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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: **ADOPTION OF NEW RULE I PERTAINING TO SELENIUM STANDARDS FOR LAKE KOOCANUSA**	**CAUSE NO. BER 2021-04 WQ** **RESPONSE TO COMMENTS ON THE STRINGENCY REVIEW OF THE SELENIUM RULE**

In accordance with the Notice of Schedule for Implementation of Review by the Board of Environmental Review and in consideration of the Record Supporting the Promulgation of ARM 17.30.632 (the "Record"),[1] Teck offers these responses to the "written comments addressing the issues presented by the Petitioners" submitted on January 13, 2022.

I. INTRODUCTION

Eleven unique comment letters were submitted. The Board of Environmental Review ("Board") specifically directed that "Comments addressing any matter other than the Stringency Review under MCA § 75-5-203 will not be considered by the Board." Notice of Schedule for Implementation of Review by the Board, p. 2. Comments generally alleged that the New

[1] The Record was posted on the Board's website on December 15, 2021 and is cited in this brief by the Bates Numbers in the lower right of each Record page (i.e.: RR_000001).

Selenium Rule's water column standard is not actually a standard, that it does not matter as much as the other parts of the New Selenium Rule, and that the federal guideline of 1.5 micrograms per liter does not apply. Those comments are wrong and inconsistent with the Record, which clearly establishes that the water column standard is intended to govern Lake Koocanusa and to be used for assessment and enforcement purposes.

None of the commenters dispute, and elementary math proves, that the water column standard of 0.8 micrograms per liter is more stringent than the federal guideline of 1.5 micrograms per liter. Even so, some commenters wrongly allege that the federal guideline of 1.5 micrograms per liter is not the operative federal guideline, that other numbers for fish tissue levels should be used, or that a wider range of values should be used. But the EPA was clear when it adopted the federal guideline for lentic waters: it recommended 1.5 micrograms per liter as being protective of the most sensitive fish species (white sturgeon), which does not exist in Lake Koocanusa.

No one argues that the finding required by the Stringency Statute was actually made. The Record is clear that it was not made. It is also clear that the finding, as intended and required by the Legislature, cannot be made based on the Record.

Comments offered regarding Teck's standing to bring its Petition and the Board's authority to review the Petitions have already been implicitly decided by the Board and are therefore beyond the scope of the Stringency Review. Additionally, comments regarding downstream impacts and future rulemaking are speculative, centered on federal law, and are beyond the scope of the Stringency Review. In order to not waive any arguments, Teck responds to the out-of-scope comments at the end of this document.

II. RESPONSES TO COMMENTS ON THE STRINGENCY REVIEW

A. The New Selenium Rule Violates the Stringency Statute.

1. The Water Column Standard is Subject to the Stringency Statute.

Commenters argued that the water column standard in the New Selenium Rule is not subject to analysis under the Stringency Statute. These arguments are inherently flawed. Insisting that the water column standard is not really a standard is contrary to the Record and specifically contrary to the agencies' previous statements and reliance upon the water column standard. If it is true that the water column standard is not really a standard, then DEQ and the Board would not have referred to it as a standard throughout the rulemaking. RR-002520 (Board referring specifically to the water column standard as a "protective standard"); RR001327 (Board referring to "water column standards"). Nor would the Board have "recognize[d] that the lake will probably be considered impaired for selenium if the proposed standard is adopted." RR_002505. Given that the lake is and remains in non-steady state (as defined in the New Selenium Rule),[2] the only applicable standard for measuring impairment is the water column standard. RR_001327.

Similarly, if it is true that the water column standard is not really a standard, then EPA would not be concerned that it "remains in effect for CWA purposes unless and until EPA approve a new state submission consistent with the CWA and EPA's WQS regulation." EPA Comment, p. 2 (Jan. 13, 2022). The agencies cannot have it both ways—they cannot insist that the water column standard is not a standard, but also insist that any revision of it is a "revised

[2] Teck does not agree with the New Selenium Rule's definition of steady state or any conclusions drawn from it.

WQS" that "must be submitted to EPA for review consistent with the CWA and EPA's WQS regulation." EPA Comment, pp. 2-3 (Jan. 13, 2022).

Legally, the argument fails for at least four reasons. First, the Stringency Statute itself does not limit which water quality standards to which it applies. *See* Mont. Code Ann. § 75-5-203(a)-(b) (referring to "standard" without limitation). The Stringency Statute was "intended to apply to any rule that . . . regulates those resources or activities for which the state has been given primary authority to regulate by federal authority." Mont. Code Ann. § 75-5-203, Compiler's Comments, "Applicability." Because Montana has primary authority to regulate water quality within the state, and because the New Selenium Rule's water column standard regulates the water quality in Lake Koocanusa right now,[3] the water column standard is a water quality standard subject to the Stringency Statute.

Second, the New Selenium Rule makes clear that the water column number is a "standard." Publication of the New Selenium Rule described it as containing "two classes of selenium *standards*: fish tissue standards, which limit the amount of selenium allowed to accumulate in different tissues, and *water column standards*, which are derived from bioaccumulation modeling and intended to limit selenium accumulation in fish tissue." RR_001326 (emphasis added). The New Selenium Rule describes the fish tissue and water column elements as "standards." ARM 17.30.632(1) ("For Lake Koocanusa and the Kootenai River mainstem, the *standards* specified in (6) [for fish tissue] and (7) [for water column] supersede the otherwise applicable water quality standards found elsewhere in state law" (emphasis added); ARM 17.30.632(2) ("Numeric selenium *standards* for Lake Koocanusa and

[3] Confirmed by the New Selenium Rule's acknowledgement that the lake is in non-steady state and affirmed by EPA in its comments. RR_001327; EPA Comment, p. 2 (Jan. 13, 2022).

the Kootenai River mainstem from the US-Canada international boundary to the Montana-Idaho border are expressed as *both* fish tissue and water column concentrations" (emphasis added)). Further, the New Selenium Rule specifies that "water column *standards* [set at 0.8 micrograms per liter for Lake Koocanusa] are the numeric *standards* for total dissolved selenium." ARM 17.30.632(7) (emphasis added).

Third, the New Selenium Rule meets the federal definition of a water quality standard. 40 C.F.R. § 131.3 (water quality standards are defined as "provisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses. Water quality standards are to protect the public health or welfare, enhance the quality of water and serve the purposes of the Act."). As the Board explained, when the water body is in steady state, selenium loadings are stable and fish selenium concentrations have leveled off. However, when not in steady state (as that term is defined in the New Selenium Rule, *see supra* footnote 2), there is a delay between increased selenium loading and increased levels of selenium in fish tissue. Therefore, both a fish tissue standard is needed (to measure compliance at steady state) and a water column standard is needed (to measure compliance at non-steady state): "[i]t is necessary to adopt the proposed definition of steady state to determine *which selenium standard* will apply to protect the aquatic life beneficial use." RR_001327. The water column standard is needed to protect the designated use, making it a water quality standard per the federal definition.

Fourth, as EPA notes "[a]ll elements are protective against chronic selenium effects." RR_003032. Even though the egg-ovary standard takes precedent over the other fish tissue and water column standards, "the water column element ensures protection when fish tissue measurements are not available." RR_003037. In this case, the Board designed standards that

specifically apply the water column standard (not the fish tissue standard) to Lake Koocanusa because the lake is in a non-steady state. RR_001327. The 2016 EPA Guideline does not exclude the water column element from consideration as a water quality standard, nor does it exempt any one of the criteria from compliance with statutes governing water quality standards, including the Stringency Statute. *See* EPA 822-F-16-005 p. 2 (Jun. 30, 2016). The water column standard is subject to the Stringency Statute.

2. The New Selenium Rule is More Stringent than the Federal Guideline.

Montana law prohibits the adoption of a rule that is "more stringent than the comparable federal regulations or guidelines that address the same circumstances." Mont. Code Ann. § 75-5-203(1). The Stringency Statute applies "if the rule in question contains any standards or requirements that exceed the standards or requirements imposed by comparable federal law." Teck Comment, at Exhibit A (1995 Mt. HB 521, Statement of Intent) (Jan. 13, 2022). The Legislature intended a broad, common-sense interpretation of the term "comparable" to protect Montanans from unnecessary regulatory burdens. *Id*.

In *Pennaco Energy, Inc. v. Mont. Bd. of Envtl. Review*, 2008 MT 425, ¶ 43, 347 Mont. 415, 429, 199 P.3d 191, 200, the Montana Supreme Court found that Montana's salinity standards could not be more stringent than the federal counterpart only because there was no federal counterpart for salinity. Here, in contrast, a federal counterpart exists: 1.5 micrograms per liter for lentic or non-flowing waters. EPA 822-F-16-005 p. 1 (Jun. 30, 2016). As demonstrated in Teck's comments, EPA's adoption of the 2016 EPA Guideline specifically refers to the numeric values as the federal criteria. Teck Comment, p. 3 (referring to Exhibit G, (81 FR 45285 (July 13, 2016)) (Jan. 13, 2022). The 2016 EPA Guideline, by its express terms,

contains a numeric water column criteria that cannot be ignored and must be used in Board's stringency review of the New Selenium Rule.

a. The Relevant Federal Guideline is the Water Column Guideline, Not the Fish Tissue Guidelines.

Commenters argued that the new selenium rule is not more stringent than the federal guideline, in part because the egg/ovary criterion was derived from the EPA 304(a) recommended criteria, which holds "more weight" than water quality criteria. As DEQ argues, "it is the EPA's egg/ovary criterion element that the Board must look to in its stringency analysis." DEQ Comment, p. 7 (Jan. 13, 2022); *see also* EPA Comment, p. 2 (Jan. 13, 2022) (arguing the water column standard "is not, by itself, a criterion – it is one part of a three-part criterion");[4] ICL Comment, p. 4 (Jan. 13, 2022) (arguing that since the water column standard is derived from an egg/ovary criterion, the Stringency Statute does not apply to the water column standard); Tribe Comment, p. 2 (Jan. 13, 2022) (arguing that the New Selenium Rule "is not more stringent than the federal standard" because it "adopted the federal standard for fish tissue … and then back-calculated the water column number"). The arguments fail legally because, as explained directly above, the New Selenium Rule's water column standard is a water quality standard as evidenced by the very words of the New Selenium Rule.

Factually, the arguments fail because DEQ arrived at the more stringent water column standard by running modeling scenarios with a whole-body tissue threshold of 5.6 mg/kg dw, which is *more stringent* than the federally recommended level of 8.5 mg/kg dw. RR_000127. DEQ also ran one model scenario using the federally recommended level of 8.5 mg/kg dw, but

[4] The term "criteria" comes from the federal Clean Water Act. 40 C.F.R. § 131.3 (defining water quality standards as both the designated use of the water and the water quality criteria for the water based upon that use). The Montana Water Quality Act does not use the term "criteria" to describe water quality standards. Mont. Code Ann. § 75-5-301(2)-(3).

when doing so altered other model inputs (bioavailability and K_d percentile) to be more "conservative" (i.e.: *more stringent*) than the distribution of calculated protective values relied upon in the 2016 EPA Guideline. RR_000127; *see also* RR000125-126 (DEQ acknowledging use of more stringent bioavailability factor and partitioning coefficient (K_d) when using the federally recommended level of 8.5 mg/kg dw). DEQ's reference to site-specific provisions as a reach to justify the New Selenium Rule and use of lower model inputs is misguided. DEQ Comment, p. 8 (Jan. 13, 2022). As noted in Teck's comments, nothing about site-specific provisions allows a free pass through the Stringency Statute. Teck Comment, pp. 9-10 (Jan. 13, 2022).

b. The Relevant Federal Guideline is the Water Column Guideline of 1.5 Microgram per Liter, Not Any Range of Values.

