BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the Lincoln County Board of County Commissioners' Petition for Rulemaking to modify the definition of "steady state" at ARM 17.30.602(32) and the Lake Koocanusa water column water quality standard at 17.30.632(7)(a)	))))))	The Montana Department of Environmental Quality's Denial of the Lincoln County Board of County Commissioners' Petition for Rulemaking

INTRODUCTION

1. Section 2-4-315, MCA, authorizes an interested person or member of the legislature acting on behalf of an interested person when the legislature is not in session, to petition an agency of the State of Montana to adopt, amend, or repeal a rule.

2. The Montana Department of Environmental Quality ("Department") received a Petition for Rulemaking, pursuant to 2-4-315, MCA, on July 2, 2025, from the Board of County Commissioners of Lincoln County ("Petitioner"), whose principal place of business is in Libby, Montana. The mailing address for the petition is 512 California Avenue, Libby, MT 59923-1942.

3. On August 13, 2025, the Department conducted a hearing to develop a record, record evidence, and allow the Petitioner and interested persons to present their views, pursuant to 2-4-315, MCA.

4. The Petition for Rulemaking is based on the following:

   a. In April 2024, the United States Environmental Protection Agency ("EPA") updated its Technical Support Materials for the national Clean Water Act (CWA) Section 304(a) Recommended Chronic Aquatic Life Selenium Criterion in Freshwater, including updated guidance on the definition of "steady state;"

   b. New fish tissue data from Lake Koocanusa is available in the Water Quality Portal, new peer reviewed literature, and an alternate approach for implementing the national criteria.

5. Petitioner requests the Department amend the Lake Koocanusa water column standard at ARM 17.30.632(7)(a) to increase the water column criterion from 0.8 µg/L to 1.5 µg/L.

6. Petitioner requests the Department amend the definition of “steady state” at ARM 17.30.602(32) to strike the words “or changing;” so that the definition would read: "Steady state" means, for the purposes of ARM 17.30.632, conditions whereby there are no activities resulting in new~~,~~ or increasing~~, or changing~~ selenium loads to the lake or river aquatic ecosystem, and selenium concentrations in fish living in the aquatic ecosystem have stabilized.

ANALYSIS

7. DEQ considered the body of record evidence contained in Appendix A (petition and supporting materials) and Appendix B (public comment and hearing transcript).

8. The Petitioner did not provide sufficient evidence to support their proposed rule amendment. For the following reasons, the Department denies the Petitioner’s request to change the water column standard for Lake Koocanusa at ARM 17.30.632(7)(a) from 0.8 µg/L to 1.5 µg/L:

   a. A site-specific standard remains appropriate and necessary to protect the designated beneficial uses of Lake Koocanusa and of downstream waters from the toxic effects of selenium. This is supported by publicly available data that show fish egg/ovary tissue concentrations above the 15.1 mg/kg dry weight (dw) fish tissue standards at ARM 17.30.632(6). It is further supported by the impaired status of the Kootenai River in Idaho for selenium, as listed by Idaho Department of Environmental Quality based on egg/ovary fish tissue data. The U.S. Environmental Protection Agency (EPA) approved Montana’s site-specific selenium standard for Lake Koocanusa in 2021 and re-affirmed that it is based on sound science, federally effective, and consistent with the requirements of the Clean Water Act. (See EPA’s public comment letter in Appendix B at page 336-338 “On February 25, 2021, the EPA approved Montana’s water quality standards at issue in the petition because they were consistent with the requirements of the Clean Water Act (CWA) and its implementing regulations that are unchanged by the 2024 Technical Support Materials. Those water quality standards remain in effect for CWA purposes.”).

   b. Revisions to EPA’s guidance materials do not warrant changes to Montana’s water column selenium standard for Lake Koocanusa. EPA’s technical support materials related to implementing EPA’s recommended selenium criteria in water quality standards, and do not impose legally binding requirements on states and tribes. The Department retains discretion to use approaches that differ from those provided in the technical support materials (See EPA’s public comment letter in Appendix B at page 336-338).

