BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the Matter of the Petitions of Teck Coal Limited and the Board of County Commissioners of Lincoln County, Montana, for review of ARM 17.30.632(7)(a) pursuant to Mont. Code Ann. Section 75-5-203 - Stringency Review of Rule Pertaining to Selenium Standard for Lake Koocanusa

TRANSCRIPT OF PROCEEDINGS - VIA ZOOM

Heard Via Zoom
February 25, 2022
1:30 p.m.

BEFORE CHAIRMAN STEVEN RUFFATTO,
BOARD MEMBERS DAVID SIMPSON,
JON REITEN, JOSEPH SMITH, JULIA ALTEMUS
STACY AGUIRRE, and DAVID LEHNHERR

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WHEREUPON, the following proceedings were had:

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CHAIR RUFFATTO:  Sandy, just for the record, let's make sure we have a quorum again.

MS. MOISEY-SCHERER:  Chair Ruffatto.

CHAIR RUFFATTO:  Yes.  I was across the room for a second here, Sandy.

MS. MOISEY-SCHERER:  Mr. Smith.

BOARD MEMBER SMITH:  Here.

MS. MOISEY-SCHERER:  Mr. Lehnherr.

BOARD MEMBER LEHNHERR:  Here.

MS. MOISEY-SCHERER:  Mr. Reiten.

BOARD MEMBER REITEN:  Here.

MS. MOISEY-SCHERER:  Mr. Simpson.

BOARD MEMBER SIMPSON:  Here.

CHAIR RUFFATTO:  Ms. Altemus.

BOARD MEMBER ALTEMUS:  Here.

MS. MOISEY-SCHERER:  Ms. Aguirre.

BOARD MEMBER AGUIRRE:  Here.

MS. MOISEY-SCHERER:  We have a quorum.

CHAIR RUFFATTO:  Thank you so much, Sandy.

Now we're going to go to Item (b), under action items on Page 7. This is the stringency
review of the selenium rule for Lake Koocanusa,
BER No. 2021-04 and 08.

Teck Coal and Lincoln County have filed
petitions for review under Montana Code Annotated
75-5-203. I'm going to refer to that when I'm
talking to the stringency statute, and it's review
under the stringency statute of the .8 micrograms
per liter lake water column standard, and I'm
going to call that the .8 standard so I don't have
to try to spit that all out all the time. So
we're reviewing the .8 standard.

Interested parties have filed written
comments, and responses, and proposed decisions,
and they have made the oral comments at the public
meeting, and we're now ready to consider the
issues.

I want to thank everyone who made
comments. I think they were very helpful to
inform us, inform the Board of the issues and the
arguments on both sides.

Today it's my thought that we're not
going to make a final written decision for
approval today. What I think we should try to do
is to make some basic decisions, and then for the
next meeting we will have a proposed final written
decision for final approval.

We're also not going to have any oral arguments or comments today as such, but the Board members will be able to ask the interested parties, if they're available, questions, and I would think that those questions would be directed primarily to the interested parties who made the most substantive comments and responses and proposed decisions. Is there any question, or comment, or suggested changes to what I've outlined as to how we might proceed today?

Dr. Leinherr.

BOARD MEMBER LEHNHERR: Thank you, Chairman Ruffatto. I just have a few comments, and then a question, but not -- I sort of jumped the gun there, I think. You're wanting comments about your proposed approach to the issue, which I think is fine. So whenever you get to a point where you think we can have some comments and questions, let me know. Thank you.

CHAIR RUFFATTO: All right. Thanks, Doctor. At this point, I would like to ask Sandy to put on our screen the questions that I believe she received yesterday. Did you receive some questions, Sandy?
MS. MOISEY-SCHERER: Yes, I did.

CHAIR RUFFATTO: Will you put those up, please.

MS. MOISEY-SCHERER: (Complies)

CHAIR RUFFATTO: What shows on your screen are what I'm suggesting the first two questions that we take, and the first question is what I would call the very basic question. If we answer that question no, we're done. If we answer that question yes, then we have to go to other questions.

The way I'm going to approach this -- and again, please, Board members, if you have other thoughts, please raise your hand or holler out -- but I want to take question one first, and that question is -- I'll read it.

Is the lake water column standard that is .8 micrograms per liter -- which we'll call the standard or the .8 standard -- more stringent than the comparable Federal guideline? And that's tracking language from the statute.

In order to help the Board get started on the discussion, I'm going to ask two parties a question to get us started, and -- to get us started, and I would ask Teck Coal first and then
DEQ to take no more than four or five minutes to
state your position and your arguments as to how
this question ought to be answered. And I will
start with Teck Coal.

I think we should leave the question up
there for now, unless it's too distracting. So
can you proceed. First of all, I should ask. Who
is representing Teck Coal, if anyone?

MS. MARQUIS: Good afternoon, Chairman
Ruffatto, members of the Board. My name is Vicki
Marquis. I'm here today representing Teck Coal.

CHAIR RUFFATTO: And who is representing
DEQ?

MS. KELLY: Chairman Ruffatto, my name
is Myla Kelly. I'm the Manager of the Water
Quality Standards and Modeling Section. We also
have our legal expert on this topic with us, is
Kirsten Bowers. So both of us are available to
answer any questions.

MS. BOWERS: Good afternoon, Board
members. I'm here also. Kirsten Bowers.

CHAIR RUFFATTO: I guess I'm distracted
by this without seeing some faces. So Amy, would
you take this down and we'll put it up again
later. Excuse me, not Amy. Sandy. Would you
take it down so we can see faces better. All right. Thank you.

No more than four or five minutes as to your position on that basic question, only that basic question, and we'll go from there.

MS. MARQUIS: Thank you, Chairman Ruffatto, members of the Board. I appreciate your diligence and the time and effort you've put into this process, and your willingness to have an open process that includes extensive public comment.

One thing that became clear through the public comment is that nobody here disputes the intention or the legislative history behind what has been described as the stringency statute.

The legislative history and the statute itself make it clear that it is to apply to all standards, and DEQ and EPA have both confirmed that it is a water quality standard, and it is enforceable, and it will be used for terms of assessing the water body.

So the water column standard of 0.8 micrograms per liter functions as a water quality standard. The Board referred to it as a water quality standard in its rulemaking; the rule itself refers to it as a water quality standard;
and EPA and DEQ agree that it is a water quality standard, so it does fall within the universe of standards that must comply with the stringency statute.

Now, the only arguments that have been raised are about to what number that 0.8 should be compared. Now, DEQ has told you that it really should be compared to a range of numbers; but that does not comply with Montana case law, nor does it comply with the Federal guideline as it was promulgated and portrayed to the public in their public notice.

And we provided a copy of that public notice with our comments, and I believe with our original petition. It's 81 Federal Register 45285, page 45286. That's from July 13, 2016. And I draw your attention to our Proposed Findings 17 and 18 for a little bit more detail on that.

Essentially what the EPA guideline did is it proposes a number for the water column standard, does not propose a range of numbers, it proposes one number. That number is 1.5. Mathematically that number is nearly two times greater than the water standard that this Board enacted which is 0.8. Therefore, the 0.8 is more
Now, other people have argued that we need to look at something different that applies in this circumstance, but in the Pennaco case, the District Court case that we referred to throughout our petition, our comments, and our proposed decision document, it's clear that in Montana what we look to for the Federal guideline is the numeric guideline for that parameter.

The parameter here is selenium. When you look at the selenium guideline, the numeric guideline proposed by EPA for lake systems, the number is 1.5.

The fact that DEQ and others call this a site specific standard, despite the fact that it was not promulgated in compliance with the site specific statute, does not exempt it from compliance with the stringent statute.

0.8 is mathematically more stringent than the EPA guideline of 1.5. There's no doubt about that, and there's no credible dispute within the comments. Thank you. I'm available to answer questions you might have as well on that topic.

CHAIR RUFFATTO: Thank you, Ms. Marquis. Who from DEQ would like to state your position and
your arguments in support of your position in less
than five minutes, please.

MS. KELLY: Chairman Ruffatto, my name
is Myla Kelly. I'm the manager of the Water
Quality Standards and Modeling Section, and thanks
for this opportunity.

I will just start off by noting that we
did, the Department did provide extensive comments
on this question throughout this process, so
hopefully you've all had an opportunity to read
through those, and read the oral arguments that we
provided, and I'll just do a brief summary so that
I'm not repeating anything.

So to note that the EPA 304(a) criteria
for selenium is the first criteria that is based
on fish tissue, and that's a very, very important
component to our discussions as we go forward.
This criteria, this EPA 304 criteria, is comprised
of multiple elements, three of which Montana
adopted as standards, and are codified in ARM
17.30.632.

So those three components include egg
ovary, muscle or whole body, and water column. So
these selenium standards are fish tissue based
standards, not water column based standards, which
really means that the standards account for all of
the dietary exposure and the bioaccumulation as
the primary pathway for selenium exposure.

So when the Department adopted the water
quality standards for Lake Koocanusa, the reason
why they are not more stringent than Federal
standards is for two really clear reasons. Number
one, the water column standard is translated from
the fish tissue standard using the exact site
specific procedures that are outlined in the
Federal guidelines.

And two, the Federal and Lake Koocanusa
water column standard is translated from the
Federal fish tissue criteria that's directly
linked to the egg ovary 15.1 milligrams per
kilogram value. So therefore, to be more
stringent than the Federal, the State would have
had to have used an egg ovary value less than the
15.1 milligrams per kilogram, and we did not do
that.

The Federal fish tissue criteria and
Montana's fish tissue standards are identical with
the translation consistent with Federal
recommended procedures. I think I'll stop there
and just be available for questions.
CHAIR RUFFATTO: Thank you, Ms. Kelly.

I appreciate both the comments and the answers to the questions. Now I'm going to open it up to the Board for questions to any of the interested parties or for discussion.

Again, right now we want to only be addressing the very first issue, and that is, whether the .8 standard is more stringent than the Federal guideline, and I'll start with Dr. Lehnherr.

BOARD MEMBER LEHNHERR: Thank you, Chairman Ruffatto. There is an issue that is worth mentioning, but it probably doesn't matter in the big picture, but I want to register a complaint about how the January 31st public hearing was held.

Public hearings are not a place for debate. They're not a place to present both sides. They're an opportunity to solicit public input, and everyone gets the same amount of time to speak.

Unfortunately, the Hearing Officer allowed some people who had already spoken to speak for an additional length of time, which was highly inappropriate. That's not how public
hearings are supposed to go.

The people that were allowed to speak an additional amount of time were a couple of attorneys, and at least a couple of politicians, and I suspect that if the people who followed the rules and limited their time to speak would have known they could speak more, that they might have taken advantage of the opportunity.

Like I said, if it mattered more in the big picture, I would probably seek to have those comments that were inappropriate stricken from the record, but as it is, this case involves --

If you look at the links on the BER website involving this issue, there are over 5,000 pages of documents available for download and for our evaluation, and in those 5,000 pages or over 5,000 pages of documents, it's very clear that the decision to arrive at the 0.8 micrograms per liter standard was arrived at after a very extensive process, highly rigorous, involving dozens of scientists, dozens of citizens, dozens or many local officials.

And I think the evidence is clearly -- overwhelming is not too strong of a word -- is overwhelmingly in favor of the validity of the 0.8
standard; and the EPA says that standard is not
more stringent than the Federal standard.

If anything, if you look at some of the
concerns about selenium standards, and adverse
affects to wildlife in the Lake Koocanusa basin,
the question should be: Should the standard be
more stringent? But that's not what we're here to
deal with.

I would like to ask a question, because
in those several thousand pages of documents that
were available for our perusal, there was at least
one public comment that pointed out that British
Columbia, where Teck Coal actually operates and
resides, may be lowering its standard to very
close to 0.8. It may be lowering its standard to
0.8 micrograms per liter.

My question is: What, if any, effect
would that have on our decision? And what, if
any, effect would that have on Teck Coal's
decision to pursue changes in rulemaking in
Montana? Thank you.

CHAIR RUFFATTO: Dr. Lehnherr, who would
you like to direct those questions to?

BOARD MEMBER LEHNHERR: I guess maybe
both Ms. Marquis and the DEQ representatives. I'm
just -- someone may have more information regarding the impact of that possible British Columbia change. I don't know who would be in a position to answer that.

CHAIR RUFFATTO: Ms. Marquis, would you be in a position to respond?