DEQ asserts that the New Selenium Rule is not more stringent than the federal guideline because it presents a water column standard within the (very wide) range of values considered by EPA and because EPA left room for under- or over-protection, allowing DEQ to adjust the water column standard as it desired. These arguments also fail based on the Record and the law.

As noted in Teck's Petition and in its Comment on the Stringency Review, the adopted federal guideline, as published in the Federal Register, is the specific numeric criteria of 1.5 micrograms per liter selenium in lentic waters. Teck Comment, Ex. G (Jan. 13, 2022). EPA did not adopt a range of values as the federal water column criteria, it adopted the specific number of 1.5 micrograms per liter. DEQ's proffered range of values is contrary to the published federal guideline.

DEQ's argument that the federal guideline, based on the 80th percentile, will be under-protective in some situations is contrary to EPA statements that "[t]hese water criterion elements should not be interpreted to be potentially under-protective in 20 percent of sites." RR_003177.

Further, the 2016 EPA Guideline is designed to be protective of the most sensitive species of fish, specifically white sturgeon, which do not exist in Lake Koocanusa. Any argument that the federal water column criteria leaves Lake Koocanusa under-protected fails for lack of Record support.

c. Elementary Math and EPA's Approval of the New Selenium Rule Confirms that It is More Stringent than the Federal Guideline.

As DEQ acknowledges, the New Selenium Rule's water column standard adopted in ARM 17.30.632(7)(a) of 0.8 micrograms per liter "is mathematically less than the federal 304(a) water column criterion of 1.5 µg/L for lentic or non-flowing waters." DEQ Comment, p. 9 (Jan. 13, 2022). Accordingly, the New Selenium Rule's water column standard is more stringent than corresponding federal standards or guidelines.

DEQ now argues that EPA did not make a determination on stringency because EPA was not evaluating Montana law. DEQ Comment, pp. 10-11 (Jan. 13, 2022). That argument only works if one assumes that the term "stringent" has some special meaning dictated by state law. That is not the case. The term "stringent" is a commonly understood to mean strict. The concept of "more stringent than federal" is not new in the realm EPA's environmental regulation. *See* Teck Comment, p. 4, fn. 3 (Jan. 13, 2022) (listing twenty-six states with no-more-stringent-than-federal provisions embedded in their environmental laws and rules. EPA has a robust litigation history specifically dealing with its approval of standards that are more stringent than the federal provision. *See* Teck Comment, pp. 11-12 (Jan. 13, 2022) (citing EPA letter provided at Exhibit H). EPA's stated determination that the New Selenium Rule "is more stringent than the recommended water column criterion element" of 1.5 micrograms per liter is accurate and persuasive.

EPA itself does not say that the New Selenium Rule's water column standard is not a water quality standard subject to the Stringency Statute. At most, EPA asserts that "what is important is whether 0.8 µg/L will result in fish tissue concentrations at least as protective as EPA's recommended fish tissue concentrations." EPA Comment, p. 2 (Jan. 13, 2022). Ironically, the current data shows that Lake Koocanusa has exceeded that 0.8 micrograms per liter level for several years, yet no valid fish tissue data reveals any exceedance of the EPA fish tissue criteria. RR_000106, RR_002481 (fig. 2-9 showing selenium levels); *supra*, § D.1.; Teck Comment, pp. 18-21 (Jan. 13, 2022). The absence of any fish tissue exceedances at the current level near 1.0 micrograms per liter affirms that the more stringent level of 0.8 micrograms per liter is *not* necessary to provide for protective fish tissue levels.

B. The Required Written Finding Was Not Made.

No one disputes that the required written finding was not made. Therefore, the New Selenium Rule cannot survive scrutiny under the Stringency Statute. Because ARM 17.30.632(7)(a) is stricter than its federal counterpart and was not accompanied by written findings as required under Mont. Code Ann. § 75-5-203(2), the New Selenium Rule should be invalidated.

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

DEQ postures that the written finding required by the Stringency Statute could be made, but the Record indicates otherwise. Further, no written finding has been made and now DEQ argues it should not have to support the rule with a peer-reviewed scientific study, which is a clear directive of the Stringency Statute. The absence of evidence in the Record, the absence of a written finding, and DEQ's unwillingness to comply with the Stringency Statute, all tell the public that the New Selenium Rule is barren of any legitimate support.

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

DEQ asserts, without citation to data, that "both cyprinid and non-cyprinid fish exceed the egg/ovary standard." DEQ Comment, p. 14 (Jan. 13, 2022) (citing Board Response to Comment 146 at R002145). In response to that comment, the Board confirms that "of the four whole body samples collected on the Montana portion of the reservoir, all were below 8.5 mg/kg dw [the federal whole body tissue criteria]." RR_002145. The data presented to the public appear on pages 25 and 26 of DEQ's technical support document. RR_000111-112. Figure 2-15 provided on page RR-000112-113 shows that all muscle tissue samples are within the federal criteria of 11.3 mg/kg dw. Figure 2-14 provided on page RR_000112 shows two redside shiner samples above the federal egg/ovary criteria (which was not in effect at the time), one redside shiner sample at the federal egg/ovary criteria, and one peamouth chub sample above the federal egg/ovary criteria. RR_000112. Per the New Selenium Rule's requirements, neither the data for the redside shiner nor the data for the peamouth chub meets the minimum requirements to represent anything about selenium levels. *See* ARM 17.30.632(6) (requiring "an average of individual fish samples or a composite sample, each option requiring a minimum number of five individuals from the same species" before the data may be presented as "a single value" representing fish tissue measurements).

As noted in Teck's Comment, the Board admitted problems with egg/ovary data collection. Teck Comment, p. 20 (Jan. 13, 2022) (*citing* Bd. Resp. to Cmt. No. 141; 143 at RR_002523). USGS confirms that "egg-ovary tissue samples collected outside of the pre-spawn window are not suitable for assessment in comparison to the national egg-ovary fish tissue criterion element." RR_0030001. *See* RR_003001-02, (USGS, Table 2) for further concerns with egg-ovary collection and use of data.

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

DEQ argues that natural sources of selenium are irrelevant to the Board's Stringency Review, yet fails to point to any Record evidence indicating that the New Selenium Rule "is achievable under current technology" given the existing background and natural levels of selenium in Lake Koocanusa. DEQ Comment, p. 13-14 (Jan. 13, 2022); Mont. Code Ann. § 75-5-203(2)(b). Further, DEQ alleges that Libby Dam operations were considered, but review of the offered Record citations reveals no mention of Libby Dam operations, specifically the fluctuation of lake levels and other concerns raised by Sen. Cuffe. *See* Teck Comment, p. 23 (Jan. 13, 2022).

3. The Record Contains No Information Regarding Costs to the Regulated Community.

DEQ implies that it "can make" the finding, but as noted by review of DEQ's citations, the Record does not contain any analysis of costs. At most, DEQ asserts that existing dischargers will not incur additional costs. But the "regulated community" is broader than the existing permitted dischargers and includes consideration of costs to new developments. As the Legislature specifically noted, "Montana must simultaneously move toward reducing redundant and unnecessary regulation that dulls the state's competitive advantage while being ever vigilant in the protection of the public's health, safety, and welfare." Teck Comment, Exhibit A, p. 1 (Jan. 13, 2022). Therefore, the "regulated community" must be broadly considered. Review of the cost to treat wastewater for selenium must be considered generally, for both existing and new development.

Additionally, DEQ cites to BMPs without consideration of which BMPs may prevent selenium discharges, whether they require special installation or maintenance, and what costs are

associated with those BMPs. DEQ Comment, p. 15-16 (Jan. 13, 2022). Because selenium is a naturally occurring element and because it is carried throughout the watershed naturally after soil disturbances, more analysis is required to inform the public of the potential treatment costs associated with the New Selenium Rule.

III. RESPONSES TO COMMENTS BEYOND THE SCOPE OF THE REVIEW

Some comments question whether Teck is a "person affected by the rule," allege environmental impacts, interpret federal law, and speculate about future rulemaking. All of those topics are beyond the scope of the stringency review and therefore should "not be considered by the Board." Notice of Schedule for Implementation of Review by the Board, p. 2.

A. Teck Is A Person Affected by the New Selenium Rule.

The Montana Department of Environmental Quality argues that Teck lacks standing because (1) it is not a "person affected by" the standard who may petition the Board under Mont. Code Ann. § 75-5-203(4)(a), and (2) the Montana Department of Environmental Quality has no jurisdiction to regulate Teck's mining operations in Canada. The Idaho Conservation league argues that Teck does not have standing to challenge a United States law under the Clean Water Act because they are a Canadian company that operates solely in Canada.[5]

At the Board's last meeting on October 29, 2021, where public comment, discussion, and review of the Petitions occurred, the Board voted and discussed whether to dismiss the Petitions immediately. During this discussion, Board Member Simpson posited whether Teck was a "person" affected under Mont. Code Ann. § 75-5-203(4) such that they could file a petition

[5] Teck seeks review under Montana state law. ICL's comment that Teck's concerns are "not relevant to this stage of the [Clean Water Act] process" are wrong because they ignore relevant Montana state law. *See* ICL Comment, p. 7, (Jan. 13, 2022).

alleging that the New Selenium Rule was stricter than the federal standard but nonetheless went on to conclude that "the earlier decision by the Board is defective in that it did not comply with 75-5-203." Board Transcript, pp. 13-15 (Oct. 29, 2021). No motion was made, and no further discussion taken, as to whether Teck's petition properly filed under Mont. Code Ann. § 75-5-203(4). The next motion was related to whether the Petitions should be dismissed without further discussion, which failed. Board Transcript, p. 21 (Oct. 29, 2021). The next motion, which was whether the Board should consider the Petitions, passed. *Id*. Accordingly, in determining that the Petitions could be considered, the Board effectively ruled that Teck was a "person" affected under Mont. Code Ann. § 75-5-203(4) and that their petition was properly filed. The Board should not now revisit that issue. However, should the Board desire to consider DEQ's and ICL's standing allegations, Teck easily meets the requirements.

DEQ is correct in asserting that, unlike judicial standing determinations made by courts, administrative standing determinations made by quasi-judicial agencies (such as the Board) depend "on the language of the statute and regulations which confer standing before that agency." *Williamson v. Mont. PSC*, 2012 MT 32, ¶ 30, 364 Mont. 128, 272 P.3d 71. Administrative standing "may permissibly be less demanding than the criteria for judicial standing." *Id.* In this case, the statute that confers standing requires that the person be "affected by" the rule believed to be more stringent than the comparable federal regulation or guideline. Mont. Code Ann. § 75-5-203(4)(a). In *Williamson*, the statute governing administrative standing required a showing that the claimant was "directly affected." *Williamson*, ¶ 32. Unlike *Williamson*, here, the statute does not condition the amount or type of "affect" required. It simply requires that the person be "affected by" the New Selenium Rule, providing a relatively low bar for standing.

Neither DEQ nor ICL dispute any of Teck's factual assertions that demonstrate administrative standing. Teck Petition, ¶¶ 21-23 (Jun. 30, 2021). Neither dispute that DEQ solicited involvement from the International Joint Commission ("IJC") related to alleged selenium exceedances in Lake Koocanusa or that DEQ portrayed the exceedances as caused by Teck's mining operations. Neither dispute that the purpose of the rule, as explained by DEQ, is to "pressure" British Columbia such that the New Selenium Rule may be enforced against Teck. Neither dispute that the Board itself acknowledged that Teck is affected by the New Selenium Rule. *Id*. Those three, undisputed pieces of evidence are enough to satisfy the low bar for administrative standing required in this case. Further evidence is found in DEQ's Technical Support Document, which presents data from Teck and dedicates several pages to discussion of Teck's operations and its regulation by British Columbia and in the Board's Response to Comment No. 77 stating "[t]he proposed standard allows MT to protect its waters by setting a protective limit that can be enforced via international treaty or via legal means with the US." RR_000087-88; RR_000091-92; RR_000094-99; RR_002504.

