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

JOINT SUBMITTAL OF DRAFT
PROPOSED LETTER TO EPA
Pursuant to the Board of Environmental Review’s (the “Board”) motion on October 14, 2022, the Board of Commissioners of Lincoln County and Teck Coal Limited (collectively, the “Petitioners”) jointly submit the attached draft proposed letter to EPA for the Board’s consideration. Counsel for Petitioners do not represent the Board and therefore have not considered potential claims and/or future actions by the Board on this issue; therefore, additional and/or different correspondence with EPA may be required to preserve any legal claims the Board may have, such as claims pursuant to the Clean Water Act and/or the Administrative Procedure Act, including 33 U.S.C. § 1365, 5 USC § 553(e), and 5 U.S.C. § 701 et seq.

Dated this 4th day of November 2022.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the following counsel of record, by the means designated below, this 4th day of November 2022:

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/s/ VICTORIA A. MARQUIS
November xx, 2022

KC Becker  
Administrator  
U.S. Environmental Protection Agency  
Region 8  
1595 Wynkoop Street  
Denver, CO 80202-1129  


Dear Administrator Becker:

The Board of Environmental Review (the “Board”) writes to inform EPA of a legal error in our previous rulemaking that established a site-specific water column standard for Lake Koocanusa, making the standard invalid for both state and federal purposes. The legal error is limited to Montana Administrative Rule 17.30.632(7)(a) which established a water column standard for “Lake Koocanusa from the US-Canada international boundary to the Libby Dam” at 0.8 µg/L selenium (the “Lake Water Column Standard”). The remaining seven criteria established, including the three fish tissue standards for Lake Koocanusa, are not impacted by the legal error and therefore remain valid.

The Board’s Authority

The Board is an “agency,” an “entity or instrumentality of the executive branch of state government.” 2-15-102(2), MCA. The Board serves a “quasi-judicial function,” which is defined as “an adjudicatory function exercised by an agency, involving the exercise of judgment and discretion in making determinations in controversies.” 2-15-102(10), MCA. This includes “interpreting, applying, and enforcing existing rules and laws” and “evaluating and passing on facts.” Id. Absent a successful appeal through the state courts, a Final Agency Action from the Board is binding.
One controversy that the law places within the Board’s authority involves petitions seeking the Board’s review and determination of compliance with Montana’s law that prohibits standards from being set more stringent “than the comparable federal regulations or guidelines that address the same circumstances” absent a specific rulemaking process and completion of specific findings. 75-5-203, MCA (the “Stringency Statute”). For the Lake Water Column Standard, the Board was presented with petitions submitted pursuant to the Stringency Statute in 2021. After nearly a year of deliberations, the Board reached a Final Agency Action on April 19, 2022, attached. The Board denied a motion to amend its Final Agency Action during its meeting on October 14, 2022 and by formal written decision adopted by the Board on December 9, 2022. Thus, the Board’s Final Agency Action finding legal error in the promulgation of the Lake Water Column Standard is final and binding.

**EPA’s Authority**

Pursuant to Section 303(c) of the Clean Water Act and the implementing federal regulations at 40 C.F.R. Part 131, the EPA “is to review and to approve or disapprove State-adopted water quality standards.” 40 C.F.R. 131.5(a). The review involves a determination of “[w]hether the State has followed applicable legal procedures for revising or adopting standards.” 40 C.F.R. 131.5(a)(6).

**Background on the Lake Water Column Standard**

Prior to July 1, 2021, the Board had authority to set water quality standards for Montana’s waters. § 75-5-301(2), MCA (2019). Pursuant to that authority, on October 9, 2020, the Board formally initiated rulemaking for the Lake Water Column Standard by publication in the Montana Administrative Register. A public comment period and public hearing followed. Public comments pointed out that the Lake Water Column Standard was set more stringent than the comparable federal guideline but without complying with the Stringency Statute. The Board, in its responses to the comments, erroneously informed the public that the Lake Water Column Standard was not set more stringent than the federal guideline and that the Stringency Statute, therefore, did not apply. No changes were made to the Lake Water Column Standard, no findings were issued pursuant to the Stringency
Statute, and the Lake Water Column Standard was promulgated and took effect on December 25, 2020.

On December 28, 2020, the Montana Department of Environmental Quality (“DEQ”) forwarded the newly promulgated rule to EPA for review. In the submission, former DEQ Director Shaun McGrath noted that DEQ certified that “the rules were adopted pursuant to state law” and included a letter from DEQ’s chief legal counsel certifying the same.