MS. MARQUIS: I can, yes. Thank you, Chairman Ruffatto, Dr. Lehnherr, members of the Board.

So as I understand the question, I'm just going to address the part about the British Columbia water quality objective. Is that what you want me to do?

BOARD MEMBER LEHNHERR: Yes, please.

Thank you.

MS. MARQUIS: Okay. Thank you. So it's my understanding that British Columbia, the important part here is that they have not released a proposed water quality objective for public comment or review or their process. I'm not a Canadian attorney, so I can't speak to their rulemaking or standard setting or water quality objective setting process, so my knowledge of it is limited.

But it's my understanding they have not
issued a proposal that would go through what is analogous to our public review process at this time. There has been talk of that.

One other thing that's important to notice is a water quality objective may not be the same as a water quality standard in Montana. They may not be implemented in the same way.

I believe at the November meeting of the Lake Koocanusa Monitoring and Research Committee, a gentleman from the Province spoke about this, and said that their water quality objective, when and if it is changed, would not be used to make impairment determinations or for enforcement.

Again, I would ask you to review those meeting minutes that DEQ has, but that's my understanding of what his testimony was or what his presentation at that meeting was.

Right now the current water quality objective for British Columbia is 2.0 micrograms per liter. Now, I go through all that just to say that's where the process is, and there isn't a lot of detail in the public realm about what the water quality objective would be, what it would be based on, or how it would be implemented.

How that impacts this process is simple.
It doesn't. This process was brought forward based on compliance with Montana State law. We're looking at a Montana water quality standard, and does it comply with Montana State law.

So nobody -- We didn't start this process to say that the standard should be two, or that it should be some other number. The process was started to say, was started to point out that the rulemaking did not comply with Montana State law.

The rulemaking can be started over, and it can be conducted in a manner that complies with Montana State law, and it can reach whatever number is appropriate.

So importantly, the existing water quality objective in British Columbia is 2.0. Whether that will change, it hasn't yet, it hasn't been formally proposed for public review at this time that I'm aware of.

What it means in terms of Teck's regulation isn't clear, and doesn't impact this process, which simply deals with: Is the water quality standards set at 0.8 for Lake Koocanusa more stringent than the Federal guideline, which is 1.5? And we believe it is. Thank you.
CHAIR RUFFATTO: Thank you, Ms. Marquis.

Ms. Kelly, do you have a response to Dr. Lehnherr's question?

MS. KELLY: I do. Yes, thank you, Chairman Ruffatto, Dr. Lehnherr.

Montana DEQ in our standards program continues to coordinate closely with British Columbia, as we have through these past six years, in the development of the standard. It was always our goal and British Columbia's goal to in the end come forward with a one lake/one number standard, understanding that water quality and the importance of a protective standard to protect aquatic life doesn't stop at an international boundary.

And as part of this continued coordination with British Columbia, we had a public meeting in November where we invite stakeholders and members of this large stakeholder group that we have been a part of for the last six years, and working towards developing these standards.

And at that time British Columbia did come forward to publicly discuss their upcoming water quality objective. That is part of our
meeting minute notes. They do intend to begin
that public process very soon.

The water column values that they have
proposed are .85. Those are functionally the same
as our Montana water quality standard. And their
fish tissue values I believe are 5.6, so those are
less than Montana's. Thank you.

CHAIR RUFFATTO: Thank you, Ms. Kelly.

Board Member Simpson.

BOARD MEMBER SIMPSON: Thank you, Mr.
Chairman. I'm going to start by making a motion
that the rule specifying .08 micrograms per liter
is more stringent than the 1.5 micrograms per
liter guideline specified by EPA, and my reasoning
for that is as follows, and --

CHAIR RUFFATTO: Dave. Let's get the
motion on the table, and then we'll follow up with
your reasoning. Is that okay?

BOARD MEMBER SIMPSON: Okay. Well, that
is the motion.

CHAIR RUFFATTO: I'm looking for a
second, if there is one.

BOARD MEMBER AGUIRRE: I'll second it.

CHAIR RUFFATTO: A motion has been made
and seconded that the .8 standard is more
stringent -- or maybe I should put it this way --
that this Board determine that the .8 standard is
more stringent than the comparable Federal
guideline. So let's discuss it. David.

BOARD MEMBER SIMPSON: If I can proceed.

Just to reiterate, the language of 75-5-203
specifies that the Board may not attempt to rule
or implement -- adopt a rule to implement
75-5-301, 75-5-302, 303, and 310, that is more
stringent than the comparable Federal regulations
or guidelines to address the same circumstances.

Keeping in mind that the EPA 1.5 is in
fact a guideline, so the language is the same. Of
course we have had a couple of petitions to review
this rule. I won't repeat that.

But in adopting the standard, the Board
did not complete the analysis and written finding
prescribed by 75-5-203(2), MCA, and instead
concluded that the new standard is not more
stringent than the EPA guideline because it was
developed using federally recommended site
specific procedures.

Now, as a matter of general practice,
the published EPA standards for water quality are
adopted or incorporated by reference in the DEQ
rules, and EPA -- requires justification to and review and approval by EPA, and implicitly or explicitly, use of EPA approved procedures to develop a new standard. And further, EPA rarely, if ever, rejects state standards that are more stringent Federal standards.

Hence, use of EPA approved or recommended procedures does not and cannot substitute for compliance with 75-5-203(2) because if it did, 203 would have no applicability, which clearly was not the intent, that is, it would become a moot question.

So the question before us is a procedural one, that is: Did the Board comply with 75-5-203, MCA? Simple math shows that the new Montana standard of 0.8 micrograms per liter for selenium is more stringent than the 2016 EPA guideline of 1.5 micrograms. And as acknowledged, this is acknowledged by EPA in their approval letter that it is in fact more stringent.

So hence, I believe the Board erred in cutting short its process, and relying on EPA approved procedures to justify its determination that the new standard is not more stringent, and so failure to address 75-5-203 is a procedural
defect and must be cured.

   Now, I have a number of technical
questions regarding the development of the
standard, but I will hold off on those until and
if we proceed further with this issue.

   CHAIR RUFFATTO: Thank you, David.

Additional discussion? Board Member Smith.

   BOARD MEMBER SMITH: Yes. Maybe to
simplify it a little bit. I'd like to -- whether
or not a case specific value is relevant in the
Federal standards. Like maybe if we could define
what the Federal standard is.

   And Ms. Marquis mentioned some Supreme
Court rulings. I don't know if that's the answer
to this or not. I'd like to hear folks' thoughts
on that.

   But I mean I think this is really
important that we include that into our decision
obviously, because if a case specific value does
follow the standards, then obviously the answer to
this question would change, and the specifics of
whether or not that number is the correct number
or not may not necessarily be relevant, as long as
they followed the -- which would be the entire
2016 EPA guidance document, if that were the case.
Does that make sense?

CHAIR RUFFATTO: I have to admit, Joe, I'm not sure if I understand the question. But maybe someone at DEQ or Ms. Marquis understands the question enough to start to address it.

BOARD MEMBER SMITH: I'd like a little bit more comment on whether or not a case specific value is a part of the Federal guideline or not.

MS. KELLY: I can address that, Board Member Smith, Chair Ruffatto. For selenium, which is obviously what we're talking about today, in EPA's recommended guidance, in their 304(a) guidance, they have an entire appendix that's referred to as Appendix K, in recognition that selenium bioaccumulates, and does bioaccumulate differently in aquatic life, depending on site specific factors of a water body.

So if a state or a tribe wanted to pursue a site specific criteria, because of the uniqueness of the toxicity, and the accumulation in aquatic life, EPA has taken the time and put this procedure, the step-by-step process together.

That is part of their 304(a) criteria, and that's Appendix K, "Translation of a selenium fish tissue criterion element to a site specific
water column value," and that is part of their national aquatic life ambient water quality criteria.

So that particular document goes through a step-wise process to derive a site specific translation, and that's the process that we went forward with using.

CHAIR RUFFATTO: Thank you, Ms. Kelly. Ms. Marquis, did you want to respond to that?

MS. MARQUIS: Yes, please. Thank you. Chairman Ruffatto, Board Member Smith, members of the Board.

As we pointed out in our petition, the stringency statute is triggered when EPA has a Federal, has promulgated a Federal regulation or approved a guideline.

It's important to note here that what EPA has is not a Federal standard. It's a Federal guideline. And yes, the Montana District Court and the Supreme Court looked at this in the Pennaco case that we have cited.

And in there, they said that what matters is what is EPA's numeric guideline, what is their guideline, what is the numeric value that they attach to that guideline, and the numeric
value that EPA attaches to their guideline for
lake systems for selenium is 1.5.

Now, the fact that EPA allows for a
process for site specific standards as they do for
many of the parameters doesn't change the fact
that in Montana, the Montana law says essentially
if the number is more stringent than the Federal
guideline number, it must comply with the
stringency statute.

So if Lake Koocanusa does have some
special attributes that make it susceptible to
high bioaccumulation -- which to be clear, Teck
argues that it does not, and the record supports
that it does not -- but if it did, and if there
was some special situation at Lake Koocanusa, the
stringency statute allows for the Department, or
previous to this the Board, to go through and talk
about that threat, and talk about how the new
standard is necessary to mitigate that threat to
human health or the environment.

So the stringency statute does not say
you can't get to .8 if that's where you need to
be. It says you have to do it in a particular
fashion, and you have to provide the written
findings that support the need for such a
stringent standard, and site specific conditions might be just what trigger that written finding or support that written finding.

Again, those written findings were not provided here, and the case law makes clear that it's the number that EPA attaches to that Federal guideline that matters. That number is 1.5. The standard here is .8. It is more stringent. Thank you.

CHAIR RUFFATTO: Ms. Bowers.

MS. BOWERS: Thank you, Chair Ruffatto and members of the Board. I think Myla Kelly provided a really good explanation, but I just want to point out that the State stringency statute applies when the State adopts a rule that's more stringent than comparable Federal regulations or guidelines.

And the Federal guidelines for lentic waters is not strictly a number 1.5, and I think to analyze this based on simple math, 1.5 versus .8, is erroneous because the Federal guidelines are based on fish tissue, and in particular the egg ovary tissue standard of 15.1, which was the basis of DEQ's criteria, and I think Myla explained very well how that was derived.
And to be more stringent than Federal guidelines, we would have had to have used an egg ovary tissue criteria of less than 15.1.

CHAIR RUFFATTO: Thank you, Ms. Bowers.

Board Member Smith.

MS. MARQUIS: May I respond to that briefly, please?

CHAIR RUFFATTO: I'm going to see what Board Member Smith -- assuming you intentionally have your hand up, Joe. Okay. Go ahead.

BOARD MEMBER SMITH: Maybe to simplify the issue, I mean the question at hand is: Does the .8 rule exceed the Federal guideline? The question is: What is the Federal guideline? Is it the entire 807 page document by the EPA that determines selenium, or is it just the one table that lists four different numbers? What is the definition of the Federal guideline, so we can figure out if we're exceeding it?

CHAIR RUFFATTO: All right. I would just say, Joe, I think you have boiled the issue down to the heart of it.

And so Ms. Marquis, you had your hand up, and maybe you could first respond to Board Member Smith, and then we'll give DEQ the chance
to respond.

    MS. MARQUIS: Thank you, Chairman

Ruffatto, Board Member Smith, members of the
Board.

    The Federal guideline is found in the
table that EPA presents in the Federal Register
where they promulgated the guideline, and in the
table that they present at the front of that 800
page document.

    Now, they do say that there may be
situations where a site specific standard is
preferable, but that is not the numeric guideline
that they provide. Again, case law in Montana
says we look to the numeric value that the EPA
provides.

    Another thing I want to clarify is while
the EPA guideline says that there may be
situations where a site specific standard could be
used, they don't say that the state has to do that
whenever possible.

    Those words are important because that's
what the public was told in the initial
rulemaking. The public was told that the Federal
guideline is that whenever possible, you have to
enact a site specific standard.
You can comb through that 800 page document, and you won't find that statement. What you'll find is that EPA says it may be preferable in cases that exhibit high bioaccumulation of selenium. That threshold trigger to get to site specific standards has never been shown, and there's no proof of it in the record. So the fact that EPA provides options does not change their guideline. The guideline is the numeric value. It's set at 1.5.