B. The Board Has Authority to Review the Petitions and Grant Relief.

DEQ erroneously states that the "Board cannot grant the relief requested in the Petitions," arguing that "DEQ, rather than the Board, must either revise the rule to conform to federal regulations or guidelines or make the written findings" required by the Stringency Statute. DEQ Comment, pp. 5-6 (Jan. 13, 2022). DEQ's argument is beyond the scope of the Board's Stringency Review and was previously decided in October when the Board committed to reviewing the Petitions. However, should the Board reconsider its authority, the following response is offered.

No one here disputes DEQ's newly granted rulemaking authority. But here, as explained in Teck's Comments and Response to Comments on the Petition Process, the Board retains authority as a quasi-judicial agency to "interpret[], apply[], and enforce[e] existing rules and laws." Mont. Code Ann. § 2-15-102(10); Teck's Comments on the Petition Process, p. 4 (Sept. 24, 2021); Teck's Responses to Comments on the Petition Process, pp. 14-15 (Sept. 29, 2021) . Given that the New Selenium Rule was promulgated pursuant to the Board's rulemaking authority, it is the Board's record that must be scrutinized to determine whether the required finding may be made. The Board therefore has authority and is well-situated to review the New Selenium Rule for compliance with the Stringency Statute and to grant the relief requested in the Petitions, including making findings about the record.

C. Data and Arguments Presented Based on Other Waterbodies is Beyond the Scope of the Stringency Review.

Some commenters opine about alleged existing harm or indications of harm beyond Lake Koocanusa, yet none point to conclusive data and all are beyond the scope of the Board's Stringency Review.

1. Wildsight's Comments are Beyond the Scope of the Stringency Review.

Wildsight prefaces its comments by admitting that it "do[es] not want to comment on the specific rulemaking process in the state of Montana or its relationship to federal regulations" thereby branding its comments as beyond the scope of the Board's Stringency Review. Wildsight Comment, p. 1 (Jan. 13, 2022). Wildsight explains its only purpose is "to comment on the necessity for such rules to exist and provide an example of what may occur" without the New Selenium Rule. *Id*. The issue before the Board is not whether the New Selenium Rule is necessary, instead the issue is whether the New Selenium Rule complied with the Stringency Statute. The Stringency Statute makes no presuppositions about necessity but requires that

standards more stringent than their federal counterparts be adequately explained and supported when first presented to the public. Wildsight's comments do no refer to the Record, and instead present opinions and information wholly outside the Record. The New Selenium Rule must stand on the existing Record; otherwise, the public participation process becomes a nullity. For that reason alone, Wildsight's entire comment letter should be rejected.

Further, the fact that Wildsight saw a need to present impermissible extra-Record evidence proves the essential point of this litigation—the written findings required to support a rule more stringent than federal are not found anywhere within the Record. Therefore, the Board should find the Record void of any evidence to support the required finding.

2. Comments Regarding Downstream Waters are Beyond the Scope of the Board's Stringency Review.

The Idaho Conservation League,[6] Earthjustice, the Environmental Protection Agency Region 8, and Montana Trout Unlimited present arguments based on application of federal law. The arguments are irrelevant to the decision pending before the Board, which is wholly based on state law. The arguments presuppose that a standard set in compliance with the Stringency Statute will not comply with federal law and vice versa—that compliance with the federal law dictates that the Stringency Statute cannot be met and must yield to federal law. But nothing in federal law allows the Board to violate state law while setting water quality standards. In fact, EPA's review must also consider "[w]hether the State has followed applicable legal procedures for revising and adopting standards." 40 C.F.R. § 131.5(a)(6). And nothing in state law,

[6] The Idaho Conservation League appears to use data collected over thirty-five years and wholly within the *Elk River* Watershed, misrepresenting it as data from the *Kootenai River* Watershed. *Compare* ICL Comment, p. 2, fig. 1 (Jan. 13, 2022) *with* RR_000097 (Fig. 1-6). The distinction is important and the impact dramatic because selenium levels in Lake Koocanusa upstream from Idaho do *not* mirror selenium levels in the Elk River watershed. *Compare* RR_000097 (fig. 1-6) with RR_000106, RR_002481(fig. 2-9).

including the Stringency Statute, prohibits compliance with the federal laws. The Stringency Statute is not per se incompatible with federal law. Arguments that presuppose such incompatibility are wrong and should not be considered.

The commenters argue that the New Selenium Rule's 0.8 micrograms per liter standard is the minimally stringent necessary to meet downstream Idaho standards and that a standard above 0.8 micrograms per liter would run afoul of the Clean Water Act requirement to consider "water quality standards of downstream waters." 40 C.F.R. 131.10(b). These same arguments were raised during the previous comment period. Teck incorporates herein its arguments on pages 4-5 of Teck's Response to Comments on the Petition Process dated September 29, 2021. The downstream comments are irrational and unsupported.

The standards for selenium in the Kootenai River are the same on both sides of the Idaho-Montana border, both are set at 3.1 micrograms per liter. Further upstream, a more stringent standard applies in Lake Koocanusa—whether set at 0.8 or at the federal guideline of 1.5 micrograms per liter, both are more stringent than the downstream river standard of 3.1 micrograms per liter. It is irrational to allege that Montana has somehow violated requirements with respect to downstream water quality.

ICL asserts that the New Selenium Rule "is required to ensure that the egg-ovary criteria of 15.1 mg/kg dw [for endangered white sturgeon] are met" downstream in Idaho. ICL Comment, p. 7 (Jan. 13, 2022). The Tribes also voice concern for the white sturgeon as "the most toxicologically sensitive fish." Tribes Ltr. to Selenium Technical Sub-Committee, p. 2 (Aug. 28, 2020). But the 2016 EPA Guideline states that fish tissue and water quality standards were specifically designed to be protective of the most sensitive fish species. RR_003177 (explaining conservative calculations, including consideration of "the most bioaccumulative fish

species" to reduce "the likelihood that the fish tissue criterion element would be exceeded if the water criterion element was being met"). EPA specifically considered the protection of threatened and endangered species, including white sturgeon and developed the guideline using "toxicity data for *Acipenser transmontanus* (white sturgeon), which is listed as endangered in specific locations, such as the Kootenai River white sturgeon in Idaho and Montana." RR_003178. Therefore, commenters are wrong to argue that the New Selenium Rule is required because the 2016 EPA Guideline would not be protective of white sturgeon. The 2016 EPA Guideline was specifically designed to be protective of white sturgeon, thus comments regarding downstream impacts have no bearing on the Board's Stringency Review.

D. Comments Regarding Future Rulemaking are Beyond the Scope of the Board's Stringency Review.

The comments also imply that if the New Selenium Rule were revised, it may not be approvable or may not be approved by EPA as required by the federal Clean Water Act. 33 U.S.C. § 1313(c). EPA review is not unlimited and does not support their automatic re-writing of state proposals. *Envtl. Def. Fund, Inc. v. Costle* , 211 U.S. App. D.C. 313, 657 F.2d 275, 294 (1981) ("it is logical that EPA should refrain from acting until the states have completed an initial effort to update the standards as they deem appropriate" and noting the "Congressional policy of placing 'primary' responsibility with the states 'to prevent, reduce, and eliminate' water pollution"). Relevant here, EPA's review considers "[w]hether the State has adopted criteria that protect the designated water uses based on sound scientific rationale." 40 C.F.R. § 131.5(1)(2). As noted above, nothing in the Record indicates that the designated water uses of Lake Koocanusa were not protected under the previous water quality standard or will not be protected under the federal guideline.

More importantly, argument about EPA's authority to review a state's water quality standards is a red herring. Here, the Petitions seek compliance with Mont. Code Ann. § 75-5-203 and argue that the Board abused the process outlined in that statute. The Petitions are, by statute, limited to review of the rule for compliance with the law. Mont. Code Ann. § 75-5-203(4)(a). The Petitions have not proposed a new water quality standard for Lake Koocanusa, much less for the Kootenai River. Any argument that a future proposed standard will not be approved under federal law is not properly before the Board and is speculative at best, and misleading at worst.

Finally, nothing in federal law allows the Board to violate state law while setting water quality standards. Nothing in state law prevents compliance with the federal laws. Should the situation require a water quality standard to be set more stringent than the federal guideline, Mont. Code Ann. § 75-5-203 provides a mechanism for doing so. Here, the standard was set more stringent than the federal guideline without complying with Mont. Code Ann. § 75-5-203.

IV. CONCLUSION

It remains undisputed that the written finding required by the Stringency Statute was not made. The logical and correct interpretation of the plain language in the Stringency Statute, as well as review of the EPA's adopted guideline, makes clear that the New Selenium Rule's water column standard of 0.8 micrograms per liter is more stringent than the federal guideline of 1.5 micrograms per liter. Because the written finding was not made or presented to the public in the initial publication, the New Selenium Rule should be declared void. The evidence required to support a written finding is not found in the Record and the Board, who was responsible for the rulemaking, should declare the Record void of sufficient evidence to make the required finding. The relief requested by Teck and the Lincoln County Commissioners in the Petitions should be granted.

DATED this 21st day of January 2022.

/s/ Victoria A. Marquis

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CERTIFICATE OF MAILING

I hereby certify that on this 21st day of January, 2022, I caused to be served a true and correct copy of the foregoing document and any attachments to all parties or their counsel of record as set forth below:

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ATTORNEY FOR DEQ

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

IN THE MATTER OF: THE PETITIONS OF TECK COAL LIMITED and the BOARD OF COUNTY COMMISSIONERS OF LINCOLN COUNTY, MONTANA for REVIEW OF ARM 17.30.632(7)(a) PURSUANT TO §75-5-203, MCA – STRINGENCY REVIEW OF SELENIUM STANDARDS FOR LAKE KOOCANUSA	**Case Nos. BER 2021-04 WQ and BER 2021-08 WQ**

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY'S WRITTEN RESPONSES TO COMMENTS ON THE PETITIONS OF TECK COAL LIMITED AND THE BOARD OF COUNTY COMMISSIONERS OF LINCOLN COUNTY, MONTANA FOR REVIEW OF ARM 17.30.632(7)(a) UNDER § 75-5-203, MONTANA CODE ANNOTATED

I. INTRODUCTION

When it initiated rulemaking and adopted ARM 17.30.632(7)(a), the Board of Environmental Review ("the Board") carefully considered the requirement at §

75-5-203, MCA that without the written findings in §75-5-203(2) and (3), MCA, the Board may not adopt rules more stringent than "comparable federal regulations or guidelines that address the same circumstances." *See* 75-5-203(1), MCA; BER Rulemaking Record (hereinafter "RR") at 002294 (BER December 11, 2020 Hearing Transcript adopting selenium standards for Lake Koocanusa and the Kootenai River and adopting DEQ's stringency analysis under § 75-5-203, MCA). The Board considered a comprehensive rulemaking record and concluded that the selenium standards for Lake Koocanusa and the Kootenai River, now codified at ARM 17.30.632, are consistent with EPA's current recommended selenium guidelines for freshwater bodies because they correspond to federal guidelines or were developed using federally recommended site-specific procedures. Because the Board determined the adopted selenium standards for Lake Koocanusa and the Kootenai River are not more stringent than comparable federal guidelines addressing site-specific selenium criteria the Board was not required to make the written findings in §75-5-203(2) and (3), MCA.

