Board of Health and Environmental Sciences and the Department of Health and Environmental Sciences (DHES) to review and revise certain rules to ensure compliance with this act.

ASSUMPTIONS:

1. The Executive Budget present law base serves as the starting point from which to determine any fiscal impact due to this proposed legislation.

2. This act will apply only to rules where no current state statutes exist that direct the department to adopt certain standards, regardless of whether federal standards and/or guidelines for standards exist. Examples of rules which are not presumed reviewable under HB521, given this assumption are:

- Surface Water Quality Standards
- Mixing Zone Rules
- Non Degradations Rules
- Surface Water Discharge Permit Rules
- Preconstruction or Plan and Specification Review (Water)
- Groundwater Rules

3. This bill does not impact those areas where department standards are more stringent than federal standards, as specifically required by state law. Examples of rules under this category would be:

Commercial hazardous and medical waste incinerator permitting rules (under development) that are intended to be more stringent than federal Boiler and Industrial Furnace (BIF) regulations by virtue of state statutory direction.

4. The bill will not impact rules that set fees or administrative penalty schedules since rules on these matters do not constitute regulatory "standards" and are not comparable on a stringency standards basis.

Examples of bills under this category would be:

the fee rules to generate fees that are based upon state statutory authority to set such fees even though in some cases DHES fees are less than what would be charged by a federal counterpart. On the other hand, the federal counterpart agency would not charge fees that currently are being charged by the state. Nevertheless, state law creates fee setting authority.

5. The bill does not impact rules that are promulgated by the department under the authority of the primacy agreements with the federal EPA wherein the state is obligated to regulate a matter even in the absence of prescriptive federal standards.

Examples of rules under this category would be:

- Air Quality General Provision rules that address malfunctions, circumvention and source testing protocols.
- Air Quality Prevention of Significant Deterioration rules
- Air Quality Visibility Impact Assessment rules
- Air Quality Permit, Construction, and Operation of air contaminant sources rules
- Stack height and dispersion technique rules
- Open burning rules
- Emission standards rules

(continued)

*Dave Lewis* 2.18.95

DAVE LEWIS, BUDGET DIRECTOR      DATE  
Office of Budget and Program Planning

DOUGLAS WAGNER, PRIMARY SPONSOR      DATE

Fiscal Note for HB0521, as introduced

**EXHIBIT B**  
**HB521**

Many of the above listed air quality rules contain state standards for which there are federal counterparts. However, all of these rules are required as part of the general State Implementation Plan (SIP) which is required by federal law, reviewed by the EPA, approved by the EPA, and which is enforceable by the EPA. In effect, DHES, through the primacy agreement with the EPA, acts as an agent for the federal government in establishing rules, standards and requirements for SIP purposes in lieu of the EPA exercising its own authority to do the same thing through a Federal Implementation Plan (FIP). Therefore, state standards become the equivalent federal standards for SIP purposes.

6. The bill does not intend to review rules that are the equivalent of or "mirror" federal requirements or standards.

Examples of rules under this category are:

- . Permit requirements for Major Stationary Sources (Air Quality)
- . Preconstruction Permit requirements for Major Stationary sources (Air Quality)
- . Lead and copper rules for Drinking Water (Water Quality)

7. The items listed in assumptions two through six do not constitute an exhaustive or complete listing of the rules and standards that DHES assumes are not reviewable under this bill. Those that are listed serve as examples of those that do fit under the various categories.

8. Review of rules by October 1995 and re-promulgation of rules by October 1996 will have to be performed by additional staff since most current staff operating within specific program areas funded under specific grant program requirements could not work on this type of a project. EPA would not allow the use of federal grants dollars to be spent for this purpose.

9. The department, for those rules that are more stringent than the federal counterpart and therefore reviewable under the provisions of HB521, would opt to "roll back" to full conformity with federal requirements rather than to defend their stringency difference per HB521 procedures for most remaining rules. For the following specific exceptions, the department would conduct studies to defend state standards:

- Public drinking water rules relative to surface water treatment that requires each filter in a water treatment plant to meet turbidity standards as a means of protecting the public from infection from giardia and cryptosporidium. Estimated cost for complying with the cost risk analysis and other requirements of HB521 to re-promulgate this rule that is more stringent than the federal counterpart is \$200,000.
- Public drinking water rules relative to requirements for a 12 month running maximum contaminant level for total coliform sampling. Estimated cost for complying with the cost risk analysis and other requirements of HB521 to re-promulgate this rule that is more stringent than the federal counterpart is \$200,000.
- Petroleum contaminated soils cleanup guidelines for the Underground Storage Tank program. Since there are no comparable federal standards and no specific state mandate, the costs for defending these rules or guidelines would be approximately \$250,000.
- Minimum treatment requirements for treatment of wastes containing nitrogen to state waters. Since there are no comparable federal requirements, the cost for defending this requirement would be approximately \$200,000 to \$500,000 dollars.
- State ambient air quality standards for nine air pollutants. With the exception of the particulate (PM-10) standard, which is equivalent to the federal standard, the remaining state ambient air quality standards are more stringent than corresponding federal standards or have no federal counterpart. The state adopted these standards in 1980 after a two year study (costing approximately \$250,000) and completed a health risk assessment and an estimate of the costs (in 1980) to industry to implement the standards. If the 1980 Environmental Impact Statement and

analysis is not adequate to comply with HB521 requirements, the estimated cost for redoing the risk-cost and technology analyses is \$250,000 per standard for nine standards for a total cost of \$2,250,000.

FISCAL IMPACT:

Expenditures:

	<u>FY96</u> <u>Difference</u>	<u>FY97</u> <u>Difference</u>
Operating Expense	2,900,000	2,900,000

Funding:

General Fund	2,900,000	2,900,000
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Net Impact on General Fund Balance:

General Fund (Cost) (01)	(2,900,000)	(2,900,000)
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STATE OF MONTANA - FISCAL NOTE

Fiscal Note for HB0521, as second reading

DESCRIPTION OF PROPOSED LEGISLATION:

An act requiring certain state administrative and local agencies to justify the adoption of rules that are more stringent than corresponding federal regulations, and requiring the Board of Health and Environmental Sciences, the Department of Health and Environmental Sciences (DHES), and local units of government to review and revise certain rules to ensure compliance with this act.

ASSUMPTIONS:

1. The Executive Budget present law base serves as the starting point from which to determine any fiscal impact due to this proposed legislation.
2. The bill as drafted and amended for second reading stipulates that retroactive petitions challenging rules already in effect can only impact rules promulgated from January 1, 1990, forward to the effective date of this act. The department does not have any method for determining how many substantive challenges would be made under this provision. For purposes of this fiscal note, assume there will be none.
3. The only rules that are reviewable under the provisions of this act, prospectively or retrospectively, are those rules where there is a direct comparable set of federal rules or guidelines. (Please see Technical Notes.)
4. HB521 is not intended to force the DHES to justify whether or not federal rules and regulations are sufficient to protect public health. Reasons of protecting public health and the environment are only at issue if the board, DHES, or local units of government promulgate a rule that is more stringent than a directly comparable federal counterpart of that rule.
5. HB521 intends to require either the board or DHES, when promulgating rules that are more stringent than directly comparable federal standards, to produce a formal "findings statement" that is supported by the documentation required in the second reading version. HB521 does not require DHES to engage in costly scientific and economic research other than to justify its actions on the basis of available validated research from other sources.
6. The bill is intended by the sponsor and proponents to focus solely on prospective reviews of rules that may be considered more stringent than comparable federal standards or guidelines, with a window provided for review of existing state guidelines (see assumption #2 above).

FISCAL IMPACT:

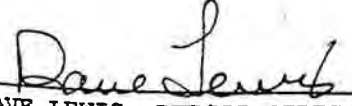
Minimal fiscal impact; however, it is not possible to determine the exact amount of additional workload. However, if there are substantive challenges through the petition process on rules already in effect between January 1, 1990 and the effective date of this bill, the impact would create a significant workload increase to the department.

TECHNICAL NOTES:

There are language issues in the bill, for example, "comparable federal rules or guidelines" should be defined to provide guidance in administering this law. Clarification of the department and local government expectations and responsibilities will make administration of this act much less likely to be subject to litigation.

EFFECT ON COUNTY OR OTHER LOCAL REVENUES OR EXPENDITURES:

Unknown, but counties would have the same documentation and justification requirements as the state board and DHES. This is likely to impact workload in the counties and cities.

 3-21-95  
DAVE LEWIS, BUDGET DIRECTOR      DATE  
Office of Budget and Program Planning

 3/21/95  
DOUGLAS WAGNER, PRIMARY SPONSOR      DATE

Fiscal Note for HB0521, as second reading

EXHIBIT B  
HB 521-#2

**MINUTES**

**MONTANA HOUSE OF REPRESENTATIVES  
54th LEGISLATURE - REGULAR SESSION**

**COMMITTEE ON NATURAL RESOURCES**

**Call to Order:** By **REP. DICK KNOX, CHAIRMAN**, on February 15,  
1995, at 3:00 pm.

**ROLL CALL**

**Members Present:**

Rep. Dick Knox, Chairman (R)  
Rep. Bill Tash, Vice Chairman (Majority) (R)  
Rep. Bob Raney, Vice Chairman (Minority) (D)  
Rep. Aubyn A. Curtiss (R)  
Rep. Jon Ellingson (D)  
Rep. David Ewer (D)  
Rep. Daniel C. Fuchs (R)  
Rep. Hal Harper (D)  
Rep. Karl Ohs (R)  
Rep. Scott J. Orr (R)  
Rep. Paul Sliter (R)  
Rep. Robert R. Story, Jr. (R)  
Rep. Jay Stovall (R)  
Rep. Emily Swanson (D)  
Rep. Lila V. Taylor (R)  
Rep. Cliff Trexler (R)  
Rep. Carley Tuss (D)  
Rep. Douglas T. Wagner (R)

**Members Excused:** None

**Members Absent:** None

**Staff Present:** Michael Kakuk, Environmental Quality Council  
Alyce Rice, Committee Secretary

**Please Note:** These are summary minutes. Testimony and  
discussion are paraphrased and condensed.

**Committee Business Summary:**

Hearing: HB 508, HB 489, HB 521, HB 538, HJR 22,  
HJR 24

Executive Action: HB 403 Tabled  
HB 489 Do Pass As Amended  
HB 508 Tabled

Tape 1, Side A



HOUSE NATURAL RESOURCES COMMITTEE

February 15, 1995

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from various property owners and blocked it together for use as a state fairground.

Closing by Sponsor:

REP. GRADY urged the committee to support HB 489.

HEARING ON HB 521

Opening Statement by Sponsor:

REP. DOUG WAGNER, House District 83, Hungry House, distributed and explained amendments to HB 521. EXHIBIT 4 REP. WAGNER said the bill was requested by various interest groups who are regulated by federal programs for clean air, clean water, radiation control, and solid and hazardous waste. The bill requires the Board of Health and Environmental Sciences (BHES) and the Department of Health and Environmental Sciences (DHES) must justify their actions when adopting rules more stringent than the corresponding federal requirements for the aforementioned programs.

Tape 2, Side A

REP. WAGNER said business, industry and the public have a right to know that the requirements imposed on them make sense and serve a worthwhile purpose. When the department or the board adopts rules that go beyond the minimum federal requirements it is required to include a statement summarizing the policy reasons for that decision. The statement must be published with the rules so the public has ready access to that information. The policy statement must include a risk/cost analysis that identifies the probability of harm to public health or the environment from limiting the requirement to the minimum federal standard and how that would be mitigated by stricter state standards. REP. WAGNER distributed a letter from Rem Kohrt, DHES, in support of HB 521. EXHIBIT 5

Proponents' Testimony:

Peggy Trenk, Western Environmental Trade Association, said the bill does not require the department or the board to conduct costly risk assessment studies in order to justify rules. The board or department is required to reference what existing scientific studies or related information it is using to identify the existence of a potential harm and to explain how a more stringent standard will mitigate it.

David Owen, Montana Chamber of Commerce, supported HB 521.

Andy Skinner, Housing Provider, said HB 521 will standardize the rules for everyone. Mr. Skinner said he has been working on the

development of a subdivision for nine years. During those nine years the county has continually made new rules. The state has water quality standards that require a depth of six feet to ground water. Lewis and Clark County adopted a rule for a depth of ten feet to ground water. The county was asked for a reason for that rule at a public hearing and the county sanitarian said that it was decided that ten feet was a good number. The result of that action is the implementation of sand filters. It costs the consumer \$5,500 a lot to put in a sand filter which the engineers in the community say has no merit. The cost over the life of a house for a couple in Helena increases \$17,000 over a 30-year loan for a system that puts more nitrates in the water than the system that is approved by the state. The counties must be accountable and must justify their rules.

**Bruce Gilbert, Stillwater Mining Company,** said there are those that will say that the bill will turn back the clock on environmental legislation. Nothing could be further from the truth. The bill represents a common sense approach to the adoption of regulations which neither seeks an end to state primacy nor the repeal of sound environmental policy.

The following proponents expressed their support for HB 521:

**Gloria Paladichuk, Richland Development**

**Charles Brookes, Billings Chamber of Commerce**

**Carl Schweitzer, Montana Contractors Association**

**Steve Turkiewicz, Montana Automobile Dealers Association**

**Gail Abercrombie, Montana Petroleum Association**

**Tammy Johnson, Citizens United for a Realistic Environment**

**Larry Brown, Agricultural Preservation Association**

**Don Allen, Montana Wood Products Association**

**Ken Williams, Montana Power Company**

**Mike Murphy, Montana Water Resources Association**

**Stuart Doggett, Montana Manufactured Housing and RV Dealers Association**

**Rex Manuel, Cenex Refining Company**

**Gary Langley, Montana Mining Association**

**Dexter Busby, Montana Refining Company**

**Allen Barkley, Columbia Falls Aluminum Company**

**John Bloomquist, Montana Stockgrowers Association and Montana Farm Bureau**

**Russ Ritter, Washington Corporation**

Tape 2, Side B

**Opponents' Testimony:**

**Steve Kelly, Friends of the Wild Swan**, said he didn't understand the purpose of the bill even after all the testimony. Cost/risk analysis will be a very costly procedure. The rules, as currently written, require agencies to inform the public about their procedures, environmental effects, risks, benefits and costs on each and every project. HB 521 is redundant, costly and unnecessary.

**Bob Robinson, Director, Department of Health and Environmental Sciences**, said HB 521 has some significant consequences on environmental protection in the state. DHES has been assigned the responsibility to protect public health and the environment under the state's numerous environmental protection laws. The bill would cause a massive re-analysis of the state's existing laws and would require completion by October 1995. The cost would be significant. The rules could be reproblicated, but the department would have to prove that the federal standards are not adequate to protect public health which is an almost impossible task. Federal standards are adequate to protect public health at the minimum level. Montanans are entitled to and deserve better than that. If the Legislature determines that HB 521 does not require the department to look at all the existing federal and state laws, the bill could be workable. If the department has to re-analyze all of the existing laws at the state and federal level, the workload and cost would be significant. It is not clear if the bill intends to eliminate fees in existing state rules that are not in federal rules. For a number of years the Legislature has directed that environmental protection programs be funded by fees. The department relies heavily on federal funding. Federal funds would not be available for re-analysis of all the rules. State funds would be needed to implement the bill.

The cost of doing a risk analysis for one contaminant, according to the EPA, is between \$250,000 and \$300,000. That would be the state's cost of doing a risk analysis to establish a standard for one metal in the water for which EPA doesn't have a standard. The department would have to analyze the state's drinking water standards for ground water. The federal government doesn't have ground water standards. An analysis would have to be done for each of the contaminants, each of the particulates, and each of the metals in order to establish a health risk assessment. The department has procedural requirements for public water supplies that require back flushing and rechecking of filters for protection from contamination. That is not required in the

federal public water supply standards. The department would have to do a cost risk analysis to prove that those procedures protected public health. HB 521 would be costly.

**Janet Ellis, Montana Audubon Legislative Fund**, said page 2, line 24 of the bill states that unless required by state law, the board may not adopt a rule that is more stringent than the corresponding federal regulations that address the same circumstances. The exemption, "unless required by state law," would mean that every rule would go through the legislative rule-making process because the Legislature doesn't have to meet the standards that state agencies are going to have to meet. On page 3, line 9, the bill sets a standard of "achievable under current technology." That is not how public health standards are generally set. They are set to protect public health. Standards are not justified by whether they are achievable under current technology.

**Ted Lange, Northern Plains Resource Council**, said the amendments that extend the proposed laws in HB 521 to the local level, makes this a major unfunded mandate. The bill is not a good use of taxpayers' money and it will cost taxpayers a lot of money.

The following opponents expressed their opposition to HB 521:

**Mary Westwood, Montana Sulphur and Chemical Company**

**Melissa Case, Montanans for a Healthy Future**

**Debbie Smith, Sierra Club**

**Bev Barnard, Montanans Against Toxic Burning**

**Ann Hedges, Montana Environmental Information Center**

**J. V. Bennett, Montana Public Interest Research Group.** Written testimony. EXHIBIT 6

Questions from Committee Members and Responses:

**REP. SCOTT ORR** asked **Mr. Robinson** how the department justifies making standards more stringent than federal standards. **Mr. Robinson** said in the case of air quality standards the study was the basis for justification.

Tape 3, Side A

**REP. EMILY SWANSON** asked **Ms. Trenk** who decides that more stringent standards are needed. **Ms. Trenk** said the party that is empowered to adopt the rules makes that decision.

**REP. SWANSON** asked **CHAIRMAN KNOX** if he intended to take executive action on the bill before the fiscal note, which is expected to be completed by February 18, is received. **CHAIRMAN KNOX** said

HOUSE NATURAL RESOURCES COMMITTEE

February 15, 1995

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executive action would not be taken until the committee has the fiscal note. **Mr. Kakuk** reminded **CHAIRMAN KNOX** that February 18 fell on a Saturday. **CHAIRMAN KNOX** said he understood there were some fairly significant implications from the expected fiscal note and was not comfortable acting on a bill of that magnitude without a fiscal note.

**CHAIRMAN KNOX** asked **Mr. Robinson** for a clarification of the difference between a risk/cost analysis and a risk/cost assessment. **Mr. Robinson** said a risk/cost assessment is an evaluation of what the public health risks are from various exposures to a contaminant. Someone has to do the scientific analysis whether it is a bench top study or a population study to say, for example, that one part per million or two parts per million represents a health risk. Then it has to be determined what the cost of that risk is. For example, it has to be determined if it is a one-in-a-million risk of cancer for someone who has been exposed for a lifetime, or if it is a one cancer in 100,000 risk. The risk cost analysis would be an evaluation of the cost of protecting against that risk.

**REP. ORR** said an arbitrary decision about nitrates cost the city of Libby 85 jobs two years ago and two or three hundred good paying jobs from that point on because the mine didn't get developed. The hospital in Libby is having financial problems because of the loss of high-paying jobs. When nitrate levels are set at 10 parts per million for the blue baby syndrome and at 20 parts per million for adults that would presumably be ingesting a lot of water. A baby would have to drink a lot of water during the day. He asked **Mr. Robinson** why the department couldn't assume that a baby isn't going to drink a gallon of water a day out of a creek, so therefore the nitrate levels could easily be at 100 parts per million which is common sense. **Mr. Robinson** said he didn't think nondegradation had a thing to do with the mine in Libby because that issue developed prior to the nondegradation law being passed. **Mr. Robinson** deferred the question to **Dr. Abe Horpestad**, **DHES**, Water Quality Division.

**REP. ORR** asked **Dr. Horpestad** how much water he would have to ingest per day at 20 parts per million to have a health problem. **Dr. Horpestad** said to have a risk problem he would have to ingest two quarts. EPA has various branches and various regulations and requirements. The state has to adopt ten parts per million for nitrates as a standard. There are no state standards in surface water quality that are more stringent than the federal requirements. Drinking water has a different set of standards that applies to water from a tap and takes into account the feasibility and the cost of treatment. It is wrong to assume there is no risk associated with drinking water that meets drinking water standards. There are no federal standards for nondegradation except for policies and a method for implementing them. The reason there is a trigger value of 2.5 parts per million for nitrates in ground water is because the department is

attempting to comply with the state law that says the quality of high quality water shall be protected.

Tape 3, Side B

Closing by the Sponsor:

REP. WAGNER said he wanted to propose an amendment to the bill to put a small appropriation in to help the department review the rules that it has been directed to do, so the transmittal deadline wouldn't have to be met.

HEARING ON HB 538

Opening Statement by Sponsor:

REP. DAVID EWER, House District 53, Helena, said HB 532 deals with water quality statutes and provides citizens the right to take private action to compel compliance with water quality statutes. The bill would empower Montanans to commence a civil action on their own behalf against a person, alleging a violation of a provision of section 75-5-636, MCA. The district court has jurisdiction to enforce the effluent standard, order, permit, rule, or provision. An aggrieved party could commence a civil action against DHES or the board, alleging a failure of the department or board to perform an act or duty required under the that section of law. The district court has jurisdiction to compel the department or board to perform the act or duty.

Proponents' Testimony:

Debbie Smith, Sierra Club, said a person must have an interest that is adversely affected before he can commence civil action. The bill allows citizens to sue in state court for documented permit violations. It opens up the judicial branch of government to actions where the executive branch of government has dropped the ball. HB 538 is not a radical bill. Ms. Smith urged the committee to pass the bill.

Jim Jensen, Environmental Information Center, said opponents will probably say there will be a potential for frivolous suits under the provisions of the bill. There has not been one frivolous citizen-initiated suit brought to enforce an environmental law in the State of Montana. There is a rule in the Montana Rules of Civil Procedures that allows judges to sanction attorneys who represent clients in frivolous actions. HB 538 is another tool that would help keep the state's water clean.

Ted Lange, Northern Plains Resource Council, supported HB 538.

Tape 4, Side A

# **EXHIBIT C**

## 1995 Mt. SB 331

Enacted, April 15, 1995

### Reporter

1995 Mt. ALS 497; 1995 Mt. Ch. 497; 1995 Mt. SB 331

MONTANA LEGISLATIVE SERVICE > MONTANA 54TH LEGISLATIVE SESSION (1995) > CHAPTER 497 >  
SENATE BILL 331

### Notice

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▶ [A> UPPERCASE TEXT WITHIN THESE SYMBOLS IS ADDED <A]

[D> Text within these symbols is deleted <D]

### Synopsis

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AN ACT GENERALLY REVISING THE MONTANA WATER QUALITY ACT; ESTABLISHING WATER QUALITY STANDARDS; REQUIRING THAT TREATMENT STANDARDS BE ECONOMICALLY, ENVIRONMENTALLY, AND TECHNOLOGICALLY FEASIBLE; AMENDING SECTIONS 75-5-103, 75-5-106, 75-5-301, 75-5-302, 75-5-304, 75-5-305, 75-5-401, 75-5-403, 75-5-605, 75-5-614, 75-5-631, 75-5-636, AND 75-6-112, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

### Text

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WHEREAS, experience with implementation and enforcement of the Montana water quality statutes has revealed deficiencies in the statutes that have led to inefficiency and unfairness in administration and enforcement of the statutes; and

WHEREAS, those deficiencies can be addressed by selective amendment of the statutes.

#### STATEMENT OF INTENT

A statement of intent is required to provide guidance to the board of health and environmental sciences regarding rulemaking. The legislature confirms the policy of this state, as reflected in 75-5-101. It is concerned that implementation of the water quality laws has in the past been too dependent on assumptions and conjecture springing from experiences and circumstances from other states and has not been sufficiently based on the conditions and needs of our state. The legislature intends that, in promulgating rules under this bill, the board of

EXHIBIT C



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health and environmental sciences should seriously consider the impact of proposed rules and that the rules should be adopted only on the basis of sound, scientific justification and never on the basis of projections or conjecture. The legislature is specifically concerned that water quality criteria must reflect concentrations that can be reliably measured, or the rules will, as a practical matter, be unenforceable. [Section 1], providing conditions for adoption of standards more stringent than federal standards, is not intended to prohibit the adoption of ground water quality standards.

*BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:*

Section 1. Standards more stringent than federal standards. (1) In adopting rules to implement this chapter, the board may adopt rules that are more stringent than corresponding draft or final federal regulations, guidelines, or criteria if the board makes written findings, based on sound scientific or technical evidence in the record, which state that rules that are more stringent than corresponding federal regulations, guidelines, or criteria are necessary to protect the public health, beneficial use of water, or the environment of the state.

(2) The board's written findings must be accompanied by a board opinion referring to and evaluating the public health and environmental information and studies contained in the record that forms the basis for the board's conclusion.

Section 2. Site-specific standards of water quality for aquatic life. (1) Notwithstanding any other provisions of this chapter and except as provided in subsection (2), the board, upon application by a permit applicant, permittee, or person potentially liable under any state or federal environmental remediation statute, shall adopt site-specific standards of water quality for aquatic life, both acute and chronic, as the standards of water quality required under 75-5-301(2) and (3). The site-specific standards of water quality must be developed in accordance with the procedures set forth in draft or final federal regulations, guidelines, or criteria.

(2) If the department, based upon its review of an application submitted under subsection (1) and sound scientific, technical, and available site-specific evidence, determines that the development of site-specific criteria in accordance with draft or final federal regulations, guidelines, or criteria would not be protective of beneficial uses, the department, within 90 days of the submission of an application under subsection (1), shall notify the applicant in writing of its determination and of all additional procedures that the applicant is required to comply with in the development of site-specific standards of water quality under this section. If there is a dispute between the department and the applicant as to the additional procedures, the board shall, on the request of the department or the applicant, hear and determine the dispute. The board's decision must be based on sound scientific, technical, and available site-specific evidence.

Section 3. *Section 75-5-103, MCA*, is amended to read:

"75-5-103. Definitions. Unless the context requires otherwise, in this chapter, the following definitions apply:

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- (1) "Board" means the board of health and environmental sciences provided for in 2-15-2104.
- (2) "Contamination" means impairment of the quality of state waters by sewage, industrial wastes, or other wastes, creating a hazard to human health.
- (3) "Council" means the water pollution control advisory council provided for in 2-15-2107.
- (4) "Degradation" means a change in water quality that lowers the quality of high-quality waters for a parameter. The term does not include those changes in water quality determined to be nonsignificant pursuant to 75-5-301(5)(c).
- (5) "Department" means the department of health and environmental sciences provided for in Title 2, chapter 15, part 21.
- (6) "Disposal system" means a system for disposing of sewage, industrial, or other wastes and includes sewage systems and treatment works.
- (7) "Effluent standard" means a restriction or prohibition on quantities, rates, and concentrations of chemical, physical, biological, and other constituents [D] which [D] [A] THAT [A] are discharged into state waters.
- (8) "Existing uses" means those uses actually attained in state waters on or after July 1, 1971, whether or not those uses are included in the water quality standards.
- (9) "High-quality waters" means state waters whose quality for a parameter is better than standards established pursuant to 75-5-301. All waters are high-quality water unless classified by the board within a classification for waters that are not suitable for human consumption or not suitable for growth and propagation of fish and associated aquatic life.
- (10) "Industrial waste" means a waste substance from the process of business or industry or from the development of any natural resource, together with any sewage that may be present.
- (11) "Interested person" means a person who has submitted oral or written comments on the department's preliminary decision regarding degradation of state waters [D] , [D] pursuant to 75-5-303. The term includes a person who has requested authorization to degrade high-quality waters.
- (12) "Local department of health" means the staff, including health officers, employed by a county, city, city-county, or district board of health.
- [A] (13) "METAL PARAMETERS" INCLUDES BUT IS NOT LIMITED TO ALUMINUM, ANTIMONY, ARSENIC, BERYLLIUM, BARIUM, CADMIUM, CHROMIUM, COPPER, FLUORIDE, IRON, LEAD, MANGANESE, MERCURY, NICKEL, SELENIUM, SILVER, THALLIUM, AND ZINC. [A]

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[D> (13) <D] [A> (14) <A] "Mixing zone" means an area established in a permit or final decision on nondegradation issued by the department where water quality standards may be exceeded, subject to conditions that are imposed by the department and that are consistent with the rules adopted by the board.

[D> (14) <D] [A> (15) <A] "Other wastes" means garbage, municipal refuse, decayed wood, sawdust, shavings, bark, lime, sand, ashes, offal, night soil, oil, grease, tar, heat, chemicals, dead animals, sediment, wrecked or discarded equipment, radioactive materials, solid waste, and all other substances that may pollute state waters.

[D> (15) <D] [A> (16) <A] "Owner or operator" means a person who owns, leases, operates, controls, or supervises a point source.

[D> (16) <D] [A> (17) <A] "Parameter" means a physical, biological, or chemical property of state water when a value of that property affects the quality of the state water.

[D> (17) <D] [A> (18) <A] "Person" means the state, [D> a <D] political subdivision of the state, institution, firm, corporation, partnership, individual, or other entity and includes persons resident in Canada.

[D> (18) <D] [A> (19) <A] "Point source" means a discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, or vessel or other floating craft, from which pollutants are or may be discharged.

[D> (19) <D] [A> (20) <A] "Pollution" means contamination or other alteration of the physical, chemical, or biological properties of state waters which exceeds that permitted by Montana water quality standards, including but not limited to standards relating to change in temperature, taste, color, turbidity, or odor [D> ; <D] [A> , <A] or the discharge, seepage, drainage, infiltration, or flow of liquid, gaseous, solid, radioactive, or other substance into state water [D> which <D] [A> THAT <A] will or is likely to create a nuisance or render the waters harmful, detrimental, or injurious to public health, recreation, safety, [A> OR <A] welfare, [A> TO <A] livestock, [A> OR TO <A] wild animals, birds, fish, or other wildlife. A discharge, seepage, drainage, infiltration or flow [D> which <D] [A> THAT <A] is authorized under the pollution discharge permit rules of the board is not pollution under this chapter. Activities conducted under the conditions imposed by the department in short-term authorizations pursuant to 75-5-308 are not considered pollution under this chapter.

[D> (20) <D] [A> (21) <A] "Sewage" means water-carried waste products from residences, public buildings, institutions, or other buildings, including discharge from human beings or animals, together with ground water infiltration and surface water present.

[D> (21) <D] [A> (22) <A] "Sewage system" means a device for collecting or conducting sewage, industrial wastes, or other wastes to an ultimate disposal point.

[D> (22) <D] [A> (23) <A] "Standard of performance" means a standard adopted by the board for the control of the discharge of pollutants [D> which <D] [A> THAT <A] reflects the greatest degree of effluent reduction achievable

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through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, [D] where [D] [A] WHEN [A] practicable, a standard permitting no discharge of pollutants.

[D] (23) [D] [A] (24) [A] [A] (A) [A] "State waters" means a body of water, irrigation system, or drainage system, either surface or underground [D] ; however, this subsection [D] [A] . [A]

[A] (B) THE TERM [A] does not apply to [A] : [A]

[A] (I) PONDS OR LAGOONS USED SOLELY FOR TREATING, TRANSPORTING, OR IMPOUNDING POLLUTANTS; OR [A]

[A] (II) [A] irrigation waters [A] OR LAND APPLICATION DISPOSAL WATERS [A] [D] where [D] [A] WHEN [A] the waters are used up within the irrigation [A] OR LAND APPLICATION DISPOSAL [A] system and the waters are not returned to [D] any other [D] state waters.

[D] (24) [D] [A] (25) [A] "Treatment works" means works, including sewage lagoons, installed for treating or holding sewage, industrial wastes, or other wastes.

[D] (25) [D] [A] (26) [A] "Water quality protection practices" means those activities, prohibitions, maintenance procedures, or other management practices applied to point and nonpoint sources designed to protect, maintain, and improve the quality of state waters. Water quality protection practices include but are not limited to treatment requirements, standards of performance, effluent standards, and operating procedures and practices to control site runoff, spillage or leaks, sludge or water disposal, or drainage from material storage.

[D] (26) [D] [A] (27) [A] "Water well" means an excavation that is drilled, cored, bored, washed, driven, dug, jetted, or otherwise constructed and intended for the location, diversion, artificial recharge, or acquisition of ground water."

Section 4. Section 75-5-106, MCA, is amended to read:

"75-5-106. Interagency cooperation -- enforcement authorization. (1) The council, board, and department may require the use of records of all state agencies and may seek the assistance of [D] such [D] [A] THE [A] agencies. [A] WHEN THE DEPARTMENT'S REVIEW OF A PERMIT APPLICATION SUBMITTED UNDER ANOTHER CHAPTER OR TITLE IS REQUIRED OR REQUESTED, THE DEPARTMENT SHALL COORDINATE THE REVIEW UNDER THIS CHAPTER WITH THE REVIEW CONDUCTED BY THE AGENCY OR UNIT UNDER THE OTHER CHAPTER, FOLLOWING THE TIME SCHEDULE FOR THAT REVIEW. [A] State, county, and municipal officers and employees, including sanitarians and other employees of local departments of health, shall cooperate with the council, board, and department in furthering the purposes of this chapter, so far as is practicable and consistent with their other duties.

(2) The department may authorize a local water quality district established according to the provisions of Title 7, chapter 13, part 45, to enforce the provisions of this chapter and rules adopted under this chapter on a case-by-

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case basis. If a local water quality district requests the authorization, the local water quality district shall present appropriate documentation to the department that a person is violating permit requirements established by the department or may be causing pollution, as defined in *75-5-103*, of state waters or placing or causing to be placed wastes in a location where they are likely to cause pollution of state waters. The board may adopt rules regarding the granting of enforcement authority to local water quality districts."

Section 5. *Section 75-5-301, MCA*, is amended to read:

"*75-5-301*. Classification and standards for state waters. Consistent with the provisions of **[D]** *75-5-302* through *75-5-307* and **<D]** *80-15-201* **[A]** AND THIS CHAPTER **<A]**, the board shall:

(1) establish **[D]** and modify **<D]** the classification of all **[A]** STATE **<A]** waters in accordance with their present and future most beneficial uses **[A]**, CREATING AN APPROPRIATE CLASSIFICATION FOR STREAMS THAT, DUE TO SPORADIC FLOW, DO NOT SUPPORT AN AQUATIC ECOSYSTEM THAT INCLUDES SALMONID OR NONSALMONID FISH **<A]**;

(2) **[A]** (A) **<A]** formulate **[A]** AND ADOPT **<A]** standards of water **[D]** purity and classification of water according to its most beneficial uses, giving consideration to the economics of waste treatment and prevention **<D]** **[A]** QUALITY, GIVING CONSIDERATION TO THE ECONOMICS OF WASTE TREATMENT AND PREVENTION. **<A]**

**[A]** (B) STANDARDS ADOPTED BY THE BOARD MUST MEET THE FOLLOWING REQUIREMENTS: **<A]**

**[A]** (I) FOR CARCINOGENS, THE WATER QUALITY STANDARD FOR PROTECTION OF HUMAN HEALTH MUST BE THE VALUE ASSOCIATED WITH AN EXCESS LIFETIME CANCER RISK LEVEL, ASSUMING CONTINUOUS LIFETIME EXPOSURE, NOT TO EXCEED 1 X 10<sup>1</sup>SP!-3!SP! IN THE CASE OF ARSENIC AND 1 X 10<sup>1</sup>SP!-5!SP! FOR OTHER CARCINOGENS. HOWEVER, IF A STANDARD ESTABLISHED AT A RISK LEVEL OF 1 X 10<sup>1</sup>SP!-3!SP! FOR ARSENIC OR 1 X 10<sup>1</sup>SP!-5!SP! FOR OTHER CARCINOGENS VIOLATES THE MAXIMUM CONTAMINANT LEVEL OBTAINED FROM 40 CFR, PART 141, THEN THE MAXIMUM CONTAMINANT LEVEL MUST BE ADOPTED AS THE STANDARD FOR THAT CARCINOGEN. **<A]**

**[A]** (II) STANDARDS FOR THE PROTECTION OF AQUATIC LIFE DO NOT APPLY TO GROUND WATER **<A]** **[D]**; **<D]** **[A]**. **<A]**

(3) review, from time to time at intervals of not more than 3 years **[A]** AND **<A]**, **[A]** TO THE EXTENT PERMITTED BY THIS CHAPTER, REVISE **<A]** established classifications of waters and **[A]** ADOPTED **<A]** standards of water **[D]** purity and classification **<D]** **[A]** QUALITY **<A]**;

(4) adopt rules governing the granting of mixing zones, requiring that mixing zones granted by the department be specifically identified **[D]**, **<D]** and requiring that mixing zones have:

(a) the smallest practicable size;

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(b) a minimum practicable effect on water uses; and

(c) definable boundaries;

(5) adopt rules implementing the nondegradation policy established in 75-5-303, including but not limited to rules that:

(a) provide a procedure for department review and authorization of degradation;

(b) establish criteria for the following:

(i) determining important economic or social development; and

(ii) weighing the social and economic importance to the public of allowing the proposed project against the cost to society associated with a loss of water quality; [D> and <D]

(c) establish criteria for determining whether a proposed activity or class of activities will result in nonsignificant changes in water quality for any parameter in order that those activities are not required to undergo review under 75-5-303(3). These criteria must be established in a manner that generally:

(i) equates significance with the potential for harm to human health or the environment;

(ii) considers both the quantity and the strength of the pollutant;

(iii) considers the length of time the degradation will occur; [D> and <D]

(iv) considers the character of the pollutant so that greater significance is associated with carcinogens and toxins that bioaccumulate or biomagnify and lesser significance is associated with substances that are less harmful or less persistent [A> . <A]

[A> (D) PROVIDE THAT CHANGES OF NITRATE IN GROUND WATER ARE NONSIGNIFICANT IF THE DISCHARGE WILL NOT CAUSE DEGRADATION OF SURFACE WATER AND THE PREDICTED CONCENTRATION OF NITRATE AT THE BOUNDARY OF THE GROUND WATER MIXING ZONE DOES NOT EXCEED: <A]

[A> (I) 7.5 MILLIGRAMS PER LITER FOR NITRATE SOURCES OTHER THAN DOMESTIC SEWAGE; <A]

[A> (II) 5.0 MILLIGRAMS PER LITER FOR DOMESTIC SEWAGE EFFLUENT DISCHARGED FROM A CONVENTIONAL SEPTIC SYSTEM; <A]

[A> (III) 7.5 MILLIGRAMS PER LITER FOR DOMESTIC SEWAGE EFFLUENT DISCHARGED FROM A SEPTIC SYSTEM USING LEVEL TWO TREATMENT, WHICH MUST BE DEFINED IN THE RULES; OR <A]

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[A> (IV) 7.5 MILLIGRAMS PER LITER FOR DOMESTIC SEWAGE EFFLUENT DISCHARGED FROM A CONVENTIONAL SEPTIC SYSTEM IN AREAS WHERE THE GROUND WATER NITRATE LEVEL EXCEEDS 5.0 MILLIGRAMS PER LITER PRIMARILY FROM SOURCES OTHER THAN HUMAN WASTE <A] .

(6) to the extent practicable, ensure that the rules adopted under subsection (5) establish objective and quantifiable criteria for various parameters. These criteria must, to the extent practicable, constitute guidelines for granting or denying applications for authorization to degrade high-quality waters under the policy established in 75-5-303(2) and (3).

(7) adopt rules to implement this section."

Section 6. Section 75-5-302, MCA, is amended to read:

"75-5-302. Revised classifications not to lower water quality standards -- exception. In revising classifications or standards or in adopting new classifications or standards, the board may not so formulate standards of water [D> purity <D] [A> QUALITY <A] or classify [D> any <D] state water as to lower [D> any <D] [A> THE <A] water quality standard applicable to [D> any <D] state water below the level applicable under the classifications and standards adopted except upon a finding that a particular state water has been classified under a standard or classification of water quality that is higher than the actual water quality that existed at the time of classification and only if the action is taken pursuant to 75-5-307. [A> WHEN THE BOARD OR DEPARTMENT IS PRESENTED WITH FACTS INDICATING THAT A BODY OF WATER IS MISCLASSIFIED, THE BOARD SHALL, WITHIN 90 DAYS, INITIATE RULEMAKING TO CORRECT THE MISCLASSIFICATION. <A] "

Section 7. Section 75-5-304, MCA, is amended to read:

"75-5-304. Adoption of standards -- pretreatment, effluent, performance. [A> (1) <A] The board shall [A> : <A]

[A> (A) <A] adopt pretreatment standards for wastewater discharged into a municipal disposal system [D> , <D] [A> ; <A]

[A> (B) <A] adopt effluent standards as defined in 75-5-103 [D> , <D] [A> ; <A]

[A> (C) <A] adopt toxic effluent standards and prohibitions [D> , <D] [A> ; <A] and

[A> (D) <A] establish standards of performance for new point source discharges.

[A> (2) IN TAKING ACTION UNDER SUBSECTION (1), THE BOARD SHALL ENSURE THAT THE STANDARDS ARE COST-EFFECTIVE AND ECONOMICALLY, ENVIRONMENTALLY, AND TECHNOLOGICALLY FEASIBLE. <A] "

Section 8. Section 75-5-305, MCA, is amended to read:

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" 75-5-305. Adoption of requirements for treatment of wastes -- variance

procedure -- appeals. (1) The board may establish minimum requirements for

the treatment of wastes. [A] FOR CASES IN WHICH THE FEDERAL GOVERNMENT HAS ADOPTED TECHNOLOGY-BASED TREATMENT REQUIREMENTS FOR A PARTICULAR INDUSTRY OR ACTIVITY IN 40 CFR, CHAPTER I, SUBCHAPTER N, THE BOARD SHALL ADOPT THOSE REQUIREMENTS BY REFERENCE. TO THE EXTENT THAT THE FEDERAL GOVERNMENT HAS NOT ADOPTED MINIMUM TREATMENT REQUIREMENTS FOR A PARTICULAR INDUSTRY OR ACTIVITY, THE BOARD MAY DO SO, THROUGH RULEMAKING, FOR PARAMETERS LIKELY TO AFFECT BENEFICIAL USES, ENSURING THAT THE REQUIREMENTS ARE COST-EFFECTIVE AND ECONOMICALLY, ENVIRONMENTALLY, AND TECHNOLOGICALLY FEASIBLE. EXCEPT FOR THE TECHNOLOGY-BASED TREATMENT REQUIREMENTS SET FORTH IN 40 CFR, CHAPTER I, SUBCHAPTER N, MINIMUM TREATMENT MAY NOT BE REQUIRED TO ADDRESS THE DISCHARGE OF A PARAMETER WHEN THE DISCHARGE IS CONSIDERED NONSIGNIFICANT UNDER RULES ADOPTED PURSUANT TO 75-5-301. <A]

(2) The board shall establish minimum requirements for the control and disposal of sewage from private and public buildings, including standards and procedures for variances from the requirements.

(3) An applicant for a variance from minimum requirements adopted by a local board of health pursuant to 50-2-116(1)(i) may appeal the local board of health's final decision to the department by submitting a written request for a hearing within 30 days after the decision. The written request must describe the activity for which the variance is requested, include copies of all documents submitted to the local board of health in support of the variance, and specify the reasons for the appeal of the local board of health's final decision.

(4) The department shall conduct a hearing on the request pursuant to Title 2, chapter 4, part 6. Within 30 days after the hearing, the department shall grant, conditionally grant, or deny the variance. The department shall base its decision on the board's standards for a variance.

(5) A decision of the department pursuant to subsection (4) is appealable to district court under the provisions of Title 2, chapter 4, part 7."

Section 9. *Section 75-5-401, MCA*, is amended to read:

" 75-5-401. Board rules for permits. (1) The board shall adopt rules:

(a) governing application for permits to discharge sewage, industrial wastes, or other wastes into state waters, including rules requiring the filing of plans and specifications relating to the construction, modification, or operation of disposal systems;



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(b) governing the issuance, denial, modification, or revocation of permits. [A> THE BOARD MAY NOT REQUIRE A PERMIT FOR A WATER CONVEYANCE STRUCTURE OR FOR A NATURAL SPRING IF THE WATER DISCHARGED TO STATE WATERS DOES NOT CONTAIN INDUSTRIAL WASTE, SEWAGE, OR OTHER WASTES. DISCHARGE TO SURFACE WATER OF GROUND WATER THAT IS NOT ALTERED FROM ITS AMBIENT QUALITY DOES NOT CONSTITUTE A DISCHARGE REQUIRING A PERMIT UNDER THIS PART AND IS NOT DEGRADATION IF: <A]

[A> (I) THE DISCHARGE DOES NOT CONTAIN INDUSTRIAL WASTE, SEWAGE, OR OTHER WASTES; <A]

[A> (II) THE WATER DISCHARGED DOES NOT CAUSE THE RECEIVING WATERS TO EXCEED APPLICABLE STANDARDS FOR ANY PARAMETERS; AND <A]

[A> (III) TO THE EXTENT THAT THE RECEIVING WATERS IN THEIR AMBIENT STATE EXCEED STANDARDS FOR ANY PARAMETERS, THE DISCHARGE DOES NOT INCREASE THE CONCENTRATION OF THE PARAMETERS. <A]

(2) The rules [D> shall <D] [A> MUST <A] allow the issuance or continuance of a permit only if the department finds that operation consistent with the limitations of the permit will not result in pollution of any state waters, except that the rules may allow the issuance of a temporary permit under which pollution may result if the department [D> insures <D] [A> ENSURES <A] that [D> such <D] [A> THE <A] permit contains a compliance schedule designed to meet all applicable effluent standards and water quality standards in the shortest reasonable period of time.

(3) The rules shall provide that the department may revoke a permit if the department finds that the holder of the permit has violated its terms, unless the department also finds that the violation was accidental and unforeseeable and that the holder of the permit corrected the condition resulting in the violation as soon as was reasonably possible.

(4) The board may adopt rules governing reclamation of sites disturbed by construction, modification, or operation of disposal systems for which a bond is voluntarily filed by a permittee pursuant to 75-5-405, including rules for the establishment of criteria and procedures governing release of the bond or other surety and release of portions of a bond or other surety."

Section 10. Section 75-5-403, MCA, is amended to read:

"75-5-403. Denial or modification of permit [A> -- TIME FOR REVIEW OF PERMIT APPLICATION <A] . (1) [A> THE DEPARTMENT SHALL REVIEW FOR COMPLETENESS ALL APPLICATIONS FOR NEW PERMITS WITHIN 60 DAYS OF THE RECEIPT OF THE INITIAL APPLICATION AND WITHIN 30 DAYS OF RECEIPT OF RESPONSES TO NOTICES OF DEFICIENCIES. THE INITIAL COMPLETENESS NOTICE MUST NOTE ALL MAJOR DEFICIENCY ISSUES, BASED ON THE INFORMATION SUBMITTED. THE DEPARTMENT AND THE APPLICANT MAY EXTEND THESE TIMEFRAMES, BY MUTUAL AGREEMENT, BY NOT MORE THAN 75 DAYS.

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AN APPLICATION IS CONSIDERED COMPLETE UNLESS THE APPLICANT IS NOTIFIED OF A DEFICIENCY WITHIN THE APPROPRIATE REVIEW PERIOD. <A]

[A> (2) <A] If the department denies an application for a permit or modifies a permit, the department shall give written notice of its action to the applicant or holder and [D> he <D] [A> THE APPLICANT OR HOLDER <A] may request a hearing before the board, in the manner stated in 75-5-611, for the purpose of petitioning the board to reverse or modify the action of the department. [D> Such <D] [A> THE <A] hearing [D> shall <D] [A> MUST <A] be held within 30 days after receipt of written request. After the hearing, the board shall affirm, modify, or reverse the action of the department. If the holder does not request a hearing before the board, modification of a permit [D> shall be <D] [A> IS <A] effective 30 days after receipt of notice by the holder unless the department specifies a later date. If the holder does request a hearing before the board, [D> no <D] [A> AN <A] order modifying [D> his <D] [A> THE <A] permit [D> shall be <D] [A> IS NOT <A] effective until 20 days after [D> he has received <D] [A> RECEIPT OF <A] notice of the action of the board.

[D> (2) This section does not apply to any modification made in permit conditions at the time of reissuance, but only to those modifications made in existing permits during their terms. <D] "

Section 11. Section 75-5-605, MCA, is amended to read:

"75-5-605. Prohibited activity. (1) It is unlawful to:

(a) cause pollution as defined in 75-5-103 of any state waters or to place or cause to be placed any wastes [A> WHERE THEY WILL <A] [D> in a location where they are likely to <D] cause pollution of any state waters [D> ; <D] [A> . ANY PLACEMENT OF MATERIALS THAT IS AUTHORIZED BY A PERMIT ISSUED BY ANY STATE OR FEDERAL AGENCY IS NOT A PLACEMENT OF WASTES WITHIN THE PROHIBITION OF THIS SUBSECTION IF THE AGENCY'S PERMITTING AUTHORITY INCLUDES PROVISIONS FOR REVIEW OF THE PLACEMENT OF MATERIALS TO ENSURE THAT IT WILL NOT CAUSE POLLUTION OF STATE WATERS. <A]

(b) violate any provision set forth in a permit or stipulation, including but not limited to limitations and conditions contained in the permit;

(c) site and construct a sewage lagoon less than 500 feet from an existing water well;

(d) cause degradation of state waters without authorization pursuant to 75-5-303;

(e) violate any order issued pursuant to this chapter; or

(f) violate any provision of this chapter.

(2) It is unlawful to carry on any of the following activities without a current permit from the department:

(a) construct, modify, or operate a disposal system [D> which <D] [A> THAT <A] discharges into any state waters;

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(b) construct or use any outlet for the discharge of sewage, industrial wastes, or other wastes into any state waters; or

(c) discharge sewage, industrial wastes, or other wastes into any state waters."

Section 12. Section 75-5-614, MCA, is amended to read:

"75-5-614. Injunctions authorized. (1) The department is authorized to commence a civil action seeking appropriate relief, including a permanent or temporary injunction, for a violation [D] which [A] THAT [A] would be subject to a compliance order under 75-5-613. An action under this subsection may be commenced in the district court of [D] the county in which the defendant is located or resides or is doing business or any [D] [A] THE [A] county where a violation occurs or is threatened [D] if the defendant cannot be located in Montana [D] , and the court [D] shall have [D] [A] HAS [A] jurisdiction to restrain the violation and to require compliance.

(2) The department may bring an action for an injunction against the continuation of an alleged violation of the terms or conditions of a permit issued by the department or any rule or effluent standard promulgated under this chapter or against a person who fails to comply with an emergency order issued by the department under 75-5-621 or a final order of the board. The court to which the department applies for an injunction may issue a temporary injunction if it finds that there is reasonable cause to believe that the allegations of the department are true, and it may issue a temporary restraining order pending action on the temporary injunction."

Section 13. Section 75-5-631, MCA, is amended to read:

"75-5-631. Civil penalties -- injunctions not barred. (1) A person who violates this chapter or a rule, permit, effluent standard, or order issued under the provisions of this chapter [D] shall be [D] [A] IS [A] subject to a civil penalty not to exceed \$ 25,000. Each day of violation constitutes a separate violation.

(2) Action under this section does not bar enforcement of this chapter or of rules or orders issued under it by injunction or other appropriate remedy.

(3) The department shall institute and maintain [D] any [D] enforcement proceedings in the name of the state.

(4) [D] When [D] [A] IN AN ACTION [A] seeking penalties under this section, the department shall take into account the following factors in determining an appropriate settlement, if any, subsequent to the filing of a complaint:

(a) the nature, circumstances, extent, and gravity of the violation; and

(b) with respect to the violator, [D] his [D] [A] THE VIOLATOR'S [A] ability to pay [D] , any [D] [A] AND [A] prior history of [D] such [D] violations, the economic benefit or savings, if any, to the violator resulting from the violator's action, [A] AMOUNTS VOLUNTARILY EXPENDED BY THE VIOLATOR TO ADDRESS OR MITIGATE THE

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VIOLATION OR IMPACTS OF THE VIOLATION TO WATERS OF THE STATE, <A> and [D> any <D] other matters as justice may require."

Section 14. Section 75-5-636, MCA, is amended to read:

"75-5-636. Action by other parties. A person, association, corporation, or agency of the state or federal government may apply to the department protesting a violation of this chapter. The department shall make an investigation and make a written report to the person, association, corporation, or agency [D> which <D] [A> THAT <A] made the protest. If a violation is established by the investigation of the department, appropriate enforcement action [D> shall <D] [A> MUST <A] be taken. [A> IF THE INVESTIGATION PROVES THE PROTEST TO HAVE BEEN WITHOUT REASONABLE CAUSE, THE DEPARTMENT MAY SEEK RECOVERY OF INVESTIGATIVE COSTS FROM THE PERSON WHO MADE THE APPLICATION. <A] "

Section 15. Section 75-6-112, MCA, is amended to read:

"75-6-112. Prohibited acts. A person may not:

- (1) discharge sewage, drainage, industrial waste, or other wastes that will cause pollution of state waters used by a person for domestic use or as a source for a public water supply system or water or ice company;
- (2) discharge sewage, drainage, industrial waste, or other waste into any state waters or on the banks of any state waters or into any abandoned or operating water well unless the sewage, drainage, industrial waste, or other waste is treated as prescribed by the board;
- (3) build or operate any railroad, logging road, logging camp, or electric or manufacturing plant of any kind on any watershed of a public water supply system unless:
  - (a) the water supply is protected from pollution by sanitary precautions prescribed by the board; and
  - (b) a permit has been issued by the department after approval of detailed plans and specifications for sanitary precautions;
- (4) commence construction, alteration, or extension of any system of water supply, water distribution, sewer, drainage, wastewater, or sewage disposal before [D> he <D] [A> THE PERSON <A] submits to the department necessary maps, plans, and specifications for its review and the department approves those maps, plans, and specifications [D> ; <D] [A> . HOWEVER, ANY FACILITY REVIEWED BY THE DEPARTMENT UNDER TITLE 75, CHAPTER 5, IS NOT SUBJECT TO THE PROVISIONS OF THIS SECTION. <A]
- (5) operate or maintain any public water supply system [D> which <D] [A> THAT <A] exceeds a maximum contaminant level established by the board unless [D> he <D] [A> THE PERSON <A] has been granted or has an application pending for a variance or exemption pursuant to this part;

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- (6) violate any provision of this part or ~~[A]~~ A ~~<A]~~ rule adopted under this part; or
- (7) violate any condition or requirement of an approval issued pursuant to this part."

Section 16. Codification instruction. [Sections 1 and 2] are intended to be codified as an integral part of Title 75, chapter 5, part 3, and the provisions of Title 75, chapter 5, part 3, apply to [sections 1 and 2].

Section 17. Saving clause. [This act] does not apply to civil or administrative actions commenced prior to [the effective date of this act] or to claims made in those actions, except that compliance plans resulting from those actions must reflect changes made by [this act].

Section 18. Effective date. [This act] is effective on passage and approval.

## History

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Approved April 15, 1995

## Sponsor

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Beck

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End of Document

# **EXHIBIT D**

MONTANA LEGISLATIVE HISTORY

Chapter 497 19 95

Bill H \_\_\_\_\_ S 331 Original bill & history ☒ C

H. Committee on Natural Resources

S. Committee on Natural Resources

Hearing Date(s) Mar 13 ☒ C

Hearing Date(s) Feb 13 ☒ C

Mar 21 ☒ C

Feb 18 ☒ C

\_\_\_\_\_ ☐ C

\_\_\_\_\_ ☐ C

\_\_\_\_\_ ☐ C

\_\_\_\_\_ ☐ C

Date Out Mar 22 ☒ C

Feb 20 ☒ C

Did this bill originate in an interim committee? ☐ Yes ☐ No

Committee \_\_\_\_\_

Report \_\_\_\_\_

2/20	REFERRED TO BUSINESS & LABOR		
3/08	HEARING		
3/08	COMMITTEE REPORT—BILL CONCURRED		
3/11	2ND READING CONCURRED	88	6
3/14	3RD READING CONCURRED	91	9
	RETURNED TO SENATE		
3/16	SIGNED BY PRESIDENT		
3/18	SIGNED BY SPEAKER		
3/20	TRANSMITTED TO GOVERNOR		
3/24	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 240		
	EFFECTIVE DATE: 10/01/95		

SB 330 INTRODUCED BY SWYSGOOD, ET AL.  
 GENERALLY REVISE WATER QUALITY NONDEGRADATION PROVISIONS OF  
 MONTANA WATER QUALITY LAWS

2/08	INTRODUCED		
2/08	FIRST READING		
2/08	REFERRED TO NATURAL RESOURCES		
2/09	FISCAL NOTE REQUESTED		
2/13	HEARING		
2/13	FISCAL NOTE RECEIVED		
2/13	FISCAL NOTE PRINTED		
2/20	COMMITTEE REPORT—BILL PASSED AS AMENDED		
2/21	2ND READING PASSED AS AMENDED	34	16
2/22	3RD READING PASSED	34	16
	TRANSMITTED TO HOUSE		
2/27	FIRST READING		
2/27	REFERRED TO NATURAL RESOURCES		
3/13	HEARING		
3/23	COMMITTEE REPORT—BILL CONCURRED AS AMENDED		
3/25	2ND READING CONCURRED AS AMENDED	63	37
3/28	3RD READING CONCURRED	58	39
	RETURNED TO SENATE WITH AMENDMENTS		
4/03	2ND READING AMENDMENTS CONCURRED	35	10
4/04	3RD READING AMENDMENTS CONCURRED	37	12
4/08	SIGNED BY PRESIDENT		
4/08	SIGNED BY SPEAKER		
4/10	TRANSMITTED TO GOVERNOR		
4/15	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 495		
	EFFECTIVE DATE: 10/01/95		

SB 331 INTRODUCED BY BECK, ET AL.  
 GENERALLY REVISE THE MONTANA WATER QUALITY ACT

2/08	INTRODUCED		
2/08	FIRST READING		
2/08	REFERRED TO NATURAL RESOURCES		
2/09	FISCAL NOTE REQUESTED		
2/13	HEARING		
2/14	FISCAL NOTE RECEIVED		
2/14	FISCAL NOTE PRINTED		
2/20	COMMITTEE REPORT—BILL PASSED AS AMENDED		
2/21	2ND READING PASSED AS AMENDED	36	14
2/22	3RD READING PASSED	36	14
	TRANSMITTED TO HOUSE		
2/27	FIRST READING		
2/27	REFERRED TO NATURAL RESOURCES		



3/13	HEARING		
3/22	COMMITTEE REPORT—BILL CONCURRED AS AMENDED		
3/25	2ND READING CONCURRED AS AMENDED	67	33
3/28	3RD READING CONCURRED	63	35
RETURNED TO SENATE WITH AMENDMENTS			
3/31	REVISED FISCAL NOTE RECEIVED		
3/31	REVISED FISCAL NOTE PRINTED		
4/03	2ND READING AMENDMENTS CONCURRED	34	11
4/04	3RD READING AMENDMENTS CONCURRED	37	12
4/08	SIGNED BY PRESIDENT		
4/08	SIGNED BY SPEAKER		
4/10	TRANSMITTED TO GOVERNOR		
4/15	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 497		
	EFFECTIVE DATE: 04/15/95		

## SB 332 INTRODUCED BY WELDON, ET AL.

REVISE CONDITIONS FOR SALE OF A MOBILE HOME IN A MOBILE HOME PARK

2/08	INTRODUCED		
2/08	FIRST READING		
2/08	REFERRED TO BUSINESS & INDUSTRY		
2/15	HEARING		
2/16	TABLED IN COMMITTEE		
2/17	COMMITTEE REPORT—BILL PASSED AS AMENDED		
2/18	2ND READING DO PASS MOTION FAILED	20	28
2/18	2ND READING INDEFINITELY POSTPONED	33	16

## SB 333 INTRODUCED BY BISHOP

REQUIRE THAT A FIRST-TIME OFFENDER OF DRIVING UNDER THE INFLUENCE OR WITH EXCESSIVE ALCOHOL CONCENTRATION WHO IS DIAGNOSED AS CHEMICALLY DEPENDENT RECEIVE TREATMENT

2/08	INTRODUCED		
2/08	FIRST READING		
2/08	REFERRED TO JUDICIARY		
2/09	FISCAL NOTE REQUESTED		
2/15	HEARING		
2/15	FISCAL NOTE RECEIVED		
2/15	FISCAL NOTE PRINTED		
2/15	COMMITTEE REPORT—BILL PASSED		
2/17	2ND READING PASSED AS AMENDED	50	0
2/18	3RD READING PASSED	46	4
TRANSMITTED TO HOUSE			
2/20	FIRST READING		
2/20	REFERRED TO JUDICIARY		
3/14	HEARING		
3/23	COMMITTEE REPORT—BILL CONCURRED AS AMENDED		
3/25	2ND READING CONCURRED	83	15
3/27	3RD READING CONCURRED	82	16
RETURNED TO SENATE WITH AMENDMENTS			
4/01	MOTION FAILED TO CONCUR WITH AMENDMENTS ON 2ND READING	15	29
4/01	2ND READING AMENDMENTS NOT CONCURRED	37	8
4/03	RECONSIDERED PREVIOUS ACTION AND PLACED BACK ON 2ND READING		
4/04	MOTION FAILED TO CONCUR WITH AMENDMENTS ON 2ND READING	24	25
4/04	2ND READING AMENDMENTS NOT CONCURRED	29	20

SENATE BILL NO. 331

INTRODUCED BY

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING THE MONTANA WATER QUALITY ACT; ESTABLISHING WATER QUALITY STANDARDS; REQUIRING THAT RULES OR STANDARDS BE ECONOMICALLY AND TECHNOLOGICALLY FEASIBLE; AND AMENDING SECTIONS 75-5-103, 75-5-106, 75-5-201, 75-5-301, 75-5-302, 75-5-304, 75-5-305, 75-5-306, 75-5-401, 75-5-403, 75-5-605, 75-5-611, 75-5-614, 75-5-631, 75-5-636, AND 75-6-112, MCA."

WHEREAS, experience with implementation and enforcement of the Montana water quality statutes has revealed deficiencies in the statutes that have led to inefficiency and unfairness in administration and enforcement of the statutes; and

WHEREAS, those deficiencies can be addressed by selective amendment of the statutes.

# STATEMENT OF INTENT

A statement of intent is required to provide guidance to the board of health and environmental sciences regarding rulemaking. The legislature confirms the policy of this state, as reflected in 75-5-101. It is concerned that implementation of the water quality laws has in the past been too dependent on assumptions and conjecture springing from experiences and circumstances from other states and has not been sufficiently based on the conditions and needs of our state. The legislature intends that, in promulgating rules under this bill, the board of health and environmental sciences should seriously consider the impact of proposed rules and that the rules should be adopted only on the basis of sound, scientific justification and never on the basis of projections or conjecture. The legislature is specifically concerned that water quality criteria must reflect concentrations that can be reliably measured, or the rules will, as a practical matter, be unenforceable.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**NEW SECTION. Section 1. Standards more stringent than federal standards.** (1) In adopting rules to implement this chapter, the board may adopt rules that are more stringent than corresponding draft or

final federal regulations, guidelines, or criteria if:

(a) the board makes written findings, based on sound scientific or technical evidence in the record, which state that rules that are more stringent than corresponding federal regulations, guidelines, or criteria are necessary to protect the public health, beneficial use of water, or the environment of the state; and

(b) the action is taken pursuant to 75-5-307.

(2) The board's written findings must be accompanied by a board opinion referring to and evaluating the public health and environmental information and studies contained in the record that forms the basis for the board's conclusion.

**NEW SECTION.** **Section 2. Standards of water quality.** (1) Notwithstanding the provisions of [section 1], in formulating and adopting standards of water quality under 75-5-301(2) or in reviewing and revising standards of water quality under 75-5-301(3) the board shall comply with the following procedures:

(a) Except as provided in subsection (1)(b), the board shall use as standards of water quality values that are no more stringent than the values set forth in the following table:

Water Quality Criteria

<u>Parameter</u>	<u>Human Health</u>	<u>Aquatic Life</u> <u>(Acute)</u>	<u>Aquatic Life</u> <u>(Chronic)</u>
A. <u>Metal Parameters</u> (expressed in micrograms per liter)			
Aluminum	-	750	87
Antimony	6	-	-
Arsenic	50	360	190
Beryllium	4	-	-
Barium	2,000	-	-
Cadmium	5	3.9*	1.1*
Chromium	100	16**	11**
Copper	1,300	18*	12*
Fluoride	4,000	-	-
Iron	300	-	1,000
Lead	5	82*	3.2*
Manganese	50	-	-

1	Mercury	2	2.4	0.012
2	Nickel	100	1,400*	160*
3	Selenium	50	20	5
4	Silver	50	4.1	-
5	Thallium	2	-	-
6	Zinc	5,000	120*	110*
7	B. <u>Other Parameters</u> (expressed in milligrams per liter)			
8	Nitrate	10	-	-
9	Ammonia	-	25***	2.2***
10	pH	6 to 9 std. units		
11	Sulfate	1,800		

Notes: All metal parameters are stated as dissolved, and compliance must be measured using dissolved methods.

\* Hardness dependent (value assumes hardness of 100)

\*\* Hexavalent

\*\*\* Ammonia is pH and temperature dependent (value of pH = 7; T = 10);

(b) For parameters not included in subsection (1)(a), the board shall use maximum contaminant levels as established under 40 CFR, part 141, as the standards of water quality for human health.

(c) For parameters not included in subsection (1)(a) and for which maximum contaminant levels have not been established, the board may formulate and adopt standards of water quality for human health that satisfy the following criteria:

(i) The values must be based on scientifically valid studies and derived in a manner consistent with draft or final federal regulations, guidelines, or criteria for assessing the health risks of environmental pollutants.

(ii) For carcinogens, the values must represent a concentration associated with an excess lifetime cancer risk level because of continuous lifetime exposure not to exceed  $1 \times 10^{-4}$ .

(iii) For systemic toxicants, the values must represent a concentration to which the human population, including sensitive subgroups, could be exposed on a daily basis without appreciable risk of deleterious effects during a lifetime.

(d) For all metal parameters not included in subsection (1)(a), the values used by the board as

1 standards of water quality must be stated as dissolved concentrations.

2 (2) In formulating and adopting standards of water quality under 75-5-301(2) or in reviewing and  
3 revising standards of water quality under 75-5-301(3), the board may not use narrative statements for any  
4 parameter.

5 (3) For the purpose of subsection (1)(c)(iii), systemic toxicants must include toxic chemicals that  
6 cause effects other than cancer or mutation.

7

8 **NEW SECTION.** Section 3. Site-specific standards of water quality for aquatic life.

9 Notwithstanding any other provisions of this chapter, the board, upon application by a permit applicant,  
10 shall adopt site-specific standards of water quality for aquatic life, both acute and chronic, as the standards  
11 of water quality required under 75-5-301(2) and (3). The site-specific standards of water quality must be  
12 developed in accordance with the procedures set forth in draft or final federal regulations, guidelines, or  
13 criteria.

14

15 **Section 4.** Section 75-5-103, MCA, is amended to read:

16 **"75-5-103. Definitions.** Unless the context requires otherwise, in this chapter, the following  
17 definitions apply:

18 (1) "Board" means the board of health and environmental sciences provided for in 2-15-2104.

19 (2) "Contamination" means impairment of the quality of state waters by sewage, industrial wastes,  
20 or other wastes, creating a hazard to human health.

21 (3) "Council" means the water pollution control advisory council provided for in 2-15-2107.

22 (4) "Degradation" means a change in water quality that lowers the quality of high-quality waters  
23 ~~for a parameter~~. The term does not include those changes in water quality determined to be nonsignificant  
24 pursuant to 75-5-301(5)(c).

25 (5) "Department" means the department of health and environmental sciences provided for in Title  
26 2, chapter 15, part 21.

27 (6) "Disposal system" means a system for disposing of sewage, industrial, or other wastes and  
28 includes sewage systems and treatment works.

29 (7) "Effluent standard" means a restriction or prohibition on quantities, rates, and concentrations  
30 of chemical, physical, biological, and other constituents ~~which~~ that are discharged into state waters.

(8) "Existing uses" means those uses actually attained in state waters on or after July 1, 1971, whether or not those uses are included in the water quality standards.

(9) "High-quality waters" means state waters whose quality for a parameter is better than standards established pursuant to 75-5-301. All waters are high-quality water unless classified by the board within a classification for waters that are not suitable for human consumption or not suitable for growth and propagation of fish and associated aquatic life.

(10) (a) "Industrial waste" means a waste substance from the process of business or industry or from the development of any natural resource, together with any sewage that may be present.

(b) The term does not mean materials incorporated or placed into a structure, facility, or location authorized in a permit issued by a state or federal agency.

(11) "Interested person" means a person who has submitted oral or written comments on the department's preliminary decision regarding degradation of state waters, pursuant to 75-5-303. The term includes a person who has requested authorization to degrade high-quality waters.

(12) "Local department of health" means the staff, including health officers, employed by a county, city, city-county, or district board of health.

(13) "Mixing zone" means an area established in a permit or final decision on nondegradation issued by the department where water quality standards may be exceeded, subject to conditions that are imposed by the department and that are consistent with the rules adopted by the board.

(14) (a) "Other wastes" means garbage, municipal refuse, decayed wood, sawdust, shavings, bark, lime, sand, ashes, offal, night soil, oil, grease, tar, heat, chemicals, dead animals, sediment, wrecked or discarded equipment, radioactive materials, solid waste, and all other substances that may pollute state waters.

(b) The term does not mean materials incorporated or placed into a structure, facility, or location authorized in a permit issued by a state or federal agency.

(15) "Owner or operator" means a person who owns, leases, operates, controls, or supervises a point source.

(16) "Parameter" means a physical, biological, or chemical property of state water when a value of that property affects the quality of the state water.

(17) "Person" means the state, a political subdivision of the state, institution, firm, corporation, partnership, individual, or other entity and includes persons resident in Canada.

1 (18) "Point source" means a discernible, confined, and discrete conveyance, including but not  
2 limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, or vessel  
3 or other floating craft, from which pollutants are or may be discharged.

4 (19) "Pollution" means contamination or other alteration of the physical, chemical, or biological  
5 properties of state waters which exceeds that permitted by Montana water quality standards, including but  
6 not limited to standards relating to change in temperature, taste, color, turbidity, or odor; ~~or~~ the discharge,  
7 seepage, drainage, infiltration, or flow of liquid, gaseous, solid, radioactive, or other substance into state  
8 water ~~which that~~ will or is likely to create a nuisance or render the waters harmful, detrimental, or injurious  
9 to public health, recreation, safety, or welfare, to livestock, or to wild animals, birds, fish, or other wildlife.  
10 A discharge, seepage, drainage, infiltration or flow ~~which that~~ is authorized under the pollution discharge  
11 permit rules of the board is not pollution under this chapter. Activities conducted under the conditions  
12 imposed by the department in short-term authorizations pursuant to 75-5-308 are not considered pollution  
13 under this chapter.

14 (20) "Sewage" means water-carried waste products from residences, public buildings, institutions,  
15 or other buildings, including discharge from human beings or animals, together with ground water infiltration  
16 and surface water present.

17 (21) "Sewage system" means a device for collecting or conducting sewage, industrial wastes, or  
18 other wastes to an ultimate disposal point.

19 (22) "Standard of performance" means a standard adopted by the board for the control of the  
20 discharge of pollutants ~~which that~~ reflects the greatest degree of effluent reduction achievable through  
21 application of the best available demonstrated control technology, processes, operating methods, or other  
22 alternatives, including, ~~where~~ when practicable, a standard permitting no discharge of pollutants.

23 (23) (a) "State waters" means a body of water, irrigation system, or drainage system, either surface  
24 or underground; ~~however, this subsection.~~

25 (b) The term does not apply to:

26 (i) privately owned ponds or lagoons; or

27 (ii) irrigation waters or land application disposal waters ~~where when~~ the waters are used up within  
28 the irrigation or land application disposal system and the waters are not returned to ~~any other~~ state waters.

29 (24) "Treatment works" means works, including sewage lagoons, installed for treating or holding  
30 sewage, industrial wastes, or other wastes.

1 (25) "Water quality protection practices" means those activities, prohibitions, maintenance  
2 procedures, or other management practices applied to point and nonpoint sources designed to protect,  
3 maintain, and improve the quality of state waters. Water quality protection practices include but are not  
4 limited to treatment requirements, standards of performance, effluent standards, and operating procedures  
5 and practices to control site runoff, spillage or leaks, sludge or water disposal, or drainage from material  
6 storage.

7 (26) "Water well" means an excavation that is drilled, cored, bored, washed, driven, dug, jetted,  
8 or otherwise constructed and intended for the location, diversion, artificial recharge, or acquisition of  
9 ground water."

10  
11 **Section 5.** Section 75-5-106, MCA, is amended to read:

12 **"75-5-106. Interagency cooperation -- enforcement authorization.** (1) The council, board, and  
13 department may require the use of records of all state agencies and may seek the assistance of ~~such~~ the  
14 agencies. The department shall coordinate permit proceedings under this chapter with permit proceedings  
15 involving the same project conducted by the department of state lands under Title 82, chapter 4, and by  
16 the department of natural resources and conservation under Title 75, chapter 20. State, county, and  
17 municipal officers and employees, including sanitarians and other employees of local departments of health,  
18 shall cooperate with the council, board, and department in furthering the purposes of this chapter, so far  
19 as is practicable and consistent with their other duties.

20 (2) The department may authorize a local water quality district established according to the  
21 provisions of Title 7, chapter 13, part 45, to enforce the provisions of this chapter and rules adopted under  
22 this chapter on a case-by-case basis. If a local water quality district requests the authorization, the local  
23 water quality district shall present appropriate documentation to the department that a person is violating  
24 permit requirements established by the department or may be causing pollution, as defined in 75-5-103,  
25 of state waters or placing or causing to be placed wastes in a location where they are likely to cause  
26 pollution of state waters. The board may adopt rules regarding the granting of enforcement authority to  
27 local water quality districts."  
28

29 **Section 6.** Section 75-5-201, MCA, is amended to read:

30 **"75-5-201. Board rules authorized.** (1) The board shall adopt rules for the administration of this



chapter and shall ensure that requirements imposed by the rules are cost-effective and economically and technologically feasible.

(2) The board's rules may include a fee schedule or system for assessment of administrative penalties as provided under 75-5-611."

**Section 7.** Section 75-5-301, MCA, is amended to read:

**"75-5-301. Classification and standards for state waters.** Consistent with the provisions of ~~75-5-302 through 75-5-307 and 80-15-201~~ and this chapter, the board shall:

(1) establish ~~and modify~~ the classification of all state waters in accordance with their present and future most beneficial uses, creating an appropriate classification for intermittent or ephemeral streams that do not support a viable fishery;

(2) formulate and adopt standards of water ~~purity and classification of water according to its most beneficial uses, giving consideration to the economics of waste treatment and prevention~~ quality that are cost-effective and economically and technologically feasible;

(3) review, from time to time at intervals of not more than 3 years and, to the extent permitted by this chapter, revise established classifications of waters and adopted standards of water ~~purity and classification~~ quality;

(4) adopt rules governing the granting of mixing zones, requiring that mixing zones granted by the department be specifically identified, and requiring that mixing zones have:

(a) the smallest practicable size;

(b) a minimum practicable effect on water uses; and

(c) definable boundaries;

(5) adopt rules implementing the nondegradation policy established in 75-5-303, including but not limited to rules that:

(a) provide a procedure for department review and authorization of degradation;

(b) establish criteria for the following:

(i) determining important economic or social development; and

(ii) weighing the social and economic importance to the public of allowing the proposed project against the cost to society associated with a loss of water quality; ~~and~~

(c) establish criteria for determining whether a proposed activity or class of activities will result in

nonsignificant changes in water quality for any parameter in order that those activities are not required to undergo review under 75-5-303(3). These criteria must be established in a manner that generally:

(i) equates significance with the potential for harm to human health or the environment;

(ii) considers both the quantity and the strength of the pollutant;

(iii) considers the length of time the degradation will occur; and

(iv) considers the character of the pollutant so that greater significance is associated with carcinogens and toxins that bioaccumulate or biomagnify and lesser significance is associated with substances that are less harmful or less persistent.

(d) provide that a domestic septic system and drain field that meets the minimum state standards results in nonsignificant changes to water quality and is not required to undergo review under 75-5-303(3) unless the predicted nitrate contamination at the end of the drain field exceeds 10 milligrams per liter.

(6) to the extent practicable, ensure that the rules adopted under subsection (5) establish objective and quantifiable criteria for various parameters. These criteria must, to the extent practicable, constitute guidelines for granting or denying applications for authorization to degrade high-quality waters under the policy established in 75-5-303(2) and (3).

(7) adopt rules to implement this section."

**Section 8.** Section 75-5-302, MCA, is amended to read:

**"75-5-302. Revised classifications not to lower water quality standards -- exception.** In revising classifications or standards or in adopting new classifications or standards, the board may not so formulate standards of water ~~purity~~ quality or classify ~~any~~ state water as to lower ~~any~~ the water quality standard applicable to ~~any~~ state water below the level applicable under the classifications and standards adopted except upon a finding that a particular state water has been classified under a standard or classification of water quality that is higher than the actual water quality that existed at the time of classification and only if the action is taken pursuant to 75-5-307. When the board or department acquires information that a body of water is misclassified, the board shall, within 60 days of acquiring the information, take action pursuant to 75-5-307 to correct the misclassification."

**Section 9.** Section 75-5-304, MCA, is amended to read:

**"75-5-304. Adoption of standards -- pretreatment, effluent, performance.** (1) The board shall:

- 1       (a) adopt pretreatment standards for wastewater discharged into a municipal disposal system;  
2       (b) adopt effluent standards as defined in 75-5-103;  
3       (c) adopt toxic effluent standards and prohibitions; and  
4       (d) establish standards of performance for new point source discharges.

5       (2) In taking action under subsection (1), the board shall ensure that the standards are  
6 cost-effective and economically and technologically feasible."

7  
8       **Section 10.** Section 75-5-305, MCA, is amended to read:

9       **"75-5-305. Adoption of requirements for treatment of wastes -- variance procedure -- appeals.**

10      (1) The board may establish minimum requirements for the treatment of wastes. For cases in which the  
11 federal government has adopted technology-based treatment requirements for a particular industry or  
12 activity in 40 CFR, chapter I, subchapter N, the board shall adopt those requirements by reference. To the  
13 extent that the federal government has not adopted minimum treatment requirements for a particular  
14 industry or activity, the board may do so, ensuring that the requirements are cost-effective and  
15 economically and technologically feasible.

16      (2) The board shall establish minimum requirements for the control and disposal of sewage from  
17 private and public buildings, including standards and procedures for variances from the requirements.

18      (3) An applicant for a variance from minimum requirements adopted by a local board of health  
19 pursuant to 50-2-116(1)(i) may appeal the local board of health's final decision to the department by  
20 submitting a written request for a hearing within 30 days after the decision. The written request must  
21 describe the activity for which the variance is requested, include copies of all documents submitted to the  
22 local board of health in support of the variance, and specify the reasons for the appeal of the local board  
23 of health's final decision.

24      (4) The department shall conduct a hearing on the request pursuant to Title 2, chapter 4, part 6.  
25 Within 30 days after the hearing, the department shall grant, conditionally grant, or deny the variance. The  
26 department shall base its decision on the board's standards for a variance.

27      (5) A decision of the department pursuant to subsection (4) is appealable to district court under  
28 the provisions of Title 2, chapter 4, part 7."

29  
30       **Section 11.** Section 75-5-306, MCA, is amended to read:

1       **"75-5-306. Purer than natural unnecessary -- dams.** (1) It is not necessary that wastes be treated  
2 to a purer condition than the natural condition of the receiving ~~stream~~ water as long as the minimum  
3 treatment requirements established under this chapter are met.

4       (2) For the purpose of issuing permits under this part, "Natural" "natural" refers to conditions of  
5 ~~material present from runoff or percolation over which man has no control~~ the water quality as of July 1,  
6 1971, or to runoff or percolation from developed land where all reasonable land, soil, and water  
7 conservation practices have been applied. Conditions resulting from the reasonable operation of dams at  
8 July 1, 1971, are natural."

9  
10       **Section 12.** Section 75-5-401, MCA, is amended to read:

11       **"75-5-401. Board rules for permits.** (1) The board shall adopt rules:

12       (a) governing application for permits to discharge sewage, industrial wastes, or other wastes into  
13 state waters, including rules requiring the filing of plans and specifications relating to the construction,  
14 modification, or operation of disposal systems;

15       (b) governing the issuance, denial, modification, or revocation of permits. The board may not  
16 require a permit for a water conveyance structure or for a natural spring if the water discharged to state  
17 waters does not contain industrial waste, sewage, or other wastes. The board may not require a permit  
18 for the discharge of ground water that is not altered from its ambient quality by the discharger as long as  
19 existing uses are not impacted in the receiving state waters.

20       (2) The rules ~~shall~~ may allow the issuance or continuance of a permit only if the department finds  
21 that operation consistent with the limitations of the permit will not result in pollution of any state waters,  
22 except that the rules may allow the issuance of a temporary permit under which pollution may result if the  
23 department ~~insures~~ ensures that ~~such~~ the permit contains a compliance schedule designed to meet all  
24 applicable effluent standards and water quality standards in the shortest reasonable period of time.

25       (3) The rules shall provide that the department may revoke a permit if the department finds that  
26 the holder of the permit has violated its terms, unless the department also finds that the violation was  
27 accidental and unforeseeable and that the holder of the permit corrected the condition resulting in the  
28 violation as soon as was reasonably possible.

29       (4) The board may adopt rules governing reclamation of sites disturbed by construction,  
30 modification, or operation of disposal systems for which a bond is voluntarily filed by a permittee pursuant

1 to 75-5-405, including rules for the establishment of criteria and procedures governing release of the bond  
2 or other surety and release of portions of a bond or other surety."

3  
4 **Section 13.** Section 75-5-403, MCA, is amended to read:

5 **"75-5-403. Denial or modification of permit -- time for review of permit application.** (1) The  
6 department shall review for completeness all applications for permits within 30 days of the receipt of the  
7 initial application and within 30 days of receipt of responses to notices of deficiencies. The initial  
8 completeness notice must note all deficiency issues, and the department may not in a later completeness  
9 notice raise an issue pertaining to the initial application that was not raised in the initial notice. An  
10 application is considered complete unless the applicant is notified of a deficiency within the appropriate  
11 review period.

12 (2) If the department denies an application for a permit or modifies a permit, the department shall  
13 give written notice of its action to the applicant or holder and ~~he~~ the applicant or holder may request a  
14 hearing before the board, in the manner stated in 75-5-611, for the purpose of petitioning the board to  
15 reverse or modify the action of the department. ~~Such~~ The hearing shall must be held within 30 days after  
16 receipt of written request. After the hearing, the board shall affirm, modify, or reverse the action of the  
17 department. If the holder does not request a hearing before the board, modification of a permit shall be  
18 is effective 30 days after receipt of notice by the holder unless the department specifies a later date. If the  
19 holder does request a hearing before the board, ~~an~~ order modifying ~~the~~ the permit shall be is not  
20 effective until 20 days after ~~he has received~~ receipt of notice of the action of the board.

21 ~~(2) This section does not apply to any modification made in permit conditions at the time of~~  
22 ~~reissuance, but only to those modifications made in existing permits during their terms."~~

23  
24 **Section 14.** Section 75-5-605, MCA, is amended to read:

25 **"75-5-605. Prohibited activity.** (1) It is unlawful to:

26 (a) cause pollution as defined in 75-5-103 of any state waters or to place or cause to be placed  
27 any industrial or other wastes where they will in a location where they are likely to cause pollution of any  
28 state waters;

29 (b) violate any provision set forth in a permit or stipulation, including but not limited to limitations  
30 and conditions contained in the permit;

1 (c) site and construct a sewage lagoon less than 500 feet from an existing water well;

2 (d) cause degradation of state waters without authorization pursuant to 75-5-303;

3 (e) violate any order issued pursuant to this chapter; or

4 (f) violate any provision of this chapter.

5 (2) It is unlawful to carry on any of the following activities without a current permit from the  
6 department:

7 (a) construct, modify, or operate a disposal system ~~which~~ that discharges into any state waters;

8 (b) construct or use any outlet for the discharge of sewage, industrial wastes, or other wastes into  
9 any state waters; or

10 (c) discharge sewage, industrial wastes, or other wastes into any state waters."

11  
12 **Section 15.** Section 75-5-611, MCA, is amended to read:

13 **"75-5-611. Violation of chapter -- administrative actions and penalties -- notice and hearing.** (1)

14 When the department has reason to believe that a violation of this chapter, a rule adopted under this  
15 chapter, or a condition of a permit or authorization required by a rule adopted under this chapter has  
16 occurred, it may have a written notice letter served personally or by certified mail on the alleged violator  
17 or the violator's agent. The notice letter must state:

18 (a) the provision of statute, rule, permit, or approval alleged to be violated;

19 (b) the facts alleged to constitute the violation;

20 (c) the specific nature of corrective action that the department requires;

21 (d) as applicable, the amount of the administrative penalty that will be assessed by order under  
22 subsection (2) if the corrective action is not taken within the time provided under subsection (1)(e); and

23 (e) as applicable, the time within which the corrective action is to be taken or the administrative  
24 penalty will be assessed. For the purposes of this chapter, service by certified mail is complete on the date  
25 of receipt. Except as provided in subsection (2)(a)(ii), an administrative penalty may not be assessed until  
26 the provisions of subsection (1) have been complied with.

27 (2) (a) The department may issue an administrative notice and order in lieu of the notice letter  
28 provided under subsection (1) if the department's action:

29 (i) does not involve assessment of an administrative penalty; or

30 (ii) seeks an administrative penalty only for an activity that it believes and alleges has violated or

1 is violating 75-5-605.

2 (b) A notice and order issued under this section must meet all of the requirements specified in  
3 subsection (1).

4 (3) In a notice and order given under subsection (1), the department may require the alleged  
5 violator to appear before the board for a public hearing and to answer the charges. The hearing must be  
6 held no sooner than 15 days after service of the notice and order, except that the board may set an earlier  
7 date for hearing if it is requested to do so by the alleged violator. The board may set a later date for  
8 hearing at the request of the alleged violator if the alleged violator shows good cause for delay.