And I want to address the fish tissue number for just a minute, and I'll point you to the rule itself, Subparagraph (2). The second sentence from the bottom of Subparagraph (2) says, "When the aquatic ecosystem is in non-steady state, both the fish tissue and the water column standards apply."

The rule also says that Lake Koocanusa is in non-steady state, so both the fish tissue and the water column standards apply. It doesn't say that one overrides the other, they both apply. So if you don't have fish tissue data, and if your water column sample exceeds the .8 standard, that means that the lake is not meeting the standard.

So the water column standard is very
important here. You can't say that it doesn't matter just because it was derived from the fish tissue number. That's not the case. The water column standard will be used for assessments, it will be used for enforcement, it will be used for permitting.

And there's evidence in the record that the Board recognized that, and they even said yeah, if there's a new development discharging water to Lake Koocanusa, they could have to comply with the standard of 0.8 micrograms per liter; or if they're subject to nondegradation analysis, they could have to comply with an even lower limit of, I believe it was 0.12 micrograms per liter.

So the water column standard is important. It's what is going to drive assessments, enforcement, it's what will be implemented in permitting. So regardless of what led to that number, that's the number that is the standard.

And let's not forget that EPA said in their approval letter that the water quality standard, the water column standard, is more stringent than their Federal guideline, just like in Pennaco where the Court relied on and found
conclusive EPA's statement.

Here EPA's statement that this standard is more stringent is also conclusive, and says that yes, it is more stringent, 0.8 is more stringent than 1.5. Thank you.

CHAIR RUFFATTO: Thank you. I expect that DEQ -- Well, I guess I would ask DEQ to answer the question that I think is key, and that's what Joe asked, and that is: What is the comparable Federal guideline? Is it the 1.5 in the table, or is it the 800 pages of the document which lays out other alternatives?

MS. BOWERS: Chair Ruffatto and members of the Board. I'll try to start that out.

It's DEQ's position that the comparable Federal guidance is the aquatic life ambient water quality criterion for selenium, the entire EPA 304(a) guidance document.

And that document actually provides a range for lentic water bodies, and the range is quite large, from .27 to 52.02 micrograms per liter, and those numbers may be protective of lentic water bodies, but it depends on site specific environmental factors.

And the Board's reason statement in
support of the rule explains that the EPA selected 1.5 as a 20th percentile from the distribution of the range that's protective of lentic water bodies; and based on the 304(a) criteria found 1.5 would not be protective in Lake Koocanusa, and that's why .8 was derived to protect fish tissue. And I'm going to let Myla take over because she's much better at explaining technical aspects than I am.


MS. KELLY: Thank you, Chairman, members of the Board.

I would just simply add -- I don't have anything to add on the importance of the entirety of the 304(a) criteria document for selenium as the basis of what you should be looking at, and again, that includes Appendix K, which is that step-by-step process that the Department used in order to establish the water column criteria.

And then I would agree with Ms. Marquis that, yes, there are three components of the water quality standard, as I mentioned before -- egg ovary, muscle, and whole body and water column -- and all of those are very important.
The Federal selenium egg ovary criterion of the 15.1 is that foundation of EPA's criteria structure, and the water column criteria, again, is translated from that egg ovary criteria. And the purpose of that translation is to ensure that our aquatic life is protected from any toxicity from selenium.

CHAIR RUFFATTO: All right. Ms. Marquis, if you're going to say something different than what you've said before, go ahead.

MS. MARQUIS: Thank you. First I'm a little -- I've not been in a situation like this where another party has two people speaking instead of one, but whatever works for the Board and gets the information in front of you, that's perfect.

I just want to point you -- and I cited this before, but I have the exact language here now.

In the Federal Register where EPA promulgated their Federal guideline -- and that's again 81 Federal Register 45285 to Page 45286 from July 13th, 2016. They say, quote, "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," end quote.

So there's a quote from EPA where they say their water quality criteria are scientifically derived numeric values. They don't say their recommended water quality criteria is an 800 page document, or is a range of values that you have to sift through and find. They say it is a scientifically derived numeric value. Their scientifically derived numeric value they say protects 95 percent of fish species at 1.5.

Thank you for indulging me one more time on that.

CHAIR RUFFATTO: Thank you, Ms. Marquis. Board Member Lehnerr. Go ahead.

BOARD MEMBER LEHNHERR: Thank you. I know Ms. Marquis, she's working for the Canadian company Teck, and her job is to paint a picture most favorable to Teck's desire not to have a protective standard.

And I hate to contradict her, but if you look at the second link on the BER page, there are over 5,000 pages full of the reasoning for the wisdom of the 0.8 micrograms per liter standard.
And there's also documentation where the EPA says the standard is not more stringent than the Federal standard.

What can you say beyond the extensive, almost unprecedented documentation and work by, like I say, dozens of scientists, and citizens, and local officials that say that the 0.8 standard is appropriate for Lake Koocanusa.

I feel like there's a train here headed in a certain direction, and I'm sort of resigned to that, but I think it's clear that 0.8 is not more stringent than the Federal standard. Thank you.

CHAIR RUFFATTO: Do any of the other Board members have questions or comments?

BOARD MEMBER REITEN: I guess, Mr. Chairman, members of the Board, I guess I would strongly agree with Dr. Lehnherr, and the answer, clearly to me the answer to that first question is no, and it's not when you consider the bioaccumulation in fish tissue.

Ultimately the goal of any of these kind of regulations is to prevent harmful conditions on fish and other wildlife, and it's clear that the old 1.5 micrograms per liter standard has shown
not to provide this protection.

CHAIR RUFFATTO: Thank you, Board Member Reiten. Ms. Marquis, I'm not going to call on you. I mean I may, but I'm going let the Board speak for awhile. Any more questions or comments from the Board?

BOARD MEMBER AGUIRRE: Mr. Chairman, when this came up a few Board meetings ago, I had done some research, and I feel like we're confusing two points in making this decision, and we're confusing the actual, just focused fact of whether that number is more stringent versus the other side of it is what should it be to protect the water.

I feel those are two separate issues. Whatever would get put in a permit, and a permittee would have to abide with, and that would be some kind of negotiation in my mind between Montana DEQ and that permittee.

And I still, I feel like we're confusing the issues. And so we keep maybe staying stationary on the matter, or not making progress. So when I seconded the motion, I do that based on really a straight up comparison of the numbers. In my mind it is more stringent.
And again, I'm not basing the decision on what it should be for Teck Coal. I'm basing the decision on the number is more stringent. That's where I'm at with this, and why I seconded that motion so quickly.

CHAIR RUFFATTO: Thank you, Board Member Aguirre. Board Member Simpson.

BOARD MEMBER SIMPSON: Thank you, Mr. Chairman, and I think my colleague Board Member Aguirre has made an excellent point here, and which I guess is the starting point where I was going to go.

She is correct. What we're deciding here is whether or not the standard is more -- the adopted State standard is more stringent than the guideline, and if -- but as I said, I have a number of technical questions that I won't get into just yet, but I am not prepared to say whether or not the .8 is or is not an appropriate number.

And I think that if in fact it is justified by the 5,000 pages of information that's already been generated on this, it should be fairly easy to make the written finding that's specified in the statute.
That's really -- If we go, if we make the determination that it is in fact more stringent, then there are two options under the statute. One is to repeal the rule, and go back to the EPA guideline. The other is to justify the standard.

And there's been a lot of work done on it. It's very possible that it, and in fact probable, that it can be justified based on the work that's been done.

So I think it's important that we keep those two issues separate. It's not that we're repealing the standard. It is just that we're making the determination of whether or not it is more stringent.

CHAIR RUFFATTO: Thank you. It's been an hour of this discussion. Let's take a ten minute break or a nine minute break. We'll reconvene at 2:40.

(Recess taken)

CHAIR RUFFATTO: We will reconvene the meeting. Sandy, will you call roll again to make sure we still have our quorum.

MS. MOISEY-SCHERER: Chairman Ruffatto.

CHAIR RUFFATTO: Here.
MS. MOISEY-SCHERER: Mr. Smith.

BOARD MEMBER SMITH: Here.

MS. MOISEY-SCHERER: Mr. Lehnherr.

BOARD MEMBER LEHNHERR: Here.

MS. MOISEY-SCHERER: Mr. Reiten.

BOARD MEMBER REITEN: Here.

MS. MOISEY-SCHERER: Mr. Simpson.

BOARD MEMBER SIMPSON: Here.

MS. MOISEY-SCHERER: Ms. Altemus.

BOARD MEMBER ALTEMUS: Here.

MS. MOISEY-SCHERER: Ms. Aguirre.

BOARD MEMBER AGUIRRE: Here.

MS. MOISEY-SCHERER: We have a quorum.

CHAIRMAN RUFFATO: Thank you so much, Sandy.

I think we should continue with the Board discussion. Mr. Simpson, do you intentionally have your hand up, or did you leave it up from before?

BOARD MEMBER SIMPSON: Sorry, Mr. Chairman. I left it up from before.

CHAIR RUFFATTO: All right. Board Member Altemus, you have your hand up, I believe.

BOARD MEMBER ALTEMUS: Yes. Thank you, Mr. Chair, members of the Board.
I have to agree with Board Member Simpson and Board Member Aguirre. To me a numeric standard is very strict, it's measurable, and it's enforceable. A guidance document is more aspirational.

And I think to answer the question that's before us, to me the answer is yes, that the standard that we have, the numeric standard, is more stringent than EPA's standard. So that is where I would be voting. But thank you.

CHAIR RUFFATTO: Thank you, Julia. Any more Board member discussion?

(No response)

CHAIR RUFFATTO: I will --

BOARD MEMBER SIMPSON: Not at this time, Mr. Chairman.

CHAIR RUFFATTO: I will offer my thoughts. I've had the benefit of everybody else offering theirs, and I can agree --

Well, first of all, I can say that Dr. Lehnherr and Board Member Reiten, I don't question that you believe, and that it may be the right standard, .8; but as has been pointed out by Board Member Aguirre and others, that is not the question before us.
The question before us is: What does the Montana law require? And more specifically, does this Board need to follow Montana law when it makes rules? And to me, that is the question.

And to the specific question, I think one needs to look no further than the statute to answer it. The statute says, "There shall be no rule more stringent than comparable Federal guideline." The word "comparable" there is key to me. The .8 standard and the 1.5 are comparable.

The .8 standard and some process, or document, or procedure is not a comparable standard. That's like trying to compare apples and oranges. And so I will vote to approve this motion, and I think the statute on its face answers the question. Any more discussion?

(No response)

CHAIR RUFFATTO: Any more discussion?

(No response)

CHAIR RUFFATTO: Then I will call the question. A motion has been made and seconded that the water column standard of .8 micrograms per liter is more stringent than the comparable Federal guideline. All in favor, say aye.

(Response)
CHAIR RUFFATTO: Opposed.

(Response)

CHAIR RUFFATTO: Let's take a roll call vote, please, Sandy.

MS. MOISEY-SCHERER: Chairman Ruffatto.

CHAIR RUFFATTO: Aye.

MS. MOISEY-SCHERER: Mr. Smith.

BOARD MEMBER SMITH: Aye.

MS. MOISEY-SCHERER: Mr. Lehnherr.

BOARD MEMBER LEHNHERR: Nay.

MS. MOISEY-SCHERER: Mr. Reiten.

BOARD MEMBER REITEN: Nay.

MS. MOISEY-SCHERER: Mr. Simpson.

BOARD MEMBER SIMPSON: Aye.

MS. MOISEY-SCHERER: Ms. Altemus.

BOARD MEMBER ALTEMUS: Aye.

MS. MOISEY-SCHERER: Ms. Aguirre.

BOARD MEMBER AGUIRRE: Aye.

CHAIR RUFFATTO: The motion passes.

Sandy, can you put up the question sheet again, please.

MS. MOISEY-SCHERER: (Complies)

CHAIR RUFFATTO: We've answered the first question yes, so now we need to address what is the remedy or consequence of the failure of the
standard to comply with the stringency statute.

You can take it down again. I just wanted to make sure we all knew what we were talking about now.

To start this discussion off, I would like to call on DEQ first, and then Ms. Marquis, to give us in no less than -- or no more than four or five minutes your position on this point, on this question, and your arguments in favor of that position. So we'll start with DEQ.

MS. BOWERS: Chair Ruffatto, members of the Board, this is Kirsten Bowers. I'll address this question on behalf of DEQ.