Teck Coal Limited (Teck) and the Board of County Commissioners of Lincoln County, Montana (Lincoln County) each filed nearly identical petitions for Stringency Review of ARM 17.30.632 asking the Board to reverse its December 11, 2020 determination that the selenium water column standard for Lake Koocanusa at ARM 17.30.632(7)(a) is not more stringent than comparable federal

guidelines. The Teck and Lincoln County petitions were consolidated by the Board at its October 29, 2021 meeting and will be referred to collectively herein as "the Petitions." *See* BER October 29, 2021 Hearing Transcript at 11:18-25.

In Section II.6 of the Notice of Schedule for Implementation of Review by the Board, the Board indicated it will not consider comments addressing any matter other than Stringency Review. Therefore, pursuant to II.4 of the Notice of Schedule for Implementation of Review by the Board, DEQ provides the following written responses to comments addressing Stringency Review.

II. DEQ's RESPONSES TO TECK's COMMENTS ADDRESSING THE BOARD'S STRINGENCY REVIEW OF ARM 17.30.632.

1. Teck argues the BER was required to make the written findings in § 75-5-203(2) and (3) because the water column standard of 0.8 micrograms per liter (µg/L) is more stringent than the federal criterion of 1.5 µg/L. *See* Teck Comments pages 1, 3, and 16.

DEQ Response: Teck ignores the fact that the Lake Koocanusa water column value of 0.8 µg/L is a translation of the federal fish tissue criteria and EPA's national selenium criteria are not water-based criteria. The federal selenium criteria are based on fish tissue criteria with the egg/ovary criterion the foundation of all the federal selenium criteria. To be more stringent than the federal criteria, the site-specific water column standard for Lake Koocanusa would have to be based on an egg/ovary criterion that is less than 15.1 mg/kg dw.

The Lake Koocanusa selenium standard codified at ARM 17.30.632(7)(a) was developed in accordance with EPA's *Aquatic Life Ambient Water Quality Criterion for Selenium – Freshwater* (2016) (herein "EPA's 2016 304(a) Guidance"), which provides a water column range from 0.27 - 52.02 µg/L that is protective for lentic waterbodies depending on site-specific environmental factors. *See* RR000402-407. EPA selected a percentile of this range resulting in the current 304(a) criteria of 1.5 µg/L for lentic waterbodies and 3.1 µg/L for lotic waterbodies. Teck represents that the 1.5 µg/L criterion is a federal standard that should be applied to all lentic waters when EPA recognizes 1.5 µg/L may leave some sites in the United States overprotected and some sites under protected. *See* RR002354. Acknowledging this, EPA developed Appendix K to provide site-specific translation guidance. The water column criterion is intended to protect fish from exceeding the 15.1 mg/kg dw egg/ovary criterion. In Lake Koocanusa, the fish egg/ovary values have been recorded above the 15.1 mg/kg dw tissue standard at water column levels below 1.5 µg/L, suggesting Lake Koocanusa would be under protected by a water column standard of 1.5 µg/L. DEQ followed the guidance in Appendix K to develop the 0.8 µg/L standard for the Lake Koocanusa water column in ARM 17.30.632(7)(a). *See* RR003764.

Notwithstanding 0.8 µg/L is mathematically less than 1.5 µg/L, the Lake Koocanusa water column criterion of 0.8 µg/L falls within the range of EPA's

guidance based on translations for lentic waters from the egg/ovary criteria. To be more stringent than federal, Montana's water column value would be less than 0.27 µg/L.

2. Teck argues, the Board ignored the legislative intent of § 75-5-203, MCA when it failed to inform the public of its stringency determination in the original publication of the proposed rules. *See* Teck Comments page 3; Teck Exhibit B at page 147. Teck argues the legislature intended that the board or department include as part of the "initial publication and all subsequent publications of a rule a statement as to whether the rule in question contains any standard or requirements that exceed the standards or requirements imposed by federal law." *Id*.

DEQ Response: In the initial publication of the proposed rule, the Board explained in its Reason Statement supporting New Rule I (now codified as ARM 17.30.632) that: "The proposed Lake Koocanusa water column standard (30-day chronic) is no more stringent than the recommended EPA 304(a) criteria because it was developed using federally recommended site-specific procedures . . . " *See* RR001328-1330. The Board further supported its determination that ARM 17.30.632 is no more stringent than federal as follows: "The proposed fish tissue and water column standards for Lake Koocanusa are based on EPA 304(a) fish tissue criteria, and site-specific water column criteria derived following procedures

set forth by EPA in the 304(a) guidance." Contrary to Teck's assertions, the Board provided a statement that the rule is not more stringent than federal in the initial publication of the proposed rule, the public was adequately advised of the Board's conclusions regarding stringency under § 75-5-203, MCA, the public had the opportunity to comment on the Board's stringency position, and in fact the public did provide comments on the Board's stringency analysis. *See* RR 002104 – 2167 (Comment 7, 13, and 200 as examples)

3. Teck argues the EPA's 2016 304(a) Guidance does not recommend site specific standards "whenever possible" and even if it did this does not exempt ARM 17.30.632(7)(a) from compliance with § 75-5-203, MCA. *See* Teck Comments at 12.

DEQ Response: The "whenever possible" language is not part of ARM 17.30.632 but was taken from the Board's Reason statement in support of the rule to explain that EPA's 2016 304(a) Guidance recommends site-specific selenium standards when necessary to address local factors that affect toxicity such as bioaccumulation. In its derivation document, DEQ explained that the proposed standards are designed to protect fish as the most sensitive ecological endpoint, including downstream federally listed threatened species, from the effects of elevated levels of selenium. The standards in ARM 17.30.632 reflect the latest science on the toxicological effects of selenium and were developed in accordance

with the EPA's 2016 304(a) Guidance. DEQ explained that it developed site-specific selenium criteria for Lake Koocanusa following EPA's 2016 304(a) Guidance and Appendix K, which provides guidance and methodologies for states and tribes to follow when deriving site specific criteria. *See* RR000090, 2486, 2544, 4018.

The proposed water column standard for the mainstem Kootenai River (3.1 µg/L) corresponds to the current (2016) EPA 304(a) criterion for lotic (flowing) waters. The proposed water column standard for Lake Koocanusa (0.8 µg/L) is based on EPA 304(a) fish tissue criteria and site-specific bioaccumulation modeling, following site-specific procedures set forth by EPA in its 2016 304(a) Guidance. ARM 17.30.632 also includes three fish-tissue standards (egg/ovary, muscle, and whole body, expressed as mg/kg dry weight) which correspond exactly to EPA's currently recommended 304(a) fish tissue criteria.

The Board did not exempt the standards from stringency review under § 75-5-203, MCA, but conducted a stringency review and concluded the proposed Kootenai River and Lake Koocanusa water column and fish tissue standards are no more stringent than currently recommended EPA 304(a) criteria because they correspond to federal standards or were developed using federally recommended site-specific procedures. *See* RR 000001-2; 002422-2427.

4. Teck argues the Board unlawfully exempted ARM 17.30.632(7)(a) from the requirements of § 75-5-203, MCA because it is a site-specific standard or because the standard contains multiple elements. *See* Teck Comments at 9.

DEQ Response: DEQ agrees § 75-5-203, MCA provides that the Board may not adopt a rule that is more stringent than comparable federal regulations or guidelines that address the same circumstance without making the written findings in § 75-5-203(2) through (5), MCA. The Board did not exempt ARM 17.30.632(7)(a) from stringency review under § 75-5-203, MCA. The Board conducted a stringency review and concluded the Lake Koocanusa water column standard is not more stringent than comparable federal standards.

Teck's differentiation between site specific standards adopted under 75-5-310, MCA and standards adopted under 75-5-301, MCA is irrelevant to the Board's Stringency review. *See* Teck's Comments at 15. A standard adopted pursuant to the process in 75-5-310, MCA becomes "the standards of water quality required under 75-5-301(2) and (3)." *See* § 75-5-310(1), MCA. DEQ agrees standards adopted under § 75-5-310, MCA are subject to stringency review.

The BER and DEQ have never asserted that ARM 17.30.632 is exempt from the stringency requirements at § 75-5-203, MCA. The BER properly found ARM 17.30.632 to be no more stringent than federal.

Teck's claim that the rulemaking is invalid for failure to follow the process in 75-5-310, MCA is irrelevant and immaterial. *See* Teck Comments at 15. The distinction between site specific standards adopted under 75-5-310, MCA and standards adopted under 75-5-301, MCA is inconsequential for purposes of stringency review under § 75-5-203, MCA. The question for the BER is whether it should reverse its previous determination that the rule is not more stringent than federal. The Board should not reach for other justifications to determine the rulemaking was defective.

5. Teck argues that the Board should rely on language in EPA's letter approving ARM 17.30.632(7)(a) as evidence the standard is more stringent than federal. *See* Teck's Comments at 10 -12.

DEQ Response: EPA does not review water quality standards for stringency. EPA reviews state standards to ensure federal requirements are met and the rule is supported by sound science. EPA determined Montana followed EPA's guidance for deriving a site-specific water column criterion for Lake Koocanusa. *See* February 25, 2021 letter from EPA Clean Water Branch Manager Judy Bloom to Board Chair Steven Ruffato submitted herein with Teck's Comments as Exhibit H.

EPA further explained that its recommended selenium criterion (RR 000299, RR004237) is a single criterion with multiple elements: The egg-ovary criterion element was derived directly from toxicity data. EPA also included the whole-

body, muscle tissue, and water column criterion elements, so that states and authorized tribes could more readily implement the criteria. The whole-body and muscle tissue elements were derived from a combination of direct toxicity measurements and conversions of the egg-ovary criterion element. The water column criterion element was derived from conversions of the egg-ovary element.

EPA also included guidance that states can use to derive a site-specific water column criterion element from one of the fish tissue criterion elements. The Board adopted two fish tissue criterion elements (egg-ovary and whole body) and a water column criterion for the Kootenai River mainstem and for Lake Koocanusa. The Petitions only challenge the water column criterion for Lake Koocanusa. The fish tissue and the Kootenai River elements are the same as the federal recommended criteria. The Lake Koocanusa water column criteria was derived from the federal egg ovary criteria following EPA guidance.

EPA's review of ARM 17.30.632 found the Lake Koocanusa water column criterion of .8 µg/L is necessary to attain and protect the federal recommended fish tissue criteria. The Board determined the water column criteria of .8 µg/L was necessary based on site specific data to achieve the federal recommended fish tissue criteria consistent with federal requirements and following federal guidance.

EPA does not conduct a stringency review under § 75-5-203, MCA. That is solely the province of the Board. EPA reviews the rule under 40 CFR

§§131.11(a)(1) and 131.12 to determine the rule protects designated uses and that it is based on sound scientific rationale. Reliance on EPA's February 25, 2021 approval letter as a stringency determination under § 75-5-203, MCA would be clear legal error.

6. Teck argues to adopt a more stringent than federal standard the Board must show the federal regulation is inadequate to protect public health and the environment. *See* Teck Comments at 13.

DEQ Response: The preamble to 1995 Montana House Bill 521, provides:

> If the rules are more stringent than comparable federal law, the written finding must include but is not limited to a discussion of the policy reasons and an analysis that supports the board's or department's decision that the proposed state standards or requirements protect public health or the environment of the state and that the state standards or requirements to be imposed can mitigate harm to the public health or the environment and are achievable under current technology. The department is not required to show that the federal regulation is inadequate to protect public health. The written finding must also include information from the hearing record regarding the costs to the regulated community directly attributable to the proposed state standard or requirement. 1995 Mt. Ch. 471. *See* Teck's Exhibit A at page 2.