9 (4) If the department does not require an alleged violator to appear before the board for a public  
10 hearing, the alleged violator may request the board to conduct the hearing. The request must be in writing  
11 and must be filed with the department no later than 30 days after service of a notice and order under  
12 subsection (2). If a request is filed, a hearing must be held within a reasonable time. If a hearing is not  
13 requested within 30 days after service upon the alleged violator, the opportunity for a contested case  
14 appeal to the board under Title 2, chapter 4, part 6, is waived.

15 (5) If a contested case hearing is held under this section, it must be public and must be held in the  
16 county in which the violation is alleged to have occurred or, at the request of the alleged violator, in Lewis  
17 and Clark County.

18 (6) (a) After a hearing, the board shall make findings and conclusions that explain its decision.

19 (b) If the board determines that a violation has occurred, it shall also issue an appropriate order for  
20 the prevention, abatement, or control of pollution, the assessment of administrative penalties, or both.

21 (c) If the order requires abatement or control of pollution, the board shall state the date or dates  
22 by which a violation must cease and may prescribe timetables for necessary action in preventing, abating,  
23 or controlling the pollution.

24 (d) If the order requires payment of an administrative penalty, the board shall explain how it  
25 determined the amount of the administrative penalty.

26 (e) If the board determines that a violation has not occurred, it shall declare the department's notice  
27 void.

28 (7) The alleged violator may petition the board for a rehearing on the basis of new evidence, ~~which~~  
29 ~~petition~~ and the board may grant the petition for good cause shown.

30 (8) Instead of issuing an order, the board may direct the department to initiate appropriate action

for recovery of a penalty under 75-5-631, 75-5-632, 75-5-633, or 75-5-635.

(9) (a) An action initiated under this section may include an administrative penalty of not more than \$10,000 for each day of each violation; ~~however~~ However, the maximum penalty may not exceed \$100,000 for any related series of violations.

(b) Administrative penalties collected under this section must be deposited in the general fund.

(c) In determining the amount of penalty to be assessed to a person, the department and board shall consider the criteria stated in 75-5-631(4) and rules promulgated under 75-5-201.

(d) The contested case provisions of the Montana Administrative Procedure Act, provided for in Title 2, chapter 4, part 6, apply to a hearing conducted under this section."

**Section 16.** Section 75-5-614, MCA, is amended to read:

**"75-5-614. Injunctions authorized.** (1) The department is authorized to commence a civil action seeking appropriate relief, including a permanent or temporary injunction, for a violation ~~which~~ that would be subject to a compliance order under 75-5-613. An action under this subsection may be commenced in the district court of ~~the county in which the defendant is located or resides or is doing business or any the~~ county where a violation occurs or is threatened ~~if the defendant cannot be located in Montana~~, and the court ~~shall have~~ has jurisdiction to restrain the violation and to require compliance.

(2) The department may bring an action for an injunction against the continuation of an alleged violation of the terms or conditions of a permit issued by the department or any rule or effluent standard promulgated under this chapter or against a person who fails to comply with an emergency order issued by the department under 75-5-621 or a final order of the board. The court to which the department applies for an injunction may issue a temporary injunction if it finds that there is reasonable cause to believe that the allegations of the department are true, and it may issue a temporary restraining order pending action on the temporary injunction."

**Section 17.** Section 75-5-631, MCA, is amended to read:

**"75-5-631. Civil penalties -- injunctions not barred.** (1) A person who violates this chapter or a rule, permit, effluent standard, or order issued under the provisions of this chapter ~~shall be~~ is subject to a civil penalty not to exceed \$25,000. Each day of violation constitutes a separate violation.

(2) Action under this section does not bar enforcement of this chapter or of rules or orders issued



1 under it by injunction or other appropriate remedy.

2 (3) The department shall institute and maintain ~~any~~ enforcement proceedings in the name of the  
3 state.

4 (4) When seeking penalties under this section, the department shall take into account the following  
5 factors in determining an appropriate settlement, if any, subsequent to the filing of a complaint:

6 (a) the nature, circumstances, extent, and gravity of the violation; and

7 (b) with respect to the violator, ~~his~~ the violator's ability to pay, ~~any~~ and prior history of ~~such~~  
8 violations, the economic benefit or savings, if any, to the violator resulting from the violator's action,  
9 amounts expended by the violator to address or mitigate the violation or impacts of the violation to waters  
10 of the state, and ~~any~~ other matters as justice may require."

11  
12 **Section 18.** Section 75-5-636, MCA, is amended to read:

13 **"75-5-636. Action by other parties.** A person, association, corporation, or agency of the state or  
14 federal government may apply to the department protesting a violation of this chapter. The department  
15 shall make an investigation and make a written report to the person, association, corporation, or agency  
16 ~~which that~~ made the protest. If a violation is established by the investigation of the department,  
17 appropriate enforcement action ~~shall~~ must be taken. If the investigation proves the protest to have been  
18 without reasonable cause, the department may seek recovery of investigative costs from the person who  
19 made the application."

20  
21 **Section 19.** Section 75-6-112, MCA, is amended to read:

22 **"75-6-112. Prohibited acts.** A person may not:

23 (1) discharge sewage, ~~drainage,~~ industrial waste, or other wastes that will cause pollution of state  
24 waters used by a person for domestic use or as a source for a public water supply system or water or ice  
25 company;

26 (2) discharge sewage, ~~drainage,~~ industrial waste, or other waste into any state waters or on the  
27 banks of any state waters or into any abandoned or operating water well unless the sewage, ~~drainage,~~  
28 industrial waste, or other waste is treated as prescribed by the board;

29 (3) build or operate any railroad, logging road, logging camp, or electric or manufacturing plant of  
30 any kind on any watershed of a public water supply system unless:

1 (a) the water supply is protected from pollution by sanitary precautions prescribed by the board;

2 and

3 (b) a permit has been issued by the department after approval of detailed plans and specifications  
4 for sanitary precautions;

5 (4) commence construction, alteration, or extension of any system of water supply, water  
6 distribution, sewer, ~~drainage~~, wastewater, or sewage disposal before ~~he~~ the person submits to the  
7 department necessary maps, plans, and specifications for its review and the department approves those  
8 maps, plans, and specifications;

9 (5) operate or maintain any public water supply system ~~which~~ that exceeds a maximum  
10 contaminant level established by the board unless ~~he~~ the person has been granted or has an application  
11 pending for a variance or exemption pursuant to this part;

12 (6) violate any provision of this part or a rule adopted under this part; or

13 (7) violate any condition or requirement of an approval issued pursuant to this part."  
14

15 NEW SECTION. **Section 20. Codification instruction.** [Sections 1 through 3] are intended to be  
16 codified as an integral part of Title 75, chapter 5, part 3, and the provisions of Title 75, chapter 5, part 3,  
17 apply to [sections 1 through 3].

18 -END-

STATE OF MONTANA - FISCAL NOTE

Fiscal Note for SB0331, as introduced

DESCRIPTION OF PROPOSED LEGISLATION:

An act generally revising the Montana Water Quality Act (MWQA), and establishing water quality standards; requiring that rules or standards be economically and technologically feasible.

ASSUMPTIONS:

1. The proposed changes to the MWQA and Surface Water Quality Standards would not be acceptable to the Environmental Protection Agency (EPA). The EPA would terminate the Department of Health and Environmental Science's (DHES) agreement for issuance of waste discharge permits under the Federal Clean Water Act. In addition to the EPA requiring a federal permit for all discharges to surface waters, the DHES would still be required to issue permits by the MWQA. The EPA would also adopt water quality standards for Montana, creating two sets of standards for Montana waters.
2. The Governor's Executive Budget, as submitted, provides the basis for determining changes for fiscal impact.
3. Revising the existing water quality standards and nondegradation rules would require one FTE (grade 15) for FY96 only. Normal operating costs, plus an amount for the 11.5% indirect rate and greater than normal travel would be required. Normal office equipment of \$5,000 would be needed.
4. Two FTE (grade 15) would be required for at least 5 years to correct the known misclassifications of Montana waters. An average reclassification action takes approximately 4 months and there are 30 known reclassifications.
5. The EPA would not participate in the costs of re-writing the water standards or the costs of reclassification, and new fees could not be charged. Thus, no new revenue would be generated as a result of this bill.
6. Funding for the above positions would be provided by the state special revenue fund, either from overhead revenues, or if this is insufficient, increased fees.
7. Assume an October 1, 1995 effective date, with FY96 expenditures reflected at 75% of the full year.
7. No water standards stricter than the federal standards would be developed.

(continued)

*David Lewis* 2-14-95  
DAVID LEWIS, BUDGET DIRECTOR      DATE  
Office of Budget and Program Planning

*Sen Tom Beck* 2-14-95  
TOM BECK, PRIMARY SPONSOR      DATE

Fiscal Note for SB0331, as introduced

**SB 331**  
**EXHIBIT D**

FISCAL IMPACT:

Expenditures:

	<u>FY96</u>	<u>FY97</u>
DHES - Water Quality Div.:	<u>Difference</u>	<u>Difference</u>
FTE	3.00	2.00
Personal services	76,300	68,000
Operating expenses	25,300	23,600
Equipment	<u>15,000</u>	<u>0</u>
Total	116,600	91,600

Funding:

State special revenue (02)	116,600	91,600
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LONG-RANGE EFFECTS OF PROPOSED LEGISLATION:

Water dischargers in Montana would be required to have both a state and federal permit, and those affected would be subject to both state and federal surface water quality standards.

TECHNICAL NOTES:

SB330 also requires the re-writing of water quality standards, and one FTE in FY96. If both bills pass, only one FTE would be required.

STATE OF MONTANA - FISCAL NOTE

Fiscal Note for SB0331, reference bill as amended

DESCRIPTION OF PROPOSED LEGISLATION:

act generally revising the Montana Water Quality Act; establishing water quality standards; and requiring that treatment standards be economically, environmentally, and technologically feasible

ASSUMPTIONS:

The Executive Budget present law base serves as the starting point from which to calculate any potential fiscal impact from this proposed legislation.

The bill will be effective upon passage and approval. Assume that the FTE, with related operating and equipment, will not be hired until October 1, 1995.

Development of industrial wastewater system design standards and reviewing waste disposal and treatment systems in compliance with the time-frames required by the revisions to 75-5-403, MCA would require 1.00 FTE.

In order to correct the known misclassifications of Montana waters, 2.00 FTE would be required during the 1997 biennium, and for at least three years beyond. An average reclassification action takes approximately four months and there are 30 known reclassifications.

There would be increased travel costs required. Normal operating costs for the FTE and equipment costs of \$5,000 per FTE would also be needed. The indirect rates applied to the personal services will be 20.9% in FY96 and FY97 (the fiscal note on the introduced bill was too low).

No standards stricter than the federal standards would be developed.

The Environmental Protection Agency (EPA) will not participate in the costs of reclassification or the cost of reviewing waste disposal and treatment plans and no new fees could be charged. Thus, no new revenue would be generated as a result of this bill.

Funding for the above positions would be provided by the state special revenue fund, either from overhead revenues, or if this is insufficient, increased fees.

FISCAL IMPACT:

Expenditures:

	FY96	FY97
	Difference	Difference
FTE	3.00	3.00
Personal Services	76,300	68,000
Operating Expenses	29,700	40,000
Equipment	15,000	0
Total Expenditures	121,000	108,000

Funding:

State Special Revenue (02)	121,000	108,000
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*Dave Lewis* 3.31-95

DAVE LEWIS, BUDGET DIRECTOR DATE  
Office of Budget and Program Planning

*Tom Beck* 3.31.95

TOM BECK, PRIMARY SPONSOR DATE

EXHIBIT D

Fiscal Note for SB0331, reference bill  
as amended

asked Mr. Horpestad if he would comment on that. He said that many of the rivers have been brought up to a higher standard. The Clark Fork and the Yellowstone have improved significantly.

SEN. BROOKE asked if he thought the bill as introduced would go back to the days that would not allow the department to significantly improve waters. Mr. Horpestad said the bill as introduced would have most of the staff of the EPA working on it.

Closing by Sponsor:

SEN. SWYSGOOD said amendments would be offered to the bill, but they were arrived at by the department after the bill was introduced. He said he wasn't sure the amendments would satisfy some of the opponents, but he would hope some of the concerns would be addressed.

HEARING ON SB 331

{Tape: 2; Side: A}

Opening Statement by Sponsor:

SEN. TOM BECK, District No. 28, Deer Lodge, said SB 331 clarifies the Montana Water Quality Act. The purpose of the bill is to clearly define high quality waters, and make the nondegradation process apply to those waters. He said instead of explaining the bill step by step, he will let the experts testify on what they are trying to do with water quality. He said he was not trying to degrade water, but was trying to make drinking water feasible in all areas of the state, from a mine or anything else. He said he had some amendments that were drafted that the department and industry had come to a compromise on.

Proponents' Testimony:

Sandy Stash, Manager of ARCO, said she would like to talk about some of the technical issues that the bill is proposing. The proposal is consistent with EPA policy and what is occurring in other states. Regarding the metals criteria and whether metals should be measured by the dissolved method or the total recoverable method, she referred to a memo from the Office of Water Policy and Technical Guidance of the EPA. A quote from that memo says: "we strongly encourage the application of the Water Effect Ratio (WER) across a watershed or waterbody as opposed to application on a discharger by discharger basis, as a technically sound and an efficient use of resources." EXHIBIT 9.

They found that the dissolved metals were the ones that get into the fish, etc., not the total recoverable. Montana currently uses the total recoverable method and the bill suggests that they go to the dissolved metals. The EPA changed their guidance to states and to date 18 states have made that change. Ms. Stash

reviewed a chart regarding the clean-up in Silver Bow Creek.  
EXHIBIT 10.

The bill suggests what the numbers should be, and how they should be measured and how decisions should be made.

Alan Joscelyn, Golden Sunlight Mine, said the reason the bill was proposed was a need for definitiveness, consistency, and predictability. There are some significant problems in the Water Quality Act with compliance. He said there is an agreement that some of the points raised by the DHES will be addressed in the amendments. With his experience over the last 5 years he said SB 331 was a good bill.

John Bloomquist, Montana Stock Growers Association said they support SB 331. He said the definition of degradation and state waters was addressed in the bill. It recognizes that certain water bodies like ponds, lagoons, or water that has been used up by the land which are not state waters, and would not be subject to the pollution and other definitions that are in the Act. In Section 7, regarding intermittent streams, it doesn't make sense to make those streams that do not support aquatic life subject to water quality standards.

Larry Brown, Morrison/Maierle Environmental Corporation said he wanted to comment on the aspect of risk as it applies to the standards. The bill will give an opportunity for risk levels to be evaluated from a technical perspective.

Don Peoples, Montana Technology Company of Butte, said that he was in favor of SB 331. The bill is a common sense approach to dealing with water quality standards.

Mr. Leavitt, member of the Tri State Information Council, said he supports the changes that SB 331 is trying to make with the definitions of water quality.

Doug Parker, Crown Butte Mines, said that the Water Quality Act was an unworkable law and the changes needed to be made. He reviewed the arsenic changes in water that is proposed in SB 331.  
EXHIBIT 11.

He said he realized the DHES had concerns about the standards that are in the proposed bill, but they will be addressed in the pending amendments and those changes should satisfy the EPA and the department's concerns. The proposed change concerning intermittent streams that is in the bill is also important. He supports SB 331.

Collin Bangs, Montana Association of Realtors, said they have met with the health department and negotiated a change that would allow the use of septic tanks and drain fields in 80%-90% in areas that previously could not. The bill gives the state of



Montana a lot better protection of their water than what they had 2 years ago.

John Youngberg, representing the Montana Farm Bureau Federation, said the questions that would be asked would be about the impact on human health with the standards. He said they have been told that they were the standards from the EPA. SB 331 will not harm human health or aquatic life. He urges the committee's support of the bill.

Jack Lynch, Chief Executive of Butte Silverbow, said with the issue of standards come the compliance and then comes the issue of cost. Butte Silverbow, in an effort to comply with some of the standards, has spent millions of dollars on sewer and landfill. The proposals of SB 331 are reasonable and attainable. He urged the passage of SB 331.

*{Comments: the following proponents did not have time to testify do to the lack of time.}*

Mike Murphy, representing the Montana Water Resources Association, supports SB 331.

Bob Williams, Montana Mining Association, supports SB 331.

Don Allen, Montana Wood Products Association, supports SB 331.

Candace Torgerson, Montana Cattlemens Association, supports SB 331.

THE FOLLOWING WRITTEN TESTIMONY WAS RECEIVED IN SUPPORT OF SB 331:

Pam Willett, Broker/Owner ERA Property Store. EXHIBIT 12.

David Bailey, Kila, Montana. EXHIBIT 13.

Opponents' Testimony:

Hope Stevens, Marysville, asked the committee members to please think carefully about who the people were that were supporting SB 331. They were nearly all large powerful industries. There are a lot of small businesses that employ people that are here to stay because of the high quality of water. Please consider their needs and those of who have children and grandchildren. She said she opposes the bill.

Donald Kern, representing the Citizens' Coalition of Pony, said SB 331 would preclude state water quality standards which were more stringent than federal regulations. SB 331 is a permit to pollute and is a slap in the face to any Montanan who appreciates the clean water supplies. The Berkeley Pit and numerous others remind us of what happens when regulations are not in place. The bill also lowers health standards for arsenic, mercury, copper,



and other heavy metals from mining waste. He said the bill is an attempt to subsidize the mining industries at the expense of the water quality in the streams. He suggested they go elsewhere to conduct their dirty business.

Glenn Marx, Policy Director, Governor Mark Racicot, said the state stands as an opponent to SB 331 as written, but if the department's amendments were adopted, the state would support SB 331. EXHIBIT 15.

Steve Pilcher, Administrator Water Quality Division, DHES, said they rise in opposition to SB 331 in its current form. He recognized and extended his appreciation to the sponsor and the industry representatives. He pointed out that DHES's standards were based on federal guidelines and were approved by the federal Environmental Protection Agency. Mr. Pilcher asked for the support of the amendments that will be offered to the bill. (For further DHES comments to the bill, see EXHIBIT 16.)

Mr. Horpestad gave a visual demonstration of dissolved vs. total recoverable methods for metal parameters. The copper that is settling to the bottom will be available for fish and bugs to eat, and be deposited on stream banks and eventually into the streams in response to thunder storms.

Nick Golder, Rancher, Forsyth, opposes SB 331.

*{Comments: Due to so much noise it was difficult to hear Mr. Golder's testimony and was not clear on the tape}*

Chris Tweeten, Montana Department of Justice, said they manage the Natural Resource Damage Program that was responsible for litigating the lawsuit against ARCO. He said they were seeing an excess of \$600 million in damages in the Clark Fork Valley. If SB 331 is enacted as introduced, it will undercut the scientific basis for the lawsuit that they worked on for 5 years and is now ready to go to trial within 2 years. Mr. Tweeten said the amendments that will be offered will address many of their concerns.

Richard Parks, Northern Plains Resource Council, said they rise in opposition to SB 331. The state may resolve their problems, but not necessarily resolve the public's problems. He said they went through a 2 year process to establish the present rules. There has been a lot of discussion that those rules were unworkable, but there were no facts supporting that. It is disrespectful for the time and the amount of money that had been spent on that process and the people involved in the Board of Health rulemaking process to require them to start all over again.

Jim Jensen, Montana Environmental Information Center, said Page 5, Line 7 the definition "industrial waste" is fine, but the change adds: "The term does not mean materials incorporated or

EXHIBIT D

placed into a structure, facility, or location authorized in a permit issued by a state or federal agency." Suppose the Department of State Lands issued a permit for a mine with a tailings pond. They all leak pollutants but they would not have to get a permit from the health department. The bill says it is legal to place materials in a place where they may cause pollution to the water. He urged the committee to table SB 331.

Becky Garland, Lincoln, said SB 331 is bad for Montanans and opposes the bill.

*{Comments: the following opponents did not get to testify due to the shortage of time.}*

Paul Roos, Fishing Outfitters Association, opposed SB 331.

Joe Gatkoski, Madison Gallatin Alliance composed of 250 members that are opposed to the bill. Please table it.

Debby Smith, Helena Attorney, Sierra Club, opposes the bill.

Brian Kuehl, Great Yellowstone Coalition, opposes the bill and the amendments.

Jim Barrett, Cooke City, Beartooth Alliance, opposes the bill.

Kenneth Knapp, Executive Director, River Action Network, opposes the bill as presently written and any amendments.

Paul Hawks, opposes SB 331.

Laurie Gano, opposes SB 331.

Dave Gano, Melville, Montana. EXHIBIT 14.

*{Comments: the meeting adjourned at 3:00 pm and reconvened upon adjournment of the Senate at 6:30 PM.}*

*{Tape: 2; Side: B}*

Questions From Committee Members and Responses:

SEN. FOSTER asked Mr. Pilcher if there was a law suit between Arco and the State of Montana; and if it had any effect on SB 331. Mr. Pilcher said the lawsuit was not a driving force in their review of SB 331. The concern is whether or not the legislation would have some effect on the departments. SEN. FOSTER asked if the department would favor the bill, would it cause harm to the law suit. Mr. Pilcher said no, the bill or the amendments would not have an adverse impact on the law suit.

SEN. CHRISTIAENS asked Mr. Bangs if he would comment about the sewage disposal issue. Mr. Bangs said the regulations that were passed last session have resulted in outlying septic tanks that had been used for years, required advance treatment systems. He said it cost between five thousand (\$5,000) and ten thousand dollars (\$10,000) more to put in the advance treatment systems. Missoula County does not approve of the advanced treatment system. The problem is the state would require that system and the local counties do not approve the advanced treatment system. There is a huge problem with affordable housing in Montana. The cost of housing in the Missoula area has gone up by 90% in the last 10 years. Therefore, they have to make sure that another five or ten thousand dollars (\$5,000 or \$10,000) is not added to the cost of the individual houses. Mr. Bangs said they feel that they could go back to the regular septic tanks and still protect the water.

SEN. WELDON said if groundwater is contaminated to the standard listed in the bill, and the water is used for drinking water, it says they would be required to shut down the water supply. He asked Mr. Pilcher if he would respond to that. Mr. Pilcher said that the question is should we allow groundwater to reach 10 milligrams per liter, which would be the maximum nitrate level allowable for public health concerns. The DHES has to review subdivisions concerning the sewage and the water. If the department allowed them to degrade the water to the maximum contaminate level, then that subdivision could not be approved because the groundwater that was used for domestic use would be at the maximum level.

CHAIR. GROSFIELD asked Mr. Joscelyn if he could give the committee members some idea of what the amendments would be about. Mr. Joscelyn said that after the bill was drafted there was mutual interests addressed by the DHES and industry that involved several meetings, and some amendments were drafted. There were 45 amendments turned into the EQC for formal drafting. Those amendments were points that came up in discussions about the bill. About 99% of the points addressed were agreed upon. They still disagreed on how parameters should be measured and a couple of other areas.

CHAIR. GROSFIELD said Mr. Tweeten testified on the amendments from the Attorney General's office on the Natural Resource Damage Program. He asked Mr. Collins if he would respond to that. Rob Collins, Chief Counsel, Natural Resource Damage Program, said initially they agreed to oppose the bill, but when industry agreed to make some amendments, some of their opposition was addressed. There was still some concern with the site specific criteria and the method of measurement. He said there would be some additional amendments proposed by the DHES. With the amendments that have been proposed and the DHES proposed amendments, the Department of Justice would support the bill.

**SEN. BROOKE** said Page 12, Lines 9-11 says: "An application is considered complete unless the applicant is notified of a deficiency within the appropriate review period." She asked **Mr. Pilcher** if he thought there would be difficulty in notifying someone within the review period with the staff that they have. He answered that the section she referred to causes considerable problems from the resource standpoint with respect to being able to complete a review within 30 days. The application for some of the projects is lengthy; for example, the 7Up Pete project, it consisted of 27 volumes. To be able to complete a one-time review of an application like that within 30 days was impossible. **SEN. BROOKE** said she had a lot of questions about the bill, but if the amendments address those questions, they would be moot. She asked if Section 13 was amended out of the bill. **Mr. Pilcher** replied that there were amendments that addressed that concern. The initial time-frame will be changed with the amendments.

**SEN. BROOKE** said she had some concern about the Milltown Dam near Missoula. Discussion has gone on for some time now concerning the toxic waste there. She asked **Mr. Pilcher** what the bill would do to address that situation. He responded that in the bill as introduced, he would have some concerns about the water quality there. But with the amendments he did not think the review on that situation would change from what is already in place. The superfund process has to consider alternatives to the remediation plan, but does not believe SB 331 would have anything to do with that decision.

**SEN. KEATING** said the matter of "dissolved" and "totally recoverable" has come up several times. He asked **Ms. Stash** if she could give a scientific explanation why totally recoverable may not be necessary. She said the demonstration **Mr. Horpestad** was the best example of total suspended solids. The solid form was not harmful to fish. She read a quote from the Water Policy and Technical Guidance from the United States Environmental Protection Agency, dated October 1993. See **EXHIBIT 9. Page 2.** That quote says: "...This conclusion regarding metal bioavailability is supported by a majority of the scientific community within and outside the agency. One reason is that a primary mechanism for water column toxicity is absorption at the gill surface which requires metals to be in the dissolved form." Copper is a metal that is immediately dissolved and is bioavailable to the fish and should be protected against. There was some talk about costs of total recoverable vs. dissolved. The difference in the cost of testing those would be about \$12.00 per sample to measure what the correct way would be.

**Ms. Stash** said there was reference made regarding a law suit from an individual company. She questioned whether it was good policy to set policy for an entire state based on a single pending lawsuit. **SEN. KEATING** said the example she referred to was with copper; that the fish could not take them in through their gills because of the size of the chunks.

SEN. KEATING asked Ms. Stash if that applied to all metals. She answered yes it does. She said what makes metals problematic is when they go from metals to a metals salt.

SEN. KEATING said 10 milligrams of nitrate per liter was considered safe until SB 401 was enacted, and was safe for a fetus. Then someone says they would compromise and say 5 milligrams per liter. Why did the department go to 2.5 milligrams per liter and then someone says they would be happy with 5. Mr. Pilcher responded that 10 was a maximum contaminate level and was designed to protect the people consuming that water. He said 10 would be enough of a threat to infants that the water must be protected. It also depends upon the source of the nitrates and other factors. Mr. Pilcher said one level is based on public health and the other is on nondegradation of water.

SEN. KEATING said SB 401 dealt with nondegradation and mixing zones. Nothing was ever said about septic tanks or subdivisions. He said he knew that they were not supposed to degrade the water and public health is supposed to be protected. However, they also have to provide for the public to be able to live some place. When nondegradation levels are unachievable or so expensive, the department has actually made rules against the public. Somewhere there has to be a happy medium for nondegradation, the public, and the protection of public health. He said if he had a septic tank and drain field on his land, it should be his prerogative if he wants to degrade the water regardless of the law. He asked Mr. Pilcher why there wasn't a happy medium that serves all purposes. He replied that when SB 401 was enacted, he could recall many of the same statements that it was a mining industry bill, but Dan Frazer, who was then Chief of the Water Quality Bureau, made it clear that nondegradation could apply to a lot of activities not just mining. He said SEN. KEATING was right that they had to achieve a balance. The department made enough changes to allow continued growth in the State of Montana. Many subdivisions were reviewed and approved with on-site drain fields, so they were not being shut down completely. In areas where the level of nitrates were moving up toward public health standard, the department has asked for advanced treatment. Many subdivisions have been approved with the advanced treatment systems installed, and were working fairly well. The department will revisit that to make sure that they were being reasonable.

SEN. CHRISTIAENS said if there are 45 amendments to the bill, he didn't feel comfortable asking questions, not knowing what the amendments would do to the bill.

CHAIR. GROSFIELD said he had been informed that the amendments would be delivered to the committee by Thursday.

Closing by Sponsor:

SEN. BECK said in the demonstration, the committee members saw the difference between the dissolved metals and recoverable. He said the same metals are in the solid stone as what was dissolved. He said he left it up to the DHES and industry to work out the amendments. There are two amendments that they were not yet in agreement on. He said as Mr. Marx pointed out, one part per billion for carcinogenic standards was pretty severe for industry to try to comply with. Industry wanted to go to one part per ten-thousand and arsenic would be one in one-thousand. SEN. BECK said he would have to talk to the people that drafted the bill before he would make a commitment on that. There has to be some common sense in the law and where does the parameter end regarding drinking water. He said in the beginning he had 10 milligrams of nitrate per liter in the bill, and the people from the Helena Valley asked very strongly for an amendment. They were putting in above ground septic systems that were costing up to ten thousand dollars (\$10,000) as opposed to about twenty-five hundred dollars (\$2,500) for a normal septic system. If the 10 milligram per liter standard had been in there, they could have met the standard. There have been a lot of amendments and compromise on the bill, and industry and the department seem to be working out the problems. SEN. BECK would appreciate the committee giving serious consideration to the amendments to the bill.

*{Tape: 3; Side: A; Comments: there was so much background noise it was nearly impossible to hear the testimony or the tape}*

HEARING ON SB 362Opening Statement by Sponsor:

SEN. LARRY TVEIT, District No. 50, Fairview, said SB 362 is an act exempting certain activities from groundwater permit requirements. The rules adopted by the Board of Health for administration of the Montana Water Quality Act exempt some activities from groundwater requirements. A recent legislative audit performance review pointed out that the statutory authority for agencies other than DHES, gave them some jurisdiction over groundwater protection and was not clear. The report recommended clarifying in statute the authority of DHES to grant exemptions by referral to other permitting agencies for groundwater protection. In the alternative, the report recommended eliminating the exemptions that created the double permitting process.

Proponents' Testimony:

Gail Abercrombie, Executive Director, Montana Petroleum Association, said she attended meeting reviewing the audit of the

MONTANA SENATE  
1995 LEGISLATURE  
NATURAL RESOURCES COMMITTEE

ROLL CALL

DATE \_\_\_\_\_

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MISSOULA CITY-COUNTY HEALTH DEPARTMENT  
301 WEST ALDER ST  
MISSOULA MT 59802-4123

(406) 523-4755  
SENATE NATURAL RESOURCES  
EXHIBIT NO. 8  
DATE 2-13-95  
BILL NO. SB-330 + 331

TESTIMONY CONCERNING SENATE BILL 331

February 13, 1995

Senate Natural Resources Committee  
Senator Grosfield, Chairman  
Montana Legislature  
Helena MT 59620

Mr Chairman, members of the committee.

My name is Jim Carlson, Director of the Environmental Health Division, Missoula City-County Health Department.

I wish to oppose Senate Bill 331 for the following reasons:

Senate Bill 331 is a major restructuring of the State Clean Water Act.

- It weakens the criteria for public exposure to carcinogens to level much less stringent than most states.
- The changes in the definition of degradation would require a complete revision of the non-degradation rules, which are only a few months old, at considerable expense to the State of Montana.
- It would weaken the nitrate standard for non-degradation in groundwater at the drinking water standard. That means that it would be legal for a source to contaminate groundwater to the point that the Federal drinking water Standard would be violated. If that groundwater was used as a public drinking water supply, we would be required to shut down the drinking water supply due to violation of the public health standard.

The non-degradation requirements must serve to protect our groundwaters as a viable source of drinking water. In Missoula groundwater is our sole source of drinking water.

It is our understanding that there are a number of amendments proposed for this bill. We have not seen these amendments. We would request that the committee rehear the bill after these amendments have been made incorporated to ensure that the public has the opportunity to comment and help fine tune the bill before it is passed on to the Senate.

In summary, we stand in opposition to this bill which weakens the State Clean Water Act as to prevent adequate protection of public resources and public health.

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ENSR FORT COLLINS

FAX 303-493-8935

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To: <i>Chuck Stilwell</i>	From: <i>Bill Stultsfield</i>
Co.	Co.
Dept.	Phone #
Fax #	Fax #

DATE *2-13-95*  
 BILL NO *SB-33* *FF*  
*10-26*

OCT 1 1993

OFFICE OF  
WATERMEMORANDUM

SUBJECT: Office of Water Policy and Technical Guidance on Interpretation and Implementation of Aquatic Life Metals Criteria

FROM: Martha G. Prothro *Martha G. Prothro*  
 Acting Assistant Administrator for Water

TO: Water Management Division Directors  
 Environmental Services Division Directors  
 Regions I-X

Introduction

The implementation of metals criteria is complex due to the site-specific nature of metals toxicity. We have undertaken a number of activities to develop guidance in this area, notably the Interim Metals Guidance, published May 1992, and a public meeting of experts held in Annapolis, MD, in January 1993. This memorandum transmits Office of Water (OW) policy and guidance on the interpretation and implementation of aquatic life criteria for the management of metals and supplements my April 1, 1993, memorandum on the same subject. The issue covers a number of areas including the expression of aquatic life criteria: total maximum daily loads (TMDLs), permits, effluent monitoring, and compliance; and ambient monitoring. The memorandum covers each in turn. Attached to this policy memorandum are three guidance documents with additional technical details. They are: Guidance Document on Expression of Aquatic Life Criteria as Dissolved Criteria (Attachment #2), Guidance Document on Dynamic Modeling and Translators (Attachment #3), and Guidance Document on Monitoring (Attachment #4). These will be supplemented as additional data become available. (See the schedule in Attachment #1.)

Since metals toxicity is significantly affected by site-specific factors, it presents a number of programmatic challenges. Factors that must be considered in the management of metals in the aquatic environment include: toxicity specific to effluent chemistry; toxicity specific to ambient water chemistry; different patterns of toxicity for different metals; evolution of the state of the science of metals toxicity, fate, and transport; resource limitations for monitoring, analysis, implementation, and research functions; concerns regarding some of the analytical data currently on record due to possible sampling and analytical contamination; and lack of standardized protocols for clean and ultraclean metals analysis. The States have the key role in the risk management process of balancing these factors in the management of water programs. The site-specific nature of this issue could be perceived as requiring a permit-by-permit approach to implementation. However, we believe

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that this guidance can be effectively implemented on a broader level, across any waters with roughly the same physical and chemical characteristics, and recommend that we work with the States with that perspective in mind.

#### Expression of Aquatic Life Criteria

##### a) Dissolved vs. Total Recoverable Metal

A major issue is whether, and how, to use dissolved metal concentrations ("dissolved metal") or total recoverable metal concentrations ("total recoverable metal") in setting State water quality standards. In the past, States have used both approaches when applying the same Environmental Protection Agency (EPA) criteria numbers. Some older criteria documents may have facilitated these different approaches to interpretation of the criteria because the documents were somewhat equivocal with regards to analytical methods. The May 1992 interim guidance continued the policy that either approach was acceptable.

It is now the policy of the Office of Water that the use of dissolved metal to set and measure compliance with water quality standards is the recommended approach, because dissolved metal more closely approximates the bioavailable fraction of metal in the water column than does total recoverable metal. This conclusion regarding metals bioavailability is supported by a majority of the scientific community within and outside the Agency. One reason is that a primary mechanism for water column toxicity is adsorption at the gill surface which requires metals to be in the dissolved form.

The position that the dissolved metals approach is more accurate has been questioned because it neglects the possible toxicity of particulate metal. It is true that some studies have indicated that particulate metals appear to contribute to the toxicity of metals, perhaps because of factors such as desorption of metals at the gill surface, but these same studies indicate the toxicity of particulate metal is substantially less than that of dissolved metal.

Furthermore, any error incurred from excluding the contribution of particulate metal will generally be compensated by other factors which make criteria conservative. For example, metals in toxicity tests are added as simple salts to relatively clean water. Due to the likely presence of a significant concentration of metals binding agents in many discharges and ambient waters, metals in toxicity tests would generally be expected to be more bioavailable than metals in discharges or in ambient waters.

If total recoverable metal is used for the purpose of water quality standards, compounding of factors due to the lower bioavailability of particulate metal and lower bioavailability of metals as they are discharged may result in a conservative water quality standard. The use of dissolved metal in water quality standards gives a more accurate result. However, the majority of the participants at the Annapolis meeting felt that total recoverable measurements in ambient water had some value, and that exceedences of criteria on a total recoverable basis were an indication that metal loadings could be a stress to the ecosystem, particularly in locations other than the water column.

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EXHIBIT NO. 9DATE 2-18-95BILL NO. SB-281

The reasons for the potential consideration of total recoverable measurements include risk management considerations not covered by evaluation of water column toxicity. The ambient water quality criteria are neither designed nor intended to protect sediments, or to prevent effects due to food webs containing sediment dwelling organisms. A risk manager, however, may consider sediments and food chain effects and may decide to take a conservative approach for metals, considering that metals are very persistent chemicals. This conservative approach could include the use of total recoverable metal in water quality standards. However, since consideration of sediment impacts is not incorporated into the criteria methodology, the degree of conservatism inherent in the total recoverable approach is unknown. The uncertainty of metal impacts in sediments stem from the lack of sediment criteria and an imprecise understanding of the fate and transport of metals. EPA will continue to pursue research and other activities to close these knowledge gaps.

Until the scientific uncertainties are better resolved, a range of different risk management decisions can be justified. EPA recommends that State water quality standards be based on dissolved metal. (See the paragraph below and the attached guidance for technical details on developing dissolved criteria.) EPA will also approve a State risk management decision to adopt standards based on total recoverable metal, if those standards are otherwise approvable as a matter of law.

#### o Dissolved Criteria

In the toxicity tests used to develop EPA metals criteria for aquatic life, some fraction of the metal is dissolved while some fraction is bound to particulate matter. The present criteria were developed using total recoverable metal measurements or measures expected to give equivalent results in toxicity tests, and are articulated as total recoverable. Therefore, in order to express the EPA criteria as dissolved, a total recoverable to dissolved correction factor must be used. Attachment #2 provides guidance for calculating EPA dissolved criteria from the published total recoverable criteria. The data expressed as percentage metal dissolved are presented as recommended values and ranges. However, the choice within ranges is a State risk management decision. We have recently supplemented the data for copper and are proceeding to further supplement the data for copper and other metals. As testing is completed, we will make this information available and this is expected to reduce the magnitude of the ranges for some of the conversion factors provided. We also strongly encourage the application of dissolved criteria across a watershed or waterbody, as technically sound and the best use of resources.

#### o Site-Specific Criteria Modifications

While the above methods will correct some site-specific factors affecting metals toxicity, further refinements are possible. EPA has issued guidance (Water Quality Standards Handbook, 1983; Guidelines for Deriving Numerical Aquatic Site-Specific Water Quality Criteria by Modifying National Criteria, EPA-600/3-H4-099, October 1984) for three site-specific criteria development methodologies: recalculation procedure, indicator species procedure (also known as the water-effect ratio (WER)) and resident species procedure. Only the first two of these have been widely used.

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SENATE NATURAL RESOURCES

EXHIBIT NO. 9DATE 2-13-95BILL NO. SB-331

In the National Toxics Rule (57 FR 60848, December 22, 1992), EPA identified the WER as an optional method for site-specific criteria development for certain metals. EPA committed in the NTR preamble to provide guidance on determining the WER. A draft of this guidance has been circulated to the States and Regions for review and comment. As justified by water characteristics and as recommended by the WER guidance, we strongly encourage the application of the WER across a watershed or waterbody as opposed to application on a discharger by discharger basis, as technically sound and an efficient use of resources.

In order to meet current needs, but allow for changes suggested by protocol users, EPA will issue the guidance as "interim." EPA will accept WERs developed using this guidance, as well as by using other scientifically defensible protocols. (OW expects the interim WER guidance will be issued in the next two months.

Total Maximum Daily Loads (TMDLs) and National Pollutant Discharge Elimination System (NPDES) Permits

o Dynamic Water Quality Modeling

Although not specifically part of the reassessment of water quality criteria for metals, dynamic or probabilistic models are another useful tool for implementing water quality criteria, especially for those criteria protecting aquatic life. These models provide another way to incorporate site-specific data. The 1991 Technical Support Document for Water Quality-based Toxics Control (TSD) (EPA/505/2-90-001) describes dynamic, as well as static (steady-state) models. Dynamic models make the best use of the specified magnitude, duration, and frequency of water quality criteria and, therefore, provide a more accurate representation of the probability that a water quality standard exceedence will occur. In contrast, steady-state models make a number of simplifying, worst case assumptions which makes them less complex and less accurate than dynamic models.

Dynamic models have received increased attention over the last few years as a result of the widespread belief that steady-state modeling is over-conservative due to environmentally conservative dilution assumptions. This belief has led to the misconception that dynamic models will always lead to less stringent regulatory controls (e.g., NPDES effluent limits) than steady-state models, which is not true in every application of dynamic models. EPA considers dynamic models to be a more accurate approach to implementing water quality criteria and continues to recommend their use. Dynamic modeling does require commitment of resources to develop appropriate data. (See Attachment #3 and the TSD for details on the use of dynamic models.)

o Dissolved-Total Metal Translators

Expressing water quality criteria as the dissolved form of a metal poses a need to be able to translate from dissolved metal to total recoverable metal for TMDLs and NPDES permits. TMDLs for metals must be able to calculate: (1) dissolved metal in order to ascertain attainment of water quality standards, and (2) total recoverable metal in order to achieve mass balance necessary for permitting purposes.

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PERMITS NATURAL RESOURCES  
PERMIT NO. 9  
DATE 2-13-95  
EPA NO. SB-231

EPA's NPDES regulations require that limits of metals in permits be stated as total recoverable in most cases (see 40 CFR §122.45(c)) except when an effluent guideline specifies the limitation in another form or the metal. The approved analytical methods measure only dissolved metal, or the permit writer expresses a metals limit in another form (e.g., dissolved, valent, or total) when required to carry out provisions of the Clean Water Act. This is because the chemical conditions in ambient waters frequently differ substantially from those in the effluent, and there is no assurance that effluent particulate metal would not dissolve after discharge. The NPDES rule does not require that State water quality standards be expressed as total recoverable; rather, the rule requires permit writers to translate between different metal forms in the calculation of the permit limit so that a total recoverable limit can be established. Both the TMDL and NPDES uses of water quality criteria require the ability to translate between dissolved metal and total recoverable metal. Attachment #3 provides methods for this translation.

#### Guidance on Monitoring

##### o Use of Clean Sampling and Analytical Techniques

In assessing waterbodies to determine the potential for toxicity problems due to metals, the quality of the data used is an important issue. Metals data are used to determine attainment status for water quality standards, discern trends in water quality, estimate background loads for TMDLs, calibrate fate and transport models, estimate effluent concentrations (including effluent variability), assess permit compliance, and conduct research. The quality of trace level metal data, especially below 1 ppb, may be compromised due to contamination of samples during collection, preparation, storage, and analysis. Depending on the level of metal present, the use of "clean" and "ultraclean" techniques for sampling and analysis may be critical to accurate data for implementation of aquatic life criteria for metals.

The magnitude of the contamination problem increases as the ambient and effluent metal concentration decreases and, therefore, problems are more likely in ambient measurements. "Clean" techniques refer to those requirements (or practices for sample collection and handling) necessary to produce reliable analytical data in the part per billion (ppb) range. "Ultraclean" techniques refer to those requirements or practices necessary to produce reliable analytical data in the part per trillion (ppt) range. Because typical concentrations of metals in surface waters and effluents vary from one metal to another, the effect of contamination on the quality of metals monitoring data varies appreciably.

We plan to develop protocols on the use of clean and ultra-clean techniques and are coordinating with the United States Geological Survey (USGS) on this project, because USGS has been doing work on these techniques for some time, especially the sampling procedures. We anticipate that our draft protocols for clean techniques will be available in late calendar year 1993. The development of comparable protocols for ultra-clean techniques is underway and will be available in 1995. In developing these protocols, we will consider the costs of these techniques and will give guidance as to the situations where their use is necessary. Appendix B to the WER guidance document provides some general guidance on the use of



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## SENATE NATURAL RESOURCES

EXHIBIT NO. 9.DATE 2-12-95BILL NO. SB-231

clean analytical techniques. (See Attachment #4.) We recommend that this guidance be used by States and Regions as an interim step, while the clean and ultra-clean protocols are being developed.

#### Use of Historical Data

The concerns about metals sampling and analysis discussed above raise corresponding concerns about the validity of historical data. Data on effluent and ambient metal concentrations are collected by a variety of organizations including Federal agencies (e.g., EPA, USGS), State pollution control agencies and health departments, local government agencies, municipalities, industrial dischargers, researchers, and others. The data are collected for a variety of purposes as discussed above.

Concern about the reliability of the sample collection and analysis procedures is greatest where they have been used to monitor very low level metal concentrations. Specifically, studies have shown data sets with contamination problems during sample collection and laboratory analysis, that have resulted in inaccurate measurements. For example, in developing a TMDL for New York Harbor, some historical ambient data showed extensive metals problems in the harbor, while other historical ambient data showed only limited metals problems. Careful resampling and analysis in 1992/1993 showed the latter view was correct. The key to producing accurate data is appropriate quality assurance (QA) and quality control (QC) procedures. We believe that most historical data for metals, collected and analyzed with appropriate QA and QC at levels of 1 ppb or higher, are reliable. The data used in development of EPA criteria are also considered reliable, both because they meet the above test and because the toxicity test solutions are created by adding known amounts of metals.

With respect to effluent monitoring reported by an NPDES permittee, the permittee is responsible for collecting and reporting quality data on a Discharge Monitoring Report (DMR). Permitting authorities should continue to consider the information reported to be true, accurate, and complete as certified by the permittee. Where the permittee becomes aware of new information specific to the effluent discharge that questions the quality of previously submitted DMR data, the permittee must promptly submit that information to the permitting authority. The permitting authority will consider all information submitted by the permittee in determining appropriate enforcement responses to monitoring/reporting and effluent violations. (See Attachment #4 for additional details.)

#### Summary

The management of metals in the aquatic environment is complex. The science supporting our technical and regulatory programs is sound and is based on the best available data. The policy and guidance outlined above represent the position of OW and should be incorporated into ongoing program operations. We do not expect that ongoing operations would be delayed or deferred because of this guidance.

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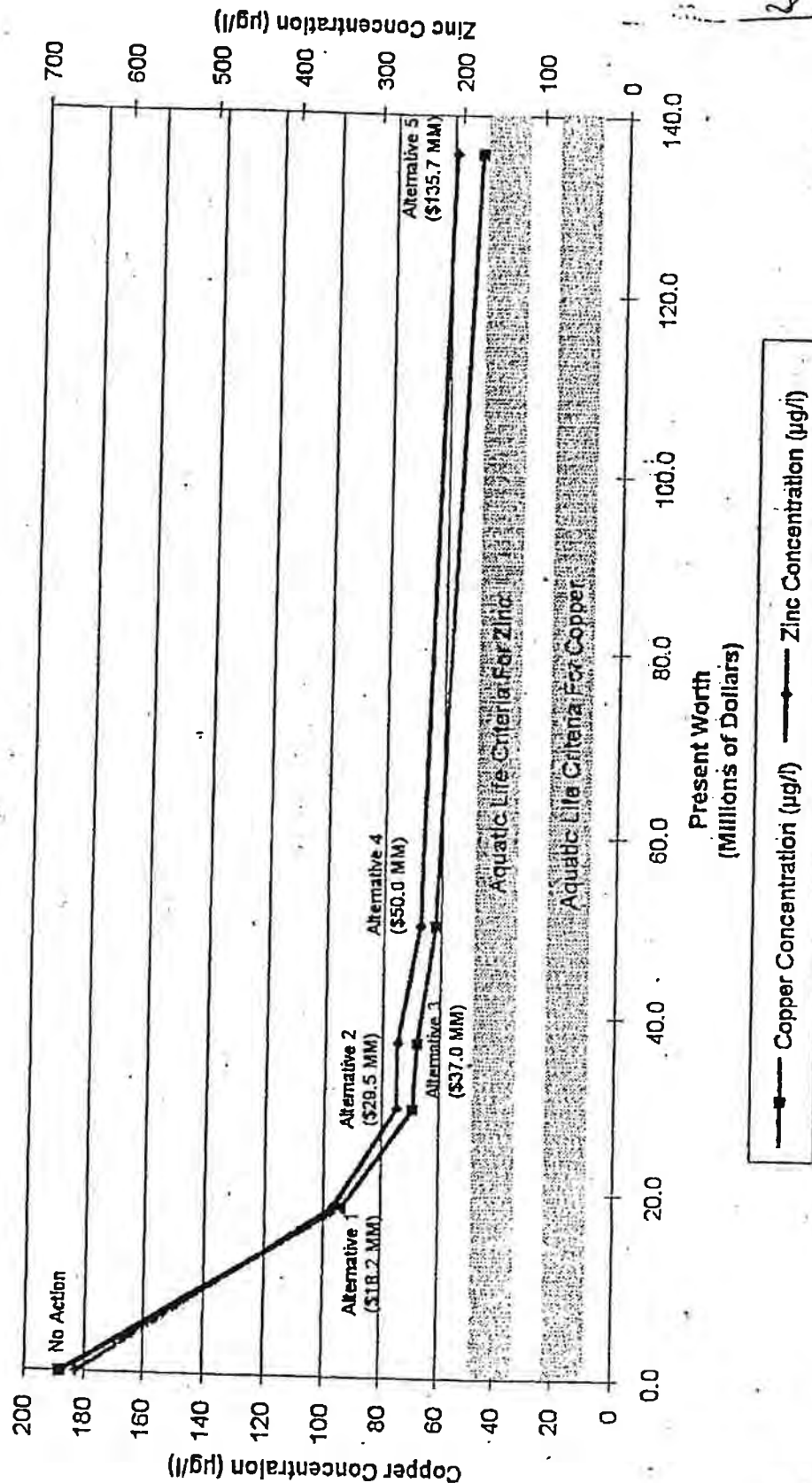
## CEMATE NATURAL RESOURCES

EXHIBIT NO. 9DATE 2-13-95BILL NO. SB-931

If you have questions concerning this guidance, please contact Jim Hanlon, Acting Director, Office of Science and Technology, at 202-260-5400. If you have questions on specific details of the guidance, please contact the appropriate OW Branch Chief. The Branch Chiefs responsible for the various areas of the water quality program are: Bob April (202-260-6372, water quality criteria), Elizabeth Fellows (202-260-7046, monitoring and data issues), Russ Kinerson (202-260-1330, modeling and translators), Don Brady (202-260-7074, Total Maximum Daily Loads), Sheila Frace (202-260-9537, permits), Dave Sabock (202-260-1315, water quality standards), Bill Telliard (202-260-7134, analytical methods) and Dave Lyons (202-260-8310, enforcement).

## Attachments

# RESIDUAL COPPER AND ZINC CONCENTRATIONS IN SILVER BOW CREEK FOR EE/CA RESPONSE ALTERNATIVES



CLIMATE NATURAL RESOURCES

10

2-13-95

23-331



## ARSENIC WATER QUALITY STANDARDS

2<sup>12</sup>

CURRENT MONTANA & EPA  
DRINKING WATER STANDARD

0.05 ppm

CHRONIC AQUATIC VALUE  
TO PROTECT FISH &  
AQUATIC LIFE

0.19 ppm

CURRENT MONTANA HUMAN  
HEALTH STANDARD

0.000018 ppm

PROPOSED 10<sup>3</sup> HEALTH  
RISK BASED STANDARD

0.02 ppm

AVERAGE ARSENIC 1992  
MISSOURI RIVER AT TOSTON

0.024 ppm



SENATE NATURAL RESOURCES

EXHIBIT NO. 12

DATE 2-12-95

BILL NO. SB-331

ERA® PROPERTY STORE

2-13

SENATOR LARRY J. TVEIT  
NATURAL RESOURCES DEPT.  
HELENA, MT

I URGE YOU TO VOTE IN FAVOR OF  
SENATE BILL 331.  
THANK YOU.

PAM WILLETT  
BROKER/OWNER

SENATE NATURAL RESOURCES

EXHIBIT NO. 12DATE 2-13-96BILL NO. SB-331

TO: SENATORS

LARRY TUGIT

LORENTS GROSFIELD

VIVIAN BROOKE

RE: SENATE Bill 331

PLEASE SUPPORT SB 331! Recent  
legislation HAS MADE IT ALMOST IMPOSSIBLE  
TO INSTALL A SEPTIC SYSTEM IN MUCH OF  
RURAL MT. A MAJOR BLOW TO AFFORDABLE HOUSING  
AND OUR RURAL RESIDENTS IN GENERAL!  
WE SHOULD NOT HOLD RURAL TAXPAYERS  
TO STANDARDS WHICH ARE HIGHER THAN  
THOSE OF RESIDENTS ON MUNICIPAL SEWER  
SYSTEMS. LET'S BE FAIR.

EXHIBIT D

HM # 755 3965

By way of introduction, my I'm a blacksmith, and raise bees & cattle with my family. We live on Tony Crik, east of Melville, in Sweet Grass county and I am not a political activist. I am currently serving as Vice-chair of Cottonwood Resource Council, which is one of several political action groups in Sweet Grass County. How a non-political activist is currently Vice-chair of a citizen's action group is kind of a funny story which I won't go into. I attend meetings, I write letters, read newsletters, study draft legislation, make phone calls, and occasionally travel to Helena to try to make a voice for what I believe in. The reason I'm not a political activist is because I have no faith in politics - less so, now, than I did when I first became involved with CRC and really began trying to educate myself, politically. Personally, I'm convinced that the only real hope we have for ourselves and Creation is Spiritual, and just as soon as I get my own unruly self into line, the rest of you might hear more from me on the subject, but, judging by my current progress, I won't be in a position to preach to anyone in this lifetime. All the same, Spirit is the reason I'm here - or, rather there - or, actually.... not there. The reason I'm not there is because I'm calving (not me, but our cows you understand). The reason I'm involving myself in this process (against my preference and my nature), the reason I look like a political activist when I'm not, the reason I am sometimes mistaken for the blankety blank environmentalist that everybody is afraid of and the reason I'm submitting this &

In exchange for the gift of ~~FINITE NATURAL RESOURCES~~ <sup>EXHIBIT NO. 14</sup> Her Creativity, I am obligated to show the utmost respect <sup>DATE 2-18-95</sup> for Her Creation, and to do my best to love and care <sup>CASE NO. 93-1331</sup> for it, to be a Good Steward, to be a Good Husbandman. I do always want to do it, and often when I try, I disappoint myself, but I don't really have a choice. I have to keep trying.

Technology and the Law are not my gods. I obey the law (almost always), and I respect technology, but they are both very limited systems in the overall scheme of things. Technology, like Statistics, can be made to argue any point of view, and is often called upon to argue opposing points of view! And, as the Law.... having personally made repeated and determined assaults on stacks of legal documents, I am convinced that Legal Language is the province of a tribe of demons, related directly to the band behind the Internal Revenue Service, who work in the dark hours to cast Stupefying Spells to discourage anyone who hasn't been initiated from peering into their Domain!

You all must work within that realm. That prompts my admiration and, at the same time, arouses my suspicions! While you may be comfortable with the Law, you may understand "Legaleeze", you may even love it, I suggest that the Law's purpose is to serve Life, and not the other way around. That's why my voice is as valid as legal or technological testimony.... Because the real issue is always one of Balance - critical, and maybe impossible to maintain. EXHIBIT D

Water is out of balance. We've taken it so



that it's no surprise that our catching up with us. Those of enough to live in Montana are luckier than most of us in this country. We still have relatively good water, but that's no reason for complacency. This is not a time to take further liberties. We are obligated, as good stewards, to safeguard what we are blessed with, and if that means all of us, I guess we better start doing whatever it's going to take.

Ranchers are notoriously independent, as a group - which we aren't, because we can never agree on anything, and we don't like crowds! We live and work alone, a lot, and are regularly confronted by situations that nobody else can, or will, deal with. The life fosters and encourages independence so we don't even like the notion of somebody else telling us what we can or can't, should or shouldn't do - not the blankety-blank bureaucrats and not the blankety blank environmentalists, either, but if we are all part of the problem, then we all have to be part of the solution, or there will be no solution. Ultimately, it is in our own best interest.

I have never met a person who I thought was who claimed that quality for his or her self. Any who tells me he is wise has just disqualified himself, in my book. If he was really wise, he'd be wise enough to keep his mouth shut about it. So the self-proclaimed wise, reveal themselves to me as fools. Intelligent? Probably. Brilliant? Exhibitedly. I don't think so - just another fool, and fools I

CLIMATE NATURAL RESOURCES  
USE IT NOW, LOSE IT!  
DATE 2/8-93  
BILL NO. SB-331

I can remember. That's why I don't argue facts, figures, and logic. The truth about that stuff is that it's just what we use to try to make our own point of view look real. But, more than that, I can't keep track of things like that - I just don't work that way! So, if my testimony seems foolish to you, that may be entirely appropriate. At least I've said my say and I thank you for the opportunity. In closing, I'll leave you with the question of what you think is more straight forward a load of horse manure that admits it came from a horse, or a load of manure that presumes itself to be wise!

Dave Gano  
Melville, MT

Senate Natural Resources Committee

Monday, February 13, 1995

Testimony on Senate Bill 331

Glenn Marx, Policy Director, Governor Racicot's Office

Mr. Chairman, for the record I'm Glenn Marx and I serve as policy director for Governor Marc Racicot.

As you've heard from some of the proponents of this bill, during the last two weeks the sponsor of the SB 331, mining industry representatives and management and staff at the Department of Health and Environmental Sciences have been meeting in an attempt to reach technical and procedural agreements regarding the contents of this bill.

Those discussions have been largely successful, and the governor offers his sincere appreciation to the sponsors of this bill and the department for the "good faith" cooperative approach on this bill. Had the industry decided to rush forward with its absolute legislative wish list, it would have touched off the kind of useless and wasteful environmental emotional holy war that nobody wins. The lengthy discussions between industry and the department were productive in that, from the State's standpoint at least, such a war is not necessary. But it appears we can't get by without at least a factual skirmish.

It is also worth pointing out the original version of this bill would have probably resulted in the loss of water quality primacy for the state. This new version of the bill abolishes that aspect of discussion and allows us to scale the debate back to what I'm sure will be a stimulating discussion focused in part on risk assessment.

Yes, risk assessment is one key area of disagreement. But this is a legitimate area of dispute, an area which merits a public policy focus, and therefore an area which deserves serious legislative examination. The Governor respects the position of industry in seeking to retain and expand job opportunities in Montana, and respects the department obligation of environmental regulation to protect public health and aquatic life. Neither focus, of course, is exclusive. Industry does demonstrate environmental stewardship, and the department does recognize that people must live and work in this state, and that the actions of people impact water quality.

The department will follow me and offer specific language for a handful of amendments which address the State's concerns. As an introduction to those amendments, and as a framework for policy discussion of two critical areas, let me provide some background information on the Governor's approach to this bill and water quality protection.

The State of Montana has a legal and constitutional obligation to protect public health. Every comment made by me the department



must be filtered through that obligatory screen. And not only does that public health screen determine regulatory actions here and now, but it must also provide a baseline of protection for environmental consequences unknown or uncertain now, and only felt in the near or distant future. That regulatory baseline can be described in one word: prevention.

This emphasis on prevention serves as the basis for two key policy amendments to SB 331. These amendments center on Section 2 of the bill, and relate to one, the publicly-accepted public health risk for cancer-causing agents...and two, a procedurally-sound way to measure metals in streams. Prevention and caution, constrained by real-world realities, form the basis of virtually every amendment the State proposes.

Right now in Montana, the acceptable risk of contracting cancer through water-borne pollutants is one in one-million. That standard is set in both law and rule. This bill proposes to change that risk threshold to one in ten-thousand for all cancer-causing agents except arsenic, which would be one in one-thousand.

Montana, like most western states, has a high rate of natural arsenic and Montana's policies must reflect that natural arsenic rate. Yet standards should be, must be, and will be, set. And because of the State's fundamental obligation of true health risk prevention, we propose to modify both the existing legal standards and the proposed changed standards suggested in this bill. From a scientific and public health standpoint, the State believes it is safe to lower the cancer-causing agent threshold from one in one-million to one in one hundred thousand. That figure should be compared to your risk of dying in a car wreck, which is one in sixty-five. Roughly half the states in the nation have adopted the one in one hundred thousand cancer risk level from water-borne pollutants.

Arsenic presents a separate challenge, and is a separate issue. The state believes public health would still be protected by lowering the arsenic threshold to one in one thousand. Thus, in this case, we concur with the sponsor's amendments.

Agreeing to lower a standard is not an easy decision to make. Keep in mind this new rate would be set at about 18 parts per billion, which is detectable and is approximately the naturally occurring rate of arsenic in Montana. The drinking water standard for arsenic is 50 parts per billion, which means the proposed level of 18 parts per billion is more than twice as stringent as the drinking water standard.

The State does not believe we in any way compromise public health by proposing this risk threshold. And we reserve the right to aggressively move to modify this established risk threshold with the advent of any new available scientific information.

It should be pointed out that establishing a risk threshold

is not nearly as tidy, nor precise, as convicting a criminal. Science is continually evolving, technology is constantly improving, and new debates are perpetually stirred. Acceptable risk levels of cancer-causing agents is invariably not a sheer scientific decision nor a strictly government decision but is in fact a public policy decision based upon public's tolerance for -- and acceptance of -- risk. It is appropriate that the Legislature, as representatives of the people of Montana, make a public policy decision -- with full public comment -- based upon the best information available. In fact, this is the exact public process EPA wants states to follow in establishing risk levels. The DHES will assist you in any way possible, and the State has provided a risk recommendation based upon what we see through the filter of public health protection.

The second serious policy issue in the bill is the question of what process is used to count impurities in the water. Should the state measure only dissolved metals in the water or should the state measure the total recoverable metals?

The State believes measurement should be consistent and expansive to make sure we quantify actual parameters of everything we can, in fact, quantify. That is, it seems to us, the only true test of actual water quality. When you are on a diet, you have to count every calorie, because every calorie contributes to weight gain. When you protect water, you have to count every impurity, because every impurity contributes to water degradation. I'm sure the department will have a more scientific example of why the State proposes an amendment to this aspect of SB 331. But simply put, water quality protection should be inclusive, not exclusive.

Mr. Chairman, while the State stands as an opponent to this bill, it does so recognizing the tremendous amount of work by the sponsor and the department which preceded this hearing. We also recognize there are only a couple significant areas of policy dispute and a few other procedural disputes embodied in the bill. But the basic obligation to protect public health and err on the side of prevention compels the State to take this posture. Should the department's amendments be adopted, the State would be in support this bill.

Thank you for the opportunity to testify.

## SENATE BILL 331

## TESTIMONY

## DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES

**Steven L. Pilcher, Administrator  
Water Quality Division**

The Department of Health and Environmental Sciences appears before you today in opposition to SB 331 in the introduced form. Let me begin by recognizing the substantive amendments being offered by the sponsor. The water quality division has been working with industry representatives on these proposed amendments for some time and we appreciate the opportunity to discuss and resolve many of the concerns and issues of the bill. Mr. Marx, on behalf of Governor Racicot has provided an excellent summary of our position on the bill and I would like to follow with more technically based testimony on several provisions of the bill.

Section 1 seeks to restrict the ability of the board to adopt standards which are more stringent than federal standards by requiring significant findings and justification. I would point out that our standards are based on federal guidelines and are submitted to and approved by the Federal Environmental Protection Agency with the important exception of ground water standards. There are no federal guidelines or standards for ground water. This provision would limit our ability to adopt technology based treatment requirements when EPA has failed to do so.

Section 2 proposes water quality standards that would not meet federal guidance and would not be approved by EPA. If these standards are approved, EPA would move to adopt our current standards creating a duplicate standard system. They would also likely terminate our delegation agreement for the issuance of waste discharge permits under Federal law resulting in the need for two permits for each facility discharging wastes to state waters.

The proposed amendments would delete this section to eliminate the risks of federal assumption of these programs but would incorporate, in a different section, legislatively mandated risk levels for human carcinogens. The proposed levels are one excess case of cancer per 10,000 (10-4) people for all carcinogens except arsenic where the risk level would be one excess case per 1,000 people (or 10-6) or about 18 parts per billion. The arsenic limit for drinking water is 50 parts per billion or a risk level of about one excess case per 750 people.

The risk level in our present standards is one excess case per million people (10-6) and is the risk level adopted by about one half of the states. The remaining states have adopted a risk level of one in one hundred thousand people (10-5). For comparative purposes the risk of death due to; a motor vehicle accident is 1 in 65, falls 1 in 186, and for home accidents it is 1 in 130 people.

Section 2 also contains a requirement that standards for metals be based on the dissolved method of analyses. Although use of the dissolved method of analyses for standards has been approved in some states we must oppose this change for the following reasons:

- ♦ all of our current standards were developed using total recoverable methods of analyses.

- ♦ Although the EPA will accept standards based on the dissolved method of analyses EPA requires that discharge limits for permits be based on the total recoverable method of analyses. Thus, instream compliance monitoring would require both types of analyses.

- ♦ The dissolved method of analysis requires filtering the samples in the field. Such filtering is very difficult in freezing weather and is much more expensive and prone to error than is the total recoverable method.

- ♦ The dissolved method of analyses does not measure all of the pollutants present. We would like to provide a quick demonstration that illustrates our concern.

- Most of the water quality data that exists in the data files is based on the total recoverable method and this data will not be comparable to new data based on the dissolved method.

Section 3 provides that the board shall adopt site specific standards. While this is a good concept, we are concerned that site specific standards reflect the impact of all routes of exposure to contaminants. There are cases where significant toxicity may be caused by fish ingesting contaminated sediment or bugs.

Section 4 proposes to modify a number of definitions. The proposed change in the definition of "Degradation" would require a complete revision of the nondegradation rules.

The proposed amendments to this definition will require relatively minor changes to the rules.

The proposed changes in the definitions of "Industrial" and "Other wastes" would remove the permitting requirements for these structures.

The proposed amendments delete these changes.

The proposed change to the definition of "State Waters" is not compatible with the fact that all waters belong to all of the people and that these waters deserve protection under the provisions of the water quality act.

The proposed amendments provide that ponds or lagoons used solely for treating, transporting or impounding pollutants are not state waters and is acceptable to the Department.

Section 5 requires coordination of our permitting process with that of other state agencies. While we now attempt to coordinate those functions, we welcome the specific legislative directive.

Section 7 directs us to establish a classification for intermittent or ephemeral streams and we agree with this need. The proposed amendment would be of value to the Department. We are, however, concerned with the proposed changes to 75-5-301(2) which require that standards be "cost-effective and economically and technologically feasible". While this condition is appropriate for establishment of treatment standards, it is inappropriate for water quality standards. Water quality standards must be set at levels that are protective of the beneficial uses. The language as proposed would result in federal promulgation of standards for Montana.

The proposed amendments would delete this change.

The proposed changes requiring that nitrate concentrations in ground water of less than 10 milligrams per liter be nonsignificant would completely negate the nondegradation concept for ground water and would significantly reduce the protection of the ground water.

The proposed amendments would result in considerable protection for ground water and would significantly reduce the burdens on the department and the regulated public.

Section 8 requires all known misclassified waters be reclassified in a timely manner. Due to the list of known misclassified streams, this effort would require significant additional resources.

The proposed amendments would provide the Department with more flexibility and reduce the resource demand.

Section 11 proposes changes to the definition of "natural" in 75-5-306 would conflict with common sense and federal requirements in that it would provide that the conditions of waters which were receiving raw sewage in 1971 would be considered natural.

The proposed amendments delete this change.

EXHIBIT NO. 16

DATE 2-13-95

BILL NO. SB-331

Section 13 establishes a new requirement that all permits be reviewed for completeness within 30 days and that the first review must include all issues. While it is appropriate to demand reasonable and timely response to submittals, the current language is not practical. Complying with this requirement would require additional resources beyond what we have requested through the budget process.

The proposed amendments extend this time to 60 days and applies to only new permits, and somewhat limits the requirement that the first review include all issues.

Section 15 modifies the current provisions for holding a contested case hearing and would require that a contested case be held in the county of the violation unless the alleged violator wanted the case to be heard in Lewis and Clark County. This change would require extensive board travel and increased expense.

The proposed amendments remove this requirement.

Section 16 includes a proposed requirement that civil actions take place in the county of the violation. Such a limitation will increase staff travel and per diem expenses.

No amendment has been proposed to address our concern.

Hopefully my comments have pointed out clearly the effort that has gone into our discussions with industry on this bill. While a couple of areas of disagreement still exist, we have made substantial progress on this bill and we ask for your support of the amendments that have been offered and of those offered by the Department.

DATE 2-13-95

SENATE COMMITTEE ON Natural Resources

BILLS BEING HEARD TODAY: SB 330, SB 331, SB 362, SB 346

< ■ > PLEASE PRINT < ■ >

Check One

Name	Representing	Bill No.	Support	Oppose
Josiah Smith	Sierra Club	all	<del>330, 331, 362</del>	<del>346</del>
Richard Pankes	NPRC	all		
Alan Rollo	MWOF	All	(371)	✓
Jim Barnett	Beantooth Alliance			✓
DONALD KERN	SELF	All		X
Joe Gutkoski Pres.	Madison Gallatin Alliance	All		✓
MIKE MURPHY	MT. WATER RES. ASSN	330 331 362 371	✓	
Scott McMillion	Roseau Chapter	all		
Lorna Frank	MT. Farm Bureau	all	✓	
Aue Harty	SELF	ALL		
CANDACE Tolgerson	MT. Cattlemen	ALL	X	
Raymond Lutz	Golden Sunlight Mine	All	X	
Thomelle	NPRC	346	X	
Alan Joseph	Golden Sunlight Mines	330 331	X	

VISITOR REGISTER

EXHIBIT D

PLEASE HAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY



DATE 2/13

SENATE COMMITTEE ON Natural Resources

BILLS BEING HEARD TODAY: 330-331-362  
346

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Check One

Name	Representing	Bill No.	Support	Oppose
Don Parker	Crown Butte Mines	330-331	✓	
Bob Wallis	mt mine assoc	330-331	✓	
Hope Stevens	Citizen	330-331	✓	✗
Laurie Gano	Citizen	<sup>346</sup> 330-331	✓	✓
Glennice Ore	NPRC	330, 331		✗
Steve Picher	DHES	330-331		✗
ROBIN CUNNINGHAM	FIGHTING OUTFITTERS ASSN - OF MONTANA	330-331		✗
GAIL ABERCROMBIE	MT Petroleum Assn	331 362	✓	
Larry Brown	Ag Pres. Assn <sup>371</sup>	331 <sup>346</sup> 330 362	✗	
DENNIS TVERSON	NMOGA	362	✓	
Don Allen	mt Wood Products Assn	330-331	✓	
Peggy Trenk	WETA	371	✓	
Russ Pether	MT Resources	331 362	✓	
John Bloomquist	Mt. Stockgrowers	330, 331, 362, 371	✓	

# VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

EXHIBIT D



DATE 2-13-95

SENATE COMMITTEE ON Natural Resources

BILLS BEING HEARD TODAY: SB 330, SB 331, SB-362  
SB 346

< ■ > PLEASE PRINT < ■ >

Check One

Name	Representing	Bill No.	Support	Oppose
Nick Golder	NPRC	SB 330 SB 331		<input checked="" type="checkbox"/>
GARY FORRESTER	SD#8	346	<input checked="" type="checkbox"/>	
COLLIN BANGS	REACTORS	331		
Jim Mockler	MT. Coal Council	53 530	<input checked="" type="checkbox"/>	
Thomas J. Johnson	CURE	SB 330 SB 331	<input checked="" type="checkbox"/>	
Al Kingston	Self	SB 330 331	<input checked="" type="checkbox"/>	
Joe Cross	SELF	SB 330 331	<input checked="" type="checkbox"/>	
Bruce Farling	Montana Trout Unlimited	SB 330 SB 331		<input checked="" type="checkbox"/>
Willis Hall	LWV	SB 330 SB 331		<input checked="" type="checkbox"/>
R F LABBE	City of DEER Lodge	SB 331	<input checked="" type="checkbox"/>	
MARKER	Archimedes	SB 330 1231	<input checked="" type="checkbox"/>	
WANDY WASH	ARCO	SB 330 SB 331	<input checked="" type="checkbox"/>	
<del>Jack Smith</del>	<del>Smith - Smith Power</del>	SB 330 SB 331	<input checked="" type="checkbox"/>	
Susan Callaghan	Montana Power	SB 330 SB 331	<input checked="" type="checkbox"/>	

# VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY EXHIBIT D

DATE 7/13/95

SENATE COMMITTEE ON Nat. Resources

BILLS BEING HEARD TODAY: 330, 362, 331  
Sp 346

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Check One

Name	Representing	Bill No.	Support	Oppose
MAISHAH PRICE	ENTERPRISE RENT-A-CAR			
Robert Ward	Enterprise Rent-a-Car			
Jack MacCoughey	MT POWER ASSOC			
CURT LANCE	HGLERA CHRYSLER-JESSEN			
MARV DYK	MDT			
Ken Knapp	MRAU			
Dick Juntunen	Santa Fe Pacific Gold.		346, 330 331, 362 371	
Hope Stevens				
Ron A. Andersen				
JOHN A. KRUTAR				X
Brian Kuehl	Greater Yellowstone Coal.			X
Jim Jensen	WELC 371	330, 331 362, 346		X
Paul S. Fenn	Self			X
Andrea Standler	NPRC			X

VISITOR REGISTER

EXHIBIT D

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

DATE 2-13-95

SENATE COMMITTEE ON Natural Resources

BILLS BEING HEARD TODAY: SB 320, SB 321, SB-362  
SB-346

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PLEASE PRINT

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Check One

Name	Representing	Bill No.	Support	Oppose
<i>John Youngberg</i>	MT Farm Bureau	362 372	<input checked="" type="checkbox"/>	
<i>Janet Ellis</i>	MT Audubon	362 346		<input checked="" type="checkbox"/>
<i>Brian Kuehl</i>	Greater Yellowstone Coal.			<input checked="" type="checkbox"/>
<i>JOHN ARRIGO</i>	DHES	SB 362	<input checked="" type="checkbox"/>	
<i>John Fitzpatrick</i>	Pegasus Gold	SB 362 SB 371 SB 372 SB 373	<input checked="" type="checkbox"/>	

### VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

EXHIBIT D

DATE 2-13-95

SENATE COMMITTEE ON Natural Resources

BILLS BEING HEARD TODAY: SB-330, SB 331, SB 362  
SB 376

< ■ > PLEASE PRINT < ■ >

Check One

Name	Representing	Bill No.	Support	Oppose
Russ Ritter	MT Resources	330 331	<input checked="" type="checkbox"/>	
John Youngberg	Montana Farm Bureau	330 331	<input checked="" type="checkbox"/>	
Chris Tweeten	MT Dept of Justice	331		<input checked="" type="checkbox"/>
Melissa Tuemmler, R.S.	Broadwater County Jefferson County	330 331	<input checked="" type="checkbox"/>	
Larry Brown	Ag. Pres. Assoc.	330 346 331	<input checked="" type="checkbox"/>	
Bob Robinson	DNES	330 + 331		<input checked="" type="checkbox"/>
Janet Ellis	MT Audubon	<del>330</del> 330 + 331		<input checked="" type="checkbox"/>
Peggy Trenw	WETA	330 + 331	<input checked="" type="checkbox"/>	

# VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

EXHIBIT D

Vote: SEGREGATED MOTION TO ADOPT FROM AMENDMENT NO. sb033002.amk, AMENDMENT NO. 1, FAILED 6-5 ON A ROLL CALL VOTE.

Motion/Vote: SEN. FOSTER MOVED TO DO PASS SB 330 AS AMENDED. MOTION CARRIED 8-3 ON A ROLL CALL VOTE.

EXECUTIVE ACTION ON SB 331

Motion: SEN. FOSTER MOVED TO DO PASS SB 331.

Motion: SEN. FOSTER MOVED TO ADOPT AMENDMENTS NO. sb033102.amk AS CONTAINED IN EXHIBIT 17.

Discussion: Mr. Kakuk said he would try to explain the main intention of the amendments. He said that these amendments were requested by SEN. BECK, and that the Discussion Draft, prepared by staff at the committee's request, EXHIBIT 17 DD, included these amendments and was nearly accurate. There was one change needed with respect to Amendment No. 4 where it says: "and providing an effective date"; that should be changed to: "and providing an immediate effective date." Another error was on Page 13, Lines 7-13 of the Discussion Draft where Items (i), (ii), and (iii) should be stricken and replaced with Amendment No. 22, items (i), (ii), (iii), and (iv). Those amendment items were developed by representatives from the mining industry and the DHES. Mr. Kakuk reviewed the rest of the amendments with the committee members.

SEN. KEATING asked Mr. Pilcher what the difference was between 7.5 milligrams per liter for waste discharge and 5.0 milligrams per liter. He responded that the department rules had stated that conventional septic systems were okay, but once they reached half the standards it meant they were 50% away from the drinking water standards already. They would therefore be required to go to Level 2 treatment which was much more expensive, but would take out those nitrates. The level of nitrates would generally be going up because they would be mixing in with background nitrates already in the groundwater.

SEN. KEATING asked if the mixing zone goes to the edge of the property. Mr. Pilcher replied that currently there was a bill being considered addressing that, and if it passes, the mixing zone would go to the edge of the property. If sewage is discharged and it goes above 5.0, the discharge will be significant and the applicant will have to go through nondegradation review.

{Tape: 3; Side: B}

CHAIR. GROSFIELD asked Mr. Horpestad what was going on with the federal rules, as described on the top of page 15 of the Discussion Draft, and how that relates to nonsignificant ~~EXHIBIT D~~ Under

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nondegradation. He answered that the language that was added reflects the fact that under federal law the treatment requirements must be imposed in order for Montana to receive primacy for the permit program. The second part of that says that to the extent the federal government has not adopted minimum treatment standards, the board can adopt them, if they go through the rule-making process and determine that they are economically, technologically and environmentally feasible." It also says if it is nonsignificant under the nondegradation rules, the department cannot require minimum treatment, except where required by the federal requirements.

CHAIR. GROSFIELD asked Mr. Horpestad to explain Section 9, Subsection (b) on page 16 of the Discussion Draft, and the proposed changes beginning on Lines 21-23. He responded that the first change to subsection (b) in the bill (Lines 18-20 of the Discussion Draft) meant that a natural spring does not contain industrial waste, and a permit cannot be required for it. The language on Lines 21-23 was stricken because it left the department in an awkward position because that groundwater would have to be monitored to see if it contained industrial waste such that it could require a permit. The new language beginning after Line 23 says that if you are pumping groundwater and discharging it to surface water, it cannot cause the surface water to violate standards.

SEN. BROOKE said the bill in this subsection (b) says essentially that a groundwater discharge to surface water does not require a permit. She asked Mr. Horpestad to further comment on that. He said the problem with that provision was that there are areas in the state where the groundwater is of lower quality than the surface water. The original language of the bill says that they cannot require a permit for discharging that groundwater to surface water. The revised language in the Discussion Draft does not prevent them from determining that the discharge constitutes a significant alteration to the surface water, and therefore could require a permit.

*{Comments: there was so much background noise it was difficult to hear.}*

SEN. BROOKE said in Missoula the aquifer was under the septic tanks. She asked what that did with respect to the current standards. Would the bill as proposed to be amended be more threatening to the aquifer? Mr. Horpestad replied that the proposed amendments raise the nondegradation significance level for good quality groundwater from the current 2.5 parts per million to 5 parts per million. SEN. BROOKE said with all the building in Missoula and more and more septic tanks, it would seem that this would cause more and more degradation to the aquifer. Mr. Horpestad said the bill would require alternate water supplies or alternate treatment systems to keep the groundwater at the same level.

Mr. Horpestad said if you start out with zero nitrates in the groundwater, and it is then allowed to go to 10 parts per million of nitrate from human sewage, that means if you drink that groundwater, essentially you are drinking 20% recycled sewage, and there may be other things present besides nitrates.

SEN. CHRISTIAENS asked how that would affect the pricing of housing. If there was already a high level of nitrates in the land, what does it cost to go from one level of treatment to another? Mr. Horpestad said that secondary treatment would require biological treatment which converts the nitrates to nitrogen gas. That is usually done with a sand filter or a small treatment plant. He estimated that would cost from \$2,500 to \$7,000 additional per housing unit.

SEN. CHRISTIAENS asked if he could install a septic tank himself. Mr. Horpestad replied that he would have to hire a contractor to do that.

SEN. WELDON said he had 3 specific concerns with the bill: 1) the changes in arsenic levels, 2) what happened to the measurement method, and 3) the savings clause. In the savings clause it says: "Section 75-5-614 does not affect proceedings that were begun before (the effective date of this act)." He asked what that meant. Mr. Pilcher said that language was put in the bill at the request of the DHES to deal with litigation that was currently in district court relative to violations that took place elsewhere in Montana. They wanted to make sure that the change would not alter those ongoing cases.

Mr. Pilcher said that with respect to the measurement method, it was their understanding that it would be necessary for the committee to act on the original amendments, and then amendments to the amendments would be provided to the committee members to address dissolved vs. total recoverable, and the risk levels that were acceptable to the department.

CHAIR. GROSFIELD said they would have to vote on the first set of amendments before they could change the amendments. He asked if it was correct to say that the amendments to the amendments were much closer to what the department feels comfortable with, with respect to the measurement method. Mr. Pilcher said that was correct.

SEN. BROOKE said the memo from the Department of Justice voiced their concern about the total recoverable versus the dissolved measurement methods. Mr. Kakuk said the staff's interpretation was that the proposed amendments had just taken the language that caused concern by the DHES and moved it from stricken section 2 into the section where it is now. They move it but have not altered it. The amendments to the amendments, if accepted by the committee, will alter it.



SEN. BROOKE said that on Page 5 of the Discussion Draft, Lines 3-4 where it says: "...permittee, or person potentially liable under any state or federal environmental remediation statute,...", the Department of Justice has serious concern about that. She asked why the site-specific standards were left in the bill. Mr. Kakuk said they were concerned about other routes of exposure, and an additional amendment that will be presented to the committee has been prepared to address that. He said that will be Amendment No. SB033103.amk.

Vote: MOTION TO ADOPT AMENDMENT NO. sb033102.amk, CARRIED WITH SEN. BROOKE VOTING NO.

CHAIR. GROSFIELD asked Mr. Pilcher to explain the amendments to the amendments called "Concept amendments to SB 331 as amended by SEN. BECK (SB033102.amk), which were from the DHES as contained in EXHIBIT 18. Mr. Pilcher reviewed the amendments with the committee.

Motion: SEN. WELDON MOVED TO APPROVE THE CONCEPT AMENDMENTS AS CONTAINED IN EXHIBIT 18.

SEN. TVEIT asked Sandy Stash, ARCO, if she would comment on the amendments. Ms. Stash said she did not see a real issue with the amendments to BECK Amendment 10 and to BECK Amendment 33. The amendment to BECK Amendment 21 gets to the heart of dissolved vs. total recoverable and would not be acceptable.

SEN. BECK, Sponsor of SB 331, said he would like to reject the amendment to BECK Amendment 10 because that was already in SB 330. On the Amendment to BECK Amendment 21, when it comes to the carcinogen rates, he would support that. He said he did not agree with the section of the amendment that takes "(c) for all metal parameters,...", etc., out of the bill. With respect to the amendments to BECK Amendment 33, he asked why the department had added: "...and the department has the opportunity to participate in the review of the activity."

Mr. Pilcher said they were only attempting to recognize that some of the other agencies that have that decision-making responsibility may not have the same level of technical expertise on all the issues that the DHES could offer.

CHAIR. GROSFIELD asked Mr. Pilcher regarding the amendment to BECK Amendment 21 what the significance of striking subsection (a) was. He responded it was intended to eliminate the maximum contaminant levels for groundwater.

Motion: SEN. WELDON WITHDREW HIS MOTION TO APPROVE ALL THE CONCEPT AMENDMENTS AND MOVED TO ADOPT THE CONCEPT AMENDMENT TO BECK AMENDMENT 10.

SEN. BROOKE asked why the language wasn't the same as in SB 330. Mr. Horpestad said the problem with the language in Amendment 10



is that it was unclear the way it was written. Does it say "the parameter likely to be affected", or does it mean "level likely to be affected?" If it means "level", that is approaching standards and it goes beyond the concept of nondegradation. The proposed change that they suggest would be: "the parameters likely to be affected by the activity" and the nonsignificance section in the law would be used to determine if that would result in a significant change.

SEN. TVEIT said the problem seems to be that the proposed language in the amendment to BECK Amendment 10 is not the same as in SB 330, is that right? CHAIR. GROSFIELD said if the language was different that would have to be rectified. The proposed language was contrary to language in SB 330.

SEN. KEATING said he didn't see where the language in one bill was contrary to the language in the other bill. It was just approached from a different angle. The language in SB 330 deals with improving the quality and the amendment to BECK Amendment 10 says: "...a parameter likely to be affected..." Those aren't different ideas.

SEN. FOSTER said he would oppose that amendment because the language they wanted was adopted in SB 330, and they should be consistent.

Vote: MOTION TO ADOPT THE CONCEPT AMENDMENT TO BECK AMENDMENT 10 FAILED WITH SEN. BROOKE, SEN. CHRISTIAENS, AND SEN. WELDON VOTING YES.

Motion/Vote: SEN. WELDON MOVED TO STRIKE SUBSECTION (a) IN BECK AMENDMENT 21. MOTION CARRIED UNANIMOUSLY.

Motion/Vote: SEN. WELDON MOVED TO ADOPT THE LANGUAGE IN THE CONCEPT AMENDMENTS TO BECK AMENDMENT 21 IN THE SUBSECTIONS WHERE (b) AND (d) WERE STRUCK. MOTION CARRIED UNANIMOUSLY.

Motion: SEN. WELDON MOVED TO STRIKE SUBSECTION (c) IN BECK AMENDMENT 21.

Mr. Horpestad reviewed dissolved vs. total recoverable as he previously stated.

Vote: MOTION TO STRIKE SUBSECTION (c) FROM BECK AMENDMENT 21, FAILED ON A ROLL CALL VOTE OF 6-5.

Motion/Vote: SEN. WELDON MOVED TO ADOPT THE NEW SUBSECTION (c) IN THE CONCEPT AMENDMENTS TO BECK AMENDMENT 21. MOTION CARRIED UNANIMOUSLY.

Motion/Vote: SEN. WELDON MOVED TO ADOPT THE CONCEPT AMENDMENT TO BECK AMENDMENT 33. MOTION CARRIED WITH SEN. CRISMORE VOTING NO.

Motion: SEN. CHRISTIAENS MOVED TO ADOPT AMENDMENTS NO. sb033103.amk AS CONTAINED IN EXHIBIT 19.