First of all, the Board of Environmental Review cannot invalidate the rule. By its clear language at Section 75-5-203 sub (4) sub(a), "A person affected by a rule that the person believes to be more stringent than comparable Federal regulations or guidelines may petition the Board to review the rule.

"If the Board determines that the rule is more stringent than comparable Federal regulations or guidelines, the Department shall comply with this section by either revising the rule to conform to the Federal regulations or
guidelines, or by making the written finding as
provided under Subsection (2) within a reasonable
period not to exceed eight months after receiving
the petition."

And the rule or the statute goes on to
say, "A petition under this section does not
relieve the petitioner of the duty to comply with
the challenged rule."

So the remedy for your determination
that the .8 standard is more stringent than
Federal is for DEQ to either revise the rule, or
to make the findings set forth in the stringency
statute.

CHAIR RUFFATTO: Thank you, Ms. Bowers.

Ms. Marquis, I assume you probably want to
respond.

MS. MARQUIS: Thank you, Chairman
Ruffatto, members of the Board.

The Board has authority to interpret,
apply, and enforce existing rules and laws. In
this case, the law that, or the rule that was
enacted, the standard that was enacted, was
enacted by the Board, and the record is the
Board's record.

So the Board is well situated, and the
Board has authority to interpret both the new selenium rule and make decisions about how it can be applied or enforced. This is expressly provided in statute at 2-15-102 Subparagraph (10), Montana Code Annotated.

So our suggested remedy is that the Board utilize its authority, recognize that it has made a mistake, that the rule is more stringent than Federal, that none of the written findings were completed, and further that the public was misled and didn't have a comment -- have any opportunity to comment on the stringency of the rule because they weren't told that the rule was more stringent than Federal.

So we believe that the Board has authority, and should declare that the selenium rule is invalid, it cannot be enforced, and further to look at the record and find that it does not support making the written findings, and send this back to DEQ for further rulemaking.

Thank you.

CHAIR RUFFATTO: Board members, questions, comments, discussion?

(No response)

CHAIR RUFFATTO: Or a motion. Dr.
Lehn herr.

BOARD MEMBER LEHNHERR: Thank you. I just wanted to comment that if you look at the stringency requirement, it's clear that -- Let's say where I think it is an incorrect determination that 0.8 is more stringent than the Federal standard, based on not a table, but based on a more complicated analysis that was done exhaustively by the previous Board; regardless the stringency regulation says that, or guidelines say that -- does not say that a requirement or a standard cannot be more stringent than Federal regulations if certain procedures are followed, and that guideline or that regulation outlines what those steps are.

So that would be an option, and I would say instead of jumping to an unnecessary step that could endanger Lake Koocanusa and its associated waterways, when there are good questions, valid questions, about whether or not the 0.8 is stringent enough, we should go back to square one, and go through public hearings, and gather information, and look at this again.

CHAIR RUFFATTO: Thank you, Doctor. Any other comments, questions?
BOARD MEMBER SIMPSON: Mr. Chairman. I guess I'm --

As far as the remedy or consequence, under the statute, it seems to me that there are two ways to go here. One is to essentially repeal the rule and revert to the Federal standard; the second choice is for the .8 standard to be justified based on the written findings that are required.

So it sounds as if it's the Department's position that it is the Department's responsibility to do that. I believe that's the case.

I'm not sure that what the Board -- I'm not sure of the Board's authority at this point, given the change in responsibility as it has to do with rulemaking, where that leaves us. Ms. Marquis addressed that to some extent, but there seems to be a conflict here, so I'm not sure how we resolve it.

CHAIR RUFFATTO: Thank you, Board Member Simpson. I'm going to ask Ms. Bowers a question following up from Dr. Lehnherr's comments.

How does DEQ propose to deal with this going forward?
MS. BOWERS: Chair Ruffatto, members of the Board. Based on the Board's determination today that the Lake Koocanusa water column standard is more stringent than Federal, the Department would make the findings in 75-5-203 Sub (2) and (3), and the Department believes it can do that based on the rulemaking record.

CHAIR RUFFATTO: I want to follow up. What Dr. Lehnherr said is that we need to initiate rulemaking again to do that, and so my question is: Is that the Department's intent?

MS. BOWERS: We've thought about this a little bit, and I might defer to Myla again, but we sort of -- and by "we," I mean the program and I have talked, and we sort of outlined a process that we think we would use to make the findings.

And yes, you're right. It would be a public process. There would be opportunity for the public to comment, and we would have to get it done by the eight month timeline that's triggered from the Lincoln County petition.

CHAIR RUFFATTO: Thank you. Any more discussion?

BOARD MEMBER AGUIRRE: I'm not clear on, Kirsten, what you just said you felt the
Department's action was. I apologize.

MS. BOWERS: No, that's okay. Board Member Aguirre and other members of the Board.

So the Department, in response to the determination that the water column standard is more stringent, would make the findings that are necessary in 75-5-203, and we would do that in a public process where we would publish our findings, and give the public opportunity to comment on them.

CHAIR RUFFATTO: Did that answer your question, Board Member Aguirre?

BOARD MEMBER AGUIRRE: I believe so. I think my question then goes on to -- The public hearing would just be focused on the findings associated with the 0.8 standard, is that correct, or does it go beyond what Board Member Altemus questioned?

Which she had a very good point about the fact that the standard has to be -- you know, you have to have a way to demonstrate compliance, and enforcement. And so I didn't know what elements are in the public review, if there's sort of like implementation standards, or it's just the standard that you're looking at. Does that make
sense?

MS. BOWERS: Yes. Member Aguirre, members of the Board.

So the process that DEQ has been outlining would include written findings, and then we would post those, and there would be a public comment period on those, and a public hearing, and we would finalize the findings, and we could present them to the Board in June probably and brief the Board on the findings.

CHAIR RUFFATTO: Any more discussion?

(No response)

CHAIR RUFFATTO: Let me offer my thoughts. I believe --

BOARD MEMBER SIMPSON: Mr. Chairman.

CHAIR RUFFATTO: Go ahead.

BOARD MEMBER SIMPSON: If I can interrupt, please. Excuse me.

My copy of the 75-5-203 I took off the internet, and I didn't reproduce the one that you sent out, so I don't know if it's different.

But under 203(2), it says, "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," etc.

Is that still the current language, or has "Board" been changed to "the Department" as a result of the statutory change?

CHAIR RUFFATTO: "Board" has been changed to "the Department."

BOARD MEMBER AGUIRRE: My copy says Department.

CHAIR RUFFATTO: Yes. I mean that part has been changed.

BOARD MEMBER SIMPSON: It has been changed?

CHAIR RUFFATTO: So it says, "The Department makes a written finding after a public hearing and public comment, based on evidence in the record."

BOARD MEMBER SIMPSON: Okay. Thank you.

CHAIR RUFFATTO: My thought is this. First of all, I tend to agree with the DEQ's position here as opposed to Teck Coal's position, but not quite, because I think it's very clear that in order to comply with this statute, DEQ will need to initiate new rulemaking, and that point is very important to these questions.
As far as the point that Ms. Marquis makes that we should declare the rule invalid, in my opinion, the rule is invalid because it violates Montana statute, but that happens by operation of law, and not by reason of something that this Board says in that regard.

So I think it is invalid, and cannot be enforced, but I don't think it's our role to make that declaration. What our role is to do is to do what the statute said, and again, it's very clear that the statute requires the Department, in my mind, to initiate new rulemaking, so it's got a proper notice, and a proper procedure through rulemaking to get there. So that's my view. So any more discussion?

BOARD MEMBER SIMPSON: Mr. Chairman, is there a motion required here? I don't see one.

CHAIR RUFFATTO: No, a motion has not been made, so you're right. We need to have a motion.

I will make a motion that the answer to this question is that the Department is obligated to follow the statute, and that's the consequence, and that in order to follow the statute, it must initiate new rulemaking.
BOARD MEMBER SIMPSON: I'll second for purpose of discussion.

CHAIR RUFFATTO: Dr. Lehnherr.

BOARD MEMBER LEHNHERR: I'm just a little unclear about the motion. Is there some way we could make it just a tad more succinct somehow?

I think it sounds like there are sort of two parts to it, that because the Board has decided that the current standard is more stringent, that it becomes sort of unenforceable now, and the second part is that the Department will initiate rulemaking.

I'm trying to think if there's some way we could have the motion be a form that if it was written, it would be pretty easy to see what the motion was about.

CHAIR RUFFATTO: I appreciate your comment. I will withdraw my motion if Board Member Simpson will withdraw his second.

BOARD MEMBER SIMPSON: Yes, I'll withdraw the second. But I do have a question.

CHAIR RUFFATTO: Go ahead. Ask the question.

BOARD MEMBER SIMPSON: If the rule is
ultimately repealed as a result of this review, that would be a Department function definitely. If the -- and this is what I would expect would happen is that the Department will prepare the written findings to comply with 203. Does the Board have any further role in this?

CHAIR RUFFATTO: I'm going to ask for a response on that from Ms. Bowers, and I would like -- and also Ms. Marquis.

MS. BOWERS: Chair Ruffatto, members of the Board. The Board's only role here is to answer the question whether the Lake Koocanusa water column standard is more stringent than comparable Federal regulations or guidelines.

The rest of the remedy is within the jurisdiction of the Department, and that is to either revise the rule to make it consistent with Federal regulations or guidelines, or to make the findings in 203.

And the statute is very clear that the rule is not repealed, and that a petition under the section does not relieve a petitioner from compliance with the challenged rule.

CHAIR RUFFATTO: Thank you. Ms. Marquis.
MS. MARQUIS: Thank you, Chair Ruffatto, members of the Board.

We believe the Board has authority, as I said earlier, to interpret, analyze, and enforce existing rules and laws. So the Board in its final agency action on this could make the determinations about the rule's applicability or its enforceability about the existing rules or the existing record.

Once the Board reaches that final agency action, we do agree that that, depending on what that final agency action says, likely would end the Board's role in these petitions.

What comes after that, I can't speculate, in terms of whether it would draw the Board back in or not, without knowing more about what that process would be.

CHAIR RUFFATTO: Thank you. Does any member -- Dr. Lehnherr, did you have a motion that you think would be more succinct?

BOARD MEMBER LEHNHERR: Not off the top of my head, Chairman Ruffatto. I'd probably have to sit down with a piece of paper for a minute or two.

CHAIR RUFFATTO: I appreciate that.
Let's do this. Let's take a few minutes and do that, and we'll see what we can come up with.

But I guess I want to say this, that if -- I think this next step would be fairly easy if DEQ would confirm to us that they plan to initiate new rulemaking to implement the statute, because I think that -- But what I hear DEQ saying is they're not going to do that, they're going to do something else.

And then I think the arguments that Ms. Marquis are making become very appropriate, because at that point, we aren't going to get to a point where we have a rule that is compliant with the statute, because we don't have a rulemaking that is compliant with the statute.

So that's my concern here when we are talking about this. I agree that it's primarily in the Department's realm, but to not go through a rulemaking or to rely on the existing rulemaking is I think within the Board's purview.

So let's take a few minutes to think about this. We're not going to take a break. We'll just take a few minutes, and some of us try to come up with a way to work out of this.

BOARD MEMBER AGUIRRE: Why don't we just
split it into two separate motions, or did we
already cover the first part of it?

    CHAIR RUFFATTO: No, I don't think we
have. So what's your suggestion? Split what into
two?

    BOARD MEMBER AGUIRRE: Split the
regulations more stringent than the Federal, which
I thought we already --

    CHAIR RUFFATTO: Yes.

    BOARD MEMBER AGUIRRE: -- went on record
with that, so then that doesn't need to be in
there anymore. So then it would just be a motion
for the desired action, which I feel like you
already stated that it has -- that Montana DEQ
needs to initiate new rulemaking.

    CHAIR RUFFATTO: Good point. Let's
think about it a bit. I've got lots of hands
here. Board Member Simpson.

    BOARD MEMBER SIMPSON: Mr. Chairman, as
a practical matter, it seems to me that the ideal
outcome here would be for the Department to go
through the process of preparing the written
findings, with that finding ultimately to be
affirmed by the Board, since this is in fact a
Board rule that predates the change in rulemaking
power.

Technically it's not a rule. It's already a rule. We're not talking about making a rule, we're talking about either retaining a rule or not subject to the requirements of 75-5-203.

So I'm not sure where we stand legally as far as having a role in the ultimate decision here, but I believe as a practical matter, that's the way it ought to be. I don't know that it's possible we get there.