The Board did not adopt a standard more stringent than federal, but even if it did it is not required to show that the federal standard is inadequate.

7. Teck argues ARM 17.30.632(7)(a) is not justified as a site-specific standard. *See* Teck Comments at 14.

DEQ Response: The site-specific selenium water column standard for Lake Koocanusa is justified and supported by the rulemaking record. The department

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

The selenium standards for Lake Koocanusa are necessary to protect downstream beneficial uses including the ESA listed white sturgeon. *See* RR004067. Federal regulation 40 CFR § 131.10(b) requires the state to consider and ensure the attainment and maintenance of downstream (including intra and interstate) water quality standards. The standards for Lake Koocanusa and the Kootenai River are considered protective of downstream uses including the protection of downstream species listed under the Endangered Species Act. *See* Response to Comment 3 RR002105

8. Teck argues the Board failed to provide the written findings required by § 75-5-203(2) and (3), MCA.

DEQ Response: Written findings under § 75-5-203, MCA, are triggered when the State adopts regulations that are more stringent than corresponding federal standards or guidelines. *See Pennaco Energy, Inc v. Mont. Bd. Of Envtl. Review*, 2008 MT 425, ¶¶43-47. On December 11, 2020, the Board adopted the selenium water column standard for Lake Koocanusa at ARM 17.30.632(7)(a) and

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

9. Teck argues the Board's rulemaking record does not support a finding under § 75-5-203(2)(a) and (b), MCA that that ARM 17.30.632(7)(a) protects public health or the environment and can mitigate harm to public health or the environment. *See* Teck Comments at 16 – 21.

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

Existing data in the record shows certain species of both cyprinid and non-cyprinid fish exceed the egg/ovary standard, which suggests impacts from elevated selenium could already be occurring in Lake Koocanusa. Some species are showing elevated levels of selenium, increasing over time. *See* RR002145 (Response to Comment 146). At the time of rulemaking, nine individual fish across three species had concentrations equal to or greater than 15.1 mg/kg dw. *See* RR001538. Adoption of the standards in ARM 17.30.632 are necessary to

develop and implement effective pollutant reduction plans, to achieve the selenium standards adopted in ARM 17.30.632, and protect aquatic life in Lake Koocanusa and the Kootenai River. *See* RR00002126 (Response to Comment 76).

10. Teck argues the Board's rulemaking record does not support a finding under § 75-5-203(2)(b) that the proposed standard is achievable under current technology. *See* Teck Comments at 22-23.

DEQ Response: If the Board determines that ARM 17.30.632(7)(a) is more stringent than comparable federal regulations or guidelines, DEQ can make the written findings that the proposed standard is achievable under current technology. Existing data in the record show the Board considered available treatment technology and the cost of treatment. *See* RR002118, 2122, 2126-2127 (Response to Comments 51, 62, and 78). The Board acknowledged there are no sources of selenium in the portion of Lake Koocanusa within Montana's jurisdiction to regulate. *See* RR002126-2127. At this time, no permittee will incur additional costs to treat wastewater for selenium to meet water quality-based effluent limits because of ARM 17.30.632. Land development activities, such as surface mining and construction, are already subject to general discharge permit requirements including implementation and maintenance of best management practices (BMPs) to avoid uncontrolled runoff to surface waters associated with these activities. There are no foreseeable additional treatment requirements associated with land

disturbing activities due to the adoption of ARM 17.30.632. *See* RR002110 and 2611 (Response to Comments 26 and 45).

11. Teck argues the Board's rulemaking record does not contain information regarding the costs to the regulated community that are directly attributable to the adoption of ARM 17.30.632. See Teck Comments at 23 – 25.

DEQ Response: If the Board determines that ARM 17.30.632(7)(a) is more stringent than comparable federal regulations or guidelines, DEQ can make the written findings in § 75-5-203(3) regarding the costs to the regulated community directly attributable to the adoption of ARM 17.30.632. Currently, there are no public or private entities discharging to the Kootenai River or Lake Koocanusa with Montana Pollutant Discharge Elimination System (MPDES) permit effluent limits for selenium. No permittee will incur additional costs to treat wastewater for selenium to meet water quality-based effluent limits based on ARM 17.30.632. As stated in DEQ Response to Teck's Argument 10 above, land development activities are already subject to general discharge permit requirements including implementation and maintenance of best management practices (BMPs). These activities will incur no new, additional treatment requirements due to the adoption of ARM 17.30.632. *See* RR002110 and 2611 (Response to Comments 26 and 45).

12. Teck argues the Board's rulemaking record fails to reference "pertinent ascertainable, and peer-reviewed scientific studies." *See* Teck Comments at 25.

DEQ Response: The plain language of § 75-5-203(4), MCA, requires DEQ to either revise the rule to conform to federal regulations or guidelines or make the written findings in § 75-5-203(2) and (3), MCA upon determination by the Board that 17.30.632(7)(a) is more stringent than comparable federal regulations or guidelines. *See* § 75-5-203(4)(a), MCA (effective July 1, 2021). Petitioners allege DEQ's written findings must "reference pertinent, ascertainable, and peer-reviewed scientific studies contained in the record." However, §75-5-203(3), MCA does not require peer-reviewed studies to be contained in the rulemaking record anytime the agency adopts a rule that is more stringent than comparable federal rules or guidelines. Instead, § 75-5-203(3), MCA provides:

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

The statute requires that findings in support of a rule that is more stringent than federal reference any studies contained in the record that form the basis of the agency's conclusion. The requirement at §75-5-203(3), MCA does not make peer-reviewed studies a prerequisite to adopting a more stringent than federal

requirement. This interpretation is supported by the legislative history of 1995 MT HB 521. The Senate Natural Resources Committee took executive action on HB 521 on March 28, 1995. Senator Grosfield proposed an amendment that would have inserted "if any" after the requirement to reference peer-reviewed studies. Senator Keating opposed the motion on the ground that "this bill doesn't say you have to have a peer-reviewed study, it only says you review any studies in the record that form the basis for the board's conclusion, and "if any" doesn't add anything." Senator Grosfield then indicated that he thought the bill could be interpreted that way and it concerned him because of cost, but "if it is clear to the committee that the bill will not require peer reviewed studies, then it was okay with him, and he would withdraw the pertinent amendments." The amendments were then withdrawn. *See* Minutes, MT Senate, 54th Leg. Reg. Session, Comm. on Natural Resources, March 28, 1995 at page 5, Exhibit 3 (attached hereto as DEQ Exhibit 1).

The preamble to 1995 Montana House Bill 521 provides guidance to the state boards and agencies charged with implementing and complying with the Legislature's direction:

> If the rules are more stringent than comparable federal law, the written finding must include but is not limited to a discussion of the policy reasons and an analysis that supports the board's or department's decision that the proposed state standards or requirements protect public health or the environment of the state and that the state standards or requirements to be imposed can mitigate harm to the public health or the environment and are

> achievable under current technology. The department is not required to show that the federal regulation is inadequate to protect public health. The written finding must also include information from the hearing record regarding the costs to the regulated community directly attributable to the proposed state standard or requirement.
> 1995 Mt. Ch. 471. *See* Teck's Exhibit A at page 2.

The preamble to 1995 Montana House Bill 521 says nothing about referencing peer-reviewed scientific studies in the findings required to support rules than are more stringent than federal. The language of the preamble and the legislative history of HB 521 indicate § 75-5-203(3), MCA does not require peer-reviewed scientific studies whenever a state agency adopts a stricter than federal requirement.

13. Teck argues the appropriate remedy is invalidation of ARM 17.30.632(7)(a). *See* Teck Comments at 25-26.

DEQ Response: The Board's jurisdiction is limited to a determination of stringency under § 75-5-203, MCA. As of July 1, 2021, DEQ rather than the Board has sole authority to adopt rules for the administration of the Montana Water Quality Act, subject to the provisions of §75-5-203, MCA. *See* 2021 MT Senate Bill 233 (SB 233), Sections 31, 32, and 34. Under § 75-5-203, MCA, as amended by SB 233, DEQ may not adopt a rule that is more stringent than the comparable federal regulations or guidelines that address the same circumstances unless DEQ makes the written findings in § 75-5-203(2) and (3), MCA.

Under § 75-5-203(4)(a), MCA, a person affected by a rule that the person believes to be more stringent than comparable federal regulations or guidelines may petition the Board to review the rule. If the Board determines that the rule is more stringent than comparable federal regulations or guidelines, DEQ, not the Board, must either revise the rule to conform to federal regulations or guidelines or make the written findings in § 75-5-203(2) and (3), MCA. *See* SB 233, Sec. 32 (now codified as § 75-5-203, MCA). Teck has not properly petitioned to repeal ARM 17.30.632(7)(a) and, without rulemaking authority, the Board cannot repeal or invalidate ARM 17.30.632(7)(a) even if it determines the rule is more stringent than federal.

III. DEQ's RESPONSES TO LINCOLN COUNTY's COMMENTS ADDRESSING THE BOARD'S STRINGENCY REVIEW OF ARM 17.30.632.

1. Lincoln County argues ARM 17.30.632(7)(a) is more stringent than its federal counterpart. *See* Lincoln County comments at 2.

DEQ Response: *See* DEQ's Responses to Teck Arguments 1 and 5 above.

2. Lincoln County argues the Board's rulemaking violated the intent of § 75-5-203, MCA, and did not consider the consequences to the County of adopting ARM 17.30.632(7)(a). *See* Lincoln County comments at 2 – 4.

DEQ Response: The rulemaking process carefully considered and weighed the consequences of adopting ARM 17.30.632 including potential economic impacts

and the need to protect aquatic life. Lincoln County participated in the rule making process and DEQ considered concerns from the Lincoln County Commissioners regarding unforeseen consequences to future development due to immediate impairment of Lake Koocanusa.

If Lake Koocanusa were found to be impaired for selenium, new point sources would need to discharge at concentrations equal to or less than 0.8 µg/L. There are no current or proposed point source dischargers on Lake Koocanusa. There has been no compelling evidence that any significant levels of selenium exist in the tributaries to Lake Koocanusa. Therefore, there is no compelling evidence that industry or future development would be hindered because of adoption of ARM 17.30.632(7)(a). *See* Response Comment 50, RR002118.

Larger land development activities, such as surface mining and construction are already subject to general discharge permit requirements including implementation and maintenance of best management practices (BMPs). The department foresees no additional treatment requirements associated with these land disturbing activities due to the adoption of site-specific selenium criteria for Lake Koocanusa. *See* Response to Comment 132, RR002140.

There is no evidence that real estate values have been or will be impacted by an impaired status of Lake Koocanusa. *See* Response to Comment 48, RR002117. Montana has 12,122 miles of rivers and 377,353 acres of lakes listed as impaired

or not supporting at least one beneficial use. There is no evidence that the communities along or near these waterbodies have endured economic consequences due to an impairment listing. *See* Response to Teck Argument 2.

Lincoln County had numerous opportunities to participate in the rulemaking including public meetings and opportunities to provide public comment. Public meetings were held in Lincoln County to provide updates on data trends in the reservoir and share information. *See* Response to Comments 12 and 19, RR 002107-2109. In fact, DEQ received comments from Lincoln County citizens urging adoption of ARM 17.30.632. *See* RR001607, 1611, 1613, 1614 and 002390-2392 (comments from Lincoln County anglers and fishing guides, citizens, and a Troy City Council member).