Mr. Pilcher explained the amendments to the committee members.

SEN. TVEIT asked why "shall" was struck and replaced by "may" in amendment no. 1. Mr. Pilcher replied that was a decision that the board made and this amendment gives them the flexibility to consider and decide on a case-by-case basis the appropriateness of replacing surface water quality standards with site specific standards. The intent was to allow the board to consider the information that would be submitted in response to the guidance made available to an applicant.

SEN. TVEIT asked Mr. Pilcher to explain, "...other routes of exposure" in amendment no. 2. He replied that they would be considering things other than just what was dissolved in the water. That could include impacts upon aquatic life in the streams.

CHAIR. GROSFIELD asked if the board did that in adopting other water quality rules. Mr. Horpestad responded that the board hasn't because they have had total recoverable standards.

Vote: MOTION TO ADOPT AMENDMENTS NO. sb033103.amk AS CONTAINED IN EXHIBIT 19, FAILED.

Motion/Vote: SEN. FOSTER MOVED TO DO PASS SB 331 AS AMENDED. MOTION CARRIED 7-4 ON A ROLL CALL VOTE.

{Tape: 4; Side: A}

EXECUTIVE ACTION ON SB 247

Motion/Vote: SEN. COLE MOVED TO TABLE SB 247. MOTION CARRIED UNANIMOUSLY.

EXECUTIVE ACTION ON SB 391

Motion: SEN. BROOKE MOVED TO ADOPT AMENDMENTS NO. sb039101.ate AS CONTAINED IN EXHIBIT 20.

CHAIR. GROSFIELD explained the amendments to the committee members. He said the amendments were in response to concerns from people who testified on the bill.

Vote: MOTION TO ADOPT AMENDMENTS NO. sb039101.ate, CARRIED UNANIMOUSLY.

2-18-98

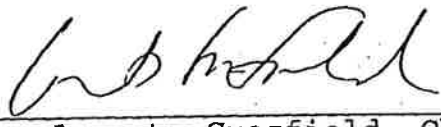
EXHIBIT D

SENATE STANDING COMMITTEE REPORT

Page 1 of 6  
February 20, 1995

MR. PRESIDENT:

We, your committee on Natural Resources having had under consideration SB 331 (first reading copy -- white), respectfully report that SB 331 be amended as follows and as so amended do pass.

Signed:   
Senator Lorents Grosfield, Chair

That such amendments read:

1. Title, line 5.

Strike: "RULES OR"

Insert: "TREATMENT"

2. Title, line 6.

Following: "ECONOMICALLY"

Insert: ", ENVIRONMENTALLY,"

Following: "FEASIBLE;"

Strike: "AND"

3. Title, line 7.

Strike: "75-5-201,"

Strike: "75-5-306,"

Strike: "75-5-611,"

4. Title, line 8.

Following: "MCA"

Insert: "; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE"

5. Page 1, line 25.

Following: "unenforceable."

Insert: "[Section 1], providing conditions for adoption of standards more stringent than federal standards, is not intended to prohibit the adoption of ground water quality standards."

6. Page 2, lines 1 and 2.

Strike: ":" on line 1 through "(a)" on line 2

7. Page 2, lines 4 and 5.

Strike: "; and" on line 4 through "75-5-307" on line 5

8. Page 2, line 10 through page 4, line 6.

Strike: section 2 in its entirety

Re-number: subsequent sections

 Amd. Coord.

Sec. of Senate

EXHIBIT D  
431216SC.SRF

9. Page 4, line 9.

Following: "applicant,"

Insert: "permittee, or person potentially liable under any state or federal environmental remediation statute,"

10. Page 4, line 23.

Following: "~~parameter~~"

Insert: "for a parameter if that change is likely to affect a beneficial use"

11. Page 5, line 7.

Strike: "(a)"

12. Page 5, lines 9 and 10.

Strike: subsection (10)(b) in its entirety

13. Page 5.

Following: line 15

Insert: "(13) "Metal parameters" includes but is not limited to aluminum, antimony, arsenic, beryllium, barium, cadmium, chromium, copper, fluoride, iron, lead, manganese, mercury, nickel, selenium, silver, thallium, and zinc."

Renumber: subsequent subsections

14. Page 5, line 19.

Strike: "(a)"

15. Page 5, lines 23 and 24.

Strike: subsection (14)(b) in its entirety

16. Page 6, line 26.

Following: "lagoons"

Insert: "used solely for treating, transporting, or impounding pollutants"

17. Page 7, line 16.

Following: "20"

Insert: ", following the time schedule of the lead agency"

18. Page 7, line 29 through page 8, line 4.

Strike: section 6 in its entirety

Renumber: subsequent sections

19. Page 8, line 10.

Strike: "intermittent" through "that"

Insert: "streams that, due to sporadic flow,"

20. Page 8, line 11.

Strike: "a viable fishery"

Insert: "an aquatic ecosystem that includes salmonid or nonsalmonid fish"

21. Page 8, lines 13 and 14.

Strike: "that" on line 13 through "feasible" on line 14

Insert: ", giving consideration to the economics of waste treatment and prevention. Standards adopted by the board must meet the following requirements:

(a) for measuring carcinogens in surface water, the water quality standard for protection of human health must be the value associated with an excess lifetime cancer risk level, assuming continuous lifetime exposure, not to exceed  $1 \times 10^{-3}$  in the case of arsenic and  $1 \times 10^{-5}$  for other carcinogens;

(b) for all metal parameters, the values used by the board as criteria for standards of water quality must be stated as dissolved concentrations;

(c) standards for the protection of aquatic life do not apply to ground water; and

(d) standards may not exceed the maximum contaminant levels obtained from 40 CFR, part 141, as of [the effective date of this act]"

22. Page 9, lines 9 through 11.

Strike: "a" on line 9 through "liter" on line 11

Insert: "changes to ground water quality are nonsignificant if the discharge will not cause degradation of surface water and the predicted concentration of nitrate at the boundary of the ground water mixing zone does not exceed:

(i) .75 milligrams per liter for nitrate sources other than domestic sewage;

(ii) 5.0 milligrams per liter for domestic sewage effluent discharged from a conventional septic system;

(iii) 7.5 milligrams per liter for domestic sewage effluent discharged from a septic system using level two treatment, which must be defined in the rules; or

(iv) 7.5 milligrams per liter for domestic sewage effluent discharged from a conventional septic system in areas where the ground water nitrate level exceeds 5.0 milligrams per liter primarily from sources other than human waste"

23. Page 9, line 25.

Strike: "acquires information"

Insert: "is presented with facts indicating"

24. Page 9, lines 26 and 27.

Strike: "60" on line 26 through "75-5-307" on line 27  
Insert: "90 days, initiate rulemaking"

25. Page 10, lines 6 and 15.  
Following: "economically"  
Insert: ", environmentally,"

26. Page 10, line 14.  
Following: "so"  
Insert: "through rulemaking, for parameters likely to affect  
beneficial uses,"

27. Page 10, line 15.  
Following: "feasible."  
Insert: "Except for the technology-based treatment requirements  
set forth in 40 CFR, chapter I, subchapter N, minimum  
treatment may not be required to address the discharge of a  
parameter when the discharge is considered nonsignificant  
under rules adopted pursuant to 75-5-301."

28. Page 10, line 30 through page 11, line 8.  
Strike: section 11 in its entirety  
Renumber: subsequent sections

29. Page 11, lines 17 through 19.  
Strike: "The" on line 17 through "waters" on line 19  
Insert: "Discharge to surface water of ground water that is not  
altered from its ambient quality does not constitute a  
discharge requiring a permit under this part and is not  
degradation if:  
    (i) the water discharged does not cause the  
    receiving waters to exceed applicable standards for any  
    parameters; or  
    (ii) to the extent that the receiving waters in  
    their ambient state exceed standards for any  
    parameters, the discharge does not increase the  
    concentration of the parameters"

30. Page 12, line 6.  
Following: "applications for"  
Insert: "new"  
Strike: "30"  
Insert: "60"

31. Page 12, lines 8 and 9.  
Strike: "deficiency" through "initial notice" on line 9  
Insert: "major deficiency issues, based on the information  
submitted. The department and the applicant may extend

these timeframes, by mutual agreement, by not more than 75 days"

32. Page 12, line 27.

Strike: "industrial or other"

33. Page 12, line 28.

Strike: " ; "

Insert: ". Any placement of materials that is authorized by a permit issued by any state or federal agency is not a placement of wastes within the prohibition of this subsection if the agency's permitting authority includes provisions for review of the placement of materials to ensure that it will not cause pollution of state waters and the department has the opportunity to participate in the review of the activity."

34. Page 13, line 12 through 15, line 9.

Strike: section 15 in its entirety

Re-number: subsequent sections

35. Page 16, line 4.

Strike: "When"

Insert: "In an action"

Following: "account"

Insert: "and the court shall consider"

36. Page 16, line 9.

Following: "amounts"

Insert: "voluntarily"

37. Page 16, lines 23, 26, and 27.

Following: "~~drainage,~~"

Insert: "drainage,"

38. Page 17, line 6.

Following: "~~drainage,~~"

Insert: "drainage,"

39. Page 17, line 8.

Following: "specification"

Strike: " ; "

Insert: ". However, any facility reviewed by the department under Title 75, chapter 5, is not subject to the provisions of this section."

40. Page 17, lines 15 and 17.

Strike: "through 3"



Insert: "and 2"

41. Page 17.

Following: line 17:

Insert: " NEW SECTION. Section 17. Saving clause. Section 75-5-614 does not affect proceedings that were begun before [the effective date of this act].

NEW SECTION. Section 18. Effective date. [This act] is effective on passage and approval."

-END-

Amendments to Senate Bill No. 331  
First Reading CopyRequested by Sen. Beck  
For the Committee on Natural ResourcesPrepared by Michael S. Kakuk  
February 14, 1995

1. Title, line 5.  
Strike: "RULES OR"  
Insert: "TREATMENT"
2. Title, line 6.  
Following: "ECONOMICALLY"  
Insert: ", ENVIRONMENTALLY,"  
Following: "FEASIBLE;"  
Strike: "AND"
3. Title, line 7.  
Strike: "75-5-201,"  
Strike: "75-5-306,"  
Strike: "75-5-611,"
4. Title, line 8.  
Following: "MCA"  
Insert: "; AND PROVIDING AN ~~immediate~~ <sup>Effective</sup> DATE"
5. Page 1, line 25.  
Following: "unenforceable."  
Insert: "[Section 1], providing conditions for adoption of standards more stringent than federal standards, is not intended to prohibit the adoption of ground water quality standards."
6. Page 2, lines 1 and 2.  
Strike: ":" on line 1 through "(a)" on line 2
7. Page 2, lines 4 and 5.  
Strike: "; and" on line 4 through "75-5-307" on line 5
8. Page 2, line 10 through page 4, line 6.  
Strike: section 2 in its entirety  
Re-number: subsequent sections
9. Page 4, line 9.  
Following: "applicant,"  
Insert: "permittee, or person potentially liable under any state or federal environmental remediation statute,"
10. Page 4, line 23.  
Following: "parameter"  
Insert: "for a parameter if that change is likely to affect a beneficial use"

11. Page 5, line 7.

Strike: "(a)"

12. Page 5, lines 9 and 10.

Strike: subsection (10)(b) in its entirety

13. Page 5.

Following: line 15

Insert: "(13) "Metal parameters" includes but is not limited to aluminum, antimony, arsenic, beryllium, barium, cadmium, chromium, copper, fluoride, iron, lead, manganese, mercury, nickel, selenium, silver, thallium, and zinc."

Renumber: subsequent subsections

14. Page 5, line 19.

Strike: "(a)"

15. Page 5, lines 23 and 24.

Strike: subsection (14)(b) in its entirety

16. Page 6, line 26.

Following: "lagoons"

Insert: "used solely for treating, transporting, or impounding pollutants"

17. Page 7, line 16.

Following: "20"

Insert: ", following the time schedule of the lead agency"

18. Page 7, line 29 through page 8, line 4.

Strike: section 6 in its entirety

Renumber: subsequent sections

19. Page 8, line 10.

Strike: "intermittent" through "that"

Insert: "streams that, due to sporadic flow,"

20. Page 8, line 11.

Strike: "a viable fishery"

Insert: "an aquatic ecosystem that includes salmonid or nonsalmonid fish"

21. Page 8, lines 13 and 14.

Strike: "that" on line 13 through "feasible" on line 14

Insert: ", giving consideration to the economics of waste treatment and prevention. Standards adopted by the board must meet the following requirements:

(a) for ground water, the water quality criteria must be the maximum contaminant level for those parameters for which an maximum contaminant level, as found in 40 CFR, part 141, has been determined, except in the case of carcinogens. For carcinogens, the water quality criteria must be the more stringent of the maximum contaminant level, if any, or the value associated with an excess lifetime cancer risk level, assuming

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continuous exposure, not to exceed  $1 \times 10^{-3}$  in the case of arsenic and  $1 \times 10^{-4}$  for other carcinogens.

(b) for measuring carcinogens in surface water, the water quality criteria for protection of human health must be the value associated with an excess lifetime cancer risk level, assuming continuous lifetime exposure, not to exceed  $1 \times 10^{-3}$  in the case of arsenic and  $1 \times 10^{-4}$  for other carcinogens;

(c) for all metal parameters, the values used by the board as criteria for standards of water quality must be stated as dissolved concentrations; and

(d) criteria for the protection of aquatic life do not apply to ground water"

22. Page 9, lines 9 through 11.

Strike: "a" on line 9 through "liter" on line 11

Insert: "changes to ground water quality are nonsignificant if the discharge will not cause degradation of surface water and the predicted concentration of nitrate at the boundary of the ground water mixing zone does not exceed:

(i) 7.5 milligrams per liter for nitrate sources other than domestic sewage;

(ii) 5.0 milligrams per liter for domestic sewage effluent discharged from a conventional septic system;

(iii) 7.5 milligrams per liter for domestic sewage effluent discharged from a septic system using level two treatment, which must be defined in the rules; or

(iv) 7.5 milligrams per liter for domestic sewage effluent discharged from a conventional septic system in areas where the ground water nitrate level exceeds 5.0 milligrams per liter primarily from sources other than human waste"

23. Page 9, line 25.

Strike: "acquires information"

Insert: "is presented with facts indicating"

24. Page 9, lines 26 and 27.

Strike: "60" on line 26 through "75-5-307" on line 27

Insert: "90 days, initiate rulemaking"

25. Page 10, lines 6 and 15.

Following: "economically"

Insert: ", environmentally,"

26. Page 10, line 14.

Following: "so"

Insert: "through rulemaking, for parameters likely to affect beneficial uses,"

27. Page 10, line 15.

Following: "feasible."

Insert: "Except for the technology-based treatment requirements set forth in 40 CFR, chapter I, subchapter N, minimum treatment may not be required to address the discharge of a

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SENATE NATURAL RESOURCES  
EXHIBIT NO. 17  
DATE 2-18-95  
BILL NO. SB-331

parameter when the discharge is considered nonsignificant under rules adopted pursuant to 75-5-301."

28. Page 10, line 30 through page 11, line 8.

Strike: section 11 in its entirety

Renumber: subsequent sections

29. Page 11, lines 17 through 19.

Strike: "The" on line 17 through "waters" on line 19

Insert: "Discharge to surface water of ground water that is not altered from its ambient quality does not constitute a discharge requiring a permit under this part and is not degradation if:

(i) the water discharged does not cause the receiving waters to exceed applicable standards for any parameters; or

(ii) to the extent that the receiving waters in their ambient state exceed standards for any parameters, the discharge does not increase the concentration of the parameters"

30. Page 12, line 6.

Following: "applications for"

Insert: "new"

Strike: "30"

Insert: "60"

31. Page 12, lines 8 and 9.

Strike: "deficiency" through "initial notice" on line 9

Insert: "major deficiency issues, based on the information submitted. The department and the applicant may extend these timeframes, by mutual agreement, by not more than 75 days"

32. Page 12, line 27.

Strike: "industrial or other"

33. Page 12, line 28.

Strike: ";

Insert: ". Any placement of materials that is authorized by a permit issued by any state or federal agency is not a placement of wastes within the prohibition of this subsection."

34. Page 13, line 12 through 15, line 9.

Strike: section 15 in its entirety

Renumber: subsequent sections

35. Page 16, line 4.

Strike: "When"

Insert: "In an action"

Following: "account"

Insert: "and the court shall consider"

36. Page 16, line 9.

EXHIBIT D

SENATE NATURAL RESOURCES

EXHIBIT NO. 17

DATE 2-18-95

CALL NO. SB-321

Following: "amounts"  
Insert: "voluntarily"

37. Page 16, lines 23, 26, and 27.

Following: "~~drainage,~~"  
Insert: "drainage,"

38. Page 17, line 6.

Following: "~~drainage,~~"  
Insert: "drainage,"

39. Page 17, line 8.

Following: "specification"  
Strike: ";

Insert: ". However, any facility reviewed by the department  
under Title 75, chapter 5, is not subject to the provisions  
of this section."

40. Page 17, lines 15 and 17.

Strike: "through 3"  
Insert: "and 2"

41. Page 17.

Following: line 17

Insert: " NEW SECTION. Section 17. Saving clause. Section 75-5-  
614 does not affect proceedings that were begun before [the  
effective date of this act].

NEW SECTION. Section 18. Effective date. [This act]  
is effective on passage and approval."

## DISCUSSION DRAFT -- 1

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING THE MONTANA WATER QUALITY ACT; ESTABLISHING WATER QUALITY STANDARDS; REQUIRING THAT ~~RULES OR~~ TREATMENT STANDARDS BE ECONOMICALLY, ENVIRONMENTALLY, AND TECHNOLOGICALLY FEASIBLE; AND AMENDING SECTIONS 75-5-103, 75-5-106, ~~75-5-201~~, 75-5-301, 75-5-302, 75-5-304, 75-5-305, ~~75-5-306~~, 75-5-401, 75-5-403, 75-5-605, ~~75-5-611~~, 75-5-614, 75-5-631, 75-5-636, AND 75-6-112, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

WHEREAS, experience with implementation and enforcement of the Montana water quality statutes has revealed deficiencies in the statutes that have led to inefficiency and unfairness in administration and enforcement of the statutes; and

WHEREAS, those deficiencies can be addressed by selective amendment of the statutes.

## STATEMENT OF INTENT

A statement of intent is required to provide guidance to the board of health and environmental sciences regarding rulemaking. The legislature confirms the policy of this state, as reflected in 75-5-101. It is concerned that implementation of the water quality laws has in the past been too dependent on assumptions and conjecture springing from experiences and circumstances from other states and has not been sufficiently based on the conditions and needs of our state. The legislature intends that, in promulgating rules under this bill, the board of health and environmental sciences should seriously consider the impact of proposed rules and that the rules should be adopted only on the basis of sound, scientific justification and never on the basis of projections or conjecture. The legislature is specifically concerned that water quality criteria must reflect concentrations that can be reliably measured, or the rules will, as

1 a practical matter, be unenforceable. [Section 1], providing  
 2 conditions for adoption of standards more stringent than federal  
 3 standards, is not intended to prohibit the adoption of ground water  
 4 quality standards.

5  
 6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

7  
 8 NEW SECTION. Section 1. Standards more stringent than federal  
 9 standards. (1) In adopting rules to implement this chapter, the  
 10 board may adopt rules that are more stringent than corresponding draft  
 11 or final federal regulations, guidelines, or criteria if:

12 (a) the board makes written findings, based on sound scientific  
 13 or technical evidence in the record, which state that rules that are  
 14 more stringent than corresponding federal regulations, guidelines, or  
 15 criteria are necessary to protect the public health, beneficial use  
 16 of water, or the environment of the state; and

17 ~~(b) the action is taken pursuant to 75-5-307.~~

18 (2) The board's written findings must be accompanied by a board  
 19 opinion referring to and evaluating the public health and  
 20 environmental information and studies contained in the record that  
 21 forms the basis for the board's conclusion.

22  
 23 ~~NEW SECTION. Section 2. Standards of water quality. (1)~~  
 24 ~~Notwithstanding the provisions of [section 1], in formulating and~~  
 25 ~~adopting standards of water quality under 75-5-301(2) or in reviewing~~  
 26 ~~and revising standards of water quality under 75-5-301(3) the board~~  
 27 ~~shall comply with the following procedures:~~

28 ~~(a) Except as provided in subsection (1)(b), the board shall use~~  
 29 ~~as standards of water quality values that are no more stringent than~~  
 30 ~~the values set forth in the following table:~~

31 ~~Water Quality Criteria~~

EXHIBIT D

Discussion Draft -- 1



1	Parameter	Human Health	Aquatic Life	Aquatic Life
2			(Acute)	(Chronic)
3	A. Metal Parameters (expressed in micrograms per liter)			
4	Aluminum		750	87
5	Antimony	6		
6	Arsenic	50	360	190
7	Beryllium	4		
8	Barium	2,000		
9	Cadmium	5	3.9*	1.1*
10	Chromium	100	16**	11**
11	Copper	1,300	18*	12*
12	Fluoride	4,000		
13	Iron	300		1,000
14	Lead	5	82*	3.2*
15	Manganese	50		
16	Mercury	2	2.4	0.012
17	Nickel	100	1,400*	160*
18	Selenium	50	20	5
19	Silver	50	4.1	
20	Thallium	2		
21	Zinc	5,000	120*	110*
22	B. Other Parameters (expressed in milligrams per liter)			
23	Nitrate	10		
24	Ammonia		25***	2.2***
25	pH	6 to 9 std. units		
26	Sulfate	1,800		
27	Notes: All metal parameters are stated as dissolved, and			
28	compliance must be measured using dissolved methods.			
29	* Hardness dependent (value assumes hardness of 100)			
30	** Hexavalent			
31	*** Ammonia is pH and temperature dependent (value of pH			

~~= 7; T = 10);~~

~~(b) For parameters not included in subsection (1)(a), the board shall use maximum contaminant levels as established under 40 CFR, part 141, as the standards of water quality for human health.~~

~~(c) For parameters not included in subsection (1)(a) and for which maximum contaminant levels have not been established, the board may formulate and adopt standards of water quality for human health that satisfy the following criteria:~~

~~(i) The values must be based on scientifically valid studies and derived in a manner consistent with draft or final federal regulations, guidelines, or criteria for assessing the health risks of environmental pollutants.~~

~~(ii) For carcinogens, the values must represent a concentration associated with an excess lifetime cancer risk level because of continuous lifetime exposure not to exceed  $1 \times 10^{-4}$ .~~

~~(iii) For systemic toxicants, the values must represent a concentration to which the human population, including sensitive subgroups, could be exposed on a daily basis without appreciable risk of deleterious effects during a lifetime.~~

~~(d) For all metal parameters not included in subsection (1)(a), the values used by the board as standards of water quality must be stated as dissolved concentrations.~~

~~(2) In formulating and adopting standards of water quality under 75-5-301(2) or in reviewing and revising standards of water quality under 75-5-301(3), the board may not use narrative statements for any parameter.~~

~~(3) For the purpose of subsection (1)(c)(iii), systemic toxicants must include toxic chemicals that cause effects other than cancer or mutation.~~

NEW SECTION.      Section 3-2. Site-specific standards of water

1 quality for aquatic life. Notwithstanding any other provisions of  
2 this chapter, the board, upon application by a permit applicant,  
3 permittee, or person potentially liable under any state or federal  
4 environmental remediation statute, shall adopt site-specific standards  
5 of water quality for aquatic life, both acute and chronic, as the  
6 standards of water quality required under 75-5-301(2) and (3). The  
7 site-specific standards of water quality must be developed in  
8 accordance with the procedures set forth in draft or final federal  
9 regulations, guidelines, or criteria.

10  
11 Section 4. 3. Section 75-5-103, MCA, is amended to read:

12 "75-5-103. Definitions. Unless the context requires otherwise,  
13 in this chapter, the following definitions apply:

14 (1) "Board" means the board of health and environmental sciences  
15 provided for in 2-15-2104.

16 (2) "Contamination" means impairment of the quality of state  
17 waters by sewage, industrial wastes, or other wastes, creating a  
18 hazard to human health.

19 (3) "Council" means the water pollution control advisory council  
20 provided for in 2-15-2107.

21 (4) "Degradation" means a change in water quality that lowers  
22 the quality of high-quality waters ~~for a parameter~~ for a parameter if  
23 that change is likely to affect a beneficial use. The term does not  
24 include those changes in water quality determined to be nonsignificant  
25 pursuant to 75-5-301(5)(c).

26 (5) "Department" means the department of health and  
27 environmental sciences provided for in Title 2, chapter 15, part 21.

28 (6) "Disposal system" means a system for disposing of sewage,  
29 industrial, or other wastes and includes sewage systems and treatment  
30 works.

31 (7) "Effluent standard" means a restriction or prohibition on

1 quantities, rates, and concentrations of chemical, physical,  
2 biological, and other constituents ~~which~~ that are discharged into  
3 state waters.

4 (8) "Existing uses" means those uses actually attained in state  
5 waters on or after July 1, 1971, whether or not those uses are  
6 included in the water quality standards.

7 (9) "High-quality waters" means state waters whose quality for  
8 a parameter is better than standards established pursuant to 75-5-301.  
9 All waters are high-quality water unless classified by the board  
10 within a classification for waters that are not suitable for human  
11 consumption or not suitable for growth and propagation of fish and  
12 associated aquatic life.

13 (10) ~~at~~ "Industrial waste" means a waste substance from the  
14 process of business or industry or from the development of any natural  
15 resource, together with any sewage that may be present.

16 ~~(b) The term does not mean materials incorporated or placed into~~  
17 ~~a structure, facility, or location authorized in a permit issued by~~  
18 ~~a state or federal agency.~~

19 (11) "Interested person" means a person who has submitted oral  
20 or written comments on the department's preliminary decision regarding  
21 degradation of state waters, pursuant to 75-5-303. The term includes  
22 a person who has requested authorization to degrade high-quality  
23 waters.

24 (12) "Local department of health" means the staff, including  
25 health officers, employed by a county, city, city-county, or district  
26 board of health.

27 (13) "Metal parameters" includes but is not limited to aluminum,  
28 antimony, arsenic, beryllium, barium, cadmium, chromium, copper,  
29 fluoride, iron, lead, manganese, mercury, nickel, selenium, silver,  
30 thallium, and zinc.

31 ~~(13)~~(14) "Mixing zone" means an area established in a permit or

1 final decision on nondegradation issued by the department where water  
 2 quality standards may be exceeded, subject to conditions that are  
 3 imposed by the department and that are consistent with the rules  
 4 adopted by the board.

5 ~~(14)~~(15) ~~(a)~~ "Other wastes" means garbage, municipal refuse,  
 6 decayed wood, sawdust, shavings, bark, lime, sand, ashes, offal, night  
 7 soil, oil, grease, tar, heat, chemicals, dead animals, sediment,  
 8 wrecked or discarded equipment, radioactive materials, solid waste,  
 9 and all other substances that may pollute state waters.

10 ~~(b) The term does not mean materials incorporated or placed into~~  
 11 ~~a structure, facility, or location authorized in a permit issued by~~  
 12 ~~a state or federal agency.~~

13 ~~(15)~~(16) "Owner or operator" means a person who owns, leases,  
 14 operates, controls, or supervises a point source.

15 ~~(16)~~(17) "Parameter" means a physical, biological, or chemical  
 16 property of state water when a value of that property affects the  
 17 quality of the state water.

18 ~~(17)~~(18) "Person" means the state, a political subdivision of the  
 19 state, institution, firm, corporation, partnership, individual, or  
 20 other entity and includes persons resident in Canada.

21 ~~(18)~~(19) "Point source" means a discernible, confined, and  
 22 discrete conveyance, including but not limited to any pipe, ditch,  
 23 channel, tunnel, conduit, well, discrete fissure, container, rolling  
 24 stock, or vessel or other floating craft, from which pollutants are  
 25 or may be discharged.

26 ~~(19)~~(20) "Pollution" means contamination or other alteration of  
 27 the physical, chemical, or biological properties of state waters which  
 28 exceeds that permitted by Montana water quality standards, including  
 29 but not limited to standards relating to change in temperature, taste,  
 30 color, turbidity, or odor, or the discharge, seepage, drainage,  
 31 infiltration, or flow of liquid, gaseous, solid, radioactive, or other

EXHIBIT D

1 substance into state water ~~which~~ that will or is likely to create a  
 2 nuisance or render the waters harmful, detrimental, or injurious to  
 3 public health, recreation, safety, or welfare, to livestock, or to  
 4 wild animals, birds, fish, or other wildlife. A discharge, seepage,  
 5 drainage, infiltration or flow ~~which~~ that is authorized under the  
 6 pollution discharge permit rules of the board is not pollution under  
 7 this chapter. Activities conducted under the conditions imposed by  
 8 the department in short-term authorizations pursuant to 75-5-308 are  
 9 not considered pollution under this chapter.

10 ~~(20)~~ (21) "Sewage" means water-carried waste products from  
 11 residences, public buildings, institutions, or other buildings,  
 12 including discharge from human beings or animals, together with ground  
 13 water infiltration and surface water present.

14 ~~(21)~~ (22) "Sewage system" means a device for collecting or  
 15 conducting sewage, industrial wastes, or other wastes to an ultimate  
 16 disposal point.

17 ~~(22)~~ (23) "Standard of performance" means a standard adopted by  
 18 the board for the control of the discharge of pollutants ~~which~~ that  
 19 reflects the greatest degree of effluent reduction achievable through  
 20 application of the best available demonstrated control technology,  
 21 processes, operating methods, or other alternatives, including, ~~where~~  
 22 when practicable, a standard permitting no discharge of pollutants.

23 ~~(23)~~ (24) (a) "State waters" means a body of water, irrigation  
 24 system, or drainage system, either surface or underground; ~~however,~~  
 25 ~~this subsection.~~

26 (b) The term does not apply to:

27 (i) privately owned ponds or lagoons used solely for treating,  
 28 transporting, or impounding pollutants; or

29 (ii) irrigation waters or land application disposal waters where  
 30 when the waters are used up within the irrigation or land application  
 31 disposal system and the waters are not returned to ~~any other~~ state



1 waters.

2 ~~(24)~~(25) "Treatment works" means works, including sewage lagoons,  
3 installed for treating or holding sewage, industrial wastes, or other  
4 wastes.

5 ~~(25)~~(26) "Water quality protection practices" means those  
6 activities, prohibitions, maintenance procedures, or other management  
7 practices applied to point and nonpoint sources designed to protect,  
8 maintain, and improve the quality of state waters. Water quality  
9 protection practices include but are not limited to treatment  
10 requirements, standards of performance, effluent standards, and  
11 operating procedures and practices to control site runoff, spillage  
12 or leaks, sludge or water disposal, or drainage from material storage.

13 ~~(26)~~(27) "Water well" means an excavation that is drilled, cored,  
14 bored, washed, driven, dug, jetted, or otherwise constructed and  
15 intended for the location, diversion, artificial recharge, or  
16 acquisition of ground water."

17  
18 Section 5- 4. Section 75-5-106, MCA, is amended to read:

19 "75-5-106. Interagency cooperation -- enforcement authorization.

20 (1) The council, board, and department may require the use of records  
21 of all state agencies and may seek the assistance of ~~such~~ the  
22 agencies. The department shall coordinate permit proceedings under  
23 this chapter with permit proceedings involving the same project  
24 conducted by the department of state lands under Title 82, chapter 4,  
25 and by the department of natural resources and conservation under  
26 Title 75, chapter 20, following the time schedule of the lead agency.  
27 State, county, and municipal officers and employees, including  
28 sanitarians and other employees of local departments of health, shall  
29 cooperate with the council, board, and department in furthering the  
30 purposes of this chapter, so far as is practicable and consistent with  
31 their other duties.

(2) The department may authorize a local water quality district established according to the provisions of Title 7, chapter 13, part 45, to enforce the provisions of this chapter and rules adopted under this chapter on a case-by-case basis. If a local water quality district requests the authorization, the local water quality district shall present appropriate documentation to the department that a person is violating permit requirements established by the department or may be causing pollution, as defined in 75-5-103, of state waters or placing or causing to be placed wastes in a location where they are likely to cause pollution of state waters. The board may adopt rules regarding the granting of enforcement authority to local water quality districts."

~~Section 6. 5. Section 75-5-201, MCA, is amended to read:~~

~~"75-5-201. Board rules authorized. (1) The board shall adopt rules for the administration of this chapter and shall ensure that requirements imposed by the rules are cost effective and economically and technologically feasible.~~

~~(2) The board's rules may include a fee schedule or system for assessment of administrative penalties as provided under 75-5-611."~~

~~Section 7. 5. Section 75-5-301, MCA, is amended to read:~~

~~"75-5-301. Classification and standards for state waters. Consistent with the provisions of 75-5-302 through 75-5-307 and 80-15-201 and this chapter, the board shall:~~

~~(1) establish and modify the classification of all state waters in accordance with their present and future most beneficial uses, creating an appropriate classification for intermittent or ephemeral streams that streams that, due to sporadic flow, do not support a viable fishery an aquatic ecosystem that includes salmonid or nonsalmonid fish;~~



1       (2) formulate and adopt standards of water purity and  
2 classification of water according to its most beneficial uses, giving  
3 consideration to the economics of waste treatment and prevention  
4 quality that are cost effective and economically and technologically  
5 feasible, giving consideration to the economics of waste treatment and  
6 prevention. Standards adopted by the board must meet the following  
7 requirements:

8       (a) for ground water, the water quality criteria must be the  
9 maximum contaminant level for those parameters for which an maximum  
10 contaminant level, as found in 40 CFR, part 141, has been determined,  
11 except in the case of carcinogens. For carcinogens, the water quality  
12 criteria must be the more stringent of the maximum contaminant level,  
13 if any, or the value associated with an excess lifetime cancer risk  
14 level, assuming continuous exposure, not to exceed  $1 \times 10^{-3}$  in the  
15 case of arsenic and  $1 \times 10^{-4}$  for other carcinogens;

16       (b) for measuring carcinogens in surface water, the water quality  
17 criteria for protection of human health must be the value associated  
18 with an excess lifetime cancer risk level, assuming continuous  
19 lifetime exposure, not to exceed  $1 \times 10^{-3}$  in the case of arsenic and  
20  $1 \times 10^{-4}$  for other carcinogens;

21       (c) for all metal parameters, the values used by the board as  
22 criteria for standards of water quality must be stated as dissolved  
23 concentrations; and

24       (d) criteria for the protection of aquatic life do not apply to  
25 ground water;

26       (3) review, from time to time at intervals of not more than 3  
27 years and, to the extent permitted by this chapter, revise established  
28 classifications of waters and adopted standards of water purity and  
29 classification quality;

30       (4) adopt rules governing the granting of mixing zones,  
31 requiring that mixing zones granted by the department be specifically

1 identified, and requiring that mixing zones have:

2 (a) the smallest practicable size;

3 (b) a minimum practicable effect on water uses; and

4 (c) definable boundaries;

5 (5) adopt rules implementing the nondegradation policy  
6 established in 75-5-303, including but not limited to rules that:

7 (a) provide a procedure for department review and authorization  
8 of degradation;

9 (b) establish criteria for the following:

10 (i) determining important economic or social development; and

11 (ii) weighing the social and economic importance to the public  
12 of allowing the proposed project against the cost to society  
13 associated with a loss of water quality; and

14 (c) establish criteria for determining whether a proposed  
15 activity or class of activities will result in nonsignificant changes  
16 in water quality for any parameter in order that those activities are  
17 not required to undergo review under 75-5-303(3). These criteria must  
18 be established in a manner that generally:

19 (i) equates significance with the potential for harm to human  
20 health or the environment;

21 (ii) considers both the quantity and the strength of the  
22 pollutant;

23 (iii) considers the length of time the degradation will occur;  
24 and

25 (iv) considers the character of the pollutant so that greater  
26 significance is associated with carcinogens and toxins that  
27 bioaccumulate or biomagnify and lesser significance is associated with  
28 substances that are less harmful or less persistent.

29 ~~(d) provide that a domestic septic system and drain field that~~  
30 ~~meets the minimum state standards results in nonsignificant changes~~  
31 ~~to water quality and is not required to undergo review under~~

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~~75-5-303(3) unless the predicted nitrate contamination at the end of the drain field exceeds 10 milligrams per liter changes to ground water quality are nonsignificant if the discharge will not cause degradation of surface water and the predicted concentration of nitrate at the boundary of the ground water mixing zone does not exceed:~~

~~(i) 5.0 milligrams per liter for domestic sewage effluent discharged from a conventional septic system;~~

~~(ii) 7.5 milligrams per liter for domestic sewage effluent discharged from a septic system using level two treatment, which must be defined in the rules; or~~

~~(iii) 7.5 milligrams per liter from sources other than human waste.~~

(6) to the extent practicable, ensure that the rules adopted under subsection (5) establish objective and quantifiable criteria for various parameters. These criteria must, to the extent practicable, constitute guidelines for granting or denying applications for authorization to degrade high-quality waters under the policy established in 75-5-303(2) and (3).

(7) adopt rules to implement this section."

Section 8- 6. Section 75-5-302, MCA, is amended to read:

"75-5-302. Revised classifications not to lower water quality standards -- exception. In revising classifications or standards or in adopting new classifications or standards, the board may not so formulate standards of water purity quality or classify any state water as to lower any the water quality standard applicable to any state water below the level applicable under the classifications and standards adopted except upon a finding that a particular state water has been classified under a standard or classification of water quality that is higher than the actual water quality that existed at

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1 the time of classification and only if the action is taken pursuant  
 2 to 75-5-307. When the board or department acquires information is  
 3 presented with facts indicating that a body of water is misclassified,  
 4 the board shall, within 60 days of acquiring the information, take  
 5 action pursuant to 75-5-307 90 days, initiate rulemaking to correct  
 6 the misclassification."

7  
 8 Section ~~9- 7.~~ Section 75-5-304, MCA, is amended to read:

9 "75-5-304. Adoption of standards -- pretreatment, effluent,  
 10 performance. (1) The board shall:

11 (a) adopt pretreatment standards for wastewater discharged into  
 12 a municipal disposal system<sub>7i</sub>;

13 (b) adopt effluent standards as defined in 75-5-103<sub>7i</sub>;

14 (c) adopt toxic effluent standards and prohibitions<sub>7i</sub>; and

15 (d) establish standards of performance for new point source  
 16 discharges.

17 (2) In taking action under subsection (1), the board shall  
 18 ensure that the standards are cost-effective and economically,  
 19 environmentally, and technologically feasible."

20  
 21 Section ~~10- 8.~~ Section 75-5-305, MCA, is amended to read:

22 "75-5-305. Adoption of requirements for treatment of wastes --  
 23 variance procedure -- appeals. (1) The board may establish minimum  
 24 requirements for the treatment of wastes. For cases in which the  
 25 federal government has adopted technology-based treatment requirements  
 26 for a particular industry or activity in 40 CFR, chapter I, subchapter  
 27 N, the board shall adopt those requirements by reference. To the  
 28 extent that the federal government has not adopted minimum treatment  
 29 requirements for a particular industry or activity, the board may do  
 30 so through rulemaking, for parameters likely to affect beneficial  
 31 uses, ensuring that the requirements are cost-effective and

1 economically, environmentally, and technologically feasible. Except  
 2 for the technology-based treatment requirements set forth in 40 CFR  
 3 chapter I, subchapter N, minimum treatment may not be required to  
 4 address the discharge of a parameter when the discharge is considered  
 5 nonsignificant under rules adopted pursuant to 75-5-301.

6 (2) The board shall establish minimum requirements for the  
 7 control and disposal of sewage from private and public buildings,  
 8 including standards and procedures for variances from the  
 9 requirements.

10 (3) An applicant for a variance from minimum requirements  
 11 adopted by a local board of health pursuant to 50-2-116(1)(i) may  
 12 appeal the local board of health's final decision to the department  
 13 by submitting a written request for a hearing within 30 days after the  
 14 decision. The written request must describe the activity for which  
 15 the variance is requested, include copies of all documents submitted  
 16 to the local board of health in support of the variance, and specify  
 17 the reasons for the appeal of the local board of health's final  
 18 decision.

19 (4) The department shall conduct a hearing on the request  
 20 pursuant to Title 2, chapter 4, part 6. Within 30 days after the  
 21 hearing, the department shall grant, conditionally grant, or deny the  
 22 variance. The department shall base its decision on the board's  
 23 standards for a variance.

24 (5) A decision of the department pursuant to subsection (4) is  
 25 appealable to district court under the provisions of Title 2, chapter  
 26 4, part 7."

27  
 28 ~~Section 11. Section 75-5-306, MCA, is amended to read:~~

29 ~~"75-5-306. Purer than natural unnecessary dams. (1) It is~~  
 30 ~~not necessary that wastes be treated to a purer condition than the~~  
 31 ~~natural condition of the receiving stream water as long as the minimum~~

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1 ~~treatment requirements established under this chapter are met.~~

2 ~~(2) For the purpose of issuing permits under this part,~~  
 3 ~~"Natural" "natural" refers to conditions or material present from~~  
 4 ~~runoff or percolation over which man has no control the water quality~~  
 5 ~~as of July 1, 1971, or to runoff or percolation from developed land~~  
 6 ~~where all reasonable land, soil, and water conservation practices have~~  
 7 ~~been applied. Conditions resulting from the reasonable operation of~~  
 8 ~~dams at July 1, 1971, are natural."~~

10 Section ~~12~~ 9. Section 75-5-401, MCA, is amended to read:

11 "75-5-401. Board rules for permits. (1) The board shall adopt  
 12 rules:

13 (a) governing application for permits to discharge sewage,  
 14 industrial wastes, or other wastes into state waters, including rules  
 15 requiring the filing of plans and specifications relating to the  
 16 construction, modification, or operation of disposal systems;

17 (b) governing the issuance, denial, modification, or revocation  
 18 of permits. The board may not require a permit for a water conveyance  
 19 structure or for a natural spring if the water discharged to state  
 20 waters does not contain industrial waste, sewage, or other wastes.  
 21 The board may not require a permit for the discharge of ground water  
 22 that is not altered from its ambient quality by the discharger as long  
 23 as existing uses are not impacted in the receiving state waters  
 24 Discharge to surface water of ground water that is not altered from  
 25 its ambient quality does not constitute a discharge requiring a permit  
 26 under this part and is not degradation if:

27 (i) the water discharged does not cause the receiving waters to  
 28 exceed applicable standards for any parameters; or

29 (ii) to the extent that the receiving waters in their ambient  
 30 state exceed standards for any parameters, the discharge does not  
 31 increase the concentration of the parameters.

(2) The rules ~~shall~~ may allow the issuance or continuance of a permit only if the department finds that operation consistent with the limitations of the permit will not result in pollution of any state waters, except that the rules may allow the issuance of a temporary permit under which pollution may result if the department ~~insures~~ ensures that ~~such~~ the permit contains a compliance schedule designed to meet all applicable effluent standards and water quality standards in the shortest reasonable period of time.

(3) The rules shall provide that the department may revoke a permit if the department finds that the holder of the permit has violated its terms, unless the department also finds that the violation was accidental and unforeseeable and that the holder of the permit corrected the condition resulting in the violation as soon as was reasonably possible.

(4) The board may adopt rules governing reclamation of sites disturbed by construction, modification, or operation of disposal systems for which a bond is voluntarily filed by a permittee pursuant to 75-5-405, including rules for the establishment of criteria and procedures governing release of the bond or other surety and release of portions of a bond or other surety."

~~Section 13.~~ 10. Section 75-5-403, MCA, is amended to read:

"75-5-403. Denial or modification of permit -- time for review of permit application. (1) The department shall review for completeness all applications for new permits within 30 60 days of the receipt of the initial application and within 30 days of receipt of responses to notices of deficiencies. The initial completeness notice must note all deficiency issues, and the department may not in a later completeness notice raise an issue pertaining to the initial application that was not raised in the initial notice major deficiencies, based on the information submitted. The department and

1 the applicant may extend these timeframes, by mutual agreement, by not  
 2 more than 75 days. An application is considered complete unless the  
 3 applicant is notified of a deficiency within the appropriate review  
 4 period.

5 (2) If the department denies an application for a permit or  
 6 modifies a permit, the department shall give written notice of its  
 7 action to the applicant or holder and ~~he~~ the applicant or holder may  
 8 request a hearing before the board, in the manner stated in 75-5-611,  
 9 for the purpose of petitioning the board to reverse or modify the  
 10 action of the department. ~~Such~~ The hearing ~~shall~~ must be held within  
 11 30 days after receipt of written request. After the hearing, the  
 12 board shall affirm, modify, or reverse the action of the department.  
 13 If the holder does not request a hearing before the board,  
 14 modification of a permit ~~shall be~~ is effective 30 days after receipt  
 15 of notice by the holder unless the department specifies a later date.  
 16 If the holder does request a hearing before the board, ~~no~~ an order  
 17 modifying his ~~the~~ permit ~~shall be~~ is not effective until 20 days after  
 18 ~~he has received~~ receipt of notice of the action of the board.

19 ~~(2) This section does not apply to any modification made in~~  
 20 ~~permit conditions at the time of reissuance, but only to those~~  
 21 ~~modifications made in existing permits during their terms."~~

22  
 23 Section ~~14.~~ 11. Section 75-5-605, MCA, is amended to read:

24 "75-5-605. Prohibited activity. (1) It is unlawful to:

25 (a) cause pollution as defined in 75-5-103 of any state waters  
 26 or to place or cause to be placed any industrial or other wastes where  
 27 they will in a location where they are likely to cause pollution of  
 28 any state waters; . Any placement of materials that is authorized by  
 29 a permit issued by any state or federal agency is not a placement of  
 30 wastes within the prohibition of this subsection.

31 (b) violate any provision set forth in a permit or stipulation,



1 including but not limited to limitations and conditions contained in  
2 the permit;

3 (c) site and construct a sewage lagoon less than 500 feet from  
4 an existing water well;

5 (d) cause degradation of state waters without authorization  
6 pursuant to 75-5-303;

7 (e) violate any order issued pursuant to this chapter; or

8 (f) violate any provision of this chapter.

9 (2) It is unlawful to carry on any of the following activities  
10 without a current permit from the department:

11 (a) construct, modify, or operate a disposal system ~~which~~ that  
12 discharges into any state waters;

13 (b) construct or use any outlet for the discharge of sewage,  
14 industrial wastes, or other wastes into any state waters; or

15 (c) discharge sewage, industrial wastes, or other wastes into  
16 any state waters."

17  
18 ~~Section 15. Section 75-5-611, MCA, is amended to read:~~

19 ~~"75-5-611. Violation of chapter -- administrative actions and~~  
20 ~~penalties -- notice and hearing. (1) When the department has reason~~  
21 ~~to believe that a violation of this chapter, a rule adopted under this~~  
22 ~~chapter, or a condition of a permit or authorization required by a~~  
23 ~~rule adopted under this chapter has occurred, it may have a written~~  
24 ~~notice letter served personally or by certified mail on the alleged~~  
25 ~~violation or the violator's agent. The notice letter must state:~~

26 ~~(a) the provision of statute, rule, permit, or approval alleged~~  
27 ~~to be violated;~~

28 ~~(b) the facts alleged to constitute the violation;~~

29 ~~(c) the specific nature of corrective action that the department~~  
30 ~~requires;~~

31 ~~(d) as applicable, the amount of the administrative penalty that~~

EXHIBIT D

1 ~~will be assessed by order under subsection (2) if the corrective~~  
2 ~~action is not taken within the time provided under subsection (1)(e);~~  
3 ~~and~~

4 ~~(e) as applicable, the time within which the corrective action~~  
5 ~~is to be taken or the administrative penalty will be assessed. For~~  
6 ~~the purposes of this chapter, service by certified mail is complete~~  
7 ~~on the date of receipt. Except as provided in subsection (2)(a)(ii),~~  
8 ~~an administrative penalty may not be assessed until the provisions of~~  
9 ~~subsection (1) have been complied with.~~

10 ~~(2) (a) The department may issue an administrative notice and~~  
11 ~~order in lieu of the notice letter provided under subsection (1) if~~  
12 ~~the department's action:~~

13 ~~(i) does not involve assessment of an administrative penalty;~~  
14 ~~or~~

15 ~~(ii) seeks an administrative penalty only for an activity that~~  
16 ~~it believes and alleges has violated or is violating 75-5-605.~~

17 ~~(b) A notice and order issued under this section must meet all~~  
18 ~~of the requirements specified in subsection (1).~~

19 ~~(3) In a notice and order given under subsection (1), the~~  
20 ~~department may require the alleged violator to appear before the board~~  
21 ~~for a public hearing and to answer the charges. The hearing must be~~  
22 ~~held no sooner than 15 days after service of the notice and order,~~  
23 ~~except that the board may set an earlier date for hearing if it is~~  
24 ~~requested to do so by the alleged violator. The board may set a later~~  
25 ~~date for hearing at the request of the alleged violator if the alleged~~  
26 ~~violator shows good cause for delay.~~

27 ~~(4) If the department does not require an alleged violator to~~  
28 ~~appear before the board for a public hearing, the alleged violator may~~  
29 ~~request the board to conduct the hearing. The request must be in~~  
30 ~~writing and must be filed with the department no later than 30 days~~  
31 ~~after service of a notice and order under subsection (2). If a~~

1 ~~request is filed, a hearing must be held within a reasonable time.~~  
2 ~~If a hearing is not requested within 30 days after service upon the~~  
3 ~~alleged violator, the opportunity for a contested case appeal to the~~  
4 ~~board under Title 2, chapter 4, part 6, is waived.~~

5 ~~(5) If a contested case hearing is held under this section, it~~  
6 ~~must be public and must be held in the county in which the violation~~  
7 ~~is alleged to have occurred or, at the request of the alleged~~  
8 ~~violator, in Lewis and Clark County.~~

9 ~~(6) (a) After a hearing, the board shall make findings and~~  
10 ~~conclusions that explain its decision.~~

11 ~~(b) If the board determines that a violation has occurred, it~~  
12 ~~shall also issue an appropriate order for the prevention, abatement,~~  
13 ~~or control of pollution, the assessment of administrative penalties,~~  
14 ~~or both.~~

15 ~~(c) If the order requires abatement or control of pollution, the~~  
16 ~~board shall state the date or dates by which a violation must cease~~  
17 ~~and may prescribe timetables for necessary action in preventing,~~  
18 ~~abating, or controlling the pollution.~~

19 ~~(d) If the order requires payment of an administrative penalty,~~  
20 ~~the board shall explain how it determined the amount of the~~  
21 ~~administrative penalty.~~

22 ~~(e) If the board determines that a violation has not occurred,~~  
23 ~~it shall declare the department's notice void.~~

24 ~~(7) The alleged violator may petition the board for a rehearing~~  
25 ~~on the basis of new evidence, which petition and the board may grant~~  
26 ~~the petition for good cause shown.~~

27 ~~(8) Instead of issuing an order, the board may direct the~~  
28 ~~department to initiate appropriate action for recovery of a penalty~~  
29 ~~under 75-5-631, 75-5-632, 75-5-633, or 75-5-635.~~

30 ~~(9) (a) An action initiated under this section may include an~~  
31 ~~administrative penalty of not more than \$10,000 for each day of each~~

1 ~~violation; however. However, the maximum penalty may not exceed~~  
2 ~~\$100,000 for any related series of violations.~~

3 ~~(b) Administrative penalties collected under this section must~~  
4 ~~be deposited in the general fund.~~

5 ~~(c) In determining the amount of penalty to be assessed to a~~  
6 ~~person, the department and board shall consider the criteria stated~~  
7 ~~in 75-5-631(4) and rules promulgated under 75-5-201.~~

8 ~~(d) The contested case provisions of the Montana Administrative~~  
9 ~~Procedure Act, provided for in Title 2, chapter 4, part 6, apply to~~  
10 ~~a hearing conducted under this section."~~

11  
12 ~~Section 16- 12.~~ Section 75-5-614, MCA, is amended to read:

13 "75-5-614. Injunctions authorized. (1) The department is  
14 authorized to commence a civil action seeking appropriate relief,  
15 including a permanent or temporary injunction, for a violation which  
16 that would be subject to a compliance order under 75-5-613. An action  
17 under this subsection may be commenced in the district court of ~~the~~  
18 ~~county in which the defendant is located or resides or is doing~~  
19 ~~business or any~~ the county where a violation occurs or is threatened  
20 ~~if the defendant cannot be located in Montana, and the court shall~~  
21 ~~have~~ has jurisdiction to restrain the violation and to require  
22 compliance.

23 (2) The department may bring an action for an injunction against  
24 the continuation of an alleged violation of the terms or conditions  
25 of a permit issued by the department or any rule or effluent standard  
26 promulgated under this chapter or against a person who fails to comply  
27 with an emergency order issued by the department under 75-5-621 or a  
28 final order of the board. The court to which the department applies  
29 for an injunction may issue a temporary injunction if it finds that  
30 there is reasonable cause to believe that the allegations of the  
31 department are true, and it may issue a temporary restraining order

1 pending action on the temporary injunction."

2

3 ~~Section 17-~~ 13. Section 75-5-631, MCA, is amended to read:

4 "75-5-631. Civil penalties -- injunctions not barred. (1) A  
5 person who violates this chapter or a rule, permit, effluent standard,  
6 or order issued under the provisions of this chapter ~~shall be~~ is  
7 subject to a civil penalty not to exceed \$25,000. Each day of  
8 violation constitutes a separate violation.

9 (2) Action under this section does not bar enforcement of this  
10 chapter or of rules or orders issued under it by injunction or other  
11 appropriate remedy.

12 (3) The department shall institute and maintain ~~any~~ enforcement  
13 proceedings in the name of the state.

14 (4) ~~When~~ In an action seeking penalties under this section, the  
15 department shall take into account and the court shall consider the  
16 following factors in determining an appropriate settlement, if any,  
17 subsequent to the filing of a complaint:

18 (a) the nature, circumstances, extent, and gravity of the  
19 violation; and

20 (b) with respect to the violator, ~~his~~ the violator's ability to  
21 pay, ~~any~~ and prior history of such violations, the economic benefit  
22 or savings, if any, to the violator resulting from the violator's  
23 action, amounts voluntarily expended by the violator to address or  
24 mitigate the violation or impacts of the violation to waters of the  
25 state, and any other matters as justice may require."

26

27 ~~Section 18-~~ 14. Section 75-5-636, MCA, is amended to read:

28 "75-5-636. Action by other parties. A person, association,  
29 corporation, or agency of the state or federal government may apply  
30 to the department protesting a violation of this chapter. The  
31 department shall make an investigation and make a written report to



1 the person, association, corporation, or agency ~~which~~ that made the  
 2 protest. If a violation is established by the investigation of the  
 3 department, appropriate enforcement action ~~shall~~ must be taken. If  
 4 the investigation proves the protest to have been without reasonable  
 5 cause, the department may seek recovery of investigative costs from  
 6 the person who made the application."

7  
 8 Section ~~19-~~ 15. Section 75-6-112, MCA, is amended to read:

9 "75-6-112. Prohibited acts. A person may not:

10 (1) discharge sewage, ~~drainage,~~ drainage, industrial waste, or  
 11 other wastes that will cause pollution of state waters used by a  
 12 person for domestic use or as a source for a public water supply  
 13 system or water or ice company;

14 (2) discharge sewage, ~~drainage,~~ drainage, industrial waste, or  
 15 other waste into any state waters or on the banks of any state waters  
 16 or into any abandoned or operating water well unless the sewage,  
 17 ~~drainage,~~ drainage, industrial waste, or other waste is treated as  
 18 prescribed by the board;

19 (3) build or operate any railroad, logging road, logging camp,  
 20 or electric or manufacturing plant of any kind on any watershed of a  
 21 public water supply system unless:

22 (a) the water supply is protected from pollution by sanitary  
 23 precautions prescribed by the board; and

24 (b) a permit has been issued by the department after approval  
 25 of detailed plans and specifications for sanitary precautions;

26 (4) commence construction, alteration, or extension of any  
 27 system of water supply, water distribution, sewer, ~~drainage,~~ drainage,  
 28 wastewater, or sewage disposal before ~~he~~ the person submits to the  
 29 department necessary maps, plans, and specifications for its review  
 30 and the department approves those maps, plans, and specifications;  
 31 However, any facility reviewed by the department under Title 75,

1 chapter 5, is not subject to the provisions of this section.

2 (5) operate or maintain any public water supply system which  
3 that exceeds a maximum contaminant level established by the board  
4 unless ~~he~~ the person has been granted or has an application pending  
5 for a variance or exemption pursuant to this part;

6 (6) violate any provision of this part or a rule adopted under  
7 this part; or

8 (7) violate any condition or requirement of an approval issued  
9 pursuant to this part."

10

11 NEW SECTION. Section 20. 16. Codification instruction.

12 [Sections 1 ~~through 3~~ and 2] are intended to be codified as an  
13 integral part of Title 75, chapter 5, part 3, and the provisions of  
14 Title 75, chapter 5, part 3, apply to [sections 1 ~~through 3~~ and 2].  
15

16 NEW SECTION. Section 17. {standard} Saving clause. Section 75-  
17 5-614 does not affect proceedings that were begun before [the  
18 effective date of this act].

19

20 NEW SECTION. Section 18. {standard} Effective date. [This act]  
21 is effective on passage and approval.

22

-END-

Concept amendments to SB 331 as amended by Sen. Beck  
(sb033102.amk)

**Beck Amendment 10.** Page 4, line 23.

Following: "parameter"

Insert: "for a parameter ~~if that change is likely to affect a~~  
beneficial use likely to be affected by a proposed activity"

**Beck Amendment 21.** Page 8, lines 13 and 14.

Strike: "that" on line 13 through "feasible" on line 14

Insert: ", giving consideration to the economics of waste treatment and prevention. Standards adopted by the board must meet the following requirements:

(a) ~~for ground water, the water quality criteria must be the maximum contaminant level for those parameters for which an maximum contaminant level, as found in 40 CFR, part 141, has been determined, except in the case of carcinogens. For carcinogens, the water quality criteria must be the more stringent of the maximum contaminant level, if any, or the value associated with an excess lifetime cancer risk level, assuming continuous exposure, not to exceed  $1 \times 10^{-3}$  in the case of arsenic and  $1 \times 10^{-4}$  for other carcinogens.~~

~~(b)~~ for measuring carcinogens in surface water, the water quality criteria standard for protection of human health must be the value associated with an excess lifetime cancer risk level, assuming continuous lifetime exposure, not to exceed  $1 \times 10^{-3}$  in the case of arsenic and  $1 \times 10^{-4}$   ~~$10^{-5}$~~  for other carcinogens;

~~(c)~~ for all metal parameters, the values used by the board as criteria for standards of water quality must be stated as dissolved concentrations; and

~~(d)~~ ~~(b)~~ criteria standards for the protection of aquatic life do not apply to ground water

(c) in no event may standards exceed the maximum contaminant levels obtained from 40 CFR part 141, as of [the effective day of this act]"

**Beck Amendment 33.** Page 12, line 28.

Strike: ";

Insert: ". Any placement of materials that is authorized by a permit issued by any state or federal agency is not a placement of wastes within the prohibition of this subsection, if the agency's permitting authority includes provisions for review of the placement of materials to ensure that it will not cause pollution of state waters and the department has the opportunity to participate in the review of the activity."



SENATE NATURAL RESOURCES  
EXHIBIT NO. 19  
DATE 2-18-96  
BILL NO. SB-331

Amendments to Senate Bill No. 331  
First Reading Copy

For the Committee on Natural Resources

Prepared by Michael S. Kakuk  
February 17, 1995

1. Page 4, line 10.

Strike: "shall"

Insert: "may"

2. Page 4, line 13.

Following: "criteria"

Insert: "and must include a consideration of the affects of other  
routes of exposure"

*Paul*

EXHIBIT D

MONTANA SENATE  
1995 LEGISLATURE  
NATURAL RESOURCES COMMITTEE  
ROLL CALL VOTE

DATE 2-18-95 BILL NO. SB 331 NUMBER 10

MOTION: TO STRIKE AMENDMENT No 21,

Subsection (e)

Failed 6-5

NAME	AYE	NO
VIVIAN BROOKE	X	
B.F. "CHRIS" CHRISTIAENS	X	
MACK COLE		X
WILLIAM CRISMORE		X
MIKE FOSTER		X
TOM KEATING		X
KEN MILLER		X
JEFF WELDON	X	
BILL WILSON	X	
LARRY TVEIT, VICE CHAIRMAN		X
LORENTS GROSFIELD, CHAIRMAN	X	

SEN:1995  
wp:rlclvote.man  
CS-11

EXHIBIT D

MONTANA SENATE  
1995 LEGISLATURE  
NATURAL RESOURCES COMMITTEE  
ROLL CALL VOTE

DATE 3-18-95 BILL NO. SB-331 NUMBER 11

MOTION: TO DO PASS AS AMENDED

PASSED 7-4

NAME	AYE	NO
VIVIAN BROOKE		X
B.F. "CHRIS" CHRISTIAENS		X
MACK COLE	X	
WILLIAM CRISMORE	X	
MIKE FOSTER	X	
TOM KEATING	X	
KEN MILLER	X	
JEFF WELDON		X
BILL WILSON		X
LARRY TVEIT, VICE CHAIRMAN	X	
LORENTS GROSFIELD, CHAIRMAN	X	

SEN:1995  
wp:rlclvote.man  
CS-11

MINUTES

MONTANA HOUSE OF REPRESENTATIVES  
54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By Rep. Dick Knox, Chairman, on March 13, 1995,  
at 3:00 pm.

ROLL CALL

Members Present:

Rep. Dick Knox, Chairman (R)  
Rep. Bill Tash, Vice Chairman (Majority) (R)  
Rep. Bob Raney, Vice Chairman (Minority) (D)  
Rep. Aubyn A. Curtiss (R)  
Rep. Jon Ellingson (D)  
Rep. David Ewer (D)  
Rep. Daniel C. Fuchs (R)  
Rep. Hal Harper (D)  
Rep. Karl Ohs (R)  
Rep. Scott J. Orr (R)  
Rep. Paul Sliter (R)  
Rep. Robert R. Story, Jr. (R)  
Rep. Jay Stovall (R)  
Rep. Emily Swanson (D)  
Rep. Lila V. Taylor (R)  
Rep. Cliff Trexler (R)  
Rep. Douglas T. Wagner (R)

Members Excused: Rep. Carley Tuss (D)

Members Absent: None

Staff Present: Michael Kakuk, Environmental Quality Council  
Alyce Rice, Committee Secretary

Please Note: These are summary minutes. Testimony and  
discussion are paraphrased and condensed.

Committee Business Summary:

Hearing: SB 330, SB 331  
Executive Action: HB 521 Do Pass As Amended  
SB 362 Do Pass As Amended  
SB 252 Tabled

Tape 1, Side A

(Note: Testimony and discussion pertaining to both SB 330 and SB  
331 can be found in each of the hearings for these two bills.)

HEARING ON SB 330Opening Statement by Sponsor:

SEN. CHUCK SWYSGOOD, Senate District 17, Dillon, said SB 330 proposes an amendment to the water quality nondegradation provisions of Montana water quality laws, changes the definition of high-quality waters, changes the definition of interested persons and amends sections 75-5-103 and 75-5-303, MCA. Under current law, almost every drop of water in the state is classified as high-quality water. Lowering one parameter of the 240 established parameters would constitute a degradation of the current definition of high-quality water. The bill proposes to protect the high-quality of waters in Montana and at the same time put some common sense into the classification of waters.

Proponents' Testimony:

Peggy Trenk, Western Environmental Trade Association. Written testimony. EXHIBIT 1 (SB 330 and SB 331)

John Bloomquist, Montana Stockgrowers Association, said the current definition of water quality degradation is the lowering of a parameter even if there is no effect on any beneficial use. Standards, criteria and definitions under the Water Quality Act should be tied to the concept of beneficial use. SB 330 would accomplish this. The present definition of high-quality waters is essentially all waters in Montana. The proposed definition recognizes that some waters in the state are not high-quality waters. The changes in SB 330 are necessary to maintain a reasonable nondegradation policy for Montana.

Larry Brown, Agricultural Preservation Association, said surface water pollution is largely due to uncontrollable sources. Permitting has advanced to the point where the state is approaching zero risks regardless of whether it is the impact on the environment or the impact on humans. It is unrealistic, unachievable and an unnecessary band-aid.

Max Botz, President, Hydrometrics, Inc., Helena, said the regulatory programs have become more complex than anywhere in the United States. All waters in the state are defined as high-quality. Colorado, Idaho, Wyoming and Utah have high-quality waters also, but they have not declared all their waters high-quality. These states have only declared the waters that are truly high-quality. SB 330 proposes that all waters continue to meet water quality standards. All it does is delineate the nondegradation provision.

The following proponents supported SB 330:

David Owen, Montana Chamber of Commerce

EXHIBIT D

Lorna Frank, Montana Farm Bureau

Don Allen, Montana Wood Products Association

Tape 1, Side B

Carl Schweitzer, Montana Contractors Association

Collin Bangs, Montana Association of Realtors

Mike Murphy, Montana Water Resources Association

Gail Abercrombie, Montana Petroleum Association

Bob Williams, Montana Mining Association

Jim Kembel, City of Billings

Employees of Pegasus Gold Corporation. Written testimony.  
EXHIBIT 2 (SB 330 and SB 331)

K. D. Feedback, Lincoln. Written testimony. EXHIBIT 3 (SB 330  
and SB 331)

Don Peoples, Montana Technology Companies, Inc., Montana Energy  
Research & Development Institute. Written testimony. EXHIBIT 4  
(SB 330 and SB 331)

Opponents' Testimony:

Hope Stevens, Self, said SB 330 is going to do irrevocable harm  
to the waters of the state and to the citizens of Montana.

Kenneth Knapp, Montana River Action Network, said SB 330 and SB  
331 propose nothing short of war on Montana's waters. The mining  
industries' war on waters threatens to degrade the water quality  
of some of the most pristine and beautiful waters of the world,  
held in high esteem by people from all over the world who come to  
Montana to utilize it. Mr. Knapp submitted a map and list  
showing 25 waters at risk in Montana. EXHIBIT 5

Brian Kuehl, Greater Yellowstone Coalition. Written testimony.  
EXHIBIT 6

Julia Page, Northern Plains Resource Council. Written testimony.  
EXHIBIT 7

Alan Rollo, Montana Wildlife Federation. Written testimony.  
EXHIBIT 8

Don Spivey, Whitefish, Self, Citizens for a Better Flathead.  
Written testimony. EXHIBIT 9

Don Kern, Board of Directors, Canyon Coalition. Written EXHIBIT D  
testimony. EXHIBIT 10

**Tape 2, Side A**

**Paul Roos, Representing Land Lindbergh, Greenough and North Powell Conservation Supervisors. Written testimony. EXHIBITS 11 and 12**

**Vicki Watson, Associate Professor, Biology, University of Montana, Self, Clark Fork-Pondera Coalition. Written testimony. EXHIBIT 13**

**Steve Pilcher, Department of Health and Environmental Sciences, said the department is concerned with the definition of degradation in SB 330. Mr. Pilcher said it was his understanding that alternate language to the definition of degradation will be offered in conjunction with SB 331. However, without knowing the fate of that bill and without ensuring that the coordination clause that is proposed in the bill will come into play and address the definition issue, it is only fair to express the department's concerns.**

**Paul Hawks, Rancher, Melville. Written testimony. EXHIBIT 14**

**Sally Jones, Self, said article 9, section 1, of the Montana Constitution prohibits the Legislature from allowing any degradation of Montana's high-quality water. Ms. Jones urged the committee to table SB 330 and SB 331.**

**The following opponents expressed opposition to SB 330 or had written testimony:**

**Jim Emerson, Self, Helena**

**Ron Cunningham, Fishing Outfitters Association of Montana**

**Jim Curtis, Sierra Club. Written testimony. EXHIBIT 15**

**Jim Barrett, Beartooth Alliance, Cooke City**

**Mike Geary, Self**

**Grant Parker, Mullendore, Tawney, Watt, Parker & Johnson, Attorneys At Law. Written testimony. EXHIBIT 16**

**Jim Carlson, City-County Health Department, Missoula**

**John Smart, Self, Island Mountain Protectors Association.**

**Louise Bruce, Montana Wilderness Association**

**Florence Ore, Concerned Citizens of Pony**

**Tony Schoonen, Anaconda Sportsmens Association**

**Bill Holdorf, Skyline Sportsmens Association**

**EXHIBIT D**

Jim Jensen, Montana Environmental Information Center

Steve Kelly, Friends of the Wild Swan

George Ochenski, Trout Unlimited

Mike Biedscheid, Self, Whitefish. Petition against SB 330 and SB 331. EXHIBIT 18

Randy Penez, Fort Belknap Tribes

Stan Krager, Self, Helena

Cecil Davis, Self, Helena. Written testimony. EXHIBIT 19

J. V. Bennett, Montana Public Interest Research Group. Written testimony. EXHIBIT 20

Dana Boussard, Self, Arlee. Written testimony. EXHIBIT 21

Willa Hall, League of Women Voters. Written testimony. EXHIBIT 22

Informational Testimony: None

Questions From Committee Members and Responses:

REP. BOB RANEY asked SEN. SWYSGOOD why he wanted to remove the public from "interested persons" and change the definition to include only property owners. State waters belong to all citizens in Montana. SEN. SWYSGOOD said the language was taken from a court decision by Judge McCarter on the Stillwater Mine. The public will still have the opportunity to make comments to the agency involved. REP. RANEY asked SEN. SWYSGOOD if the public would have the same impact as the property owner in a siting decision on degradation. SEN. SWYSGOOD said he wasn't sure.

REP. KARL OHS asked Mr. Pilcher to explain classifications three and four of ground waters. Mr. Pilcher said class three and class four ground waters are those that have a total dissolved solids level in the range of 10,000 parts per million. The waters are classified in those two classifications because of the high dissolved solids which render them of marginal use for most beneficial purposes. The waters are not necessarily suitable for drinking even under desperate situations.

REP. CLIFF TREXLER asked Mr. Pilcher if all the municipalities in Montana were complying with the water quality laws. Mr. Pilcher said he didn't want to go as far as to say all municipalities are in compliance with water quality laws. The water quality standards are used by the Water Quality Division when it issues permits for the discharge of waste in the waters. Every municipality that discharges waste into the state's waters must

EXHIBIT D



have a waste discharge permit. The limits that are imposed as conditions on the quality of the discharge are based on protection of beneficial uses and compliance with surface water quality standards.

Tape 2, Side B

REP. JON ELLINGSON asked Mr. Pilcher to explain the designated uses that are referred to under exceptions on page 2 of the bill. Mr. Pilcher said the Montana surface water quality standards identify a number of beneficial uses that are to be protected. Some of those uses are drinking and culinary purposes, irrigation, and fish and aquatic life. REP. ELLINGSON asked for an example of a river or lake that would not be capable of supporting one of the designated uses. Mr. Pilcher said, as a cautious example, a stream not capable of supporting any beneficial use would be Silver Bow Creek. Silver Bow Creek is classified at the current lowest classification recognized in the significant limitations.

REP. ELLINGSON said many people in his community fish and swim in the Clark Fork River. Missoula recharges its aquifer by way of the Clark Fork River. He asked SEN. SWYSGOOD if the city of Missoula would be considered an "interested person" under the new definition. SEN. SWYSGOOD said if the city has an interest that is liable to be affected by the degradation process, it would be classified as an "interested person." REP. ELLINGSON said he understood that an "interested person" was a property owner. A water company in Missoula drills wells and takes water out of the aquifer. He asked SEN. SWYSGOOD if he considered the water company or the city of Missoula to be interested parties. SEN. SWYSGOOD said probably not.

REP. BILL TASH asked Mr. Pilcher to explain specifically why he was concerned about the definition of degradation. Mr. Pilcher said the department's primary concern is with the definition of degradation because that is what triggers the protection that the rules have been promulgated provide. If degradation does not apply to any waters, there is no need for the nondegradation process that has been developed. An amendment will be proposed for consideration of SB 331 that will address the definition of degradation. As it now stands, the definition of degradation is the same in SB 330 and SB 331. The amendment to be offered would revert back to the language that exists currently in the law. If the amendment is accepted, it would eliminate the department's concern.

REP. PAUL SLITER asked Chris Tweeten, Department of Justice, if SB 330 violates article 9, section 1, of the Montana Constitution as suggested by one of the opponents. Mr. Tweeten said he was the worst person to be asked that question because the Attorney General never expresses opinions on the constitutionality of pending legislation. The reason for that is in the event the legislation is enacted and the Attorney General's staff is called

EXHIBIT D

upon to go to court to defend the legislation's constitutionality and it doesn't find that there are constitutional problems, it would undermine the arguments that the staff would need to present. However, if SB 330 is enacted, the Attorney General's office will study it in great detail to determine whether its constitutionality can be protected under the Montana Constitution.

REP. HAL HARPER referred to page 8 of the bill that states that the department may review authorizations to degrade state waters and may modify the authorization if it determines that an economically, environmentally, and technologically feasible modification to the development exists. He asked Mr. Pilcher if he thought the extent of the modification would constitute the possibility of revoking the authorization. Mr. Pilcher said the language referred to was inserted on the Senate floor. There was considerable discussion in Senate Natural Resources. The primary concern was whether the language enabled the department to significantly modify an authorization to the equivalent of a revocation. That is a legal question that needs to be answered. Without the language to revoke an authorization, it would preclude the department from considering some alternatives.

REP. SLITER asked Alan Joscelyn, Attorney, if, in his opinion, SB 330 violates article 9, section 1, of the Montana Constitution. Mr. Joscelyn said he believed that the legislation is constitutional. The constitution requires the Legislature to act reasonably in defining what is and what is not allowable degradation.

Michael Kakuk, Legal Counsel, Environmental Quality Council (EQC), told the committee that the council undertook a year and a half study that addressed the nondegradation issue. One of the sub-issues it looked at was the constitutionality of Montana's new nondegradation policy. The report has been completed and copies are available for anyone that is interested.

Tape 3, Side A

REP. RANEY asked Mr. Pilcher if there is a stream that is presently degraded from a mining operation and has no beneficial use, does it mean that it is all right to dump anything and everything into it. Mr. Pilcher said other provisions of the Montana Water Quality Act would prevent conditions from worsening in that situation.

REP. DANIEL FUCHS asked Mr. Pilcher how many of the public water supplies are in compliance with the current nondegradation policy. Mr. Pilcher said generally the provisions and the impact of the nondegradation policy do not impact public water supplies.

REP. FUCHS redirected his question to Mr. Kuehl. Mr. Kuehl said the nondegradation policy that is being debated has not been implemented. The rulemaking was only approved on July 15, 1995.

There is not one polluter that is out of compliance with the nondegradation policy because not one polluter has gone through the nondegradation policy at this point in time. The nondegradation policy hasn't been tried out to determine if it is a good policy. The policy has been enacted and is being changed before it has even been tried out.

Closing by Sponsor:

REP. SWYSGOOD said all that SB 330 proposes to do is to put some reasonableness into the interpretation of what high-quality waters are. It is not the intention of the bill to degrade the quality of life in Montana, or to degrade the quality of waters that should rightfully be protected.

HEARING ON SB 331

Opening Statement by Sponsor:

SEN. TOM BECK, Senate District 28, Deer Lodge, said he was born and raised in the Deer Lodge valley. He has watched the Clark Fork River waters turn red, gray and into all kinds of waters. At present it is a fairly clear stream. There are trout in that stream and there will continue to be trout in that stream. There is a major cleanup of the stream that is continuing. SB 331 will put some common sense into the water quality standards of the state. The present standard for arsenic is 18 parts per trillion. The bill will reduce that standard to 20 parts per billion. The arsenic in the Madison River flows 50 parts per billion. There is a lot of sensationalism and hysteria regarding SB 331. The scientific community will describe what is really in the bill.

Proponents' Testimony:

Collin Bangs, Montana Realtors Association, said SB 331 will permit people to build affordable houses and will still do a good job of preventing the pollution of the state's water.

John Bloomquist, Montana Stockgrowers Association, pointed out the following benefits of SB 331:

State standards that are more stringent than federal standards would be allowed if there is sound scientific or technical evidence that stricter standards are warranted.

The definitional change of state waters would exclude those waters that are privately owned ponds or lagoons used solely for treating, transporting, or impounding pollutants; irrigation waters or land application disposal waters when the waters are used up within the irrigation of

EXHIBIT D

application disposal system and the waters are not returned

to state waters.

Changes in the bill under prohibited activities would eliminate potential enforcement by making it unlawful to cause pollution by placing wastes where they are likely to cause pollution of state waters.

Classification changes in the bill create appropriate classification for intermittent streams where no fishery is supported.

Tape 3, Side B

Mr. Bloomquist said SB 331 makes reasonable and necessary changes to the Water Quality Act. SB 331 is not just a mining bill; it affects everyone who uses water.

Larry Brown, Agricultural Preservation Association, said SB 331 perfects the process of bringing science to the administrative process.

Lorna Frank, Montana Farm Bureau, supported SB 331 for the same reasons Mr. Bloomquist gave.

Chris Gallus, Representing Don Peoples, Montana Technology Companies, Inc., and Montana Energy and Research Development Institute. (See Exhibit 4)

Carl Schweitzer, Montana Contractors Association, supported SB 331.

Doug Parker, Crown Butte Mines, supported SB 331.

David King, Hydrogeologist, Schafer and Associates, said SB 331 establishes a water quality level for arsenic that protects the environment and recognizes Montana's unique geologic environment. The bill proposes to set arsenic levels at 20 parts per billion. To put this value into perspective, the current water quality protection standards for fish and aquatic life are 190 parts per billion. The EPA standards for drinking water are 50 parts per billion. In the upper Madison River there are 50 to 70 parts per billion of arsenic naturally occurring in the water. The average arsenic concentration of arsenic in the Missouri River in Townsend is 24 parts per billion. Laboratory detection levels for arsenic are only three parts per billion, yet the current Montana health standard is 0.018 parts per billion. That is less than a drop of water in an olympic sized swimming pool. The 20 parts per billion value will protect Montana's water quality. It is less than one-half of the federal and state standards for drinking water and it is significantly lower than water quality that is occurring naturally in Montana. Mr. King urged the committee to support SB 331.

Ray Lazuk, Hydrologist, Golden Sunlight Mines, said one of the purposes behind SB 331 is to put some clarification back into the regulations and address some technical issues that are presently left open to interpretation by regulatory personnel. Unfortunately, the interpretation hasn't always been consistent. Another important purpose is the recognition of the hydraulic characteristics of a water shed when developing water resource regulations. Mr. Lazuk urged the committee to support SB 331.

Sandra Stash, Engineer, Atlantic Richfield Company, said SB 331 encourages the use of site specific water quality criteria to direct water quality management in Montana. A permittee will look at the actual organisms in the water in an attempt to help the department set the water quality criteria appropriately. An amendment that will be offered will give a permittee some recourse if there is scientific debate between the department and the permittee.

The following proponents supported SB 331:

Don Allen, Montana Wood Products Association

Peggy Trenk, Western Environmental Trade Association

Mike Murphy, Montana Water Resources Association

David Owen, Montana Chamber of Commerce

Jim Kembel, City of Billings

Bob Williams, Montana Mining Association

Tim Wilkinson, John Wilkinson Construction, Great Falls

Opponents' Testimony:

Hope Stevens, Self, opposed SB 331.

Vicki Watson, Associate Professor, Biology, University of Montana, Self. Written testimony. (See Exhibit 13)

Tape 4, Side A

Steve Pilcher, Department of Health and Environmental Sciences (DHES), Water Quality Division, said until the department is sure the proposed amendments have been included in the bill it opposes SB 331 in its current form. The department's ability to develop site specific water quality standards when conditions so demand or dictate, is currently contained in Montana's water quality laws. However, all routes of exposure of a contaminant to the beneficial use have to be considered. It is essential that reference to other routes of exposure be included in the bill. The definition of degradation in SB 331 mirrors the definition of degradation in SB 330. The concerns raised about degradation in

EXHIBIT D

SB 330 are appropriate for SB 331. The department has historically utilized the total recoverable method of metals analysis. The department is required under federal guidelines to use the total recoverable method in setting effluent limits for waste discharge permits in conjunction with MPDES program. DHES has yet to be convinced that switching to dissolved, where only the impact of the metals in the water column is analyzed, is in the best interest of the environment and of the state's water quality program.

Jim Carlson, City-County Health Department, Missoula. Written testimony. EXHIBIT 23

Kenneth Knapp, Montana River Action Network, urged the committee to table SB 331.

Chris Tweeten, Attorney General's Office, Department of Justice, said the department's interest arose initially from the claim against the American Refining Company (ARCO) over natural resource damages in the Clark Fork River Basin. In that lawsuit the state seeks to recover \$630 million. In preparing the claim for trial the state has invested a considerable sum of money in conducting a natural resource damage assessment in the Clark Fork River Basin. Many of the water quality standards which are subject to change in SB 331 were incorporated in the damage assessment. The department is particularly concerned about the attempt in the proposed legislation to change the method of measuring water quality standards from recoverable to dissolved concentration. However, the amendments that will be offered will remove the reference to changing to dissolved concentration and will leave the law as it currently stands. The amendments go a long way toward addressing the problems that SB 331 has with respect to the Clark Fork River Basin litigation. SB 331, as it currently exists, may undercut the science that was the basis for the reports that the department is going to offer in the trial and there is a potential for decreasing the recovery.

Don Spivey, Self, Citizens for a Better Flathead. Written testimony. EXHIBIT 24

Brian Kuehl, Greater Yellowstone Coalition, Bozeman. Written testimony. (See Exhibit 6)

Alan Rollo, Montana Wildlife Federation. Written testimony. EXHIBIT 25

Tape 4, Side B

The following opponents expressed their opposition to SB 331.

Mark Shapley, Hydrogeologist, Island Mountain Protectors Association

EXHIBIT D

HOUSE NATURAL RESOURCES COMMITTEE

March 13, 1995

Page 12 of 17

Jim Jensen, Montana Environmental Information Center. Written testimony. EXHIBIT 26

George Ochenski, Trout Unlimited

Julia Page, Northern Plains Resource Council. Written testimony. EXHIBIT 27

Jim Curtis, Sierra Club

J. V. Bennett, Montana Public Interest Research Group. Written testimony. EXHIBIT 28

Robin Cunningham, Fishing Outfitters Association

Steve Kelly, Friends of the Wild Swan

Stan Frasier, Self, Helena

Florence Ore, Concerned Citizens of Pony

Jim Emerson, Self, Helena

Willa Hall, League of Women Voters of Montana. Written testimony. EXHIBIT 29

Paul Hawks, Rancher, Melville. Written testimony. EXHIBIT 30

Tim Wilkinson, John Wilkinson Construction, Great Falls. Written testimony. EXHIBIT 31

Informational Testimony: None

Questions From Committee Members and Responses:

REP. JON ELLINGSON said it was hard to understand why SB 331 is needed. The proponents have said that the legislation will encourage economic development. Montana's economic development, the growth of per capita income, and almost every other measure of economic growth is leading the nation. One reason that Montana is leading the nation is that it has values that are very desirable, including its pristine environment and waters. REP. ELLINGSON asked SEN. BECK why Montana should tamper with any degradation of its water quality in the name of encouraging economic development when it doesn't need to. SEN. BECK said economic development hinges on more than just people moving into the state. There has to be jobs for those people. It appears that it has been quite difficult for the mining industry to permit mines. The agricultural industry has had to struggle to meet the water quality standards. The timber industry has also had some strains put on it due to the water quality standards. The legislation doesn't put the state's water quality below EPA standards. The standards would still be above many of EPA's standards.

EXHIBIT D

REP. HAL HARPER asked Ms. Watson how the adoption of SB 331 would change the ultimate clean-up of the Clark Fork River. Ms. Watson said she hadn't assessed clean-up specifically, she concentrated mostly on its overall impact on the waters of all of Montana. One lawsuit and one particular set of problems shouldn't determine all of Montana's water quality policies. There has been too much attention addressed to the arsenic standards. The legislation loosens up the standards for all the other carcinogens as well. SB 331 would probably make it more difficult for the state to require the same level of clean-up than it would have required otherwise for the Clark Fork River.

REP. BOB RANEY asked Mr. Pilcher if trout can survive in water that is at the minimum drinking water standard. Mr. Pilcher said generally speaking, trout probably would survive, but it must be kept in mind that sometimes what is good for humans may not be good for fish and aquatic life. To protect fish and aquatic life, it may mean adopting standards that are different than the maximum contaminant levels for human consumption.

Tape 5, Side A

REP. EMILY SWANSON asked SEN. BECK which parties were involved in writing the amendments. SEN. BECK said he understood that the mining industry, DHES and possibly the Governor's office all worked on the amendments.

REP. DAVID EWER referred to a section in the bill that relates to the adoption of standards for pretreatment, effluent and performance of waste. Reference is made to establishing standards of performance for new point source discharges and that the Board shall ensure that the standards are cost-effective and economically, environmentally and technologically feasible. This seems to jeopardize the requirement for some sort of base line for standards. REP. EWER asked Mr. Pilcher to comment. Mr. Pilcher said surface water quality standards should not be subject to determination of what is economically feasible. Surface water standards have to be adopted to protect the beneficial uses. That section attempts to address the development of treatment standards and treatment requirements. The bill, in its current language, would require the department in setting treatment standards, to take into consideration things such as technology-based treatment requirements and economic and environmental feasibility.

CHAIRMAN KNOX said there had been some concerns expressed about the potential impact on livestock during calving season because of the rules that have been adopted by the department on water quality in stream corridors. CHAIRMAN KNOX asked Mr. Pilcher for his comments on those concerns and also how SB 331 would affect those concerns. Mr. Pilcher said the Water Quality Act requires people to refrain from causing pollution. The nondegradation provision is intended to deal with new and increased sources of contamination. If an individual has a feedlot or any confined

EXHIBIT D



livestock operation located in such a manner that all of the waste that accumulates on the surface of that lot is flushed into an adjacent stream every time there is a natural precipitation event, there is a likelihood that pollution could occur. If the department finds that the discharge of that waste into the stream causes pollution and impacts the beneficial use, it would work with the responsible party to devise alternate methods of handling the run off from the feedlot. With the possible exception of the relaxation of the nitrate levels in ground water, SB 331 wouldn't change the threat to agriculture very much.