By letter to the Board dated February 25, 2021, EPA approved ARM 17.30.632, including the Lake Water Column Standard. EPA noted that the Lake Water Column Standard “is more stringent than the recommended water column criterion element for lentic aquatic systems in EPA 2016 (1.5 µg/L).” EPA Letter, p. 12.

**The Petition Process**

In 2021, two petitions were filed with the Board seeking its review of the Lake Water Column Standard pursuant to the Stringency Statute. Rather than proceed with a contested-case type process that requires formal legal submissions, the Board opted to open the process to all interested parties. The process included wide public participation at each Board meeting and at a public hearing held by the Board. The petitions were decided through an open, public process, which generated active participation from citizens from within and outside Montana, as well as non-governmental environmental organizations, state agencies, and EPA. All of the Board’s records, including public comments and filings received, as well as meeting and public hearing transcripts, are available on our website at [https://deq.mt.gov/about/ber](https://deq.mt.gov/about/ber) for your review.

After nearly a year of considerations and deliberations, the Board issued its Final Agency Action and Order concluding that the “Board erred, as a matter of law, when it concluded the Lake Numeric Standard was not more stringent than the comparable federal guideline and that it did not need to make the written findings required by [the Stringency Statute].” Order, pp. 19-20. The Board also concluded that the Lake Water Column Standard “and the rulemaking upon which it is based fail to comply with the Stringency Statute.” Order, p. 20. Finally, the Board concluded, and recently affirmed, that “Because the Board’s rulemaking failed to
comply with [the Stringency Statute], in order to have a valid and enforceable lake water column standard, new rulemaking must be initiated.” Order, p. 20.

**Impact of the Board’s Final Agency Action and Order**

Pursuant to federal and state law, the legal error and failure to comply with the Stringency Statute mean that the Lake Water Column Standard has been invalid since its inception. *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005); *Action on Smoking & Health v. Civil Aeronautics Bd.*, 230 U.S. App. D.C. 1, 713 F.2d 795, 797 (D.C. Cir. 1983); *Clark Fork Coalition v. Tubbs*, 2016 MT 229, 384 Mont. 503, 380 P.3d 771; *Northwest Airlines v. State Tax Appeal Bd.*, 221 Mont. 441, 720 P.2d 676 (1986); *State v. Vainio*, 2001 MT 220, 306 Mont. 439, 35 P.3d 948; *Rosebud County v. Dept. of Rev.*, 257 Mont. 306, 849 P.2d 441, 720 P.2d 676 (1986). The legal error also carries over to the EPA’s approval of the standard, issued February 25, 2021, which relied, in part, on an erroneous legal certification by DEQ that the standard was “duly adopted” under the Montana Water Quality Act and the Montana Administrative Procedures Act.

After an adjudicatory proceeding that lasted more than a year, the Board concluded and affirmed its conclusions that the Lake Water Column Standard was not duly adopted pursuant to the Montana Water Quality Act because both the Lake Water Column Standard and the rulemaking violated the Stringency Statute. The Board’s decision invalidates the Lake Water Column Standard for state purposes. The Board now seeks recognition that the legal error also invalidates the Lake Water Column Standard for federal purposes.

**Conclusion**

Based upon the Cooperative Federalism principles of the Clean Water Act and the error committed by the Board in 2020, we ask that, in accordance with the federal Clean Water Act, including 40 C.F.R. 131.5(a)(6), and 131.21, EPA vacate its prior approval of the Lake Water Column Standard. EPA may wish to consider again the December 2020 submission from Montana, this submission, the Board’s Final Agency Action and Order, as well as the online record supporting it, to support vacatur of that portion of EPA’s prior approval that applies to the Lake Water Column Standard found at ARM 17.30.632(7)(a).
As noted above, this action does not impact the remainder of ARM 17.30.632 that was approved by EPA. We kindly ask for confirmation that EPA has vacated its prior approval of the Lake Water Column Standard within at least 90 days.

Sincerely,

Steven Ruffatto
Chair, Montana Board of Environmental Review

Enclosure:  Final Agency Action and Order of the Board of Environmental Review, Cause Nos. BER 2021-04 and 08 WQ (April 19, 2022)

cc: Tonya Fish, EPA Montana Operations Office
    Darcy O’Connor, Director, Water Division, Region 8
    Chris Dorrington, Director, Montana Department of Environmental Quality
This matter comes before the Board of Environmental Review ("Board") on the Montana Department of Environmental Quality’s ("DEQ") Motion to Alter or Amend ("Motion") the Board of Environmental Review’s Final Agency Action and Order dated April 19, 2022 ("Order"). DEQ’s Motion requests that the Order be amended by striking Paragraph IV.6, which reads: “Because the Board’s rulemaking failed to comply with § 75-5-203, MCA, in order to have a valid and enforceable lake water column standard, new rulemaking must be initiated.”