   c. Fish egg/ovary tissue data (both available during rulemaking in 2020, and newer data) show concentrations that exceed the 15.1

mg/kg dw standard (as supported by public comments; see USGS's comment letter in Appendix B at page 339-340; and see Confederated Salish and Kootenai (CSKT) comments in Appendix B at pages 140 - 143) which supports maintaining the current site-specific water column standard to protect beneficial uses and downstream uses. The record evidence includes EPA's Technical Support for Adopting and Implementing the EPA's 2016 Selenium Criterion in Water Quality Standards stating, "Therefore, in the situation where the water column criterion element is met, but the fish tissue criterion element is exceeded, the EPA recommends developing a site-specific water column criterion element that more appropriately reflects a protective water column concentration for that site." This allows for the water column standard to be set at a level that effectively protects the fish egg/ovary tissues from exceeding the 15.1 mg/kg dw and protects the designated beneficial uses.

i. Fish egg/ovary data considered in 2020 meets data quality requirements (as supported by public comments including MT FWP in Appendix B at page 150-153; and USGS in Appendix B at page 339-340);

ii. Inclusion or exclusion of the fish egg/ovary data does not affect the calculations used to derive the protective water column standard of 0.8 µg/L but is important in understanding that a site-specific water column standard is necessary.

iii. The Petitioner provides insufficient information to support the use of the new models cited in the petition to estimate fish egg/ovary concentrations using fish muscle tissue data;

iv. The Petitioner provides insufficient justification for using the described bioaccumulation factor approach rather than the mechanistic modeling approach. The mechanistic modeling approach was employed by EPA to derive the national criteria. The Department selected a protective water column criterion using the mechanistic modeling approach developed by USGS; the decision to use that model was broadly supported by a transboundary working group.

9. For the following reasons, the Department denies the Petitioner's request to change the definition of steady state at ARM 17.30.602(32) to remove "or changing." The 2024 revisions to EPA's technical support materials for implementing EPA's recommended selenium criteria in water quality standards do not warrant rulemaking to change ARM 17.30.602(32).

a. As described in 8(b) above, EPA's guidance materials do not impose legally binding requirements on states and tribes, and the Department retains discretion to use approaches that differ from those provided in the technical support materials (See EPA public comment letter in Appendix B at page 336-338).

10. The preamble of the petition and the oral testimony of the Petitioner suggests economic hardship to Lincoln County may result from regulatory mechanisms to implement water quality standards at ARM 17.30.632 but the petition provides no evidence to support this claim. At present, no Montana Pollutant Discharge Elimination System permits have been issued authorizing discharges to Lake Koocanusa. The Petitioner provided no evidence of any existing or proposed sources of selenium in Lincoln County, MT that have been or would be regulated under ARM 17.30.632. The state's Nonpoint Source Management Plan does not impose water quality-based effluent limits on the industries that support Lincoln County's economy. Rather, nonpoint source pollution in Montana is addressed through voluntary implementation of nonpoint source reductions and best management practices. Fishing and recreational tourism on Lake Koocanusa and the Kootenai River downstream generates significant revenue and jobs in Lincoln County and elsewhere, as supported by public comments. See e.g. Comment Letter from Fishing Outfitters Association of Montana (FOAM), Appendix B at page 182-184. Outfitting and guiding provide a strong economic benefit to Lincoln County and it is necessary to protect aquatic life and recreational beneficial uses in Lake Koocanusa and downstream.

11. The determination of non-steady state is reassessed triennially as specified at ARM 17.30.632(4).

12. As supported by record evidence, there are bilateral efforts underway to better understand and address water pollution in the Elk-Kootenai/y Watershed including an International Joint Commission Study and British Columbia Ministry of Environment and Parks' Area Based Management Plan that both separately address selenium. It would be premature to make any changes at this time before that work is complete.

RULEMAKING

13. Based on record evidence, the Department hereby denies the Petition for Rulemaking submitted by the Board of County Commissioners of Lincoln County.

DATED this 2nd day of September, 2025.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY

Signed by:
Sonja Nowakowski
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Director

NOTICE: The Petitioner has the right to appeal the decision of this agency by filing a petition for judicial review in district court within 30 days after service of this final written decision of the Department.

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 2nd day of September, 2025 a true and correct copy of the foregoing has been served by placing same in the United States Mail, postage prepaid, address as follows:
Board of County Commissioners of Lincoln County
…….

Additionally, this final written decision of the Department was posted on the Department's website at: https://deq.mt.gov/water/Programs/standards#accordion1-collapse4