The standards at ARM 17.30.632 are necessary to protect aquatic life in Lake Koocanusa and may form the basis of pollutant load reduction plans (and avoid an impairment determination) and protect downstream waters and beneficial uses including ESA-listed white sturgeon. Commentors noted healthy fish populations are important for tourism and recreation associated with fishing, which plays an important role in the Lincoln County economy and creates direct and indirect jobs for residents. *See* Response to Comment 41 RR002115.

3. Lincoln County argues the standard in ARM 17.30.632(7)(a) should be invalidated. *See* Lincoln County comments at 4-5.

DEQ Response: The Board's jurisdiction is limited to making a stringency determination and the Board is without rulemaking authority to repeal ARM 17.30.632 in response to the Petitions. *See* Response to Teck Argument 13.

IV. DEQ's RESPONSES TO MONTANA MINING ASSOCIATION's COMMENTS ADDRESSING THE BOARD'S STRINGENCY REVIEW OF ARM 17.30.632.

1. The Montana Mining Association argues the Board's adoption of ARM 17.30.632(7)(a) did not comply with § 75-5-203, MCA.

DEQ Response: *See* DEQ's Responses to Teck Arguments 1, 2, and 9.

V. DEQ's RESPONSES TO TREASURE STATE RESOURCES's COMMENTS ADDRESSING THE BOARD'S STRINGENCY REVIEW OF ARM 17.30.632.

1. Treasure State Resources argues the Board's adoption of ARM 17.30.632(7)(a) did not comply with § 75-5-203, MCA, and the relief requested by Teck and Lincoln County should be granted.

DEQ Response: *See* DEQ's Responses to Teck Arguments 1, 2, 9, and 13.

VI. CONCLUSIONS

The only question before the Board is whether it should reverse its previous determination that the rule is not more stringent than federal. In reviewing the records and making this decision on stringency, the Board should not consider some of the immaterial arguments raised by the Petitioners such as the impact of 2021 Montana House Joint Resolution 37 (Interim Legislative Committee Study of

selenium in Lake Koocanusa). The Petitioners are not presenting a petition to repeal ARM 17.30.632(7)(a) and the Board should not reach for justifications to determine the Board's 2020 rulemaking process defective based on arguments that go beyond the scope of stringency review.

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

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

Respectfully submitted this 21st day of January 2022.

/s/ Kirsten H. Bowers
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Certificate of Service

I hereby certify that on this 21st day of January 2022, I caused a true and correct copy of the foregoing to be e-mailed to the following:

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MINUTES

MONTANA SENATE
54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By **CHAIRMAN LORENTS GROSFIELD**, on March 28, 1995, at 11:00 AM

ROLL CALL

Members Present:
Sen. Lorents Grosfield, Chairman (R)
Sen. Larry J. Tveit, Vice Chairman (R)
Sen. Mack Cole (R)
Sen. William S. Crismore (R)
Sen. Mike Foster (R)
Sen. Thomas F. Keating (R)
Sen. Ken Miller (R)
Sen. Vivian M. Brooke (D)
Sen. B.F. "Chris" Christiaens (D)
Sen. Jeff Weldon (D)

Members Excused: Sen. Bill Wilson

Members Absent: None

Staff Present: Todd Everts, Environmental Quality Council
Michael Kakuk, Environmental Quality Council
Theda Rossberg, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:
Hearing: None
Executive Action: HB 521

EXECUTIVE ACTION ON HB 521

{Tape: 1; Side: A}

CHAIRMAN GROSFIELD asked Todd Everts to explain the technical amendments. **Mr. Everts, Environmental Quality Council,** explained amendments no. hb052109.amk as contained in **EXHIBIT 1.** **Mr. Everts** said they are technical amendments.

Motion/Vote: **SEN. WILLIAM CRISMORE MOVED TO ADOPT AMENDMENT hb052109.amk AS CONTAINED IN EXHIBIT 1. MOTION CARRIED UNANIMOUSLY.**

Motion: **SEN. TOM KEATING MOVED HB 521 BE CONCURRED IN AS AMENDED.**

Substitute Motion: **SEN. JEFF WELDON MOVED TO ADOPT AMENDMENT NO. hb052102.ate AS CONTAINED IN EXHIBIT 2.**

Discussion: **SEN. WELDON** said that those amendments were suggested by **Ann Hedges, Montana Environmental Information Council.**

Ms. Hedges explained the amendments to the committee members as contained in **EXHIBIT 2.**

SEN. WELDON said he thought the base premise of HB 521 was a good idea and an explanation was necessary. He said the proposed amendments would make the bill more structuraly sound.

CHAIRMAN LORENTS GROSFIELD said that amendments 1 and 8 are the same, striking "required" and inserting "allowed." The committee may wish to deal with those at the same time.

SEN. MIKE FOSTER said **SEN. WELDON'S** proposed amendments address the burning of hazardous waste. He said he was curious as to what **Tom Daubert, Ash Grove Cement Company** thought about the amendments. **Mr. Daubert** said they had no interest in petitioning the Department of Health and Environmental Sciences to rework the rules that they have developed. It was a long process and they were very thorough.

Tom Ebzery said what you have to think about is why the rules adopted were more stringent than the federal rules. Congress is adopting a cost-benefit analysis approach that costs a lot of money. There should be an estimate as to what the cost would be to the regulated community.

SEN. LARRY TVEIT asked **Mr. Everts** how the differences in amendment 8 between "required" and "allowed" would affect the bill.

Mr. Everts referred the question to **Michael Kakuk, Environmental Quality Council. Mr. Kakuk** answered that the department can't go beyond federal guidelines unless they are allowed to. Therefore, by striking "required" and inserting "allowed", if they are allowed to go beyond federal guidelines, they don't have to comply with the bill. He said if "allowed" is inserted into the bill, itwould result in the bill having no impact on state regulations. Amendments 1, 6, and 8 are all related to "required."

CHAIRMAN GROSFIELD said the statutes already address "required" specifically. He asked **Mr. Kakuk** if the state had any rules adopted that are stricter than the federal rules. **Mr. Kakuk** replied that he wasn't sure if the department had any stricter rules than the federal rules, but it could be possible that the legislature could approve stricter rules. He said there are

procedural standards required by state law that are stricter than the federal standards.

SEN. CHRISTIAENS asked **Mr. Kakuk** what would happen if the amendments were not adopted. **Mr. Kakuk** answered that there are certain requirements under state statutes that are stricter than federal rules, but under the bill as introduced, they would be okay.

CHAIRMAN GROSFIELD stated that since this package of amendments deals with several different topics that he would rule that the question should be divided, and that the committee would first vote on amendments No. 1, 6 and 8.

Vote: **MOTION ON AMENDMENTS 1, 6 AND 8 FAILED 1-9 WITH SEN. WELDON VOTING YES.**

CHAIRMAN GROSFIELD stated that the committe would next deal with amendments 2 and 3.
SEN. VIVIAN BROOKE asked if the same thing would not be achievable under current technology, and if that is challenged, would that mean the standard would have to be stricken. The provision in the bill sets up a complex system that local agencies and state agencies will have to defend, and what happens after that fails. She asked if the standards and requirements drop off the books, would the state have topay for a business or industry loss.

SEN. WELDON pursued **SEN. BROOKE'S** line of questioning and further asked **Mr. Kakuk** if the state or local government fails to meet the local standards, what happens to the rules or regulations. **Mr. Kakuk** replied that if this bill passes and if the state adopts a rule after the effective date of this bill, it could be subject to a law suit. If the court agreed, then the state would have to go back and readopt the rule to comply with this bill.

SEN. CHRISTIAENS asked if that was retroactive back to 1990, or does it mean forward. **Mr. Kakuk** said as an example, if the bill is passed in its current form, and there is a rule adopted after 1990 that someone thinks is more stringent than the federal standard, the that person could file a petition with a fee of up to $250 to have the department review that rule. The department would then look at the rule and find out if there was a comparable federal regulation, and if the state was more stringent, determine whether the state standard protects public health and the environment, and whether it can mitigate harm and is technologically achievable.

SEN. CHRISTIAENS wondered what kind of a burden that would be to the state to be retroactive from 1990. **CHAIRMAN GROSFIELD** said that would be addressed in other amendments to be reviewed.

SEN. TOM KEATING said Subsection 2 (B) states, "The local board standard or requirement to be imposed can mitigate harm to the

public health or environment and is achievable under current technology." He said that is a safeguard for people that want to do something so the Board of Health can't all of a sudden issue some stringent standards without proving them able to mitigate harm. They have to give reasons for it otherwise they could be arbitrary and capricious about setting standards in order to shut down an industry. He said that (B) is an important line that should stay in the bill.

SEN. WELDON said the whole bill is fertilizer for litigation and would keep a lot of lawyers busy. By striking that language that would take away the potential for litigation.

Vote: **MOTION TO ADOPT AMENDMENTS 2 & 3 FAILED 2-8, WITH SEN. WELDON AND SEN. CHRISTIAENS VOTING YES.**

CHAIRMAN GROSFIELD said amendment 4 would be dealt with next and it would eliminate the sentence which states, "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."

Mr. Ebzery said this means if you do something more stringent you have a risk benefit analysis done by the government to find out the impact to the regulated community.

{Tape: 1; Side: B}

Vote: **MOTION TO ADOPT AMENDMENT 4 FAILS 1-9, WITH SEN. WELDON VOTING YES.**

CHAIRMAN GROSFIELD said amendments 5 & 7 go together and eliminate subsection (4) (6) which states, He asked **SEN. WELDON** to withdraw his motion on amendments 5 & 7 because he was proposing an amendment that would accomplish the same thing, only in a different way. **CHAIRMAN GROSFIELD** said there was a real problem with the retroactive date of January 1, 1990. He said he wanted it to apply to prospective changes in rules. HB 330 and HB 331 that were passed in this committee, are going to require the board to redo the Water Quality Rules. Some of the guidelines in the bill apply to rule-making which is good. If it goes back to every rule since 1990, local and state government will be in a real bind.

Motion/withdrawn: **SEN. WELDON WITHDREW AMENDMENTS 5 & 7.**

CHAIRMAN GROSFIELD stated that the last amendment in this package, amendment No. 9, was next.

Mr. Everts explained amendment 9 to the committee members. That amendment inserts, "Notwithstanding the provisions of [Section 3]". This would apply to Title 75, Chapter 10, which clarifies that when you are dealing with rules for boilers and industrial furnaces that the provisions of the bill do not apply to those

rules. He said under Subsection 2 of 75-10-405 it currently says, "The department may not adopt rules under this part that are more restrictive than those promulgated by the federal government under the Resource Conservation and Recovery Act of 1976..."

Vote: **MOTION TO ADOPT AMENDMENT 9, CARRIED 7-3, WITH SEN. KEATING, SEN. TVEIT AND SEN. CRISMORE VOTING NO.**

Motion: **CHAIRMAN GROSFIELD MOVED TO ADOPT AMENDMENTS hb052110.amk AS CONTAINED IN EXHIBIT 3, EXCEPT FOR AMENDMENT NO. 16 WHICH IS IDENTICAL TO THE AMENDMENT NO. 9 THAT WAS JUST ADOPTED.**

SEN. KEATING said this bill doesn't say you have to have a peer-reviewed study, it only says you review any studies contained in the record that form the basis for the board's conclustion, and "if any" doesn't add anything. **CHAIRMAN GROSFIELD** said he had thought the bill might be interpreted to mean you had to have peer-reviewed studies and that concerned him because of cost. **SEN. KEATING** said if it is clear to the committee that the bill will not require peer-reviewed studies, then it was okay with him and he would withdraw the pertinent amendments.

CHAIRMAN GROSFIELD withdrew amendments 2, 5, 8, 11, and 14.