CHAIRMAN KNOX asked Mr. Pilcher if it could be assumed that existing livestock practices along the streams would be allowed to continue if there has not been any citation or cause for action. Mr. Pilcher said that assumption might be going one step too far. There is no grandfather protection for an operation that has existed for a number of years and has gone unnoticed by the department and found sometime in the future to be causing a water quality problem. The current law doesn't provide that protection and SB 331 doesn't either. Due to limited staff, the department has focused on the livestock operation areas that posed a serious threat to water quality where the impact to beneficial uses could be documented. The department would then work with the party to correct the problem.

Mr. Joscelyn explained the amendments to SB 331 at the request of REP. SWANSON. EXHIBIT 32

Tape 5, Side B

Closing by Sponsor:

SEN. BECK said the amendments to SB 331 may be compatible with Governor Racicot, some of the people in the department and industry, but he was not in total agreement with them. SB 331 will not degrade the waters of Montana. People will still be able to drink out of the streams.

EXECUTIVE ACTION ON HB 521

Motion: REP. DOUG WAGNER MOVED HB 521 DO PASS.

Discussion:

Copies of the Department of Health and Environmental Sciences' (DHES) comments on the fiscal note, discussion draft no. 2 and amendments to HB 521 were provided to the committee. EXHIBITS 33, 34 and 35

REP. WAGNER explained the comments from the department on the fiscal note.

EXHIBIT D

# HOUSE OF REPRESENTATIVES

## Natural Resources

### ROLL CALL

DATE 3-13-95

NAME	PRESENT	ABSENT	EXCUSED
Rep. Dick Knox, Chairman	✓		
Rep. Bill Tash, Vice Chairman, Majority	✓		
Rep. Bob Raney, Vice Chairman, Minority	✓		
Rep. Aubyn Curtiss	✓		
Rep. Jon Ellingson	✓		
Rep. David Ewer	✓		
Rep. Daniel Fuchs	✓		
Rep. Hal Harper	✓		
Rep. Karl Ohs	✓		
Rep. Scott Orr	✓		
Rep. Paul Sliter	✓		
Rep. Robert Story	✓		
Rep. Jay Stovall	✓		
Rep. Emily Swanson	✓		
Rep. Lila Taylor	✓		
Rep. Cliff Trexler	✓		
Rep. Carley Tuss			✓
Rep. Doug Wagner	✓		



EXHIBIT Y1  
DATE 3-13-95  
SB 330/331

**Western Environmental Trade Association**

**Aspen Court, 33 South Last Chance Gulch, Suite 2B  
Helena, Montana 59601  
Phone (406) 443-5541  
Fax # 443-2439**

**TESTIMONY BEFORE THE HOUSE NATURAL RESOURCES COMMITTEE**

**MONDAY, MARCH 13, 1995**

**SENATE BILL 330/331**

Mr. Chairman, Members of the Committee, my name is Peggy Trenk and I'm here today representing the Western Environmental Trade Association in support of SB 330(331).

It's no secret that this bill, and its companion legislation, have attracted a good deal of attention in the media and in the halls of this building. The value of the legislative process is that it allows ideas and proposals to be openly and thoroughly discussed with the intended outcome to be enactment of good public policy. This bill has undergone many changes in recent weeks as different interests have offered their input. From the perspective of accommodating these various points of view, SB 330 (and 331) is a probably a better bill today than when it was first introduced.

However, what has also emerged out of this public process is a series of inaccuracies about both the source, and the impact of this legislation. Before you hear from some other folks about what the bill actually does, I'd like to offer the Committee a brief perspective on what I call "Modern Legislative Mythology - 101".

**EXHIBIT D**

Page 2

1. MYTH NUMBER 1: SB 330/331 IS A MINING BILL

SB 330 and some of the other pieces of legislation you have or will consider are important to the mining industry. But the mining industry is by no means the only interest who has a stake in this bill. Following passage of SB 401 last session, a coalition of interests and industries came together to participate in the extensive rulemaking process undertaken to implement that bill. In the latter part of that process, those groups submitted joint testimony to the Board of Health and Environmental Sciences on what we all believed were changes necessary to make the rules minimally workable. That group represented realtors and homebuilders, agriculture, oil and gas, timber, main street businesses, contractors, mining, and citizen organizations. I recall at one point, one of the Board of Health members remarked that it appeared we collectively represented 90% of the state's economy. While I can't verify that percentage, I can say with reasonable certainty this "coalition" spoke directly for 64,000 Montanans.

Now what has all that got to do with SB 330/331? The point of all that is, this bill is also a product of those same groups and the people they represent. It was clear that even as the existing rules were adopted last summer, they still contained significant workability problems identified by the various participants. Yes, the mining industry has a stake in this bill, but so do a lot of other folks across Montana who raise livestock, and build homes, and pick up the tab for local water treatment plants -- folks on whose behalf Senator Swysgood and those who signed on to this bill have stepped forward to make the nondegradation law a workable policy.

EXHIBIT D

2. MYTH NUMBER 2: SB 330 AND RELATED BILLS ROLL ENVIRONMENTAL PROTECTION BACK 20 YEARS.

The water quality bills that have generated the most controversy this session are not a frontal assault on Montana's environmental laws. As I mentioned earlier, they derive primarily from what has happened in the last two years since passage of SB 401.

The other day some of the opponents to these bills had a rally here at the Capitol and one of the signs outside read, "Who Elected Gary Langley"? Now some of those who know Gary pretty well immediately countered with the question, "Who would elect Gary Langley", but then that's another story entirely.

I would suggest a better sign might have been, "Who elected the staff at the Department of Health and Environmental Sciences to set environmental policy in Montana?" Regulators play an important role in protecting our environment, but I have always understood that role to be in IMPLEMENTING THE POLICY set down by the Legislature, not in SETTING THEIR OWN POLICY. You are the people who set policy.

We were among those who supported SB 401 in 1993 because we thought it was important for the public, DHES, and the regulated industries to clarify the existing nondegradation law. It is our believe that the rules that emerged in this interim to implement that law reached beyond what you, the Legislature, intended in SB 401 and that the Department did in fact, SET new policy in some areas. I don't mean that as a criticism of the Department

or the Board of Health and Environmental Sciences. They did a very good job of trying to seek public comment and involvement in drafting the rules. The problem is, when people start from a different set of assumptions about legislative policy, they rarely arrive at the same point of agreement.

If we were disagreeing about how many times to mow the Capitol lawn this summer, that difference of opinion wouldn't matter. But how we implement the water nondegradation law has such a significant impact on our environment, on our economy, and on the people who live in this state that we felt it necessary to come back in this legislative session to better clarify the state's policy--knowing full well we'd be criticized for doing so. We simply don't feel DHES accurately captured the legislative intent in their rules, and apparently, neither did the Montana Senate a few weeks ago when a bi-partisan majority voted in support of SB 330(331).

In other words, we aren't asking you to overturn 20 years of environmental law, but rather to determine whether regulatory requirements established to implement SB 401 went beyond the intent of Legislature, and if so, to provide better guidance as to how to bring them back in line with the policy you have set.

And finally,

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### 3. MYTH NUMBER THREE: SB 330 (AND ITS COMPANION LEGISLATION) IS THE WORK OF EVIL CORPORATE POLLUTERS AND WILL INCREASE CANCER RATES IN MONTANA

I don't know how much time members of this Committee have had to devote to following the national media or that of our neighboring states in recent months, but when it comes to proposals that will impact existing environmental laws -- whether they involve air or water quality, farming practices or timber harvest, you can count on a similar theme to be attributed to the environmental community. Somewhere in that article, there will likely be an attempt to link whatever the applicable issue might be to "evil corporate polluters" and the fear that it will somehow lead to increases in "cancer". That has been particularly true in the local media regarding SB 330 and SB 331. Unfortunately, the facts don't always bear that out and they certainly haven't in this case. We who represent industry are criticized, and at times fairly criticized, for seeking to justify what we believe only in terms of "JOBS" and "WHAT IT WILL COST TO COMPLY". Maybe we do sound like a broken record sometimes.

But if that's the case, the themes of "corporate polluter" and "cancer" are the flip side of that same broken record. The difference is, we are called upon to quantify those job numbers, to identify the goods and services we contribute to the economy of Montana, to explain to homeowners why their water rates have gone up, and to identify why regulatory policy is important to all those considerations. Those who use words like "corporate greed" and "cancer" should have to be as accountable for their statements as the folks I represent. If they can

EXHIBIT D

illustrate by virtue of the facts that these are legitimate concerns, then by all means they should be considered. But to this point in the debate, there has been little proof to support those arguments.

In sum, there is a lot of issues that this Committee will want to weigh as they consider the merits of this and related water quality bills. Yours is not an easy task, but I am confident as you hear the ensuing testimony, it will become clear what is proposed in this bill makes sense and provides for sound public policy. In closing, I'd like to acknowledge recent reports about the strength of Montana's economy. I haven't reviewed those in any depth, but who can find fault with a growing economy. My only question is, how much better might those numbers be if we made sure we provided for a reasonable and consistent regulatory climate. What's good can always get better.

I want to thank you all for your attention and I encourage your support of this legislation.



EXHIBIT 3  
DATE 3-13-95  
SB 330 / 331

March 10, 1995

KD Feeback  
PO Box 907  
Lincoln, Montana 59639

Senator Tom Beck  
Montana State Senate  
Capitol Station  
Helena, Montana 59620

Dear Sir,

I am writing to voice my support for both SB 330 & SB 331. I am an avid outdoors person and come from several generations of people who have made their livly-hood from the land. Neither I nor the people I live around want to see our environment degraded, however, we must make a living as well. As a corollary I'd like to voice my support for SB 252 & SB 362.

Our laws governing regulation of Montana's water are not only unenforceable, they are unrealistic. Currently, proponents of the existing water regulations have selectively used them against the mining and timber industry. I feel certain that eventually the same unrealistic laws will be used to castigate municipal water systems as well as agricultural industries.

I also support reasonable reclamation guidelines for hard rock mining, SB 338.

Thank you for your proactive measures in these endeavors.

Cordially,



KD Feeback

EXHIBIT D

EXHIBIT 4  
DATE 3-13-95  
SB 330/331

**Testimony  
Donald R. Peoples  
Montana Technology Companies, Inc. &  
Montana Energy Research & Development Institute**

**Montana House of Representatives  
Natural Resource Committee  
Room 437, 3:00 p.m. (or Adjournment)**

Mr. Chairman, members of the committee. For the record my name is Don Peoples, CEO/President of Montana Technology Companies, and the Montana Energy Research & Development Institute in Butte. My company is involved in research and development of environmental waste remediation technologies, and we are very concerned about economic development in Montana. It is for these reasons that we appear today in strong support of Senate Bills 330 and 331.

As the former Chief Executive of Butte-Silver Bow, and now as President of a company involved in economic development, I understand the importance of Montana's natural resources based economy. When the mines closed in Butte, and again when they re-opened, I completely understood the impacts that our natural resource industries have on our communities. And as a life-long resident of Butte, I am aware of the environmental impacts that can occur from mining and inadequate regulation.

We should expect that industries operating in Montana provide protection for our environment. That is in our constitution, and it is important to Montanans. Yet it is possible that we can go too far. Some of our protective standards cause great harm to industry and workers while resulting in little or no tangible benefit to the environment.

Montana should provide a standard of protection justified by our need to maintain a healthy environment and a healthy economy. Unfortunately some see these

two goals as mutually exclusive. My experience tells me we can do both, and these bills allow us to do both.

Montana needs to step away from the extremism on both sides of this debate and put forth sensible regulation that protects the environment and allows our natural resource based industries to operate under some stability. Simply put, these bills:

- Create a reasonable and sensible standard by which to regulate industries and other water dischargers (i.e. cities);

- Sets attainable and measurable human health standards;

- Protects recreational opportunities important to the citizens of Montana;

- Provides some added stability to an industry that provides significant revenue for local governments, schools, and the state; and

- Helps protect Montana jobs and the families those jobs support.

You will hear, that these bills are an assault on our environment, and that these bills represent some sort of legislative atrocity if passed. My experience tells me that nothing could be further from the truth, and that the only potential atrocity is for Montana to fail to enact practical well reasoned regulations, and continue this debate along the old environmentalist vs. industry debate.

Contrary to what some would have you believe these bills do not return us to a state of unregulated, unchecked industrial development. They do not create standards which are unsafe for humans and leave fisheries unprotected. They do not create unbridled benefits to industry to the exclusion of Montana citizens. All these bills do is set a safe and sensible standard, that provides stability and meets the expectations everyday Montanans.

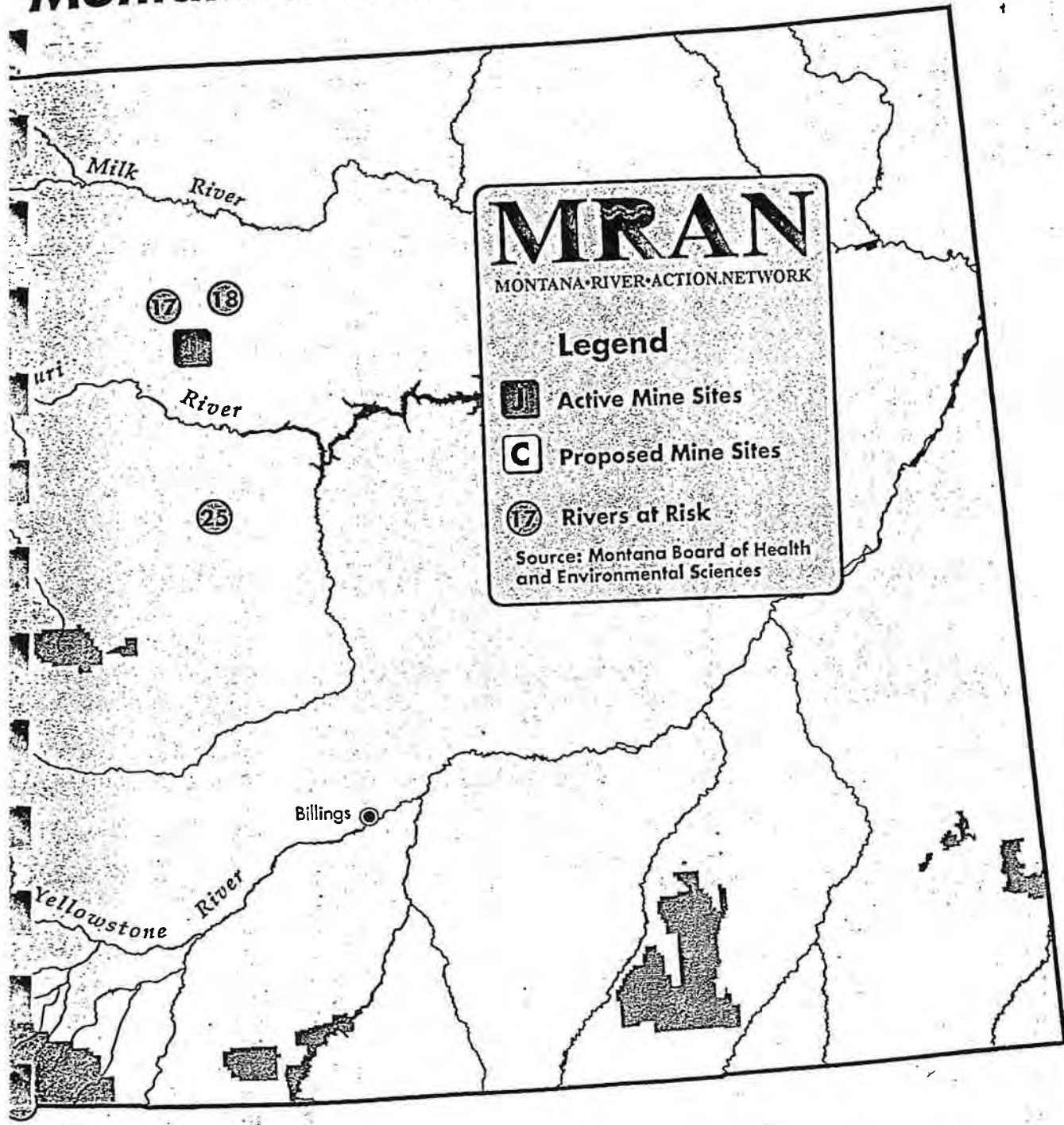
Natural resource extraction is important to Montana. One need only look to the Coal Tax Trust, the Resource Indemnity Trust, Hard-rock Impact funds, revenues paid to local governments and schools, and most importantly, to the jobs provided and the families those jobs support.

In conclusion, my company is a leader in the field of environmental remediation technology. We understand the importance of our environment. We understand what "no" regulation of industry does to the environment. These bills do not leave our environment unprotected and they meet our expectations for sound public policy. They protect our environment, our health, and our recreation, while giving us the benefits of stable industry, needed revenue, and jobs.

Thank you, we urge your support.

# Risk Montana's Waters

EXHIBIT 5  
DATE 3-13-95  
SB. 330/331



## 25 "Waters - at Risk"

### Mining Industry's War on Montana's Waters

Water Body	County / Location	Mining Activity (historic, active or proposed)
1. Blackfoot River	Lewis & Clark	Inactive or abandoned mining, and Proposed "7-up Pete Joint Venture Mine"
2. Tenmile Creek	Lewis & Clark	Inactive or abandoned mining
3. Silver Creek	Lewis & Clark	Inactive or abandoned mining
4. Clark's Fork of the Yellowstone River and Fisher Creek	Park	Proposed "New World" Noranda-Crown Butte Mine
5. Daisy Creek, Soda Butte Cr. & Stillwater	Park	Inactive or abandoned mining and proposed "New World" Noranda-Crown Butte Mine" and existing "Stillwater"
6. Yellowstone River	Park	Proposed dredge mining operation (Yankee Jim Canyon)
7. Pony (Drinking water)	Jefferson	Cyanide from "Pony Abandoned Gold Mill"
8. Boulder River	Jefferson	Inactive or abandoned mines
9. Cataract Creek	Jefferson	Inactive or abandoned mines
10. Mainstem, Clark Fork R.	Sanders	Inactive or abandoned mines
11. Rock Creek	Sanders	Inactive or abandoned mines, plus "ASARCO Rock Creek"

12.	Belt Creek	Cascade	Inactive or abandoned mines
13.	Dry Fork, Belt Creek	Cascade	Inactive or abandoned mines
14.	W. Fk., Bitterroot River (Headwaters)	Ravalli	Inactive or abandoned mining
15.	Upper Clark Fork River	Powell / Missoula	Inactive or abandoned mining
16.	Grasshopper Creek	Beaverhead	Inactive or abandoned mining
17.	Rock Cr. (near Landusky)	Phillips	Inactive or abandoned mining
18.	Ruby & King Creeks	Phillips & Blaine	Inactive or abandoned mining and "Zortman-Landusky N
19.	Flint Creek	Granite & Deer Lodge	Inactive or abandoned mining
20.	Lake Creek	Lincoln	Inactive or abandoned mining
21.	Libby Creek	Lincoln	Inactive or abandoned mining & proposed "Noranda's Montanore Mine"
22.	Jefferson River (groundwater near river)	Madison	"Golden Sunlight Mine"
<del>23.</del>	Confederate Gulch	Broadwater	Inactive or abandoned mining
<del>24.</del>	East Boulder River	Sweet Grass	Proposed East Boulder Platinum Mine
<del>25.</del>	Chicago Gulch & Collar Gulch	Fergus	Inactive or abandoned mining

# **Mining Industry's War on Montana's Water**

## ***Active and Proposed Hardrock Mines***

- A. ASARCO (Proposed)**
- B. Noranda Montanore (Proposed)**
- C. 7 Up Pete Joint Venture (Proposed)**
- D. Pegasus Gold Beal Mt. (Active)**
- E. Golden Sunlight Mine (Active)**
- F. Jardine Joint Venture (Active)**
- G. Noranda-Crown Butte (Proposed)**
- H. East Boulder Mine (Proposed)**
- I. Stillwater Mine (Active)**
- J. Zortman-Landusky (Active)**



## **Waters at Risk Press Conference Technical Background**

The waters identified in the graphics and supporting documents were derived from the 305-B report published by the Montana Board of Health and Environmental Sciences.

Any technical questions regarding reclassification or legislative efforts to degrade Montana's water quality should be addressed to:

Deborah Smith, Board President  
Montana River Action Network  
401 N. Last Chance Gulch  
Helena, MT 59601  
454-3441

or

Peter Aengst  
Greater Yellowstone Coalition  
Box 1874  
Bozeman, MT 59771  
586-1593



## Greater Yellowstone Coalition

EXHIBIT

6

DATE

3-13-95

SB

330/331

Comments on SB 330 and SB 331. Submitted to the Montana House of Representatives Natural Resources Committee -- March 13, 1995.

Good afternoon Mr. Chairman, members of the committee. My name is Brian Kuehl. I represent the Greater Yellowstone Coalition based in Bozeman, Montana. The Greater Yellowstone Coalition works to protect the environment, communities, and sustainable economies in Greater Yellowstone including portions of Carbon, Sweetgrass, Park, Gallatin, Beaverhead, and Madison counties in Montana.

The Greater Yellowstone Coalition opposes SB 330 and 331. If passed, these bills will dramatically lower our state's water quality at the expense of our health, livelihood, and way of life. Attached is a list of the provisions in SB 330 and 331 that would lower the quality of Montana's rivers. For the sake of brevity, I will limit my oral testimony to one provision contained in SB 331. I want to emphasize, though, that correcting this one provision will not correct these bills; both are flawed to their very core.

SB 331 proposes lowering the arsenic standards to allow 1 in 1,000 Montanans to get cancer instead of the current level of 1 in 1,000,000 Montanans. Think about that change for a minute. In Libby, three people could get cancer due to this change. In Dillon, four people. In Lewistown, seven people. In Billings, sixty seven people. Which of your constituents are expendable? Do you think they will understand when you explain that a sacrifice had to be made and it was them? When you have the Missoula health department, and other health departments in the state objecting to this provision, it should give you pause. It should make you ask whether it is really good policy to subject eight hundred Montanans to cancer.

Again, this provision is just one of the many that are objectionable in these bills. These bills will affect every stream in Montana and every Montanan. These bills will adversely affect landowners, farmers, ranchers, recreation and other industries, and anglers, all of whom rely on the high quality of Montana's waters.

Before you vote on these bills, think of the Montanan's who will be affected by these bills and ask yourself one question -- will your constituents thank you for voting for these bills? If you agree that they will not, then table SB 330 and 331.

10  
EXHIBIT  
DATE 3-13-95  
SB 330/331

Statement of Donald H. Kern

Mister Chairman and members of the committee:

My name is Donald Kern, and I have been asked to testify as an opponent of SB 330 and SB 331 because of my experience as a hydrologic technician on three national forests – the Flathead, the Bitterroot and the Nez Perce. I am not currently employed by nor do I speak for the Forest Service, however, my experience more than qualifies me to speak on the topic of water quality. I do speak as a member of the Board of Directors of the Canyon Coalition, a government watchdog group of over 400 members whose primary mission is protection of the Greater Glacier Ecosystem.

SB 330 and SB 331 would prohibit state water quality standards which are more stringent than federal regulation except in limited circumstances. This "permit to pollute" is a slap in the face to every Montanan who appreciates our precious clean water supplies. Many streams found within the boundaries of this state have been described by both state and federal agencies as "some of the most pristine waters to be found in the lower 48 states." We have the Berkeley Pit and the largest toxic superfund site in the world to remind us of what happens when regulations are not in place.

Changes in methodology, such as expressing standards in total dissolved instead of total recoverable methods are masked attempts to allow further pollution. This bill prohibits the state from preventing water pollution from many industrial sources, including mine tailings, cyanide heap leach pads and other wastes, and agricultural sources such as feedlots, which are frequently located on or near streambanks. SB 331 also requires the state to prepare costly analyses defending Montana's water quality standards which are stricter than federal standards.

Perhaps the ugliest part of these bills is their attempt to remove non-dissolved pollution from regulation; essentially eliminating much mining waste and other "chunk-type" wastes from regulation. This is totally unacceptable at a time when huge, foreign mining conglomerates are pushing to mine every corner of Montana and getting away with it under the protection of the antiquated 1872 Mining Law.

SB 330 and SB 331 would limit the number of streams protected by non-degradation standards, and allows increased degradation in the few streams that will remain protected. It also limits public participation in some non-degradation determination to those people who have property interests that may be affected by determinations, excluding the general public, who are the true owners of our state's waters. Once again, this is a veiled attempt to subsidize the mining and timber industries at the expense of the water quality in these streams.

Finally, these bills lower human health standards for carcinogens such as arsenic, and increase the risk of cancer by 100 fold, lowering standards from 1/1,000,000 to 1/10,000. Are we now expected to subsidize mining with our lives and the lives of our children?

The proposed changes in these bills are nothing more than attempts to gut more than 20 years of existing water quality regulations and open up pristine streams to unacceptable pollution. If industry views our current degradation rules as onerous and draconian, then I would suggest they look elsewhere to conduct their dirty business. Do not allow industry to bully you into lowering our water quality standards to the same standards as New Jersey. I strongly urge you to kill these bills and protect the pristine waters of Montana.

Thank you.

EXHIBIT D

EXHIBIT 11DATE 3-13-95SB 330/331

To: Members of the House Natural Resources Committee

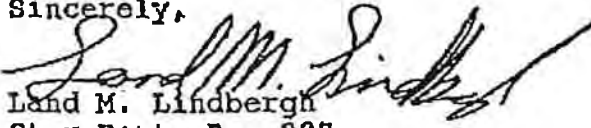
From: Land M. Lindbergh - Resident of Greenough, Montana

Subject: SB #330 and SB#331

Position: Opposed to SB. #330 and SB#331 in their entirety.

As a 30 year resident and property owner in the Big Blackfoot Valley, I am deeply concerned with the implications of SB #330 and SB #331 for the long term quality of the waters of Montana. Those of us who have been working very closely for a great many years with agricultural, industrial and environmental groups, as well as with state and federal agencies, are terribly disturbed by the prospects of such legislation destroying the gains that have been made to protect and enhance water quality in this state. We have put in a tremendous amount of time and effort to get to where we are now with water quality ... please don't destroy in a few ill-considered moments what has taken years to build into one of the finest examples of responsible state law in the United States. Please defeat both of these bills, now under consideration by your committee, in their entirety. Thank you very much for your serious consideration of my strongly held opinions on this legislation.

Sincerely,



Land M. Lindbergh  
Star Route Box 337  
Greenough, Montana 59836

(1-406-244-5599)

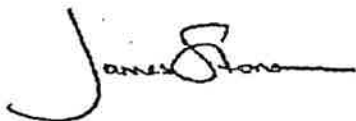
EXHIBIT D

EXHIBIT 12  
DATE 3-13-95  
SB 330 / 331

TO: Members of the Natural Resource Committee  
FROM: The North Powell Conservation Supervisors  
RE: SB 330 and SB 331

The Supervisors of the North Powell Conservation District ( N.P.C.D. ) would like to go on record as opposing SB 330 and SB 331. We feel that it is important that the Agriculture Industry show itself in support of good water quality regulations that improve Montana's water quality; not degradate it at the hands of any industry. The N.P.C.D has initiated The Nevada Creek Watershed Project which has put Agriculture in the Blackfoot Valley in the lead for BMP's in relation to water quality and land stewardship. In conclusion; we feel that we need to work together, not compromise, the pristine water that we all work and live for in Montana.

Thank you for your time and consideration on these bills.



James Stone - Member

David Cochran - President

David Mannix - Vice President

Tracy Manley - Member

Mick Goettle - Member

EXHIBIT 13  
DATE 3-13-95  
SB 330/331

Date: 3-13-95

*Vicki Watson*

From: Vicki Watson, Assoc. Professor, Biology, U. Montana  
To: Montana House Natural Resource Committee

RE: Comments on SB 330 and 331

The last legislature directed the DHES to revise its nondegradation rules and water quality standards. These were carefully revised over a 2 year period with much input from scientists and a wide range of interests. Nobody got everything they wanted, but the process is probably the best we could have done. These new rules have just been put in place. Give them a chance to work. My reading of SB 330 and 331 is that they would be harder to enforce, cause more delays and legal wrangling, and give much less protection to human health, environmental quality and property values. They are too flawed to be salvaged by amendment. I urge you to stop these bills in this committee.

Here are some of the things SB 331 would do if passed:

- \* Make it harder for the Board of Health to adopt rules more stringent than general federal guidelines (which are set as the minimum acceptable levels); yet makes it easier for dischargers to get the Board to set site-specific standards for them that are weaker than the general federal guidelines.

- \* Greatly weaken water quality standards-- allowing a 1000 fold increase in cancer death risk from arsenic and a 10 fold increase in cancer death risk from other carcinogens. There are about 110 carcinogens with standards and many more that don't have standards. Given the Montana population, this could translate to as much as 800 more deaths from arsenic and about 1000 more deaths from other carcinogens. Do you want to be one of those statistics?

- \* Change standards for metals to a form for which EPA has provided no guidance. DHES would have no meaningful way of enforcing such standards.

- \* Weaken protection for groundwater--changes in groundwater are not significant degradation as long as nitrate stays just a bit below the level at which the water becomes unfit to drink--apparently all other aspects of the groundwater can degrade as long as nitrates remain barely acceptable. There are many things wrong with this view. 1) Other substances can degrade groundwater besides nitrates. 2) Allowing substances to degrade to a point just short of the standard gives little protection in groundwater due to the uncertainty of characterizing groundwater. 3) Nitrates do not just harm water for drinking. If nitrates are allowed to rise to these high levels, many streams and lakes in Montana would become more enriched and would experience increased algae levels and reduced water clarity. Jack Stanford of the Biological Station at Flathead Lake speaking before the Board of Health stated that such a rise in nitrate levels in groundwaters around Flathead Lake would likely harm its quality significantly.

EXHIBIT D



\* Require that the Board of Health downgrade the classification of certain streams, and abandon the goal of restoring them. Many streams in the state that were damaged by poor historic mining practices were given classifications based on what they were like before the damage, with the intent of reclaiming these streams. Now the board would be forced to write off these streams and let them be classified industrial sewers.

\* Require that standards be "cost effective and economically, environmentally and technologically feasible". But the bill does not define these terms. Lawyers would spend a lot more time arguing over what this means for every single permit than was the case when all dischargers simply had to meet health and environmental standards. Who says what is 'economically feasible'? The discharger pays the treatment bills but does not pay Montanan's medical bills or replace the lost fish. And what does 'environmentally feasible' mean? The usual explanation I am given for this is that some unpolluted Montana streams (such as those flowing out of Yellowstone) have some metals levels that exceed standards, so the standards should be as high as those naturally poisonous streams. This makes no sense. There are naturally poisonous mushrooms in the woods; does that mean we should allow poisons on all our foods to rise to the level where they are as poisonous as those mushrooms?

\* Would allow groundwater to be pumped and discharged into surface water without a discharge permit or nondegradation permit as long as the groundwater was not altered from its 'ambient quality'. What if the water was pumped from a mine where the ambient water quality was contaminated by historical mining in the area? Or, as often happens, the pumping of groundwater starts the process of acid rock drainage which contaminates the water before it ever reaches the pump? Or if contaminated groundwater was being pumped up after a spill? Or the groundwater is naturally salty and makes the surface water more salty? All of these would degrade the surface water and possibly even violate state standards, but without tracking through a permit, we would not know this until too late.

\* Existing law says it was unlawful to place wastes in a location where they are likely to cause water pollution--the new law says where they will cause water pollution. We can rarely say for certain that land disposed wastes will get in surface water. So now wastes can be placed where they are likely to cause water pollution as long as it is not certain that they will. Moreover, any waste put there with a federal or state permit is assumed not to pollute waters even though no water quality agency reviewed that permit. We have a lot of waste sites around the country permitted by other agencies that are now polluting the water and costing a lot to clean up.

\* The entire section on administrative actions and penalties taken when the law is violated seems to be stricken by 331. Does that mean there is no longer any penalty for violating this act?

EXHIBIT D

And what about SB 330 which amends the Nondegradation Law?

This act repeals the Nondegradation law by redefining degradation. Formerly, degradation was any worsening of water quality. SB 330 says degradation is the lowering of water quality in a way likely to affect a beneficial use. In the recent past, policy makers in DHES stated that the standards protect beneficial uses, so until standards are violated, beneficial uses are not affected. Hence there is no degradation until standards are violated. Yet the intent of the nondegradation law is to prevent water that is better than the standards from degrading to the standards. Catch 22.

SB 330 also redefines high quality waters. (whose high quality must be maintained). In existing law, all state waters were high quality for any parameter (a measure, like the amount of copper) that was better than water quality standards. So even if one parameter was at or below the standard, all the other high quality parameters were to be maintained. So all state waters were high quality in some way and worthy of protection. Under SB 330 high quality waters do not include any that are not capable of supporting any of their designated uses. Many Montana waters are designated as not fully supporting their designated uses based on a parameter that does not meet standards. So if even one parameter exceeds the standard, the water might lose its high quality status and all its parameters could be allowed to degrade. Do we allow many of our waters to degrade to New Jersey conditions because we mistakenly allowed one parameter to degrade?

SB 330 also declares that streams that flow only a short time in the spring are not high quality waters worthy of protection from degradation even though these streams can be important for spawning and migration according to fisheries biologists.

SB 330 also says that most of us Montanans have no interest in water quality. It redefines 'interested persons' who may challenge the Board of Health's decisions on whether or not to allow degradation of state waters. Formerly, anyone of us who showed our interest by submitting oral or written testimony on the Board's preliminary decision could challenge their final decision. Under SB 330 they can be challenged only by those wishing to degrade the water or by someone who owns property that would be directly affected. Perhaps we could claim our bodies are our property and would be affected if we unwittingly took a drink or ate a fish from the wrong place.

Formerly, the DHES was required to review permits to degrade state waters every 5 years to see if a technique had been developed that would allow a discharger to stop degrading state waters. Under SB 330 the DHES may do this, but is not required to. Given budget cuts, the DHES won't be doing anything it is not required to do, so even if a low cost technology comes along that would make degradation unnecessary, it won't be used.

EXHIBIT D



Many people in Montana have the mistaken notion that the laws that protect our air, water, land and wildlife hurt our economy. Two of the strongest parts of our economy are our tourism industry and our real estate values. Many people visit Montana and many others relocate here for retirement or to operate small businesses. These keep our economy healthy. Mining is a relatively small part of our economy according to studies by U. Montana economists. Weakening our water quality and land reclamation laws in the name of helping our economy is counterproductive. Protecting our high quality environment is the best way to keep Montana's economy healthy in the long term.

EXHIBIT 15  
DATE 3-13-95  
SR. 330 & SB331

Testimony Concerning SB330 and SB331

Mr. Chairman, my name is Jim Curtis. I live at 1318 Khan abad Drive, Missoula, MT. In presenting this statement I am representing the Montana Chapter of the Sierra Club, but I am also representing myself.

The Montana Chapter strongly opposes SB330 and SB331. In opposing these two bills we are proud to associate ourselves with the many other organization and the many ordinary citizens of Montana that have helped in the team effort to assure that one of Montana's most important and precious natural resources, clean water, has been protected by good state legislation.

Suddenly, in 1995, we find ourselves astounded and angered that the protective laws that have served Montana well for the past two decades are under frontal attack, apparently from industries who stand to profit by being allowed to make clean waters unclean, and safe drinking water less safe.

Granted, these laws are not perfect, but their imperfections are not those that have been alleged in the Statements of Intent found in SB330 and SB331. The regulations for protection of our clean waters do not lack in scientific justification. The system is not broken. The only significant flaws are that the protective laws need to be strengthened, not weakened, and they need to be more effectively implemented and enforced.

Mr. Chairman, I would be interested to meet the legislator who can truly state that he was elected on a platform to promote the pollution of Montana's clean ground and surface waters. If any Montana voters thought they were voting to make their streams less able to sustain fish and aquatic life, they were few and far between. I do not believe that Montanans thought they were voting to have the waters from their wells and municipal water supplies made less safe to drink, more likely to cause cancer.

If you do not have a mandate from the majority of Montana voters to make the waters in this state less safe and clean, the only motivation for this legislation has to be coming from those who will profit from a license to pollute.

The question before this committee is really very simple. Are you going to grant that license to potential industrial polluters? We in the Montana Chapter sincerely hope that the answer is a resounding "NO."

EXHIBIT 16  
DATE 3-13-95  
SB 330 & SB 331

MULLENDORE, TAWNEY & WATT, P.C.

ATTORNEYS AT LAW

BERT G. MULLENDORE (MT, WA, AK)  
CLIP D. TAWNEY (MT) (1949-1995)  
LLIAM C. WATT (MT)  
ANT D. PARKER (MT, WA)  
ROTHY L. BROWNLOW (MT)  
RA J. JOHNSON (MT)

310 WEST SPRUCE STREET  
MISSOULA, MONTANA 59802

TELEPHONE: (406) 542-5000  
FAX: (406) 542-8920

March 13, 1995

TER MICHAEL MELOY (MT)  
OF COUNSEL

House Natural Resources Committee  
Montana's 54th Legislative Assembly  
Capitol Station  
Helena, MT 59620

SB 330 and SB 331 - Efforts to Weaken  
Montana's Water Quality Laws

Dear Natural Resource Committee Members:

We are writing to urge you to reject efforts to weaken the state's Water Quality Act provisions which protect Montana's nationally-recognized high quality waters from degradation.

Montana is experiencing renewed economic growth and vitality because it has clean water and good overall environmental quality. We represent a number of growing and successful businesses in Montana that would not be here if it wasn't for our clean water and our high environmental quality. The changes being proposed in SB 330 and SB 331 will result in a lowering of water quality, and increased risks to the health of Montanans for generations to come.

We believe these proposed changes send the wrong message to Montanans and others interested in investing in our state, and in the long run, will be a detriment to our economy. Montana's reputation for world-renowned trout fishing and recreational opportunities will be damaged if we weaken existing water quality laws.

In 1971 the Montana Legislature adopted a nondegradation policy that prohibited new and increased sources of pollution from degrading Montana's high quality waters. This nondegradation policy was modified in 1993 through SB 401, in an effort endorsed by the Department of Health and Environmental Sciences, the mining industry, municipalities, and other regulated industries. We have not yet had an opportunity to implement and test this new law, and the regulations adopted by DHES.

We believe that weakening Montana's water quality laws as proposed in SB 330 and SB 331 would constitute an unconstitutional legislative act. Article IX, Section 1 of the

EXHIBIT D

House Natural Resources Committee

Page - 2

March 13, 1995

Montana Constitution prohibits the Legislature from allowing any degradation of Montana's high quality waters. The proper method for allowing such degradation, as required by the Montana constitution, is to submit the issue to a vote of the people.

The history of the Constitutional Convention supports the position that the Montana Legislature cannot provide for the degradation of Montana waters. The comments on the majority proposal clarify that this section applies to water, and that Montana's waters cannot be degraded:

Subsection (3) mandates the legislature to provide adequate remedies to protect the environmental life support system from degradation. The committee intentionally avoided definitions to preclude being restrictive and the term "environmental life support system" is all encompassing including, but not limited to air, water, and land and whatever interpretation is afforded this phrase by the legislature and courts; there is no question that it cannot be degraded.

[Emphasis added.]

Vol. II, *Proceedings of Constitutional Convention of State of Montana*, pg. 555 (1971-1972). This prohibition on degradation is further supported by comments of Delate C.B. McNeil from Polson, who stated that, "our intention was to permit no degradation of the present environment of Montana and affirmatively require enhancement of what we have now." Vol. IV, *Proceedings of Constitutional Convention of State of Montana*, pg. 1205 (1971-1972).

We ask you to reject the recent efforts to expressly allow pollution and degradation of our waters to the detriment of the public's health and Montana's environment. If you have any questions regarding these matters, please feel free to call.

Sincerely,

Mullendore, Tawney & Watt, P.C.



Grant D. Parker

  
Sara J. Johnson

c: Governor Racicot

18

3-1395

3304SB331

We the undersigned strongly oppose any measures that would weaken Montana's water quality laws. In our view, Senate Bills 330, 331, and 382 are a giant step backwards in our efforts to maintain clean water in our lakes and streams.

Michael B. Budscheid	455 Glenwood Rd Whitefish, MT	862-3570
Jamie B. Metzmaker	915 Dakota Whitefish, MT	862-7960
Pete Metzmaker	915 DAKOTA WF	862-7960
W. R. Becker	905 Dakota #A	862-0604
J. F. H. H. H.	905 DAKOTA A	862-0604
Gail Leonard	514 Pine Place, W. fish	862-5807
Leo Reane	514 Pine Place W. fish	862-5807
George D. Widener	15 Central Ave, W. fish	862-1298
Rest. V. Motwani	Box 1564, W. fish	862-1090
Patricia K. Widener	15 Central Whitefish, MT	862-1298 59937
Melie Chiedscheid	455 Glenwood WF	862-3510
Karen C. Zwislock	35 Dakota Ave WF	862-5700

EXHIBIT ~~18~~ 19  
DATE 3-13-95  
SB 3304 SB331

Ladies and Gentlemen,

I am not a lobbyist or a special interest. I am an average concerned voting citizen.

Hasn't this state and this country paid enough for the unguarded environmental henhouse? Does history always have to repeat itself?

Most resource users don't pay much of anything for the land they use or raw materials they extract. Can't they at least be forced to extract or use the resources in the most scientifically sound methods available to prevent degradation of these multi-use lands we all hold as precious?

Allowing industry to write legislation is wrong! Allowing industry to write environmental legislation is ludicrous! If we protect these lands to the best of our ability, then their worth will only appreciate exponentially for all future generations to come.

Thank You!

*Totally against 330-331*

*Bill Davis*

*315-C*

*Leonard Cannon*

*Alva, MB*

EXHIBIT 21  
DATE 3-13-95  
SB 330 & SB 331

*Boussard/Reifel*  
Two Heart Creek  
24425 Doney Rd.  
Arlee, MT 59821 USA  
Phone-(406)-726-3357  
Fax-(406)-726-41360

March 9, 1995

To: House of Representatives  
Natural Resources Committee

From: Dana Boussard, 24425 Doney Rd. Arlee, MT 59821

Re: SB 231, 349, 362, 330, 331

As a concerned Montana citizen, I am writing to urge you to vote **no** on the above Senate bills. They will degrade and destroy Montana's precious resources. All of these bills weaken Montana's strong environmental laws---laws that we citizens who deserve a clean environment for ourselves and our children, have fought for over the last 20 years.

Living in "The Last Best Place" is a honor for all of us. That name was coined by the state for its pristine qualities of air, water, and scenery.....not for its polluted air, its clearcut forests, and its dirty streams!

Please vote **NO** on these bills and save Montana's true assets! Once they are gone.....they are gone.

*Thank you*  
*Dana Boussard*

EXHIBIT 24  
DATE 3-13-95  
SB 331

March 12, 1995

Memo to: House Natural Resources Committee  
Representative Dick Knox, Chairman

Subject Senate Bill 331

I'm a retired citizen, operator of a small business near Whitefish and am representing myself and the Citizens for A Better Flathead, a public interest group of several hundred members.

We are strongly opposed to Senate Bill 331 for several reasons:

1. Montana's water , both quantity and quality, represent the most important economic asset of this State. It also represents the most fundamental element in our quality of life. Several recent surveys in Flathead County have identified preservation of water quality as the most important public concern and any degradation is damaging to our future and our children's and grandchildren's future.

2. The proposed standards changes along with changes in the non-degradation regulations will have negative impacts such as:

- \* An increase in toxic disease causing agents for ever degrading quality of life and that is unacceptable to us.
- \* Modifying non-degradation rules which would allow for increased loading of nutrients such as Nitrogen will accelerate the degradation of lakes and streams throughout the state.
- \* This does not help maintain employment in the extractive industries, it only enables increased profits for those industries. Personnel costs are always the key cost-cutting target in any business. Automation will eliminate and change jobs in this industry independent of any legislative action.
- \* This legislation will surely damage the State's case against ARCO while at the same time this legislature is considering additional funding for that litigation--doesn't make sense. An opinion from the Attorney General on this aspect is needed.
- \* Once polluted, the recovery costs will be beyond the State's capability to fund, e.g., the ARCO site, Lake Washington-300 Million, Lake Tahoe-multiple Billions.

EXHIBIT D



3. The State waters, streams, rivers, and lakes are in the public domain and are thus the private property rights of every resident of this State. Any degradation is an infringement of those rights.

We believe there is little if anything to gain from this legislation and EVERYTHING to lose thus we urge you to table it and not pass it through for House consideration.

Respectfully,



Don Spivey  
51 Penney Lane  
Columbia Falls, MT 59912  
257-0724

.cc Governor Marc Racicot



# MONTANA WILDLIFE FEDERATION

P.O. Box 1175  
Helena, MT 59624

Ph: 406-449-7604  
Fax: 406-449-8946

March 13, 1995

EXHIBIT 25  
DATE 3-13-95  
SB 331

House Natural Resources Committee  
Helena, Montana

Chairman Knox and Committee Members,

I am Alan Rollo, representing the Montana Wildlife Federation. I would like to start by thanking the sponsor of SB 331 for being concerned about the business climate of this state. We do feel though that this bill has missed that mark significantly and for that reason we oppose it.

A key issue here today is why should this bill push primarily one industries agenda to impact so many other worthy businesses in Montana. This state's waters are the hub to many businesses that ensure a diversity in our economic world which makes it hard for us to see the rational for this bill. I am not just talking small dollars here with the other businesses, I am talking major contributors to our tax base, such as: the non-resident tourism industry that brought in \$1.2 billion last year, the angler business that brings in approximately \$205 million annually, the agriculture community that irrigates over 1,700,000 acres and has over 2,500,000 head of cattle, the in-state recreational trade, other local community businesses that utilize a lot of water, let alone the communities themselves that require water for their citizens. All have one common denominator - clean water.

The next significant issue is the amount of water quality problems that Montana citizens are contending with, with our current water quality laws and we want to relax them more. I have brought only a few examples of where people that want the law changed have already caused significant problems to individuals water supplies which I have attached to my testimony. People can replace a lot of items that they acquire but they cannot replace their loved ones or easily clean their degraded water once contaminated.

The last key point is the fiscal requirements that apply to this bill. In a time of budget constraints why should we modify the water quality laws considerably after two years of heavy debate and numerous hearings around the state. \$116,000 to rewrite the water quality standards is a large dollar figure and then you have the major confusion as everyone tries to understand the new law, only two years after the last major rewrite of the water quality laws.

What I have mentioned today should not be considered lightly, for the businesses that I have mentioned are just a few that allow Montana to maintain a steady and healthy economic growth, not the boom and bust of earlier years seen with some industries. We must look at all businesses when we look at this bill.

So in recap, there are three key reasons that I would like to suggest, would enable this committee to feel good about tabling this bill:

1. Economics of other good businesses in Montana;
2. The health and welfare of our citizens; and
3. The time and money just spent to reaccomplish the water quality rules.

For those three reasons alone, we request that this committee table SB 331.  
Thank you.

Sincerely,

Alan Rollo

Montana Wildlife Federation

EXHIBIT D

**Montana Department  
of  
Fish, Wildlife & Parks**

EXHIBIT 26  
DATE 3-13-95  
SB 331



*Submitted by Jim Jensen  
Montana Environmental Information  
Center During SB 331 hearing*

P.O. Box 200701  
Helena, MT 59620-0701  
(406) 444-3186  
FAX: (406) 444-4952  
March 9, 1995

*COPY*

Governor Racicot  
Room 204, State Capitol  
P.O. Box 200801  
Helena, MT 59620-0801

Dear Governor Racicot:

As the group you charged with developing a recovery strategy for bull trout, we are aware of a number of bills pending before the Legislature which may affect our work.

We today forward to you a memo prepared by our Scientific Group which expresses concern over four bills which may adversely impact bull trout recovery. In addition, Montana Fish, Wildlife & Parks has informed us that HB 192 may constrain our ability to work with local watershed groups in developing watershed recovery strategies. There may be other bills which will affect, positively or negatively, bull trout restoration.

We do not have the time to fully investigate each of these bills, nor do we have a structure which makes it easy to either oppose or support specific legislation. We all recognize, however, that the work of the Legislature may affect our ability to successfully complete a bull trout recovery plan. Given this, we hope that you will take your goals for bull trout recovery fully into account as you consider the merits of the laws being passed by this Legislature.

Sincerely,

*[Signature]*  
For / Larry Peterman, Chairman  
Bull Trout Restoration Team

/ss

EXHIBIT D

3/10/95

TO: Bull Trout Restoration Group

FROM: Bull Trout Scientific Group

The Scientific Group has reviewed the implications of the following bills by discussing their content with staff of the Water Quality Bureau, Dept. of State Lands, and Fish, Wildlife and Parks and feels that they are in conflict with bull trout restoration.

The group was split on what to recommend to the Restoration Group. Generally, half of the scientific group recommends that the Governor veto these bills if they reach his desk in their present form. The other half suggest that we inform the restoration team of the problems with the bills and they decide what to recommend to the Governor.

Any other bills that will lower water quality standards, or cause land use changes that negatively impact water quality or aquatic habitat should be reviewed for their impact on bull trout. If they will potentially have negative impacts they should be dealt with in a similar fashion as the following bills.

HB201

45-55

Dept. of State Lands would be required to cut 50 Million board feet of timber annually from state owned timber lands. One important reason DSL does not cut that much now is that they take into account cumulative watershed effects, so they mitigate for surrounding land practices. If this bill passes, they will have to be more aggressive in their timber harvest. This bill <sup>may</sup> make their policy for mitigation more difficult.

Bull trout are dependent on healthy watersheds, and impairment would have negative impacts to bull trout populations.

HB 263

Dept. of State Lands would have to manage their lands for maximum income to the State. DSL would have less flexibility to protect fisheries resources like they did when they made it policy not to harvest timber in SME's and to review and fix any grazing problems in bull trout streams.

SB 331

Changes the water quality standard for metals in streams from total recoverable metals to dissolved. This means that instead of acidifying the samples and extracting all of the ecologically available metals for analysis, the samples would be filtered and analyzed. Typically, this would mean some relaxation of the standard for metals. Metals in the sediments would not be included in the standards. Even though metals that are in particulate form

EXHIBIT D

COPY



**PlumCreek Timber Company, L.P.**

Flathead Unit

2050 Highway 2 West P.O. Box 8990

Kallispell, MT 59904-1990

406/755-1498

March 9, 1995

The Honorable Marc Racicot  
Governor  
The State of Montana  
State Capitol Building  
Helena, Montana 59620

Dear Governor Racicot:

As a member of your Bull Trout Restoration Team, I want to share my opinion on the comments regarding pending legislation forwarded to you by the Team from our Science Group.

Based on the conversation at the Restoration Team meeting, I do not believe that either the Science Group or the Team itself have sufficient information on which to base their concerns with pending legislation. I believe that more detailed and accurate information regarding the legislation is available from the various state agencies that have evaluated these bills.

Plum Creek remains committed to working towards constructive solutions based on sound scientific analysis to recover bull trout, as evidenced by our participation on the Restoration Team as well as our research and actions on the ground.

Sincerely,

Bill Parson  
Director of Operations

EXHIBIT D

# Northern Plains Resource Council

EXHIBIT 27  
DATE 3-13-95  
SB 331

**Testimony of Julia Page  
for the Northern Plains Resource Council  
on Senate Bill 331  
before the House Natural Resources Committee  
March 13, 1995**

Mr. Chairman, members of the Committee, for the record, my name is Julia Page. I live in Gardiner, Montana where I operate a whitewater rafting company. I am speaking today on behalf of members of the Northern Plains Resource Council.

I am here today to express our deep opposition to Senate Bill 331. Senator Beck's bill also was written by lobbyists and lawyers for the mining industry. Taken in concert with SB 330, it would remove most of the protections that have enabled Montana to retain an enormously valuable natural resource which is rapidly disappearing elsewhere - clean water.

In SB 331, the mining industry again wants to change our laws because it claims strict protection of clean water is unfair, too restrictive and too expensive. Again, I say Montana's water resources are exceptional and they require and deserve exceptional protection.

New section 2 of SB 331 requires the establishment of site-specific water quality standards at the request of members of the regulated community. The only practical reason for requesting site-specific standards is to obtain lower standards. Therefore, this provision of the bill will just make it easier for polluters to exploit Montana waters that are already damaged and continue to pollute them further. This is a direct contradiction of the goals of the federal Clean Water Act, the Montana Water Quality Act and the state Constitution which are to protect, maintain and improve water quality. (Page 4, lines 14-20)

Like its companion SB 330, this bill redefines degradation to allow more pollution of state waters. (Page 4, line 30)

SB331 changes the definition of "state waters" so if an industry or anyone impounds state water, it would no longer be protected as "state waters". Since most impoundments leak or seep into groundwater, this provision provides yet another way to hurt the quality of Montana's water. (Page 7, lines 6-7)

EXHIBIT D

EXHIBIT 18  
DATE 3-13-95  
SB 331

# MontPIRG

Montana Public Interest Research Group

360 Corbin Hall - Missoula, MT - (406) 243-2908

Testimony Against Senate Bill 331, March 13, 1995

Chairman Knox and members of the House Natural Resource Committee:

For the record, my name is J.V. Bennett, for the Montana Public Interest Research Group, or MontPIRG.

MontPIRG is a non-profit, non-partisan research and advocacy organization working for good government, consumer rights and sound environmental protection. MontPIRG represents over 4000 members in Montana, with 2200 student members, and is funded with membership donations.

As an organization advocating good government and sound environmental protection, MontPIRG rises in opposition to Senate Bill 331.

Senate Bill 331 would allow the pollution of Montana's waters by prohibiting the state from preventing water pollution from industrial sources. By prohibiting the state from adopting rules more stringent than federal standards without exhaustive and expensive studies, this bill is likely to doom Montana to the quality of water found in states like New Jersey.

Moreover, Senate Bill 331 would lower the acceptable cancer risk for heavy metals to 1 in 10,000 and for arsenic to 1 in 1000. This is simply an unacceptable risk to human health regardless of the purported benefits.

Senate Bill 331 also has the questionable effect of allowing the placement of wastes near water without water quality review if the placement is authorized by another permitting authority. This removes an important guarantee that potential effects to water quality by a permitted activity will be considered.

For these reasons MontPIRG urges this committee to table this attempt to weaken the laws protecting water quality.



MISSOULA  
COUNTY



MISSOULA CITY-COUNTY HEALTH DEPARTMENT  
301 W ALDER ST  
MISSOULA MT 59802-4123

(406) 523-4755

EXHIBIT 29  
DATE 3-13-95  
SB 331 453 531

Dick Knox, Chairman  
House Natural Resources Committee

Mr. Chairman, members of the committee,

The Missoula City-County Health Department is opposed to those modifications included in Senate Bill 331 which substantially weaken state law. Missoula County is responsible for the operation and maintenance of 3 state permitted community sewer systems which accept and treat effluent from homes and businesses in communities such as Lolo, Clinton, El Mar Estates, and Golden West. We do everything in our power to insure that these systems are properly operated to meet State requirements, but also to guarantee that our discharge has the lowest impact on state waters that is achievable by our equipment. We view the use of our state waters for effluent discharge as a privilege that needs to be carefully protected. Residents of Missoula County place an extremely high value on the quality of our waters and we realize the fragile nature of our lakes rivers and aquifers.

Even with the current water quality rules, we know from research conducted by the Department of Fish Wildlife and Parks that the Clark Fork River in Missoula County has far fewer fish than a stream of its type should have. How can we expect to reverse this situation with a weakened water quality law?

The residents of Milltown have had to find a new source of drinking water, the water that those homes had used for decades was contaminated with arsenic. Weakening the standard for arsenic will not bring that aquifer back into use. Missoula will be saddled with the discharge of two to twenty pounds per day of arsenic for the next couple thousand years into the headwaters of the Missoula aquifer which is the sole source of drinking water for nearly sixty thousand people.

Septic systems in the Linda Vista area have seriously polluted area drinking water wells with bacteria and nitrate. In fact, roughly 25 percent of the water in these wells originated in a septic system. This bill would allow that same percentage of contamination from septic systems using level two treatment and still rank it "nonsignificant" with regard to non-degradation.

With these comments in mind we make the following recommendations for amendments to this bill:

Strike new section two in its entirety. This requires the Board of Health to adopt weakened site specific standards when someone pollutes an area so badly that it becomes **EXHIBIT D**



federal super-fund site. It makes no sense to require a lower set of standards for those who have the greatest impact on our water resources.

Strike the amendment to the definition of non-degradation in section 3. One of the purposes of non-degradation is to provide an adequate margin of safety to prevent devastating impacts on streams or long lasting impact on aquifers. The definition in the current bill essentially a violation of a standard before degradation is deemed to have occurred.

In the amendments to the definition of "state waters" the term "privately owned" should be deleted unless we want publicly owned sewage lagoons to be considered as "state waters". Apparently the drafters of the bill forgot that public systems serve far more businesses than all the "private" systems in the state.

In section 5. (75-5-301) should be amended to read (line 25) "streams that due to natural sporadic flow, do not support an aquatic system ..." We need to be sure that we don't mandate a weakening in standards for streams that are artificially de-watered.

In section 5 (2), (A) the one in a thousand risk level for the arsenic standard should be stricken. There is no evidence to indicate that cancer for arsenic is preferable to cancer from other chemicals. Just because some carcinogens occur naturally such as arsenic, doesn't mean that we shouldn't minimize the risk when the source is caused by man as is the case in mining and arsenic. We also question lowering the risk level for other carcinogens from one-in-a-million to one-in-a-hundred-thousand.

Strike section 5 (2), (D). This section apparently limits the level of protection of any stream or lake to that of those standards set for human consumption. Please note that the human stomach can stand levels of many contaminants which are lethal to all aquatic life. This provision is contrary to the new criteria set in new section 1, which allows standards that are necessary for protection. "Equal" should be replaced with "less stringent than"

Section 5 (5), (d), (I)-(IV) sets standards for degradation from nitrate. It is important to note that the legislature would be setting aside its own non-degradation criteria in setting the standards for non-degradation at 75% of the drinking water standard. It is also a change in precedent to take the authority from the State Board of Health. Most ground waters in Missoula County are .01 milligrams per liter nitrate in their natural state. This standard allows an increase of 750 times background to be considered non-significant if level two-treatment is used. If the level-two system fails to remove nitrate as predicted, the concentration could go as high as 15 milligrams per liter, which is 50% over

EXHIBIT D

the drinking water standard. From this it is apparent that the proposals do not provide an adequate margin of safety. These standards would make it legal to cause pollution such as that in Linda Vista where ground water is contaminated and unwary home buyers have been required to install public sewer at a cost of \$13,000 per home. It is our preference that the standards set by the Board of Health stand and that this section be stricken. In any case pristine waters should not be allowed to exceed 5 milligrams per liter. At a minimum (III) should be stricken.

Section 11 (75-5-605) should delete the new language "where they will" and return the old language "in a location where they are likely to". The other new language is reasonable. The old language should be retained because the new language stops the state from preventing pollution and only allows it to respond to contamination which has already occurred.

This concludes our specific comments. We respectfully to ask you to carefully consider the amount of amount of enjoyment, concern and love that Montanans have for our State waters. This bill as written, jeopardizes and, in some instances sacrifices those waters to other interests. Please don't let a few examples of regulatory mistakes cause wholesale repeal of our water law and remember that much of our states waters are still greatly diminished in quality and fisheries production due to the influences of man.

Jim Carlson



Director  
Environmental Health



Senate Bill 331 by Senator Beck  
HOUSE NATURAL RESOURCE COMMITTEE, March 13 1995

TESTIMONY SUBMITTED BY THE LEAGUE OF WOMEN VOTERS OF MONTANA

We are certainly in favor of making the administration of our water laws more efficient and fair, but not at the expense of weakening our Water Quality Standards, as is the intent of this bill. Requiring coordination between appropriate departments is a good idea and should benefit both the permittee and the State.

However, allowing the permittee to adopt his own standards as allowed in the Site-specific standards section is quite inappropriate.

The requirement of extensive proof, and studies to establish standards higher than federal standards are much too stringent and expensive. We have water standards appropriate for our state and these should not be lowered to the federal levels.

This bill weakens water protection by allowing one excess cancer death per 1,000 Montanans from arsenic, instead of the current cancer risk of one death in 1 million.

Again, as in several other bills, this bill favors economic development over the protection of the health of the people and the environment of Montana. What is the point of having a good job if you must sacrifice your own health or that of the people of the state so that you can't enjoy the fruits of that job?

The lack of permits and review are unacceptable. We urge you to table this bill.

Willi Hall  
Legislative Corps, LWVM



330

My name is Paul Hawks. I am a third generation rancher from Melville. A little over two years ago, the State of Montana had a nondegradation policy requiring new sources of pollution to maintain existing water quality. The 1971 law hoped to maintain the high quality of Montana's waters as the state developed. We take for granted our high quality water, but it is the envy of most other states. By the 1960's, water quality in other states had become so bad that the federal Clean Water Act was passed to set minimum standards for public health. A basic tenet of that law was to maintain and improve existing water quality.

Montana also adopted that basic tenet in both its Constitution and its Water Quality Law. With no rules to implement the nondegradation policy, however, that issue came to a head last session in SB 401. Industry felt that the policy was too onerous and everyone agreed that a workable policy did not exist. After bitter debate and a two year rule making process, the State finally adopted a potentially workable process last summer, nearly a quarter century after the law was passed.

Neither side was totally happy. But the policy adopted agreed that some degradation does occur when development occurs, and it attempted to balance this with the philosophy that it was in the State's best long term interest to maintain and improve our water quality whenever possible. The policy categorically excluded many activities as "nonsignificant" and even allowed violations of the minimum standards in "mixing zones" as long as they were of the smallest practicable size. This policy has never been used, and SB 331 seeks to ensure that it never is.

Practicably this bill abandons our commitment to maintaining and improving our water quality, and will let all state water, except in national parks and wilderness areas, be degraded over time to the lowest common denominator, ie. minimum federal standards. Is this really the legacy that this committee wants to leave to future generations?

How many of you consider yourselves as conservatives? I was raised to believe that a true conservative protected the things he needed, used things wisely, and left them in as good or better shape than he found them. He was a true steward of the land and his community. He didn't take a little here, take a little there, and line his own pockets at his neighbors expense.

A lot of work went into the present policy under SB401. It has the potential to solve the contentiousness around this issue. If passed, SB 330 will let the cat out of the bag again. We'll be right back where we started and probably in court. Years away from a solution.....

# JOHN WILKINSON CONSTRUCTION

329 FLOOD ROAD  
GREAT FALLS, MONTANA 59404

EXHIBIT 3/8  
DATE 3-13-95  
SB 331

March 10, 1995

Senator Tom Beck's Office  
Attn: Elaine  
Montana State Capital  
Helena, Montana

Re: SB 331

*Committee Members*

Dear 

I am writing you concerning Senate Bill 331 introduced by Senator Beck which I understand has been referred to the House's Natural Resources Committee. I would appreciate you forwarding this letter to the chair of that committee.

Senate Bill 331 attempts to interject some reasonableness in the Department of Health and Environmental Sciences' recent interpretation of Montana's water nondegradation law. I would like to stress the importance of passage of this bill to not only our small company and our community but no doubt to many Montanans.

We are in the planning stages of a residential development in the greater Great Falls area which would not only provide needed lots for a growing community, but would also provide direct road access (shortening the current access by 5-6 miles) from the local fire department to over 250 existing residences. Not only would public safety be enhanced, but I am told that most of those served in the area would see a significant reduction in their fire insurance premiums.

However, development is currently hindered by DHES' administrative rules enacted just last year regarding subdivisions and the nondegradation of ground water. More specifically, in determining whether to allow any subdivision, the Department requires a nitrate test of the "first water" occurring under the property no matter how insignificant the aquifer or zone of saturation nor whether the water is used for any purpose. Although the EPA drinking water standard is 10 mg/l, DHES's administrative rules prohibit any realistic development of the property if the nitrate level is greater than 5.0 mg/l. The only alternative is to obtain a permit to degrade; a process which is quite lengthy, expensive, and unlikely to result in a favorable result. I have included with this letter a copy of ARM 16.20.712, Table I, demonstrating this point.

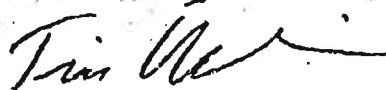
With Senate Bill 331, as currently amended, the environmental standards become a little more reasonable. Environmental safeguards would still be required by use of a Level II type

EXHIBIT D

septic system in most circumstances, and the resulting nitrogen concentration could not exceed 7.5 mg/l, still well below the EPA standard of 10 mg/l.

As a Montanan I value our quality water. I also appreciate a healthy economy. It is foolish to believe that the two are incompatible. Enactment of Senate Bill 331 would certainly maintain quality water but would also loosen the current strangle-hold on residential development.

Sincerely,

A handwritten signature in black ink, appearing to read "Tim Wilkinson", with a stylized flourish at the end.

Tim Wilkinson

# WATER QUALITY

16.20.712

EXISTING NITROGEN CONCENTRATION IN GROUND WATER AS OF APRIL 29, 1993	PRIMARY SOURCE OF EXISTING NITROGEN	PREDICTED NITROGEN CONCENTRATION AT THE EDGE OF THE MIXING ZONE AFTER THE PROPOSED ACTIVITY	REQUIREMENTS FOR NONSIGNIFICANCE FOR HUMAN WASTE DISPOSAL	REQUIREMENTS FOR NONSIGNIFICANCE FOR DISPOSAL OF OTHER WASTES
< 2.5 MG/L	HUMAN WASTE	< 2.5 MG/L	NONE	NONE
		2.5 < 5.0 MG/L	LEVEL 2 TREATMENT	NONE
		5 < 7.5	SIGNIFICANT	SECONDARY TREATMENT AS DEFINED BY THE DEPARTMENT
	OTHER	< 5.0 MG/L	NONE	NONE
		5 < 7.5 MG/L	LEVEL 2 TREATMENT	SECONDARY TREATMENT AS DEFINED BY THE DEPARTMENT
		7.5 < 10	SIGNIFICANT	SIGNIFICANT
2.5-5.0 MG/L	HUMAN WASTE	< 5 MG/L	LEVEL 2 TREATMENT	SECONDARY TREATMENT AS DEFINED BY THE DEPARTMENT
		5 < 7.5	SIGNIFICANT	SECONDARY TREATMENT AS DEFINED BY THE DEPARTMENT
	OTHER	< 5	NONE	NONE
		5 < 7.5	LEVEL 2 TREATMENT	SECONDARY TREATMENT AS DEFINED BY THE DEPARTMENT
		> 7.5	SIGNIFICANT	SIGNIFICANT
* 5.0-7.5	HUMAN WASTE	ANY INCREASE	SIGNIFICANT	SIGNIFICANT
	OTHER	< 7.5	LEVEL 2 TREATMENT	SECONDARY TREATMENT AS DEFINED BY THE DEPARTMENT
		7.5	SIGNIFICANT	SIGNIFICANT
> 7.5	ANY	ANY INCREASE	SIGNIFICANT	SIGNIFICANT
		10 or greater	NOT ALLOWED VIOLATES STANDARDS	NOT ALLOWED VIOLATES STANDARDS
ANY LEVEL	ANY	NO CHANGE	NOT SIGNIFICANT	NOT SIGNIFICANT

Proposed Amendments to SB 331  
Third Reading Copy, As Amended

1. Page 4, line 14

Following: "life."

Insert: "(1)"

2. Page 4, line 15

Following: "chapter,"

Insert: "and except as provided in subsection (2),"

3. Page 4, line 20

Following: - "criteria."

Insert: "(2) If the department, based upon its review of an application submitted under subsection (1) and sound scientific, technical and available site-specific evidence, determines that the development of site-specific criteria in accordance with draft or final federal regulations, guidelines, or criteria would not be protective of beneficial uses, the department, within 90 days of the submission of an application under subsection (1), shall notify the applicant in writing of its determination and of all additional procedures the applicant must comply with in the development of site-specific standards of water quality under this section. If there is a dispute between the department and the applicant as to the additional procedures, the board shall, on the request of the department or the applicant, hear and determine the dispute. The board's decision must be based on sound scientific, technical and available site specific evidence."

4. Page 4, line 30

Strike: "~~for a parameter~~ FOR A PARAMETER IF THAT CHANGE IS LIKELY TO AFFECT A BENEFICIAL USE"

Insert: "for a parameter"

5. Page 7, lines 25 - 28

Strike: "The department shall coordinate permit proceedings under this chapter with permit proceedings involving the same project conducted by the department of state lands under Title 82, chapter 4, and by the department of natural resources and conservation under Title 75, chapter 20, FOLLOWING THE TIME SCHEDULE OF THE LEAD AGENCY."

Insert: "When the department's review of a permit application submitted under another chapter is required or requested, the department will coordinate the review with the review conducted by the agency or unit under the other chapter following the time schedule for that review."

6. Page 8, line 30

Following: "FOR"

Strike: "MEASURING"

7. Page 8, line 30

Following: "CARCINOGENS"



Strike: "IN SURFACE WATER"

8. Page 9, line 4

Strike: Subsection (B) in its entirety

Renumber: subsequent subsections

9. Page 9, line 8

Following: "(D)"

Insert: "Notwithstanding subsection (A) above,"

10. Page 13, line 3

Following: "(I)"

Insert: "THE DISCHARGE DOES NOT CONTAIN INDUSTRIAL WASTE, SEWAGE,  
OR OTHER WASTES,"

(II)"

11. Page 13, line 4

Following: "PARAMETERS"

Delete: "; OR"

Insert: "," AND"

12. Page 13, line 5

Strike: "(II)"

Insert: "(III)"

13. Page 17, line 29

Following: "account"

Strike: "AND THE COURT SHALL CONSIDER"

14. Page 19, line 15

Following: "CLAUSE."

Strike: "SECTION 75-5-614 DOES NOT AFFECT PROCEEDINGS THAT WERE  
BEGUN BEFORE [THE EFFECTIVE DATE OF THIS ACT]."

Insert: "THIS ACT DOES NOT APPLY TO CIVIL OR ADMINISTRATIVE  
ACTIONS COMMENCED PRIOR TO THE EFFECTIVE DATE OF THIS ACT OR TO  
CLAIMS MADE IN THOSE ACTIONS, EXCEPT THAT COMPLIANCE PLANS  
RESULTING FROM SUCH ACTIONS MUST REFLECT CHANGES MADE BY THIS ACT."

15. Page 19

Following: Section 18

Insert: "NEW SECTION. SECTION 19. COORDINATION INSTRUCTION. IF  
SB 330 IS PASSED AND APPROVED AND IF IT INCLUDES A SECTION THAT  
AMENDS 75-5-103(4), DEFINITION OF "DEGRADATION", THEN THE  
DEFINITION OF DEGRADATION PROVIDED IN SECTION 3 OF THIS ACT SHALL  
PREVAIL, AND THE DEFINITION PROVIDED IN SB 330 IS VOID."

-End-

## HOUSE OF REPRESENTATIVES

## VISITOR'S REGISTER

COMMITTEE

BILL NO.

331

DATE

3-13-95

SPONSOR(S)

Senator Dick

PLEASE PRINT

PLEASE PRINT

PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	BILL	OPPOSE	SUPPORT
DONALD KERN 1805 JOSLYN #89 HELENA	CANYON CAUTION	331	X	
Willa Hall	LWVMT	331	X	
Ken Knapp Box 383 Helena	man	331	X	
W. James Kember	City of Billings	331		✓
Brian Kuehl	GIC	331	X	
ALAN ROLLO	MWF	331	X	
ROBIN CUNNINGHAM	FISHING OUTFITTERS ASSN. OF MONTANA	331	X	
DON STONEY	SELF & Wholesale for 30th 5/10th	331	X	
GEORGE OCHENSKI	TROUT UNLIMITED	331	X	
Mike Grimes	Self	331	X	
Barb Grimes	Blackfoot Legacy	331	X	
Don Pader	Chow Table	331		X
Jim Smeltzer	Self	331	X	

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS  
ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

EXHIBIT D

## HOUSE OF REPRESENTATIVES

## VISITOR'S REGISTER

Natural Resources COMMITTEE BILL NO. SB 331  
 DATE 3-13-95 SPONSOR(S) Senator Beck

PLEASE PRINT

PLEASE PRINT

PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	BILL	OPPOSE	SUPPORT
John K. 7 parcels	Pegasus Gold	SB 331		X
Peter Angst	self	SB 331	X	
MIKE MURPHY	MT. WATER RES. ASSN.			X
Ronald Lazuk	Golden Light Mine	331 SB		X
ANDREA WASH	ARCO	331		✓
Larry Brown	Az Pres. Assoc.	330 331		✓
Bob Williams	MT MINE MNG	331		✓
Steve Gilbert	SELF		X	
Peggy Tenik	WETA	SB 331		X
Toy Schoonen	Arcond Sports	SB 331	X	
Michael Downey	Self	331	X	
Cecil Davis	Self	330	X	
DKL HILDORF	SKYCLINESPORTSMEN	330	✓	

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS  
 ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

EXHIBIT D

## HOUSE OF REPRESENTATIVES

## VISITOR'S REGISTER

Natural Resource COMMITTEE BILL NO. SB-331  
 DATE 2-13-95 SPONSOR(S) Sen. Beck

PLEASE PRINT

PLEASE PRINT

PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	BILL	OPPOSE	SUPPORT
Jim Curtis, 1318 Khonabad Dr. Mslc	MT Chapter Sierra Club	331	X	
Jon Kutar.	Self	331	X	
Collin Damp	Reston	331	X	X
Paul Ross	Self and Powell City SLD	331	X	
MIKE GEARY	SELF	331	X	
Howard Sumner	Billings Assoc. Rea. Soc	331		X
Jim Barrett	BA Cooke City	331	X	
JERRY KENNEY	BILLINGS. REALTORS	331		X
DAVE HAWES	MELVILLE	331	X	
Julia Page	NPRC	331	X	
Louise Bruce	Mont. Wilderness Assoc.	331	X	
Jim Mockler	MT. Coal Council	331		✓
CHMS Tweeten	mt. Dept. of Justice	331	✓	

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## HOUSE OF REPRESENTATIVES

## VISITOR'S REGISTER

Natural Resources  
DATE 3-13-95

COMMITTEE

BILL NO.

SB 331

SPONSOR(S)

Sen. Dick

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PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	BILL	OPPOSE	SUPPORT
Hope Stevens	SELF	331	X	
Don Allen	MT. World Wildlife Fund	331		✓
MARK SHAPLEY	ISLAND MOUNTAIN PROTECTORS		X	
Jim Carlson	MSLA Co		✓	
Randy Peneg	Ft. Belknap Tribe		✓	
Kim Milburn	City of Helena	331		✓
Sally Johnson	Self		✓	
Grant Parker	Self	331	X	
Kelly Rosenblatt	City Council City of Missoula	331	X	
Stan Frasier	Self	331	X	
Tamara J. Johnson	CURE			X
Russ Ritter	MT Resources			✓
John Bloomquist	MT. Stockpiles	331		X

w/Chris  
po. Piche

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EXHIBIT D

## HOUSE OF REPRESENTATIVES

## VISITOR'S REGISTER

BILL NO. SB-331DATE 3-13-95SPONSOR(S) Sen DeLoach

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NAME AND ADDRESS	REPRESENTING	BILL	OPPOSE	SUPPORT
GAIL ABERCROMBIE	MT Petroleum Assn	331		X
509 Daly Vicki Watson Missoula, MT	Myself	331	✓	
Ken Williams	MPC/Entech	331		✓
J.V. Bennett	Mont DIRG	331	✓	
Lorna Frank	MT. Farm Bureau	331		✓
Don Peoples	Mont. Technology Co/MERRED			✓
Chris Gallus	MTC/MERRED			✓
Jack Lynch	CEO Butte Silver Bow			✓
Steve Kelly	FOWS		X	
Harmon Ore	Concerned Citizens of Butte	331	X	
Rosemary Harmon Helena		331	X	
Heidi Halverson	Self	331	X	
Dylan Torcoletti	"	331	X	

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HOUSE OF REPRESENTATIVES

VISITOR'S REGISTER

Noted Resources COMMITTEE SB 331  
 DATE 3-13-95 SPONSOR(S) Sen. DeLo

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PLEASE PRINT

PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	BILL	OPPOSE	SUPPORT
John Gaddell	MT WILDERNESS ASSOC	331	X	
<del>Steve Pichon</del>	DHEC	231	X	
Carl Schweitzer	MT Cont Assn	331		X
Janet Ellis	MT Audubon	331	X	
David Duran	MT chamber	331		✓
DAVID HEMLON	MT ASS. OF CHURCHES	331	✓	

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EXHIBIT D

EXECUTIVE ACTION ON SB 331

Motion: REP. BILL TASH MOVED SB 331 BE CONCURRED IN.

Motion/Vote: REP. TASH MOVED TECHNICAL AMENDMENTS TO SB 331.  
EXHIBIT 1 Voice vote was taken. Motion carried unanimously.

Motion: REP. TASH MOVED SEN. BECK'S AMENDMENTS TO SB 331.  
EXHIBIT 2

Discussion:

Alan Joscelyn, Attorney, explained SEN. BECK's amendments.

REP. TASH asked Mr. Joscelyn if any of the amendments change any of the assumptions on the fiscal note. Mr. Joscelyn said the assumptions related to the bill before it was amended in the Senate so they don't necessarily apply to the bill.

REP. HAL HARPER said if the committee passes the amendments it would be rewriting Montana's water quality laws. REP. HARPER said he wouldn't vote for the amendments or the bill. Montanans want their water protected. Water quality in the state is declining and SB 331 will hasten it.

REP. TASH said he respected REP. HARPER's expertise in water quality but accepted the amendments because the Department of Health and Environmental Sciences (DHES) has worked very carefully to ensure SB 331 would provide the direction the department needs.

REP. BOB RANEY asked Abe Horpestad (DHES) to explain amendment no. 8. Mr. Horpestad said amendment no. 8 ensures that if EPA comes up with a drinking water standard more stringent than the risk level specified in SB 331, the department will adopt the stricter standard.

Vote: Voice vote was taken. Motion on SEN. BECK's amendments carried 12 to 6. REP. RANEY, REP. HARPER, REP. CARLEY TUSS, REP. EMILY SWANSON, REP. JON ELLINGSON and REP. DAVID EWER voted no.

Motion: REP. TASH MOVED SB 331 BE CONCURRED IN AS AMENDED.

Discussion:

REP. TASH said SB 331 has had a lot of time and effort put into it. The bill offers industry reasonable and practical compliance rules it can work with and are stringent enough to protect the environment.

REP. RANEY said last session HB 401 was passed, which he protested, because the purpose of the bill was to lower water quality standards. There was a long session, with ~~EXHIBIT D~~ involvement in the writing of new rules. The rules that were



developed still didn't satisfy the industries that want to exploit Montana waters for the purpose of making money. That is why SB 330 and SB 331 were composed. The citizens of Montana won't profit from the bills, but industries will.

REP. HARPER agreed with REP. RANEY and said SB 330 and SB 331 aren't DHES bills, they are industry bills. In fact, the person who explained the amendments, represents industry. SB 331 will seriously weaken Montana's water quality in the near future and that impact will worsen as time goes on.

Vote: Roll call vote was taken. Motion carried 12 to 6. REP. RANEY, REP. ELLINGSON, REP. EWER, REP. HARPER, REP. SWANSON and REP. TUSS voted no.

#### EXECUTIVE ACTION ON SB 346

Motion: REP. JAY STOVALL MOVED SB 346 BE CONCURRED IN.

Motion/Vote : REP. HAL HARPER MOVED AMENDMENTS TO SB 346. EXHIBIT 3 Voice vote was taken. Motion carried unanimously.

Motion: REP. STOVALL MOVED SB 346 BE CONCURRED IN AS AMENDED.

#### Discussion:

REP. BOB RANEY asked Abe Horpestad, DHES, if a permit was really needed to make a stream better. Mr. Horpestad said currently, when a permit is issued, water quality standards have to be met. In many cases that can't be done. SB 346 enables the department to write a temporary permit that can be complied with while the water is being cleaned up. REP. RANEY said as far as he was concerned, a permit that is issued for 20 years is not a temporary permit. Mr. Horpestad reminded REP. RANEY that the permit would be effective up to 20 years. There will also be a review every three years and if necessary, a public hearing will be held.

REP. BILL TASH said SB 346 is a solution bill that gives industry the opportunity to work within a reasonable, temporary permit allowance, to get the streams cleaned up.

REP. ROBERT STORY said SB 346 is the department's recognition of reality.

REP. HAL HARPER said he would put his faith in the department and support the bill.

Vote: Voice vote was taken. Motion carried unanimously.

# HOUSE OF REPRESENTATIVES

## Natural Resources

ROLL CALL

DATE 3-21-95

NAME	PRESENT	ABSENT	EXCUSED
Rep. Dick Knox, Chairman	✓		
Rep. Bill Tash, Vice Chairman, Majority	✓		
Rep. Bob Raney, Vice Chairman, Minority	✓		
Rep. Aubyn Curtiss	✓		
Rep. Jon Ellingson	✓		
Rep. David Ewer			✓
Rep. Daniel Fuchs	✓		
Rep. Hal Harper	✓		
Rep. Karl Ohs	✓		
Rep. Scott Orr	✓		
Rep. Paul Sliter	✓		
Rep. Robert Story	✓		
Rep. Jay Stovall	✓		
Rep. Emily Swanson	✓		
Rep. Lila Taylor	✓		
Rep. Cliff Trexler			✓
Rep. Carley Tuss	✓		
Rep. Doug Wagner	✓		



## HOUSE STANDING COMMITTEE REPORT

March 22, 1995

Page 1 of 3

Mr. Speaker: We, the committee on Natural Resources report that Senate Bill 331 (third reading copy -- blue) be concurred in as amended.

Signed:

  
Dick Knox, Chair

And, that such amendments read:

Carried by: Rep. Tash

1. Page 4, line 14:

Following: "life."

Insert: "(1)"

2. Page 4, line 15:

Following: "chapter"

Insert: "and except as provided in subsection (2)"

3. Page 4.

Following: line 20

Insert: "(2) If the department, based upon its review of an application submitted under subsection (1) and sound scientific, technical, and available site-specific evidence, determines that the development of site-specific criteria in accordance with draft or final federal regulations, guidelines, or criteria would not be protective of beneficial uses, the department, within 90 days of the submission of an application under subsection (1), shall notify the applicant in writing of its determination and of all additional procedures that the applicant is required to comply with in the development of site-specific standards of water quality under this section. If there is a dispute between the department and the applicant as to the additional procedures, the board shall, on the request of

EXHIBIT D

Committee Vote:

661015SC.Hdh

March 22, 1995

Page 2 of 3

the department or the applicant, hear and determine the dispute. The board's decision must be based on sound scientific, technical, and available site-specific evidence."

4. Page 4, line 30.

Strike: "IF" through "USE"

5. Page 7, line 6.

Strike: "privately owned"

6. Page 7, lines 25 through 28.

Strike: "The" on line 25 through "AGENCY." on line 28

Insert: "When the department's review of a permit application submitted under another chapter or title is required or requested, the department shall coordinate the review under this chapter with the review conducted by the agency or unit under the other chapter, following the time schedule for that review."

7. Page 8, line 25.

Following: "(2)"

Insert: "(a)"

8. Page 8, line 28.

Following: "PREVENTION."

Insert: "(b)"

9. Page 8, line 30.

Strike: "(A)"

Insert: "(i)"

Strike: "MEASURING"

Strike: "IN SURFACE WATER"

10. Page 9, line 3.

Strike: "i"

Insert: ". However, if a standard established at a risk level of  $1 \times 10^{-3}$  for arsenic or  $1 \times 10^{-5}$  for other carcinogens violates the maximum contaminant level obtained from 40 CFR, part 141, then the maximum contaminant level must be adopted as the standard for that carcinogen."

11. Page 9, lines 4 through 6.

Strike: "(B)" on line 4 through "(C)" on line 6

Insert: "(ii)"

12. Page 9, lines 6 through 9.

Strike: "i" on line 6 through "ACT;" on line 9

EXHIBIT D

661015SC.Hdh



March 22, 1995

Page 3 of 3

Insert: "."

13. Page 10, line 7.

Strike: "TO"

Insert: "of nitrate in"

Strike: "QUALITY"

14. Page 13.

Following: line 2

Insert: "(i) the discharge does not contain industrial waste, sewage, or other wastes;"

Renumber: subsequent subsections

15. Page 13, line 4.

Strike: "OR"

Insert: "and"

16. Page 13, line 8.

Strike: "may"

Insert: "must"

17. Page 17, line 29.

Strike: "AND" through "CONSIDER"

18. Page, 19

Following: line 13

Insert: "NEW SECTION. Section 17. Coordination instruction. If Senate Bill No. 330 is passed and approved and if it includes a section that amends the definition of "degradation" contained in 75-5-103, then the definition of degradation provided in [section 3 of this act], amending 75-5-103, is effective and the definition provided in Senate Bill No. 330 is void."

Renumber: subsequent sections

19. Page 19, lines 15 and 16.

Strike: "SECTION" through "ACT".

Insert: "[This act] does not apply to civil or administrative actions commenced prior to [the effective date of this act] or to claims made in those actions, except that compliance plans resulting from those actions must reflect changes made by [this act]."

-END-

# HOUSE OF REPRESENTATIVES

## ROLL CALL VOTE

### Natural Resources

DATE 3-21-95 BILL NO. SB 331 NUMBER           

MOTION: BE CONCURRED IN AS AMENDED

NAME	AYE	NO
Rep. Dick Knox, Chairman	✓	
Rep. Bill Tash, Vice Chairman, Majority	✓	
Rep. Bob Raney, Vice Chairman, Minority		✓
Rep. Aubyn Curtiss	✓	
Rep. Jon Ellingson		✓
Rep. David Ewer		✓
Rep. Daniel Fuchs	✓	
Rep. Hal Harper		✓
Rep. Karl Ohs	✓	
Rep. Scott Orr	✓	
Rep. Paul Sliter	✓	
Rep. Robert Story	✓	
Rep. Jay Stovall	✓	
Rep. Emily Swanson		✓
Rep. Lila Taylor	✓	
Rep. Cliff Trexler	✓	
Rep. Carley Tuss		✓
Rep. Doug Wagner	✓	

EXHIBIT D

EXHIBIT 1  
DATE 3-21-95  
SB 331

Amendments to Senate Bill No. 331  
Third Reading Copy

For the Committee on Natural Resources

Prepared by Michael S. Kakuk  
March 7, 1995

1. Page 8, line 25.

Following: "(2)"

Insert: "(a)"

2. Page 8, line 28.

Following: "PREVENTION."