CHAIR RUFFATTO: Thank you. Board Member Lehnherr.

BOARD MEMBER LEHNHERR: Thank you. I tend to agree with Board Member Aguirre that two motions may be appropriate. I think that might be a good way to handle it, and end up with motions that by themselves are fairly succinct.

The first motion could deal with what the Board envisions for what we do, now that we've decided that the 0.8 is more stringent than the Federal standard.

The second motion could be to, as you suggested, instruct the Department to initiate rulemaking, because it seems like by looking at 75-5-203 that we would be talking about rulemaking
for a new standard. Thanks.

CHAIR RUFFATTO: Ms. Bowers.

MS. BOWERS: Chair Ruffatto, members of the Board. Respectfully you have no rulemaking authority as of July 1 of 2021. And I appreciate your sentiments, but they're outside your jurisdiction, and advisory only.

And I also want to point out that under 75-5-203, DEQ can adopt a rule that is more stringent than Federal. We just have to make the findings. And the Board is the same. The Board was not prohibited from adopting a standard that is more stringent than Federal, but if they did, they had to make the findings.

So pursuant to these petitions, you have now answered the question that the .8 water column standard is more stringent than Federal, so it's now up to DEQ to make the written findings or to undertake rulemaking. And I can't -- sitting here right now today I cannot commit to undertaking rulemaking.

CHAIR RUFFATTO: Okay. I want to state this. I think the Board erred, and I think it's within the Board's purview to correct its error and to do so completely, not in a partial way.
So let's put up -- Instead of trying to resolve this question immediately, let's put up that question sheet again, because there are a number of questions that I think we need to get to if we're going to -- If the Department is not willing to commit to doing rulemaking, then we need to deal with the rulemaking that we've already conducted erroneously. So let's put up that list of questions, Sandy.

MS. MOISEY-SCHERER: (Complies)

BOARD MEMBER AGUIRRE: I have a quick question. Is that --

CHAIR RUFFATTO: Yes.

BOARD MEMBER AGUIRRE: For Ms. Bowers.

When you're looking at the 75-5-203, are you looking at section or number item two, or are you looking at item four when you're --

MS. BOWERS: Board Member Aguirre, and members of the Board. I was reading from sub (4).

BOARD MEMBER AGUIRRE: Okay. So either revising the rule to conform to the Federal regulations or guidelines, or by making written findings as provided under Subsection (2)?

MS. BOWERS: Correct. I just wanted to be clear. Thank you.
CHAIR RUFFATTO: The reason I wanted to put up these other questions -- and Sandy, can you scroll down so we see Questions 3, 4, 5, 6, and 7. Those are additional questions that were presented by the petitions and argued by the parties. We'll skip the Teck Coal standing one for the time being.

But one of the points that was argued by Teck, and really never refuted by DEQ, was that the initial notice, at least the initial notice of the rulemaking failed to comply with the stringency statute, and I think the answer to that is fairly clear that it did not.

And then the next question is: Does the rulemaking record with respect to the standard contain the evidence which would support a finding?

Now, that evidence has to be in the record, and not out there in these 5,000 pages in order for it to comply with Montana law.

And then Item No. 7. There was a point that was debated in the comments about whether peer reviewed scientific studies are required to make the findings.

So again, if the Board -- if DEQ would
commit to going through rulemaking, to me that would answer five, six, it wouldn't answer seven, but I don't know that we would feel like we would need to answer that if they would commit to rulemaking, because that's a question that they would have to address in the process.

But if DEQ is not committing to rulemaking, I think we have to answer these, and declare the rulemaking either valid or invalid. I think it's clearly invalid. So there's no way that we could have a valid rule without a valid rulemaking, and that's where I think the problem is.

And I want to ask Ms. Bowers. Would you be in a position at some point today, or in the next period of time before the next meeting, to either commit or say you're not going to commit to rulemaking?

MS. BOWERS: Chair Ruffatto, members of the Board. I'm not in a position today to commit or not commit to rulemaking.

CHAIR RUFFATTO: Can I ask this question. Are you, is DEQ committed to not going through rulemaking? Because that would also help our analysis.
MS. BOWERS: Chair Ruffatto, members of the Board. I'm not sure we're not committed to not doing rulemaking, but I think maybe this discussion -- it's getting a little -- I think you're really straying outside your jurisdiction here, and I mean that respectfully. You're here today to answer the stringency question, and then the rest of the remedy is within the jurisdiction of DEQ, including the findings.

You know, I respect your advice as to whether the record can support the findings, but the findings are really within the Department's jurisdiction and not the Board's at this point.

CHAIR RUFFATTO: I appreciate your statement and your position there. What that overlooks is that we're talking about a rulemaking that this Board conducted, and we made an error on -- this Board made an error on that, and so that gives us, in my view, the purview to address these additional questions. So I disagree with your statement.

So I think we need to take a break, and come up with some motions that will -- that this Board can agree on that will get this process moving. So let's take a -- I don't want to --
Let's take a ten minute break, and we'll come back and have some motions to present.

(Recess taken)

CHAIR RUFFATTO: Let's please reconvene.

Sandy, would it be possible for you to take that screen down.

MS. MOISEY-SCHERER: (Complies)

CHAIR RUFFATTO: Thank you. By the way, Sandy, I want to thank you for your great work here and for keeping us going and on track.

MS. MOISEY-SCHERER: It's a pleasure, sir.

CHAIR RUFFATTO: Can you, Sandy, call roll again.

MS. MOISEY-SCHERER: Chairman Ruffatto.

CHAIR RUFFATTO: Here.

MS. MOISEY-SCHERER: Mr. Smith.

(No response)

MS. MOISEY-SCHERER: Mr. Smith.

(No response)

MS. MOISEY-SCHERER: Mr. Lehnherr.

BOARD MEMBER LEHNHERR: Here.

MS. MOISEY-SCHERER: Mr. Reiten.

(No response)

MS. MOISEY-SCHERER: Mr. Reiten.
(No response)

CHAIR RUFFATTO: Mr. Simpson.

BOARD MEMBER SIMPSON: Here.

MS. MOISEY-SCHERER: Ms. Altemus.

BOARD MEMBER ALTEMUS: Here.

MS. MOISEY-SCHERER: Ms. Aguirre.

BOARD MEMBER AGUIRRE: Here.

MS. MOISEY-SCHERER: We have a quorum.

CHAIR RUFFATTO: And I see that Joe is here, too, Joe Smith, Board Member Smith.

BOARD MEMBER SMITH: I'm here now.

CHAIR RUFFATTO: I will expect Board Member Reiten to show up soon, but we have a quorum.

So I'm going to make a motion, and let's understand that we're not -- we've made the basic decision. I think we need to put this into a decision document, so it's going to be finally approved at the next meeting. So the motions that we're going to make now, in my mind, are guidance for whoever is drafting the final decision document.

So on question No. 2, I will move that the remedy is for DEQ to comply with 75-5-203, and that it must do so by initiating rulemaking to
adopt a rule consistent with the stringency statute because the Board's rulemaking was invalid as to the .8 standard. Joe.

BOARD MEMBER SMITH: Can I ask a question or do we need to wait for a second?

CHAIR RUFFATTO: Go ahead and ask the question. Maybe the answer to your question will produce a second.

BOARD MEMBER SMITH: I'm a little confused still on why we need to push DEQ to reintroduce into the rulemaking session. I mean it seems like part four of 75-5-203 basically states that the remedy is to basically go back through No. 2 within eight months.

CHAIR RUFFATTO: The reason why I think it does is because of the language of Subparagraph (2) which says it makes the written findings after a public hearing and public comment based on the evidence in the record.

So that means it has to have an appropriate notice to initiate that, and absent a notice to initiate that process, the record is invalid, and at least that's my view.

And those points were clearly addressed in the briefing. The Teck Coal and Lincoln County
folks argued that the rulemaking was invalid because it did not -- it was not initiated with the statement required by the statute, and that is that the rule they were trying to adopt was more stringent than the Federal regulations, so the whole rulemaking was premised on an incorrect basic assumption, and so we need a valid rulemaking to make a valid rule.

BOARD MEMBER AGUIRRE: So do we take a position on that?

CHAIR RUFFATTO: Well, that's the question. If we don't want to take that position, then we could leave it up to DEQ to do whatever it wants, but I think that because the Board made an error, it's up to the Board to rectify that error. But we don't have to.

And I'm going to say that my motion has just died for lack of a second, and I will entertain any other motions. Joe.

BOARD MEMBER SMITH: Just one more real quick question. So what if we pass this motion, but the DEQ doesn't follow it? Are there any consequence of that, or to us specifically as the Board?

CHAIR RUFFATTO: That all depends on
what creative lawyers do when they decide to challenge what we've done or challenge what DEQ does. I can't answer that question. I think it's a quagmire out there, as I look down the road.

BOARD MEMBER AGUIRRE: I mean it feels like your motion -- I felt like I wasn't ready for you to throw it away, because I do feel like the rulemaking is invalid.

CHAIR RUFFATTO: Maybe we can do better. I'm probably trying to accomplish too much here, okay? I'm going to state, I'm going to restate the motion a little differently and narrower.

I will move that the remedy is for DEQ to comply with the 75-5-203.

BOARD MEMBER SMITH: I'll second that.

CHAIR RUFFATTO: Discussion.

BOARD MEMBER SIMPSON: Mr. Chairman.

CHAIR RUFFATTO: Yes. Dave Simpson.

BOARD MEMBER SIMPSON: I'm sorry. I'm trying to get my feeble mind around this question. I gather from the point you just made, Mr. Chairman, that you consider, in this situation where the rule has already been adopted and found to be deficient because of the procedure, that the preparation of the written finding is still a
CHAIR RUFFATTO: That would be my thought, because this statute calls for that written finding to be made in a rulemaking process after a public hearing and public comment.

BOARD MEMBER SIMPSON: So what we're proposing to do is to back up to the point before the rule was formally adopted by the Board, and comply with 203 by preparing the written finding, but that will have to be done by the Department since the Board is no longer in the role of rulemaking.

And I also concur with your point that since this is a Board rule, the Board must have some role in correcting the error. It seems like we're handing this over to the Department with no further oversight, which from my standpoint is the incorrect way to go.

CHAIR RUFFATTO: I appreciate that, but I'll tell you my position on that is that once we hand it over, having done what we can do to correct our error, that the Legislature has handed it to the Department, and it is within their jurisdiction. So on that point I agree with Ms. Bowers and DEQ.
I mean I don't know if there's some other way it could end up with the Board. I suppose it could on some permit application or something like that.

But just on this rulemaking process, I agree with DEQ, that once we get done with our work on these petitions, it's all in DEQ's hands, and the Legislature has decided to give that to the Department and not to this Board.

BOARD MEMBER SIMPSON: The point was made earlier that the Board could still, would have a role as an advisory role. So the thing I've been turning over in my mind is what would that look like. I mean does the Board become a part of the public where we go and testify at the hearing, or what form could or would that take?

CHAIR RUFFATTO: Ms. Bowers, I think it was you that suggested the possibility of an advisory role.

MS. BOWERS: Yes, I think I used those words.

But I had my hand up because I wanted to point out that we did, DEQ did commit to making the written findings after a public hearing, and I heard one of the Board members say that that was
required by the statute, and DEQ agrees.

And DEQ is committed to following 75-5-203, particularly sub (4), and we have started outlining a process for making the necessary written findings. And I wanted to offer up that one -- Potentially we could bring it to the Board at the April meeting, the process, I mean.

CHAIR RUFFATTO: Thank you, Ms. Bowers. Ms. Marquis, you haven't raised your hand, but I would like you to pitch in here if you have some thoughts that might help us out.

MS. MARQUIS: I really don't have anything new to add. I agree, as we argued, the rulemaking record was deficient, and the rulemaking itself is invalid, and the only way to correct that is with a new rulemaking.

CHAIR RUFFATTO: Thank you. Was my motion seconded? Joe, did you second it?

BOARD MEMBER SMITH: Yes, I did.

CHAIR RUFFATTO: Any more discussion?

Dr. Lehnherr. I apologize. You had your hand up quite awhile ago.

BOARD MEMBER LEHNHERR: No problem.

Just a couple things.
I'm a little bit -- Ideally if there is a substantive motion, we could get it in writing just to avoid confusion. I'm wondering if Laurie could perhaps read back what she has in the transcript for the motion, just so I'm clear.