SEN. BROOKE 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.

Mr. Kakuk said amendments 3, 6, 9, 12, and 15 all say the same thing: "striking subsection (4) in its entirety." That section referred to the retroactive date of January 1, 1990.

SEN. KEATING asked why that language was in the bill to begin with. **Mr. Ebzery** said the original bill had language with a look-back without a date. The purpose was to see if they were able to justify living under the present rules. Going back to 1980 was considered, but **Director Bob Robinson** said they did not have data that far back, so 1990 was the date picked because by that time the department was keeping enough data for an informed decision to be made now.

CHAIRMAN GROSFIELD said the reason the retroactive date was proposed to be removed from the bill was to respond to fiscal note concerns. If the retroactive date is left in the bill that means the agencies must go back to 1990 and review all of the rules and redo them. He said that rule-making comes up often enough that they shouldn't have to do that. **CHAIRMAN GROSFIELD** said that in the statement of intent, on Page 2, Lines 26 it says, "any rule that is adopted, readopted, or amended under the authority of or in order to implement, comply with..." He said another amendment he was proposing would make that clearer.

SEN. CHRISTIAENS asked **CHAIRMAN GROSFIELD** if the committee adopted his amendment, would that take care of some of the unfunded mandate. **CHAIRMAN GROSFIELD** replied yes, that would take care of it. Everyone thinks HB 521 is a good bill, butk the unfunded mandate part of it is a concern.

SEN. KEATING asked **CHAIRMAN GROSFIELD** if since 1990 there have been some changes in rules and standards that are unachievable, did he feel they should be reviewed as to whether or not they are too strict. **CHAIRMAN GROSFIELD** replied that he agreed, and a good example was the arsenic standard that was adopted in the nondegredation rules, and that was unachievable. SB 331 will require the rewriting of that rule, which would be accomplished under the requirements of HB 521 if it passes. He felt that in the normal course of events, rules will be rewritten.

SEN. KEATING said if the language is stricken and the bill doesn't allow them to go back, he anticipates in the next 2 years, there will be a flood of bills dealing with rewriting standards.

SEN. CHRISTIAENS said that is one of the reasons it should be funded. The Consensus Council is funded and is the way it should be handled.

SEN. CRISMORE said that **Mr. Robinson** was comfortable with going back to 1990.

Vote: MOTION TO ADOPT THE REMAINING AMENDMENTS AS CONTAINED IN EXHIBIT 3, FAILED WITH A ROLL CALL VOTE OF 5-5.

Motion: CHAIRMAN GROSFIELD MOVED TO ADOPT AMENDMENTS NO. hb052111.amk AS CONTAINED IN EXHIBIT 4.

Mr. Kakuk explained the amendments to the committee members.

SEN. WELDON asked **Mr. Kakuk** as it relates to public notice requirements, what would be more stringent than a federal regulation. **Mr. Kakuk** said for example, if the federal regulation states that the public is given 30 days notice and the state says it must be 15 days notice, that would be more stringent.

SEN. BROOKE asked **Mr. Kakuk** how that interacts with local government and communities adopting more stringent rules for air and water quality. In Section 2, subsection (2) it states, "The board or department may adopt a rule to implement this chapter that is more stringent than COMPARABLE federal regulations OR GUIDELINES only if the board or department makes a written finding after a public hearing and public comment and based on evidence in the record..." **Mr. Kakuk** said the bill does address local air and water quality, but a local community or government cannot adopt a rule that is more stringent than state standards, until approved by the local governing body or board through a

finding similar to the finding that state agencies are required to make under this bill.

SEN. KEATING said the state does not have primacy on wetlands. Rules and regulations on wetlands are exempt from the bill. **CHAIRMAN GROSFIELD** said the bill doesn't address wetlands. **SEN. KEATING** said there already was a bill to take primacy away from the state and give everything back to the Environmental Protection Agency. **CHAIRMAN GROSFIELD** said he thought that bill had been tabled.

Mr. Ebzery asked what establishing and delegating primacy to the state meant, in no. 3 of the amendments. There is a lot of unknown in that language. Programs like surface mining have a clear delegation of primacy to the state, other statutes may not. He said he thought the words "established and delegated primacy", were confusing. **Mr. Kakuk** agreed that the language was unclear as to what might be or might not be included.

CHAIRMAN GROSFIELD said he would like the bill to deal with the primacy issue so it would be clear what rules they were talking about. **SEN. KEATING** said if the state wants a tighter rule or standard, it is only fair that they justify that even if they don't have primacy. He thought that if an applicant or permittee under a particular standard could say that the state doesn't have primacy and therefore the state's rule is not subordinate to federal rule, that the applicant or permittee could then say that they could get their permit under the federal standard. He didn't know if that would be possible, but felt that it would be opening the door for a fight.

SEN. MACK COLE said it looks like referring to establishing primacy will cause problems. **CHAIRMAN GROSFIELD** asked if "established and" were struck, and "delegated" was left in, would that be clearer. **Mr. Ebzery** said if you use the term "delegated primacy to the state", the argument could be, as an example, that there would be no delegation under the Clean Water Act. **Mr. Kakuk** suggested that the programs be specifically identified in the bill.

Mr. Everts suggested that Subsection 1 could read, "Sections 1-3 are intended to apply to any rule that is adopted or readopted or amended that attempts to regulate those resources or activities for which the state assumes primacy of a federal program, as of the effective date of this Act."

Motion Withdrawn: **CHAIRMAN GROSFIELD** said that because of the confusion and concern he would withdraw the amendments.

Motion: **CHAIRMAN GROSFIELD MOVED TO ADD TO THE END OF THE STATEMENT OF INTENT, THE FOLLOWING LANGUAGE, "This Act does not apply to the establishment of fees, time-frames, public notice requirements or other requirements that are administrative in nature."**

SEN. FOSTER asked **Mr. Ebzery** what his reaction was to the motion. **Mr. Ebzery** said in regard to the "fees, time-frame, and public notice", that is probably okay, but "other requirements that are administrative in nature" should not be added. The response from the Department would probably be "too bad that doesn't apply, here is your $250 back." If the Department is given that much flexibility, they will deem everything administrative. He said he thought that would promote litigation because it is so vague.

SEN. MILLER said he agreed with **Mr. Ebzery** and wondered if there were any other areas that needed to be changed. **Mr. Kakuk** said instead of "public notice", "public participation" is more the focus of it. **SEN. KEATING** said the bill already exempts fees, but time-frames can be important to an applicant. The time-frames are usually set in statute and if they are not in the statute, the board can set time-frames but the department could be argumentive and capricious.

{Tape: 2; Side: A}

Amended Motion: **CHAIRMAN GROSFIELD AMENDED HIS MOTION TO READ: "This Act is not intended to apply to the establishment or setting of fees, time-frames, public participation requirements, or enforcement procedures."**

SEN. FOSTER said he was wondering just what "enforcement" entails. **Mr. Ebzery** said he had the same questions regarding "enforcement." In the amendments to the statutes in the Clean Water Act and the Clean Air Act, they did not want to have one form of enforcement that was more dramatic than the other. If you want a more severe enforcement, why not come up with a finding of why it should be done.

Substitute Motion/Vote: **SEN. FOSTER MOVED ON PAGE 3, LINE 2, AFTER THE WORD "fees", TO ADD "or to public participation requirements." MOTION CARRIED 9-1 WITH SEN. BROOKE VOTING NO.**

Motion: **SEN. KEATING MOVED SB 521 BE CONCURRED IN AS AMENDED.**

Discussion:

SEN. BROOKE said on the fiscal note there is language in the Technical Notes that says, "comparable federal rules or guidelines should be defined to provide guidance in administering this law." She asked if anyone was concerned with that language. She said their County Attorney in Missoula said that "regulated community" is not defined, and in Missoula the local Air Control Board enacts regulations which limits the type of solid fuel burning devices that can be installed in existing structures. She said she was concerned about the expense that would be passed on to the local community governments.

CHAIRMAN GROSFIELD said that one of his amendments addressed that issue and that amendment failed. He said he had the same concern

and wanted to get a better idea of what "comparable meant", and that was the reason he proposed the amendment on primacy and being specific regarding what we were talking about.

CHAIRMAN GROSFIELD asked **Mr. Kakuk** when the fiscal note was drafted. **Mr. Kakuk** said the fiscal note was drafted after it came out of the House Committee. He added that, in **Mr. Robinson's** testimony, the fact that not all the terms in this bill were well defined was also brought out.

Vote: **MOTION THAT HB 521 BE CONCURRED IN AS AMENDED CARRIED 7-3 ON A ROLL CALL VOTE.**

{Comments: the committee meeting was recorded on one and one-half 60 minute tapes.}

ADJOURNMENT

Adjournment: 5:45 PM

LORENTS GROSFIELD, Chairman

THEDA ROSSBERG, Secretary

LG/TR

MONTANA SENATE
1995 LEGISLATURE
NATURAL RESOURCES COMMITTEE

ROLL CALL DATE 3-28-95

SEN

NAME	PRESENT	ABSENT	EXCUSED
VIVIAN BROOKE	X		
B.F. "CHRIS" CHRISTIAENS	X		
MACK COLE	X		
WILLIAM CRISMORE	X		
MIKE FOSTER	X		
TOM KEATING	X		
KEN MILLER	X		
JEFF WELDON	X		
BILL WILSON			X
LARRY TVEIT, VICE CHAIRMAN	X		
LORENTS GROSFIELD, CHAIRMAN	X		

SEN:1995
wp.rollcall.man
CS-09

EXHIBIT 1

SENATE STANDING COMMITTEE REPORT

March 28, 1995

MR. PRESIDENT:

We, your committee on Natural Resources having had under consideration HB 521 (third reading copy -- blue), respectfully report that HB 521 be amended as follows and as so amended be concurred in.

Signed: _____
Senator Lorents Grosfield, Chair

That such amendments read:

1. Page 3, line 2.
Following: "FEES"
Insert: "or to public participation requirements"

2. Page 3, line 8, page 5, line 12, and page 7, line 16.
Following: "(5)"
Strike: "AND"
Insert: "or"

3. Page 9, line 20, and page 10, line 27.
Following: "(4)"
Strike: "AND"
Insert: "or"

4. Page 23, line 15.
Strike: "The"
Insert: "Notwithstanding the provisions of [section 3], the"

-END-

Amd. Coord.
Sec. of Senate

_____
Senator Carrying Bill

711500SC.SPV

EXHIBIT NO. 1
DATE 3-28-95
BILL NO. HB-521

Amendments to House Bill No. 521
Third Reading Copy

For the Committee on Natural Resources

Prepared by Michael S. Kakuk
March 27, 1995

1. Page 3, line 8, page 5, line 12, and page 7, line 16.
Following: "(5)"
Strike: "AND"
Insert: "or"

Passed unanimously

2. Page 9, line 20, and page 10, line 27.
Following: "(4)"
Strike: "AND"
Insert: "or"

EXHIBIT NO. 2
DATE 3-28-95
BILL NO. HB 521

Amendments to House Bill No. 521
Third Reading Copy

Requested by Senator Weldon
For the Committee on Natural Resources

Prepared by Todd Everts
March 28, 1995

1. Page 3, line 8, page 5, line 12, and page 7, line 16.
Strike: "required"
Insert: "allowed"

2. Page 4, lines ~~11~~ and ~~12~~, page 6, lines 15 and 16, page 8 lines 19 and 20, page 9, lines 28 and 29, and page 11 lines 5 and 6.
Strike: ":" on line 11, page 4, line 15, page 6, line 19, page 8, line 28, page 9, and line 5, page 11 through "(A)" on line 12, page 4, line 16, page 6, line 20, page 8, line 29, page 9, and line 6, page 11.