Insert: "(b)"

3. Page 8, line 30.

Strike: "(A)"

Insert: "(i)"

4. Page 9, line 4.

Strike: "(B)"

Insert: "(ii)"

5. Page 9, line 6.

Strike: "(C)"

Insert: "(iii)"

6. Page 9, line 8.

Strike: "(D)"

Insert: "(iv)"

7. Page 9, line 9.

Strike: ";

Insert: "."

8. Page 13, line 8.

Strike: "may"

Insert: "must"

Amendments to Senate Bill No. 331  
Third Reading Copy

EXHIBIT 21

DATE 3-21-95

SB 331

Requested by Sen. Beck  
For the Committee on Natural Resources

Prepared by Michael S. Kakuk  
March 16, 1995

1. Page 4, line 14.  
Following: "life."  
Insert: "(1)"

2. Page 4, line 15.  
Following: "chapter"  
Insert: "and except as provided in subsection (2)"

3. Page 4.  
Following: line 20  
Insert: "(2) If the department, based upon its review of an application submitted under subsection (1) and sound scientific, technical, and available site-specific evidence, determines that the development of site-specific criteria in accordance with draft or final federal regulations, guidelines, or criteria would not be protective of beneficial uses, the department, within 90 days of the submission of an application under subsection (1), shall notify the applicant in writing of its determination and of all additional procedures that the applicant is required to comply with in the development of site-specific standards of water quality under this section. If there is a dispute between the department and the applicant as to the additional procedures, the board shall, on the request of the department or the applicant, hear and determine the dispute. The board's decision must be based on sound scientific, technical, and available site-specific evidence."

4. Page 4, line 30.  
Strike: "IF" through "USE"

5. Page 7, line 6.  
Strike: "privately owned"

6. Page 7, lines 25 through 28.  
Strike: "The" on line 25 through "AGENCY." on line 28  
Insert: "When the department's review of a permit application submitted under another chapter or title is required or requested, the department shall coordinate the review under this chapter with the review conducted by the agency or unit under the other chapter, following the time schedule for that review."

7. Page 8, line 30.  
Strike: "MEASURING"



Strike: "IN SURFACE WATER"

8. Page 9, line 3.

Strike: "i"

Insert: ". However, if a standard established at a risk level of  $1 \times 10^{-3}$  for arsenic or  $1 \times 10^{-5}$  for other carcinogens violates the maximum contaminant level obtained from 40 CFR, part 141, then the maximum contaminant level must be adopted as the standard for that carcinogen."

9. Page 9, lines 4 and 5.

Strike: subsection (B) in its entirety

Re-number: subsequent subsections

10. Page 9, lines 7 through 9.

Strike: "AND" on line 7 through "ACT1:" on line 9

11. Page 10, line 7.

Strike: "TO"

Insert: "of nitrate in"

Strike: "QUALITY"

12. Page 13.

Following: line 2

Insert: "(i) the discharge does not contain industrial waste, sewage, or other wastes;"

Re-number: subsequent subsections

13. Page 13, line 4.

Strike: "OR"

Insert: "and"

14. Page 17, line 29.

Strike: "AND" through "CONSIDER"

15. Page, 19

Following: line 13

Insert: "NEW SECTION. Section 17. Coordination instruction. If Senate Bill No. 330 is passed and approved and if it includes a section that amends the definition of "degradation" contained in 75-5-103, then the definition of degradation provided in [section 3 of this act] is effective and the definition provided in Senate Bill No. 330 is void."

Re-number: subsequent sections

16. Page 19, lines 15 and 16.

Strike: "SECTION" through "ACT1."

Insert: "[This act] does not apply to civil or administrative actions commenced prior to [the effective date of this act] or to claims made in those actions, except that compliance plans resulting from those actions must reflect changes made by [this act]."

# EXHIBIT E

## 2015 Mt. SB 325

Enacted, April 30, 2015

### Reporter

2015 Mt. ALS 378; 2015 Mt. Laws 378; 2015 Mt. Ch. 378; 2015 Mt. SB 325

MONTANA ADVANCE LEGISLATIVE SERVICE > MONTANA 64TH REGULAR SESSION > CHAPTER NO. 378 > SENATE BILL 325

### Notice

---

Added: Text highlighted in green

Deleted: ~~Red text with a strikethrough~~

### Synopsis

---

AN ACT REVISING THE BOARD OF ENVIRONMENTAL REVIEW PROCESS FOR ADOPTING WATER QUALITY REGULATIONS MORE STRINGENT THAN FEDERAL REGULATIONS; REVISING IMPLEMENTATION OF WATER QUALITY STANDARDS THAT ARE PURER THAN A NATURAL CONDITION OF A WATERCOURSE OR WATER SOURCE; REVISING THE PROCESS FOR RECLASSIFYING WATER QUALITY STANDARDS; REVISING THE PROCESS FOR ADOPTING SITE-SPECIFIC WATER QUALITY STANDARDS; PROVIDING A DEFINITION; AMENDING SECTION 75-5-203, MCA; AND REPEALING SECTION 75-5-309, MCA.

### Text

---

*BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:*

#### Section 1.

##### **State regulation for natural conditions.**

- (1) The department may not apply a standard to a water body for water quality that is more stringent than the nonanthropogenic condition of the water body. For the parameters for which the applicable standards are more stringent than the nonanthropogenic condition, the standard is the nonanthropogenic condition of the parameter in the water body. The department shall implement the

## 2015 Mt. SB 325

standard in a manner that provides for the water quality standards for downstream waters to be attained and maintained.

(2)

(a) For water bodies where the standard is more stringent than the condition of the water body but subsection (1) is not applicable, the board shall adopt rules consistent with comparable federal rules and guidelines providing criteria and procedures for the department to issue variances from standards if:

(i) the condition cannot reasonably be expected to be remediated during the permit term for which the application for variance has been received; and

(ii) the discharge to which the variance applies would not materially contribute to the condition.

(b) A variance issued pursuant to subsection (2)(a) must be reviewed every 5 years and may be modified or terminated as a result of the review.

**Section 2.** Section 75-5-203, MCA, MCA, is amended to read:

**"75-5-203. State regulations no more stringent than federal regulations or guidelines.**

(1) ~~After April 14, 1995, except~~ Except as provided in subsections (2) through (5) or unless required by state law, the board may not adopt a rule to implement ~~this chapter~~ 75-5-301, 75-5-302, 75-5-303, or 75-5-310 that is more stringent than the comparable federal regulations or guidelines that address the same circumstances. The board may incorporate by reference comparable federal regulations or guidelines.

(2) The board may adopt a rule to implement this chapter that is more stringent than comparable federal regulations or guidelines only if the board 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~~ can mitigate harm to the public health or environment and is achievable under current technology.

(3) The written finding must reference ~~information and~~ pertinent, ascertainable, and peer-reviewed scientific studies contained in the record that forms the basis for the board's conclusion. The written finding must also include information from the hearing record regarding the costs to the regulated community that are directly attributable to the proposed state standard or requirement.

(4)

(a) A person affected by a rule of the board ~~adopted after January 1, 1990, and before April 14, 1995,~~ that that person believes to be more stringent than comparable federal regulations or guidelines

## 2015 Mt. SB 325

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 board 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 ~~12~~ 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 board may charge a petition filing fee in an amount not to exceed \$250.

(b) A person may also petition the board for a rule review under subsection (4)(a) if the board adopts a rule ~~after January 1, 1990~~, in an area in which no federal regulations or guidelines existed and the federal government subsequently establishes comparable regulations or guidelines that are less stringent than the previously adopted board rule.

(5) This section does not apply to a rule adopted under the emergency rulemaking provisions of 2-4-303(1).

**Section 3. Repealer.**

The following section of the Montana Code Annotated is repealed:

[75-5-309, MCA](#). Standards more stringent than federal standards.

**Section 4. Codification instruction.**

[Section 1] is intended to be codified as an integral part of Title 75, chapter 5, and the provisions of Title 75, chapter 5, apply to [section 1].

**History**

---

Approved by the Governor April 30, 2015

Effective date: October 1, 2015

**Sponsor**

---

Keane

MONTANA ADVANCE LEGISLATIVE SERVICE  
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# **EXHIBIT F**

**NATURAL RESOURCE COMMITTEE  
MARCH 30, 2015 HEARING  
SB325**

**SPEAKERS:**

Chairman White  
Rep. Keane  
Rep. Amy Grmoljez  
Dave Galt  
Tammy Johnson  
George Mathieus

Speaker	Content
Chairman White	With that, we'll open the hearing on Senate Bill 325.
Senator Keane	Thank you Mr. Chairman. I kind of know about being in a rush. That's where we are on the other side too. My name is Jim Keane. I represent Senate District 38, which is the Southeast side of Butte in Jefferson County. Mr. Chairman and members of the Committee, sometimes you have an idea or you're sitting in a committee and a Bill comes up, somebody comes up and says, "Well we'd support that if there were, it was a broader Bill," so Mr. Chairman, that's what I've done. I brought a broader Bill that actually solves a great problem and its about water and discharge. This Bill is a Bill that has been a problem for counties and people who discharge water in the State of Montana and how the Department utilizes those rules and its all with the federal government. The federal rules and Mr. Chairman, we worked with the Department. If you'll notice there is a lot of cross-offs and Department, we came to some conclusions on that and I have another amendment, Mr. Chairman, which I need to have put on the Bill. We've been working with the Department on that, on that amendment and if you could hand that amendment out, I would like that to become part of the Bill. What it does, it helps us get a standard for what discharge in the State of Montana, Mr. Chairman, and honoring your wishes. Thank you.
Chairman White	Thank you, Senator Keane. Are there proponents for Senate Bill 325?
Sen. Grmoljez	Good afternoon, Mr. Chairman, and members of the committee for the record, my name is Amy Grmoljez – G-R-M-O-L-J-E-Z – and I represent Arch Coal and we wanted to thank the Bill sponsor and the Department of Environmental Quality for working on this Bill. As Senator Keane discussed with all of you, we were interested in a different Bill in the Senate, but as the process goes, that Bill went its own path, which ended up dying and this Bill, which is, as Senator Keane has told me repeatedly, a

Speaker	Content
	<p>“better Bill,” is in its place and so, um, we supported the Bill with the amendments, Mr. Chairman, and that reason is that we think it’s clear underneath the amended version of water – there was a question about downstream uses before and so underneath the definition, underneath the amended version of the Bill, you’ll notice that there is added in the non-anthropogenic term that I know is very favorable and understandably that means non-human, basically, that’s throughout the Bill and of course, our concerns are mostly with Section 1, Sub 1 of the Bill as we think it pertains to what we would be interested in terms of the other parts of that where it talks about downstream water, that we think it’s clear instead of downstream uses, uh, the solution in this Bill is really that it allows existing natural conditions to be the standard, Mr. Chairman. It’s very simple. It doesn’t legislate standard or science. It recognizes that in reality there are standards that may be inconsistent with nature and it recognizes that longstanding policy discharge are not required to treat, to quality cleaner than natural. Um, we appreciate that it requires the EQ to implement in a manner that attains and maintains the downstream water quality standards and we think it gives them the necessary guidance that they have it gets to the outcome that they want, as well, so Mr. Chairman, we support the Bill. Thank you. As amended.</p>
Chairman White	Thank you, Ms. Grmoljez. Further proponents?
Dave Galt	<p>Mr. Chairman and members of the Committee. For the record, my name is Dave Galt. I’m the Executive Director of the Montana Petroleum Association and in the interest of brevity, I agree with everything that Senator Keane and Amy Grmoljez just said. We’ve kicked this around with our members and NPA and we support the Bill with the amendment on it, so thank you very much.</p>
Chairman White	Thank you, Mr. Galt. Further proponents – Senate Bill 325?
Tammy Johnson	<p>Good afternoon, Mr. Chairman, members of the Committee. Tammy Johnson, the Executive Director of the Montana Mining Association. For all of the reasons that you’ve already heard and in the interest of time, We doo support Senate Bill 325 with amendments. Thank you.</p>
George Mathieus	<p>Mr. Chair, members of the Committee. For the record, my name is George Mathieus – M-A-T-H-I-E-U-S – representing the Montana Department of Environmental Quality. I apologize, I’m going to read my testimony, so that I can be quick. I’m going to use natural and non-anthropogenic today interchangeably. Mostly because folks are used to the term natural. Webster’s definition of anthropogenic is “... of, relating to, or resulting from the influence of human beings on nature.” This Bill has two distinct components that I would like to point out. The first one is this. This Bill</p>



Speaker	Content
	<p>allows the Board to adopt a water quality standard at a non-anthropogenic condition. This Bill requires the Department to set permit limits to protect downstream water quality standards that will protect downstream uses, as well. This is found in No. 5 of the Amendment that's been mentioned. When the standard is more stringent than natural, the natural condition becomes the standard. This Bill limits natural as a nonanthropogenic condition. This aligns with EPA's view of natural and Senate Bill 160, which I believe this Committee heard last week. This Bill allows the Department to delist water bodies that are currently on our 303D list as impaired for a natural condition. In the end, the Universe is small. It only affects streams and parameters when there are more stringent than nonanthropogenic conditions. The second component. It allows the Department to issue a temporary variance to a discharger under the following conditions: The receiving stream exceeds a water quality standard due to existing anthropogenic sources and the discharger would not significantly contribute to that exceedance. This Bill allows for upstream responsible parties and/or mitigation activities to address the issues over time, rather than forcing cleanup by downstream parties who are not responsible. This would fix a real problem for many municipalities. In summary, on the first component, which was the natural component, natural conditions cannot impair an existing use; otherwise, that use simply would not exist. This is acknowledged by setting a standard at natural. This bill allows for the implementation of that standard to follow a more cumulative water shed affects concept when setting limits. Additionally, current law – MCA755306 – provides that dischargers may not be required to treat to a purer than natural condition. It is unclear how that current provision applies to water quality standards downstream. Senate Bill 325 requires the Department to implement a standard in a manner that protects downstream water quality uses, which could be purer than the natural condition. In short, Senate Bill 325 removes the ambiguities in current law. Second component summary: The variance. Today a municipality might be on the hook for cleaning up its discharge to levels that are costly and potentially ineffective. This might be due to existing water quality conditions from legacy mines. It is important to note that these municipalities will still be held to permit limits that protect other water quality standards. The variants would allow time for remedial efforts of the responsible party to take effect, rather than placing the burden on a municipality. And finally, this Bill triggers two rulemaking efforts. The first one will define how nonanthropogenic is determined and the other, on how the variants are implemented. Both rulemakings will result in a formalized public process that can be consistently used. Mr. Chairman, thank you. I'm available for questions.</p>

Speaker	Content
Chairman White	Thank you, Mr. Mathieus. Further proponents? Senate Bill 325. Further proponents? See none. Opponents? Senate Bill 325?
	END.

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# EXHIBIT G



without the following options: Zero/span ports for external calibration; an optional inlet filter; or an optional second gas measurement module co-located inside of the enclosure.

This application for a reference method determination for this SO<sub>2</sub> method was received by the Office of Research and Development on April 25, 2016. This analyzer is commercially available from the applicant, Sutron Air Quality Division, 2548 Shell Road, Georgetown, TX 78628.

The four new PM equivalent methods are automated monitoring methods utilizing a measurement principle based on active sampling of ambient aerosols and contemporaneous analysis by means of a light-scattering technique for determination of particle size and mass concentration. These newly designated equivalent methods for PM<sub>2.5</sub>, PM<sub>10</sub> and PM<sub>10-2.5</sub>, are identified as follows:

EQPM-0516-236, "Teledyne Advanced Pollution Instrumentation Model T640 PM mass monitor," continuous ambient particulate monitor operated at a volumetric flow rate of 5.0 Lpm, equipped with a TAPI 5-Lpm sample inlet (P/N: 081050000), TAPI aerosol sample conditioner (P/N: 081040000), configured for operation with firmware version 1.0.2.126 or later, and operated in accordance with the Teledyne Model T640 Operations Manual. This designation applies to PM<sub>2.5</sub> measurements only.

EQPM-0516-238, "Teledyne Advanced Pollution Instrumentation Model T640 PM mass monitor with 640X option," continuous ambient particulate monitor operated at a volumetric flow rate of 16.67 Lpm, equipped with the louvered PM<sub>10</sub> inlet specified in 40 CFR 50 Appendix L, Figs. L-2 thru L-19, TAPI aerosol sample conditioner (P/N: 081040000), configured for operation with firmware version 1.0.2.126 or later, in accordance with the Teledyne Model T640 Operations Manual. This designation applies to PM<sub>2.5</sub> measurements only.

EQPM-0516-239, "Teledyne Advanced Pollution Instrumentation Model T640 PM mass monitor with 640X option," continuous ambient particulate monitor operated at a volumetric flow rate of 16.67 Lpm, equipped with the louvered PM<sub>10</sub> inlet specified in 40 CFR 50 Appendix L, Figs. L-2 thru L-19, TAPI aerosol sample conditioner (P/N: 081040000), configured for operation with firmware version 1.0.2.126 or later, in accordance with the Teledyne Model T640 Operations Manual. This designation applies to PM<sub>10</sub> measurements only.

EQPM-0516-240, "Teledyne Advanced Pollution Instrumentation

Model T640 PM mass monitor with 640X option," continuous ambient particulate monitor operated at a volumetric flow rate of 16.67 Lpm, equipped with the louvered PM<sub>10</sub> inlet specified in 40 CFR 50 Appendix L, Figs. L-2 thru L-19, TAPI aerosol sample conditioner (P/N: 081040000), configured for operation with firmware version 1.0.2.126 or later, in accordance with the Teledyne Model T640 Operations Manual. This designation applies to PM<sub>10-2.5</sub> measurements only.

The four applications for equivalent method determination for the PM candidate methods were received by the Office of Research and Development on May 2, 2016, June 1, 2016, June 9, 2016 and June 14, 2016 respectively. The monitors are commercially available from the applicant, Teledyne Advanced Pollution Instrumentation, Inc., 9480 Carroll Park Drive, San Diego, CA 92121-2251.

Representative test analyzers have been tested in accordance with the applicable test procedures specified in 40 CFR part 53, as amended on October 26, 2015. After reviewing the results of those tests and other information submitted by the applicant, EPA has determined, in accordance with part 53, that these methods should be designated as a reference or equivalent method.

As a designated reference or equivalent method, these methods are acceptable for use by states and other air monitoring agencies under the requirements of 40 CFR part 58, Ambient Air Quality Surveillance. For such purposes, each method must be used in strict accordance with the operation or instruction manual associated with the method and subject to any specifications and limitations (e.g., configuration or operational settings) specified in the designated method description (see the identification of the method above).

Use of the method also should be in general accordance with the guidance and recommendations of applicable sections of the "Quality Assurance Handbook for Air Pollution Measurement Systems, Volume I," EPA/600/R-94/038a and "Quality Assurance Handbook for Air Pollution Measurement Systems, Volume II, Ambient Air Quality Monitoring Program," EPA-454/B-13-003, (both available at <http://www.epa.gov/ttn/amtic/qalist.html>). Provisions concerning modification of such methods by users are specified under Section 2.8 (Modifications of Methods by Users) of Appendix C to 40 CFR part 58.

Consistent or repeated noncompliance with any of these conditions should be

reported to: Director, Exposure Methods and Measurement Division (MD-E205-01), National Exposure Research Laboratory, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711.

Designation of these reference and equivalent methods is intended to assist the States in establishing and operating their air quality surveillance systems under 40 CFR part 58. Questions concerning the commercial availability or technical aspects of the method should be directed to the applicant.

Dated: July 1, 2016.

Jennifer Orme-Zavaleta,  
Director, National Exposure Research Laboratory.

[FR Doc. 2016-16578 Filed 7-12-16; 8:45 am]

BILLING CODE 6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OW-2004-0019; FRL 9949-02-OW]

### Recommended Aquatic Life Ambient Water Quality Criterion for Selenium in Freshwater

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability.

**SUMMARY:** The Environmental Protection Agency (EPA) is announcing the release of a final updated Clean Water Act (CWA) section 304(a) recommended national chronic aquatic life criterion for the pollutant selenium in fresh water. The final criterion supersedes EPA's 1999 CWA section 304(a) recommended national acute and chronic aquatic life criteria for selenium. The 2016 recommended criterion reflects the latest scientific information, which indicates that selenium toxicity to aquatic life is primarily based on organisms consuming selenium-contaminated food rather than direct exposure to selenium dissolved in water. Draft versions of the criterion underwent public review in 2014 and 2015 and external peer review in 2015. EPA considered all public comments and peer reviewer comments in the development of the 2016 final selenium criterion document. EPA's water quality criterion for selenium provides recommendations to states and tribes authorized to establish water quality standards under the CWA.

**FOR FURTHER INFORMATION CONTACT:** Joe Beaman, Health and Ecological Criteria Division, Office of Water (Mail Code 4304T), Environmental Protection Agency, 1200 Pennsylvania Avenue

NW., Washington, DC 20460; telephone number: (202) 566-0420; email address: [beaman.joe@epa.gov](mailto:beaman.joe@epa.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. General Information

*A. How can I get copies of this document and other related information?*

1. *Docket.* EPA has established a docket for this action under Docket ID No. EPA-HQ-OW-2004-0019. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy at the Water Docket in the EPA Docket Center, (EPA/DC) EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Water Docket is (202) 566-2426.

2. *Electronic Access.* You may access this Federal Register document electronically from the Government Printing Office under the "Federal Register" listings FDSys (<http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=FR>).

##### II. What are EPA's recommended water quality criteria?

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. Section 304(a)(1) of the CWA directs EPA to develop and publish and, from time to time, revise criteria for protection of aquatic life and human health that accurately reflect the latest scientific knowledge. Water quality criteria developed under section 304(a) are based on data and the latest scientific knowledge on the relationship between pollutant concentrations and environmental and human health effects. Section 304(a) criteria do not reflect consideration of economic impacts or the technological feasibility of meeting pollutant concentrations in ambient water.

EPA's section 304(a) recommended criteria provide technical information to

states and authorized tribes in adopting water quality standards (WQS) that ultimately provide a basis for assessing water body health and controlling discharges or releases of pollutants. Under the CWA and its implementing regulations, states and authorized tribes are to adopt water quality criteria to protect designated uses (e.g., public water supply, aquatic life, recreational use, or industrial use). EPA's recommended water quality criteria do not substitute for the CWA or regulations, nor are they regulations themselves. EPA's recommended criteria do not impose legally binding requirements. States and authorized tribes have the discretion to adopt, where appropriate, other scientifically defensible water quality criteria that differ from these recommendations.

##### III. What is selenium and why is EPA concerned about it?

Selenium is a naturally occurring element that can be released into water resources by natural sources via weathering and by anthropogenic sources, such as surface mining, coal-fired power plants, and irrigated agriculture. Selenium is nutritionally essential for animals in small amounts, but toxic at higher concentrations. Selenium bioaccumulates in the aquatic food chain, and toxicity in fish occurs primarily through maternal transfer to the eggs. Chronic maternal exposure in fish and aquatic invertebrates can cause reproductive impairments (e.g., larval deformity or mortality); other aquatic effects include impacts on juvenile growth and mortality.

##### IV. Information on the Aquatic Life Ambient Water Quality Criterion

EPA has updated the aquatic life criterion document for selenium based on the latest scientific knowledge and current EPA policies and methods, including EPA's *Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses* (1985) (EPA/R-85-100) and *Guidelines for Ecological Risk Assessment* (1998) (EPA/630/R-95/002F). Toxicity data and other information on the effects of selenium were subjected to both internal and external peer review. In 2004, EPA

published the first draft of the updated recommended selenium criterion using fish-tissue concentrations. In 2009, EPA helped organize an international expert workshop on selenium and initiated collaboration with the U.S. Geological Survey to develop a selenium bioaccumulation model. EPA then revised the 2004 draft criterion to include fish tissue and water column concentrations. In 2014, EPA released the draft recommended criterion for public comment and external peer review. EPA revised the draft recommended criterion accordingly and in 2015 released the draft for a second round of public comment. EPA has considered all public comments and peer reviewer comments in the development of the 2016 final selenium criterion document.

The 2016 selenium criterion document recommends that states and authorized tribes adopt a multi-media criterion into their water quality standards. The criterion has four elements, and EPA recommends that states include all four elements in their standards. Because adverse reproductive effects are most closely linked to selenium concentrations in fish tissue, the 2016 chronic criterion is based primarily on concentrations in fish egg-ovary tissues and is translated into whole body, muscle, and water column concentrations for lakes/reservoirs and rivers/streams to create the four elements of the chronic criterion (two fish tissue and two water column). EPA recommends that when implementing the criterion, the fish tissue elements take precedence over the water column elements, except in certain circumstances. For example, water column values are the applicable criterion element in the absence of fish tissue measurements, such as waters where fish have been extirpated or where physical habitat and/or flow regime cannot sustain fish populations, or in waters with new discharges of selenium where steady state has not been achieved between water and fish tissue at the site. The previous 1999 acute and chronic recommended criteria were water column concentrations only. The table below compares the 2016 criterion with the 1999 criteria.

COMPARISON OF FINAL 2016 SELENIUM CRITERION TO 1999 CRITERIA

Criterion version	Chronic				Short-term	
	Egg-Ovary <sup>1</sup> (mg/kg dw)	Whole Body <sup>1</sup> (mg/kg dw)	Muscle <sup>1</sup> (mg/kg dw)	Water, <sup>1</sup> Lentic (µg/L)	Water, <sup>1</sup> Lotic (µg/L)	Water (µg/L)
2016 Final Update .....	15.1	8.5	11.3	1.5 (30 d) .....	3.1 (30 d) .....	Intermittent exposure equation.

## COMPARISON OF FINAL 2016 SELENIUM CRITERION TO 1999 CRITERIA—Continued

Criterion version	Chronic					Short-term
	Egg-Ovary <sup>1</sup> (mg/kg dw)	Whole Body <sup>1</sup> (mg/kg dw)	Muscle <sup>1</sup> (mg/kg dw)	Water, <sup>1</sup> Lentic (µg/L)	Water, <sup>1</sup> Lotic (µg/L)	Water (µg/L)
1999 Selenium Criteria	N/A	N/A	N/A	5 (4 d) .....	5 (4 d) .....	Acute Equation based on water column concentration.

<sup>1</sup> A note on hierarchy of table: when fish egg/ovary concentrations are measured, the values supersede any whole-body, muscle, or water column elements except in certain situations. Whole body or muscle measurements supersede any water column element when both fish tissue and water concentrations are measured, except in certain situations (see examples in text above). Water column values are derived from fish tissue concentrations.

The criterion document does not include an acute criterion (based on water-only exposure) because selenium is bioaccumulative and toxicity primarily occurs through dietary exposure. EPA derived an intermittent exposure criterion element from the 30-day average water column criterion element for situations where elevated inputs of selenium could result in bioaccumulation in the ecosystem and potential chronic effects in fish (e.g., new discharges).

#### V. What is the relationship between the water quality criterion and your state or tribal water quality standards?

As part of the WQS triennial review process defined in section 303(c)(1) of the CWA, the states and authorized tribes are responsible for maintaining and revising WQS. Standards consist of designated uses, water quality criteria to protect those uses, a policy for antidegradation, and may include general policies for application and implementation. Section 303(c)(1) requires states and authorized tribes to review and modify, if appropriate, their WQS at least once every three years.

States and authorized tribes must adopt water quality criteria that protect designated uses. Consistent with EPA's regulations at 40 CFR 131.11(a), protective criteria must be based on a sound scientific rationale and contain sufficient parameters or constituents to protect the designated uses. Criteria may be expressed in either narrative or numeric form. States and authorized tribes have four options when adopting water quality criteria for which EPA has published section 304(a) criteria. They may:

- (1) Establish numerical values based on recommended section 304(a) criteria;
- (2) Adopt section 304(a) criteria modified to reflect site-specific conditions;
- (3) Adopt criteria derived using other scientifically defensible methods; or
- (4) Establish narrative criteria where numeric criteria cannot be established or to supplement numerical criteria (40 CFR 131.11(b)).

EPA's regulation at 40 CFR 131.20(a) provides that if a state does not adopt new or revised criteria parameters for which EPA has published new or updated recommendations, then the state shall provide an explanation when it submits the results of its triennial review to the Regional Administrator consistent with CWA section 303(c)(1). The updated section 304(a) selenium criteria supersede EPA's previous 304(a) recommended criteria for selenium. Consistent with 40 CFR 131.21, new or revised water quality criteria adopted into law or regulation by states and authorized tribes on or after May 30, 2000 are applicable water quality standards for CWA purposes only after EPA approval.

#### VI. Additional Information

EPA is developing a set of technical support documents to assist states. These materials will include fish tissue monitoring guidance as well as FAQs and fact sheets addressing flexibilities for states and authorized tribes in implementing the criteria, assessing and listing water body impairments, and wastewater permitting.

Dated: June 30, 2016.

Joel Beauvais,  
Deputy Assistant Administrator, Office of Water.

[FR Doc. 2016-16585 Filed 7-12-16; 8:45 am]

BILLING CODE 6560-50-P

#### FEDERAL COMMUNICATIONS COMMISSION

##### Federal Advisory Committee Act; Technological Advisory Council

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice of public meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, this notice advises interested persons that the Federal Communications Commission's (FCC) Technological Advisory Council will hold a meeting.

**DATES:** Tuesday, September 20th, 2016 in the Commission Meeting Room, from 12:30 p.m. to 4 p.m.

**ADDRESSES:** Federal Communications Commission, 445 12th Street SW., Washington, DC 20554.

**FOR FURTHER INFORMATION CONTACT:** Walter Johnston, Chief, Electromagnetic Compatibility Division, 202-418-0807; [Walter.Johnston@FCC.gov](mailto:Walter.Johnston@FCC.gov).

**SUPPLEMENTARY INFORMATION:** At the September 20th meeting, the FCC Technological Advisory Council will discuss progress on and issues involving its work program agreed to at its initial meeting on March 9th, 2016. The FCC will attempt to accommodate as many people as possible. However, admittance will be limited to seating availability. Meetings are also broadcast live with open captioning over the Internet from the FCC Live Web page at <http://www.fcc.gov/live/>. The public may submit written comments before the meeting to: Walter Johnston, the FCC's Designated Federal Officer for Technological Advisory Council by email: [Walter.Johnston@fcc.gov](mailto:Walter.Johnston@fcc.gov) or U.S. Postal Service Mail (Walter Johnston, Federal Communications Commission, Room 2-A665, 445 12th Street SW., Washington, DC 20554). Open captioning will be provided for this event. Other reasonable accommodations for people with disabilities are available upon request. Requests for such accommodations should be submitted via email to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or by calling the Office of Engineering and Technology at 202-418-2470 (voice), (202) 418-1944 (fax). Such requests should include a detailed description of the accommodation needed. In addition, please include your contact information. Please allow at least five days advance notice; last minute requests will be accepted, but may not be possible to fill.

Federal Communications Commission.

Ronald T. Repasi,  
Deputy Chief, Office of Engineering and Technology.

[FR Doc. 2016-16515 Filed 7-12-16; 8:45 am]

BILLING CODE 6712-01-P

# EXHIBIT H



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 8**

1595 Wynkoop Street  
Denver, CO 80202-1129  
Phone 800-227-8917  
[www.epa.gov/region8](http://www.epa.gov/region8)

February 25, 2021

Ref: 8WP-CWQ

Steven Ruffatto  
Chair, Montana Board of Environmental Review  
Montana Department of Environmental Quality  
Metcalf Building, 1520 East Sixth Avenue  
P.O. Box 200901  
Helena, Montana 59620-0901

Subject: EPA's action on Montana's Revised Selenium Criteria for Lake Koocanusa and the Kootenai River (ARM 17.30.632 & ARM 17.30.602(32))

Dear Mr. Ruffatto:

The U.S. Environmental Protection Agency (EPA) has completed its review of Montana's revised water quality standards (WQS) and is approving the Administrative Rules of Montana (ARM) 17.30.632 and 17.30.602(32) as described in the enclosure to this letter. Receipt of the submission on December 28, 2020, initiated EPA's review of the revised WQS pursuant to Section 303(c) of the Clean Water Act (CWA) and the implementing federal WQS regulation (40 C.F.R. Part 131). The submission included: (1) the revised WQS adopted by the Board of Environmental Review on December 11, 2020 now codified at ARM 17.30.632 and 17.30.602(32); (2) rulemaking documents including a Technical Support Document, public notices, public comments, and response to comments; (3) transcript of the public hearing on November 5, 2020; and (4) Special Assistant Attorney General's certification that the WQS were duly adopted pursuant to state law. Although the new and revised rules took effect under state law on December 25, 2020, the EPA's approval under CWA Section 303(c) is required before the WQS are effective for CWA purposes.

**Clean Water Act Review Requirements**

CWA section 303(c)(2), requires states and authorized Indian tribes<sup>1</sup> to submit new or revised WQS to EPA for review. EPA is required to review and approve, or disapprove, the submitted standards. Pursuant to CWA § 303(c)(3), if EPA determines that any standard is not consistent with the applicable requirements of the Act, the Agency shall, no later than the ninetieth day after the date of submission, notify the state or authorized tribe and specify the changes to meet the requirements. If such changes are not adopted by the state or authorized tribe within ninety days after the date of notification, EPA is to promptly propose and then promulgate such standard pursuant to CWA section 303(c)(4). The Region's

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<sup>1</sup> CWA section 518(e) specifically authorizes EPA to treat eligible Indian tribes in the same manner as states for purposes of CWA section 303. See also 40 C.F.R. § 131.8.



goal has been, and will continue to be, to work closely with states and authorized tribes throughout the water quality standards development process to ensure that statutory and regulatory requirements are clear. Pursuant to 40 C.F.R. § 131.21(c), new or revised state standards submitted to EPA after May 30, 2000, are not effective for CWA purposes until approved by EPA.

### Today's Action

Montana adopted revised selenium criteria for the protection of the Class B-1 designated uses<sup>2</sup> for the portions of Lake Koocanusa and the Kootenai River (summarized in Table 1) in Montana. 40 C.F.R. § 131.11 describes the regulatory requirements for water quality criteria. Today's action addresses submitted changes to ARM 17.30.602(32) and 17.30.632 that include new or revised WQS requiring EPA's review and action under CWA section 303(c). EPA is approving ARM 17.30.602(32) and 17.30.632, except for portions of ARM 17.30.632(4) and 17.30.632(6) that EPA has determined are not new or revised WQS requiring EPA action pursuant to CWA section 303(c). The rationale for EPA's decisions is in the enclosure.

### Selenium criteria adopted by Montana for Lake Koocanusa and the Kootenai River

Media Type	Fish Tissue		Water Column
Criterion Element	Egg/Ovary	Whole Body or Muscle	Monthly Average Exposure
Magnitude	15.1 mg/kg dw	Whole Body 8.5 mg/kg dw Muscle 11.3 mg/kg dw	Lake Koocanusa 0.8 µg/L Kootenai River 3.1 µg/L
Duration	Instantaneous measurement	Instantaneous measurement	30 days
Frequency	Not to be exceeded	Not to be exceeded	Shall not be exceeded more than once in three years, on average

### Endangered Species Act Requirements

EPA's approval of Montana's revised selenium criteria submitted on December 28, 2020 is in compliance with the Endangered Species Act (ESA), 16 U.S.C. § 1536 *et seq.* Under Section 7(a)(2) of the ESA, EPA must ensure that its approval of these modifications to Montana's WQS is not likely to jeopardize the continued existence of threatened and endangered species or result in the destruction or adverse modification of designated critical habitat of such species. EPA initiated consultation with the US Fish and Wildlife Service (USFWS) regarding the potential effects of this action on April 28, 2020 via an email sent to Jacob Martin, Assistant Field Supervisor, Montana Ecological Services Field Office. EPA kept the USFWS apprised of the state's development of the criteria throughout 2020. EPA sent a final Biological Evaluation to the USFWS on February 18, 2021. EPA received a letter from the USFWS on February 25, 2021 concurring with EPA's determination that approval of Montana's revised water quality standards for selenium "may affect, but is not likely to adversely affect" either the bull trout and its designated critical habitat or the white sturgeon within the action area.

<sup>2</sup> Class B-1 includes the following designated uses: drinking, culinary, and food processing purposes after conventional treatment; bathing, swimming, and recreation; growth and propagation of salmonid fishes and associated aquatic life, waterfowl and furbearers; and agricultural and industrial water supply. See ARM 17.30.609 and ARM 17.30.623.

## **Indian Country**

EPA's approval of Montana's submitted WQS does not extend to Indian country as defined in 18 U.S.C. §1151. Indian country generally includes (1) lands within the exterior boundaries of the following Indian reservations located within Montana: the Blackfeet Indian Reservation, the Crow Indian Reservation, the Flathead Reservation, the Fort Belknap Reservation, the Fort Peck Indian Reservation, the Northern Cheyenne Indian Reservation, and the Rocky Boy's Reservation; (2) any land held in trust by the United States for an Indian tribe; and (3) any other areas that are "Indian country" within the meaning of 18 U.S.C. §1151. Today's action is not intended as an action to approve or disapprove WQS for waters within Indian country. EPA, or eligible Indian tribes, as appropriate, retain responsibilities under CWA section 303 in Indian country.

## **Conclusion**

EPA commends Montana for collaborating with multiple stakeholders for over five years to develop a site-specific selenium water column element for Lake Koocanusa consistent with the approaches recommended by EPA for developing site-specific selenium criteria. The adoption of fish tissue criterion elements for Lake Koocanusa as well as fish tissue elements and a water column criterion element for the Kootenai River that are the same as the current EPA recommended selenium criterion elements are also important improvements. We thank Montana for your work to protect and improve these waters and look forward to continued partnership in this watershed. If you have any questions, please contact Tonya Fish on my staff at [fish.tonya@epa.gov](mailto:fish.tonya@epa.gov).

Sincerely,

JUDY  
BLOOM

Digitally signed  
by JUDY BLOOM  
Date: 2021.02.25  
15:31:06 -07'00'

Judy Bloom  
Manager, Clean Water Branch

Enclosure

## **Rationale for the EPA's Approval of Revised Selenium Criteria for Lake Koocanusa and the Kootenai River (ARM 17.30.632 and ARM 17.30.602(32))**

Water quality standards (WQS) include: (1) designated uses; (2) water quality criteria that support the designated uses; (3) antidegradation requirements; and optional general policies. 40 C.F.R. Part 131. At issue in this action are water quality criteria for selenium adopted by Montana for the protection of the Class B-1 designated uses<sup>3</sup> in Lake Koocanusa and the Kootenai River (ARM 17.30.632 and ARM 17.30.602(32)).<sup>4</sup>

### **1. Clean Water Act and 40 C.F.R. Part 131 Requirements Relevant to Water Quality Criteria**

Clean Water Act (CWA) section 101(a)(2) establishes as a national goal the achievement of water quality that provides for the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water. CWA section 304(a)(1) requires EPA to develop and publish and, from time to time, revise national recommended criteria for protection of water quality and human health that accurately reflect the latest scientific knowledge. Water quality criteria developed under CWA section 304(a) are based solely on data and scientific judgments on the relationship between pollutant concentrations and environmental and human health effects. CWA section 304(a) criteria do not reflect consideration of economic impacts or the technological feasibility of meeting pollutant concentrations in ambient water.

EPA uses Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses (1985) (commonly referred to as the “1985 Guidelines” or “Aquatic Life Guidelines” and hereafter referred to in this document as “Aquatic Life Guidelines”) to derive 304(a) criteria recommendations to protect aquatic life from the effects of toxic pollutants. These Aquatic Life Guidelines describe an objective way to estimate the highest concentration of a substance in water that will not present a significant risk to the aquatic organisms in the water. This EPA method relies primarily on acute and chronic laboratory toxicity data for aquatic organisms from eight taxonomic groups reflecting the distribution of aquatic organisms’ taxa that are intended to be protected by water quality criteria.

EPA’s WQS regulation at 40 C.F.R. Part 131 interprets and implements CWA sections 101(a)(2) and 303(c). 40 C.F.R. § 131.11(a)(1) requires that water quality criteria adopted by states and authorized tribes<sup>5</sup> “be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use.” For waters with multiple use designations, the criteria must support the most sensitive use. Designated uses are those uses specified in WQS for each water body or segment whether or not they are being attained (40 C.F.R. § 131.3(f)). In other words, designated uses establish the environmental objectives for each water body (*e.g.*, aquatic life, recreation, drinking water, agriculture,

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<sup>3</sup> Class B-1 includes the following designated uses: drinking, culinary, and food processing purposes after conventional treatment; bathing, swimming, and recreation; growth and propagation of salmonid fishes and associated aquatic life, waterfowl and furbearers; and agricultural and industrial water supply. See ARM 17.30.609 and ARM 17.30.623.

<sup>4</sup> See [www.mtrules.org/gateway/Subchapterhome.asp?scn=17%2E30.6](http://www.mtrules.org/gateway/Subchapterhome.asp?scn=17%2E30.6).

<sup>5</sup> CWA section 518(e) specifically authorizes the EPA to treat eligible Indian tribes in the same manner as states for purposes of CWA section 303. See also 40 C.F.R. § 131.8.

etc.). Numeric criteria may be based on EPA's CWA section 304(a) guidance, CWA section 304(a) guidance modified to reflect site-specific conditions, or other scientifically defensible methods (40 C.F.R. § 131.11(b)). CWA section 510 and EPA's CWA implementing regulations allow states to adopt water quality standards that are more stringent than may be strictly necessary under federal law.<sup>6</sup>

## 2. Background

Montana's revised selenium criteria are applicable to the surface waters of Lake Koocanusa and the Kootenai River within Lincoln County, Montana. The Kootenay River (note different spelling in British Columbia) originates in southeast British Columbia and flows south into Montana near the town of Eureka. The river is impounded by Libby Dam, creating Lake Koocanusa. Downstream of Libby Dam, the Kootenai River flows west into Idaho and then north into British Columbia, forming Kootenay Lake (see Figure 1).

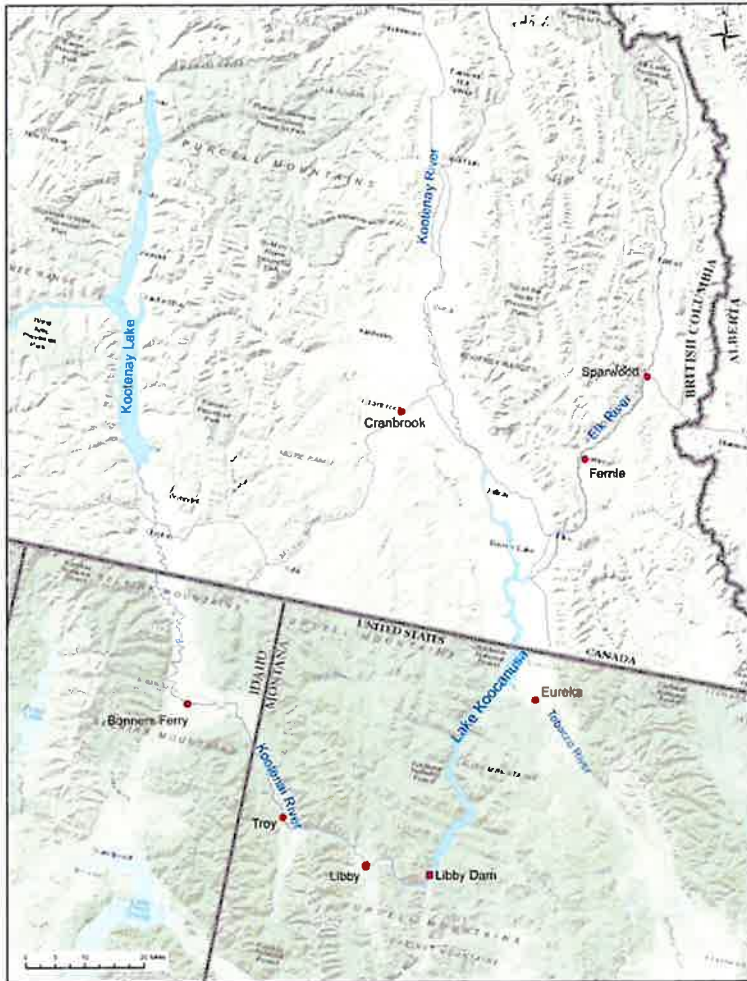
Selenium is an essential micronutrient and low levels of selenium in the diet are required for normal cellular function in almost all animals. However, selenium at amounts not much above the required nutritional levels can have toxic effects on aquatic life and aquatic-dependent wildlife, making it one of the most toxic of the biologically essential elements. Egg-laying vertebrates have a lower tolerance for selenium than do mammals, and the transition from levels of selenium that are biologically essential to those that are toxic for these species occurs across a relatively narrow range of exposure concentrations. Elevated selenium levels above what is nutritionally required in fish and other wildlife inhibit normal growth and reduce reproductive success through effects that lower embryo survival, most notably teratogenesis (i.e., embryo/larval deformities). The deformities associated with exposure to elevated selenium in fish may include skeletal, craniofacial, and fin deformities, and various forms of edema that result in mortality. Elevated selenium exposure in birds can reduce reproductive success including decreased fertility, reduced egg hatchability (embryo mortality), and increased incidence of deformities in embryos.

Scientific studies indicate that selenium toxicity to aquatic life and aquatic-dependent wildlife is driven by diet (i.e., the consumption of selenium contaminated prey) rather than by direct exposure to dissolved selenium in the water column. Unlike other bioaccumulative contaminants such as mercury, the single largest step in selenium accumulation in aquatic environments occurs at the base of the food web where algae and other microorganisms accumulate selenium from water. The vulnerability of a species to selenium toxicity is determined by a number of factors in addition to the amount of contaminated prey consumed. A species' sensitivity to selenium, its population status, and the duration, timing and life stage of exposure are all factors to consider. In addition, the hydrologic conditions and water chemistry of a water body affect bioaccumulation; in general, slow-moving, calm waters or lentic waters enhance

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<sup>6</sup> See 40 C.F.R. 131.4(a) ("As recognized by section 510 of the Clean Water Act, States may develop water quality standards more stringent than required by this regulation."); see also *City of Albuquerque v. Browner*, 97 F.3d 415, 423 (10th Cir. 1996) (noting "states' inherent right to impose standards or limits that are more stringent than those imposed by the federal government").

the production of bioavailable forms of selenium (selenite), while faster-moving waters or lotic waters limit selenium uptake given the rapid movement and predominant form of selenium (selenate).<sup>7</sup>



**Figure. 1 Map of Lake Kootenai and the Kootenai River**

### **3. EPA Recommended Selenium Criterion**

EPA's national recommended water quality criterion for selenium (EPA 2016),<sup>8</sup> developed by EPA in accordance with CWA section 304(a), provides recommendations to states and authorized tribes to establish WQS pursuant to the CWA. EPA 2016 recommends states/authorized tribes adopt one selenium criterion composed of four criterion elements: two fish tissue criterion elements (egg/ovary and whole body and/or muscle) and two water column criterion elements (30-day average and intermittent exposure). The water column criterion elements are further refined into values for lentic

<sup>7</sup> Excerpt from 83 Fed. Reg. 64063 (December 13, 2018).

<sup>8</sup> See [www.epa.gov/wqc/aquatic-life-criterion-selenium](http://www.epa.gov/wqc/aquatic-life-criterion-selenium).

waters (e.g., lakes/reservoirs) and lotic waters (e.g., streams/rivers) because selenium bioaccumulates differently in these two water body types. Adopting all four criterion elements ensures protection when fish tissue data are unavailable (See Table 1 below).

**Table 1. Summary of EPA's Freshwater Selenium Ambient Chronic Water Quality Criterion for Protection of Aquatic Life.**

Media Type	Fish Tissue <sup>1</sup>		Water Column <sup>4</sup>	
Criterion Element	Egg/Ovary <sup>2</sup>	Fish Whole Body or Muscle <sup>3</sup>	Monthly Average Exposure	Intermittent Exposure <sup>5</sup>
<b>Magnitude</b>	15.1 mg/kg dw	8.5 mg/kg dw whole body or 11.3 mg/kg dw muscle (skinless, boneless filet)	1.5 µg/L in lentic aquatic systems  3.1 µg/L in lotic aquatic systems	$WQC_{int} = \frac{WQC_{30-day} - C_{bkgrnd}(1 - f_{int})}{f_{int}}$
<b>Duration</b>	Instantaneous measurement <sup>6</sup>	Instantaneous measurement <sup>6</sup>	30 days	Number of days/month with an elevated concentration
<b>Frequency</b>	Not to be exceeded	Not to be exceeded	Not more than once in three years on average	Not more than once in three years on average
<p>1. Fish tissue elements are expressed as steady-state.</p> <p>2. Egg/Ovary supersedes any whole body, muscle, or water column element when fish egg/ovary concentrations are measured.</p> <p>3. Fish whole body or muscle tissue supersedes water column element when both fish tissue and water concentrations are measured.</p> <p>4. Water column values are based on dissolved total selenium in water and are derived from fish tissue values via bioaccumulation. Water column values are the applicable criterion element in the absence of steady-state fish tissue measurements.</p> <p>5. Where WQC30-day is the water column monthly element, for either a lentic or lotic waters; <math>C_{bkgrnd}</math> is the average background selenium concentration, and <math>f_{int}</math> is the fraction of any 30-day period during which elevated selenium concentrations occur, with <math>f_{int}</math> assigned a value <math>\geq 0.033</math> (corresponding to 1 day)</p> <p>6. Fish tissue data provide instantaneous point measurements that reflect integrative accumulation of selenium over time and space in fish population(s) at a given site.</p>				

EPA recognizes selenium bioaccumulation potential depends on the structure of the food web, hydrology, and several biogeochemical factors that characterize a particular aquatic system. Therefore, site-specific water column criterion element values may be necessary at aquatic sites with high selenium bioaccumulation to ensure adequate protection of aquatic life. In its CWA section 304(a) criterion, EPA

provided two methods<sup>9</sup> for translating the recommended fish tissue criterion elements into site-specific water column criterion elements:

- Mechanistic model – uses scientific knowledge of aquatic system food webs to establish a relationship between the concentration of selenium in the water column and the concentration of selenium in fish tissue. EPA worked with the United States Geological Survey (USGS) to derive a translation equation utilizing a mechanistic model of bioaccumulation previously published in peer-reviewed scientific literature to derive recommended water column criterion elements.
- Empirical Bioaccumulation Factor (BAF) model – uses direct measurement of selenium concentrations in both the water column and fish tissue to calculate the ratio of the two concentrations. The ratio (BAF) can then be used to estimate the target concentration of selenium in the water column as related to the target fish tissue criterion element.

#### 4. Montana's Revised Selenium Criteria for Lake Koocanusa and the Kootenai River

Montana adopted revised selenium criteria to protect Class B-1 designated uses in Lake Koocanusa and the Kootenai River that are consistent with the recommendations in EPA 2016 for fish tissue and water column criterion elements (summarized in Table 2). For the Kootenai River, Montana adopted the EPA 2016 recommended water column criterion element for lotic waters. For Lake Koocanusa, Montana used the EPA 2016 recommended mechanistic model method for translating the recommended fish tissue criterion elements into a site-specific water column criterion element. The selenium criteria in Department Circular DEQ-7 of 5 µg/L (chronic) and 20 µg/L (acute) continue to apply for CWA purposes for the rest of Montana.<sup>10</sup>

**Table 2. Selenium criteria adopted by Montana for Lake Koocanusa and the Kootenai River**

Media Type	Fish Tissue		Water Column
<b>Criterion Element</b>	Egg/Ovary	Whole Body or Muscle	Monthly Average Exposure
<b>Magnitude</b>	15.1 mg/kg dw	Whole Body 8.5 mg/kg dw Muscle 11.3 mg/kg dw	Lake Koocanusa 0.8 µg/L Kootenai River 3.1 µg/L
<b>Duration</b>	Instantaneous measurement	Instantaneous measurement	30 days
<b>Frequency</b>	Not to be exceeded	Not to be exceeded	Shall not be exceeded more than once in three years, on average

The egg/ovary criterion element supersedes the whole body or muscle criterion element. The fish tissue criterion elements supersede the water column elements only when the water bodies are in steady state (see section 5.2).

<sup>9</sup> Appendix K provides recommendations and examples for developing site-specific selenium criteria at [www.epa.gov/sites/production/files/2016-07/documents/aquatic\\_life\\_awqc\\_for\\_selenium\\_-\\_freshwater\\_2016.pdf](http://www.epa.gov/sites/production/files/2016-07/documents/aquatic_life_awqc_for_selenium_-_freshwater_2016.pdf).

<sup>10</sup> See [deq.mt.gov/Portals/112/Water/WQPB/Standards/PDF/DEQ7/DEQ-7.pdf](http://deq.mt.gov/Portals/112/Water/WQPB/Standards/PDF/DEQ7/DEQ-7.pdf).

## 5. EPA Analysis and Rationale for Approval

### 5.1 Selenium Criteria

40 C.F.R. § 131.11(a)(1) requires that water quality criteria adopted by states and authorized tribes “be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use.”<sup>11</sup> For waters with multiple use designations, the criteria must support the most sensitive use. For the reasons discussed below, EPA has concluded that Montana’s revised selenium criteria are both supported by a sound scientific rationale and based on EPA’s 304(a) national recommended criteria as permitted by 40 C.F.R. 131.11(b)(1).

#### 5.1.1 Protection of Designated Uses

Both Lake Koocanusa and the Kootenai River are designated Class B-1, which includes the following designated uses: drinking, culinary, and food processing purposes after conventional treatment; bathing, swimming, and recreation; growth and propagation of salmonid fishes and associated aquatic life, waterfowl and furbearers; and agricultural and industrial water supply.<sup>12</sup> Montana determined in *Derivation of a Site-Specific Water Column Selenium Standard for Lake Koocanusa* (MT TSD)<sup>13</sup> that the most sensitive designated use for selenium is growth and propagation of salmonid fishes and associated aquatic life (see MT TSD sections 1.31, 2.3.5 and 3.6).

EPA’s CWA section 304(a) recommended selenium criteria for the protection of human health are 170 µg/L (consumption of water + organism) and 4200 µg/L (consumption of organism only),<sup>14</sup> and are much less stringent than the CWA section 304(a) recommended water column criterion element for the protection of aquatic life in EPA 2016 of 1.5 µg/L (lentic) and 3.1 µg/L (lotic) (See Table 1). Montana adopted the Maximum Contaminant Level established by EPA under the Safe Drinking Water Act of 50 µg/L for the protection of human health<sup>15</sup> (see Department Circular DEQ-7), which is less stringent than the EPA 2016 water column criterion element. Therefore, selenium criteria adopted by states/authorized tribes that protect aquatic life are expected to also protect humans.

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<sup>11</sup> For the reasons explained herein, EPA has concluded that the state’s water quality standard submission is supported by a sound scientific rationale. EPA notes that its charge under federal law is to review state water quality criteria submissions only to ensure that sound science shows they are protective of the designated use, not to determine whether the precise value selected by the state is the most scientifically rigorous number possible. EPA’s regulations at 40 C.F.R. 131.4(a) expressly preserve states’ right to “develop water quality standards more stringent than required.” Accordingly, once EPA has determined that sound scientific rationale shows that a state submission is protective of the designated use, its role under the cooperative federalism framework of the CWA is not to second guess the state’s scientific analysis. See *City of Albuquerque v. Browner*, 97 F.3d 415, 426 (10th Cir. 1996) (“If the proposed standards are more stringent than necessary to comply with the Clean Water Act’s requirements, the EPA may approve the standards without reviewing the scientific support for the standards”); *Ctr. for Regulatory Reasonableness v. United States Env’tl. Prot. Agency*, No. CV 16-1435, 2019 WL 1440303, at \*10 (D.D.C. Mar. 31, 2019) (“States are expressly empowered to adopt criteria substantially below any hypothetical ‘impairment threshold’”).

<sup>12</sup> See ARM 17.30.609 and ARM 17.30.623.

<sup>13</sup> See [deq.mt.gov/Portals/112/Water/WQPB/Standards/Koocanusa/TSD\\_Lake%20Koocanusa\\_Sep2020\\_Final.pdf](http://deq.mt.gov/Portals/112/Water/WQPB/Standards/Koocanusa/TSD_Lake%20Koocanusa_Sep2020_Final.pdf).

<sup>14</sup> See [www.epa.gov/wqc/national-recommended-water-quality-criteria-human-health-criteria-table](http://www.epa.gov/wqc/national-recommended-water-quality-criteria-human-health-criteria-table).

<sup>15</sup> See [www.epa.gov/ground-water-and-drinking-water/national-primary-drinking-water-regulations](http://www.epa.gov/ground-water-and-drinking-water/national-primary-drinking-water-regulations).



Analyses conducted for the derivation of EPA 2016 concluded that available data indicates fish are more sensitive to selenium than amphibians, aquatic invertebrates, and plants. The EPA 2016 criterion is based on reproductive effects on fish and this is expected to also protect the less sensitive taxa in the aquatic community.

In addition, EPA completed a review of scientific literature related to the toxicity of selenium to aquatic-dependent wildlife, of which aquatic-dependent birds were determined to be the most sensitive taxa. EPA concluded that since the translated water column values for aquatic-dependent wildlife are equal or extremely close to EPA's 2016 selenium water column criterion elements, the EPA's 2016 selenium water column elements would also protect aquatic-dependent wildlife.<sup>16</sup>

In summary, EPA agrees with DEQ's identification of growth and propagation of salmonid fishes and associated aquatic life as the most sensitive designated use for Lake Koocanusa and the Kootenai River.

### 5.1.2 Sound Scientific Rationale

EPA criteria recommendations consist of three components: (1) magnitude - how much of a pollutant (or pollutant parameter such as toxicity), expressed as a concentration, is allowable; (2) duration - the period of time (averaging period) over which the instream concentration is averaged for comparison with criteria magnitudes (limits the duration of concentrations above the criteria magnitudes); and (3) frequency - how often criteria can be exceeded.<sup>17</sup> EPA 2016 recommends states/authorized tribes adopt one selenium criterion composed of four criterion elements: two fish tissue criterion elements (egg/ovary and whole body and/or muscle) and two water column criterion elements (30-day average and intermittent exposure).

#### 5.1.2.1 Magnitude

##### Fish Tissue Criterion Elements

EPA developed a chronic criterion reflective of the reproductive effects of selenium concentrations on fish species, consistent with consensus recommendations of expert panels and with peer review and public comments on draft criteria. Based on the available dietary exposure data from lab studies and field exposures, the egg/ovary criterion element concentration is 15.1 milligrams selenium per kilogram dry weight (mg Se/kg dw) based primarily on 17 reproductive studies representing 12 fish species (10 fish genera). EPA applied the sensitivity distribution concepts from the *U.S. EPA Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and their Uses*<sup>18</sup> to derive the national selenium criterion. The Lake Koocanusa fish assemblage is represented in the EPA 2016 selenium toxicity database by quantitative reproductive toxicity values for 3 of 10 fish

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<sup>16</sup> See *Aquatic Life and Aquatic-Dependent Wildlife Selenium Water Quality Criterion for Freshwaters of California* (Part 4), at [www.epa.gov/sites/production/files/2019-03/documents/ca\\_statewide\\_se\\_tsd\\_508\\_compliant.pdf](http://www.epa.gov/sites/production/files/2019-03/documents/ca_statewide_se_tsd_508_compliant.pdf).

<sup>17</sup> See *Technical Support Document for Water Quality-based Toxics Control* (Section 2.2.1) at [www3.epa.gov/npdes/pubs/owm0264.pdf](http://www3.epa.gov/npdes/pubs/owm0264.pdf).

<sup>18</sup> See [www.epa.gov/wqc/guidelines-deriving-numerical-national-water-quality-criteria-protection-aquatic-organisms-and](http://www.epa.gov/wqc/guidelines-deriving-numerical-national-water-quality-criteria-protection-aquatic-organisms-and).

genera (13 fish species) that reside in Lake Koocanusa (Dolly Varden (surrogate for bull trout), rainbow trout, and Westslope cutthroat trout), and 1 genera (that resides in the Montana portion of the Kootenai River (white sturgeon). Although white sturgeon, the most sensitive species in the EPA 2016 dataset, do not reside in Lake Koocanusa, per 40 C.F.R. § 131.10(b), the criteria for Lake Koocanusa must provide for the attainment and maintenance of the WQS in the Kootenai River. Also, qualitative species or genus surrogate level tissue values for an additional 5 species (mountain whitefish, kokanee, largescale and longnose sucker, and redbelt shiner), were considered in the derivation process, leaving only 4 of 13 species unrepresented in the toxicity database. One of the important principles for site-specific criteria development established by the Selenium Technical Subcommittee during that process was that all fish species without toxicity data should be considered equally sensitive to the white sturgeon. Therefore, the white sturgeon tissue values would be applicable to the burbot, northern pikeminnow, peamouth chub, and yellow perch. The fish genera present in the Kootenai River are similarly represented by EPA's 2016 dataset, with a majority of the species in the river represented by either quantitative data for the specific species or qualitative data for species or genus level surrogates, and all fish species without toxicity data considered equally sensitive to the white sturgeon.

Selenium concentrations measured either in fish whole body or muscle tissue in non-reproductive studies (typically evaluating juvenile growth and survival), were available for 8 genera. Several studies measured whole body and muscle concentrations in reproductive studies concurrent with measurements in egg or ovary tissues resulting in directly measured chronic values for 2 genera. Whole body and muscle criterion elements were derived using these directly measured tissue concentration data, or by applying conversion factors (*CF*) to egg or ovary concentrations to derive species-specific whole body or muscle tissue concentrations. Then the sensitivity distribution concept was applied to distributions of whole body and muscle tissue concentrations to derive the whole body (8.5 mg Se/kg dw) and muscle (11.3 mg Se/kg dw) criterion elements. EPA determined that the egg/ovary criterion element was most relevant to the toxic manifestations of selenium in fish resulting in a hierarchical application of the tissue criterion where the egg/ovary criterion supersedes the whole body or muscle tissue criterion when fish egg/ovary concentrations are measured at a site.

Montana's revised selenium criteria in ARM 17.30.632 include fish tissue criterion elements that are the same as the recommended magnitudes in EPA 2016 for both Lake Koocanusa and the Kootenai River: egg/ovary 15.1 mg/kg dw, muscle 11.3 mg/kg dw, and whole body 8.5 mg/kg dw. EPA 2016 provides the basis for EPA's approval of these criterion elements.

#### Water Column Criterion Element for the Kootenai River

The water column criterion element (30-day average) that Montana adopted for the Kootenai River is the same as the recommended water column value in EPA 2016: 3.1 µg/L total dissolved selenium for lotic waters. EPA 2016 provides the basis for EPA's approval of this criterion element

#### Water Column Criterion Element for Lake Koocanusa

The site-specific water column criterion element for Lake Koocanusa was developed through a five year collaboration between DEQ and British Columbia Ministry of Environment and Climate Change Strategy (BC-ENV). The Lake Koocanusa Monitoring and Research Working Group and a Selenium

Technical Subcommittee were established to coordinate this work. Presser and Naftz (2020)<sup>19</sup> and the companion data release<sup>20</sup> that includes a comprehensive set of site-specific data compiled from public databases (Federal, State, and Provincial) and reports by Teck Coal Ltd., provided the foundational selenium modeling for both DEQ and BC-ENV to use to develop a protective water column criterion element for Lake Koocanusa that both Montana and British Columbia could then adopt through their respective regulatory processes.

For Montana, the culmination of this work was the adoption of the water column criterion element (30-day average) for Lake Koocanusa (0.8 µg/L total dissolved selenium). As described in more detail below, this criterion element was derived consistent with the mechanistic model method in EPA 2016 for translating the recommended fish tissue criterion elements into site-specific water column criterion elements.

The mechanistic model approach uses scientific knowledge of the bioaccumulation dynamics and aquatic food webs of a site to establish a relationship between the concentration of selenium in the water column and the concentration of selenium in fish tissue. Selenium dissolved in surface water enters aquatic food webs by assimilating into trophic level 1 primary producer organisms (e.g., algae) or adsorption to other biotic (e.g., detritus) and abiotic (e.g., sediment) particulate material. Organic particulate material is consumed by trophic level 2 organisms (usually aquatic invertebrates, but also some fish species that are herbivores/detritivores) resulting in the accumulation of selenium in the tissues of those organisms. Trophic level 2 organisms are then consumed by trophic level 3 organisms (typically fishes) resulting in accumulation of selenium in the tissues of those fish (and so on up the food web). The transfer of selenium up the food web can be characterized by a number of parameters and modeled with an equation. An enrichment factor (*EF*) characterizes the assimilation of dissolved selenium into the base of the food web by quantifying the partitioning of selenium between the dissolved and particulate state. Bioaccumulation of selenium from one trophic level to the next is quantified by a trophic transfer factor (*TTF*). A conversion factor (*CF*), which establishes the ratio of selenium concentrations between different fish tissues, may also be used if the fish tissue being modeled is muscle or egg/ovary rather than whole body. These parameters are used in the mechanistic model with a target protective fish tissue selenium concentration (e.g., egg/ovary 15.1 mg/kg dw, muscle 11.3 mg/kg dw, or whole body 8.5 mg/kg dw), to derive a selenium water column criterion element that will ensure the protective fish tissue criterion element is met and will therefore be protective of the site-specific ecosystem.

EPA 2016 describes six steps for deriving a site-specific water column criterion element from the selenium egg/ovary criterion element using EPA's mechanistic model approach. Following is a summary of how the work of Presser and Naftz (2020) and additional work by Montana is consistent with the six steps.

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<sup>19</sup> Presser, T.S., and Naftz, D.L., 2020, Understanding and documenting the scientific basis of selenium ecological protection in support of site-specific guidelines development for Lake Koocanusa, Montana, U.S.A., and British Columbia, Canada: U.S. Geological Survey Open-File Report 2020–1098, 40 p., doi.org/ 10.3133/ ofr20201098.

<sup>20</sup> See Presser, T.S., and Naftz, D.L., 2020, Selenium concentrations in food webs of Lake Koocanusa in the vicinity of Libby Dam (Montana) and the Elk River (British Columbia) as the basis for applying ecosystem-scale modeling, 2008–2018: U.S. Geological Survey data release, doi.org/10.5066/P9VXYSNZ.

1) Identify the appropriate target fish species.

The overall goal of Presser and Naftz (2020) was to provide an ecosystem-scale model that illustrates the site-specific range of potential selenium exposure and bioaccumulation that can inform the basis for regulatory decision-making by Montana and British Columbia. Therefore, they did not select one target fish species and instead provided generalized food webs based on fish species present that could be further refined by the respective governments. Presser and Naftz (2020) used available Lake Koocanusa data including fish species abundance and fish catches to identify fish species present. Based on recommendations from the Selenium Technical Subcommittee, twelve species of fish were considered as potential target species for the modeling: bull trout, burbot, kokanee, longnose sucker, largescale sucker, mountain whitefish, northern pikeminnow, peamouth chub, rainbow trout (wild strain), reidside shiner, Westslope cutthroat trout, and yellow perch. Species-specific dietary data summarized as percentage of taxa-specific invertebrate biomass, recent selenium concentrations for invertebrate taxa in 2018, and a study of the contents of the stomachs of fish species caught in 2017 were used to assign each fish species to a generalized food-web category to reduce the number of modeling scenarios. Two generalized food-web categories were identified and modeled: an invertebrate to fish model (IFM) and a trophic fish model (TFM). The IFM is based on fish consuming only invertebrates (i.e., zooplankton and/or insects) and protects a community of rainbow trout, Westslope cutthroat trout, reidside shiner, longnose sucker, peamouth chub, largescale sucker, mountain whitefish, and kokanee. The TFM is based on forage fish (trophic level 3 (TL3)) consuming invertebrates and predator fish (trophic level 4 (TL4)) consuming forage fish and protects a community of bull trout, burbot, and northern pikeminnow.

In general, EPA recommends selecting fish species in the aquatic system with the greatest selenium sensitivity and bioaccumulation potential. Presser and Naftz (2020) provided a qualitative vulnerability ranking for Lake Koocanusa fish species. The most vulnerable species include the reidside shiner, peamouth chub, and northern pikeminnow based on sensitivity and burbot based on its demersal feeding and winter spawning period. Given this, Montana followed the recommendation of the Selenium Technical Subcommittee to use the more conservative TFM model food web for protection of potentially sensitive piscivorous species and species of cultural importance (see MT TSD section 5.1.3).

2) Model the food web of the targeted fish species.

Presser and Naftz (2020) used available Lake Koocanusa data including dietary metrics for fish and invertebrate taxa in fish stomachs to develop two primary food web models: IFM and TFM. Montana selected the TFM for modeling the water column value. Montana then selected the version of this model that resulted in the greatest bioaccumulation potential. This was the model that represents TL4 fish consuming 100% TL3 fish which consume 100% aquatic insects (chironomids).

- 3) Identify appropriate trophic transfer factor (*TTF*) values by either:
- selecting the appropriate *TTF* values from a list of EPA 2016-derived values, or
  - deriving *TTF* values from other existing data, or
  - deriving *TTF* values by conducting additional studies, or
  - extrapolating *TTF* values from existing values.

Following option b and Presser and Naftz (2020), Montana used previously published laboratory-derived *TTFs* from Presser and Luoma (2010)<sup>21</sup>: 2.8 (aquatic insects), 1.5 (zooplankton), and 1.1 (fish). The mean “all insect” *TTF* (2.8) that Presser and Naftz (2020) used to model Lake Koocanusa is composed of: mayfly, caddisfly, crane fly, stonefly, damselfly, corixid (waterboatman), and chironomid (midge). The zooplankton *TTF* reflects a zooplankton composite and the fish *TTF* is the mean of all fish species included in Presser and Luoma (2010). These *TTFs* are not identical to those that EPA used in EPA 2016 but are close in magnitude to those in EPA 2016 and scientifically defensible. Montana did not use site-specific *TTFs* due to data limitations identified in Presser and Naftz (2020).

- 4) Determine the appropriate value of *EF* (enrichment factor) by either:
- deriving a site-specific *EF* value from current field measurements, or
  - deriving an appropriate *EF* value from older existing data, or
  - extrapolating from *EF* values of similar waters.

Montana derived site-specific *EF* values from field measurements (option a above). Presser and Naftz (2020) and Montana used the term *K<sub>d</sub>* instead of *EF* to describe the relationship between selenium concentrations in particulate and dissolved phases. EPA 2016 indicates that the *K<sub>d</sub>* (or *EF*) is the most influential model parameter and therefore the most critical element for which to use site-specific data. Available data included a robust dataset of 87 matched samples for particulate and dissolved selenium collected over multiple years (2015-2019), seasons, and water depths. Rather than selecting a single representative value from the *K<sub>d</sub>* dataset to use in the model, Presser and Naftz (2020) present each *K<sub>d</sub>* calculation as an independent scenario (n=87), resulting in 87 predicted dissolved selenium concentrations for each model scenario. Montana used this distribution of *K<sub>d</sub>*'s and resulting dissolved selenium concentrations to derive their water column criterion element.

- 5) Determine the appropriate *CF* (conversion factor) value by either:
- selecting the appropriate *CF* value from a list of EPA 2016-derived values, or
  - deriving a *CF* value from other existing data, or
  - deriving a *CF* value by conducting additional studies, or
  - extrapolating a *CF* value from existing values.

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<sup>21</sup> Presser, T.S., and Luoma, S.N., 2010, A methodology for ecosystem-scale modeling of selenium: Integrated Environmental Assessment and Management, v. 6, no. 4, p. 685–710, doi.org/ 10.1002/ ieam.101.

A conversion factor (*CF*) quantifies the relationship between the concentration of selenium in the eggs and/or ovaries and the concentration of selenium in the whole body or muscle tissues of fish. Montana used EPA's whole body tissue guideline (8.5 mg/kg dw) in their modeling, therefore no *CF* was needed.

6) Translate the applicable fish tissue element into a site-specific water concentration value.

To derive a site-specific water column criterion element for Lake Koocanusa that is protective of the chosen fish tissue criterion elements, Montana used the mechanistic model to translate the whole body fish tissue criterion element into a water column criterion element using the following equation:

$$C_{\text{water column criterion element}} = \frac{C_{\text{whole body criterion element}}}{TTF_{\text{composite}} \times (K_d / 1000) \times \text{SPM \% bioavailability}}$$

$C_{\text{water column criterion element}}$	=	translated site-specific water column criterion element (µg/L),
$C_{\text{whole body criterion element}}$	=	whole body fish tissue criterion element (µg/g),
$TTF_{\text{composite}}$	=	product of the trophic transfer factor (TTF) values in each trophic level of the food web of the target fish model (no units of measurement),
$K_d$	=	environmental partitioning factor (L/g),
$\text{SPM \% bioavailability}$	=	percent bioavailability of suspended particulate matter

Montana used the following values to populate the equation:

$C_{\text{whole body criterion element}}$	=	8.5 µg/g,
$TTF_{\text{composite}}$	=	$TTF^{TL4\text{Fish}} \times TTF^{TL3\text{Fish}} \times TTF^{\text{aquatic insects}} = 1.1 \times 1.1 \times 2.8 = 3.39$
$K_d$	=	75 <sup>th</sup> percentile of distribution
$\text{SPM \% bioavailability}$	=	60%

The use of these values results in a water column criterion element of 0.8 µg/L. Although this criterion element is more stringent than the recommended water column criterion element for lentic aquatic systems in EPA 2016 (1.5 µg/L), based on the state's technical documentation included in its submission, summarized above, EPA concludes that it is supported by a sound scientific rationale.<sup>22</sup>

As Montana adopted the EPA 2016 recommended fish tissue criterion elements, the whole body criterion element that was used in this translation was the value of 8.5 µg/g dw. The  $TTF_{\text{composite}}$  used in this translation was calculated using the TFM and fish and invertebrate  $TTF$ s from Presser and Luoma 2010. As presented in step 3 above, the use of existing  $TTF$ s is an approach recommend in EPA 2016.

As presented in Presser and Naftz (2020), Montana also included a bioavailability factor for suspended particulate matter in the model, which reflects the bioavailability of selenium from particulate matter to organisms in the ecosystem. In validation runs of the model, Presser and Naftz (2020) showed that a

<sup>22</sup> As noted above, the possibility that this criterion element may be more stringent than necessary to protect the designated use would not provide a valid legal justification under Section 303(c) of the CWA or EPA's implementing regulations for disapproval. See 40 C.F.R. 131.4(a).

60% bioavailability factor better represented the measured invertebrate and zooplankton selenium concentration in Lake Koocanusa than a 100% bioavailability factor.

Lastly, Montana selected the 75<sup>th</sup> percentile of the  $K_d$  distribution for the translation. This is a conservative  $K_d$  value protective of a majority of the scenarios observed in Lake Koocanusa.

#### Intermittent Criterion Element

In addition to the monthly exposure water column criterion element discussed above, EPA 2016 includes a recommended intermittent exposure water column criterion element. Montana did not adopt an intermittent exposure water column criterion element for either Lake Koocanusa or the Kootenai River. The state's rationale in the response to comments is "The intermittent exposure element is unnecessary because MPDES [Montana Pollutant Discharge Elimination System] rules do not differentiate between intermittent and continuous discharges for purposes of developing water quality-based effluent limits. When calculating the reasonable potential for a discharger to cause or contribute to an exceedance of a water quality standard, DEQ methods treat continuous and intermittent dischargers the same."<sup>23</sup> The MPDES program uses the maximum effluent concentration during the period of record to evaluate reasonable potential for a discharge to cause or contribute to an exceedance of a water quality standard.<sup>24</sup> EPA concludes Montana's approach will protect the applicable designated uses without the intermittent exposure water column criterion element. EPA notes that there are currently no public or private entities discharging to the Kootenai River or Lake Koocanusa with MPDES permit effluent limits for selenium.<sup>25</sup>

#### **5.1.2.2. Duration**

EPA's recommended duration for the water criterion elements is 30 days. EPA 2016 provides a detailed analysis for the derivation of a 30-day averaging period. This differs from typical criteria averaging periods based on EPA's 1985 Guidelines, where the basis for the criterion averaging period is a time period less than or equal to the "characteristic time," which describes the toxic speed of action due to direct waterborne toxicity of metals. The derivation of the averaging period for the selenium water column concentration was based on the kinetics of bioaccumulation and depuration rates for different trophic levels. The duration for Montana's water column criterion elements for Lake Koocanusa and the Kootenai River is specified as "30-day average" in ARM 17.30.632(7), which is consistent with EPA 2016.

EPA's recommended duration for the fish tissue criterion elements is instantaneous because fish tissue data provide point measurements that reflect integrative accumulation of selenium over time and space in the fish populations(s) at a given site. The fish reflect bioaccumulation of selenium that has already occurred and reflect the extended exposure to selenium in the water body. The duration for Montana's fish tissue criterion elements for Lake Koocanusa and the Kootenai River is specified as "instantaneous" in ARM 17.30.632(6), which is consistent with EPA 2016.

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<sup>23</sup> Notice of Amendment and Adoption p. 2394, response to comment #186.

<sup>24</sup> September 4, 2020 email from Myla Kelly to Tonya Fish.

<sup>25</sup> Notice of Amendment and Adoption p. 2343, response to comment #26.

### 5.1.2.3 Frequency

The recommended frequency in EPA 2016 of once in three years on average is based on the ability of an aquatic ecosystem to recover when pollutant impacts are associated exclusively with water column exposure.<sup>26</sup> The frequency for Montana's water column criterion elements for Lake Koocanusa and the Kootenai River is specified as "shall not be exceeded more than once in three years, on average" in ARM 17.30.632(7), which is consistent with EPA's recommendations in the 1985 Guidelines for water column criteria and in EPA 2016.

The recommended frequency of exceedance in EPA 2016 for the fish tissue criterion elements of the selenium criterion is "not to exceed." Selenium is a bioaccumulative pollutant; therefore, elevated levels in various ecological compartments (e.g., biota, surficial sediments) require a long period to decrease, and the associated aquatic community requires a long time to recover following reduction or removal of an elevated selenium exposure to a given system. As selenium is bioaccumulative and the pathway for exposure is through the food web, the typical criteria return frequency of once in three years on average is not appropriate for selenium in fish tissue as this could lead to sustained ecological impacts. As fish tissue has a much longer recovery time than water column concentrations, a frequency of "not to exceed" is appropriate for the tissue criterion element. The frequency for Montana's fish tissue criterion elements for Lake Koocanusa and the Kootenai River is specified as "not to exceed" in ARM 17.30.632(6), which is consistent with EPA 2016.

### 5.2 Definition of Steady State and Criteria Element Hierarchy

Montana adopted ARM 17.30.602(32) and added this definition:

"Steady state" means, for the purposes of ARM 17.30.632, conditions whereby there are no activities resulting in new, increasing, or changing selenium loads to the lake or river aquatic ecosystem, and selenium concentrations in fish living in the aquatic ecosystem have stabilized.

EPA 2016 does not include a definition of "steady state," but does recommend fish tissue elements of the selenium criterion supersede water column elements under steady state conditions because the selenium concentrations in fish tissues are a more sensitive and reliable indicator of the negative effects of selenium in aquatic life. EPA 2016 also states that fish tissue concentrations do not fully represent potential effects on fish and the aquatic ecosystem in areas with new selenium inputs:

"New inputs are defined as new activities resulting in selenium being released into a lentic or lotic waterbody. New inputs will likely result in increased selenium in the food web, likely resulting in increased bioaccumulation of selenium in fish over a period of time until the new or increased selenium release achieves a quasi-'steady state' balance within the food web. EPA estimates that concentrations of selenium fish tissue will not

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<sup>26</sup> See *Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses* (1985 Guidelines) at [www.epa.gov/sites/production/files/2016-02/documents/guidelines-water-quality-criteria.pdf](http://www.epa.gov/sites/production/files/2016-02/documents/guidelines-water-quality-criteria.pdf).



represent a 'steady state' for several months in lotic systems, and longer time periods (e.g., two to three years) in lentic systems, depending upon the hydrodynamics of a given system such as the location of the selenium input related to the shape and internal circulation of the waterbody, particularly in reservoirs with multiple riverine inputs, hydraulic residence time, and the particular food web. Estimates of steady state under new or increased selenium input situations are expected to be site dependent, so local information should be used to better refine these estimates for a particular waterbody. Thus, EPA recommends that fish tissue concentration not override water column concentration in these situations until these periods of time have passed in lotic and lentic systems, respectively, or steady state conditions can be estimated." (EPA 2016 pp. 101-102).

Consistent with this, EPA 2016's Table 1 (also Table 1 of this enclosure) footnotes 1 and 4 specify that the fish tissue elements are expressed as steady-state and water column values are the applicable criterion element in the absence of steady-state condition fish tissue data.

The language above from EPA 2016 was intended to address the scenario where fish tissue data are not exceeding those criterion elements, but the water column data are exceeding that element. However, another scenario DEQ raised in discussions with EPA is how to address the situation where fish tissue data are exceeding those criterion elements, but the water column data are not. EPA advised that in that scenario, EPA would still consider the water body impaired.<sup>27</sup> In other words, if a water body is not in steady-state, it is considered impaired if either the fish tissue or water column elements are exceeded. As a result, Montana adopted the following language in ARM 17.30.632(2): "When the aquatic ecosystem is in steady state and selenium data is available for both fish tissue and the water column, the fish tissue standards supersede the water column standard. When the aquatic ecosystem is in non-steady state, both the fish tissue and water column standards apply." ARM 17.30.632(3) specifies that Lake Koocanusa and the Kootenai River are in non-steady state and the Department will reassess the status triennially and amend the rule if necessary.

EPA concludes that the definition of "steady state" in ARM 17.30.602(32), the criteria element hierarchy in ARM 17.30.632(2), and the statement in ARM 17.30.632(3) that Lake Koocanusa and the Kootenai River are not in steady state are consistent with EPA 2016.

### **5.3 Protection of Downstream Waters**

40 C.F.R. § 131.10(b) requires that criteria provide for the attainment and maintenance of the WQS of downstream waters. Montana addressed this in section 6.2 of the MT TSD. The Kootenai River is downstream of Lake Koocanusa. The fish tissue criterion elements are the same for both water bodies: egg/ovary 15.1 mg/kg dw, muscle 11.3 mg/kg dw, and whole body 8.5 mg/kg dw. Lake Koocanusa's water column criterion element of 0.8 µg/L is more stringent than the water column criterion element of

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<sup>27</sup> See September 2, 2020 email from Tonya Fish to Lauren Sullivan.

3.1 µg/L in the Kootenai River. Fish tissue and water column criterion elements are the same for the Kootenai River in Montana and the downstream segment of the Kootenai River in Idaho.<sup>28</sup>

Based on the information above, EPA concludes Montana's revised selenium criteria will provide for the attainment and maintenance of downstream uses.

#### **5.4 EPA's Action**

Based on the information above, EPA approves the revised selenium criteria in ARM 17.30.632 because they are "based on sound scientific rationale and ... contain sufficient parameters or constituents to protect the designated use" as required by 40 C.F.R. § 131.11. The selenium criteria also provide for the attainment and maintenance of the WQS of downstream waters consistent with 40 C.F.R. § 131.10(b). In addition, EPA approves the definition of "steady state" in ARM 17.30.602(32) because it informs application of the revised criteria consistent with 40 C.F.R. § 131.11. As with all WQS, these provisions are subject to state review at least every three years pursuant to 40 C.F.R. § 131.20(a).

Today's action is limited to waters under Montana's jurisdiction and Montana's revised WQS that apply to Lake Koocanusa from the US-Canada international boundary to the Libby Dam as specified in ARM 17.30.632(6) and 7(a). EPA remains committed to continued collaboration with Montana, British Columbia, the Confederated Salish and Kootenai Tribes, Kootenai Tribe of Idaho, First Nations, and other interested parties.

#### **6.0 Provisions That EPA Has Determined Are Not WQS**

EPA has determined the following provisions are not WQS:<sup>29</sup>

- In ARM 17.30.632(4): "Permit conditions and limits developed from the water column standards comply with the fish tissue standards." This language does not describe a desired ambient condition of a waterbody to support a particular designated use. Rather, these statements provide information related to permit conditions.
- ARM 17.30.632(5): "No person may violate the numeric water quality standards in (6) and (7)." This language does not describe a desired ambient condition of a waterbody to support a particular designated use. Rather, these statements provide information related to criteria implementation.
- In ARM 17.30.632(6): "Fish tissue sample results shall be reported as a single value representing an average of individual fish samples or a composite sample, each option requiring a minimum number of five individuals from the same species." This language does not describe a desired ambient condition of a waterbody to support a particular designated use. Rather, these statements provide information related to sampling and monitoring for compliance with the criteria. The state has flexibility in how it interprets discrete fish samples, and it is reasonable to apply the

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<sup>28</sup> See IDAPA 58.01.02.210.01 at [adminrules.idaho.gov/rules/current/58/580102.pdf](http://adminrules.idaho.gov/rules/current/58/580102.pdf).

<sup>29</sup> See *What is a New or Revised Water Quality Standard Under CWA 303(c)(3)? Frequently Asked Questions* at [www.epa.gov/sites/production/files/2014-11/documents/cwa303faq.pdf](http://www.epa.gov/sites/production/files/2014-11/documents/cwa303faq.pdf).

instantaneous fish tissue elements to a composite sample or average of individuals of the same species, as adopted by MT.

## **7.0 Conclusion**

EPA commends Montana for collaborating with multiple stakeholders for over five years to develop a site-specific selenium water column element for Lake Koocanusa consistent with the approaches recommended by EPA for developing site-specific selenium criteria. The adoption of fish tissue criterion elements for Lake Koocanusa as well as fish tissue elements and a water column criterion element for the Kootenai River that are the same as the current EPA recommended selenium criterion elements are also important improvements. The adopted criteria are based on sound science including robust site-specific data for Lake Koocanusa showing that they protect the applicable designated uses of Lake Koocanusa and the Kootenai River.