CHAIR RUFFATTO: I read it from my sheet of paper here, so I could read it again.

BOARD MEMBER LEHNHERR: If you wouldn't mind, Chairman Ruffatto. Thank you.

CHAIR RUFFATTO: I move that the appropriate remedy is for DEQ to comply with MCA 75-5-203, and Joe seconded that.

BOARD MEMBER SIMPSON: Mr. Chairman. Would it be appropriate to include in that motion, since this appears to be previously unplowed ground, if we could ask the Department as part of that process to prepare a plan for, an implementation plan for compliance with 203, and to identify points during the process for consultation with the Board as an advisor in an advisory capacity.

CHAIR RUFFATTO: I am not prepared to include that in my motion, and the reason I am not prepared is because I don't think we have that jurisdiction.
But let me say this, Dave. If this motion passes or doesn't pass, you could make that motion, and the Board could include that in the record for sure. Any further discussion? Yes.

Dr. Lehnherr.

BOARD MEMBER LEHNHERR: Chairman Ruffatto, sorry to ask about this, but I'm just a little bit unclear at this point.

Our role in DEQ rulemaking is advisory, as I understand it, and the purpose of your motion is advisory; is that correct, or am I misreading that?

CHAIR RUFFATTO: I have never said that I believe that this Board has an advisory role in rulemaking. Ms. Bowers suggested that. Maybe we'll ask her. Do you think the Board has an advisory role in rulemaking?

MS. BOWERS: Chair Ruffatto, members of the Board, currently you have no role in rulemaking, but the Department respects your advice.

CHAIR RUFFATTO: All right. Thank you. So Dr. Lehnherr, I would answer your question then, based on that, that we do not have an official role in rulemaking, but that the
Department would respect our advice if we decided to offer some. Any more discussion?

(No response)

CHAIR RUFFATTO: All right. A motion has been made and seconded that the remedy is for the Department, DEQ, to comply with 75-5-203. All in favor, say aye.

(Response)

CHAIR RUFFATTO: Opposed, nay.

(No response)

CHAIR RUFFATTO: The motion carries. I think we should answer these other questions then, and keep in mind that we're going to put together a written decision which documents these things.

So the next question is -- Well, I will take them in order here, just for ease. The next question on the sheet that's been up there is: Does Teck Coal, Limited have standing? I would open that up for discussion among the Board. Dr. Lehnerr.

BOARD MEMBER LEHNHERR: Thanks, Chairman Ruffatto.

I would say that if Teck Coal was the only one, the petitioner, then I would say that 75-5-203 didn't apply because there's no person
involved. Teck Coal is not -- a corporation is not a person.

But I think probably even more significant is the fact if you walked up to any Montanan and said, "Should a foreign corporation who doesn't even have a license to do business in Montana, should a foreign corporation be allowed to determine our air and water quality standards?," I think you would be hard pressed to find anyone who said that that corporation had a right to have any role in determining Montana's air and water standards.

So if wasn't for the presence of the Libby or the Lincoln County Commissioners, I would say we didn't have a person, anyone with any standing in this case, but we do have the Lincoln County Commissioners.

CHAIR RUFFATTO: Board Member Simpson.

BOARD MEMBER SIMPSON: Thank you, Mr. Chair. What is the definition of a person under the law as used in 203?

CHAIR RUFFATTO: I don't know, but my guess is it includes entities, but that's just my best guess. So I don't think -- I think Teck Coal would be considered a person for purposes of this
statute, but that's just how "person" is commonly used in the law.

I will ask Ms. Bowers to give DEQ's position on this issue of Teck Coal's standing, and just try to do it in about two minutes, and then I'll ask Ms. Marquis.

MS. BOWERS: Thank you, Chair Ruffatto, members of the Board.

First Teck Coal is a person under the definitions under the Water Quality Act, because they are -- it includes corporations, and it even includes persons resident in Canada.

But they are not a person affected by the Lake Koocanusa rule, and the statute at 75-5-203 sub (4) Sub(a) is clearly, standing is clearly limited to a person affected by a rule that the person believes to be more stringent than comparable Federal regulations or guidelines.

And Teck Coal cannot be affected by the Lake Koocanusa water column standard because that standard only applies south of the international border. It's limited to the Montana side of Lake Koocanusa.

And Teck Coal argues that they are affected because of speculation that the
Department's rule may put pressure on British Columbia to adopt a similar rule, and that there are some non-specific accusations that somehow Teck was targeted by the rulemaking, but those are all too speculative and too attenuated to establish standing under the statute.

CHAIR RUFFATTO: Ms. Marquis, do you want to address this?

MS. MARQUIS: Please. Thank you, Chairman Ruffatto, members of the Board.

The definition of person in the statute -- and this is found at 75-5-103 -- means the State, a subdivision of the State, institution, firm, corporation, partnership, individual, or other entity, and includes persons resident in Canada, end quote. So the statute specifically includes Teck within that definition of persons.

Now, as Ms. Bowers correctly noted, the statute says the petition process is limited to persons affected by the rulemaking. And she said that we've asserted a claim based on speculation, and that's not true.

If you look to our citations that we provided you, the Board's rulemaking record specifically says this is only going to affect
Teck. The Board's rulemaking record says this would be used to pressure British Columbia to set a standard. British Columbia issues permits that govern Teck. That is going to affect Teck Coal.

Probably one of the most egregious --

Probably one of the most on-point pieces of evidence is the letter sent from DEQ's Director at the time, Shaun McGrath, to the International Joint Commission, and this letter is dated December 31st, 2020.

And in there it is very clear that then Director McGrath is asking the International Joint Commission to get involved, and to use Montana's newly promulgated standard against Teck Coal, and against the coal mining operations in the Elk Valley. The coal mining operations in the Elk Valley are Teck Coal's coal mining operations.

It's very clear that not only did the Board intend for the standard to impact Teck directly or through British Columbia, but also DEQ intended that this rule be used to affect Teck Coal through the International Joint Commission.

Therefore Teck clearly has standing to bring this petition before the Board.

CHAIR RUFFATTO: Thank you. Thank you
both. Do we have a motion on Teck Coal's standing? Dave Simpson, do you have your hand up?

BOARD MEMBER SIMPSON: I do. I just had a question, and this is just to follow up on the statement made by Ms. Bowers earlier.

Am I to understand that the standard of 0.8 is applicable only south of the international border, so therefore we must have two different standards for the lake?

My understanding the whole purposes of this process in cooperating with Canada and developing the standard was to have a consistent standard for the lake, but I gather that's not the case.

MS. BOWERS: Board Member Simpson, and members of the Board.

Currently there are two standards. There's the Montana standard south of the international border, and then BC's -- I don't think they call them water quality standards. I think they're called objectives or something like that.

But theirs applies north of the border, I think it's currently two micrograms per liter, but they may be working toward adopting a lower
standard, and a standard that's closer to
Montana's.

BOARD MEMBER SIMPSON: I'll make a
motion -- sorry?

CHAIR RUFFATTO: Go ahead.

BOARD MEMBER SIMPSON: I was going to
say I'll make a motion that -- If we really need
to do that. I think it's pretty well defined
under the law -- but I believe Teck Coal does have
standing in this case, and I'll make a motion to
that effect.

CHAIR RUFFATTO: Do we have a second?

(No response)

CHAIR RUFFATTO: I would second that
motion. Discussion. Yes, Dr. Lehnherr.

BOARD MEMBER LEHNHERR: Thanks, Chairman
Ruffatto.

I understand that in the technical
jargon Teck Coal is considered to have standing,
but I will have to oppose the motion, just since
I'm a Montanan and voting for probably your
average Montanan who would disagree with that.
Thank you.

CHAIR RUFFATTO: Thank you, Doctor. Any
more discussion?
(No response)

CHAIR RUFFATTO: No more discussion.

I'll call the question. A motion has been made that Teck Coal has standing under the stringency statute. All in favor, say aye.

(Response)

CHAIR RUFFATTO: Opposed, nay.

BOARD MEMBER LEHNHERR: Nay.

COURT REPORTER: Who was the second nay?

CHAIR RUFFATTO: We'll call a roll call.

It was Jon Reiten, but we'll make sure we get it on the record. Sandy, would you do a roll call vote.

MS. MOISEY-SCHERER: Chairman.

CHAIR RUFFATTO: Yes.

MS. MOISEY-SCHERER: Mr. Smith.

BOARD MEMBER SMITH: Yes.

MS. MOISEY-SCHERER: Mr. Lehnerr.

BOARD MEMBER LEHNHERR: No.

MS. MOISEY-SCHERER: Mr. Reiten.

BOARD MEMBER REITEN: No.

MS. MOISEY-SCHERER: Mr. Simpson.

BOARD MEMBER SIMPSON: Aye.

MS. MOISEY-SCHERER: Ms. Altemus.

BOARD MEMBER ALTEMUS: Aye.
MS. MOISEY-SCHERER:  Ms. Aguirre.

BOARD MEMBER AGUIRRE:  Aye.

CHAIR RUFFATTO:  The motion passes.

The next question is:  Did the initial notice of rulemaking with respect to the .8 standard fail to comply with the stringency statute?  I will ask -- oh, Dave, go ahead.  If you've got your hand up --

BOARD MEMBER SIMPSON:  Oh, sorry. My hand was still up from before, but I believe we've already answered that.

CHAIR RUFFATTO:  No, I don't think we have. How do you think that we have answered that?

BOARD MEMBER SIMPSON:  By making the determination that the standard of .8 is more stringent than the guideline 1.5.

CHAIR RUFFATTO:  All right. I understand your point. I guess I am taking that a step further -- what your point is -- is because the notice required it to state that, that it was invalid.

But we haven't really made that determination yet. So I think we should make this determination, so that when we prepare a written
decision, we have good grounds to state it. Does that make sense to you?

BOARD MEMBER SIMPSON: Yes.

CHAIR RUFFATTO: Legal mumbo-jumbo is what we're dealing with here, and I'm trying to make sure we walk through it carefully.

BOARD MEMBER AGUIRRE: I'm going to make a motion --

BOARD MEMBER SIMPSON: I think the word is "quagmire."

CHAIR RUFFATTO: Go ahead, Stacy.

BOARD MEMBER AGUIRRE: I'm going to make a motion that the initial notice of rulemaking with respect to the standard failed to comply with the stringency statute.

CHAIR RUFFATTO: Do we have a second?

BOARD MEMBER SIMPSON: I'll second it.

CHAIR RUFFATTO: Thank you, Board Member Simpson. Discussion.

(No response)

CHAIR RUFFATTO: If there is no discussion, I'll call the question. A motion has been made and seconded that the initial notice of rulemaking failed to comply with the stringency statute. All in favor, say aye.
CHAIR RUFFATTO: Opposed, nay.

(Respons)

CHAIR RUFFATTO: Roll call.

MS. MOISEY-SCHERER: Chairman.

CHAIR RUFFATTO: Aye.

MS. MOISEY-SCHERER: Mr. Smith.

BOARD MEMBER SMITH: Aye.

MS. MOISEY-SCHERER: Mr. Lehnherr.

BOARD MEMBER LEHNHERR: Nay.

MS. MOISEY-SCHERER: Mr. Reiten.

BOARD MEMBER REITEN: Nay.

MS. MOISEY-SCHERER: Mr. Simpson.

BOARD MEMBER SIMPSON: Aye.

MS. MOISEY-SCHERER: Ms. Altemus.

BOARD MEMBER ALTEMUS: Aye.

MS. MOISEY-SCHERER: Ms. Aguirre.

BOARD MEMBER AGUIRRE: Aye.

CHAIR RUFFATTO: Motion passes.

The next question is: Does the
rulemaking record with respect to the .8 standard
contain evidence that would support the finding
required by the stringency statute?

And to kick this off, I will ask Ms.
Marquis to give us a couple of minutes of the
position that Teck Coal has and your basis for that.

MS. MARQUIS: Thank you, Chairman Ruffatto, and members of the Board.

As we pointed out in our briefing and decision document that we proposed for the Board's consideration, the record is barren of the evidence that is required, and part of that is based on the motion that just passed, which was that there was no -- the rulemaking wasn't initiated with any notice that the Board was promulgating a standard that is more stringent than Federal.

So just briefly to review the requirements based on the statute -- and let me pull that up quickly here -- there must be a written finding based on evidence that, first of all, the proposed standard or requirement protects public health or the environment.