3. Page 4, lines 13 through 15, page 6, lines 17 through 19, page 8, lines 21 through 23, page 9 line 30 through page 10 line 2 and page 11 lines 7 through 9.
Strike: "; AND" on line ~~13~~, page 4, line 17, page 6, line 21, page 8, line 30, page 9, and line 7, page 11 through "TECHNOLOGY" on line 15, page 4, line 19, page 6, line 23, page 8, line 2, page 10, and line 9, page 11.

4. Page 4, lines 17 through 20, page 6, lines 22 through 24, page 8, lines 26 through 28, page 10 lines 5 through 7 and page 11, lines 12 through 14.
Following: "CONCLUSION." on line 17, page 4, line 22, page 6, line 25, page 8, line 5, page 10, and line 12, page 11
Strike: "THE" on line 17, page 4, line 22, page 6, line 26, page 8, line 5, page 10 and line 12, page 11 through "REQUIREMENT." on line 20, page 4, line 24, page 6, line 28, page 8, line 7, page 10, and line 14, page 11.

5. Page 4, line 21, page 6, line 25, page 8, line 29, page 10, line 8, and page 11, line 15.
Strike: "(A)"

6. Page 4, line 23, page 6, line 27, page 9, line 1, page 10, line 10, and page 11, line 17.
Following: "GUIDELINES"
Insert: "and that is not allowed by state law"

7. Page 5, lines 2 through 6, page 7 lines 6 through 10, page 9 lines 10 through 14, page 10 lines 19 through 23, and page 11, lines 26 through 30.
Strike: subsection (B) in its entirety

EXHIBIT 1

SENATE NATURAL RESOURCES
EXHIBIT NO. 2
DATE 3-28-95
BILL NO. HB 521

8. Page 9, line 20 and page 10, line 27.
Strike: "REQUIRED"
Insert: "allowed"

9. Page 23, line 15.
Strike: "The"
Insert: "Notwithstanding the provisions of [section 3], the"

EXHIBIT 3
DATE 3-28-95
HB 521

Amendments to House Bill No. 521
Third Reading Copy

Requested by Sen. Grosfield
For the Committee on Natural Resources

Prepared by Michael S. Kakuk
March 28, 1995

1. Page 3, line 8.
Strike: "(5)"
Insert: "(4)"

2. Page 4, line 17.
Following: "STUDIES"
Insert: ", if any,"

3. Page 4, line 21 through page 5, line 6.
Strike: subsection (4) in its entirety
Renumber: subsequent subsection

4. Page 5, line 12.
Strike: "(5)"
Insert: "(4)"

5. Page 6, line 21.
Following: "STUDIES"
Insert: ", if any,"

6. Page 6, line 25 through page 7, line 10.
Strike: subsection (4) in its entirety
Renumber: subsequent subsection

7. Page 7, line 16.
Strike: "(5)"
Insert: "(4)"

8. Page 8, line 25.
Following: "STUDIES"
Insert: ", if any,"

9. Page 8, line 29 through page 9, line 14.
Strike: subsection (4) in its entirety
Renumber: subsequent subsection

10. Page 9, line 20.
Strike: "THROUGH (4)"
Insert: "and (3)"

11. Page 10, line 4.
Following: "STUDIES"
Insert: ", if any,"

12. Page 10, lines 8 through 23.
Strike: subsection (4) in its entirety

13. Page 10, line 27.
Strike: "THROUGH (4)"
Insert: "and (3)"

withdrawn

14. Page 11, line 11.
Following: "STUDIES"
Insert: ", if any,"

15. Page 11, lines 15 through 30.
Strike: subsection (4) in its entirety

16. Page 23, line 15.
Strike: "The"
Insert: "Notwithstanding the provisions of [section 3], the"

EXHIBIT 4
DATE 3-28-95
BILL NO. HB 521

Amendments to House Bill No. 521
Third Reading Copy

Requested by Sen. Grosfield
For the Committee on Natural Resources

Prepared by Michael S. Kakuk
March 28, 1995

1. Title, line 14.
Following: "DATE"
Insert: "AND APPLICABILITY PROVISIONS"

2. Page 2, line 25 through page 3, line 2.
Strike: "[SECTIONS" on page 2, line 25 through "FEES." on page 3, line 2

3. Page 30.
Following: line 4
Insert: "NEW SECTION. **Section 22. Applicability.** (1) [Sections 1 through 3] are intended to apply to any rule that is adopted, readopted, or amended and that attempts to regulate those resources or activities for which the federal government has established and delegated primacy to the state as of [the effective date of this act].

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

(3) [This act] does not apply to the establishment of fees, timeframes, public notice requirements, or other requirements that are administrative in nature."
Renumber: subsequent section

MONTANA SENATE
1995 LEGISLATURE
NATURAL RESOURCES COMMITTEE
ROLL CALL VOTE

DATE 3-28-95 BILL NO. HB 521 NUMBER

MOTION: Amendments 3, 6, 9, 12, 15
hb052110.amk

Vote: 5-5 Fails

NAME	AYE	NO
VIVIAN BROOKE		X
B.F. "CHRIS" CHRISTIAENS	X	
MACK COLE	X	
WILLIAM CRISMORE		X
MIKE FOSTER		X
TOM KEATING		X
KEN MILLER	X	
JEFF WELDON	X	
BILL WILSON		
LARRY TVEIT, VICE CHAIRMAN		X
LORENTS GROSFIELD, CHAIRMAN	X	

SEN:1995
wp:rlclvote.man
CS-11

EXHIBIT 1

MONTANA SENATE
1995 LEGISLATURE
NATURAL RESOURCES COMMITTEE
ROLL CALL VOTE

DATE 3-28-95 BILL NO. HB 521 NUMBER 2

MOTION: HB 521 CONCURRED IN AS AMENDED

~~PA~~ By a Vote of 7-3

NAME	AYE	NO
VIVIAN BROOKE		X
B.F. "CHRIS" CHRISTIAENS	X	
MACK COLE	X	
WILLIAM CRISMORE	X	
MIKE FOSTER	X	
TOM KEATING	X	
KEN MILLER	X	
JEFF WELDON		X
BILL WILSON		
LARRY TVEIT, VICE CHAIRMAN	X	
LORENTS GROSFIELD, CHAIRMAN		X

SEN:1995
wp:rlclvote.man
CS-11

EXHIBIT 1

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8
1595 Wynkoop Street
Denver, CO 80202-1129
Phone 800-227-8917
www.epa.gov/region8

January 21, 2022

Ref: 8WP-CWQ

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

Subject: EPA's response to comments in the Matter of the Petitions of Teck Coal Limited and the Board of County Commissioners of Lincoln County, Montana, for review of ARM 17.30.632(7)(a) pursuant to Mont. Code Ann. Section 75-5-203

Dear Mr. Ruffatto:

Thank you for the opportunity to respond to comments. The U.S. Environmental Protection Agency (EPA) disagrees with the characterization of the Petitioners that EPA's action letter constitutes a stringency determination under MCA 75-5-203. As stated in our action letter and comments submitted on January 13, 2022, EPA evaluated the requirements of 40 C.F.R. § 131.11(a)(1) and determined that ARM 17.30.632 was based on sound scientific rationale and protected the designated use.

EPA would also like to respond to a statement made by Teck Coal Limited on page 19 of their comments that says, "the 2016 EPA Guideline require use of an 'average' or a 'composite sample' of 'a minimum number of five individuals from the same species.'" This statement is incorrect. EPA's recommended selenium criterion (EPA 2016)[1] does not contain this statement and does not address the topic of sample size. In addition, EPA 2016 is a recommendation and does not create any legally-binding requirements. EPA did address sample size in a set of draft Technical Support Materials for implementation of EPA 2016. Both the 2016 versions and the 2021 versions[2] of the Technical Support Materials note that states and authorized tribes have flexibility in how they interpret a discrete fish sample to represent a population and have flexibility in determining an appropriate sample size.

[1] See the BER's record posted December 15, 2021 at RR_000299 and RR_004237. Also available at www.epa.gov/wqc/aquatic-life-criterion-selenium.
[2] Available at www.epa.gov/wqc/aquatic-life-criterion-selenium.

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

Sincerely,

JUDY BLOOM

Digitally signed by JUDY BLOOM
Date: 2022.01.21 09:50:24 -07'00'

Judy Bloom
Manager, Clean Water Branch

Murry Warhank
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203 North Ewing Street
Helena, MT 59601
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Attorneys for the Board of County Commissioners of Lincoln County

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: **ADOPTION OF NEW RULE I PERTAINING TO SELENIUM STANDARDS FOR LAKE KOOCANUSA**	**CAUSE NO. BER 2021-04 WQ** **RESPONSE TO COMMENTS**

The Legislature mandated that the Board must make written findings prior to enacting a water quality standard that is more stringent than the federal counterpart to protect the state's competitive advantage. DEQ's comments underscore the need for these findings and brush off Lincoln County's economic concerns without solid data or adequate notice to the public. The Board should abandon the rule as it was not properly adopted.

DEQ contends that the selenium standard for Lake Koocanusa is not more stringent than the federal rule based on its interpretation of the EPA's standards. The EPA, however, disagrees. It specifically found that the state's standard is "more stringent" than the federal one. *See* Ex. H to Teck Comments. The EPA reiterated and did not retract this statement in its recent comments. The Board must defer to the EPA's interpretation of its one rules pursuant to federal and state law. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019); *Clark Fork Coal. v. Mont. Dep't of Envtl.*

Quality, 2008 MT 407, ¶ 20, 347 Mont. 197, 197 P.3d 482. The Board therefore should retract the standard unless and until it makes specific findings required by Mont. Code Ann. § 75-5-203.

Lincoln County also must respond to DEQ's comments on its concerns over the economic impact of this regulation. It contends in its comments that it is not aware of any immediate economic impact caused by the rule. However, its own analysis in the record is quite limited. It indicated only that existing permit holders are not known to be discharging selenium. It does not contend, however, that it analyzed whether there will be new wastewater dischargers in the future or whether it even analyzed whether the selenium rule would be an issue for existing wastewater dischargers when they need to renew their permits. RR_002489.

Instead, they make claims that "there is no reason to expect" issues from the rule and that it has no "compelling" information that industry would be affected. RR_002497. DEQ's lack of information cannot be equated to proof that industry and future development will be unaffected, especially without any analysis to support its conclusions. First, the public was not notified that the Board intended to adopt standards that are more stringent than their federal counterparts. It is no surprise then that information about the potential down-range impacts has not materialized. The Legislature recognized that this notice is critical in gathering economic data, and the Board should too.

Second, DEQ's analysis of down-range impacts does not add up. It claims that Teck is not an interested party in these proceedings. It also claims that tributaries and "background or natural sources" of selenium were all accounted for in the rulemaking process. Finally, it claims that industry will not be affected. If that is the case, the rule will not limit the selenium in Lake Koocanusa at all, and it fails to protect the environment and human safety.

The Board should reverse the selenium rule. Lincoln County recognizes that the rule may be reimplemented if an appropriate procedure occurs. Lincoln County looks forward to continued involvement in these processes.

DATED this 21st day of January, 2022.

JACKSON, MURDO & GRANT, P.C.

/s/ Murry Warhank
Murry Warhank
Attorneys for the Lincoln County Board of County Commissioners

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Response to Comments* was mailed postage pre-paid, via U.S. mail and e-mailed on this 21st day of January, 2022, and directed to:

Regan Sidner, Board Secretary (**original**)
Board of Environmental Review
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P.O. Box 200901
Helena, MT 59620-0901
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aforney@hollandhart.com

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