# EXHIBIT I



A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA REQUESTING AN INTERIM STUDY OF SELENIUM LEVELS IN LAKE KOOCANUSA, INCLUDING A COLLABORATIVE REVIEW OF THE MODELING, ANALYSIS, AND WATER QUALITY STANDARDS ADOPTED IN 2020.

WHEREAS, the Board of Environmental Review promulgated a site-specific selenium standard for Lake Koocanusa on December 11, 2020, and the United States Environmental Protection Agency approved the board's new standard in early 2021; and

WHEREAS, some affected stakeholders question the 2020 site-specific selenium standard for Lake Koocanusa and request a cooperative review of the new administrative rule, ARM 17.30.632, technical support documents, background data, and assumptions used in the previous modeling process, and stakeholder desire to complete the model validation process; and

WHEREAS, these affected stakeholders desire an opportunity to engage in additional, thoughtful, collaborative, and scientifically defensible analysis with state regulators to determine whether the 2020 site-specific standards for Lake Koocanusa are appropriate.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

That the Legislative Council be requested to designate the Environmental Quality Council, subject to section 5-5-217, MCA, and to direct sufficient staff resources, pursuant to section 5-11-112, MCA, to establish a collaborative process with the Department of Environmental Quality to:

(1) analyze the data and processes referenced in and used to support rulemaking to determine if ARM 17.30.632, as it pertains to Lake Koocanusa, complies with the Montana Water Quality Act and the

federal Clean Water Act; and

(2) offer recommendations on what changes, if any, are needed to ARM 17.30.632 or supporting documentation.

BE IT FURTHER RESOLVED, that the Legislative Council requests that the Environmental Quality Council invite two members of the Water Policy Interim Committee, including a member of the Senate and a member of the House of Representatives with one each from the majority party and the minority party, to participate as ex officio members of this study.

BE IT FURTHER RESOLVED, that the study be conducted and recommendations be developed with consultation of interested stakeholders, including:

(1) the Lincoln County Board of Commissioners;

(2) selenium experts and other experts who have experience proposing and reviewing water quality standards; and

(3) other appropriate agencies, including the Governor's Office, the Board of Environmental Review, and the Department of Environmental Quality.

BE IT FURTHER RESOLVED, that all aspects of the study, including presentation and review requirements, be concluded prior to April 1, 2022.

BE IT FURTHER RESOLVED, that the final results of the study, including any findings, conclusions, comments, or recommendations of the appropriate committee, be reported to the 68th Legislature, the Governor's natural resources policy advisor, and the British Columbia Ministry of the Environment.

- END -

I hereby certify that the within bill,  
HJ 37, originated in the House.

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Chief Clerk of the House

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Speaker of the House

Signed this \_\_\_\_\_ day  
of \_\_\_\_\_, 2021.

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President of the Senate

Signed this \_\_\_\_\_ day  
of \_\_\_\_\_, 2021.

HOUSE JOINT RESOLUTION NO. 37

INTRODUCED BY S. GUNDERSON

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA REQUESTING AN INTERIM STUDY OF SELENIUM LEVELS IN LAKE KOOCANUSA, INCLUDING A COLLABORATIVE REVIEW OF THE MODELING, ANALYSIS, AND WATER QUALITY STANDARDS ADOPTED IN 2020.



# **EXHIBIT J**

Montana DEQ - Water Quality Standards Attainment Record

Reporting Cycle: 2020      Assessment Record: MT76D003\_010.pdf      Status: Completed

ASSESSMENT UNIT INFORMATION

Reporting Cycle:	2020	
Assessment Unit:	MT76D003_010	
Waterbody Name:	Lake Koocanusa	
Location Description:	LAKE KOOCANUSA	
Water Type:	FRESHWATER LAKE	Size (Miles/Acres) 28874.5 ACRES
		Use Class: B-1
Hydrologic Unit Code:	17010101	
HUC Name:	Middle Kootenai	
Watershed:	Kootenai	
Basin:	Columbia	
TMDL Planning Area:	Kootenai	
Ecoregion:	Northern Rockies	
County:	Lincoln County	
Lat/Long AU Start (U/S):		
Lat/Long AU End (D/S):		

MONITORING INFORMATION

Date Assessment Started: 10/24/2011  
Assessed By: Drygas, Jonathan

# Montana DEQ - Water Quality Standards Attainment Record

Reporting Cycle: 2020      Assessment Record: MT76D003\_010.pdf      Status: Completed

## CITATIONS

Citation	Location	Biological Data	Habitat Data	Chemistry Data
U.S. Fish and Wildlife Service (1965), Detailed Report on Fish and Wildlife Resources Affected by Libby Dam and Reservoir Project, Kootenai River, Montana	WQPB Ebrary	fish; wildlife		
Huston, Joe E. (1971), Reservoir Investigations: Kootenai River Study: July 1, 1969 - June 30, 1970, F-34-R-4 Job # IV-a	WQPB Ebrary	fish		
Huston, Joe E. ; May, Bruce (1972), Evaluation of Mitigation Measures in Fisher River, Wolf Creek, and Fortine Creek: Status of Water Quality, Erosion, and Fish Populations as Related to Railroad Relocation and Stream Channel Changes	WQPB Ebrary	fish; macroinvertebrates	Land use; riparian &/or instream surveys & physical features	metals; quantitative physical data
Nunnallee, David A. ; Botz, Maxwell K. (1974), Water Quality Inventory and Management Plan: Kootenai River Basin, Montana	WQPB Ebrary	fecal coliforms	riparian &/or instream surveys & physical features	common ions, pH, conductivity, miscellaneous; major nutrients; metals; quantitative physical data
May, Bruce ; Huston, Joe E. (1975), Habitat Development of Young Creek, Tributary to Lake Koocanusa: Final Job Report: 1969-1975, Contract No. DACW 67-73-C-0002	WQPB Ebrary	fish		
May, Bruce (1976), A Preliminary Evaluation on the Effects of Gas Bubble Disease on Fish Populations in the Kootenai River Below Libby Dam	WQPB Ebrary	fish		quantitative physical data
Corvallis Environmental Research Laboratory ; Environmental Monitoring & Support Laboratory (1977), Report on Koocanusa Reservoir, Lincoln County, Montana, and British Columbia, Canada, Working Paper No. 795	WQPB Ebrary	algae; chlorophyll		benthic sediment data; common ions, pH, conductivity, miscellaneous; major nutrients; quantitative physical data

# Montana DEQ - Water Quality Standards Attainment Record

Reporting Cycle: 2020      Assessment Record: MT76D003\_010.pdf      Status: Completed

Citation	Location	Biological Data	Habitat Data	Chemistry Data
May, Bruce ; Huston, Joe E. ; McMullin, Steve L. (1979), Lake Koocanusa Post-impoundment Fisheries Study: 1974 - 1978, Contract # DACW67-75-C-0004	WQPB Ebrary	fish; macroinvertebrates		quantitative physical data
May, Bruce ; Huston, Joe E. (1979), Kootenai River Investigations: Final Job Report, Contract # DACW 67-76-C-0055	WQPB Ebrary	algae; fish		common ions, pH, conductivity, miscellaneous; quantitative physical data
McMullin, Steve L. (1979), Food Habits and Distribution of Rainbow and Cutthroat Trout in Lake Koocanusa, Montana (Master's Thesis)	WQPB Ebrary	fish; macroinvertebrates	riparian &/or instream surveys & physical features	
Graham, Patrick J. (1981), Status of White Sturgeon in the Kootenai River	WQPB Ebrary	fish	riparian &/or instream surveys & physical features	
May, Bruce ; Appert, Sue ; Huston, Joe E. ; Perry, Sue ; Dos Santos, Joseph M. (1981), Kootenai River Fisheries Investigations: 1976 - 1981, Contract # DACW 67-79-C-01112	WQPB Ebrary	algae; fish; macroinvertebrates	riparian &/or instream surveys & physical features	quantitative physical data
Bonde, Thomas J.H. ; Bush, Ronald M. (1982), Limnological Investigations: Lake Koocanusa: Montana: Part 1: Pre-impoundment Study, 1967-1972, Special Report 82-21	WQPB Ebrary	fecal coliforms; fish; macroinvertebrates		benthic sediment data; common ions, pH, conductivity, miscellaneous; metals
May, Bruce ; Huston, Joe E. (1982), Lake Koocanusa Post-impoundment Fishery Study: 1979 - 1982, Contract # DACW 67-79-C-0077	WQPB Ebrary	fish		bioaccumulation
Perry, Sue ; Huston, Joe E. ; Dos Santos, Joseph M. ; May, Bruce ; Schumacher, Robert E. (1983), Kootenai River Fisheries Investigations Final Completion Report: 1972-1982	WQPB Ebrary	algae; chlorophyll; fish; macroinvertebrates	riparian &/or instream surveys & physical features	common ions, pH, conductivity, miscellaneous; quantitative physical data

# Montana DEQ - Water Quality Standards Attainment Record

Reporting Cycle: 2020      Assessment Record: MT76D003\_010.pdf      Status: Completed

Citation	Location	Biological Data	Habitat Data	Chemistry Data
Huston, Joe E. ; Hamlin, Paul ; May, Bruce (1984), Lake Koocanusa Investigations Final Report: 1972 - 1983	WQPB Ebrary	fish	General	General; General
Shepard, Bradley B. (1985), Quantification of Libby Reservoir Water Levels Needed to Maintain or Enhance Reservoir Fisheries: Annual Report FY 1984, BPA 83-467	WQPB Ebrary	algae; fish; macroinvertebrates	riparian &/or instream surveys & physical features	
Bonde, Thomas J.H. (1987), Libby Dam-Lake Koocanusa Project: A Narrative Reviewing Actions Taken to Mitigate the Effects of Dam Construction and Operation on Fish Resources	WQPB Ebrary	fish	riparian &/or instream surveys & physical features	
Fraley, John J. ; May, Bruce ; Clancey, Patrick T. ; Beattie, Will (1987), Fisheries Evaluation Program for the Flathead Lake/River System and Hungry Horse and Libby Reservoirs	WQPB Ebrary	fish; macroinvertebrates		quantitative physical data
Chisholm, Ian ; Hensler, Mike E. ; Hansen, Barry ; Skaar, Don (1989), Quantification of Libby Reservoir Levels Needed to Maintain or Enhance Reservoir Fisheries: Methods and Data Summary, 1983-1987, Project Number 83-467	WQPB Ebrary	algae; fish; macroinvertebrates	riparian &/or instream surveys & physical features	common ions, pH, conductivity, miscellaneous; quantitative physical data
Fraley, John J. ; Marotz, Brian ; Decker-Hess, Janet ; Beattie, Will ; Zubik, Raymond J. (1989), Mitigation, Compensation, and Future Protection for Fish Populations Affected by Hydropower Development in the Upper Columbia System, Montana, USA	WQPB Ebrary	fish	riparian &/or instream surveys & physical features	benthic sediment data; common ions, pH, conductivity, miscellaneous; major nutrients
Hamilton, Hal R. ; Linton, Larry R. ; Chow-Fraser, Pat ; Taylor, Barry ; Fernet, Dave (1990), Koocanusa Reservoir State of the Aquatic Environment, 1972-1988	WQPB Ebrary	algae; chlorophyll; fish; macroinvertebrates	Land use	common ions, pH, conductivity, miscellaneous; major nutrients; metals; quantitative physical data

# Montana DEQ - Water Quality Standards Attainment Record

Reporting Cycle: 2020      Assessment Record: MT76D003\_010.pdf      Status: Completed

Citation	Location	Biological Data	Habitat Data	Chemistry Data
Ferreira, Rodger F. ; Adams, D. Briane ; Davis, Robert E. (1992), Development of Thermal Models for Hungry Horse Reservoir and Lake Koocanusa, Northwestern Montana and British Columbia, Water-Resources Investigations Report 91-4134	WQPB Ebrary			quantitative physical data
Thomas, Ginger (1992), Status Report: Bull Trout in Montana	WQPB Ebrary	fish	riparian &/or instream surveys & physical features	quantitative physical data
Domrose, Robert J. ; Hensler, Mike E. (1993), Statewide Fisheries Investigations: Survey and Inventory of Coldwater Lakes: Northwest Montana Coldwater Lakes Investigations	WQPB Ebrary	fish; macroinvertebrates		
Knudson, Ken (1994), Water Quality Status Report: Kootenai (Kootenai) River Basin British Columbia, Montana, and Idaho	WQPB Ebrary	fish		major nutrients; metals; quantitative physical data
Phillips, Glenn R. ; Bahls, Loren L. (1994), Lake Water Quality Assessment and Contaminant Monitoring of Fishes and Sediments From Montana Waters	WQPB Ebrary	algae; fish	riparian &/or instream surveys & physical features	benthic sediment data; bioaccumulation; major nutrients; metals; quantitative physical data; toxicity tests
Maroltz, Brian ; Althen, Craig ; Lonon, Bill ; Gustafson, Daniel (1996), Model Development to Establish Integrated Operational Rule Curves for Hungry Horse and Libby Reservoirs, Montana: Final Report 1996, Project No. 83-467	WQPB Ebrary	fish; macroinvertebrates		quantitative physical data
Montana Bull Trout Scientific Group (1996), Upper Kootenai River Drainage: Bull Trout Status Report (Including Lake Koocanusa, Upstream of Libby Dam)	WQPB Ebrary	fish	Land use	quantitative physical data
Skaar, Don ; DeShazer, Jay ; Garrow, Larry ; Ostrowski, Tom ; Thornburg, Barry (1996),	WQPB Ebrary	fish; macroinvertebrates	riparian &/or instream surveys & physical	quantitative physical data

# Montana DEQ - Water Quality Standards Attainment Record

Reporting Cycle: 2020      Assessment Record: MT76D003\_010.pdf      Status: Completed

Citation	Location	Biological Data	Habitat Data	Chemistry Data
Quantification of Libby Reservoir Levels Needed to Maintain or Enhance Reservoir Fisheries: Investigations of Fish Entrainment through Libby Dam, 1990-1994, Project No. 83-467			features	
Montana Bull Trout Restoration Team (1998), Restoration Plan for the Bull Trout in the Clark Fork River Basin and Kootenai River Basin, Montana (DRAFT)	WQPB Ebrary	fish	riparian &/or instream surveys & physical features	
U.S. Geological Survey (199n), USGS Water Data for the Nation - NWIS	Assessment Record	algae; chlorophyll; fecal coliforms; fish; other bacteriological data	Land use; riparian &/or instream surveys & physical features	benthic sediment data; bioaccumulation; common ions, pH, conductivity, miscellaneous; major nutrients; metals; organics; quantitative physical data
Pommen, Larry W. (2001), Water Quality Assessment of Elk River at Highway 93 (1968-2000)	WQPB Ebrary			metals
Montana Department of Environmental Quality, Planning, Prevention and Assistance Division, Water Quality Planning Bureau (2006), STORET/Storease Data Archive [Electronic Resource]	DEQ Metcalf Multimedia Case	General; algae; chlorophyll; fecal coliforms; fish; macroinvertebrates; other bacteriological data	General; Land use; riparian &/or instream surveys & physical features	General; Rosgen type; benthic sediment data; common ions, pH, conductivity, miscellaneous; imagery data; major nutrients; metals; organics; quantitative physical data
McDonald, Les (2009), Survey of Selenium in Water, Zooplankton, and Fish in Lake Koocanusa, British Columbia, 2008	WQPB Ebrary			bioaccumulation; metals

# Montana DEQ - Water Quality Standards Attainment Record

Reporting Cycle: 2020      Assessment Record: MT76D003\_010.pdf      Status: Completed

Citation	Location	Biological Data	Habitat Data	Chemistry Data
Dessouki, Tarik C.E. ; Ryan, Andrea (2010), Water Quality Assessment of the Kootenay, Elk, and St. Mary Rivers	WQPB Ebrary			metals
(2011), British Columbia Ministry of Environment data for the Elk River at Highway 93	Assessment Record			metals
Deleray, Mark ; Cavigli, Jon ; Steed, Amber ; Selch, Trevor (2011), Transboundary Flathead Fisheries Baseline Data Collection, Agreement No. h1434080017	WQPB Ebrary	fish		bioaccumulation
Montana Department of Environmental Quality (2011), MT DEQ Selenium Mixing Calculation for Lake Koocanusa	Assessment Record			metals
Montana Legislative Services Division (2011), Montana Code Annotated, MCA 75-5-103	Montana State Library			General
(2011), Teck Coal presentation 8 September 2011, Cranbrook, BC Line creek Operations phase II Project update Presentation to the Working group (water quality and aquatic health working group) slide 21,27	Assessment Record			metals

Comments:



# Montana DEQ - Water Quality Standards Attainment Record

Reporting Cycle: 2020      Assessment Record: MT76D003\_010.pdf      Status: Completed

## DATA MATRIX Biological Data

**Comments:** Biological data additions are limited to species present and counts conducted in 2008 by MT FWP. Bull Trout, a species of concern in Montana, are present in the lake.

### Lake Koocanusa

Data Type	Comments	Ref Num	Citation
algae	(DR8 Citation: National Eutrophication Survey. 1977. Report on Koocanusa Reservoir, Lincoln County, Montana. EPA Region VIII. Working Paper No. 795.) Dominant algal assemblage (1975): Chroomonas, Asterionella, and Pandorina.	2155	Corvallis Environmental Research Laboratory ; Environmental Monitoring & Support Laboratory (1977), Report on Koocanusa Reservoir, Lincoln County, Montana, and British Columbia, Canada, Working Paper No. 795
algae		3618	Shepard, Bradley B. (1985), Quantification of Libby Reservoir Water Levels Needed to Maintain or Enhance Reservoir Fisheries: Annual Report FY 1984, BPA 83-467
algae	Primary Productivity 1986: Productivity ranged from 63.9-588 mg m-2 day-1. The mean yearly rate, based on samples from 4 sites during 8 months of the year (including winter) was 259.94 mg C m-2 day-1. 1972-1980: Productivity ranged from 0.4 to 420 mg C m-2 day-1.	2104	Chisholm, Ian ; Hensler, Mike E. ; Hansen, Barry ; Skaar, Don (1989), Quantification of Libby Reservoir Levels Needed to Maintain or Enhance Reservoir Fisheries: Methods and Data Summary, 1983-1987, Project Number 83-467
algae	Dominant algal assemblage 1972-88: Tabellaria fenestrata was a dominant form in the late 1980's, as was Dinobryon divergens. Centric diatoms (Melosira and Cyclotella) alternated in abundance with pennate diatoms. "The least abundant forms were the green and blue-green algae, neither of which constituted more than 10% of the community biomass in any year". The dominant algal groups suggest an oligotrophic lake.	800	Hamilton, Hal R. ; Linton, Larry R. ; Chow-Fraser, Pat ; Taylor, Barry ; Fernet, Dave (1990), Koocanusa Reservoir State of the Aquatic Environment, 1972-1988
chlorophyll	(DR8 Citation: National Eutrophication Survey. 1977. Report on Koocanusa Reservoir, Lincoln County, Montana. EPA Region VIII. Working Paper No. 795.) Chlorophyll a 1975:	2155	Corvallis Environmental Research Laboratory ; Environmental Monitoring & Support Laboratory (1977), Report on Koocanusa Reservoir, Lincoln

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	Chlorophyll a ranged from 0.9-5.9 µg/L, with a mean (5 sites 3 samplings in summer) of 2.6 µg/L.		County, Montana, and British Columbia, Canada, Working Paper No. 795
chlorophyll	Chlorophyll a (1972-1988): "Chlorophyll a measured at the Border site varied without any significant trend from 1973 to 1988 (Figure 6.1.1). Annual means generally ranged between 1.0 and 2.0 µg/L, except in 1976 and 1984, when they approached 3.0 µg/L.	800	Hamilton, Hal R. ; Linton, Larry R. ; Chow-Fraser, Pat ; Taylor, Barry ; Fernet, Dave (1990), Kootcanusa Reservoir State of the Aquatic Environment, 1972-1988
fecal coliforms	Pre-impoundment data	1640	Bonde, Thomas J.H. ; Bush, Ronald M. (1982), Limnological Investigations: Lake Kootcanusa: Montana: Part 1: Pre-Impoundment Study, 1967-1972, Special Report 82-21
fish		941	U.S. Fish and Wildlife Service (1965), Detailed Report on Fish and Wildlife Resources Affected by Libby Dam and Reservoir Project, Kootenai River, Montana
fish	(DR8 Citation: May, 1969-1972. Job Progress Reports for Fisher River, Wolf Creek and Fortine Creek.)	1120	Huston, Joe E. ; May, Bruce (1972), Evaluation of Mitigation Measures in Fisher River, Wolf Creek, and Fortine Creek: Status of Water Quality, Erosion, and Fish Populations as Related to Railroad Relocation and Stream Channel Changes
fish	Assessment of fishery (1969-1978): Peamouth, northern squawfish and redeye shiner populations have increased markedly since impoundment in 1971. Burbot, rainbow and cutthroat trout and also increased since impoundment. Suckers, Mt. Whitefish and bull trout had increased only slightly. "Nongame fish populations present in the river expanded rapidly and it only took three years for them to fill the available habitat in the new reservoir".	1370	May, Bruce ; Huston, Joe E. (1975), Habitat Development of Young Creek, Tributary to Lake Kootcanusa: Final Job Report: 1969-1975, Contract No. DACW 67-73-C-0002

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Data Type	Comments	Ref Num	Citation
fish	(DR8 Citation: May, B., J. Huston, & S. McMullin. 1979. Lake Koocanusa Post-Impoundment Fisheries Study - completion Report (part of F-11-2). DFWP. 53 p.)	1619	May, Bruce ; Huston, Joe E. ; McMullin, Steve L. (1979), Lake Koocanusa Post-Impoundment Fisheries Study: 1974 - 1978, Contract # DACW67-75-C-0004
fish	(DR8 Citation: May, B. and J. Huston. 1979. Lake Koocanusa Post-Impoundment Fisheries Study - Completion Report (F-11-2 partial). DFWP. 53 p.)	1619	May, Bruce ; Huston, Joe E. ; McMullin, Steve L. (1979), Lake Koocanusa Post-Impoundment Fisheries Study: 1974 - 1978, Contract # DACW67-75-C-0004
fish		811	May, Bruce ; Huston, Joe E. (1979), Kootenai River Investigations: Final Job Report, Contract # DACW 67-76-C-0055
fish		1290	McMullin, Steve L. (1979), Food Habits and Distribution of Rainbow and Cutthroat Trout in Lake Koocanusa, Montana (Master's Thesis)
fish	Conditions which probably contributed to the decline of white sturgeon in Montana include the operation of Libby Dam , and poor water quality in the 1950's and 1960's from several upstream mining operations. "No conclusive evidence in available on the cause for the decline in the sturgeon population".	2341	Graham, Patrick J. (1981), Status of White Sturgeon in the Kootenai River
fish		1640	Bonde, Thomas J.H. ; Bush, Ronald M. (1982), Limnological Investigations: Lake Koocanusa: Montana: Part 1: Pre-Impoundment Study, 1967-1972, Special Report 82-21
fish	(DR8 Citation: FWP. 1982. Lake Koocanusa Post-Impoundment Fisheries Study - Interim Progress Report (F-11-2 partial). DFWP. 7 p.) Assessment of fishery (1982): "Lake Koocanusa has provided an excellent sport fishery. The fishery was based primarily on rainbow and cutthroat trout until 1981 when kokanee became important. A localized fishery for	1618	May, Bruce ; Huston, Joe E. (1982), Lake Koocanusa Post-Impoundment Fishery Study: 1979 - 1982, Contract # DACW 67-79-C-0077

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Data Type	Comments	Ref Num	Citation
fish	burbot also developed....."		
fish	(DR8 Citation: May, B. and J. Huston. 1981. Lake Koocanusa Post-Impoundment Fisheries Study - Annual Progress Report (F-11-2 partial). DFWP. 19 p.)	1618	May, Bruce ; Huston, Joe E. (1982), Lake Koocanusa Post-Impoundment Fishery Study: 1979 - 1982, Contract # DACW 67-79-C-0077
fish	(DR8 Citation: May, B. and J. Huston. 1980. Lake Koocanusa Post-Impoundment Fisheries Study - Annual Progress Report (F-11-2 partial). DFWP. 26 p.)	1618	May, Bruce ; Huston, Joe E. (1982), Lake Koocanusa Post-Impoundment Fishery Study: 1979 - 1982, Contract # DACW 67-79-C-0077
fish		3618	Shepard, Bradley B. (1985), Quantification of Libby Reservoir Water Levels Needed to Maintain or Enhance Reservoir Fisheries: Annual Report FY 1984, BPA 83-467
fish	Use of fishery since dam construction 1987: Fisherman hours have increased from 87,300 fisherman days in 1965 (pre-impoundment) to 133,500, a 65% increase.	1634	Bonde, Thomas J.H. (1987), Libby Dam-Lake Koocanusa Project: A Narrative Reviewing Actions Taken to Mitigate the Effects of Dam Construction and Operation on Fish Resources
fish		2104	Chisholm, Ian ; Hensler, Mike E. ; Hansen, Barry ; Skaar, Don (1989), Quantification of Libby Reservoir Levels Needed to Maintain or Enhance Reservoir Fisheries: Methods and Data Summary, 1983-1987, Project Number 83-467
fish	Assessment of impact of dam operation to in-reservoir fishery (1989): "Construction and operation of hydroelectric facilities in the Flathead and Kootenai drainage's have caused very significant losses in fish populations and continue to affect both riverine and reservoir fisheries".	1830	Fraley, John J. ; Marotz, Brian ; Decker-Hess, Janet ; Beattie, Will ; Zubik, Raymond J. (1989), Mitigation, Compensation, and Future Protection for Fish Populations Affected by Hydropower Development in the Upper Columbia System, Montana, USA
fish	State of the fishery (1972-1988): "The fish community of Lake Koocanusa has undergone three major changes in species	800	Hamilton, Hal R. ; Linton, Larry R. ; Chow-Fraser, Pat ; Taylor, Barry ; Fernet, Dave

EXHIBIT J

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Data Type	Comments	Ref Num	Citation
	composition since the reservoir was impounded in 1972. Two new species, kokanee and yellow perch, have been unintentionally introduced.....four species, mountain whitefish, rainbow trout, westslope cutthroat and reidside shiner, have decreased relative to their initially high abundances just after impoundment in the mid-1970's".		(1990), Kootenai River State of the Aquatic Environment, 1972-1988
fish	1992: The bull trout population in Lake Kootenai is small in number (< 5% of the fish population) although individuals are large. Data suggest that there is some feeding advantage for bull trout in the lake relative to other similar lakes (Flathead, Hugry Horse).	2342	Thomas, Ginger (1992), Status Report: Bull Trout in Montana
fish		1975	Domrose, Robert J. ; Hensler, Mike E. (1993), Statewide Fisheries Investigations: Survey and Inventory of Coldwater Lakes: Northwest Montana Coldwater Lakes Investigations
fish	Fisheries summary to 1994: In spite of intensive hatchery efforts gill net sampling by fish managers have shown a steady decline of cutthroat trout in the reservoir. Recently, Kokanee have been a primary salmonid game species. Catch rates have been fairly high, but the size of the fish has decreased. Mysis shrimp are found in the reservoir and have probably contributed to the decline to the kokanee fishery.	2753	Knudson, Ken (1994), Water Quality Status Report: Kootenai (Kootenai) River Basin British Columbia, Montana, and Idaho
fish	Bull Trout in Lake Kootenai (1996): Libby dam presents a fish passage barrier. Lake Kootenai bull trout utilize the Grave Creek drainage for spawning and rearing. MFWP has conducted site surveys for Bull trout redds since 1983 in 3 tributaries. The info presently available is insufficient to make conclusions regarding population trend. No trends evident. "Gill netting in Lake Kootenai suggest the bull trout population may be stable. However, we cannot fully assess the risk due to current population trend based on existing	2645	Montana Bull Trout Scientific Group (1996), Upper Kootenai River Drainage: Bull Trout Status Report (Including Lake Kootenai, Upstream of Libby Dam)

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Data Type	Comments	Ref Num	Citation
	knowledge".		
fish	Investigations of fish entrainment through Libby Dam, 1990-94: Entrainment is mainly a problem in Spring and Fall, with densities of 42 fish 104 m-3.	2103	Skaar, Don ; DeShazer, Jay ; Garrow, Larry ; Ostrowski, Tom ; Thornburg, Barry (1996), Quantification of Libby Reservoir Levels Needed to Maintain or Enhance Reservoir Fisheries: Investigations of Fish Entrainment through Libby Dam, 1990-1994, Project No. 83-467
fish	Reservoir operation impacts to bull trout (1998): Bull trout are impacted by current draw down operations of the reservoir. Integrated rule curves have been adopted by the NWPCC but not implemented. Current dam operation are in accordance with endangered Snake River salmon. "Implementation of Integrated Rule Curves for Libby and Hungry Horse reservoirs is essential to restoration, and will continue to be pursued through various forums in the Pacific Northwest".	2179	Montana Bull Trout Restoration Team (1998), Restoration Plan for the Bull Trout in the Clark Fork River Basin and Kootenai River Basin, Montana (DRAFT)
fish	The report was to determine a baseline for Flathead lake selenium concentrations in fish tissue. The purpose of the study was to compare tissue samples collected in both Lake Koocanusa and its upstream sources in British Columbia to samples collected in Flathead Lake, North Fork Flathead. The species sampled from Lake Koocanusa include Bull Trout, Northern Pikeminnow, Mountain Whitefish, Kokanee, Peamouth, Longnose Sucker and Rainbow Trout.	13228	Delaray, Mark ; Cavigli, Jon ; Steed, Amber ; Selch, Trevor (2011), Transboundary Flathead Fisheries Baseline Data Collection, Agreement No. h1434080017
macroinvertebrates	(DR8 Citation: May, 1969-1972. Job Progress Reports for Fisher River, Wolf Creek and Fortine Creek.) Data not pertaining to the reservoir per se.	1120	Huston, Joe E. ; May, Bruce (1972), Evaluation of Mitigation Measures in Fisher River, Wolf Creek, and Fortine Creek: Status of Water Quality, Erosion, and Fish Populations as Related to Railroad Relocation and Stream Channel Changes

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Data Type	Comments	Ref Num	Citation
macroinvertebrates	Benthic macroinvertebrates (1979): Diversity of benthic organisms in the near-shore area is limited by drawdowns.	1290	McMullin, Steve L. (1979), Food Habits and Distribution of Rainbow and Cutthroat Trout in Lake Koocanusa, Montana (Master's Thesis)
macroinvertebrates		1640	Bonde, Thomas J.H. ; Bush, Ronald M. (1982), Limnological Investigations: Lake Koocanusa: Montana: Part 1: Pre-impoundment Study, 1967-1972, Special Report 82-21
macroinvertebrates	Densities of benthic macroinvertebrates were negatively affected by drawdown. Density significantly decreased from the permanently wetted zone to the frequently dewatered zone. The shallow and mid-zones increased in density as water levels were raised. However, the littoral zone generally had greater densities and biomasses of surface macroinvertebrates than did the limnetic zone.	2104	Chisholm, Ian ; Hensler, Mike E. ; Hansen, Barry ; Skaar, Don (1989), Quantification of Libby Reservoir Levels Needed to Maintain or Enhance Reservoir Fisheries: Methods and Data Summary, 1983-1987, Project Number 83-467
macroinvertebrates	Pelagic zooplankton: In spite of variations in biomass (in 1980's due apparently to kokanee production) the species composition of the zooplankton has remained generally the same from 1973-1988.	800	Hamilton, Hal R. ; Linton, Larry R. ; Chow-Fraser, Pat ; Taylor, Barry ; Fernet, Dave (1990), Koocanusa Reservoir State of the Aquatic Environment, 1972-1988

## DATA MATRIX

### Habitat Data

### Comments:

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## DATA MATRIX Chemistry Data

### Comments:

Selenium bioaccumulation data was collected by MT FWP in 2008. However, the fish tissue collected from the lake were from different species than samples collected from upstream, so comparisons were difficult to make.

Selenium loading is occurring in Lake Koocanusa due to surface coal mining in the Elk Creek drainage, with 95% of the selenium load entering the lake from Elk River. Trend analysis on data collected by the British Columbia Ministry of Environment shows a significant (p-value= 0.000) increasing trend in selenium. The data shows an average increase of 376 kg Se per year or a 19.7% increase per year. As new mining projects are started in the Elk River drainage this load is expected to increase by 14.3% in 2012 and the again by another 26.14% in 2018. Based on these expected loads, it estimated that by 2015 the lake will be exceeding Montana's chronic aquatic life standard for total selenium.

### Lake Koocanusa

Data Type	Comments	Ref Num	Citation
General	MCA-75-5-103(36) "Threatened water body" means a water body or stream segment for which sufficient credible data and calculated increases in loads show that the water body or stream segment is fully supporting its designated uses but threatened for a particular designated use because of: (a) proposed sources that are not subject to pollution prevention or control actions required by a discharge permit, the nondegradation provisions, or reasonable land, soil, and water conservation practices; or (b) documented adverse pollution trends.	13237	Montana Legislative Services Division (2011), Montana Code Annotated, MCA 75-5-103
benthic sediment data	Mercury and PCB's in Lake sediment: PCB's non-detected. Hg was low and does not represent a contamination problem.	1623	Phillips, Glenn R.; Bahls, Loren L. (1994). Lake Water Quality Assessment and Contaminant Monitoring of Fishes and Sediments From Montana Waters
bioaccumulation	(DR8 Citation: FWP. 1982. Lake Koocanusa Post-Impoundment Fisheries Study - Interim Progress Report (F-11-2 partial). DFWP. 7 p.)	1618	May, Bruce ; Huston, Joe E. (1982), Lake Koocanusa Post-Impoundment Fishery Study: 1979 - 1982, Contract # DACW 67-79-C-0077
bioaccumulation	Mercury and PCB's in fish: PCB's were not detected at all, Hg was usually have and in one case equal to national average	1623	Phillips, Glenn R.; Bahls, Loren L. (1994), Lake Water Quality Assessment and Contaminant



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Data Type	Comments	Ref Num	Citation
	for freshwater fish ( $\approx 0.2 \mu\text{g/g}$ ).		Monitoring of Fishes and Sediments From Montana Waters
bioaccumulation	<p>This study examined Kokanee samples collected on both sides of the United States-Canadian border in Lake Kootenai. Additionally it also examined Peamouth data collected on the United States side of the lake.</p> <p>U.S. Data:</p> <p>Mean Peamouth Whole Body sample: <math>3.38 \mu\text{g/g}</math> dry weight (10 Fish)</p> <p>Mean Peamouth Muscle Tissue sample: <math>3.30 \mu\text{g/g}</math> dry weight (10 Fish)</p> <p>Mean Peamouth Ovary sample: <math>7.82 \mu\text{g/g}</math> dry weight (10 Fish)</p> <p>Mean Kokanee Whole Body sample: <math>2.61 \mu\text{g/g}</math> dry weight (10 Fish)</p> <p>Mean Kokanee Muscle Tissue sample: <math>1.89 \mu\text{g/g}</math> dry weight (10 Fish)</p> <p>Mean Kokanee Ovary sample: <math>3.93 \mu\text{g/g}</math> dry weight (9 Fish)</p> <p>Canadian Data:</p> <p>Mean Kokanee Whole Body sample: <math>2.36 \mu\text{g/g}</math> dry weight (10 Fish)</p> <p>Mean Kokanee Muscle Tissue sample: <math>1.79 \mu\text{g/g}</math> dry weight (10 Fish)</p> <p>Mean Kokanee Ovary sample: <math>3.60 \mu\text{g/g}</math> dry weight (9 Fish)</p>	13233	McDonald, Les (2009), Survey of Selenium in Water, Zooplankton, and Fish in Lake Kootenai, British Columbia, 2008
bioaccumulation	This study was comparing selenium in fish tissue samples from the Lake Kootenai system and the Flathead lake system (Flathead Lake and the North Fork of the Flathead River). Samples taken from fish in Lake Kootenai were from	13228	Delaray, Mark ; Cavigli, Jon ; Steed, Amber ; Seich, Trevor (2011), Transboundary Flathead Fisheries Baseline Data Collection, Agreement No. h1434080017

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Data Type	Comments	Ref Num	Citation
	muscle and liver tissue. No whole body fish samples for Lake Koocanusa were reported in this document.		
	The mean selenium concentration for muscle tissue: Mountain Whitefish (count: 2 fish) 2.5 mg/kg dry weight, Bull Trout (count: 20 fish) 1.6 mg/kg dry weight, Longnose Sucker (count: 14 fish) 3.5 mg/kg dry weight, Northern Pikeminnow (count: 20 fish) 1.3 mg/kg dry weight, Peamouth (count: 20 fish) 2.9 mg/kg dry weight, Kokanee (count: 20 fish) 1.7 mg/kg dry weight and Rainbow Trout (count: 2 fish) 1.6 mg/kg dry weight.		
	The mean selenium concentrations for liver tissue samples were: Whitefish (count: 2 fish) 27.8 mg/kg dry weight, Bull Trout (count: 20 fish) 7.6 mg/kg dry weight, Longnose Sucker (count: 14 fish) 8.8 mg/kg dry weight, Kokanee (count: 20 fish) 10.5 mg/kg dry weight and Rainbow Trout (count: 2 fish) 13.9 mg/kg dry weight. The mean selenium concentrations for ovary tissue samples: Northern Pikeminnow (count: 18 fish) 3.6 mg/kg dry weight, Peamouth (count: 20 fish) 7.3 mg/kg dry weight and Longnose Sucker (count: 4 fish) 4.8 mg/kg dry weight.		
	The mean selenium concentrations for ovary tissue samples are as follows: Northern Pikeminnow( Count: 18 fish) 3.6 mg/kg dry weight, Peamouth (count 20 fish) 7.3 mg/kg dry weight, Kokanee (Count: 20 fish) 3.7 mg/kg dry weight and Longnose Sucker (Count: 4 fish) 4.8 mg/kg dry weight.		

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Data Type	Comments	Ref Num	Citation
common ions, pH, conductivity, miscellaneous		1640	Bonde, Thomas J.H. ; Bush, Ronald M. (1982), Limnological Investigations: Lake Koocanusa: Montana: Part 1: Pre-impoundment Study, 1967-1972, Special Report 82-21
common ions, pH, conductivity, miscellaneous	Common ions and pH (1972-89): No notable change in pH, usually around 8-8.5. TDS has declined from the early years of the reservoir, sulfate typical (~20 mg/L. Alkalinity usually around 110 mg/L as Ca CO3.	800	Hamilton, Hal R. ; Linton, Larry R. ; Chow-Fraser, Pat ; Taylor, Barry ; Fernet, Dave (1990), Koocanusa Reservoir State of the Aquatic Environment, 1972-1988
common ions, pH, conductivity, miscellaneous	DO level in the hypolimnion 1997-98: DO does not appear to drop below 7.6 even at the very bottom of the hypolimnion during stratification.	2772	U.S. Geological Survey (199n), USGS Water Data for the Nation - NWIS
common ions, pH, conductivity, miscellaneous		10255	Montana Department of Environmental Quality, Planning, Prevention and Assistance Division, Water Quality Planning Bureau (2006), STORET/Storease Data Archive [Electronic Resource]
major nutrients	(DR8 Citation: National Eutrophication Survey. 1977. Report on Koocanusa Reservoir, Lincoln County, Montana. EPA Region VIII. Working Paper No. 795.) 1975: Mean TP was 50.6 µg/L. Nitrate + nitrite was 82 µg/L.	2155	Corvallis Environmental Research Laboratory ; Environmental Monitoring & Support Laboratory (1977), Report on Koocanusa Reservoir, Lincoln County, Montana, and British Columbia, Canada, Working Paper No. 795
major nutrients	1972-1988: There was a large decrease in TP near the Border site after 1975. Thereafter, no trend, with a mean value near 2 µg/L. From 1976 to 1989, to trend in nitrate concentrations. However, there were significant long-term decreases in TN, TKN, and ammonia. TN:TP ratios at the Forebay site were high (near 50) indicating strong P limitation, while at the Border site closer to 10-15 (Canadian data), near the transition between N and P limitation.	800	Hamilton, Hal R. ; Linton, Larry R. ; Chow-Fraser, Pat ; Taylor, Barry ; Fernet, Dave (1990), Koocanusa Reservoir State of the Aquatic Environment, 1972-1988

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Data Type	Comments	Ref Num	Citation
major nutrients		2753	Knudson, Ken (1994), Water Quality Status Report: Kootenay (Kootenai) River Basin British Columbia, Montana, and Idaho
major nutrients	Total P 1992: 6 µg/L.	1623	Phillips, Glenn R. ; Bahls, Loren L. (1994), Lake Water Quality Assessment and Contaminant Monitoring of Fishes and Sediments From Montana Waters
major nutrients	1995-8: Mean nitrate + nitrite was 93 µg/L. Ortho-P was 1.0 µg/L. Total P was 8 µg/L. Approximate N:P ratio ([Nitrate + nitrite + ammonium: ortho-P]) = 102:1. These values were calculated considering non-detects as zero. Indicates very strong P limitation.	2772	U.S. Geological Survey (199n), USGS Water Data for the Nation - NWIS
major nutrients		10255	Montana Department of Environmental Quality, Planning, Prevention and Assistance Division, Water Quality Planning Bureau (2006), STORET/Storease Data Archive [Electronic Resource]
metals	Older data	2724	Nunnallee, David A. ; Botz, Maxwell K. (1974), Water Quality Inventory and Management Plan: Kootenai River Basin, Montana
metals		1640	Bonde, Thomas J.H. ; Bush, Ronald M. (1982), Limnological Investigations: Lake Koocanusa: Montana: Part 1: Pre-impoundment Study, 1967-1972, Special Report 82-21
metals	Metals in the reservoir near the US/Canadian border, 1972-1989: Arsenic, cadmium were never at detection levels, copper never exceeded any standard, nor did iron or zinc. Mean lead concentrations for the period 1977-89 was 1.7 µg/l + 1.5. Maximum concentration was 11 µg/L. Site-specific	800	Hamilton, Hal R. ; Linton, Larry R. ; Chow-Fraser, Pat ; Taylor, Barry ; Fernet, Dave (1990), Koocanusa Reservoir State of the Aquatic Environment, 1972-1988

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Data Type	Comments	Ref Num	Citation
metals	data indicates most total lead had analytical problems. NO INDICATION OF METALS PROBLEMS.		
	Data pertains to Canadian portion of the Kootenai River	2753	Knudson, Ken (1994), Water Quality Status Report: Kootenay (Kootenai) River Basin British Columbia, Montana, and Idaho
metals		2772	U.S. Geological Survey (199n), USGS Water Data for the Nation - NWIS
metals	This report looks at data collected from 1984 to 2000 on the Elk River at highway 93 (just above the mouth where the river enters Lake Kootenay) in British Columbia. The report states that there is an increasing trend in selenium caused by surface coal mining. It also notes that 24% of the samples exceed the British Columbia Ministry of the Environment's aquatic life guidelines.	13231	Pommen, Larry W. (2001), Water Quality Assessment of Elk River at Highway 93 (1968-2000)
metals	Site specific report: Metals did not exceed standards or were below detection limit. One zinc sample among dozens was found to exceed the aquatic life standard.	10255	Montana Department of Environmental Quality, Planning, Prevention and Assistance Division, Water Quality Planning Bureau (2006), STORET/Storease Data Archive [Electronic Resource]
metals	Total selenium samples were collected at three sites on the Canadian side of lake with the sites being composed of a surface and near bottom sample at five subsites. The mean concentrations for selenium at the three sites were: 0.11 µg/L at Kilkomun Creek Bailey Bridge, Canada (above the Elk River on the lake), 1.33 µg/L for the Elk River lake site and 0.84 µg/L at the Gold Creek lake site near the US-Canada border.  The report also states that 95% of the selenium load entering the lake is coming from the Elk River. Based on data collected	13233	McDonald, Les (2009), Survey of Selenium in Water, Zooplankton, and Fish in Lake Kootenay, British Columbia, 2008

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Data Type	Comments	Ref Num	Citation
	at the mouth since 1984 the selenium concentrations have been increasing by an average of 376 kg Se/year or 19.7% per year in the river. The Elk River contributes to 26% of the water flowing into Lake Koocanusa.		
metals	The data reported in this document pertains to the Canadian part of the drainage. The document states that Selenium data collected on the Elk River at Highway 93 (just above the mouth where the river enters Lake Koocanusa) has shown "significant increasing trend." The document also states that trend analysis estimates a 0.56 µg/L annual increase in total selenium and a 0.59 µg/L increase in dissolved selenium. It also states that dissolved selenium measurements suggest that total selenium is almost entirely in dissolved form increasing the bioavailability. Additionally the document notes that selenium concentration in the Elk River have exceeded British Columbia Ministry of the Environment's and the Canadian Council of Ministers of the Environment's aquatic life guidance.	13229	Dessouki, Tarik C.E.; Ryan, Andrea (2010), Water Quality Assessment of the Kootenay, Elk, and St. Mary Rivers
metals	Data has been collected by the British Columbia Ministry of Environment at the Elk River at Highway 93 cross just above the mouth (Lake Koocanusa) since 1984. Both liner regression and Kendall's Tau analysis showed a significant trend (p-value= 0.000 for both tests). A 95% confidence interval was used in both tests.	13236	(2011), British Columbia Ministry of Environment data for the Elk River at Highway 93
metals	Selenium load increases allocations are set 14.34% per year with the Line Creek mine expansion in 2012 and 26.14% with the Swift Creek mine addition in 2018.	13235	(2011), Teck Coal presentation 8 September 2011, Cranbrook, BC Line creek Operations phase II Project update Presentation to the Working group (water quality and aquatic health working group) slide 21,27

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Data Type	Comments	Ref Num	Citation
metals	Using information the information and data from several sources, MT DEQ staff were able to conduct a selenium loading analysis for Lake Koocanusa. The Elk River contributes 95% of the Selenium Load to Lake Koocanusa. Based on data collected near the mouth of the Elk River since 1984 the selenium load has been increasing by 19.7% per year. The source for the increasing selenium loads is surface coal mining occurring in the Elk River drainage. There are two proposed mine expansions, one in 2012 and one in 2018, which will increase the current load with each expansion. The loading model shows that by 2015 total selenium concentrations in Lake Koocanusa will be above the current standard of 5 µg/L.	13234	Montana Department of Environmental Quality (2011), MT DEQ Selenium Mixing Calculation for Lake Koocanusa
quantitative physical data	Not pertinent to the reservoir	1120	Huston, Joe E. ; May, Bruce (1972), Evaluation of Mitigation Measures in Fisher River, Wolf Creek, and Fortine Creek: Status of Water Quality, Erosion, and Fish Populations as Related to Railroad Relocation and Stream Channel Changes
quantitative physical data	Older data	2724	Nunnallee, David A. ; Botz, Maxwell K. (1974), Water Quality Inventory and Management Plan: Kootenai River Basin, Montana
quantitative physical data	Relevant to the river below the dam	10459	May, Bruce (1976), A Preliminary Evaluation on the Effects of Gas Bubble Disease on Fish Populations in the Kootenai River Below Libby Dam
quantitative physical data	(DR8 Citation: National Eutrophication Survey. 1977. Report on Koocanusa Reservoir, Lincoln County, Montana. EPA Region VIII. Working Paper No. 795.) Secchi depth 1975: 5 sites, 3 samplings in summer = mean Secchi of 4 meters	2155	Corvallis Environmental Research Laboratory ; Environmental Monitoring & Support Laboratory (1977), Report on Koocanusa Reservoir, Lincoln County, Montana, and British Columbia,

# Montana DEQ - Water Quality Standards Attainment Record

Reporting Cycle: 2020      Assessment Record: MT76D003\_010.pdf      Status: Completed

Data Type	Comments	Ref Num	Citation
quantitative physical data	(DR8 Citation: May, B. and J. Huston. 1979. Lake Koocanusa Post-Impoundment Fisheries Study - Completion Report (F-11-2 partial). DFWP. 53 p.) Limited data	1619	Canada, Working Paper No. 795  May, Bruce ; Huston, Joe E. ; McMullin, Steve L. (1979), Lake Koocanusa Post-Impoundment Fisheries Study: 1974 - 1978, Contract # DACW67-75-C-0004
quantitative physical data	Limited data	811	May, Bruce ; Huston, Joe E. (1979), Kootenai River Investigations: Final Job Report, Contract # DACW 67-76-C-0055
quantitative physical data	Limited data	3657	May, Bruce ; Appert, Sue ; Huston, Joe E. ; Perry, Sue ; Dos Santos, Joseph M. (1981), Kootenai River Fisheries Investigations: 1976 - 1981, Contract # DACW 67-79-C-01112
quantitative physical data	Very general data	1229	Fraley, John J. ; May, Bruce ; Clancey, Patrick T. ; Beattie, Will (1987), Fisheries Evaluation Program for the Flathead Lake/River System and Hungry Horse and Libby Reservoirs
quantitative physical data	Secchi depth (1972-1988): Post 1977: 0.457-10 meters, mean = 4.02 m.	800	Hamilton, Hal R. ; Linton, Larry R. ; Chow-Fraser, Pat ; Taylor, Barry ; Fernet, Dave (1990), Koocanusa Reservoir State of the Aquatic Environment, 1972-1988
quantitative physical data		957	Ferreira, Rodger F. ; Adams, D. Briane ; Davis, Robert E. (1992), Development of Thermal Models for Hungry Horse Reservoir and Lake Koocanusa, Northwestern Montana and British Columbia, Water-Resources Investigations Report 91-4134
quantitative physical data		2753	Knudson, Ken (1994), Water Quality Status Report: Kootenay (Kootenai) River Basin British



# Montana DEQ - Water Quality Standards Attainment Record

Reporting Cycle: 2020      Assessment Record: MT76D003\_010.pdf      Status: Completed

Data Type	Comments	Ref Num	Citation
quantitative physical data	Secchi depth 1992: 2 meter Secchi depth ( 1 sample).	1628	Columbia, Montana, and Idaho  Phillips, Glenn R. ; Bahls, Loren L. (1994), Lake Water Quality Assessment and Contaminant Monitoring of Fishes and Sediments From Montana Waters
quantitative physical data	Very general data	2103	Skaar, Don ; DeShazer, Jay ; Garrow, Larry ; Ostrowski, Tom ; Thornburg, Barry (1996), Quantification of Libby Reservoir Levels Needed to Maintain or Enhance Reservoir Fisheries: Investigations of Fish Entrainment through Libby Dam, 1990-1994, Project No. 83-467
quantitative physical data	Stratification and other data (1996) 1996-97: Reservoir stratifies and develops a distinct epi- and hypolimnion. Mean light extinction coefficient was 0.171. Light depth to 1% light level was 12.75 meters (~ Secchi depth of 4.3 meters).	2772	U.S. Geological Survey (199n), USGS Water Data for the Nation - NWIS

Montana DEQ - Water Quality Standards Attainment Record

Reporting Cycle: 2020      Assessment Record: MT76D003\_010.pdf      Status: Completed

DQA SUMMARY

Aquatic Life & Fishes

Nutrients	NOT ASSESSED
Metals	PASS
Sediment	NOT ASSESSED
Temperature	NOT ASSESSED
Other	NOT ASSESSED

Drinking Water

Metals	NOT ASSESSED
Other	NOT ASSESSED

Recreation

Nutrients	NOT ASSESSED
E.coli	NOT ASSESSED
Other	NOT ASSESSED

Agriculture

Common	NOT ASSESSED
Other	NOT ASSESSED

Montana DEQ - Water Quality Standards Attainment Record

Reporting Cycle: 2020      Assessment Record: MT76D003\_010.pdf      Status: Completed

ASSESSMENT HISTORY

Cycle 2006

Cycle 2008

Not assessed this cycle

Cycle 2010

Not assessed this cycle

Cycle 2012

Aquatic Life is being listed as threatened due to calculated increases in loads of selenium. This documented adverse pollution trend is attributed a combination of existing and proposed coal mining operations on the Elk and Fording Rivers in British Columbia. No other beneficial uses or existing cause listings were assessed during the 2012 reporting cycle.

Cycle 2014

Not assessed this cycle

Cycle 2016

Not assessed this cycle

Cycle 2018

Not assessed this cycle

Cycle 2020

Not assessed this cycle

## Montana DEQ - Water Quality Standards Attainment Record

**Reporting Cycle:** 2020      **Assessment Record:** MT76D003\_010.pdf      **Status:** Completed

### Overall Condition of Segment

#### 2012 Cycle:

Lake Koocanusa is split by the Montana-Canadian border (60% of the lake is within the United States) and the assessment unit is only that area falling inside the United States. The Elk River provides approximately 26% of the water to Lake Koocanusa. The Elk River drainage in Canada has several large coal mines which are attributed to increased loads of selenium. The majority of the selenium loads entering Lake Koocanusa occur in Canada with 95% of the selenium load coming from the Elk River. Total recoverable selenium data has been collected by British Columbia Ministry of Environment since 1984 at the Highway 93 Elk River crossing. Trend analysis from this site shows a statistically significant increase (p-value= 0.000) in selenium concentrations. The data set shows an average increase of 376 kg Se per year or a 19.7% increase per year in the Elk River. These loads are expected to increase by 14.3% in 2012 and by 26.14% in 2018 as new mining projects are started in the Elk River drainage. Based on these selenium load contributions, it is estimated that by 2015 the lake will be exceeding Montana's aquatic life water quality standard for total selenium. Aquatic Life is being listed as threatened due to selenium.

Probable sources of pollution identified in this watershed include: Dam or Impoundment, and Sources Outside State Jurisdiction or Borders.

#### 2010 Cycle:

**Comments:** Overall water quality good to excellent, with no metals or other contaminant problems in water or sediment. DO levels in hypolimnion during stratification remain above 7.5 mg/L. Weight-of-evidence from numerous parameters indicate that the lake is oligotrophic, leaning towards mesotrophic. Current dam operation (drawdowns) appear to impact both near-shore aquatic life and the success of the reservoir's salmonid fishery. Integrated rule curves to address this problem have been adopted, but not implemented, due to downstream issues. Aquatic Life & Cold Water Fishery: DO levels in hypolimnion during stratification remain above 7.5 mg/L. Weight-of-evidence from numerous parameters indicate that the lake is oligotrophic, leaning towards mesotrophic. Current dam operation (drawdowns) appear to impact both near-shore aquatic life and the success of the reservoir's salmonid fishery. Integrated rule curves to address this problem have been adopted, but not implemented, due to downstream issues. Drinking Water: No violations of water quality standards. Fish Consumption: no advisories at this time; no PCBs present in fish tissue; mercury levels below advisory level and assumed to be natural (no documentation can be found that links mercury to anthropogenic sources). Primary Contact (recreation): No indications of blooms or fecal problems.

Montana DEQ - Water Quality Standards Attainment Record

Reporting Cycle: 2020      Assessment Record: MT76D003\_010.pdf      Status: Completed

USE SUPPORT DECISION

Use Class		B-1			
Trophic Status:		OLIGOTROPHIC	Trophic Trend:		Degrading
Uses	DQA	Method, Data, and Information Used	Assessment Type and Confidence	Use Support	Partial Use SupportThreatened Flag Certainty
Aquatic Life	Pass			Not Fully Supporting	No Yes
Agricultural				Fully Supporting	No No
Drinking Water				Fully Supporting	No No
Primary Contact Recreation				Fully Supporting	No No
Method Number and Description					

# Montana DEQ - Water Quality Standards Attainment Record

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## IMPAIRMENT INFORMATION

Uses	Cause (Confidence): Source(Confirmed)	Observed Effects
Aquatic Life	372 (High): 146 (Y) 526 ( ): 142 (N)	
Agricultural		
Drinking Water		
Primary Contact Recreation		

Cause Number and Description	Source Number and Description	Observed Effect Number and Description
372-Selenium 526-Flow Regime Modification	142-Dam or Impoundment 146-Sources Outside State Jurisdiction or Borders	

## DELISTING / STATUS CHANGES

Cause	Reason for Change	Date of Change

Montana DEQ - Water Quality Standards Attainment Record

Reporting Cycle: 2020      Assessment Record: MT76D003\_010.pdf      Status: Completed

CATEGORY INFORMATION

Previous Cycle	
Cycle	2018
Category	5 - Waters where one or more applicable beneficial uses have been assessed as being impaired or threatened, and a TMDL is required to address the factors causing the impairment or threat.
User Defined Category	N/A
Current Cycle	
Cycle	2020
Category	5 - Waters where one or more applicable beneficial uses have been assessed as being impaired or threatened, and a TMDL is required to address the factors causing the impairment or threat.
User Defined Category	N/A

# EXHIBIT K





Positive

As of: January 13, 2022 9:11 PM Z

**Friends of the Wild Swan v. Dep't of Natural Res. & Conservation**

Supreme Court of Montana

July 13, 2005, Submitted on Briefs ; December 29, 2005, Decided

No. 04-862

**Reporter**

2005 MT 351 \*; 330 Mont. 186 \*\*; 127 P.3d 394 \*\*\*; 2005 Mont. LEXIS 625 \*\*\*\*

FRIENDS OF THE WILD SWAN, a Montana Nonprofit Corporation, Plaintiff and Appellant, v. DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, and MONTANA BOARD OF LAND COMMISSIONERS, Defendants and Respondents.

**Subsequent History:** Released for Publication: January 25, 2006.

**Prior History:** [\*\*\*\*1] APPEAL FROM: The District Court of the First Judicial District, In and For the County of Lewis and Clark, Cause No. BDV-2003-527, Honorable Jeffrey M. Sherlock, Presiding Judge.

*Friends of the Wild Swan v. Department of Natural Resources and Conservation, 2004 Mont. Dist. LEXIS 2478, 2004 ML 87 (2004)*

**Disposition:** Affirmed.

**Counsel:** For Appellant: Andrew J. Nelson, Smith & Thiel Law Offices, Missoula, Montana; Timothy Bechtold, Rossbach Hart Bechtold P.C., Missoula, Montana.

For Respondents: Tommy Butler and Mark Phares, Special Assistant Attorneys General, Department of Natural Resources and Conservation, Helena, Montana.

**Judges:** JIM RICE. We Concur: KARLA M. GRAY,

JOHN WARNER, BRIAN MORRIS. Justice Brian Morris concurs. Justice W. William Leaphart dissenting. Justice Patricia Cotter joins in the dissent. Justice James C. Nelson dissents. Justice Jim Rice delivered the Opinion of the Court.

**Opinion by:** Jim Rice

**Opinion**

[\*\*\*395] [\*\*187] Justice Jim Rice delivered the Opinion of the Court.

[\*P1] Appellant Friends of the Wild Swan appeals from the order of the First Judicial District Court granting summary judgment in favor of Respondents Department of Natural Resources and Conservation and the Board of Land Commissioners. We affirm.

[\*P2] We restate the issue on appeal as follows:

[\*P3] Does § 77-1-202, MCA [\*\*\*\*2] , require the Board of Land Commissioners to conduct a harvest-level financial accounting when considering a proposed timber sale on school trust lands?

**BACKGROUND**

[\*P4] In 2003, the Montana Department of Natural Resources and Conservation (DNRC) selected one of

EXHIBIT K

three alternatives set forth in a Final Environmental Impact Statement on logging in the Swan River State Forest. The selected alternative, "Alternative C," proposed harvesting 10.2 million board feet in three phases from a parcel of school trust lands known today as the Goat [\*\*\*396] Squeezer Project Area. The purpose of the harvest was to generate funds for the Montana public schools as well as to promote timber stand health and vigor. DNRC submitted the proposed timber harvest and sale to the Montana Board of Land Commissioners (Board) as required, and the Board approved the harvest and sale on July 21, 2003. In approving the proposal, the Board did not conduct a harvest-level accounting of the timber sale. Instead, the Board specifically evaluates costs and benefits at the programmatic, or year-end, level only.

[\*P5] Friends of the Wild Swan (FOWS), a nonprofit environmental group, challenged the Board's methodology [\*\*\*\*3] in evaluating timber sale transactions in the District Court, arguing that § 77-1-202, MCA (2003) [\*\*188] ( henceforth § 77-1-202, MCA)<sup>1</sup> required harvest-specific accountings. The District Court, however, rejected that challenge and granted summary judgment to the Respondents. FOWS

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<sup>1</sup> The 2005 Legislature amended § 77-1-202(1), MCA, which now reads, in pertinent part:

The Board shall administer this trust to:

- (a) secure the largest measure of legitimate and reasonable advantage to the state; and
- (b) provide for the long-term financial support of education.

The amendments were effective July 1, 2005. FOWS brought this suit prior to that date, challenging the timber sale pursuant to the 2003 version of the statute. All future references to this section herein are to subsection (1) of the 2003 version of the statute.

appealed to this Court on November 10, 2004.

## STANDARD OF REVIEW

[\*P6] In granting summary [\*\*\*\*4] judgment, the District Court ruled as a matter of law that § 77-1-202, MCA, did not require the Board to reconcile timber-sale costs and benefits at the harvest-level. No factual disputes are identified, and we review the District Court's conclusions of law *de novo*, determining their correctness. Steer, Inc. v. Department of Revenue (1990), 245 Mont. 470, 474-75, 803 P.2d 601, 603.

## DISCUSSION

[\*P7] The issue of whether § 77-1-202, MCA, requires harvest-level accounting was one of four issues addressed by the District Court and is the only substantive issue raised on appeal. The District Court concluded that no "statute, constitution, rule, regulation, or case law" required the State to perform such specific accountings. The District Court pointed to the year-end accounting requirements as well as to mandated calculations and reporting methodologies as indications that the Legislature never intended to require more specific accountings. It also relied on the Legislature's two-time rejection of bills which would have required harvest-level accounting in reaching its conclusion. *See* H.B. 605 (Mont. [\*\*\*\*5] 2003), H.B. 576 (Mont. 2001). FOWS challenges that conclusion and asserts that the requirement of § 77-1-202, MCA, to "secure the largest measure of legitimate and reasonable advantage to the state" language is rendered meaningless without a harvest-level accounting requirement.

### The Trust For Public Schools

[\*P8] Under the Act of February 22, 1889 (the Enabling Act), the federal government granted Montana certain lands "for the support of common schools." Enabling Act, § 10. The grant of those lands created [\*\*189] a

trust for the people. *Montanans for the Responsible Use of the School Trust v. Board of Land Commissioners*, 1999 MT 263, P13, 296 Mont. 402, P13, 989 P.2d 800, P13 (*Montrust I*). Montana's first Constitution accepted the lands which were granted on the terms of the Enabling Act, recognizing that they were held in trust and that the State acted as trustee. *Montrust I*, P13. Finally, Montana's 1972 Constitution re-affirmed the land grant, the trust, and the terms of the Enabling Act. *Art. X, Sec. 11, Mont. Const.* (1972).

[\*P9] Pursuant to the Montana Constitution, the Board of Land Commissioners is directed to administer [\*\*\*\*6] the trust and act as the accountable trustee. *See Art. XI, Sec. 4, Mont. Const.* (1889); *Art. X, Sec. 4, Mont. Const.* (1972). To assist the Board in fulfilling its responsibility as trustee, the Legislature enacted Sec. 3, ch. 60, L. 1927, today § 77-1-202, MCA, which outlined the Board's obligations [\*\*\*397] with regard to the language of the Enabling Act and the Montana Constitution. At the time this proceeding was initiated, the language outlining the trust responsibility had not changed in seventy years. It provided:

In the exercise of these powers, the guiding principle is that these lands and funds are held in trust for the support of education and for the attainment of other worthy objects helpful to the well-being of the people of this state as provided in The Enabling Act. The board shall administer this trust to secure the largest measure of legitimate and reasonable advantage to the state.

Section 77-1-202, MCA.

#### ***Deference to the Board***

[\*P10] Initially, we note that the law affords discretion to the Board in its administration of the school land trust. In *State v. Babcock* (1966), 147 Mont. 46, 51, 409 P.2d 808, 811, [\*\*\*\*7] we explained that "The State Board of

Land Commissioners has considerable discretionary power . . . . If the 'largest measure of legitimate and reasonable advantage' from the use of state lands is to accrue to the state, then the State Land Board must, necessarily, have a large discretionary power." We further explained that this power was "inherent in the general and discretionary powers conferred by the constitution, and necessary for the proper discharge of its duties . . . ." *Babcock*, 147 Mont. at 51, 409 P.2d at 811. Finally, we affirmed that discretion in *Montanans for the Responsible Use of the School Trust v. Darkenwald*, 2005 MT 190, 328 Mont. 105, 119 P.3d 27 (*Montrust II*), where, when faced with an evaluation of the Board's method of determining "fair market value," we stated, "we will not 'control the discretion of the board unless it [\*\*190] appears that the action of the board is arbitrarily and, in effect, fraudulent.'" *Montrust II*, P52 (citing *Toomey v. State Bd. of Land Comm'rs* (1938), 106 Mont. 547, 562, 81 P.2d 407, 415). This is not to say the Board has unfettered discretion, or that its discretion is unlimited. [\*\*\*\*8] *Babcock*, 147 Mont. at 52, 409 P.2d at 811. However, it is clear that the Board's obligation as trustee is a complex one, that the obligation is governed by constitutional and statutory provisions which grant authority to the Board over the trust, and that these provisions grant "large" or "considerable" discretion to the Board in the performance of its duties.

[\*P11] In addition to the discretion granted to the Board as the administrator of the trust, the law entitles the Board, as a state agency, to "respectful consideration" of its "long and continued course of consistent interpretation" of § 77-1-202, MCA, which it has administered for many years. *Montana Power Co. v. Public Service Comm.*, 2001 MT 102, P25, 305 Mont. 260, P25, 26 P.3d 91, P25. This consideration can be overcome by "compelling indications." *Montana Power*, P25, *see also Glendive Med. Ctr. v. Mont. Dep't of*

*Public H.H.S., 2002 MT 131, PP14-15, 310 Mont. 156, PP14-15, 49 P.3d 560, PP14-15.*

***Does § 77-1-202, MCA, require the Board to conduct a harvest-level accounting when considering timber sales on school trust lands?***

[\*P12] FOWS argues that in order to fulfill the obligations under § 77-1-202, MCA, the Board must conduct a harvest-level accounting of every proposed trust-land timber sale before approving the project. In response, the Board argues that it fulfills its obligation under § 77-1-202, MCA, by conducting a program-wide accounting on a yearly basis, and notes that there is no proof that it has ever failed to secure "the largest measure of legitimate and reasonable advantage." The question presented, therefore, is whether § 77-1-202, MCA, itself silent on accounting methodologies, requires the Board to conduct a harvest-level financial accounting.

[\*P13] As a matter of statutory interpretation, our goal is to ascertain the intent of the Legislature. *McCormick v. Brevig*, 2004 MT 179, P40, 322 Mont. 112, P40, 96 P.3d 697, P40, *see also* § 1-2-101, MCA. Our inquiry begins with the words of the statute itself: "The legislative intent is to be ascertained, in the first instance, from the plain meaning of the words used. [\*\*\*\*10] " *Western Energy Co. v. Dept. of Revenue*, 1999 MT 289, P11, [\*\*\*398] 297 Mont. 55, P11, 990 P.2d 767, P11; *Brevig*, P40.

[\*P14] [\*\*191] First, we observe that the plain language of the statute, set forth above, does not require such accountings. In fact, the statute on its face requires no accountings at all. Instead, the statute simply requires the Board to "secure the largest measure of legitimate and reasonable advantage to the state." Section 77-1-202, MCA. Of course, this Court may not "insert what has been omitted" when

interpreting a statute. Section 1-2-101, MCA. This principle counsels against reading a specific accounting requirement into § 77-1-202, MCA.

[\*P15] However, FOWS argues that, despite the absence of an explicit requirement in the statute, we should reach a conclusion that the Board can fulfill its obligation to secure the largest measure of benefit to the state with regard to proposed timber sales only by conducting an accounting of all costs and benefits at the harvest level. FOWS reasons that a "comprehensive economic evaluation" is "implicit in the plain language [\*\*\*\*11] of the statute," particularly when the Board's fiduciary role with regard to school trust lands is considered.

[\*P16] FOWS's reference to the purposes which the Board must serve is not inappropriate. "We have many times stated that statutes must be read and considered in their entirety and the legislative intent may not be gained from the wording of any particular section or sentence, but only from a consideration of the whole." *State v. Heath*, 2004 MT 126, P27, 321 Mont. 280, P27, 90 P.3d 426, P27 (citing *Home Bldg. & Loan Ass'n of Helena v. Fulton* (1962), 141 Mont. 113, 115, 375 P.2d 312, 313). We are to give effect to all statutory provisions within a statutory scheme. Section 1-2-101, MCA. The process of reading relevant statutory schemes in their entirety is what allows the Court to give true effect to the will of the Legislature. *Dukes v. City of Missoula*, 2005 MT 196, P14, 328 Mont. 155, P14, 119 P.3d 61, P14. Above, we have set forth the underpinnings of the Board's trust obligation over school lands, and we now turn to the broader statutory structure governing that obligation.

[\*P17] [\*\*\*\*12] While § 77-1-202 is itself silent about accounting obligations, there are provisions within the statutory scheme which illuminate the legislative intent regarding the Board's accounting obligations. Section

77-1-223, MCA, "Forest land report to trust beneficiaries--contents," and § 77-1-224, MCA, "Asset value and average return of revenue methods described," detail the Board's duties in reporting to trust beneficiaries, requiring yearly reports to the trust beneficiaries, and instructing how the trust assets must be valued. These statutes represent the Legislature's affirmative efforts to require the Board to account for costs and profits in the timber-sale process. It is clear that **[\*\*192]** the accounting required by §§ 77-1-223 and 77-1-224, MCA, does not include harvest-level reconciliation.

**[\*P18]** In light of the explicit accounting directives set forth in these statutes, we are hard pressed to conclude that the Legislature somehow meant to imply a more specific accounting requirement within § 77-1-202, MCA, as urged by FOWS. To do so, we would need to determine that the Legislature "implicitly" required **[\*\*\*\*13]** an accounting by way of § 77-1-202, MCA, which is silent on the issue, despite the fact it explicitly addressed the Board's accounting requirements in other provisions of the same statutory scheme.

**[\*P19]** FOWS asserts that these other statutory accounting requirements are insufficient because they do not require the costs of individual sales, here the Goat Squeezer sale, to be calculated. It argues that, if the Board's "economic analysis is flawed or incomplete," the Board cannot demonstrate that it is securing the largest measure of legitimate and reasonable advantage.

**[\*P20]** This argument erroneously assumes that the "legitimate and reasonable advantage" which the Board must pursue is exclusively an economic one. While financial return is, without question, a vital purpose, it is not the Board's only goal. The law recognizes the unique nature of the Board's obligation to manage the

school trust lands. Land trusts require maintenance efforts to ensure long-term sustainability, and the Board is thus forced to make "difficult to **[\*\*\*399]** account for" decisions aimed at (1) ensuring long-term sustainability of school trust lands, while also (2) providing **[\*\*\*\*14]** adequate resources to present beneficiaries. See Babcock, 147 Mont. at 53-54, 409 P.2d at 811; see also § 77-1-203, MCA. This duality of purpose is unique in the context of land and resource management because it requires a trustee to consider more than just immediate financial benefit in its decision making. Indeed, one purpose of the Goat Squeezer sale was to promote timber-stand health.

**[\*P21]** Further in this regard, § 77-1-203, MCA, "Multiple Use Management," requires land management with the goal of promoting multiple purposes on the land, "so that . . . harmonious and coordinated management of the various resources, each with the other, will result without impairment of the productivity of the land . . . ." Section 77-1-203(1)(b), MCA. This statute evidences legislative recognition that in the context of trust land management, sustainable use and long-term forest health are important non-economic factors which the Board must also consider. Although the statutory directive to "secure the largest measure of legitimate and reasonable advantage" certainly **[\*\*193]** includes economics, **[\*\*\*\*15]** the phrase is not limited in purpose to financial return, thus undercutting FOWS's argument that there must be additional accounting efforts in order to comply with it.

**[\*P22]** We concede that additional information and analysis is always possible, and may very well be advantageous. Certainly, a limb by limb, tree by tree, or acre by acre accounting is theoretically possible in the context of a timber sale, and undoubtedly such accountings would help the Board in its evaluation of proposed timber sales. Indeed, one could envision many things which could be read into the language of

"secure the largest benefit" that would aid in the performance of the Board's duties. Of course, at some level, additional analysis would probably be prohibitively expensive and counterproductive. The point, however, is that it is not the duty of this Court to decide what accounting measures would best serve the Board in the fulfillment of its obligations. Those are matters for the Board and the Legislature.

[\*P23] Given the lack of evidence to the contrary, we cannot conclude that the Board, in view of the multiple purposes it must fulfill with regard to school trust lands, the deference which [\*\*\*\*16] the law provides in its administration of school trust lands, and current statutory accounting requirements, has not or cannot secure the largest measure of benefit without a harvest-level accounting of timber sales. Consequently, we conclude that such a requirement is not implicit within § 77-1-202, MCA.

#### ***Strict Accountability***

[\*P24] Finally, we address FOWS's brief argument that harvest-level accounting is required under § 77-1-202, MCA, by virtue of the "strict accountability" requirement of Article VIII, Section 12 of the Constitution, which provides:

Strict accountability. The legislature shall by law insure strict accountability of all revenue received and money spent by the state and counties, cities, towns, and all other local governmental entities.

[\*P25] Interpreting this provision, we have stated that "the Constitution indicates that the strict accountability function is not self-executing." Reep v. Board of County Commissioners (1981), 191 Mont. 162, 169, 622 P.2d 685, 689. The provision directs the legislature to implement the provision "by law," and, as such, [\*\*\*\*17] it is up to the Legislature to create the statutory means which ensure "strict accountability." In *Reep*, the

Legislature, in the context of county government audits, required the Department of Community Affairs to [\*\*194] conduct "comprehensive audits," instead of leaving that task to the county auditor. Reep, 191 Mont. at 169, 622 P.2d at 688-89. The effect of that decision was to recognize that the Legislature had significant discretion in creating a statutory scheme which satisfied the "strict accountability" mandate. *See also, Grossman v. State Dep't of Natural Res. (1984), 209 Mont. 427, 464, 682 P.2d 1319, 1338* (holding that DNRC's issuance of coal tax severance bonds for water resource development did not violate the strict accountability requirement). Such discretion is necessary given the breadth and diversity of monies spent and [\*\*\*400] received by various agencies of the State of Montana, and the peculiar accounting difficulties that may be faced in some agencies and not in others.

[\*P26] Here, the Legislature responded to the need for strict accountability by enacting, § 77-1-223, MCA, requiring annual detailed trust [\*\*\*\*18] reports to all beneficiaries, and § 77-1-224, MCA, describing exactly how certain revenue must be calculated and reported to the beneficiaries. These provisions constitute the Legislature's effort to ensure accountability.

[\*P27] FOWS does not argue that these statutes are unconstitutional for failing to ensure "strict accountability." Instead, it appears to argue that § 77-1-202, MCA, must be read as requiring harvest-level accounting to give effect to the constitutional mandate for strict accountability. However, the Legislature clearly addressed "strict accountability" of trust revenues and administration costs by enacting the statutes addressed above. We cannot conclude that, in order to ensure strict accountability, a harvest-level accounting requirement must also be mandated.

#### ***Conclusion***

[\*P28] As the United States Supreme Court noted in *Chevron U.S.A. v. N.R.D.C.* (1984), 467 U.S. 837, 865, 104 S. Ct. 2778, 2793, 81 L. Ed. 2d 694, 717, "judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing [\*\*\*\*19] political interests, but not on the basis of the judges' personal policy preferences." It may be easy to second-guess the Board's approach of conducting programmatic review of timber sales and the Legislature's two-time rejection of bills requiring harvest-level accounting of timber sales. However, the question here is not whether more specific accounting is preferable or even desirable. Rather, the question is whether harvest-level accounting of proposed timber sales is required by law. After review of the Enabling Act, the Montana Constitution, and the statutory scheme, we conclude that the Board is [\*\*195] not required by law to conduct harvest-level review of timber sales. Therefore, we conclude that the Board is not in violation of § 77-1-202, MCA, when it forgoes harvest-level financial reconciliation. Consequently, the request of FOWS for attorney fees is also denied.

[\*P29] Affirmed.

/S/ JIM RICE

We Concur:

/S/ KARLA M. GRAY

/S/ JOHN WARNER

/S/ BRIAN MORRIS

Concur by: Brian Morris

**Concur**

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Justice Brian Morris concurs.

[\*P30] I concur in the conclusion reached by Judge Sherlock and this Court on appeal that nothing in the plain [\*\*\*\*20] language of § 77-1-202, MCA, requires the Board of Land Commissioners to conduct a harvest-level financial accounting when considering a proposed timber sale on public trust lands. I write separately, however, to reiterate several points from our decision in *Montanans for School Trust v. Darkenwald*, 2005 MT 190, 328 Mont 105, 119 P.3d 27 (*Montrust II*), that bear on the outcome here.

[\*P31] As the Court points out in P22, many things could be read into the language of "secure the largest benefit" of § 77-1-202, MCA, that would aid in the performance of the Board's duties in managing school trust lands. We noted in *Montrust II* that the Board's discretionary authority to "secure the largest benefit" potentially countenances accepting lease terms less than the highest bid in order to effectuate sustained yield concepts and ensure the long term strength of the trust corpus. *Montrust II*, P56, citing *State v. Babcock* (1966), 147 Mont. 46, 409 P.2d 808.

[\*P32] The Legislature also retains the ability to impose reasonable constraints upon the Board's discretion that the Board [\*\*\*\*21] cannot ignore in carrying out its trust responsibilities. *Montrust II*, P61. For example, in *Skyline Sportsmen's Ass'n. v. Bd. of Land Commissioners* (1997), 286 Mont. 108, 114, 951 P.2d 29, 32, in the context of a proposed exchange of school trust land, we held that "neither the Board's fiduciary duty to the trust beneficiaries nor . . . other factors" relieves the Board of its constitutional obligation to follow the "regulations and restrictions" imposed by the Legislature. We recognize that some legislative decisions may cabin the Board's discretion in managing state trust lands in the short term, but these same decisions also may help the [\*\*\*\*401] Board "secure the largest benefit" in the long run. These reasonable legislative regulations include

various environmental and land-use restrictions. *Montrust II*, P57.

[\*P33] Thus, as the Court correctly concludes today, nothing in the language of § 77-1-202, MCA, that directs the Board to "secure the [\*\*196] largest benefit," requires the Board to conduct a harvest-level financial accounting. Likewise, nothing in § 77-1-202, MCA, prevents the Board from considering various [\*\*\*\*22] non-economic factors, including the scenic and aesthetic effects of proposed uses, in seeking to "secure the largest benefit" for trust beneficiaries when contemplating whether to approve proposed timber sales.

/S/ BRIAN MORRIS

Dissent by: W. William Leaphart; James C. Nelson

## Dissent

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Justice W. William Leaphart dissenting.

[\*P34] The Majority astutely observes that "we cannot conclude that the Board . . . has not . . . secured the largest measure of benefit without a harvest-level accounting of timber sales." P23. Nor can we, I submit, conclude that the Board has fulfilled this statutory mandate absent such accounting. This is the precise reason why § 77-1-202, MCA, requires harvest-level accounting of timber sales. For in the absence of such accounting, the statutory command to the Board of Land Commissioners to "secure the largest measure of legitimate and reasonable advantage to the state," § 77-1-202(1), MCA, is rendered impotent--mere surplus verbiage. While it is true that the Board could conduct its accounting at any level of abstraction (*i.e.*, "limb by limb, tree by tree"), the most rational manner in which [\*\*\*\*23] to do so--indeed the only manner which gives substantive meaning to the commands of § 77-1-

202, MCA--is at the harvest level (*i.e.*, sale by sale). The Board makes discrete management decisions pertaining to individual timber harvests. The Board does not decide to make these sales on a "programmatic" basis; rather, the decision whether to harvest from a particular stand of trees is made, as it should be, with respect to each individual sale. Only by accounting for its actual costs on a per-sale basis can the Board have any understanding of the marginal profits (*i.e.*, "advantage to the state") reaped by its various management decisions. It takes little business acumen to know that one should not dispose of over three-quarters of a million dollars of assets in a single lump sale without bothering to look at the rate of return to one's investment. It takes even less to understand that without comparing the costs and benefits it is preposterous to suggest that one has secured the largest measure of benefit. But we should be clear, as is the Majority, that financial considerations are but one of many considerations that the Board must account for in making [\*\*\*\*24] its management decisions. Rather than excusing the Board's burying its head in the sand, however, the need to simultaneously consider each sale's environmental, ecological and silvicultural implications supports the common sense notion that the Board should consider the various costs and benefits of individual timber sales.

[\*P35] [\*\*197] Aside from its financial contributions to (or incremental depletions of) the School Trust, it is clear that every timber sale will have environmental, ecological and silvicultural effects, both positive and negative. The State assures us that the Goat Squeezer sale will have the beneficial effects of promoting timber stand health and vigor by removing trees at risk of infection and will promote regeneration of shade intolerant plant species. The harvest may even increase the rate of growth of decadent portions of the stand. On the other hand, the road construction necessary to complete the sale will likely contribute to erosion and



sedimentation of streams, the harvesting of trees will reduce the winter range available to white-tailed deer, and may eliminate those decadent portions of the stand which prove vital to maintaining varied ecological niches [\*\*\*\*25] capable of sustaining diverse biota. These effects, both positive and negative, should all play into the Board's calculus in making its determination whether to proceed with the sale. Unlike the pecuniary implications of the sale, however, it makes *no sense whatsoever* to aggregate these effects in a "programmatic analysis" of all sales completed during a year. The economic, ecological and silvicultural effects of a timber harvest are inherently local. Aggregating these effects across several sales would render consideration [\*\*\*402] of them utterly meaningless. An improvement in white-tailed deer's winter habitat in the Elkhorn Mountains will do nothing to offset the potentially deleterious effects of the Goat Squeezer sale on the winter habitat of white-tailed deer who live in the vicinity of Swan Lake. Stream sedimentation caused by roads constructed for the Goat Squeezer sale will not be mitigated by the closure of a road in the Gallatin Canyon. Aggregating these effects forces the Board to compare apples to oranges. More importantly, it precludes the Board making informed decisions whether to proceed with any particular management decision.

[\*P36] Accounting on a per-sale basis [\*\*\*\*26] not only facilitates rational management decisions today, it enables the Board to make far better decisions concerning future resource allocations and land management decisions—it promotes sustainability. All land is not created equal. Because of varying sun exposure, soil fertility--nutrient richness, moisture retention, aeration, etc.--exposure to the elements, and other variables, certain lands are better suited to growing trees for harvest than others. Because of these attributes, certain stands of forest will require more

expensive, intensive management (such as pre-harvest thinning) in order to produce commercially viable timber. Although past success is not a perfect predictor of future performance, it is one [\*\*198] extremely useful indicator at a land manager's disposal. If the management costs incurred in growing trees for timber harvest in an area greatly exceed the harvest receipts (and would do so irrespective of timber prices), this indicates that perhaps such an area could be better utilized in the future for something other than silviculture. Such adaptive management is routine practice for land managers. Without the Board's accounting for the management expenditures incurred, [\*\*\*\*27] however, its future management decisions are deprived the adaptive advantages that could be gleaned from this information.

[\*P37] The Legislature has told us that the Board has a duty to "secure the largest measure of legitimate and reasonable advantage to the state." Section 77-1-202(1), MCA. The Legislature has also declared that "the preservation of natural areas on state trust land has sufficient value to present and future education to meet the state's obligation for the disposition and utilization of trust land as specified in The Enabling Act." Section 76-12-103(2), MCA. There is no indication that the area comprising the Goat Squeezer sale has been designated a "natural area." See § 76-12-104, MCA. Nevertheless, the Legislature has established a baseline measure of benefit that must be exceeded in order to engage in extractive practices on certain trust lands. Certainly in such instances, the only way to determine whether the "advantage to the state" exceeds this baseline is by determining the marginal benefit expected from the harvest (or mine or dam).

[\*P38] The Majority points [\*\*\*\*28] us to two statutory provisions that purportedly "illuminate the legislative intent regarding the Board's accounting obligations." P17. These provisions, however, say very little about

the Board's duties of accounting, instead detailing the Board's duty to transmit reports to beneficiaries. Section 77-1-223, MCA, sets forth the required contents of financial reports, which the Board must prepare and provide annually to the beneficiaries. These reports must summarize the asset value of the forested tracts and calculate the average return of revenue on asset value for the forested tracts, § 77-1-223(2)-(4), MCA, which is calculated by utilizing a ten-year rolling average, § 77-1-224, MCA. The Board is not explicitly required to conduct any accounting whatsoever; rather, § 77-1-223, MCA, like § 77-1-202, MCA, only implicitly requires the Board to complete any accounting. Moreover, calculating a ten-year rolling average return of revenue on asset value is not sufficient to ensure that the Board secures the largest benefit, even on a "programmatic" (*i.e.*, annual) basis. In [\*\*\*\*29] fact, the Board could lose money on any of its individual transactions, during any single year or during a string of consecutive [\*\*199] years, and the beneficiaries would never learn of these losses so long as the Board reported a net gain over the course of a decade. This Court has indicated that the State, as trustee, must "be able to prove 'that the information in the accounting is sufficiently accurate [\*\*\*403] and complete to enable the beneficiaries to protect and defend the equitable or beneficial interest.'" Montanans for the Responsible Use of the School Trust v. Darkenwald, 2005 MT 190, P29, 328 Mont. 105, P29, 119 P.3d 27, P29 ( Montrust II) (quoting Loring, A Trustee's Handbook § 8.24, at 622 (Charles E. Rounds, ed., 2005)). Is a ten-year rolling average return sufficiently complete to enable the beneficiaries to defend their interest? Does this method of accounting meet the Board's "higher duty to the public than . . . an ordinary businessman," Montanans for the Responsible Use of the School Trust v. State ex rel. Board of Land Comm'rs, 1999 MT 263, P14, 296 Mont. 402, P14, 989 P.2d 800, P14 (citation omitted), would owe to his beneficiaries? [\*\*\*\*30] Would we

tolerate such loose accounting by a private trustee? Of course not. The reporting methodology in no way interferes with the Board's ability to conduct more detailed accounting. Nor does it enable the Board to ensure that it has secured the largest measure of reasonable and legitimate advantage. To that end, these procedures, aimed simply at keeping the beneficiaries moderately informed, are utterly worthless.