And here there's no evidence that it will protect public health or the environment. In fact, the evidence in the record suggests that the background levels of selenium that are contributed to by tributaries and other forces may be very near, if not right at or above what the standard
is currently set at.

There's also evidence in the record that there is no harm occurring, and so there is really nothing right now that the rule would protect, or protect anybody or anyone from.

The second requirement is that the State standard or requirement to be imposed can mitigate the harm to the public health or the environment.

And this is important because not only is there no harm occurring, as evidenced by the fish tissue data, there are no fish tissue, credible fish tissue samples that currently exceed any of the Federal, or now the State's fish tissue standards.

I know that there's been a lot of conclusory statements about what the data shows, but if you look at the data and analyze it in accordance with what the rule requires, there is no conclusive data.

The rule requires that there has to be at least a composite or an average of at least five individual samples, and that equals one data point. For most of the fish species for the egg or the ovary data, there are not five samples.

It also requires that for the egg tissue
samples, they be collected from ripe ovaries, and again, the record suggests that this didn't happen, and the Board recognized that in the record that there were problems with the collection of the egg or the ovary data.

So there's no proof of harm, and there's no proof that this standard can mitigate the harm. Importantly, as the Board and DEQ have said, they cannot regulate Teck, and they presume that all of the selenium contributions are coming from Teck, so there's no way that the standard can be implemented in a manner that protects or mitigates harm to the public health or the environment.

Again, we don't believe that there is harm to the public health or the environment occurring now, but even if there was, it's not clear that this standard can mitigate such harm.

The third requirement is that the State standard or requirement to be imposed has to be achievable under current technology, and this is very important, because there's no evidence in the record of what the current technology can achieve. What the Board's rulemaking record said was it just depends on what Teck Coal does up in Canada. That does not meet the requirement of the
statute. The statute puts an affirmative duty on to -- then it was the Board, now it's the Department -- to show that the standard is achievable under current technology.

There was no discussion of what that current technology is, or what it could achieve. In fact, there were questions about whether laboratories, the regular labs that people use to analyze water quality standards, can even analyze down to that level on a consistent basis.

And that was obvious when we talked about the background selenium contributions, because most of those samples were analyzed by a lab that could only analyze down to .9 micrograms per liter.

The fourth thing that's required is that the written finding must reference pertinent ascertainable and peer reviewed scientific studies contained in the record.

And the reason for this -- and it was clear in the legislative history that we printed out -- was that there's a lot of conclusory statements made, and a lot of speculation and hypothesis.

And the Legislature, when they enacted
the stringency statute, they wanted to be sure
that they weren't reacting to emotional, or
speculative, or conclusory statements, and that
what they were doing was based on the real
science. So if the real science shows that a
standard more stringent is needed, then they want
proof of that.

And again, the record is barren of that
evidence, and nobody has really disputed that, and
nobody has been able to point to any record
citations where that evidence exists.

So Teck's position remains that there is
no evidence in the rulemaking record that would
support the required written findings. Thank you.

CHAIR RUFFATTO: Ms. Bowers, do you want
to offer the DEQ's position?

MS. BOWERS: Chair Ruffatto, members of
the Board.

I first want to point out that the
petitions were brought under the stringency
statute. The stringency statute has a very
specific remedy. It's provided in 75-5-203 sub
(4).

So these generalized comments that
rulemaking is somehow invalid are overridden by
the specific remedy provided in the statute. The specific prevails over the general.

And all this discussion, all this technical discussion is way beyond the scope of where the Board needs to go today. You've made the decision that .8 water column standard for Lake Koocanusa is more stringent than comparable Federal regulations or guidelines, and that's as far as you need to go. The rest of the remedy is up to the Department.

CHAIR RUFFATTO: Thank you, Ms. Bowers. Do I have any motion or discussion?

BOARD MEMBER SIMPSON: Mr. Chairman, I'd like to make few points if I could.

CHAIR RUFFATTO: Please do.

BOARD MEMBER SIMPSON: And this has to do with the findings that are going to have to be prepared. The findings are going to have to justify the rule, and so I think to just assume that the record that we have is going to justify the rule may be overreaching more than a little.

And the reason I say that is there are a lot of technical questions here, which again, we may be getting the cart ahead of the horse, but I think the questions are going to have to be
addressed in that finding if it's going to be a valid finding.

Ms. Marquis has touched on some of the points that I have on my list here, and first and foremost was: What is the problem to be addressed by the rule?

And rather than to go back and reiterate what has already been stated, it's clear from the record that the position that the fish in Lake Koocanusa are being adversely affected by selenium levels is extremely weak. I believe that's going to have to be beefed up quite a bit in order to justify the rule in the first place.

The second has to do with selenium detection limits. The selenium standard is in the range of one microgram per liter, or one part per billion, and that's very near the detection limit of .5 micrograms per liter using atomic absorption spectrometry that I could gather from the internet. That's the best information I could come up with. I don't know if it's accurate.

But the DEQ7 standard reporting is now, the reporting standard is one microgram per liter, so clearly that's inadequate to analyze at 0.8 with confidence. Concentrations are extremely
And just to show you the amounts we're talking about, I wanted to make a point. You all know what that is -- (indicating) -- it's a one dollar bill. And in discussing water quality, we often talk about parts per million.

So if you had a million of these, which I would dearly like to have, and you spend $1,000 a day shopping, your million dollars would last you for about two years and nine months. If you had a billion of these, and you spend at a rate of $1,000 a day, it would take you 2,730 years.

That's the amount of selenium that we're talking about here. It's extremely low. And so I think we need to have an affirmation that the precision and degree of confidence in our analytical method realistically allows the imposition of such a standard, and I don't know that we have that.

Another question along that same line is whether or not there have been similar levels, similar standards adopted by other states in other circumstances. I didn't run across anything in the portions of the record that I read that indicated one way or another whether that's the
case, but it seems like we're dealing in standards at a level that, at least from the evidence that I've been able to find, have not been affirmed so far.

Another issue is background, and this also was an issue that was brought up by Ms. Marquis, is the Elk River basin comprises about 1720 square miles, or about 19 percent of the Lake Koocanusa catchment area of 8,985 square miles.

In order to predict impacts on the lake from selenium entering the system from the Elk River, accurate selenium data are required for the Kootenai above its confluence with Elk River. I don't know if such data exists or not.

According to information provided by Teck there are some analyses that are limited by a .9 detection limit, but without that information, it's kind of hard to predict just what the impacts of selenium that's originating at the Teck Coal properties is likely to result in.

And there's just one other question there, and I don't believe that it's a critical factor in this case, but I think's it's something to recognize, and that is that State law states that it's not necessary for wastes to be treated
to a purer condition than natural condition of the receiving stream.

I recognize we're not talking about a discharge here. We're talking about an in-stream or an in-lake standard. But without some understanding of what the natural condition of impounded waters is in Lake Koocanusa, it's kind of hard to justify a standard as low as what we're talking about.

The next item on my list is the selenium model. I went back and looked at the slide shows that have been presented and the information contained therein, as well as the EPA review.

And according to information provided by Teck, the USGS model consistently over-predicted measured fish selenium concentrations. Is that the case? I don't know. But it sounds as if it's a very conservative model.

And according to the EPA approval letter, EPA recommends selecting fish species in the aquatic system with the greatest selenium sensitivity and bioaccumulation potential. So the model selected by Montana was the more conservative with the greatest bioaccumulation potential presumably at altered levels.
Moreover, bioaccumulation values for all species without empirical data were equated with white sturgeon, which is described as the most sensitive species in the system.

White sturgeon don't occur in Lake Koocanusa, but are present in the Kootenai River below Kootenai Falls. White sturgeon are long lived, and have been known to live 100 years or more, which intuitively means a long time for bioaccumulation to occur.

I couldn't find any data on this on the bioaccumulation question, so I do have a question. Is the use of white sturgeon bioaccumulation values a reasonable assumption? I don't know, but in short, the input data in my view were ultra-conservative.

Mathematical modeling of natural systems can be a valuable analytical and predictive tool, but in order to construct and confirm a valid model, several important criteria must be considered.

Now, I've had some experience with models, but not in the question of water quality and bioaccumulation, but in other areas like groundwater modeling.
But it's important to have a complete understanding of the system being modeled, and so that's my question. Is there a complete understanding of the system sufficient to support the model? Is the model calibrated to real world conditions in Lake Koocanusa? There's some indication that it's not.

Are input data reasonable and verifiable, or are they overly conservative? And have sensitivity runs been conducted? I understand the impact of variations in input data.

The combination of a conservative model that over-predicts measured concentrations, combined with extremely conservative input variables, can only result in artificially low calculation of threshold selenium concentration.

I don't know if the 0.8 standard is justified or not. I just -- I don't think there's enough information here to justify, at least I don't have enough information to make that conclusion, but I think there are a lot of questions.

Finally, based on the available data, Lake Koocanusa is not impaired relative to EPA's selenium standard of one and a half micrograms per
liter, since the average over a number of years has been about one microgram per liter.

In addition to that, it doesn't appear that the data available to date at least that selenium concentrations in the lake are rising. They seem to be relatively consistent.

So it looks like the application of a new standard could result in an impairment determination merely by a regulatory action. Could an impairment determination severely limit economic development in the future? It certainly could.

So what would be the impact of an impairment determination in general, and on Teck in particular, although since Teck is not being regulated by the State of Montana, that's really something to be addressed by the authorities in British Columbia.

But that goes through my long list. I'm sorry to bore you with it, but my point is there are a lot of questions in my mind based on the information that's available as to whether or not the determination of a 0.8 micrograms per liter is reasonable and necessary.

And that's why I think that there are a
lot of issues that will need to be addressed in this finding that's going to be prepared by the Department, beyond what I have seen in the products that have been produced so far.

CHAIR RUFFATTO: Thank you, Dave. Is there any more discussion or a motion? Dr. Lehnherr.

BOARD MEMBER LEHNHERR: Thank you, Chairman Ruffatto.

I just want to respond rather briefly, and I hate to contradict anyone, but the over 5,000 pages of documents from the previous Board's analysis definitely shows a number of peer reviewed studies that shows even adverse events, and there were serious questions raised about whether or not the 0.8 standard was strict enough.

It can be hard to grasp some scientific concepts, and I think if you look at something like the moon landing, say, I personally believe we landed on the moon. Not everyone does. But the moon is 240,000 miles away, and yet everything came together, and you think, "Well, how could that happen?"

You know, it seems like there were all these huge numbers involved, and how could that
happen, and yet I think it shows that some very unusual facts, and scientific findings, and some of the methodologies used in science can have significant results.

And from a medical standpoint, there are adverse events in the human body on the magnitude of parts per million, for example. So we shouldn't take these numbers that you think, "Well, boy, that's tiny." You know, a micron, we talk about things that are a micron wide. Well, I can't even see that, but tiny little things like viruses can have significant effects. So we shouldn't discount these numbers that seem a little bit hard to understand.

And I just also want to remind -- I'm sort of a broken record here about this over 5,000 pages -- but there were dozens of highly qualified scientists, very knowledgeable in their field, world class scientists, that made determinations that guided the previous Board's actions.

And finally, I think it's telling that British Columbia is looking at lowering their standard to 0.85, very close to 0.8. So that says something about what's going on in Lake Koocanusa, and the standards that are best for that
ecosystem.

That's all I want to say. Thank you for letting me comment.

CHAIR RUFFATTO: Thank you, Doctor.

Board Member Aguirre.

BOARD MEMBER AGUIRRE: Based on all this discussion, which I feel was valuable to the point of making a motion that the rulemaking record with respect to the standard, whether that contains evidence that would support the findings required by the stringency statute, I move that it does not, or make a motion that it does not contain -- the standard doesn't contain evidence that would support the findings required by the stringency statute on process.

CHAIR RUFFATTO: Thank you. Do we have a second?

(No response)

CHAIR RUFFATTO: I will second that motion. Discussion.

BOARD MEMBER SIMPSON: Mr. Chairman, I do believe that the extensive record that's been developed on this, that 50,000 pages or so, does contain evidence that would support the findings as it relates to -- I'll shuffle my papers here --
anyway, as it relates to the requirements for what
is supposed to be in the finding, that is, there
has to be a technical determination that certain
requirements have been fulfilled.

However, there's a question in my mind
as to whether the standard -- or whether the
rulemaking record is complete and accurate in all
respects, would be the best way to put it. That's
why I raised the list of questions that I raised.