[\*P39] The majority relies primarily on two prior cases interpreting the statutory command to the Board to "secure the largest measure of legitimate and reasonable advantage to the state"--State ex rel. Thompson v. Babcock (1966), 147 Mont. 46, 409 P.2d 808, and Montrust II--both of which are easily distinguishable from the present controversy. In Babcock, we indicated that in order to fulfill its statutory mandate, which we described as "the principal restriction on the power of the Board," 147 Mont. at 52, 409 P.2d at 811, the Board must have "a large discretionary power." Babcock, 147 Mont. at 51, 409 P.2d at 811. In Babcock, we allowed the Board to knowingly accept less than the highest bid for the [\*\*\*\*31] lease of agricultural lands because the interest in having a lessee who would be a good steward and not abandon the lease was deemed worthy of consideration. Babcock, 147 Mont. at 49, 52-53, 409 P.2d at 811. Unlike the present controversy, the Board was well informed about the return it was receiving, but chose to receive less than the maximum financial return based on non-pecuniary benefits. Here, in contrast, the Board has no sense of the return it is receiving on the Goat Squeezer sale. If the Board knew it were selling assets at a loss, it could conceivably provide an acceptable [\*\*200] explanation for doing so, such as stemming the spread of disease in a stand of trees.

[\*P40] In Montrust II, this Court affirmed the Board's decision to sell a future stream of mineral royalties and approved the Board's method for determining the

present full market value of that future stream of income. *Montrust II*, PP32, 64. The plaintiffs challenged the discount rate that the Board utilized in calculating the present value of the future stream of revenue. Both sides presented expert testimony regarding the discount rate and members of the Board testified that they had [\*\*\*\*32] considered various discount rates before eventually selecting one. *Montrust II*, PP45-46. We declined to "control the discretion of the board" in its selection of a discount rate and consequent calculation of full market value. *Montrust II*, P52 (citation omitted). Nevertheless, the Board did prospectively consider its options before selecting a discount rate and calculating the present full market value of the specific assets sold. In stark contrast to the present case, the Board did not dispose of trust assets without bothering to consider whether it was receiving a fair return (or generating any revenue at all).

[\*P41] Finally, to the extent that the Court's decision in *Montrust II* hinged on the "Board's discretionary authority . . . in order to effectuate sustained yield concepts and ensure the long-term strength of the trust corpus," P56, this consideration counsels against allowing the Board to proceed with timber sales under a veil of ignorance. Trees are a classic example of a renewable resource: timber can be harvested from the same land in a perpetual cycle. Growing trees for harvest, however, requires a considerable outlay of resources throughout the growth [\*\*\*\*33] cycle. Moreover, not all land is equally fertile and conducive to silviculture. Therefore, a manager who seeks to maximize the generative capacity and income from her land should track expenditures and returns [\*\*\*404] in order to rationally allocate land to its optimal uses in the future. Without doing so, it is impossible for a manager to plan so as to "secure the largest measure of legitimate and reasonable advantage" from her lands.

[\*P42] I dissent.

/S/ W. WILLIAM LEAPHART

Justice Patricia Cotter joins in the dissent of Justice Leaphart.

/S/ PATRICIA O. COTTER

Justice James C. Nelson dissents.

[\*P43] It has been a tough year for the School Trust. First, we upheld a legislative scheme that robs the Trust of resources for future school children in the name of current tax relief (*Montanans for the Responsible Use of the School Trust v. Darkenwald*, 2005 MT 190, PP66-69, [\*\*201] 328 Mont. 105, PP66-69, 119 P.3d 27, PP66-69 (Leaphart, J., dissenting) (*Montrust II*)); throws general trust law and fiduciary principles out the window as far as the Trust is concerned; and approves a \$ 94,000,000.00 short-fall in the Trust by 2031 (*Montrust II*, PP70-98 (Nelson, [\*\*\*\*34] J., dissenting)).

[\*P44] Now we are told by the majority at P10 of this Opinion that while the Board of Land Commissioners (the Board) does not have "unfettered discretion" in determining "fair market value," we will not find an abuse of that discretion unless the Board's action is, "in effect, fraudulent." What a lofty standard to set for our elected trustees in their management of the lands committed under our Constitution and Enabling Act to the education of Montana's children! And, what a contrast with the standard we articulated in *State v. Babcock* (1966), 147 Mont. 46, 54, 409 P.2d 808, 812 (the State Board of Land Commissioners "owes a higher duty to the public than does an ordinary businessman"). Now the standard is: "Do what you want; just don't do something that involves bad faith, dishonesty or moral turpitude." See *Black's Law Dictionary* 672 (7th ed. 1999). Now, absent being able to prove outright theft, graft or corruption, no future litigant such as Friends of the Wild Swan (FOWS) or Montrust will have a chance in litigation seeking to protect the Trust from

mismanagement and waste by the Board.

[\*P45] Obviously, with the abuse of discretion [\*\*\*\*35] bar set at ground level, pretty much anything the Board chooses to do under § 77-1-202, MCA, will be acceptable. I disagree that the bar is as low as the majority says it is. Moreover, I disagree that every decision the Board makes under such a ridiculously inadequate standard is entitled to "respectful consideration" or deference.

[\*P46] I agree with FOWS's argument and analysis, the majority's primer on statutory construction notwithstanding. Section 77-1-202(1), MCA, can and should be interpreted to require that each harvest must, as the statute plainly requires, "secure the *largest* measure of legitimate and reasonable advantage to the state and provide for the long-term financial support of education." The majority takes comfort in the fact that the statute "does not require accountings." Likewise, it is also true that neither does the statute authorize the Board to pursue a "methodology" of "program-wide accounting on a yearly basis"--i.e., accepting losses on some harvests under the premise that at the end of the year there should, theoretically, be more profitable harvests than losers.

[\*P47] Even common [\*\*\*\*36] sense dictates that one cannot secure the *largest* [\*\*202] measure of return if that measure--profitability--is reduced by unprofitable harvests. If I have three proposed harvests and will make a combined profitable return of \$ 200,000.00 on two of the three, how exactly am I securing the *largest* measure of return, if I throw into that mix, the third sale on which I will lose \$ 50,000.00? The real problem is that the Board will never know which individual harvests are winners or losers--i.e., it will never know whether it is securing the *largest* measure of return--because it does not account for the harvests individually. I am reminded of a pizza shop commercial a few years ago

that had the proprietor saying that he loses money on each individual sale, but makes up for that in volume.

[\*P48] The majority's attempt to "illuminate [] legislative intent" in the provisions of §§ 77-1-223<sup>1</sup> and 77-1-224, MCA, is also [\*\*\*405] unavailing. These statutes--the Legislature's "affirmative efforts," as the majority puts it--are nonspecific as to accounting methods. None require any particular accounting practice, and none prohibit an accounting method which would apprise the Board as to whether [\*\*\*\*37] it is receiving the "*largest* measure of legitimate and reasonable advantage to the state" on each harvest.

[\*P49] The majority's reliance on these general statutes ignores the Board's fiduciary responsibility with respect to state trust lands. What we stated in Montanans for the Responsible Use of the School Trust v. Board of Land Commissioners, 1999 MT 263, P14, 296 Mont. 402, P14, 989 P.2d 800, P14 (*Montrust I*), bears repeating here:

The State of Montana is a trustee of those lands (hereafter, the school trust lands). *See, e.g., Toomey v. State Board of Land Com'rs* (1938), 106 Mont. 547, 559, 81 P.2d 407, 414; *State v. Stewart* (1913), 48 Mont. 347, 349, 137 P. 854, 855. Further, "The state board of land commissioners, as the instrumentality created to administer that [\*\*\*\*38] trust, is bound, upon principles that are elementary, to so administer it as to secure the largest measure of legitimate advantage to the beneficiary of it." *Stewart*, 48 Mont. at 349-50, 137 P. at 855. The State Board of Land Commissioners

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<sup>1</sup>The record reflects that the "Asset Value Reports" for trust assets in which the majority seem to take comfort are based on program-level costs that are simply estimates.

(hereafter, the Board) "owes a higher duty to the public than does an ordinary businessman." *State v. Babcock* (1966), 147 Mont. 46, 54, 409 P.2d 808, 812.

Whether the Board's fiduciary obligations--its higher duty to the [\*\*203] public--are reflected in unrelated, general accounting statutes does not alter its fiduciary obligation to secure the *largest* measure of legitimate and reasonable advantage to the state trust assets. Section 77-1-202, MCA, imposes on the Board duties that would be imposed on any fiduciary. Accounting for costs to ensure each disposition of the timber assets of the trust to ensure that the *largest* advantage is achieved is part of that duty.

[\*P50] Furthermore, the majority's rationale--primarily focusing on legislative accounting requirements (or more properly, the lack thereof)--is not bolstered by its discussion of the Board's duties as regards forest [\*\*\*\*39] management practices and non-economic considerations. Despite what this Court did to minimize the Board's fiduciary obligations in *Montrust II*, those trustee obligations, created under the Enabling Act and codified at § 77-1-202, MCA, require that the Board ensure the *largest* measure of legitimate and reasonable advantage to the state in the disposition of trust assets. The salient question is whether or not, at the moment of disposition, the Board can definitively state that an individual timber sale creates the statutorily required "largest measure" of advantage to the state and trust beneficiaries. Without knowing the costs of the individual sale, the Board cannot answer that question; it cannot accurately evaluate the sale's economic impact; and, therefore, it cannot comply with the clear directive of § 77-1-202, MCA.

[\*P51] Additionally, the majority never explains how exactly forest management practices and non-economic considerations would be harmed by the Board

accounting for individual harvests. If anything, those practices and considerations would be enhanced because of the Board's more detailed knowledge of the legitimate and reasonable [\*\*\*\*40] advantages of each sale along with the associated costs. Justice Leaphart's dissent drives this point home.

[\*P52] Here, FOWS challenged the Goat Squeezer sale, not the annual timber harvest program for all state trust lands. The undisputed fact is that the Board does not know the costs or benefits of this sale in order to make an informed decision as to whether the sale's projected revenue warrants approval. Program-level accounting does not answer this question and, more importantly, does not obviate the Board's fiduciary obligation to realize the *largest* measure of advantage in each individual disposition of trust assets.

[\*P53] In summary, the record reflects that the Goat Squeezer sale will incur an estimated \$ 750,400.00 in "expenditures" for the chosen action, Alternative C. The record also reflects that stumpage values, an [\*\*204] important factor in determining any timber sale, continue to decline as does the rate of return on state forest lands. Here, the Board has failed to demonstrate that the subject timber [\*\*\*406] sale has secured any advantage, much less the *largest* measure of legitimate and reasonable advantage which § 77-1-202, MCA [\*\*\*\*41] , requires.

[\*P54] Interestingly, the United States Forest Service accounts for costs and revenues of each individual timber sale on federal holdings in Montana, so it cannot be that difficult an endeavor. Private businesses throughout this country utilize cost accounting as part of their cost-benefit analysis; yet, seemingly, the Board and the State of Montana lack this elemental accounting capability with respect to timber sales from School Trust lands.

**[\*P55]** The Board is not complying with § 77-1-202, MCA, if it cannot demonstrate that it has secured the *largest* legitimate and reasonable advantage to the State with regard to each sale of Trust assets. Not only has that unambiguous statutory mandate not been proven in this case; but, as a result of the Court's decision here, the Board--exercising it's nearly unlimited discretion--will not, as a practical matter, have to concern itself with this statutory requirement in the future. Under these circumstances, we can only hope, that what the State loses on individual sales, it will make up in volume.

**[\*P56]** I dissent.

/S/ JAMES C. NELSON

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**Mont. Indep. Living Project v. City of Helena**

Supreme Court of Montana

December 22, 2020, Submitted on Briefs; January 26, 2021, Decided

DA 20-0247

**Reporter**

2021 MT 14 \*; 403 Mont. 81 \*\*; 479 P.3d 961 \*\*\*; 2021 Mont. LEXIS 82 \*\*\*\*; 2021 WL 248486

The MONTANA INDEPENDENT LIVING PROJECT, INC., a Montana Non-Profit Corporation, Plaintiff and Appellant, v. The CITY OF HELENA, and JOHN DOES I-XXX, Defendant and Appellee.

**Subsequent History:** Released for Publication February 16, 2021.

**Prior History:** [\*\*\*\*1] District Court of the First Judicial District, In and For the County of Lewis and Clark, Cause No. CDV 2016-484. Honorable Kathy Seeley, Presiding Judge.

Maffit v. City of Helena, 2020 Mont. LEXIS 2285 (Mont., Sept. 1, 2020)

**Counsel:** For Appellant: Michael C. Doggett, Doggett Law Offices, Missoula, Montana.

For Appellee: Murry Warhank, Erin Lyndes, Jackson, Murdo & Grant, P.C., Helena, Montana; Thomas J. Jodoin, City Attorney, Iryna O'Connor, Deputy City Attorney, Helena, Montana.

**Judges:** We Concur: MIKE McGRATH, JAMES JEREMIAH SHEA, INGRID GUSTAFSON, DIRK M. SANDEFUR. Justice Ingrid Gustafson, concurring. Justice Beth Baker delivered the Opinion of the Court.

**Opinion by:** Beth Baker

**Opinion**

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[\*\*\*962] [\*\*83] Justice Beth Baker delivered the Opinion of the Court.

[\*P1] The Montana Independent Living Project, Inc. ("MILP") appeals the First Judicial District Court's dismissal of its claim that the City of Helena retaliated against it when the City lowered the priority of MILP's request for funding as a direct result of an unrelated discrimination complaint MILP had filed against the City. The District Court concluded that § 49-2-301, MCA, does not provide a cause of action to non-human entities and [\*\*\*963] dismissed MILP as a plaintiff for lack of standing. We affirm.

**[\*\*84] FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>**

[\*P2] MILP is a state- and federal-funded non-profit [\*\*\*\*2] corporation and center for independent living that advocates for people with disabilities in

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<sup>1</sup> Because this case was dismissed pursuant to M. R. Civ. P. 12(b)(6), we draw on the facts alleged in MILP's complaint, which we take as true on consideration of its appeal. *See Hein v. Sott*, 2015 MT 196, ¶ 7, 380 Mont. 85, 353 P.3d 494.

Montana. MILP requested funds from the City in 2014 to purchase a van to transport people with disabilities when City services were not available. The Helena Area Transportation Advisory Committee ("HATAC"), an informal committee of stakeholders that provides non-binding recommendations regarding transportation services to the City, advised the City that it ranked MILP's request as its first priority for funding.

[\*P3] On February 17, 2015, MILP and its Chief Executive Officer Robert Maffit filed a complaint ("Initial Complaint") with the Montana Human Rights Bureau ("HRB") alleging the City's public transit system had discriminated against people with disabilities by segregating them from others in a new series of bus routes. In a subsequent meeting to establish the City's Transit Development Plan, the City Commission ranked a fixed-route bus line project ahead of MILP's van request, departing from its typical practice of following the HATAC's recommendations. Despite the subordinate ranking, the Montana Department of Transportation funded MILP's request. MILP then voluntarily dismissed its Initial [\*\*\*\*3] Complaint and filed a new complaint with the HRB. The new complaint ("Retaliation Complaint") alleged that the City violated § 49-2-301, MCA, when, as a direct consequence of MILP's Initial Complaint, it retaliated against MILP by not prioritizing its request for funding.

[\*P4] As part of its own investigation, MILP filed an open records request with the City, resulting in the discovery of e-mails and other communications it alleges show animus and discriminatory behavior toward MILP and Maffit. MILP claims "[t]he e-mails and the City's other actions showed that the City engaged in a coordinated effort to discredit MILP and the HATAC." The HRB in its decision, however, found no reasonable cause to believe the City had retaliated against either MILP or Maffit. The HRB further concluded that, as a

corporation, MILP did not have standing to file a retaliation complaint under § 49-2-301, MCA.

[\*P5] MILP and Maffit then brought an action in the District Court. The [\*\*85] amended complaint alleged retaliation and sought a judicial determination that the HRB's decision was unlawful, incorrect, and an abuse of discretion. MILP moved for partial summary judgment regarding non-human entities' ability to file retaliation complaints under the [\*\*\*\*4] Montana Human Rights Act ("MHRA"). The City moved to dismiss MILP as a plaintiff and the retaliation count for failure to state a claim. The District Court granted the City's motion to dismiss on November 18, 2019; it concluded that § 49-2-301, MCA, does not allow non-human entities to sue for retaliation and MILP thus had no standing.

[\*P6] MILP petitioned this Court for supervisory control of the District Court's ruling, which we denied. *See Maffit v. Mont. First Judicial Dist. Ct.*, 400 Mont. 556 (2020). Maffit then voluntarily dismissed his complaint, and the District Court issued its final Judgment. MILP appeals.

## STANDARD OF REVIEW

[\*P7] "We review de novo a district court's ruling on a M. R. Civ. P. 12(b)(6) motion to dismiss." *Hein v. Sott*, 2015 MT 196, ¶ 7, 380 Mont. 85, 353 P.3d 494 (citation omitted). "The correct interpretation of a statute is a question of law that we review de novo." *Bates v. Neva*, 2014 MT 336, ¶ 9, 377 Mont. 350, 339 P.3d 1265 (citation omitted).

## DISCUSSION

[\*P8] *May a non-human entity file a complaint for retaliation under the Montana Human Rights Act, § 49-2-301, MCA?*



[\*P9] [\*\*\*964] The MHRA provides broad protection from discrimination. Bates, ¶ 26. The MHRA includes retaliation against an individual as a prohibited discriminatory practice:

It is an unlawful discriminatory practice for a person, educational institution, financial institution, or governmental entity [\*\*\*\*5] or agency to discharge, expel, blacklist, or otherwise discriminate against an individual because the individual has opposed any practices forbidden under this chapter or because the individual has filed a complaint, testified, assisted, or participated in any manner in an investigation or proceeding under this chapter.

Section 49-2-301, MCA. "Person" is defined broadly to include "one or more individuals, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated employees' associations, employers, [\*\*86] employment agencies, organizations, or labor organizations." Section 49-2-101(18), MCA. The MHRA does not define "individual."

[\*P10] The District Court concluded that § 49-2-301, MCA, does not provide standing to non-human entities to file retaliation claims because the legislature explicitly chose to use the word "individual" instead of "person" in that provision. It disagreed with MILP that this interpretation would lead to an absurd result because "[i]t is consistent with the traditional notion of standing. That is, while an advocacy group may file a discrimination claim on behalf of an individual or persons, an individual, not an organization, must show that illegal [\*\*\*\*6] retaliation is directed at that individual complainant." MILP argues that the District Court's conclusion is erroneous because it does not comport with the MHRA's broad purpose and legislative history or with federal authority that supports a broad implied

right of action for retaliation.

[\*P11] When engaging in the construction of a statute, we look first to its plain language. Gannett Satellite Info. Network, Inc. v. State, 2009 MT 5, ¶ 20, 348 Mont. 333, 201 P.3d 132 (citations omitted). Language that is clear and unambiguous, using words' plain and ordinary meanings, requires no further interpretation. Gannett, ¶ 20 (citation omitted); Bates, ¶ 15 (citation omitted). Our role is "simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or omit what has been inserted." Section 1-2-101, MCA. We also construe statutory language as a whole and in light of its surrounding sections to avoid conflicting interpretations. Mont. Sports Shooting Ass'n v. State, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003 (citations omitted). We avoid constructions "that render[] any section of the statute superfluous or fail[] to give effect to all of the words used." Gannett, ¶ 19, § 1-2-101, MCA ("Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.").

[\*P12] The plain language of § 49-2-301, MCA [\*\*\*\*7], clearly and unambiguously prohibits a "person" from retaliating against an "individual" because "the *individual* has opposed any practices forbidden under this chapter or because the *individual* has" participated in a human rights matter. (Emphasis added.) By using both "person" and "individual," this provision draws a distinction between the class of actors that potentially could retaliate—any "person"—and the class of discrimination victims against whom retaliation is prohibited—any "individual." See § 1-2-101, MCA; see [\*\*87] also, e.g., Zinvest, LLC v. Gunnersfield Enters., 2017 MT 284, ¶ 26, 389 Mont. 334, 405 P.3d 1270 (quoting Gregg v. Whitefish City Council, 2004 MT 262, ¶ 38, 323 Mont. 109, 99 P.3d 151) ("Different language is to be given different construction."); accord Densley v. Dep't of Ret. Sys., 162 Wn.2d 210, 219, 173 P.3d 885, 889 (2007)

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(citations omitted) ("When the legislature uses two different terms in the same statute, courts presume the legislature intends the terms to have different meanings."). Because "person" includes both "individuals" and non-human entities under the MHRA, § 49-2-101(18), MCA, a construction that included non-human entities in a definition of "individual" would be redundant and impermissibly render that term superfluous. Bates, ¶ 18, see Formicove, Inc. v. Burlington N., Inc., 207 Mont. 189, 194, 673 P.2d 469, 471 (1983) (citation omitted) ("We must assume that the [\*\*\*965] legislature does not perform idle acts."). Applying the MHRA's explicit definition to the plain language of the retaliation statute, the term "individual" undoubtedly has a different and more limited meaning than the term "person." Giving effect to all of the statute's words, we conclude that the more limited meaning clearly and unambiguously excludes non-human entities.

[\*P13] MILP argues that because § 49-2-501(1), MCA, allows a "person" aggrieved by a discriminatory practice to file a complaint under the MHRA, use of the word "individual" in § 49-2-301, MCA, is irrelevant. But MILP misreads the operative language of § 49-2-501(1), MCA. Title 49, Chapter 2, Part 5, MCA, provides the "Enforcement" mechanisms for illegal discrimination: "[a] person claiming to be aggrieved by *any discriminatory practice prohibited by this chapter* may file a complaint with the department." Section 49-2-501(1), MCA (emphasis added). The provision allows a "person" to file a complaint, but only if the person suffers a "Prohibited Discriminatory Practice[]" as defined by Part 3 of [\*\*\*\*8] the MHRA. Included among such prohibited practices, § 49-2-301, MCA, proscribes retaliation against "an individual." That individual is the person "aggrieved" by the alleged discriminatory practice. Stated otherwise, the law makes retaliation a prohibited practice only when the retaliation is directed at an

individual. We thus find MILP's argument unpersuasive.

[\*P14] MILP additionally contends that federal authority supports an implied right of action for non-human entities to file retaliation claims if § 49-2-301, MCA, does not. Because § 49-2-301, MCA, clearly and unambiguously prohibits claims by non-human entities, any implied cause of action would be inconsistent with the statute. See [\*\*88] Lyman Creek, LLC v. City of Bozeman, 2019 MT 243, ¶¶ 17-18, 397 Mont. 365, 450 P.3d 872 (citations omitted). We need not address MILP's additional arguments regarding the legislative history of the MHRA or other federal authority interpreting the word "individual." Gannett, ¶ 20, State v. Strong, 2015 MT 251, ¶ 13, 380 Mont. 471, 356 P.3d 1078 (when the plain language of a statute is clear and unambiguous, we need not engage in further construction).<sup>2</sup>

[\*P15] We will construe the MHRA in favor of the Act's broad "intended protection" against discrimination if the provision at issue is "susceptible to more than one plausible construction." Bates, ¶ 26. Here, however, the statutes [\*\*\*\*9] are clear and unambiguous. We conclude that the plain language of § 49-2-301, MCA, does not permit non-human entities to file retaliation

<sup>2</sup> MILP contends that the related administrative rule and the HRB's application and enforcement of it also support MILP's interpretation of the statute. See Admin. R. M. 24.9.603(1) (2017) ("It is unlawful to retaliate against or otherwise discriminate against *a person* because *the person* engages in protected activity.") (emphasis added). MILP raises this argument for the first time on appeal, and we thus decline to address it. See Mont. Prof'l Sports, LLC v. Nat'l Indoor Football League, LLC, 2008 MT 98, ¶ 53, 342 Mont. 292, 180 P.3d 1142. An agency in any event may not "engraft additional and contradictory requirements on the statute." Gold Creek Cellular of Mont. LP v. State, 2013 MT 273, ¶ 12, 372 Mont. 71, 310 P.3d 533 (citation omitted).

claims under the Montana Human Rights Act. MILP's request for attorneys' fees under the private attorney general doctrine likewise thus fails. See *Faust v. Util. Sols., LLC*, 2007 MT 326, ¶ 18, 340 Mont. 183, 173 P.3d 1183 (citations omitted) (noting that a party "must succeed in some measure in the underlying controversy in order to obtain attorney fees pursuant to the private attorney general doctrine").

## CONCLUSION

**[\*P16]** The District Court was correct when it held that § 49-2-301, MCA, does not allow non-human entities to file retaliation claims under the *Montana Human Rights Act*. The plain language of the statute allows only an "individual," a natural human person, to seek redress for retaliation. We accordingly affirm the District Court's order dismissing MILP as a plaintiff.

/s/ BETH BAKER

We Concur:

/s/ MIKE McGRATH

/s/ JAMES JEREMIAH SHEA

**[\*\*\*966]** /s/ INGRID GUSTAFSON

/s/ DIRK M. SANDEFUR

Concur by: Ingrid Gustafson

## Concur

Justice Ingrid Gustafson, concurring.

**[\*P17]** I reluctantly concur with the Opinion's interpretation of § 49-2-301, MCA, **[\*\*89]** in light of the definition of "person" contained in § 49-2-101(18), MCA, and the MHRA's failure to define "individual." Despite

the plain and unambiguous language defining retaliation as **[\*\*\*\*10]** a discriminatory practice against an "individual" as opposed to a "person," in the context of the MHRA's purpose and other provisions within the MHRA, I am not necessarily convinced the Legislature intended this result. It appears fundamentally unfair and at odds with the MHRA's broad purpose and legislative history of preventing discrimination to foreclose an action if a government agency were to withhold funding from an advocacy group in retaliation for its advocacy for a protected class of individuals.

**[\*P18]** The broad purpose of MHRA is to prevent discrimination and retaliation for engaging in investigation or protected activities. The MHRA defines prohibited discriminatory practices to include retaliation (§ 49-2-301, MCA); aiding, coercing, or attempting discrimination (§ 49-2-302, MCA); discrimination in employment (§ 49-2-303, MCA); discrimination in public accommodations (§ 49-2-304, MCA); discrimination in housing (§ 49-2-305, MCA); discrimination in financing and credit transactions (§ 49-2-306, MCA); discrimination in education (§ 49-2-307, MCA); discrimination by the state (§ 49-2-308, MCA); discrimination in insurance and retirement plans (§ 49-2-309, MCA), and discrimination based on maternity and pregnancy-related leave (§§ 49-2-310 and -311, MCA). Pursuant to § 46-2-101(2), MCA, an "aggrieved party" is "a person . . . who has been or is likely to be specially **[\*\*\*\*11]** and injuriously affected by a violation of this chapter." "A person claiming to be aggrieved by any discriminatory practice prohibited by this chapter may file a complaint with the department." Section 49-2-501(1), MCA, (emphasis added). Section 49-2-501, MCA, does not preclude a "person" from filing a complaint asserting retaliation as discriminatory practices. Retaliation is a discriminatory practice prohibited by the MHRA. Section 49-2-301, MCA. MILP is clearly a "person" pursuant to § 49-2-101(18), MCA,

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asserting to be aggrieved by a prohibited discriminatory practice of the MHRA. At best, it seems incongruous to permit an advocacy group such as MILP to file a complaint alleging retaliation, but then define retaliation as being only available to "individuals" rather than "persons," such that despite being permitted to file the claim, the claim cannot survive judgment on the pleadings. But, based on the clear and unambiguous language of §§ 49-2-101(18) and -301, MCA, that is precisely what the Legislature did. I seriously question whether the Legislature truly intended advocacy groups and other "persons" to be subject to **[\*\*90]** retaliation for engaging in advocacy for a protected class of individuals with no recourse.

**[\*P19]** Further, § 49-2-501(2), MCA, permits an advocacy group to file a complaint on behalf of another **[\*\*\*\*12]** person, charging any unlawful discrimination under the MHRA. If an advocacy group does so, the advocacy group could then be retaliated against for its advocacy of the aggrieved person and could use evidence of the retaliation to prove the discrimination claim. *See Mahan v. Farmers Union Cent. Exch.*, 235 Mont. 410, 422, 768 P.2d 850, 858 (1989) (discussing the interplay between retaliation and discrimination under the statute and explaining: "Under the [MHRA], acts of retaliation for participating in proceedings before the Human Rights Commission are discrimination actions separate and apart from the claim of discrimination in the original proceedings. It might possibly be considered evidence of bad faith in the original termination of employment as well as in the retaliation."). The advocacy group, however, would then be precluded from bringing a stand-alone retaliation claim. Given the broad purpose of the MHRA and its other statutory provisions, this appears to be a legislative oversight, which has inadvertently been created by piecemeal modifications made in the MHRA over time.

/s/ INGRID GUSTAFSON

Justice Dirk Sandefur joins the Concurrence of Justice Gustafson.

/s/ DIRK M. SANDEFUR

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Caution

As of: January 13, 2022 9:17 PM Z

**Montana Env'tl. Info. Ctr. v. Department of Env'tl. Quality**

Supreme Court of Montana

September 10, 1998, Argued and Submitted ; October 20, 1999, Decided

No. 97-455

**Reporter**

1999 MT 248 \*; 296 Mont. 207 \*\*; 988 P.2d 1236 \*\*\*; 1999 Mont. LEXIS 266 \*\*\*\*; 56 Mont. St. Rep. 964; 49 ERC (BNA) 1402

MONTANA ENVIRONMENTAL INFORMATION

CENTER; CLARK FORK-PEND OREILLE COALITION;  
and WOMEN'S VOICE FOR THE EARTH, Plaintiffs and  
Appellants, v. DEPARTMENT OF ENVIRONMENTAL  
QUALITY, Defendant and Respondent, and SEVEN-UP  
PETE JOINT VENTURE, Defendant-Intervenor and  
Respondent.

Crowley & Bloomquist, P.C.; Helena, Montana.

Karl J. England, Attorney at Law, Missoula, MT.

William A. Rossbach and Elizabeth A. Brennan.  
Attorneys at Law; Missoula, MT.

Jack R. Tuholske, Attorney at Law; Missouri, Montana.

Matthew O. Clifford, Beers Law Offices; Missoula,  
Montana.

**Subsequent History:** As Corrected October 28, 1999. As  
Corrected October 29, 1999.

**Prior History:** [\*\*\*\*1] APPEAL FROM: District Court of  
the First Judicial District, In and for the County of Lewis  
and Clark, The Honorable Jeffrey Sherlock, Judge  
presiding.

**Judges:** Justice Terry N. Trieweller delivered the opinion  
of the Court. We Concur: William E. Hunt, Sr., James C.  
Nelson, Jim Regnier, Justices. Justice W. William  
Leaphart, specially concurring. Chief Justice J. A.  
Turnage joins in the specially [\*\*\*\*2] concurring opinion.  
Justice Karla M. Gray, specially concurring.

**Disposition:** Reversed and remanded for further review.

**Opinion by:** Terry N. Trieweller

**Counsel:** For Appellants: Thomas M. France (argued),  
National Wildlife Federation; Missoula, Montana.

David K. Wilson, Reynolds, Motl & Sherwood; Helena,  
Montana.

For Respondents: Rebecca W. Watson (argued), and  
Alan L. Joscelyn, Gough, Shanahan, Johnson &  
Waterman; Helena, Montana.

John North (argued), and Richard R. Thweatt, Montana  
Department of Environmental Quality; Helena, Montana.

For Amici: Frank C. Crowley and Colleen Coyle, Doney,

**Opinion**

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[\*\*1237] [\*\*209] Justice Terry N. Trieweller delivered  
the opinion of the Court.

[\*P1] The Plaintiffs, Montana Environmental  
Information Center (MEIC), Clark Fork-Pend Oreille  
Coalition, and Women's Voices for the Earth, filed an  
amended complaint in the District Court for the First  
Judicial District in Lewis and Clark County in which the

EXHIBIT K

Department of Environmental Quality (DEQ) for the State of Montana [\*\*210] was named as the Defendant and in which Seven-Up Pete Joint Venture (SPJV) subsequently intervened. Plaintiffs alleged, among other claims, that to the extent § 75-5-317(2)(j), MCA (1995) allows discharges of water from watering well or monitoring well tests, which degrade high quality waters without review pursuant to Montana's nondegradation policy found at § 75-5-303(3), MCA (1995), that statute is void for a violation of Article IX, Section 1(1) and (3) of the Montana Constitution. Plaintiffs sought an injunction suspending the exploration license that had been issued by DEQ to SPJV for pump tests to be performed at the site of its proposed gold mine. Both parties moved for summary judgment and [\*\*\*\*3] following the submission of affidavits and oral testimony, the District Court held that absent a finding of actual injury, § 75-5-317(2)(j), MCA (1995) was not unconstitutional as applied and entered judgment for the DEQ. The Plaintiffs appeal from the judgment of the District Court. We reverse and remand for further review consistent with this opinion.

[\*P2] The issue on appeal is whether the Plaintiffs have demonstrated standing to challenge the constitutionality of § 75-5-317(2)(j), MCA (1995), and, if so, whether the statute implicates either Article II, Section 3 or Article IX, Section 1 of the Montana Constitution.

#### FACTUAL BACKGROUND

[\*P3] The following facts are taken from those allegations in the Plaintiffs' complaint and amended complaint which are uncontroverted by DEQ's answer and from testimony and exhibits offered in the District Court.

[\*P4] MEIC is a nonprofit organization, whose members live primarily in Montana and are actively

involved in issues related to the protection and enhancement of water quality and fish and wildlife habitat. The Clark Fork-Pend Oreille Coalition is a nonprofit corporation whose members reside primarily in the Clark Fork drainage of Montana [\*\*\*\*4] and Idaho and who, for the past ten years, have worked to improve water quality in the Clark Fork drainage. Women's Voice for the Earth is also a nonprofit organization based in Missoula, Montana and is dedicated to protecting biological diversity in the northern Rockies. Members of all three organizations, float, fish, hunt, and view wildlife on the Blackfoot River and on public and private lands adjoining the Blackfoot River. Furthermore, the Blackfoot River is a major tributary to the Clark Fork River.

[\*P5] The Defendant, Montana Department of Environmental Quality is the State agency in charge of protecting water quality and issuing [\*\*211] permits to hard rock mines. In doing so, it is obligated to comply with the Montana Environmental Policy Act, §§ 75-1-101, et seq., MCA, the Montana Water Quality Act, §§ 75-5-301, et seq., MCA, and the Montana Constitution.

[\*P6] Seven-Up Pete Joint Venture has submitted an application for a massive open-pit gold mine in the upper Blackfoot River valley, near the confluence of the Landers Fork and Blackfoot Rivers. Plaintiffs' complaint alleged that in the summer of 1995, [\*\*\*1238] DEQ illegally amended SPJV's mineral exploration license to allow for the discharge [\*\*\*\*5] of groundwater containing high levels of arsenic and zinc into the shallow aquifers of the Blackfoot and Landers Fork Rivers, without requiring nondegradation review pursuant to § 75-5-303(3), MCA (1995), and to the extent that it was authorized to do so, pursuant to § 75-5-317(2)(j), MCA (1995), the latter statute violates the right to a clean and healthy environment guaranteed by Article II, Section 3 of Montana's Constitution, and the

clear nondegradation policy established by Article IX, Section 1 of Montana's Constitution.

[\*P7] The Blackfoot River provides habitat for many different species of fish and wildlife, including important habitat for the imperiled Bull Trout, a species which qualifies for listing as an endangered species pursuant to 16 U.S.C. §§ 1531, et seq. The Landers Fork River is an important tributary of the Blackfoot in terms of both water flow and fish habitat. In particular, it provides critical spawning and rearing habitat for Bull Trout.

[\*P8] In 1992 SPJV applied for an exploration license pursuant to the Metal Mine Reclamation Act, §§ 82-4-301, et seq., MCA, and was issued exploration license No. 00497, which authorized [\*\*\*\*6] it to collect geophysical information and generally explore the mineral formations associated with the proposed mine. However, on June 2, 1995, SPJV submitted a new work plan which included extended pumping of underground water at the proposed mine site and sought approval for the pumping pursuant to its exploration license. The pumping is apparently intended to provide data necessary to determine the long-term response to dewatering at the McDonald Gold Mine Project. Pursuant to the proposal, groundwater was to be pumped from the bedrock aquifer and discharged into two infiltration galleries—one located in the Blackfoot River alluvium and one located in the Landers Fork River alluvium.

[\*P9] Although SPJV's application to amend its exploration license was initially approved, DEQ later realized that the water to be [\*\*212] pumped from the bedrock and discharged into the Blackfoot and Landers Fork alluvia, contained concentrations of some constituents including arsenic at greater concentrations than existed in the receiving water. Therefore, the initial approval was rescinded until SPJV proposed and DEQ agreed that areas in the Blackfoot and Landers Fork

alluvia could serve as mixing zones for [\*\*\*\*7] the discharged water in order to bring the discharges into compliance with State law. A groundwater mixing zone is a portion of the aquifer receiving a discharge where water quality standards may be exceeded in order to allow mixing with the receiving water to occur. *See § 75-5-103(18), MCA.*

[\*P10] Formal authorization for the proposed discharges into the Blackfoot and Landers Fork alluvia was issued by DEQ on August 10, 1995.

[\*P11] Officials at DEQ determined that the mixing zone in the Blackfoot alluvial aquifer could extend 5000 feet down gradient from the Blackfoot infiltration gallery and the mixing zone in the Landers Fork alluvial aquifer could extend 4000 feet down gradient from the Landers Fork infiltration gallery. They estimated that arsenic would be diluted to meet water quality standards by the time the discharge had gone 2000 feet from the Blackfoot infiltration gallery and 1500 feet from the Landers Fork infiltration gallery.

[\*P12] DEQ determined that water from the Blackfoot mixing zone would not enter the surface water of the Blackfoot River but that water from the Landers Fork mixing zone would discharge to the surface waters of that river. However, DEQ concluded [\*\*\*\*8] that all chemical constituents in the groundwater would be diluted below applicable water quality standards prior to discharge to the Landers Fork surface waters.

[\*P13] The background level of arsenic in the groundwater of the Blackfoot and Landers Fork alluvium in the vicinity of the well test discharges is no more than .003 milligrams per liter (mg/l). The expected level of arsenic in the water at the wellhead from the three water wells tested in 1995, was expected to be .018 mg/l for well No. 4, .055 mg/l for well No. 5, and .036 mg/l for well No. 6. Water wells Nos. 4 and 5 discharged to the

Blackfoot infiltration gallery and water well No. 6 to the Landers Fork infiltration gallery.

**[\*P14] [\*\*\*1239]** The actual levels of arsenic at the wellhead for wells tested in 1995 ranged from .016 to .025 mg/l for well No. 4; .035 to .056 mg/l for well No. 5; and .024 to .039 mg/l for well No. 6. The actual level of arsenic **[\*\*213]** reaching the Blackfoot infiltration gallery during the 1995 test ranged from .015 to .020 mg/l and the actual level of arsenic reaching the Landers Fork gallery ranged from .018 to .020 mg/l due to chemical changes caused by the atmosphere.

**[\*P15]** The 1995 well tests involved the pumping **[\*\*\*\*9]** and discharge of 740 gallons of underground water per minute to the Blackfoot alluvium and 240 gallons of underground water per minute to the Landers Fork alluvium. The duration of the tests was four months.

**[\*P16]** However, samples taken during and after the 1995 well tests from monitoring wells located at a point approximately 4000 feet down gradient from the infiltration galleries, showed no change in the Blackfoot, and no significant change in the Landers Fork alluvia, from the background level of arsenic.

**[\*P17]** Plaintiffs brought this action on October 6, 1995, and alleged that they have been damaged by the discharge of polluted water to the Blackfoot and Landers Fork Rivers. They sought a writ of mandamus compelling DEQ to comply with various statutory procedures prior to amendment of the exploration license. In particular, Plaintiffs sought an order requiring SPJV to comply with the nondegradation requirements found at § 75-5-303(3), MCA, and to the extent that they were not required to do so, based on the waiver found at § 75-5-317(2)(j), MCA, (1995), Plaintiffs sought a declaratory judgment that the latter statute was unconstitutional and an injunction ordering DEQ to

suspend **[\*\*\*\*10]** amended exploration license No. 00497.

**[\*P18]** In support of their complaint, Plaintiffs offered testimony from Dan L. Fraser, a registered professional engineer, and environmental consultant who worked for the Water Quality Bureau of the Montana State Department of Health and Environmental Sciences (DHES) from 1976 to 1993 and who was the bureau chief from 1990 to 1993. DHES was the state agency which administered Montana's Water Quality Act before that responsibility was given to DEQ. Fraser testified that the Montana numeric water quality standard for protection of health from arsenic is .018 milligrams per liter (mg/l) but that based on his review of data submitted by SPJV to DEQ in support of its application for permission to conduct pumping tests, water with higher levels of arsenic would be discharged to the Blackfoot and Landers Fork alluvia during pumping. He testified that arsenic is a carcinogen which causes skin cancer to humans and that the EPA has found evidence of an association between internal cancer and arsenic.

**[\*P19] [\*\*214]** Fraser acknowledged that in 1995 the Water Quality Act (§ 75-5-317(2)(j), MCA) was amended to deem certain activities including water well and monitoring **[\*\*\*\*11]** well tests "nonsignificant" and allow them to proceed without the form of review which would otherwise be required for degradation of the State's waters. However, it was his opinion that the discharges proposed by SPJV were not "nonsignificant" in reality and that the permit issued by DEQ did not take into account public health risks associated with the discharge of arsenic. It was his opinion that any increase of arsenic content in drinking water is likely to cause an increase in the risk of cancer to those who consume it.

**[\*P20]** James Volberding is the senior project geologist for SPJV and has a degree in geological engineering.



He is responsible for supervising the hydrologic studies connected to the proposed McDonald Gold Mine Project. Those studies include the well pump tests at issue.

[\*P21] Volberding explained that construction of the mine will require the groundwater levels in the vicinity of the mine to be temporarily lowered by a system of wells which will provide water for the mining operations and prevent flooding of the mine workings. The three wells involved in the current tests were constructed in 1993 to provide the necessary data by a series of pump tests regarding the [\*\*\*\*12] chemistry and volume of water in the groundwater systems. Pumping from the three wells commenced on July 26, 27, and 28, 1995, and by October 11, monitoring data was available regarding the water being pumped and the effect that it had on the [\*\*\*1240] surface of the two rivers. He explained that the arsenic load of the discharged water was less than had been expected and while acknowledging that it exceeded the level of the receiving water at the point of discharge, testified that it will be close to nondetectable below the mixing zone of the Landers Fork alluvium and will contain .005 mg/l of arsenic immediately below the mixing zone for the Blackfoot River alluvium compared to .003 mg/l of arsenic for the receiving water. He testified that arsenic concentrations in other Montana waters used for drinking by individuals are higher.

[\*P22] Joe Gurrieri is a hydrologist with the Reclamation Division of the Hard Rock Bureau of the DEQ. It is his responsibility, in that capacity, to review mining plans as they relate to hydrology. In that capacity he was familiar with the facts that pertained to SPJV's pump tests. Based on the data provided by SPJV he concluded that there was no beneficial use of [\*\*\*\*13] water which would be interfered with by the [\*\*215] proposed mixing zones and that neither the biological resources of the Blackfoot River nor recreational use of the river would be affected. He determined that by the

end of the mixing zones, all constituents of the pumped water, including arsenic, would be below human health standards and would not present a problem in terms of toxicity.

[\*P23] Gurrieri calculated that the concentration of arsenic at a point 3000 feet down gradient from the Landers Fork infiltration gallery would be .008 mg/l and that the arsenic concentration 5000 feet down gradient from the Blackfoot infiltration gallery would be .009 mg/l. These concentrations are lower than the standards for groundwater or surface water but greater than the concentrations in the receiving water.

[\*P24] Geoffrey Beale, a hydrologist employed by SPJV also agreed that the water pumped from underground had higher concentrations of arsenic than the water into which it would be received, but testified that at some point downstream from the point of discharge the arsenic level will be diluted sufficiently, that it will not affect the arsenic level of the background water.

[\*P25] In support of their [\*\*\*\*14] motion for summary judgment, the Plaintiffs contended that pursuant Article II, Section 3 and Article IX, Section 1 of the Montana Constitution and § 75-5-303(3), MCA (1995), the State may not allow degradation of high quality waters without making the necessary showings required by the degradation review process set forth in the statute; that "degradation" includes increasing the concentration of arsenic in high quality waters; (both parties agree the waters in question are "high quality" waters) and that to the extent that water well tests are arbitrarily excluded from review, pursuant to § 75-5-317(2)(j), MCA (1995), that statute offends Montana's constitution and the government must demonstrate both a compelling state interest for doing so, that the waiver provided for is closely tailored to effectuate only that interest and that it is the least onerous path available.

[\*P26] In opposition to the Plaintiffs' motion for summary judgment and in support of DEQ's motion, DEQ and SPJV pointed out that at a short distance from the points of discharge there were no changes from background levels of arsenic, that therefore, Plaintiffs have not demonstrated violation of their right to [\*\*\*\*15] a clean and healthful environment, and for that reason, strict scrutiny of the blanket waivers provided for by § 75-5-317, MCA (1995) is not required. Furthermore, they alleged that for Plaintiffs to have standing to challenge § 75-5-317, MCA, [\*\*216] they must demonstrate injury in fact and they have not done so because they have failed to demonstrate that either their health or the environmental health has been harmed by the discharges in question.

[\*P27] In reply, Plaintiffs pointed out that Rule 16.20.712(1)(b), ARM (now *Rule 17.30.715(1)(b), ARM*), classifies any discharge of carcinogens in excess of those levels present in the background water as significant and that therefore, they have demonstrated all the harm necessary to establish standing and to require strict scrutiny of the statute which provides blanket exemption for that type of discharge from nondegradation review. In essence, Plaintiffs argued that § 75-5-317, MCA, which does not permit consideration of how a discharge might degrade water quality, cannot be said to meet the constitutional requirement [\*\*\*1241] for maintaining our current quality of environment.

[\*P28] The District Court held that Article II, Section 3 of the Montana [\*\*\*\*16] Constitution does provide a fundamental right to a clean and healthy environment, and that parties such as the Plaintiffs are entitled to bring a direct action in court to enforce that right. The District Court interpreted the Plaintiffs' challenge to § 75-5-317, MCA (1995) as an "applied" challenge based on the fact that Plaintiffs do not contend the statute is unconstitutional in all conceivable applications.

However, the District Court held that before strict scrutiny applies, Plaintiffs must demonstrate that a right guaranteed by the constitution has been abridged and that in this case they did not do so because:

[\*P29] 1. There is no proof that discharges from the mixing zones (as opposed to discharges from the ground) exceeded water quality standards;

[\*P30] 2. Plaintiffs have demonstrated no significant changes to the quality of water on either the surfaces of the Landers Fork or Blackfoot Rivers;

[\*P31] 3. Before a constitutional violation can be shown, Plaintiffs must demonstrate that the waters of the Blackfoot and Landers Fork are so affected that public health is threatened or applicable water quality standards are violated to the extent that there is a significant impact on [\*\*\*\*17] either river. Absent a finding of actual injury, as defined, § 75-5-317, MCA, is not unconstitutional as applied.

[\*P32] In an order denying the Plaintiffs' request for an order temporarily restraining further pumping tests, the District Court noted the following factual findings which formed the basis for its conclusions:

[\*P33] [\*\*217] 1. The existing level of arsenic in the Landers Fork River is .0015 mg/l. The State expected the arsenic in the well water which was to be discharged into the infiltration gallery to be at a level of .014 mg/l and be reduced to .006 mg/l by the end of the mixing zone.

[\*P34] 2. SPJV, however, concluded that the level of arsenic discharged into the infiltration galleries is .009 mg/l, far below the standard for aquatic life and the human health standard and that there will be no detectable change in the ambient level of arsenic in water 50 feet downstream from the point of discharge.

[\*P35] 3. Based on these figures, there is no evidence

of threat to public health, no violation of water quality standards, and no significant impact on the Landers Fork River or the Blackfoot River.

**[\*P36]** The District Court originally held, however, that based upon the affidavit of Dan **[\*\*\*\*18]** Fraser there was an issue of fact which could not be resolved by summary judgment. The Plaintiffs later asked the Court to either reconsider its order based on the amount of arsenic at the point of discharge or enter a final order based on the facts which the court currently assumed to be true. The District Court did so; it denied the Plaintiffs' motion for summary judgment, granted the DEQ's motion and dismissed the Plaintiffs' complaint.

**[\*P37]** On appeal, Plaintiffs contend that when the legislature amended the Water Quality Act, by enacting § 75-5-317(2)(j), MCA (1995), to exclude certain activities from review pursuant to the act's nondegradation policy, the blanket exclusion is unconstitutional when the facts show, as they did here, that degradation will occur. Plaintiffs contend that because Montanans have a fundamental right to a clean and healthful environment pursuant to Article II, Section 3 of the Montana Constitution, the provisions of the amendment must be strictly scrutinized for not only a compelling state interest, but also to assure that the amendment is closely tailored to effectuate the government's interest by the least onerous path available and that the District **[\*\*\*\*19]** Court erred by refusing to apply strict scrutiny absent a demonstration of risk to human or environmental health because Montana's Constitution, in particular, Article IX, Section 1, is intended to prevent pollution before it occurs. Plaintiffs contend that all they needed to demonstrate was that the concentration of arsenic, a known carcinogen, as it came out of the well, was greater than the carcinogen in the receiving water because the State has already determined pursuant to Rule 17.30.715(1)(b), ARM that discharges of that nature are

significant enough to require nondegradation review pursuant **[\*\*218]** to § 75-5-303, MCA. Plaintiffs **[\*\*\*1242]** request that this Court remand to the District Court for a determination of whether exemption from nondegradation review is constitutional. However, they do not suggest that nondegradation review satisfies the constitutional requirement of a clean and healthful environment under all circumstances. They simply contend that it is the minimum that is required as applied to the facts in this case.

**[\*P38]** The DEQ and SPJV respond that because the District Court correctly found that arsenic levels returned to ambient standards within 50 feet from the point of discharge **[\*\*\*\*20]** of the well water, Plaintiffs have not sustained their burden of proving they are threatened with injury by the enactment of § 75-5-317(2)(j), MCA, and therefore, have no standing to challenge the statute. They also contend that the constitutional provisions in question were not intended to prohibit all discharges of water which include arsenic but only those which render the receiving water unclean or unhealthy and that neither condition was proven in this case. Finally, the Respondents contend that § 75-5-317(2)(j), MCA, did not waive nondegradation review for discharges deemed significant by Rule 17.30.715, ARM, but that it simply codified those categories already deemed nonsignificant by Rule 17.30.716, ARM.

#### ISSUE

**[\*P39]** The issue on appeal is whether the Plaintiffs have demonstrated standing to challenge the constitutionality of § 75-5-317(2)(j), MCA (1995), and, if so, whether the statute implicates either Article II, Section 3 or Article IX, Section 1 of the Montana Constitution.

## DISCUSSION

### Standard of Review

[\*P40] The District Court held that based on the facts presented to it, Plaintiffs had not established that § 75-5-317(2)(j), MCA (1995), violates Montana's [\*\*\*\*21] Constitution. We review a district court's constitutional conclusions as we do other issues of law to determine whether they are correct. See *Wadsworth v. State* (1996), 275 Mont. 287, 298, 911 P.2d 1165, 1171.

### Standing

[\*P41] In *Gryczan v. State* (1997), 283 Mont. 433, 442-43, 942 P.2d 112, 118, we held that the following criteria must be satisfied to establish [\*\*219] standing: (1) the complaining party must clearly allege past, present, or threatened injury to a property or civil right; and (2) the alleged injury must be distinguishable from the injury to the public generally, but the injury need not be exclusive to the complaining party.

[\*P42] In *Missoula City-County Air Pollution Control Board v. Board of Environmental Review* (1997), 282 Mont. 255, 937 P.2d 463, this Court considered the first prong of the two-part test and concluded that a threatened injury to the Local Board had been established by demonstrating "potential economic injury." *Missoula City-County Air Pollution Control Bd.*, 282 Mont. at 262-63, 937 P.2d at 468. The court accepted the Local Board's argument that "it faced potential economic harm from the [\*\*\*\*22] additional expenses necessary to monitor, collect and analyze data, and to develop a regulatory response which will ensure that Missoula air quality meets minimum federal standards in the face of increased air pollution from Stone Container." *Missoula City-County Air Pollution Control Bd.*, 282 Mont. at 262, 937 P.2d at 468.

[\*P43] The second prong of the test for standing requires that the litigant distinguish his or her injury from injury to the general public. *Gryczan*, 283 Mont. at 442, 942 P.2d at 118. However, the injury need not be exclusive to the litigant. *Gryczan*, 283 Mont. at 443, 942 P.2d at 118. In *Gryczan* we held that the plaintiffs had satisfied the second prong because they "presented evidence of specific psychological effects caused by the statute." We further found it significant that "to deny Respondents standing would effectively immunize the statute from constitutional review." *Gryczan*, 283 Mont. at 446, 942 P.2d at 120.

[\*P44] In *Missoula City-County Air Pollution Control Board* we held that the Local Board's "interest in the effective discharge of the obligations imposed upon it by law is the [\*\*\*\*23] equivalent of the personal stake which would support standing of a private citizen of the [\*\*\*1243] Missoula airshed." *Missoula City-County Air Pollution Control Bd.*, 282 Mont. at 262, 937 P.2d at 467. We further stated that:

It is clear to this Court that a citizen of Missoula, as one who breathes the air into which Stone Container is expelling pollutants, would have standing to bring this action .... In the same way as a citizen of the Missoula airshed is more particularly affected by the State Board's acts than is a citizen of another area, the interest [\*\*220] of the Local Board is distinguishable from and greater than the interest of the public generally.

*Missoula City-County Air Pollution Control Bd.*, 282 Mont. at 262, 937 P.2d at 467-68.

[\*P45] Based on these criteria, we conclude that the allegations in the Plaintiffs' complaint which are uncontroverted, established their standing to challenge conduct which has an arguably adverse impact on the area in the headwaters of the Blackfoot River in which

they fish and otherwise recreate, and which is a source for the water which many of them consume. Whether Plaintiffs have demonstrated sufficient harm [\*\*\*\*24] from the statute and activity complained of to implicate their constitutional rights and require strict scrutiny of the statute they have challenged, is a separate issue.

established by § 75-5-303, MCA, of Montana's Water Quality Act is reasonably well designed to meet the constitution's objectives and that it is the minimum requirement which must be satisfied for a discharge which degrades the existing quality of Montana water. The relevant portions of that statute provide:

#### Constitutional and Statutory Framework

[\*P46] Appellants contend that § 75-5-317(2)(j), MCA (1995), violates their rights guaranteed by Article II, Section 3 and Article IX, Section 1 of the Montana Constitution.

[\*P47] Article II, Section 3 provides in relevant part that:

All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment....

Mont. Const. art. II, § 3.

[\*P48] Article IX, Section 1 provides in relevant part as follows:

(1) The State and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.

....

(3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

Mont. Const. art. IX, § 1 (emphasis added).

[\*P49] Although enacted prior to the constitutional provisions relied [\*\*\*\*25] on, the Plaintiffs contend that the nondegradation policy for high quality waters

[\*\*221] (1) Existing uses of state waters and the level of water quality necessary to protect those uses must be maintained and protected.

(2) Unless authorized by the department under subsection (3) or exempted from review under 75-5-317, the quality of high quality waters must be maintained.

(3) The department may not authorize degradation of high quality waters unless it has been affirmatively demonstrated by a preponderance of evidence to the department that:

(a) degradation is necessary because there are no economically, environmentally, and technologically feasible modifications to the proposed project that would result in no degradation;

(b) the proposed project will result in important economic or social development and that the benefit of the development exceeds the costs to society of [\*\*\*\*26] allowing degradation of high quality waters;

(c) existing and anticipated use of state waters will be fully protected; and

(d) the least degrading water quality protection practices determined by the department to be economically, environmentally, and technologically feasible will be fully implemented by the applicant prior to and during the proposed activity.

§ 75-5-317, MCA (1995).

[\*P50] Plaintiffs contend that the Constitution's environmental protections were violated [\*\*\*1244] by the legislature in 1995, when it amended § 75-5-317(2)(j), MCA to provide a blanket exception to the requirements of nondegradation review for discharges from water well or monitoring well tests without regard to the harm caused by those tests or the degrading effect that the discharges have on the surrounding or recipient environment. Section 75-5-317 (2)(j), MCA (1995), provides in relevant part as follows:

(1) The categories or classes of activities identified in subsection (2) cause changes in water quality that are nonsignificant because of their low potential for harm to human health or the environment and their conformance with the guidance found in 75-5-301(5)(c).

(2) The following categories [\*\*\*\*27] or classes of activities are not subject to the provisions of 75-5-303:

\*\*\*\*\*

[\*\*222] (j) discharges of water from water well or monitoring well tests . . . conducted in accordance with department-approved water quality protection practices . . . .

[\*P51] Plaintiffs contend that the groundwater discharged into the alluvia of the Landers Fork and Blackfoot Rivers and ultimately to the alluvial aquifers and the surface water of at least the Landers Fork River, degraded high quality waters by definition as established by the Department or its predecessor through *A.R.M. 17.30.715(1)(b)*, which provides as follows:

(1) The following criteria will be used to determine whether certain activities or classes of activities will result in nonsignificant changes in existing water quality due to their low potential to affect human

health or the environment. These criteria consider the quantity and strength of the pollutant, the length of time the changes will occur, and the character of the pollutant. Except as provided in (2) of this rule, changes in existing surface or groundwater quality resulting from the activities that meet all the criteria listed below are nonsignificant, and are not required [\*\*\*\*28] to undergo review under 75-5-303, MCA:

\*\*\*\*\*

(b) discharges containing carcinogenic parameters ... at concentrations less than or equal to the concentrations of those parameters in the receiving water ....

[\*P52] Because discharges containing carcinogenic parameters, (i.e., discharged water containing concentrations of arsenic equal to .009 mg/l) greater than those in the receiving water (i.e., .003 mg/l) were allowed in this case, Plaintiffs contend that the discharges should not have been exempt from nondegradation review by DEQ's own standards and that they have, therefore, demonstrated the necessary harm for strict scrutiny of the blanket exemption provided for in § 75-5-317(2)(j), MCA.

[\*P53] DEQ and SPJV on the other hand, contend that even before the 1995 amendment to § 75-5-317, MCA, which exempted well tests from nondegradation review, well tests were exempted from nondegradation review by *ARM 16.20.713(i)*, the predecessor to what is currently *ARM 17.30.716*, which incorporates the exemptions found at § 75-5-317(2)(j), MCA by reference.

#### [\*\*223] Constitutional Analysis

[\*P54] In order to address the issue raised on appeal, it is necessary that we determine the threshold [\*\*\*\*29]

showing which implicates the rights provided for by Article II, Section 3 and Article IX, Section 1 of the Montana Constitution and the level of scrutiny to be applied to each provision. DEQ and SPJV contend, and the District Court agreed that actual danger to human health or the health of the environment must first be demonstrated. The Plaintiffs contend that Montana's constitutional provisions are intended to prevent harm to the environment; that degradation to the environment is all that need be shown; and that degradation was established in this case based on the DEQ's own adopted standard.

[\*P55] We have not had prior occasion to discuss the level of scrutiny which applies when the right to a clean and healthful environment guaranteed by Article II, Section 3 or those rights referred to in Article IX, Section 1 are implicated. Nor have we previously discussed the showing which must necessarily be made to establish that rights guaranteed by those two constitutional provisions [\*\*\*1245] are implicated. However, our prior cases which discuss other provisions of the Montana Constitution and the debate of those delegates who attended the 1972 Constitutional Convention, guide us in both respects.

[\*P56] [\*\*\*\*30] In Butte Community Union v. Lewis (1986), 219 Mont. 426, 712 P.2d 1309, we held that:

If a fundamental right is infringed or a suspect classification established, the government has to show a "compelling state interest" for its action.

....

... in order to be fundamental, a right must be found within Montana's Declaration of Rights or be a right "without which other constitutionally guaranteed rights would have little meaning." In the Matter of C.H. (Mont. 1984), [210 Mont. 184], 683 P.2d 931, 940, 41 Mont. St. Rep. 997, 1007.

Butte Community Union, 219 Mont. at 430, 712 P.2d at 1311.

[\*P57] We held, however, that a middle-tier level of scrutiny will be applied when a right is implicated which, though not contained in our declaration of rights, is referred to in our constitution even though the constitutional provision in question is merely directive to the legislature. We held that:

[\*\*224] A benefit lodged in our State Constitution is an interest whose abridgement requires something more than a rational relationship to a governmental objective.

....

... Where constitutionally significant interests are implicated by governmental [\*\*\*\*31] classification, arbitrary lines should be condemned. Further, there should be balancing of the rights infringed and the governmental interest to be served by such infringement.

Butte Community Union, 219 Mont. at 434, 712 P.2d at 1313-14.

[\*P58] We held that when a government classification is challenged as a violation of equal protection and a constitutionally significant interest is implicated, middle-tier scrutiny requires that the State demonstrate two factors: "(1) that its classification ... is reasonable; and (2) that its interest in classifying ... is more important than the people's interest in obtaining [constitutionally significant benefits]." Butte Community Union, 219 Mont. at 434, 712 P.2d at 1314.

[\*P59] We elaborated on the level of scrutiny for statutes or rules which implicate rights guaranteed in our declaration of rights in Wadsworth v. State (1996), 275 Mont. 287, 911 P.2d 1165. There we held that, "the inalienable right to pursue life's basic necessities is

stated in the Declaration of Rights and is therefore a fundamental right." Wadsworth, 275 Mont. at 299, 911 P.2d at 1172.

[\*P60] We also [\*\*\*\*32] held in *Wadsworth* that the nature of interest affected by state action dictates the standard of review that we apply and that: "the most stringent standard, strict scrutiny, is imposed when the action complained of interferes with the exercise of a fundamental right or discriminates against a suspect class." Wadsworth, 275 Mont. at 302, 911 P.2d at 1174 (citations omitted).

[\*P61] In *Wadsworth*, we gave the following explanation of what is required by strict scrutiny:

Strict scrutiny of a legislative act requires the government to show a compelling state interest for its action. *Shapiro*, 394 U.S. [618] at 634, 89 S. Ct. [1322.] 1331. When the government intrudes upon a fundamental right, any compelling state interest for doing so must be closely tailored to effectuate only that compelling state interest. *Pastos*, 887 P.2d [199] at 202 (citing *Zablocki v. Redhail* (1978), 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618). In addition to the necessity that the State show a compelling state interest for invasion of a fundamental right, the State, to sustain the validity [\*\*225] of such invasion, must also show that the choice of legislative [\*\*\*\*33] action is the least onerous path that can be taken to achieve the state objective. *Pfost v. State* (1985), 219 Mont. 206, 216, 713 P.2d 495, 505.

Wadsworth, 275 Mont. at 302, 911 P.2d at 1174.

[\*P62] Finally, in language relevant to this case, we held in *Wadsworth* that, "while DOR's conflict of interest policy or rule is at issue rather than a statute, we, nevertheless, [\*\*\*1246] apply strict scrutiny analysis

since the operation of that rule implicates Wadsworth's fundamental right to the opportunity to pursue employment." Wadsworth, 275 Mont. at 303, 911 P.2d at 1174 (emphasis added).

[\*P63] Applying the preceding rules to the facts in this case, we conclude that the right to a clean and healthful environment is a fundamental right because it is guaranteed by the Declaration of Rights found at Article II, Section 3 of Montana's Constitution, and that any statute or rule which implicates that right must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken [\*\*\*\*34] to achieve the State's objective.

[\*P64] State action which implicates those rights provided for in Article IX, Section 1 would normally not be subject to strict scrutiny because those rights are not found in Montana's Declaration of Rights. Those rights would normally be subject to a middle-tier of scrutiny because lodged elsewhere in our state constitution. However, we conclude that the right to a clean and healthful environment guaranteed by Article II, Section 3, and those rights provided for in Article IX, Section 1 were intended by the constitution's framers to be interrelated and interdependent and that state or private action which implicates either, must be scrutinized consistently. Therefore, we will apply strict scrutiny to state or private action which implicates either constitutional provision.

[\*P65] A thorough review of the discussion and debate among the delegates to our 1972 Constitutional Convention leads us to the further conclusion that the nature of the environmental rights provided by Articles II and IX cannot be interpreted separately, but that it was the delegates' intention that the two provisions compliment each other and be applied in tandem.



Therefore, we look [\*\*\*\*35] to the records of the convention discussion and debate to determine the showing that must be made before the rights are implicated and strict scrutiny applied.

[\*P66] [\*\*226] Article IX, Section 1 was reported to the floor of the constitutional convention by the Natural Resources and Agricultural Committee on March 1, 1972. *Montana Constitutional Convention*, Vol. IV at 1198-99. As originally proposed, however, Article IX, Section 1(1) required that "the state and each person . . . maintain and enhance the Montana environment for present and future generations." *Montana Constitutional Convention*, Vol. IV at 1200, March 1, 1972. It did not provide, as does the current provision, the obligation to "maintain and improve a clean and healthful environment." See *Montana Constitutional Convention*, Vol. IV at 1200, March 1, 1972; *Mont. Const. art. IX, § 1(1)*. The provision, as introduced, was thought by members of the committee to be the strongest environmental protection provision found in any state constitution. *Montana Constitutional Convention*, Vol. IV at 1200, March 1, 1972. Delegate McNeil explained that descriptive adjectives were not included preceding the word environment [\*\*\*\*36] such as healthful or unsoiled, because the majority felt that the current Montana environment encompassed all of those descriptive adjectives. *Montana Constitutional Convention*, Vol. IV at 1200, March 1, 1972. He further explained that descriptive adjectives were not originally included because:

The majority felt that the use of the word "healthful" would permit those who would pollute our environment to parade in some doctors who could say that if a person can walk around with four pounds of arsenic in his lungs or SO<sub>2</sub> gas in his lungs and wasn't dead, that that would be a healthful environment. We strongly believe-the majority does-that our provision-or proposal is

stronger than using the word "healthful."

*Montana Constitutional convention*, Vol. IV at 1201, March 1, 1972.

[\*P67] In discussing the interrelationship of subsections (1) and (3), Delegate McNeil stated:

Subsection (3) mandates the Legislature to provide adequate remedies to protect the environmental life-support system from degradation. The committee intentionally avoided definitions, to preclude being restrictive. And the term "environmental life support system" is all-encompassing, including [\*\*\*\*37] but not limited to air, water, and [\*\*\*1247] land; and whatever interpretation is afforded this phrase by the Legislature and courts, there is no question that it cannot be degraded.

*Montana Constitutional Convention*, Vol. IV at 1201, March 1, 1972 (emphasis added).

[\*P68] [\*\*227] There were delegates including Delegate Campbell who felt that without descriptive adjectives, such as "clean and healthful" prior to the term "environment," Article IX, Section 1 lacked the force that the majority had intended. *Montana Constitutional Convention*, Vol. IV at 1204, March 1, 1972. However, the proponents of Section 1 as introduced, insisted that the subsection require that the environment not only be maintained but improved. See Delegate John Anderson cmts. (*Montana Constitutional Convention*, Vol. IV at 1204, March 1, 1972).

[\*P69] Delegate McNeil explained the committee's concern about including "clean and healthful" as follows:

The majority felt this would permit degradation of the present Montana environment to a level as defined in Illinois, which may be clean and healthful. And our intention was to permit no

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degradation from the present environment and affirmatively require [\*\*\*\*38] enhancement of what we have now.

*Montana Constitutional Convention*, Vol. IV at 1205, March 1, 1972 (emphasis added),

[\*P70] In further discussing the interrelationship between subsections (1) and (3) of Article IX, Delegate McNeil stated:

The majority proposal before you now does recommend, as did Mr. Lindbergh, government monitoring. It goes further than that and directs the Legislature to provide remedies to prevent degradation. This is anticipatory.

*Montana Constitutional Convention*, Vol. IV at 126, March 1, 1972 (emphasis added).

The proposal mandates the legislature to prevent degradation and to prevent unreasonable depletion. Now, that includes private property.

*Montana Constitutional Convention*, Vol. V at 1221, March 1, 1972 (emphasis added).

[\*P71] Delegates such as Mae Nan Robinson who agreed in substance with the preceding statements by Delegate McNeil suggested amendments but only for the purpose of assuring greater protection of the current environment. Delegate Robinson stated:

I contend that if you're really trying to protect the environment, you'd better have something whereby you can sue or seek injunctive [\*\*\*\*39] relief before the environmental damage has been done; it does very little good to pay someone monetary damages because the air has been polluted or because the stream has been polluted if you [\*\*228] can't change the condition of the environment once it has been destroyed.

*Montana Constitutional Convention*, Vol. V at 1230, March 1, 1972.

[\*P72] In defending the section as proposed, proponents explained that:

The reason that the majority did not support a separate section saying "the right to sue", the paragraph 3 of our report states, "The Legislature is directed to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion of natural resources." Now, to those of us that studied what we were doing for a long time before we did it, we felt that this, in itself, is a lot stronger than, certainly, the proposal we're looking at right now [a proposed right to sue provision].

*Montana Constitutional Convention*, Vol. V at 1232-33, March 1, 1972.

[\*P73] In concluding remarks in opposition to amending the committee majority's proposed Article IX, Section 1, Delegate [\*\*\*\*40] McNeil gave the following explanation for the language being recommended:

We did not want the Supreme Court of this state or the Legislature to be able to say that the environment in Montana, as we know right now, can be degraded to a healthful environment. So our purpose in leaving that word out was to strengthen it. I would like also to remind the delegates that the Illinois provision does not contain subparagraph 3 of the majority proposal, [Article IX, Section 1(3)] which speaks precisely to the point that concerned Jerry Cate so much, and that is there is no provision by which the Legislature can prevent-and this is anticipatory-can prevent unreasonable depletion of the natural [\*\*\*1248] resources. I submit if you will read that majority proposal again

and again, you will find that it is the strongest of any constitution....

*Montana Constitutional Convention*, Vol. V at 1243, March 1, 1972.

[\*P74] Delegate Foster also gave the following defense of the language as originally proposed:

I feel that if we, as a Constitutional Convention of Montana, use our line of defense on the environment on the basis of healthful, then we, in fact, might as well forget it, because [\*\*\*\*41] what I'm concerned about in Montana is not a healthful environment. This country is going to have to address itself to the question of a healthful environment. What I'm concerned about is an environment that is [\*\*229] better than healthful. If all we have is a survivable environment, then we've lost the battle. We have nothing left of importance. The federal government will see to it one way or another, if it's in its power, that we have an environment in which we can manage to crawl around or to survive or to in some way stay "alive". But the environment that I'm concerned about is that stage of quality of the environment which is above healthful; and if we put in the Constitution that the only line of defense is a healthful environment and that I have to show, in fact, that my health is being damaged in order to find some relief, then we've lost the battle; so I oppose this amendment.

*Montana Constitutional Convention*, Vol. V at 1243-44, March 1, 1972.

[\*P75] In the end advocates for adding the descriptive language "clean and healthful" prevailed. However, it was not on the basis that they wanted less protection than articulated by Delegates McNeil and Foster, it was because they [\*\*\*\*42] felt the additional language was

necessary in order to assure the objectives articulated by Delegates McNeil and Foster. *See* Delegate Campbell cmts. (*Montana Constitutional Convention*, Vol. V at 1246, March 1, 1972). It was agreed by both sides of the debate that it was the convention's intention to adopt whatever the convention could agree was the stronger language. *See* Delegate McNeil cmts. (*Montana Constitutional Convention*, Vol. IV at 1209, March 1, 1972).

[\*P76] Although Article IX, Section 1(1), (2), and (3) were all approved by the convention on March 1, 1972 (*Montana Constitutional Convention*, Vol. V at 1251, 1254-55, March 1, 1972) the right to a clean and healthful environment was not included in the Bill of Rights until six days later on March 7, 1972. On that date, Delegate Burkhart moved to add "the right to a clean and healthful environment" to the other inalienable rights listed in Article II, Section 3 of the proposed constitution. *Montana Constitutional Convention*, Vol. V at 1637, March 7, 1972. He explained his intention that it interrelate with those rights provided for and previously adopted in Article IX, Section 1. Montana Constitutional [\*\*\*\*43] *Convention*, Vol. V at 1637, March 7, 1972. He also stated that it was his intention through the addition of this right to the Bill of Rights to give force to the language of the preamble to the constitution. *Montana Constitutional Convention*, Vol. V at 1637, March 7, 1972. Burkhart stated: "I think it's a beautiful statement, and it seems to me that what I am proposing here is in concert with [\*\*230] what's proposed in that Preamble..." *Montana Constitutional Convention*, Vol. V at 1638, March 7, 1972. Delegate Eck concurred that including the additional language in Article II, Section 3, was consistent with the intention of the Natural Resources Committee when it reported Article IX, Section 1. Montana Constitutional *Convention*, Vol. V at 1638, March 7, 1972. The right to a clean and healthy environment was, therefore,

included as a fundamental right by a vote of 79 to 7. *Montana Constitutional Convention*, Vol. V at 1640, March 7, 1972. We have previously cited with approval the following language from 16 C.J.S. *Constitutional Laws* § 16(1984):

The prime effort or fundamental purpose, in construing a constitutional provision, is to ascertain and to give effect to [\*\*\*\*44] the intent of the framers and of the people who adopted it. The court, therefore, should constantly keep in mind the object sought to be accomplished ... and proper regard should be given to the evils, if any, sought to be prevented or remedied ....

*General Agric. Corp. v. Moore* (1975), 166 Mont. 510, 518, 534 P.2d 859, 864.

[\*P77] [\*\*\*1249] We conclude, based on the eloquent record of the Montana Constitutional Convention that to give effect to the rights guaranteed by Article II, Section 3 and *Article IX, Section 1 of the Montana Constitution* they must be read together and consideration given to all of the provisions of Article IX, Section 1 as well as the preamble to the Montana Constitution. In doing so, we conclude that the delegates' intention was to provide language and protections which are both anticipatory and preventative. The delegates did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment. Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked. The delegates [\*\*\*\*45] repeatedly emphasized that the rights provided for in subparagraph (1) of Article IX, Section 1 was linked to the legislature's obligation in subparagraph (3) to provide adequate remedies for degradation of the environmental life support system and to prevent unreasonable degradation of natural resources.

[\*P78] We conclude, therefore, that the District Court erred when it held that Montana's constitutional right to a clean and healthy environment was not implicated, absent a demonstration that public health is threatened or that current water quality standards are affected [\*\*231] to such an extent that a significant impact has been had on either the Landers Fork or Blackfoot River.

[\*P79] We conclude that the constitutional right to a clean and healthy environment and to be free from unreasonable degradation of that environment is implicated based on the Plaintiffs' demonstration that the pumping tests proposed by SPJV would have added a known carcinogen such as arsenic to the environment in concentrations greater than the concentrations present in the receiving water and that the DEQ or its predecessor after studying the issue and conducting hearings has concluded that discharges containing [\*\*\*\*46] carcinogenic parameters greater than the concentrations of those parameters in the receiving water has a significant impact which requires review pursuant to Montana's policy of nondegradation set forth at § 75-5-303, MCA. The fact that DEQ has a rule consistent with § 75-5-317(2)(j), MCA (1995), is of no consequence. As we have previously held in *Wadsworth*, the constitution applies to agency rules as well as to statutes.

[\*P80] We conclude that for purposes of the facts presented in this case, § 75-5-303, MCA is a reasonable legislative implementation of the mandate provided for in Article IX, Section 1<sup>1</sup> and that to the extent § 75-5-

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<sup>1</sup>In fact, the delegates to the 1972 Constitutional Convention were very much aware of legislation passed during the previous year, such as requirements for nondegradation review and indicated that they felt that legislation was consistent with their own efforts to engraft environmental protection to Montana's Constitution. See Delegate Loendorf cmts. (*Montana Constitutional Convention*, Vol. IV at 1207,

317(2)(j), MCA (1995) arbitrarily excludes certain "activities" from nondegradation review without regard to the nature or volume of the substances being discharged, it violates those environmental rights guaranteed by Article II, Section 3 and Article IX, Section 1 of the Montana Constitution. Our holding is limited to § 75-5-317(2)(j), MCA (1995), as applied to the facts in this case. We have not been asked to and do not hold that this section facially implicates constitutional rights.

**[\*P81] [\*\*\*\*47]** Based on these holdings, we reverse the judgment of the District Court and remand to the District Court for strict scrutiny of the statutory provision in question, and in particular for a determination **[\*\*232]** of whether there is a compelling state interest for the enactment of that statute based on the criteria we articulated in *State v. Wadsworth*.

**[\*P82]** The judgment of the District Court is reversed and this case is remanded for further proceedings consistent with this opinion.

Terry Trieweller

Justice

We Concur:

Chief Justice

William E. Hunt, Sr.

James C. Nelson

Jim Regnier

Justices

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March 1, 1972); Delegate Swanberg cmts. (*Montana Constitutional Convention*, Vol. V at 1238-39, March 7, 1972); and Delegate Campbell cmts. (*Montana Constitutional Convention*, Vol. V at 1246 March 7, 1972).

**Concur by:** W. William Leaphart; Karla M. Gray

## Concur

**[\*\*\*1250]** Justice W. William Leaphart, specially concurring.

**[\*P83]** I concur in the result reached by the Court and specifically with the conclusion that the right to a clean and healthful environment is a fundamental right guaranteed by the Declaration of Rights found at Article II, Section 3 of the Montana Constitution. Having so concluded, the Court goes on to declare that "state or private action which implicates either [Article II, Section 3 or Article IX, Section 1 of the Montana Constitution], must be scrutinized consistently. Therefore, **[\*\*\*\*48]** we will apply strict scrutiny to state or private action which implicates either constitutional provision." I agree that state action implicating the rights guaranteed by Article II, Section 3 or Article IX, Section 1, must be subject to strict scrutiny. Although Article IX, Section 1, clearly imposes an obligation on private entities, as well as the state, to maintain and improve a clean and healthy environment, I would not, in the context of this appeal, address the question of private action. In resolving this appeal, we are not addressing private action. Rather, we are addressing state action; that is, the constitutionality of a state statute. The conclusion that we will apply strict scrutiny analysis to private action is dicta which, I submit, may well prove unworkable in the future. As we state in this opinion, strict scrutiny analysis requires that the state demonstrate a compelling state interest and that its action is both closely tailored to effectuate that interest and the least onerous path that can be taken to achieve the State's objective. I am not clear as to how, or whether, private action lends itself to a "compelling state interest" analysis. That is a question that **[\*\*\*\*49]** I think would be better left to another day.

[\*P84] Finally, the Court concludes that

to the extent § 75-5-317(2)(j), MCA (1995), arbitrarily excludes certain activities" from nondegradation review without regard to the nature or volume of the substances being discharged, it violates those environmental rights guaranteed by Article II, Section 3 and Article IX, Section 1 of the Montana Constitution. Our holding is limited to § 75-5-317(2)(j), MCA (1995), as applied to the facts of [\*233] this case. We have not been asked to and do not hold that this section facially implicates constitutional rights.

[\*P85] I do not see how the Court can logically avoid declaring that the statute is unconstitutional on its face. The constitutional infirmity of § 75-5-317(2)(j), MCA (1995), is not limited to the facts in the present case but inheres in the statute's creation of a blanket exception. It creates a blanket exception to the requirements of nondegradation review for discharges from water well or monitoring well tests without regard to the harm caused by those tests or the degrading effect that the discharges have on the surrounding or recipient environment. The fact that there may be [\*\*\*50] water discharges from well tests, say for agricultural purposes, that do not in fact create harm to the environment, does not alter the fact that such discharges are exempted from nondegradation review and that such review is the tool by which the State implements and enforces the constitutional right to a clean and healthy environment. The facial unconstitutionality of § 75-5-317(2)(j), MCA (1995), lies in its exemption of particular water discharges from nondegradation review without consideration of the nature and volume of substances in the water that is discharged. The possibility that some water discharges will not harm the environment does not justify their exemption from careful review by the State to protect Montana's fundamental rights to a clean and healthy environment and to be free from

unreasonable degradation of that environment. The whole purpose of the nondegradation review is to determine, in advance, whether a water discharge will be harmful and, if so, is the harm justified and can it be minimized. See § 75-5-303, MCA. In excluding water discharges from well tests from review, the statute makes it impossible for the State to "prevent unreasonable depletion [\*\*\*51] and degradation of natural resources" as required by Article IX, Section 1(3), of the Montana Constitution. Art. IX, Sec. 1(3), Mont. Const.

W. William Leaphart

Justice

Chief Justice J. A. Turnage joins in the foregoing specially concurring opinion.

J. A. Turnage

Chief Justice

[\*\*\*1251] Justice Karla M. Gray, specially concurring.

[\*P86] Except for the "private action" subject addressed in Justice Leaphart's special concurrence, I concur in the Court's opinion in all regards. I join Justice Leaphart's opinion insofar as it relates to the propriety of addressing the "private action" question in this case.

Karl M. Gray

Justice

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## *Pennaco Energy v. Mont. Bd. of Env'tl. Review*

Twenty-Second Judicial District Court of Montana, Big Horn County

October 17, 2007, Decided

Cause No. DV 06-68

### Reporter

2007 Mont. Dist. LEXIS 513 \*

PENNACO ENERGY, INC., et. al., Plaintiff, FIDELITY EXPLORATION AND PRODUCTION COMPANY MONTANA BOARD OF OIL AND GAS CONSERVATION, Plaintiff-Intervenor, vs. MONTANA BOARD OF ENVIRONMENTAL REVIEW, et. al., Defendant, NORTHERN PLAINS RESOURCE COUNCIL, and TONGUE RIVER WATER USERS, Defendant-Intervenors

**Subsequent History:** Related proceeding at *N. Cheyenne Tribe v. Tongue River Water Users' Assoc.*, 2008 Mont. Dist. LEXIS 647 (2008)

**Affirmed by** *Pennaco Energy, Inc. v. Mont. Bd. of Env'tl. Review*, 2008 MT 425, 347 Mont. 415, 199 P.3d 191, 2008 Mont. LEXIS 664 (2008)

**Judges:** [\*1] BLAIR JONES, District Judge.

**Opinion by:** BLAIR JONES

### Opinion

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#### ORDER ON MOTIONS FOR SUMMARY JUDGMENT

P1. Before the Court are *Motions for Summary Judgment* filed by Defendants Montana Board of Environmental Review (BER) and Department of Environmental Quality (DEQ), together with Defendant-Intervenors Northern Plains Resource Council (NPRC) and Tongue River Water Users Association (TRWUA.)

A cross *Motion for Summary Judgment* was filed by Plaintiffs Pennaco Energy, Inc. (Pennaco), Marathon Oil Company (Marathon), and Plaintiff-Intervenor Fidelity Exploration and Production Company (Fidelity.) A hearing on the motions was held at the Stillwater County Courthouse, Columbus, Montana on July 2, 2007. John C. Martin and Duane A. Siler of Patton Boggs, LLP, Washington, D.C. and Lawrence B. Cozzens of Cozzens, Warren & Harris, Billings, Montana appeared on behalf of Pennaco. Jon Metropoulos of Gough, Shanahan, Johnson & Waterman, [\*2] Helena, Montana appeared on behalf of Fidelity. Assistant Montana Attorneys-General Sarah A. Bond and Jennifer M. Anders appeared representing Defendant BER. Defendant DEQ was represented by Claudia L. Massman. NPRC and TRWUA were represented by Jack R. Tuholske and Brenda Lindlief-Hall, respectively.

#### STATEMENT OF THE CASE

P2. On June 30, 2006, Plaintiffs brought this action under the Montana Administrative Procedure Act (MAPA), § 2-4-506, MCA, the Montana Declaratory Judgment Act, § 27-8-102, MCA et seq., the Montana Water Quality Act (WQA), § 75-5-101, MCA et seq., and the Montana Environmental Policy Act (MEPA), § 75-1-101, MCA et seq., seeking to invalidate water quality rules adopted by Defendant BER on April 14, 2003 and on May 18, 2006.

P3. Plaintiffs allege that the BER adopted the 2003 rules

without the specific findings or the sound scientific basis Plaintiffs believe is mandated under the WQA and, indirectly, under MAPA. Plaintiffs further allege that the 2006 rules, which designated *Electrical Conductivity* (EC) and *Sodium Adsorption Ratio* (SAR) as "harmful" parameters, were unaccompanied by specific written findings and lacked an adequate scientific basis for the designation. [\*3] Additionally, Plaintiffs contend that the BER and the DEQ were required to prepare an environmental impact statement (EIS) for the proposed rule under MEPA.

P4. On February 22, 2007 Defendants and Defendant-Intervenors (collectively Defendants) moved for summary judgment on all claims as set forth in the Plaintiffs' *Complaint*. On April 12, 2007, Plaintiffs and Plaintiff-Intervenors (collectively Plaintiffs) filed a cross-motion for summary judgment on all claims. The issues have been fully briefed. On June 30, 2007, the parties submitted an *Agreed Statement of Law and Facts* (Agreed Facts). The Court heard oral argument on July 2, 2007.

#### PROCEDURAL AND FACTUAL BACKGROUND

P5. This case involves the validity of certain administrative rules governing water quality promulgated by the BER in 2003 and 2006. The 2003 rules establish numeric water quality standards for EC and SAR. The 2006 rules address nondegradation review of discharges into State waters that contribute to EC and SAR, including coal-bed methane effluents. The 2003 rules were motivated, at least in part, by projected coal bed methane (CBM) development in the Powder River Basin of southeastern Montana. (BER Rec. at 00694.) CBM [\*4] produced water is known to contain high levels of sodium and salts. EC and SAR indicators occur naturally and are present in water extracted from coal seams during CBM production. See *Northern*

*Plains Res. Council v. Fidelity Exploration & Dev. Co.*, 325 F.3d 1155, 1158 (9th Cir. 2003), cert. denied, 540 U.S. 967, 124 S. Ct. 434, 157 L. Ed. 2d 312 (2003). Scientific research indicates that at certain levels, EC can damage plants and SAR may negatively affect soils. (*Id.*, see also, Agreed Facts, Nos. 17, 20.) Arguably, CBM produced water discharged into rivers and streams could potentially damage soils, crops, aquatic life and native plant communities.