I mean I'm not in a position to say
whether the .8 is right or wrong. I just don't
know. But I think based on the presentations that
I've seen --

And I admit I've not dug back into all
50,000 pages of what's been presented -- but I
have looked at the summary presentations that were
used to justify adoption of the rule, and that's
where my questions arise, is whether or not all of
these factors have been adequately addressed, that
is, not only is the standard justified, but can it
be applied with confidence, given the limitations
in our analytical methods.

Those are questions I don't have an
answer to, but I think in any finding they would
have to be addressed. So with respect to the
motion, I can't support a statement that says there's no evidence to support the findings, but I do feel that the findings need to be re-examined in some respects.

CHAIR RUFFATTO: Thank you, David. I would -- I'm going to state why I seconded the motion.

I do not know the answer to all of the questions that Board Member Simpson asked, but I did go through all of the references that DEQ made in arguing on this point, and all the references that Teck Coal made.

And I could conclude from that -- I assume they pointed to the most clear evidence -- and I could conclude from that that, number one, they never addressed the point of achievable under current technology, because it didn't address the current technology.

I look at the evidence that was pointed to regarding mitigation of harm, and the evidence was not there. It was for the reasons that Ms. Marquis stated.

Now, whether it protects public health and the environment, I can't -- I didn't -- I don't have the technical expertise to answer that
one.

So I'm going to propose a slight amendment to the motion that might be helpful, and we'll consider it a suggestion of a friendly amendment, and that is to add the word "all the findings," in other words, is there evidence to support all the findings. I think it's clear that there's not evidence to support some of the findings, but we're not sure about others.

Is that amendment acceptable as a friendly amendment, Board Member Aguirre?

BOARD MEMBER AGUIRRE: It is acceptable, yes.

CHAIR RUFFATTO: And I second that motion as amended. David, does that help to answer your reluctance?

BOARD MEMBER SIMPSON: Yes.

CHAIR RUFFATTO: Any other discussion? (No response)

CHAIR RUFFATTO: If there's no other discussion, I'll call the question.

BOARD MEMBER LEHNHERR: Chairman Ruffatto. Excuse me. Can you restate the motion, again, please?

CHAIR RUFFATTO: I will.
A motion has been made and seconded that the rulemaking record with respect to the .8 standard does not contain the evidence that would support all the findings required by the stringency statute. Any more discussion?

If there's no more discussion, all in favor -- Well, let's just skip to the roll call.

Chairman.

Aye.

Mr. Smith.

Aye.

Board Member Lehnherr.

Nay.

Mr. Reiten.

Nay.

Mr. Simpson.

Aye.

Ms. Altemus.

Aye.

Ms. Aguirre.
CHAIR RUFFATTO: The motion passes. We have one more question on this list, and there may be others, and that question is: Does the stringency statute require peer reviewed scientific studies to support the findings required by the stringency statute? And I will turn this over, and I will let Ms. Bowers speak to that first, if she is inclined to do so.

MS. BOWERS: Chair Ruffatto, members of the Board. No, the findings do not require peer reviewed scientific studies, but if they are in the record, they must be cited to.

The statute at 75-5-203 sub (3) says, "The written finding must reference pertinent, ascertainable, and peer reviewed scientific studies contained in the record that form the basis for the Department's conclusion."

That doesn't say that a peer reviewed scientific study is a prerequisite to adopting a more stringent standard than Federal. And there is some legislative history that supports that, and that's cited in the record and in our briefing.

But one thing that the Legislature
pointed to was that water quality rules are not always about standards, water quality standards. Sometimes they're procedural rules, and it makes no sense that there would be a peer reviewed scientific study for a procedural rule, like a time frame or something, for example, that DEQ could adopt that might be more stringent than a Federal.

So I think to argue that peer reviewed scientific studies have to be in the record is to say that a rule, a more stringent than Federal rule could never be adopted unless there was a peer reviewed scientific study to support that, and that simply is illogical.

CHAIR RUFFATTO: Thank you, Ms. Bowers. Ms. Marquis, do you want to address that?

MS. MARQUIS: Yes. Thank you, Chair Ruffatto, members of the Board.

I think the statute is clear, and if it is interpreted as DEQ asks you to interpret it, it means nothing. It just says that the Department has to point to these studies. But what good is that if they're not required to have the studies. And the legislative history -- and I highlighted this a little bit earlier in my last
response -- is clear as well. In there you'll see
the note that DEQ pointed to about, you know, the
peer reviewed scientific study should be required.

But Senator Brooke clarified that -- and
this is a quote -- she said, "The proponents made
it very clear that it should be in the bill, and
they demanded that decisions should be made on
peer reviewed scientific studies," end quote. And
then after that statement, the bill passed as it
was proposed with this language in there.

So the legislative history and the words
of the statute itself demonstrate that scientific
peer reviewed -- pertinent, ascertainable, and
peer reviewed scientific studies must be in the
record to support the standard.

And again, I'm going to point out that
this isn't for every water quality standard. This
is a special heightened requirement for those
situations where they want to set the standard
more stringent than Federal.

Some states don't allow that at all, but
Montana went to the extra trouble to say, "Yes,
you can do it if you meet these requirements," and
this is one of them, that it has to be based on
pertinent, ascertainable, and peer reviewed
CHAIR RUFFATTO: Any questions or comments from the Board?

(No response)

CHAIR RUFFATTO: I have a question, and I hope you don't get upset with this question, but I want to ask Ms. Bowers and Ms. Marquis.

Why did neither of you address this point in your decision, proposed decision documents? I'll start with you, Ms. Marquis.

MS. MARQUIS: Perhaps it was an oversight. I thought it was to be clear that this is a requirement of the statute, that there must be peer reviewed scientific studies in the record, and it's clear that there are none. If there were, we could have pointed to them, but there aren't any.

At the end of the day, the Department's derivation document was not peer reviewed, so it's just not there. And that is wrapped up in the finding that there is no evidence in the record to support the written finding.

CHAIR RUFFATTO: Thank you. Ms. Bowers, can you respond to my question? And maybe I know the answer, but I'll let you state it.
MS. BOWERS: Chair Ruffatto, members of the Board.

The issue of scientific peer reviewed studies was briefed, but -- in the Department's proposed decision. So we focused on the fact that the Board previously conducted a stringency review, and determined that the rule was not more stringent than Federal, and so the findings were not required. That's what we focused our proposed decision on.

CHAIR RUFFATTO: I understand. Thank you. Any discussion?

BOARD MEMBER SIMPSON: Yes, Mr. Chairman. It seems to me that by its own language 203 does require reference to peer reviewed scientific studies, so I'm a little unsure as to why there's a question, that is, why it's something that we perhaps need to have a motion on.

CHAIR RUFFATTO: I can answer why I put it on this list, and that's because the parties briefed it, and they had conflicting arguments, and so I put it on this list because it has been argued in the briefs, so I thought it was appropriate for us to consider the question.
And I will add that I tend to agree with you that the statute seems pretty clear on its face.

BOARD MEMBER SIMPSON: Is a motion required, Mr. Chairman?

CHAIR RUFFATTO: Please.

BOARD MEMBER SIMPSON: Well, I would move that, make a motion that the stringency statute does require peer reviewed scientific studies to support the findings required by the stringency -- to support the findings that are required under this section.

CHAIR RUFFATTO: Is there a second?

BOARD MEMBER AGUIRRE: I second.

CHAIR RUFFATTO: Who was that? I missed it.

BOARD MEMBER AGUIRRE: It was Stacy.

CHAIR RUFFATTO: Okay. Thank you, Stacy. I'm looking here. Thank you. Discussion.

(No response)

CHAIR RUFFATTO: Well, I will say this. All of you are tired, as I am, but this I think is an important question, because if we're wondering whether or not the Board's record was valid or not, this is an important question. So that is
why I put it on here. I support the motion. Any more discussion?

(No response)

CHAIR RUFFATTO: There being no more discussion, I'll call the question. A motion has been made that the stringency statute requires peer reviewed studies to support the required findings, and we'll take a roll call vote. Sandy, please proceed.

MS. MOISEY-SCHERER: Chairman.

CHAIR RUFFATTO: Yes.

MS. MOISEY-SCHERER: Mr. Smith.

BOARD MEMBER SMITH: Yes.

MS. MOISEY-SCHERER: Mr. Lehnherr.

BOARD MEMBER LEHNHERR: Yes.

MS. MOISEY-SCHERER: Mr. Reiten.

BOARD MEMBER REITEN: Yes.

MS. MOISEY-SCHERER: Mr. Simpson.

BOARD MEMBER SIMPSON: Yes.

MS. MOISEY-SCHERER: Ms. Altemus.

BOARD MEMBER ALTEMUS: Yes.

MS. MOISEY-SCHERER: Ms. Aguirre.

BOARD MEMBER AGUIRRE: Yes.

CHAIR RUFFATTO: Thank you. The motion passes unanimously.
I believe that I have covered my points on this matter. I will say that we will cause a proposed decision to be prepared for the next meeting to finalize the determinations that we've made here. And so thank you all for your patience, and for working through what has been a very beneficial, but very difficult process.

Let me find my agenda. But before we move on, does anybody have any further comments on the selenium rule matter? If not, we will go to the new contested case, and --

MS. MARQUIS: Mr. Chairman.

CHAIR RUFFATTO: Yes.

MS. MARQUIS: I apologize. I have to just put one additional thing on the record.

Earlier in the Board's discussion today, one of the Board members made a statement about the motives of me and my client in bringing this petition. I'm just compelled to say on the record that judgments and statements about the motives of my client and about me personally are beyond the scope of what's in front of the Board.

And I do take my job very, very seriously as a Montana lawyer. I took an oath as an officer of the legal system, I take my
responsibility very seriously to pursue the truth, and I know that I have a responsibility under that oath to ensure the quality of justice.

So I don't take those statements lightly, and I just wanted to correct that for the record.

My client, Teck, if you want to know about their motives, go on their website and look at everything they've done to protect the environment, including bringing online another treatment facility just today that brings the total capacity to treat water up into the tens of millions of gallons. So I just want to say that on the record. Thank you.

CHAIR RUFFATTO: Thank you, Ms. Marquis. Anything else anybody wants to say on the selenium rule?

(No response)

CHAIR RUFFATTO: If not, we'll move to new contested cases.

(The proceedings were concluded at 4:49 p.m.)
CERTIFICATE

STATE OF MONTANA

: SS.

COUNTY OF LEWIS & CLARK

I, LAURIE CRUTCHER, RPR, Court Reporter, Notary Public in and for the County of Lewis & Clark, State of Montana, do hereby certify:

That the proceedings were taken before me at the time and place herein named; that the proceedings were reported by me in shorthand and transcribed using computer-aided transcription, and that the foregoing - 114 - pages contain a true record of the proceedings to the best of my ability.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 11th day of March, 2022.

________________________
LAURIE CRUTCHER, RPR
Court Reporter - Notary Public

My commission expires

March 9, 2024.

Gun - 5:16

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**I**

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**J**

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Justice - 114:3
Justification - 23:1
1. Is the lake water column standard (.8 µg/L) (the “Standard”) more stringent than the comparable federal guideline?

If yes, then:

2. What is the remedy/consequence of the failure to comply with the Stringency Statute?

Additional questions presented by the Petitions and argued by the interested parties:

3. Should the Board address any of the following questions?

4. Does Teck Coal Limited have standing?

5. Did the initial notice of rulemaking with respect to the Standard fail to comply with the Stringency Statute?

6. Does the rulemaking record with respect to the Standard contain evidence that would support the findings required by the Stringency Statute?

7. Does the Stringency Statute require peer-reviewed scientific studies to support the findings required by the Stringency Statute?
Montana Code Annotated 2021

TITLE 75. ENVIRONMENTAL PROTECTION
CHAPTER 5. WATER QUALITY
Part 2. Administrative Agencies

State Regulations No More Stringent Than Federal Regulations Or Guidelines

75-5-203. State regulations no more stringent than federal regulations or guidelines. (1) Except as provided in subsections (2) through (5) or unless required by state law, the department 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 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 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.

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

(b) A person may also petition the board for a rule review under subsection (4)(a) if the department adopts a rule 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).

History: En. Sec. 1, Ch. 471, L. 1995; amd. Sec. 2, Ch. 378, L. 2015; amd. Sec. 32, Ch. 324, L. 2021.