P6. The production of CBM in the Powder River Basin requires the pumping and disposing of enormous amounts of waste water, which is released when hydrostatic pressures trapping the methane gas is relieved. The produced water diminishes once the gas begins to flow. Various methods are available to methane producers to dispose of the produced water. The least expensive method is to discharge the water directly into surface waters. However, the Ninth Circuit Court of Appeals has concluded that CBM produced water is a "harmful pollutant" necessitating a National [\*5] Pollutant Discharge Elimination System (NPDES) permit before discharge into surface waters. *Northern Plains Res. Council*, *supra*, 325 F.3d 1155 at 1162.

P7. The administrative record shows that in 2000 and 2001, the DEQ was actively investigating the impact of CBM development and the effects of CBM produced water on soils, crop yields, and aquatic life in the Powder River Basin. (BER Rec. 02641, 02867-70, 00098107). This coincided with DEQ's participation in a statewide oil and gas environmental impact statement (EIS) being prepared in conjunction with the federal Bureau of Land Management. (BER Rec. 01061, 03947-60). Ultimately, the DEQ decided to adopt numeric water quality standards to protect irrigated agriculture and other designated uses of surface water in the Basin. Industry interests opposed this effort, contending that water quality was adequately protected under the narrative standard applicable to all parameters for which



there are no numeric standards. (BER Rec. 00979, 01100, 01858-863).

P8. In 2002, following consultations with DEQ's expert consultant, Dr. Oster, a soil scientist from the USDA Salinity Lab in Riverside, California, DEQ staff developed two proposals for water [\*6] quality standards for EC and SAR. These proposals were presented to the BER in July 2002. (Agreed Facts, No. 25; BER Rec. 02751-761; 02669, 02766, 00981-994). Both proposals were accompanied by technical support documents explaining the rationale and the scientific basis for the proposed rules. (BER Rec. 01061-74; 01082-95). Further, the record shows that BER received information that the rivers in the Powder River Basin have naturally fluctuating levels of EC and SAR, and that those natural variations may exceed the standards on occasion. (BER Tr., 1/31/03, at 186:17-18.) This may be due to the fact that the region was once a marine ecosystem and thus naturally high in salts and sodic compounds. (BER Rec. 00910.) Montana law exempts "naturally occurring" runoff from the permitting process. *See A.R.M. 17.30.602.*

P9. Contemporaneously, in June 2002, NPRC, TRWUA, and other irrigators in the Powder River Basin filed a citizens' petition to initiate rulemaking. The petition urged the BER to adopt numeric standards for EC and SAR on four rivers in the Basin and their tributaries. (Agreed Facts, No. 23; BER Rec. 00801-839).

P10. The BER voted to publish three different proposals and receive [\*7] public comment. (Agreed Facts, No. 26; 7/26/02 Tr. at 181, 184). At BER's insistence, a collaborative committee of interested parties met five times in two months, but was unable to reach consensus. (Id. at 171, 183.) Members of the collaborative committee included CBM developers and their consultants, DEQ, EPA, irrigators, NPRC, and the Northern Cheyenne and Crow Tribes. The Northern

Cheyenne Tribe was also in the process of developing numeric water quality standards for EC and SAR. (BER Rec. 00439-537; see also 01917-02075, 02461.)

P11. The BER held public hearings in Miles City on September 26, 2002, and in Helena on September 27, 2002. (Agreed Facts, No. 28.) BER and interested parties also participated in a public tour of CBM wells and agricultural sites in Wyoming and Montana on September 25, 2002. (BER Rec. 01265.) BER modified the proposed rules in response to comments received and held an additional public hearing in January 2003. (BER Rec. 02298-306, 1/31/03 Tr.) Before and during the public comment period, which extended from August 2002 to January 2003, the BER received extensive information and comment from soil scientists, DEQ technical staff, the federal Environmental [\*8] Protection Agency (EPA), industry, environmental groups, and irrigators. (Agreed Facts, No. 28.) This information and comment is contained in the administrative record submitted to the Court.

P12. In March 2003, the BER adopted specific numeric standards for EC and SAR in the affected streams for both the irrigation season and the non-irrigation season. (Agreed Facts, Nos. 34, 36.) The BER also addressed these parameters for purposes of Montana's nondegradation policy, but voted to retain a narrative nonsignificance criterion for high quality water (rather than imposing numeric thresholds) to determine whether nondegradation review is triggered. BER also incorporated a nonseverability clause and provisions for flow-based permitting. (Agreed Facts, No. 49; BER Rec. 02298-306; 3/28/03 Tr. at 129-156; 190.) The administrative record suggests that the narrative nonsignificance criteria, the nonseverability clause, and flow-based permitting were a compromise in favor of the CBM developers so that industry would support adoption of numeric standards. (BER Rec. 01205, 02273, 02298-306.)

P13. On April 14, 2003, the BER certified the new rules and amendments to the Secretary of State for publication [\*9] in the Montana Administrative Register (MAR). The *Notice of Adoption and Amendment* included responses to comments submitted. The new rules and amendments became effective upon publication on April 25, 2003. (Agreed Facts, No. 54; BER Rec. 0255274.) The 2003 numeric water quality standards were codified at *ARM 17.30.670(1)-(6)*. The Regional Administrator of EPA approved the standards set by the BER in August 2003. (Agreed Facts, No. 57; BER Rec. 06046-49.)

P14. Two years later, in May 2005, NPRC and a group of irrigators filed another petition for rulemaking, asking the BER to adopt rules to (1) require reinjection or treatment of CBM water, and (2) designate EC and SAR as "harmful" parameters so that those discharges would be subject to objective numeric nonsignificance criteria and would no longer qualify as nonsignificant under the subjective narrative criteria. (BER Rec. 03605-677.) On September 26, 2005, the BER certified to the Secretary of State for publication MAR Notice No. 17-231, a notice of public hearing on the proposed amendment. (Agreed Facts, No. 64.) Notice of public hearings was published on October 6, 2005. (BER Rec. 04331.)

P15. The BER held public hearings on November [\*10] 9, 2005, in Lame Deer; November 10, 2005 in Miles City; and December 1, 2005 in Helena (Agreed Facts, No. 64; BER Rec. 04132-147). On March 23, 2006, the BER held a public meeting and voted to adopt the nondegradation component of the petition as submitted. (Agreed Facts, No. 66; 3/23/06 Tr. at 129-31.) The BER voted to reject the proposal to require reinjection or treatment of CBM water. (3/23/06 Tr. at 133; 157; 166.) On May 8, 2006, the BER certified to the Secretary of State a *Notice of Amendment*, which included responses to comments submitted. (Agreed Facts, No. 70.) Adoption of the nondegradation

component resulted in the application of the same numeric nonsignificance criteria for EC and SAR in the four affected streams that apply to other parameters with numeric water quality standards. (Agreed Facts, No. 66; BER Rec. 06657, 06661; Agreed Facts, No. 66.) The rules adopted in 2006 have been submitted to the EPA, but have not yet been approved. (Agreed Facts, No. 71.)

P16. Plaintiff energy companies filed their *Amended Complaint for Declaratory Judgment* in July 2006, challenging the 2003 and 2006 rulemakings. Plaintiffs do not allege that they have been denied a permit under the [\*11] challenged rules, nor do they allege that they have applied for and been denied an authorization to degrade high quality water in Montana. Fidelity filed its own *Complaint* in intervention in August 2006, which essentially mirrors Plaintiffs' *Amended Complaint*. Defendants answered those complaints, and submitted the certified administrative record of the 2003 and 2006 rulemakings to this Court in December 2006. Defendants and Defendant-Intervenors filed motions for summary judgment and accompanying briefs in February 2007. At a scheduling conference in March 2007, Plaintiffs indicated their intent to file a cross-motion for summary judgment. Thereafter, the Court set a briefing schedule for crossmotions and responsive pleadings, and requested an agreed statement of facts. The parties submitted an *Agreed Statement of Facts and Law* prior to the hearing, which the Court has considered along with the voluminous administrative record.

#### STANDARD OF REVIEW

P17. Summary judgment may be granted if there is no genuine issue of material fact and the movant is entitled to a judgment as a matter of law. *Rule 56(c), M.R.Civ.P.* A party requesting summary judgment first "must

demonstrate that no genuine [\*12] issues of material fact exist. Once the moving party has made this showing, "the burden shifts to the non-moving party to prove, by more than mere denial and speculation, that a genuine issue does exist." Cape-France Enterprise v. Estate of Peed, 2001 MT 139, P13, 305 Mont. 513, 29 P.3d 1011. Summary judgment is particularly appropriate in cases involving judicial review of final agency action. Friends of the Wild Swan v. Department of Natural Resources & Conservation, 2005 MT 351, P28, 330 Mont. 186, 127 P.3d 394, citing Chevron USA, Inc. v. NRDC, 467 U.S. 837, 865, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984); Winchell v. Montana Dep't of Natural Resources Conservation, 1999 MT 11, 293 Mont. 89, 972 P.2d 1132.

P18. Plaintiffs brought this declaratory judgment action pursuant to the Montana Administrative Procedure Act (MAPA) and the Montana Declaratory Judgment Act (MDJA). Section 2-4-506(2), MCA provides that a court may declare a rule invalid only if "the rule was adopted with an arbitrary or capricious disregard for the purpose of the authorizing statute as evidenced by documented legislative intent." A rule comports with MAPA if it is (a) consistent and not in conflict with the applicable statute, [\*13] and (b) reasonably necessary to effectuate the purpose of the statute. See § 2-4-305(6), MCA.

P19. The opinions of the Montana Supreme Court explain the brief statutory language providing the applicable standard of review for formal agency action. In Winchell, supra, the Supreme Court noted that judicial review of agency rulemaking is limited to whether the agency erred in law, or whether its decision is wholly unsupported by evidence, or is clearly arbitrary or capricious. Winchell, supra, 1999 MT 11, P11.

P20. When the agency decision is within its delegated area of expertise, as it is in this case, and when it is based on scientific or technical data, the Supreme Court

has held that judicial review is even narrower. In Johansen v. State, 1999 MT 187, P9, 295 Mont. 339, 983 P.2d 962 (Johansen II), the Supreme Court affirmed its earlier ruling in Johansen I that "district courts should defer to an agency's decision where substantial agency expertise is involved." Id., P9, quoting Johansen v. Dep't of Natural Resources & Conservation, 1998 MT 51, P29, 288 Mont. 39, 955 P.2d 653 (Johansen I). Moreover, "[n]either the district court nor the Supreme Court may substitute their discretion [\*14] for the discretion reposed in boards and commissions by the legislative acts." Johansen I, P26, quoting North Fork Preservation Ass'n v. Dep't of State Lands, 238 Mont. 451, 778 P.2d 862, 866 (1989).

P21. The U.S. Supreme Court has stated: "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified expert even if, as an original matter, a court might find contrary views more persuasive." Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989). The Montana Supreme Court endorsed this deferential standard in North Fork, supra, which involved judicial review of an agency decision to forego an EIS:

This decision necessarily involved expertise not possessed by courts and is part of a duty assigned to [the agency], not the courts. In light of this, and the cases cited above, we hold that the standard of review to be applied by the trial court and this Court is whether the record establishes that the agency acted arbitrarily, capriciously, or unlawfully. Id., 238 Mont. at 458-59, 778 P.2d at 867.

P22. In reviewing whether the agency acted arbitrarily or capriciously, the Court must consider [\*15] whether the decision "was based on a consideration of the relevant factors" and whether there has been a "clear error of judgment." Id., 238 Mont. at 465, 778 P.2d at 871,

quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971). The Court may not substitute its judgment for that of the agency to which the legislature has assigned the role of expert and decision maker. *Friends of the Wild Swan*, *supra*. For this reason, the party challenging the agency's action has the burden of proving error by the rulemaking agency. See *Thornton v. Commissioner of Dep't of Labor & Indus.*, 190 Mont. 442, 445, 621 P.2d 1062, 1064 (1980). The Court reviews the agency determination of law for correctness. *Seven Up Pete Venture v. Montana*, 2005 MT 146, 58, 327 Mont. 306, 114 P.3d 1009.

P23. NPRC and TRWUA submit that the Montana Constitution is relevant to the standard of review insofar as it guarantees to all citizens the right to a clean and healthful environment, *Mont. Const. art. II, §3*, and imposes a duty on the State and each person to maintain and improve a clean and healthful environment for present and future generations, *Mont. Const. art. IX, §1*. In light of [\*16] of these constitutional provisions, Defendant-Intervenors argue that the administrative rules cannot be invalidated based on Plaintiffs' argument that they are overly protective, and that if there is any question about the validity of the rules, this Court is obligated to recognize their validity in light of *Mont. Const. art. II, §3*, and *art. IX, §1*. Since the Court concludes that the BER's exercise of rulemaking authority was consistent with authorizing legislation, and that BER did not act arbitrarily or capriciously in the exercise of that discretion, the constitutional implications of BER's actions need not be considered.

## ISSUES

P24. The Court restates the issues as follows:

1. Should the Court consider evidence submitted by

Plaintiffs outside the certified administrative record?

2. Are the 2003 BER rules setting numeric standards for EC and SAR invalid because the BER acted with an arbitrary or capricious disregard for the purpose of the authorizing statute(s)?

3. Are the 2006 BER rules classifying EC and SAR as harmful parameters invalid because:

a) the BER acted with an arbitrary or capricious disregard for the purpose of the authorizing statute(s)?

and/or

b) BER did not comply with [\*17] applicable statutory law?

4. Was the BER required to make written findings in accordance with §§ 75-5-203 and/or 75-5-309, MCA, relative to the 2003 or 2006 rulemakings?

5. Was the BER required to prepare an environmental impact statement (EIS) at the time of the 2006 rulemaking?

## DISCUSSION

P25. 1. Should the Court consider evidence submitted by Plaintiffs outside the certified administrative record

P26. Judicial review of formal agency actions, like the MAPA rulemakings at issue herein, is generally confined to the record before the agency unless the Plaintiff can show a clear and specific need for supplementation. See § 2-4-704(1), MCA; see, e.g., *Public Power Council v. Johnson*, 674 F.2d 791, 793-94 (9th Cir. 1982). There are limited exceptions which may justify expansion of the record or permit discovery, i.e., where there is a need to explain the agency's action, where the record is incomplete, or where there is a need to explain technical terms or the subject matter involved. *Id.*

P27. The parties generally agree on these standards, although they disagree on their application to this case. Plaintiffs claim that extra-record evidence is appropriate because witness deposition testimony [\*18] establishes that the administrative record is inadequate on certain points. Defendants respond that Plaintiffs have made no real showing that the additional material is needed or relevant, or how the evidence offered demonstrates anything other than the same arguments repeated before the BER.

P28. The administrative record certified to this Court exceeds 6,000 pages. It includes all public comments received, notices of hearings, transcripts of BER proceedings, scientific data and reports - many of which are from Plaintiffs' experts and representatives - relevant correspondence, and a wealth of other information. Plaintiffs' offered supplemental information was also available for the Court's consideration. The extra-record evidence offered by Plaintiffs is information that the rulemaking agency never considered. Plaintiffs offer this extra-record evidence in support of their contentions that the rules at issue are invalid. Defendants object to this Court's consideration of that evidence, noting that Defendants maintained, and Plaintiffs agreed, to a standing objection to the admissibility of any deposition testimony.

P29. Upon the Court's review of the administrative record, the Court [\*19] concludes that the agency adequately considered all relevant information or evidence necessary for an informed decision. All indications are that the administrative record is complete and more than adequate to resolve the issues before the Court. Additional evidence is not required to explain the agency's action or the subject matter involved. The Court gives little weight to Plaintiffs' reliance on deposition testimony of DEQ personnel suggesting that the administrative record is silent or inadequate on certain points. It is unclear whether those witnesses

actually reviewed the administrative record that was certified to this Court. More importantly, the administrative record speaks for itself.

P30. For the foregoing reasons, the Court declines to admit, as additional evidence, the supplemental material offered by Plaintiffs. Even if the Court were inclined to consider the supplemental material offered by the Plaintiffs, the record, in its entirety, would not support a finding of an abuse of discretion or error of law by the rulemaking body.

P31. 2. Are the 2003 BER rules setting numeric standards for EC and SAR invalid because the BER acted with an arbitrary or capricious disregard [\*20] for the purpose of the authorizing statute(s)

P32. The authorizing statutes governing development of water quality standards are the *Clean Water Act (CWA)* and the *Montana Water Quality Act (WQA)*. The federal EPA is the congressionally delegated agency to administer and implement the CWA, and its administrative decisions are entitled to deference. *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, supra, 467 U.S. at 844-45; accord, *Montana Power Co. v. Environmental Protection Agency*, 608 F.2d 334, 345 (9th Cir. 1979). The BER is the state agency delegated to set water quality standards in Montana in accordance with the WQA. See §§ 75-5-201, -301, MCA.

#### **A. The Clean Water Act (CWA)**

P33. The CWA is essentially a mandate to the states to protect water quality through permitting of pollutant discharges and through development of water quality standards. The overall purpose of the CWA is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters," with the ultimate goal being the complete elimination of pollution

from the nation's waters. See 33 U.S.C. § 1251(a); Public Utility District No. 1 v. Washington Dep't of Ecology, 511 U.S. 700, 704, 114 S. Ct. 1900, 128 L. Ed. 2d 716 (1994). [\*21] To achieve this goal, Congress has prohibited the point-source discharge of any pollutant into the waters of the United States unless that discharge is permitted. See 33 U.S.C. § 1311(a); see also, United States v. Earth Sciences, 599 F.2d 368, 373 (10th Cir. 1979); Pronsolino v. Nastri, 291 F.3d 1123, 1126-1127 (9th Cir. 2002); Natural Resources Def. Council v. Environmental Protection Agency, 279 F.3d 1180, 1182 (9th Cir. 2002). The Ninth Circuit Court of Appeals has ruled that CBM water is a pollutant whose discharge must be permitted in accordance with the CWA. Northern Plains Resource Council v. Fidelity, 325 F.3d 1155, 1165 (9th Cir. 2003), cert. denied, 540 U.S. 967, 124 S. Ct. 434, 157 L. Ed. 2d 312 (2003) (Agreed Facts, No. 14).

P34. Under the CWA, the States have primary responsibility for developing and implementing water quality standards to "protect the public health or welfare, enhance the quality of water and serve the purposes of [the Act]." See 33 U.S.C. § 1313(a) to (c), 40 CFR § 131.2(d) (Agreed Facts, No. 2). All new or revised state water quality standards must be submitted to EPA for review and either approval or disapproval. See 33 U.S.C. § 1313(c)(2)(A); 40 CFR § 131.21(a), [\*22] § 131.5 (Agreed Facts, No. 11). EPA provides specific minimum requirements for water quality standards: (1) first, each water body must be assigned "designated uses," such as recreation or the protection of aquatic life; (2) second, the standards must specify for each body of water the amounts of various pollutants or pollutant parameters that may be present without impairing the designated use; and (3) third, each state must adopt an antidegradation review policy which will allow the state to assess activities that may lower the water quality of the water body. *Am. Wildlands v.*

*Environmental Protection Agency*, 260 F.3d 1192, 1194 (10th Cir. 2001). The CWA requires a state's water pollution control agency to review water quality standards a minimum of once every three years. See 33 U.S.C. § 1313(c); 40 C.F.R. § 131.21(a).

## B. The Montana Water Quality Act (WQA)

P35. In compliance with the CWA, the Montana Legislature has designated the DEQ as the state agency responsible for regulation of point-source discharges of pollutants in Montana. See § 75-5-211, MCA; (BER Rec. 00538; Agreed Facts, No. 4). Similarly, the BER is the designated rulemaking body for water quality regulations in Montana. [\*23] See § 75-5-201, -301, MCA. (Agreed Facts, No. 3.)

P36. Consistent with the mandates of the CWA, the BER is statutorily required to (1) classify all state waters in accordance with their present and future most beneficial uses; (2) adopt water quality standards giving consideration to the economics of waste treatment and prevention; (3) periodically review and, if necessary, revise those classifications and standards; (4) adopt rules for mixing zones; (5) adopt rules implementing Montana's nondegradation policy; and (6) ensure that the rules for nondegradation establish objective and quantifiable criteria for various parameters. See § 75-5-301, MCA.

P37. Montana's public policy relative to water quality is found in § 75-5-101, MCA. The stated policy is:

- (1) to conserve water by protecting, maintaining and improving the quality and potability of water for public water supplies, wildlife, fish and aquatic life, agriculture, industry, recreation and other beneficial uses;
- (2) to provide a comprehensive program for the prevention, abatement, and control of water pollution;

and

(3) to balance the inalienable rights to pursue life's basic necessities and possess and use property in lawful ways [\*24] with the policy of preventing, abating and controlling water pollution. *Id.*

P38. The Legislature recognized its constitutional obligations under Mont. Const. art. II, § 3, and art. IX, by expressing its intent that "the requirements of this chapter provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources." See § 75-5-102(1), MCA. The Legislature has also expressly stated that "rules should be adopted only on the basis of sound, scientific justification and never on the basis of projections or conjecture," and that the BER should "seriously consider the impact of the proposed rules[.]" *1995 Statement of Intent, ch. 497, L. 1995*.

### C. Consistency With Authorizing Statutes (2003 rules)

P39. Plaintiffs allege that the 2003 rulemaking was done with an arbitrary and capricious disregard for the purpose of the authorizing statutes above because: (1) there was no valid reason to adopt numeric water quality standards for EC and SAR in place of the long-standing narrative standard, as the narrative standard was thought to be historically protective; and [\*25] (2) the 2003 numeric standards lack any sound scientific justification. Having reviewed the applicable statutes, the administrative record, and in light of state and federal mandates for water quality protection, the Court concludes otherwise.

P40. The waters in question are the Tongue River, the Powder River, the Little Powder River, Rosebud Creek, and the tributaries of those waterways. In accordance

with the WQA, the BER has classified these waters as either Class B-2 or Class C-3 waters, both of which are to be maintained as suitable for, *inter alia*, agricultural water supply, e.g. irrigation. See *ARM 17.30.611, 17.30.624, 17.30.629*. The use of water for irrigated agriculture is a beneficial use. See *State ex rel. Greely v. Confederated Salish & Kootenai Tribes*, 219 Mont. 76, 712 P.2d 754 (1985).

P41. Until 2003, the beneficial use of these waters for irrigated agriculture was protected by a general "narrative" water quality standard. The "narrative" water quality standard was first promulgated in 1972, and generally prohibits any discharge which creates "concentrations or combinations of materials which are toxic or harmful to human, animal, plant or aquatic life." *ARM 17.30.637* [\*26] (Agreed Facts, No. 24). The narrative standard applies to all parameters not otherwise governed by numeric standards.

P42. In this case, the administrative record reflects that the EPA and the DEQ had concerns about the DEQ's ability to objectively and consistently translate the "narrative" standard into permit limits for discharges of CBM produced water. (BER Rec. 00982, 01062, 00339, 00995). This concern is also reflected in the BER's final decision document (BER Rec. 02555: "[n]umeric standards are necessary to clearly delineate an enforceable limit that is consistently applied by various permit writers; the Board does not agree that retaining the existing narrative standard is appropriate"). DEQ, BER and the public generally were aware that large-scale CBM development was predicted in the Powder River Basin over the next decade, and permitting discharges of CBM produced water was an issue. (BER Rec. 02637, 00694, 00098-107). For this reason, and with EPA's support, Montana began the process of developing numeric water quality standards for the two known constituents (EC and SAR) of CBM water that, in certain concentrations, are harmful to irrigated

agriculture. Over a span of nearly [\*27] two years, a public process took place which produced numerous public hearings, a collaborative effort among the different interest and governmental groups, copious amounts of scientific data and reports, revision of the numbers, and ultimately adoption of the numeric water quality standard at issue in this case.

P43. Federal law clearly mandates the protection of water quality for designated uses, including agriculture. *Northern Plains Res. Council v. Fidelity*, *supra*, 325 F.3d at 1159. In fact, federal regulations encourage states to establish numeric values based on scientifically defensible methods. *See* 40 C.F.R. § 131.11 (narrative standards may be established if numeric standards cannot be set); *Natural Resources Defense v. United States EPA*, 915 F.2d 1314, 1317-18 (1990). Narrative criteria are appropriate to supplement numeric criteria, or in the interim until numeric criteria can be established. *See* 40 C.F.R. § 131.11(b)(2).

P44. State law requires similar protective measures, and contemplates a comprehensive program for pollution prevention. *See* § 75-5-101(2), MCA. Given these objectives, and the projections for widespread CBM development, the BER was warranted in taking proactive [\*28] measures to protect water quality. The BER's decision to use numeric standards is within the agency's sound discretion under its rulemaking authority, to which this Court must defer. Theoretically, it is possible that a record so overwhelmingly establishes error regarding the agency's decision that a court should overrule it and remand to the agency, but such circumstances are not present here.

P45. Plaintiffs assert that the BER acted arbitrarily and capriciously because the numeric water quality standards ultimately adopted in 2003 are excessively strict, sometimes even lower than natural levels of EC and SAR in the receiving water. Plaintiffs suggest that

absent some reliable data that the general "narrative" standard was inadequate to protect designated uses, there is no scientific basis to justify a change from the general "narrative" standard to a numeric water quality standard. The Court disagrees. Given the long term projection for massive CBM development, the rules were "reasonably necessary" to ensure consistency in permitting, and for promoting the overriding goal of protecting irrigated agriculture as a designated use. Nothing more is required to uphold the agency actions [\*29] as consistent with the authorizing statutes.

P46. The Court understands that the BER focused on CBM discharges in light of the fact that "non-point source" discharges, such as agricultural runoff, are regulated differently from "pointsource" discharges under the CWA and under Montana law pursuant to the MPDES permitting process. *See e.g. League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1183 (9th Cir. 2002); *see also, Northern Plains, supra*, 325 F.3d 1155, 1161-1165 (9th Cir. 2003). Following the Ninth Circuit Court's ruling that CBM point discharges constitute a "pollutant," the BER was obliged to regulate it as such under the MPDES program. Given this rationale, such focus was proper and does not constitute unfair treatment toward industry.

P47. Plaintiffs also attack the scientific basis of the numbers that were ultimately chosen. On this record, the Court will not second-guess the BER's choice of numbers relative to what is required to protect beneficial uses, e.g., irrigated agriculture. The record is exhaustive and contains more than sufficient scientific justification for the numeric standards that were adopted. The fact that data in the administrative record is subject [\*30] to scientific debate does not render the agency's conclusions unfounded, nor should the Court participate in that debate and substitute its judgment for that of the rulemaking agency. *See American Petroleum Inst. v.*



United States EPA, 858 F.2d 261, 264 (5th Cir. 1988); accord, Marsh v. Oregon, supra, 490 U.S. at 378 ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.")

P48. Scientists agree that, at some levels, EC is damaging to plants and SAR is damaging to soils. (Agreed Facts, No. 29; BER Rec. 00011, 00085, 00113, 01532, 01533.) The parties agree that both parameters can affect the suitability of water for irrigation. (Agreed Facts, No. 20, citing BER Rec. 01174.) The record demonstrates, and the parties acknowledge that the factors to consider include soil type, irrigation methods, and crops grown. (Agreed Facts, No. 29, citing BER Rec. 00082, 00109, 01534-37.) The law does not require the BER to set the standard at the least protective level (i.e., more favorable to industry), or to shift risk to beneficial [\*31] users (the irrigators), or to wait for the damage to the resource to occur prior to acting. Moreover, when the matter under consideration is subject to scientific debate, substantial agency expertise is involved, and the agency must choose among differing scientifically supported conclusions, the Court will not consider a second round of scientific debate which infringes upon the executive branch decision-making function. Friends of the Wild Swan v. Department of Natural Resources & Conservation, supra, P28. The Court's function is only to determine whether BER's decision was made in compliance with applicable law, supported by the evidence, and adopted through valid administrative procedures. Id., see also North Fork Preservation Assoc. v. Department of State Lands, supra, 238 Mont. at 458-59, 778 P.2d at 867.

P49. The Court concludes that the BER, in the exercise of its discretion, was entitled to weigh the science, compare the veracity of the experts, and make a final determination based on the evidence presented. See

Maine v. Norton, 257 F. Supp. 2d 357 (D. Me. 2003).

Ultimately, the BER set numeric standards that fell within the range of science presented and determined that rain [\*32] and other considerations required a conservative approach to protect irrigated agriculture and aquatic life. (BER Rec. 02669, 02562-64.) In response to comments, the BER specifically found that the adopted standards were based on a "sound rationale" designed to protect beneficial uses. (BER Rec. 02508.)

P50. Plaintiffs' essentially argue that the BER should set the standards based on the assimilative capacity of the river to absorb pollutants. However, this is impermissible under the CWA. Southeast Alaska Conservation Council v. United States Army Corps of Eng'rs, 486 F.3d 638, 644 (9th Cir. 2007). Adoption of Plaintiffs' argument would require this Court not only to impermissibly second-guess the BER, but also potentially authorize disposal of water effectively transforming the Powder River Basin into a waste water treatment system. Ultimately, the BER was not required to retain a narrative standard for EC and SAR simply because any prospective damage from full-scale CBM development had not yet occurred. When water quality is at stake, the BER and the DEQ are mandated to afford protection, and to the extent these agencies have done so consistent with supportive scientific data, there [\*33] is no error.

P51. 3. Are the 2006 BER rules, classifying EC and SAR as harmful parameters invalid because (a) the BER acted with an arbitrary or capricious disregard for the purpose of the authorizing statute(s) and/or (b) BER did not comply with applicable statutory law

#### A. Applicable Law

P52. In addition to state and federal requirements to adopt protective water quality standards, the CWA

requires states to adopt an anti-degradation policy to protect high quality water. 40 C.F.R. §§ 131.6(d), 131.12(a). High quality water includes all surface waters in Montana except those waters that are not capable of supporting any one of the designated uses for their classification, and any water that is of higher quality than the applicable water quality standard. *See § 75-5-103(10), MCA.*

P53. Montana's anti-degradation policy is called a "nondegradation" policy and is found at § 75-5-303, MCA. The statute provides: "[e]xisting uses of state waters and the level of water quality necessary to protect those uses must be maintained and protected." *See § 75-5-303(1), MCA*. DEQ may not authorize degradation of high quality water unless it has been affirmatively demonstrated by a preponderance of the evidence [\*34] that (a) degradation is necessary because there are no economically, environmentally, and technologically feasible modifications to the proposed project that would result in no degradation; (b) the proposed project will result in important economic or social development and that the benefit of the development exceeds the costs to society of allowing degradation of high quality waters; (c) existing and anticipated use of state waters will be fully protected; and (d) the least degrading water quality protection practices determined by the department to be economically, environmentally, and technologically feasible will be fully implemented by the applicant prior to and during the proposed activity. *See § 75-5-303(3), MCA.*

P54. "Degradation" means a change in water quality that lowers the quality of high-quality waters for a parameter. The term does not include those changes in water quality determined to be nonsignificant. *See § 75-5-103(5), MCA*. If degradation is allowed, the CWA requires that "existing and anticipated uses of state

waters must be fully protected." *See 33 U.S.C. § 303(3)(c).*

P55. The BER is responsible for adopting rules to implement Montana's nondegradation policy, including [\*35] rules to determine whether a discharge qualifies as "nonsignificant." *See § 75-5-301(5), MCA*. Pursuant to that statute, the BER is directed to:

(a) provide a procedure for department review and authorization of degradation;

(b) establish criteria for the following:

(i) determining important economic or social development; and

(ii) weighing the social and economic importance to the public of allowing the proposed project against the cost to society associated with a loss of water quality;

(c) establish criteria for determining whether a proposed activity or class of activities, in addition to those activities identified in §75-5-317, will result in nonsignificant changes in water quality for any parameter in order that those activities are not required to undergo review under §75-5-303(3). These criteria must be established in a manner that generally:

(i) equates significance with the potential for harm to human health, a beneficial use, or the environment;

(ii) considers both the quantity and the strength of the pollutant;

(iii) considers the length of time the degradation will occur;

(iv) considers the character of the pollutant so that greater significances associated with carcinogens and toxins [\*36] that bioaccumulate or biomagnify and lesser significance is associated with substances that are less harmful or less persistent. *See §75-5-301(5)(a)-*

(c), MCA.

P56. In accordance with § 75-5-301(5), MCA, the BER has adopted rules governing nondegradation procedures in *ARM 17.30.707-716*. The procedure requires a discharger to undergo nondegradation review and thereby obtain an authorization to degrade high quality water, unless the proposed discharge qualifies as "nonsignificant" under *ARM 17.30.715*. The nonsignificance criteria are dependent on several factors, including the quantity, strength and character of the pollutant (e.g., carcinogens being most closely regulated, then toxins, and finally, pollutants that are deemed harmful). The discharge of any parameter for which numeric standards exist is significant if it will cause the receiving waters to meet or exceed the numeric standards. A discharge of any parameter that is governed by the narrative water quality standard qualifies as "nonsignificant" as long as the change "will not have a measurable effect on any existing or anticipated use or cause measurable changes in aquatic life or ecological integrity." *See ARM 17.30.715(1)(g)*. [\*37] This is referred to as the "narrative nonsignificance rule" because it does not have numeric trigger values for nondegradation review, as there are for carcinogens, toxics, and other harmful parameters.

#### **B. Consistency With Authorizing Statutes (2006 rules)**

P57. Prior to the 2003 rulemaking, any discharges containing EC and SAR were subject to the "narrative nonsignificance rule" because EC and SAR were governed by the narrative water quality standards in *ARM 17.30.637*. In 2003, when numeric standards for EC and SAR were adopted, discharges of those parameters no longer qualified as "nonsignificant" under subsection (1)(g). Nonetheless, the BER voted to retain the narrative "nonsignificant" criteria for purposes of nondegradation review even though EC and SAR now

had numeric standards. (BER Rec. 06659; 3/28/03 Tr. at 157, 160.) In practice, the narrative nonsignificance criterion meant that a discharge of EC and SAR would be deemed significant (and thus subject to formal nondegradation review) only if it caused concentrations of those parameters to be at or near the concentrations allowed by the 2003 numeric standards. (Agreed Facts, No. 52.) This allowed a discharger to degrade water [\*38] quality effectively up to the water quality standard itself.

P58. In the 2006 rulemaking, the BER designated EC and SAR as "harmful" parameters for purposes of the nonsignificance determination, which means that numeric nonsignificance criteria apply (what the parties refer to as the "40/10" rule). (Agreed Facts, No. 59.) With this designation, as with other harmful parameters, a discharge containing EC and SAR qualifies as nonsignificant only if the change in water quality is "less than 10% of the applicable standard and the existing water quality level is less than 40% of the standard." *See ARM 17.30.715(1)(f)*. This change requires an authorization to degrade if a proposed discharge to high quality water exceeds these trigger levels (State's Exhibit B), so that dischargers may no longer degrade high quality water up to the standard itself. Plaintiffs challenge this action as arbitrary or capricious because they allege (1) there is no evidence that water quality was not adequately protected under the 2003 nondegradation criteria; (2) the BER failed to consider the factors in § 75-5-301(5), MCA; and (3) the BER was illogically focused on CBM rather than irrigation as the true cause [\*39] of degradation. Implicit in Plaintiffs' argument is the notion that the 2006 rulemaking effectively cut the numeric standards in half, so that an entirely new scientific justification for the rules was required.

P59. The Court is not persuaded by Plaintiffs' characterization of the 2006 rulemaking. In fact, what

the BER did in 2006 was treat discharges of EC and SAR for purposes of nondegradation review in the same manner as all other constituents for which there are numeric standards. (BER Rec. 06657, 06661.) This was essentially a policy-based decision for which there is adequate scientific justification in the 2003 rulemaking record. The rules protect high quality water by requiring permit writers to stop short of allowing degradation right up to the standard.

P60. In a proper exercise of its discretion, the BER determined that its 2003 decision to retain a narrative nonsignificance rule for EC and SAR did not adequately protect high quality water, and that it was more appropriate to treat EC and SAR consistently with all other parameters for which there are numeric standards. (BER Rec. 06654-06661.) There is nothing in the record to suggest that the BER's decision was based on anything [\*40] but a careful consideration of relevant factors, or that the BER committed a "clear error of judgment." As in the 2003 rulemaking, the BER held numerous public hearings, received significant comment, and clearly articulated its reasons for changing from narrative nonsignificance criteria, to numeric criteria that were clear and identifiable. In this respect, the 2006 amendment is entirely consistent with the legislative directive to establish "objective and quantifiable criteria for various parameters," when adopting rules implementing Montana's nondegradation policy. See § 75-5-301(6), MCA.

P61. As noted, Montana's nondegradation policy forbids any change to high quality waters unless certain findings are made. See § 75-5-303(3), MCA. To the extent that discharges of EC and SAR qualified as nonsignificant under the 2003 rules, the potential existed for incremental degradation of high quality water without the required findings. In this respect, the 2006 rules simply brought the regulation of EC and SAR into

better conformity with state and federal law. In sum, there is nothing arbitrary or capricious about the BER's classification of EC and SAR as harmful parameters, especially in [\*41] view of NPRC v. Fidelity, supra.

P62. Finally, the effect of the new nondegradation criteria is simply to require CBM developers to obtain an authorization to degrade, which is not the equivalent of a moratorium on CBM development. Where high quality water is at stake, the law mandates this result and does not allow the DEQ or the BER to forego such review.

P63. After review of the administrative record of the 2003 and 2006 proceedings, the Court finds that the BER adequately considered the factors in § 75-5-301(5), MCA, when amending its nonsignificance rule. The rule itself (ARM 17.30.715) includes the language of the statute:

(1) The following criteria will be used to determine whether certain activities or classes of activities will result in nonsignificant changes in existing water quality due to their low potential to affect human health or the environment. These criteria consider the quantity and strength of the pollutant, the length of time the changes will occur, and the character of the pollutant.

P64. It may be inferred that, by amending the rule itself, the BER took these factors into account when it determined that EC and SAR should be classified as harmful parameters for [\*42] purposes of determining nonsignificance. Therefore, the Court concludes that the BER did comply with statutory law when classifying EC and SAR as harmful parameters in 2006.

P65. 4. Was the BER required to make written findings in accordance with §§ 75-5-203 and/or 75-5-309, MCA, relative to the 2003 or 2006 rulemakings

P66. Montana law requires the BER to make written findings if it adopts rules that are more stringent than

corresponding federal regulations. *See §§ 75-5-203, -309, MCA.* Specifically, *§ 75-5-203(1), MCA*, forbids the adoption of a rule that is "more stringent than the comparable federal regulations or guidelines that address the same circumstances." Subsection 2 allows adoption of such a rule if the BER makes certain findings based on evidence in the record. *Section 75-5309(1), MCA*, contains a similar requirement employing different language and authorizes adoption of rules that are "more stringent than corresponding draft or final federal regulations, guidelines, or criteria" if the requisite written findings are made. These statutory requirements were imposed by the Legislature in 1995. (See Chapters 471 and 497.)

P67. The parties acknowledge that the BER did not make [\*43] written findings under *§§ 75-5-203* or *75-5-309, MCA*, for either the 2003 or the 2006 rulemakings. The DEQ provided a legal opinion to the BER that the 2003 numeric standards and the 2006 nonsignificance criteria for EC and SAR were not more stringent than comparable or corresponding federal regulations. (Agreed Facts, Nos. 56, 69.) Defendants argue that the BER was not required to make written findings because there are no "comparable" or "corresponding" federal regulations, guidelines, or criteria governing EC and SAR. Alternatively, citing *40 C.F.R. § 130.11*, Defendants argue that the rules governing EC and SAR are consistent with, and not more stringent than, federal regulations requiring states to adopt water quality standards to protect designated uses.

P68. Plaintiffs argue that when the EPA approved the general "narrative" water quality standard (presumably around 1972), it became the federal standard for purposes of *§§ 75-5-203* and *75-5-309, MCA*, so that any subsequent change to numeric standards triggered the necessity for written findings thereunder. Similarly, Plaintiffs contend that when EPA approved the nonsignificance nondegradation criteria in 2003, it

became the federal [\*44] nondegradation standard, so that any subsequent designation of EC and SAR as harmful parameters also triggered the requisite statutory findings.

P69. Plaintiffs cite no authority for the proposition that EPA approval "federalizes" the standard such that the BER is required to comply with *§§ 75-5-203* and/or *75-5-309, MCA*, whenever a water quality standard or the nonsignificance criteria are revised. This is a question of legislative intent, and there is nothing in the plain language of the statutes or their legislative history to support Plaintiffs' interpretation. Written findings are required only when the adopted or revised state standards are more stringent than comparable or corresponding federal regulations or guidelines. *See §§ 75-5-203 and 75-5-309, MCA. Sections 75-5-203 and 75-5-309, MCA*, are triggered only when EPA has promulgated a federal regulation, guideline or criteria addressing the particular parameter involved (EC or SAR) or discharges of CBM water generally. *See 33 U.S.C. § 1314(a)* (authorizing EPA to promulgate numeric criteria that apply nationwide). The parties agree that there are no national numeric criteria for EC or SAR. (BER Rec. 00539; Agreed Facts, No. 22.) [\*45] In the absence of specific corresponding or comparable federal regulations or guidelines governing EC or SAR, or CBM produced water generally, the Court concludes that the BER was not required to issue written findings under *§§ 75-5-203* or *75-5-309, MCA*. The Court also notes that the BER's adoption of numeric standards for EC and SAR and their classification as harmful parameters is consistent with the federal CWA insofar as the standards protect designated uses and high quality water. The statutes do not require the BER to issue written findings for rules that are consistent with, as opposed to more stringent than (or in conflict with), federal requirements.

P70. In view of the foregoing, the BER did not arbitrarily

disregard the controlling statutes.

P71. 5. Was the BER required to prepare an environmental impact statement (EIS) at the time of the 2006 rulemaking

P72. The standard for judicial review of an agency's action subject to the Montana Environmental Policy Act (MEPA) is "whether the record establishes that the agency acted arbitrarily, capriciously, or unlawfully." North Fork Preservation Ass'n v. Department of State Lands, *supra*, 238 Mont. at 458-59, 778 P.2d at 867. To determine [\*46] the lawfulness or unlawfulness of an agency decision, a court reviews an agency's action for compliance with its own procedural rules under MEPA. *Id.*, 238 Mont. at 459, 778 P.2d at 867. Plaintiffs contend that the 2006 rulemaking constituted a "major action of state government" that required preparation of an EIS pursuant to MEPA. The Court disagrees.

P73. When the BER adopted the rules classifying EC and SAR as "harmful" in 2006, the agency did not authorize any activity affecting the quality of the human environment. The Montana Supreme Court has affirmed that "[a]n EIS is required only when there is a substantial question as to whether [the action] may have a significant effect upon the human environment." See § 75-1-201(1)(b)(iv), MCA. Ravalli County Fish & Game Ass'n v. Montana Dep't of State Lands, 273 Mont. 371, 382, 903 P.2d 1362, 1370 (1995).

P74. In resolving the issue of whether a duty of environmental review exists, the Court is required to determine when MEPA analysis must be completed prior to a final agency decision. For guidance, this Court has reviewed case law which addresses the timing of an EIS in the decision-making process of state and federal agencies. Other courts [\*47] have attempted to explain with precision at what point an EIS is required. The Court is persuaded that "[a]n EIS is required when the

'critical agency decision' is made which results in 'irreversible and irretrievable commitments of resources' to an action which will affect the environment." Sierra Club v. Peterson, 230 U.S. App. D.C. 352, 717 F.2d 1409 (D.C. Cir., 1983) (citing Mobil Oil Corp. v. F.T.C., 562 F.2d 170, 173 (2d Cir. 1977)). This same rule has been adopted by the Ninth Circuit Court of Appeals. See e.g. Conner v. Burford, 848 F.2d 1441, 1446 (9th Cir., 1988) ["Our circuit has held that an EIS must be prepared before any irreversible and irretrievable commitment of resources."] Based upon the above authority, it is clear that promulgation of rules regulating water quality does not constitute an "irretrievable commitment of resources" and is not an action requiring an EIS. The regulations do not authorize nor permit surface disturbing activity independent of further governmental action. See Conner v. Burford, *supra*; see also, Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 891-902, 110 S. Ct. 3177, 3190-3191, 111 L. Ed. 2d 695 (1990). The promulgation or modification of environmental [\*48] regulations, while certainly very significant, is not the type of "major action of state government" contemplated under MEPA. In contrast, a decision by DEQ to authorize degradation under §75-5-303, MCA, or to issue a MPDES permit, would require prior environmental review due to its potential effect upon the human environment. See ARM 17.4.603(1). No such circumstance is present in this case. Accordingly, the BER did not err in declining to prepare an EIS at the time of the 2006 rulemaking.

P75. WHEREFORE, for the reasons stated above,

P76. IT IS ORDERED as follows:

P77. 1. The *Motions for Summary Judgment* filed by Defendants, BER and DEQ, and Defendant-Intervenors, NPRC and TRWUA, are hereby GRANTED.

P78. 2. The Cross *Motion for Summary Judgment* filed

by Plaintiffs and PlaintiffIntervenor Fidelity is hereby  
**DENIED.**

P79. Let judgment be prepared and entered  
accordingly.

**DATED** this 17th day of October, 2007.

BLAIR JONES, District Judge

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**Pennaco Energy, Inc. v. Mont. Bd. of Env'tl. Review**

Supreme Court of Montana

October 16, 2008, Submitted on Briefs; December 16, 2008, Decided

DA 07-0755

**Reporter**

2008 MT 425 \*; 347 Mont. 415 \*\*; 199 P.3d 191 \*\*\*; 2008 Mont. LEXIS 664 \*\*\*\*

PENNACO ENERGY, INC., MARATHON OIL COMPANY, ST. MARY'S LAND & EXPLORATION COMPANY, and YATES PETROLEUM CORPORATION, Plaintiffs and Appellants, v. MONTANA BOARD OF ENVIRONMENTAL REVIEW, MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, NORTHERN PLAINS RESOURCE COUNCIL, and TONGUE RIVER WATER USERS' ASSOCIATION, Defendants and Appellees.

**Prior History:** [\*\*\*\*1] APPEAL FROM: District Court of the Twenty-Second Judicial District, In and For the County of Big Horn, Cause No. DV 2006-068. Honorable Blair Jones, Presiding Judge.

Pennaco Energy v. Mont. Bd. of Env'tl. Review, 2007 Mont. Dist. LEXIS 513 (2007)

**Counsel:** For Appellants: Ronald F. Waterman, Gough, Shanahan, Johnson & Waterman, Helena, Montana; L.B. Cozzens, Cozzens Law Office, Billings, Montana; John C. Martin, Duane A. Siler, Michele L. Walter, Patton Boggs, LLP, Washington, D.C.

For Appellees, Montana Board of Environmental Review and Montana Department of Environmental Quality: Hon. Mike McGrath, Montana Attorney General, Jennifer Anders, Sarah A. Bond, Assistant Attorneys General, Helena, Montana; Claudia Massman, Department of Environmental Quality, Helena, Montana.

For Appellee, Northern Plains Resource Council: Jack

R. Tuholske, Tuholske Law Office, P.C., Missoula, Montana.

For Appellee, Tongue River Water Users Association: Brenda Lindlief Hall, Reynolds Motl & Sherwood, PLLP, Helena, Montana.

**Judges:** PATRICIA COTTER. We concur: W. WILLIAM LEAPHART, BRIAN MORRIS, JAMES C. NELSON, JIM RICE. Justice Patricia O. Cotter delivered the Opinion of the Court.

**Opinion by:** Patricia O. Cotter

**Opinion**

[\*\*\*193] Justice Patricia O. Cotter delivered the Opinion of the Court.

[\*P1] [\*\*417] The Plaintiffs and Appellants in this matter [\*\*\*\*2] are Pennaco Energy, Marathon Oil, Nance Petroleum and Yates Petroleum (collectively Pennaco). The Defendants and Appellees are Montana Board of Environmental Review (BER or the Board) and Montana Department of Environmental Quality (DEQ). Defendant Intervenor is Northern Plains Resource Council (NPRC) and Tongue River Water Users' Association (TRWUA).

[\*P2] This case arises from the regulation of the discharge into state waterways of salty water produced from coal bed methane (CBM) production. This water is



called "CBM produced water." CBM produced water, which contains naturally high levels of sodium and salts, is frequently discharged by industries to surface waters. As a result, the water quality of the receiving waters can be degraded. Additionally, when land is subsequently irrigated with surface water mixed with CBM produced water, there is a potential threat to the irrigated agriculture as the salt from the water may accumulate in the plants' root systems and impair plant growth. In recognition of this potential impact, the State regulates the discharge of two harmful components of CBM produced water--sodium adsorption ratio (SAR <sup>1</sup>) and electrical conductivity (EC <sup>2</sup>). The EPA is [\*\*\*3] currently studying the coal bed methane sector to determine if federal effluent guidelines for these parameters are appropriate. *71 Fed. Reg. 76644, 76656 (Dec. 21, 2006)*.

[\*P3] In both 2003 and 2006, BER revised its rules regulating EC and SAR. Pennaco challenged these revised rules in the Twenty-Second Judicial District Court. BER filed a motion for summary judgment and Pennaco filed a cross-motion for summary judgment. The District Court granted BER's motion and denied Pennaco's. On appeal, Pennaco challenges the standard of review applied by the District Court, as well as the court's conclusions that BER did not fail to comply with relevant rules in promulgating [\*\*\*4] new

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<sup>1</sup> SAR is the concentration of sodium relative to calcium and magnesium in water.

<sup>2</sup> EC--electrical conductivity of water means the ability of water to conduct an electrical current at 25 degrees C. It is expressed as microSiemens per centimeter ([mu]S/cm) or micromhos/centimeter ([mu]mhos/cm) or equivalent units and is corrected to 25 degrees C. Admin. R. M. 17.30.602(9). Electrical conductivity of water samples is used as an indicator of how salt-free or impurity-free the sample is; the purer the water, the lower the conductivity.

standards for EC and SAR. We affirm.

## [\*\*418] ISSUES

[\*P4] A restatement of the issues presented on appeal is:

[\*P5] Did the District Court erroneously apply a standard of review that was too deferential and inapplicable to agency rulemakings?

[\*P6] Did the District Court err in concluding that BER was authorized to designate EC and SAR harmful in 2006 when BER had refused to do so in 2003?

[\*P7] Did the District Court err in concluding that BER's revised rule was not "more stringent" than federal law, and therefore BER was not statutorily required to issue written findings of fact?

## FACTUAL AND PROCEDURAL BACKGROUND

[\*P8] [\*\*\*5] Marathon Oil Company, a Delaware corporation with headquarters in Houston, Texas, engages in worldwide exploration and production of crude oil and natural gas, as well as domestic refining, marketing, and transportation of petroleum products. Marathon holds leases for oil and gas production in Montana. Pennaco is a wholly owned subsidiary of Marathon and is actively pursuing coal bed natural gas development in the Powder River Basin (the Basin) in Wyoming. Nance Petroleum and Yates Petroleum are [\*\*\*194] out-of-state corporations also pursuing coal bed natural gas development in the Basin in Montana and Wyoming.

[\*P9] To produce coal bed natural gas, a well is drilled into the selected coal seam. On the surface of the coal are molecules of methane gas, held in place by water pressure from a coal seam aquifer. In order to release

the natural gas, the water pressure must be released. This is accomplished by pumping water out of the coal seam which causes the methane to detach from the coal and rise to the surface. The regulations imposing restrictions on the discharge of this pumped water are the source of this dispute.

**[\*P10]** The federal Clean Water Act, enacted in 1972 (the Act), delegates the responsibility **[\*\*\*\*6]** for enforcing the Act to states that meet specific criteria. States are required to enact water protection laws consisting of three elements: establishment of a "designated use" for each water body--e.g., recreation, irrigation, etc.; establishment of numeric or narrative water quality standards for each water body designed to prevent impairing the water quality for that particular use; and adoption of a nondegradation policy to maintain and protect a state's water resources. 40 C.F.R. §§ 131.10, 131.11, and 131.12.

**[\*P11]** Between 1972 and 2003, EC and SAR, among other parameters, were regulated in Montana exclusively by narrative standards, as **[\*\*419]** opposed to numeric standards. The Administrative Rules of Montana (ARMs) set forth a general prohibition against discharging substances that create concentrations or combinations of materials which are toxic or harmful to human, animal, plant or aquatic life, or that would produce undesirable aquatic life. Admin. R. M. 17.30.637(1)(d)-(e). The State also established a nondegradation policy for its water. Admin. R. M. 17.30.705. "Degradation" is "a change in water quality that lowers the quality of high-quality waters for a parameter. The term does **[\*\*\*\*7]** not include those changes in water quality determined to be nonsignificant pursuant to 75-5-301(5)(c)." *Section 75-5-103(5), MCA.* Additionally, the ARMs specify that "degradation" "is defined in *75-5-103, MCA*, and also means any increase of a discharge that exceeds the limits established under or determined from a permit or approval issued by the

department prior to April 29, 1993." Admin. R. M. 17.30.702(3). "High-quality waters" are defined as "all state waters, except: . . . surface waters that: are not capable of supporting any one of the designated uses for their classification . . . ." *Section 75-5-103(10)(b)(i), MCA.* The State established specific criteria for determining whether an activity would result in nonsignificant changes in existing water quality. Admin. R. M. 17.30.715. With some exception for changes in the quality of water for any parameter for which there were only narrative water quality standards (i.e., EC and SAR before 2003), any changes that would not have a measurable effect on any existing or anticipated use or cause measurable changes in aquatic life or ecological integrity were viewed as insignificant and would not trigger a nondegradation review. Admin. **[\*\*\*\*8]** R. M. 17.30.715(1)(g) and (2).

**[\*P12]** In early 2000, at the behest of the Water Pollution Control Advisory Council, DEQ began investigating the effect of CBM produced water on soils and stream life to determine whether to implement numeric standards for this type of discharge. In May 2002, DEQ completed two alternative draft rules, both of which set a range of numeric water quality standards for EC and SAR on the rivers and streams in the Powder River Basin. Both proposals were accompanied by technical support documents explaining the rationale and scientific basis for the proposed rules.

**[\*P13]** In early June 2002, NPRC, TRWUA and other Powder River Basin water rights holders filed a petition for rulemaking urging BER to adopt numeric standards for EC and SAR. BER put out three proposals for public comment and held two public meetings. Industry opposed the numeric standards arguing that the existing narrative standard was sufficient. While the public comment period was open, **[\*\*420]** BER received extensive information from scientists and technical people, the EPA, environmental groups and irrigators.

[\*P14] In 2003, BER adopted numeric standards for EC and SAR for three rivers and a creek making up the Powder River [\*\*\*\*9] Basin. Admin. R. M. 17.30.670. These standards established specific levels for EC and SAR [\*\*\*195] discharges into the waters of the Basin from November 1 through March 1 each year. They also established lower levels of allowable discharges from March 2 through October 31. In addition, the Board expressly provided that the nonsignificance criteria that were in place at that time and applied to parameters regulated by narrative standards *only*, would continue to apply to EC and SAR, despite the fact that EC and SAR would now have numeric standards. It rejected irrigators' requests to designate EC and SAR as "harmful" parameters at that time but agreed to explore a method of tracking natural EC to address nondegradation issues. The effect of employing numeric criteria for the discharge of EC and SAR but retaining the narrative "nonsignificant" criteria for nondegradation review of these parameters was to potentially allow discharges that could degrade water quality up to the numeric water quality standard.

[\*P15] In 2005, NPRC and a group of irrigators filed another petition for rulemaking asking BER to adopt rules to require treatment of CBM produced water. They also requested again that BER designate [\*\*\*\*10] EC and SAR as "harmful" parameters. BER put this out for public comment and held three hearings and a public meeting. In May 2006, BER rejected the proposal to require treatment but designated EC and SAR as "harmful."

[\*P16] In June 2006, Pennaco challenged the validity of the EC and SAR water quality standards promulgated by BER in 2003 and 2006. It filed an action in the Twenty-Second Judicial District Court under Montana Administrative Procedure Act (MAPA), Montana Declaratory Judgment Act (MDJA), Montana Water Quality Act (WQA) and Montana Environmental Policy

Act (MEPA) seeking to invalidate the 2003 and 2006 rules adopted by BER. Pennaco claimed the 2003 rules had no sound scientific basis. Pennaco also claimed BER and DEQ failed to prepare a MEPA-required environmental impact statement (EIS). In February 2007, BER moved for summary judgment asserting that no genuine issues of material fact existed and that the administrative record showed that it had validly exercised its authority to issue the challenged rulemakings. In April 2007, Pennaco filed a cross-motion for summary judgment arguing that BER had not validly exercised its authority because the rulemakings were not [\*\*421] supported by [\*\*\*\*11] the required sound, scientific justification. After briefing and joint submission of Agreed Facts, the court held oral argument in July 2007. In October 2007, the District Court granted BER's motion and denied Pennaco's cross-motion. Pennaco appeals.

## STANDARDS OF REVIEW

[\*P17] We review a district court's grant of summary judgment de novo, and apply the same criteria applied by the district court pursuant to M. R. Civ. P. 56(c). A district court properly grants summary judgment only when no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law. *Sampson v. National Farmers Union Property*, 2006 MT 241, P 7, 333 Mont. 541, P 7, 144 P.3d 797, P 7 (citation omitted).

[\*P18] An agency's conclusions of law are reviewed to determine if they are correct. This same standard of review is applicable to both the district court's review of the administrative decision and our subsequent review of the district court's decision. *Indian Health Board v. Mont. Dept. of Labor*, 2008 MT 48, P 11, 341 Mont. 411, P 11, 177 P.3d 1029, P 11.

## DISCUSSION

**[\*P19]** *Did the District Court erroneously apply a standard of review that was too deferential and inapplicable to agency rulemakings*

**[\*P20]** **[\*\*\*\*12]** In the District Court's 33-page decision, the court acknowledged that Pennaco brought this action under multiple statutes--MAPA, §§ 2-4-101 to -711, MCA, MDJA, §§ 27-8-101 to -313, MCA, the Montana WQA, §§ 75-5-101 to -1126, MCA, and MEPA, §§ 75-1-101 to -1112, MCA. The court cited § 2-4-506(2), MCA, which is within the Judicial Notice and Declaratory Rulings section of MAPA, and provides that a court may declare an administrative rule invalid only if "the rule was adopted with an **[\*\*\*196]** arbitrary or capricious disregard for the purpose of the authorizing statute." Citing § 2-4-305(6), MCA, in the Adoption and Publication of Rules section of MAPA, the court explained that a rule comports with the administrative procedure act if it is *(a)* consistent and not in conflict with the applicable statute, and *(b)* reasonably necessary to effectuate the purpose of the statute.

**[\*P21]** The District Court also determined that an agency decision involving "substantial agency expertise" must be reviewed to determine whether the agency acted arbitrarily, capriciously or unlawfully. Relying on Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989) and North Fork Pres. v. Dept. of State Lands, 238 Mont. 451, 458-59, 778 P.2d 862, 867 (1989),

**[\*\*\*\*13]** **[\*\*422]** the court noted that when we reviewed an agency's decision to forego an EIS, we applied an arbitrary, capricious or unlawful standard. The District Court also explained how to review an agency decision for arbitrariness or capriciousness, again relying on both U.S. Supreme Court and Montana Supreme Court authority. Applying these standards, the District Court

held that, based on BER's underlying statutory authority (also analyzed by the court), the agency rulemakings were consistent with supportive scientific data and the authorizing statutes. The court found that the 2003 rules were motivated by BER's concerns of projected CBM development in the Powder River Basin <sup>3</sup> and the difficulty for DEQ staffers to objectively and consistently translate the existing narrative standards. The court determined that the protection mandated by both federal and state water laws warranted proactive measures by BER.

**[\*P22]** On appeal, Pennaco claims the District Court mistakenly applied the standard **[\*\*\*\*14]** of review in the declaratory judgment provisions of MAPA when it should have applied the standard set forth in the section of MAPA for the adoption and publication of rules. Additionally, Pennaco maintains that WQA requires that "rules should be adopted only on the basis of sound, scientific justification" and the Board should "seriously consider the impact of the proposed rule." Pennaco summarizes the applicable rules and asserts that under MAPA and WQA, the District Court was required to consider whether the 2003 and 2006 rules were: (1) based on serious consideration of their impact; (2) adopted *only* on the basis of sound, scientific justification and *not* on the basis of projections and conjecture; (3) consistent with and not in conflict with the statute; and (4) reasonably necessary to effectuate the purposes of the WQA. It opines that failure to satisfy any of these substantive standards mandated that the District Court declare the rules invalid.

**[\*P23]** Pennaco argues that the District Court should have first looked to the substantive standards in part 3

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<sup>3</sup>The record indicates that EPA predicted that 9,551 CBM wells will be operating in the Basin by 2010 resulting in the discharge of millions of gallons of CBM production water per day into the Basin's river system.

of MAPA, i.e., the Adoption and Publication of Rules section, to discern if the rules met the required substantive standards. It opines [\*\*\*\*15] that the rules did not comply because they had no "sound scientific basis." Pennaco maintains that only after determining if the substantive standards are satisfied should the court [\*\*423] then look to part 5 of MAPA and specifically to § 2-4-506(1) and (2), MCA, to determine if either provision would allow a finding of invalidity. Pennaco maintains that by going first to § 2-4-506(2), MCA, (and without consideration of subsection (1)), the District Court overlooked the actual and correct standard of review in part 3.

[\*P24] Pennaco also posits that the court's determination of the standard of review was erroneously based on cases from this Court that did not involve either agency rulemakings or challenges under MAPA. It further claims that the court ignored applicable cases addressing agency rulemaking. Relying on Bell v. Dept. of Licensing, 182 Mont. 21, 23, 594 P.2d 331, 333 (1979), and Board of Barbers, Etc. v. Big Sky College, Etc., 192 Mont. 159, 161, 626 P.2d 1269, 1270 (1981), Pennaco argues that this Court has stated that the "MAPA test of 'reasonable necessity to effectuate the purposes of the statute' should be [\*\*\*197] applied." Pennaco maintains that the application of the wrong standard of [\*\*\*\*16] review requires this Court to vacate and remand for "the more searching review demanded by MAPA and the WQA."

[\*P25] Pennaco also asserts that the District Court failed to heed our directive that it give less deference to agency interpretations that are inconsistent or recent, and that the Board's decision to "flip-flop" and reverse its consistent thirty-year-old narrative approach to regulating EC and SAR was not entitled to the critical deference given it by the District Court. Pennaco claims that BER's decision to classify EC and SAR as "harmful" parameters in 2006 was a direct reversal of its 2003

decision to not do so. It argues that the 2006 decision lacked scientific support and therefore is invalid.

[\*P26] Pennaco proffers that application of the incorrect standard of review lowered the threshold for demonstrating the validity of the rules. It maintains that it provided the District Court with substantial evidence showing that BER had no sound scientific basis for its 2003 and 2006 rulings but by applying the wrong standard of review the court gave too much deference to BER's rulemaking decisions. It asserts that a numeric limit for EC and SAR was unnecessary because scientific studies showed [\*\*\*\*17] that CBM-related discharges had not and would not adversely impact the state's water quality; therefore, the narrative standard was adequate to protect the state's water.

[\*P27] Pennaco also argues that the District Court misinterpreted the standard it employed; the standard was not simply "arbitrary and capricious," but rather an "arbitrary and capricious disregard for the purpose of the authorizing statute."

[\*P28] BER counters that Pennaco failed to identify any clear error by [\*\*424] the District Court and therefore failed to meet the burden of establishing reversible error. Furthermore, the Board asserts that the adoption of the numerical standards for EC and SAR was timely, necessary, scientifically and EPA supported. BER claims that it "was inundated with science" during the 2003 public comment period and that the adopted numeric standards fell within the range of science presented.

[\*P29] BER posits that § 2-4-302, MCA, governs adoption of rules and *not* the review of those rules by the judicial branch. BER reiterates that the standard propounded by Pennaco--whether the rules: (1) were based on sound science (WQA); (2) were reasonably necessary (MAPA); and (3) not in conflict with the

statute (MAPA)--was [\*\*\*\*18] actually employed by the District Court when it considered the matter in the manner required by § 2-4-506(2), MCA. While BER does not disagree with Pennaco's argument vis-a-vis recent or inconsistent rulings, it claims that it is inapplicable here as BER had sound reasons for reevaluating protections to the Basin's water system from these parameters based on projected significant CBM development. BER opines that this Court should not expand judicial review of agency decisions to include reweighing the science, second-guessing BER and substituting our decision for that of the Board.

[\*P30] Furthermore, BER defends the District Court's reliance on the standard of review applied in various administrative cases which Pennaco argued was inapposite. The Board avers that Winchell v. DNR, 1999 MT 11, 293 Mont. 89, 972 P.2d 1132, Johansen v. State, 1999 MT 187, 295 Mont. 339, 983 P.2d 962 (Johansen II), Johansen v. State, Dept. of Natural Resources, 1998 MT 51, 288 Mont. 39, 955 P.2d 653 (Johansen I), and North Fork, involve judicial review of a final agency decision where no review was specifically provided under MAPA. These cases, BER submits, illustrate that judicial review is limited, especially [\*\*\*\*19] when the court is reviewing an agency decision that requires substantive agency expertise.

[\*P31] Intervenors NPRC and TRWUA assert that MAPA does not contain an explicit standard of review for administrative rules as it does for contested cases; therefore, absent such an explicit standard, the District Court correctly drew guidance from § 2-4-506(2), MCA, and from administrative law decisions issued by this Court. They argue that the District Court was correct because Pennaco failed to show how numeric standards are inconsistent with the protective purposes of [\*\*\*198] state and federal water quality laws. Under the CWA, the Montana WQA and the Montana Constitution, establishment of water quality [\*\*425]

standards and nondegradation requirements is required pursuant to BER's duty to protect the environment. They maintain that under any standard of review adopted by this Court, the District Court correctly upheld BER's adoption of the 2003 and 2006 rules.

[\*P32] Intervenors suggest that the 2003 rule adopting numeric criteria but retaining the narrative nonsignificant criterion for nondegradation review violated the nondegradation policy and was constitutionally suspect. As a consequence, they argue, BER's 2006 [\*\*\*\*20] designation of these pollutants as "harmful" corrected this error by establishing a numeric nondegradation standard for EC and SAR which resulted in the similar treatment of all parameters for which numeric criteria had been established.

[\*P33] Pennaco replies that MAPA gave rise to this cause of action, not the MDJA, and therefore MAPA's standard of review controls. It posits that the declaratory judgment provisions do not *give rise* to a cause of action; rather, they simply allow a court to declare the rights, liabilities, and remedies of the parties once a court resolves the dispute. Pennaco proffers that if the standard in the MDJA applied there would be no point to MAPA having a standard of review since parties challenging agency actions typically plead declaratory judgment as a basis for relief.

[\*P34] Pennaco clarifies that it is not arguing that BER was precluded from switching to a numeric nondegradation criterion after retaining the narrative criteria in 2003; rather, it is arguing that before reversing its previous rejection of the numeric nondegradation criteria, the WQA required BER to provide a sound scientific justification for its action. Changing its position on "policy" grounds [\*\*\*\*21] (to provide that EC and SAR not be treated differently from other parameters controlled by numeric criteria) does not satisfy the requirement for a "sound scientific justification."

Nevertheless, argues Pennaco, even if BER could appropriately rely on a policy reason, its policy justifications are unpersuasive. Under the narrative standards in effect between 2003 and 2006, BER already had the authority to limit discharges of EC or SAR to levels that did not cause further degradation of the receiving waters.

[\*P35] We conclude the District Court applied an appropriate standard of review to BER's 2003 and 2006 rulemakings. The court's decision specifically addressed the factors in § 2-4-305(6)(a) and (b), MCA, in that the rules were consistent with the requirements of the CWA and the WQA, and were reasonably necessary to effectuate the purpose of the statute, i.e., the protection of the state's waters, [\*\*426] particularly in light of the projected growth of the CBM sector in the Basin and DEQ's difficulty in issuing objective and consistent discharge permits. The court found that BER reviewed copious scientific data and relied on this data to draft rules that had sufficient scientific justification, [\*\*\*\*22] thereby finding that WQA's mandate for "sound, scientific justification" was met. Additionally, based on consideration of all the circumstances, the court determined that BER had not adopted rules with an "arbitrary and capricious disregard for the purpose of the statutes." This determination satisfied the requirements of § 2-4-506, MCA. Given the multiplicity of Acts under which Pennaco sought review (see P 16), the standard of review assembled by the District Court from these different sources was not erroneous under the circumstances with which it was presented. For these reasons, we affirm the District Court's application of an appropriate standard of review.

[\*P36] *Did the District Court err in concluding that BER was authorized to designate EC and SAR harmful in 2006 when BER had refused to do so in 2003*

[\*P37] In response to Pennaco's complaints that BER

had no scientific justification in 2006 to reverse its previous decision rejecting requests to classify EC and SAR as "harmful" parameters, the District Court determined that BER's classification of EC and SAR as "harmful" was consistent with the federal CWA in that it was designed to protect uses and high quality water. The court also concluded [\*\*\*\*23] "what the BER did in 2006 was treat discharges of EC and SAR for [\*\*\*199] purposes of nondegradation review in the same manner as all other constituents for which there are numeric standards." The court recognized that BER held public hearings, received significant comments, and clearly articulated its reasons for changing its position and that BER's ruling was "entirely consistent with the legislative directive to establish 'objective and quantifiable criteria for various parameters.'"

[\*P38] On appeal, Pennaco maintains that the lack of scientific justification for the reversal in position renders the rule invalid. BER counters that it is charged with protecting the state's water under both the CWA and Montana's WQA. It maintains that it had sufficient scientific evidence to support imposition of numeric criteria in 2003 and that this same scientific data supported its 2006 decision to re-classify EC and SAR as "harmful." Moreover, it defends its decision on the ground that re-classification of the two parameters resulted in the uniform treatment of all parameters for which numeric criteria had been established, rather than the irregular regulation of EC and SAR [\*\*427] that resulted from the 2003 ruling. [\*\*\*\*24] BER asserts that this policy change was within its authority, was supported by scientific data, and was required to protect high quality waters in Montana from degradation. BER's rationale for its decision appears in its Notice of Amendment issued in May 2006:

The board finds that EC and SAR should be categorized as "harmful" for the purpose of implementing Montana's nondegradation policy.

The board notes that the intent of Montana's nondegradation policy is to protect the increment of "high quality" water that exists between ambient water quality and the numeric water quality standards. . . . Given that numeric standards have been adopted for EC and SAR, the board is uncomfortable with the inconsistency of the current "narrative" classification of EC and SAR, which is used solely for parameters for which no numeric standards have been adopted. Since all other parameters with numeric water quality standards are classified as either carcinogenic, toxic, or harmful, the board believes that EC and SAR should be treated in a similar manner.

**[\*P39]** We are not persuaded by Pennaco's argument that BER's decision should be afforded decreased deference by virtue of the fact that it is a reversal of **[\*\*\*\*25]** an earlier decision. Pennaco relies for this argument upon *National Wildlife Fed. v. Nat'l Marine Fish. Serv.*, 422 F.3d 782 (9th Cir. 2005), in which the U. S. Court of Appeals stated "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference,' than a consistently held agency view." *National Wildlife*, 422 F.3d at 799. However, we conclude that *National Wildlife* is inapposite. In that case, the district court found invalid two NMFS opinions issued over a period of four years. In its second opinion, according to the court, the agency had directly reversed its earlier opinion, but erroneously failed to take account of several significant factors in doing so. Here, by contrast, BER's decision to classify EC and SAR as "harmful" for purposes of nondegradation review was not as much a reversal of an earlier decision as it was a recognition that it had created an inconsistent regulatory scheme with its 2003 rules. Moreover, while rejecting a 2003 request to classify these parameters as harmful at the time, BER had expressly agreed to continue

studying the effects of these pollutants. Upon learning **[\*\*\*\*26]** that its 2003 rule potentially allowed dischargers to discharge a level up to the numeric standards regardless of the background level of these parameters in the receiving waters, BER revised its rule to create consistency of regulation and **[\*\*428]** protect the Basin's water.

**[\*P40]** We conclude that BER was authorized to classify EC and SAR as "harmful" under its mandate to protect the waters of Montana and to achieve regulatory consistency with other parameters for which numeric standards had been adopted. While this may have been a policy-based decision, there appears to be adequate scientific justification in the rulemaking record. This rule protected high quality water by requiring permit writers to stop short of allowing degradation up to the standard; it was reasonably necessary to ensure consistency in permitting and protection of the receiving waters, and it was consistent with the authorizing statutes. **[\*\*\*200]** The District Court did not err in so concluding.

**[\*P41]** *Did the District Court err in concluding that BER's revised rule was not "more stringent" than federal law, and therefore BER was not statutorily required to issue written findings of fact*

**[\*P42]** Finally, Pennaco argues that BER was statutorily required **[\*\*\*\*27]** to issue written findings because it adopted rules that were more stringent than corresponding federal rules. The District Court rejected this argument, as do we.

**[\*P43]** The District Court noted that DEQ issued two legal opinions to BER stating that neither the 2003 numeric water quality standard nor the 2006 nonsignificance criteria were more stringent than comparable or corresponding federal regulations. The court rejected Pennaco's argument that when EPA approved the earlier-promulgated "narrative" water



quality standard (presumably around 1972), the narrative standard became the federal standard so that the adoption of numeric standards constituted a "more stringent" standard. The court similarly rejected Pennaco's argument that when EPA approved the narrative nonsignificance criteria in 2003, this became the federal standard. The District Court stated that Pennaco offered no legal authority for its proposition that EPA's *approval* of state narrative standards "federalizes" such standards in such a way as to trigger the "written justification" requirement in the Montana statutes. The District Court determined that neither the plain language of the statutes nor the legislative histories [\*\*\*\*28] supported Pennaco's interpretation. It further concluded that §§ 75-5-203 and -309, MCA, requiring such written findings, were triggered by EPA-promulgated regulations or criteria, not mere approval of a state standard. The court concluded that because there were no corresponding federal numeric standards for EC or SAR, BER's adoption of numeric standards was not "more stringent" than a federal standard. The court [\*\*429] further opined that the classification of EC and SAR as "harmful" parameters was consistent with the federal CWA rather than "more stringent" or in conflict with federal requirements. Accordingly, because the 2006 classification was not more stringent than or in conflict with federal standards, no additional written findings were required.

[\*P44] We find no fault with the District Court's analysis. We disagree with Pennaco's argument that EPA's approval of BER's revised rules in 2003 established federal criteria for EC and SAR, the subsequent revision of which would constitute a more stringent standard triggering written findings. Furthermore, we find no authority to support a conclusion that BER's classification of EC and SAR as "harmful" parameters and the consequential nondegradation [\*\*\*\*29] review rule constitute a "more

stringent" standard in light of the fact that EPA has not adopted a corresponding standard. The revised rule is consistent with 40 C.F.R. § 131.11(a)(1) which requires states to adopt water quality standards to protect designated uses:

131.11(a) Inclusion of pollutants: (1) States must adopt those water quality criteria that protect the designated use. Such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use.

[\*P45] In addition, BER's 2006 nondegradation rule appears to be consistent with EPA's antidegradation policy at 40 C.F.R. § 131.12, which provides in relevant part:

(a) The State shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy pursuant to this subpart. The antidegradation policy and implementation methods shall, at a minimum, be consistent with the following:

(1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.

(2) Where the quality [\*\*\*\*30] of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public [\*\*\*201] participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate [\*\*430] important economic or social development in the area in which the waters are located. In

allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.

[\*P46] Lastly, while not determinative of our decision here, we note that subsequent to the District Court proceedings in this matter, the EPA issued a letter on February 29, 2008, approving BER's revision to the nondegradation provision in *ARM 17.30.670(6)*, and stating that the revised rule was consistent with the requirements of the CWA and [\*\*\*\*31] EPA's antidegradation provisions codified at 40 C.F.R. § 131.12. EPA stated:

The revised water quality standards amend Montana's nondegradation requirements applicable to [EC and SAR] for the . . . Powder River [Basin]. The revision to *ARM 17.30.670(6)* classifies EC and SAR as "harmful" parameters for the purposes of making nonsignificance determinations for high quality waters. Specifically, the revised rule now reads: "EC and SAR are harmful parameters for the purposes of the Montana Water Quality Act, Title 75, Chapter 5, MCA." EC and SAR, therefore, now will be subject to the nonsignificance criteria in *ARM 17.30.715(l)(f)*, which provides, in part, that changes in high quality waters will be considered nonsignificant where ". . . changes outside of a mixing zone designated by the department are less than 10% of the applicable standard and the existing water quality level is less than 40% of the standard."

Thus, EPA expressly approved BER's 2006 nondegradation rule as being consistent with its mandates.

[\*P47] Based on the record, the District Court correctly concluded that BER's 2003 and 2006 rules have a scientific basis, are reasonably necessary to effectuate the purpose of the applicable [\*\*\*\*32] statutes, are consistent and not in conflict with the relevant statutes, have not been adopted with an arbitrary and capricious disregard for the purpose of the authorizing statutes, and are consistent with and not more stringent than EPA's antidegradation policy.

[\*P48] For the foregoing reasons, we affirm the District Court.

/s/ PATRICIA COTTER

We concur:

/s/ W. WILLIAM LEAPHART

/s/ BRIAN MORRIS

/s/ JAMES C. NELSON

/s/ JIM RICE

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End of Document

**Rosebud County v. Dep't of Revenue**

Supreme Court of Montana

October 8, 1992, Submitted on Briefs ; March 18, 1993, Decided

No. 92-227

**Reporter**

257 Mont. 306 \*; 849 P.2d 177 \*\*; 1993 Mont. LEXIS 73 \*\*\*; 50 Mont. St. Rep. 281

ROSEBUD COUNTY, MONTANA and PHILLIPS  
COUNTY, MONTANA, Plaintiff/Intervenor and  
Respondent, v. THE DEPARTMENT OF REVENUE OF  
THE STATE OF MONTANA, Defendant and Appellant

**Subsequent History:** [\*\*\*1] Released for Publication  
April 6, 1993.

**Prior History:** Appeal from the District Court of Rosebud  
County. Sixteenth Judicial District. Honorable Joe L.  
Hegel, Judge.

**Disposition:** Affirmed.

**Counsel:** For Defendant and Appellant: **Paul Van Tricht**,  
Tax Counsel, Office of Legal Affairs, Department of  
Revenue, Helena.

For Plaintiff/intervenor and Respondent: **Larry Schuster**,  
Great Falls; **John C. McKeon**, Phillips County Attorney,  
Malta.

For Amici Curiae: **John Alke** and **Chris D. Tweeten**,  
Hughes, Kellner, Sullivan & Alke, Helena.

**Judges:** Justice Hunt delivered the Opinion of the Court.  
Chief Justice Turnage, Justices Trieweiler, Harrison,  
McDonough and Weber concur. Justice Gray did not  
participate in this decision.

**Opinion by:** HUNT

**Opinion**

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[\*\*178] [\*\*\*07] Appellant Montana Department of  
Revenue (DOR) appeals from a judgment of the  
Sixteenth Judicial District Court, Rosebud County,  
invalidating the "Acquired Cost" method and reinstating  
the "Green Guide" as the method of determining market  
value of heavy equipment for property tax assessment.  
We affirm.

The plaintiff and appellant have set forth several issues  
which we consolidate and restate as follows:

1. Did the District Court err in denying DOR's motion to  
dismiss on the grounds [\*\*\*2] that plaintiff suffered no  
actual harm?

2. Did the District Court err in denying DOR's motion to  
dismiss on the grounds that plaintiff, as a political  
subdivision of the State of Montana, does not have  
standing to sue the State itself?

[\*\*\*08] 3. Did the District Court err in declaring that  
DOR's attempt to amend 42.21.131, ARM, did not  
comply with the requirements set out in the Montana  
Administrative Procedure Act (MAPA)?

4. Did the District Court err in concluding that DOR is  
required to assess all heavy equipment at 100 percent

257 Mont. 306, \*308; 849 P.2d 177, \*\*178; 1993 Mont. LEXIS 73, \*\*\*2

of its market value according to § 15-8-111, MCA, and that market value is not adequately determined by employing the "Acquired Cost Method"?

The green guide method of establishing the market value of heavy equipment for property tax assessments has been the primary method used from 1975 through December 31, 1990, by DOR. However, if a particular item could not be located in the green guide, various back-up methods, such as the acquired cost method, were employed.

The green guide method involves using the national green guides which represent a nationwide average of sale prices of equipment in average working order. The market values in the guides are [\*\*\*3] by region and include the trends of depreciation tables.

In April 1990, Denis Adams, Director of DOR, began discussing the possibility of having the acquired cost method replace the green guide as the primary method of assessment. Although the green guide method would still be employed, it would only be used if the acquired cost of a particular item could not be ascertained.

On January 4, 1991, DOR sent out a letter to all of the county tax assessors directing them to use the acquired cost method, rather than the green guide method, as the primary method. The county assessors complied with this directive. The result was a substantial loss of market value, taxable value, and revenue for plaintiffs Rosebud County and Phillips County.

In order to address the objections to the implementation of the amended rule, DOR initiated a formal rule-making process under MAPA and held a public hearing on May 8, 1991. At the hearing, there was much opposition to the new valuation method due to concerns regarding fiscal impact, the State's inability to audit the method appropriately, and the lack of appointed auditors. Support for the amendment came in the form of letters

from contractors and [\*\*\*4] mining companies.

On May 31, 1991, the Revenue Oversight Committee of the Montana Legislature presided over an additional hearing. There was no action taken as a result of this hearing. On June 3, 1991, notice of the [\*\*\*309] adoption of the amendment to 42.21.131, ARM, adopting the acquired cost method, was published.

[\*\*179] Plaintiffs Rosebud County and Phillips County filed an Amended Complaint for Injunctive and Declaratory Relief from the administrative rule at issue. On December 16, 1991, the District Court issued its Findings of Fact and Conclusions of Law and Order invalidating the administrative rule and amendment to 42.21.131, ARM, as adopted June 13, 1991. The DOR appeals from that order.

I.

Did the District Court err in denying DOR's motion to dismiss on the grounds that plaintiff suffered no actual harm?

The DOR claims that Rosebud County does not have standing to sue because it has not suffered any actual harm. In order to establish standing to sue, one need only show potential economic harm. Montana Human Rights Division v. City of Billings (1982), 199 Mont. 434, 443, 649 P.2d 1283, 1288. That court concluded the respondents [\*\*\*5] did in fact have standing to assert the constitutional rights of their employees in refusing to disclose personal information about them without their consent or court order because doing so might place the respondents in jeopardy of being sued. City of Billings, 649 P.2d at 1288. In the case at bar, Rosebud County has a potential for harm caused by change in valuation of heavy equipment in the county. Rosebud County has a substantial interest in the protection of its tax base. The District Court found that Rosebud County had standing to sue, and we agree.

## II.

Did the District Court err in denying DOR's motion to dismiss on the grounds that plaintiff, as a political subdivision of the State of Montana, does not have standing to sue the State itself?

Although DOR has cited School District No. 55 v. Musselshell County (1990), 245 Mont. 525, 802 P.2d 1252, for the proposition that Rosebud County lacks standing in the case at bar, the two cases can be distinguished by the type of relief sought. Rosebud County is suing for injunctive and declaratory relief, rather than damages. Since counties [\*\*\*6] are considered to be persons under § 2-4-102(8), MCA, they possess all the rights of persons during administrative rule-making. Sections 2-4-302 and -305, MCA. Because of DOR's failure to satisfy the procedural and substantive requirements of MAPA by not holding [\*310] hearings prior to making its rule to change the method of determining the value of property, Rosebud is entitled to bring an action against the State to protect its statutory and constitutional interests. The District Court did not err in denying DOR's motion to dismiss.

## III.

Did the District Court err in declaring that DOR's attempt to amend 42.21.131, ARM, did not comply with the requirements set out in the Montana Administrative Procedure Act (MAPA)?

The Montana Administrative Procedure Act states in part as follows:

**2-4-302. Notice, hearing, and submission of views.**

(1) Prior to the adoption, amendment, or repeal of any rule, the agency shall give written notice of its intended action. The notice shall include a statement of either the terms or substance of the intended action or a description of the subjects and

issues involved, the rationale for the intended action, and the time when, place where, [\*\*\*7] and manner in which interested persons may present their views thereon.

\*\*\*\*

(3) If any statute provides for a different method of publication, the affected agency shall comply with the statute in addition to the requirements contained herein. *However, in no case may the notice period be less than 30 days or more than 6 months.*

(4) Prior to the adoption, amendment, or repeal of any rule, the agency shall afford interested persons at least 20 days' notice of a hearing and 28 days from the day of notice to submit data, views, or arguments, orally or in writing.

[\*\*180] The DOR did none of these things prior to its attempt in January 1991 to adopt the acquired cost method.

The District Court found that after receiving objections regarding the implementation of an amended "rule" by administrative fiat in 1991, the DOR initiated the formal rule-making process. This process culminated in a public hearing on May 8, 1991.

During the administrative rule hearing on May 8, 1991, Adams met with a large contingent of county and state officials who appeared in opposition to the proposed rule change. There were no proponents of the proposed amendment in attendance at the meeting, although they [\*\*\*8] did return form letters that had previously been distributed by Adams.

[\*311] The rule-making process in this case was, in essence, a sham. The result was that the public, the Legislature, and certain affected agencies were denied their right to participate effectively in the governmental process. The District Court did not err in finding that

DOR's attempt to amend 42.21.131, ARM, was invalid.

IV.

Did the District Court err in concluding that DOR is required to assess all heavy equipment at 100 percent of its market value according to § 15-8-111, MCA, and that market value is not adequately determined by employing the "Acquired Cost Method"?

According to § 15-8-111(3), MCA, DOR is prohibited from assessing heavy equipment lower than 100 percent of market value. It should be noted that both Director Adams and Property Supervisor Noble agreed that the acquired cost method yields an assessment 22 percent less than market value. Therefore, the amendment is in conflict with § 15-8-111(3), MCA. Even if the amendment had been "reasonably necessary," this necessity was not demonstrated in DOR's notice of proposed rule making. Section 2-4-305(6)(b), MCA.

The substance and procedure [\*\*\*9] of the rule making in this case is deficient, and the new rule in question is invalid.

We affirm the District Court.

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