DEQ accepts the Board’s determination that the “Lake Water Column Standard” for Lake Koocanusa (ARM 17.30.632(7)(a)) is more stringent than the comparable Federal guideline, thus acknowledging that the Lake Water Column Standard violates Subsection (1) of Section 75-5-203, Montana Code Annotated.
“(Stringency Statute”). Although the Lake Water Column Standard violates the Stringency Statute, DEQ argues that the standard is nevertheless valid.

For the reasons stated below, DEQ’s Motion is denied.

The principles at stake here are the rule of law and the imperative that administrative agencies carry out the Legislature’s intent. Whether any particular site-specific lake water column selenium standard for Lake Koocanusa is justified presents a separate question to be resolved through a valid rulemaking process.

DEQ fails to acknowledge or address a fundamental principle of administrative law – a rule promulgated in violation of its enabling statute is invalid from its inception. See Paulsen v. Daniels, 413 F.3d 999, 1008 (9th Cir. 2005); Action on Smoking & Health v. Civil Aeronautics Bd., 230 U.S. App. D.C. 1, 713 F.2d 795, 797 (D.C. Cir. 1983); Clark Fork Coalition v. Tubbs, 2016 MT 229, ¶ 25, 384 Mont. 503, 380 P.3d 771; Northwest Airlines v. State Tax Appeal Bd., 221 Mont. 441, 445, 720 P.2d 676 (1986); State v. Vainio, 2001 MT 220, ¶ 27, 306 Mont. 439, 35 P.3d 948; Rosebud County v. Dept. of Rev., 257 Mont. 306, 310-11, 849 P.2d 441, 720 P.2d 676 (1993). This principle is codified in the Montana Administrative Procedure Act (“MAPA”) at Section 2-4-305(6), MCA (“adoption…. of a rule is not valid or effective unless it is…. consistent and not in conflict with the statute”). Moreover, the legislature did not intend the Stringency Statute to be read in isolation. To the contrary, the Montana Legislature’s
statement of intent for the Stringency Statute expressly states that its provisions are “in addition to all requirements imposed by existing law and rules.” 1995 Bill Text MT H.B. 521.

As the Board fully explained in its Order, the Lake Water Column Standard was promulgated in clear and direct violation of Subsection (1) of the Stringency Statute. DEQ does not challenge this conclusion. Thus, based on the fundamental principle of administrative law described above, the standard was invalid and unenforceable by operation of law from its inception. In order to promulgate a valid site-specific water column selenium standard for Lake Koocanusa, rulemaking in compliance with MAPA and the Montana Water Quality Act, including the Stringency Statute, is required. Section 2-4-305, MCA; Section 75-5-203, MCA.

In its effort to avoid new rulemaking in compliance with MAPA and the Stringency Statute, DEQ relies on the Stringency Statute’s language stating that “[a] petition under this section does not relieve the petitioner of the duty to comply with the challenged rule.” Section 75-5-203(4), MCA. This reliance is misplaced. The clear and plain meaning of this language is that the “petition” does not relieve
the petitioner of the duty to comply. It does not address the effect of a determination that a rule was promulgated in violation of the Stringency Statute.¹

DEQ’s argument that the Stringency Statute allows it to make the required finding after the rule has been adopted in violation of Subsection (1) of the statute fails based on the very language relied on by DEQ. Subsection (4)(a) provides that one remedy is to make the required finding “as provided under subsection (2).” Subsection (2) states that a rule more stringent than the comparable federal guideline may be “adopted” “only if” the department makes the required finding. This clearly places a precondition on the adoption of such a rule and thus precludes DEQ’s position that the finding can be made after adoption.

A primary purpose of the rulemaking provisions of MAPA and the Stringency Statute is to ensure that the public generally and interested parties in particular are fully and accurately informed so that they can meaningfully and effectively participate in the rulemaking process. Section 2-4-101(2); 1995 Bill Text MT H.B. 521. In the present case, the publication initiating rulemaking misinformed the public that the Lake Water Column Standard was not more stringent than the comparable federal guideline. See Order, p. 5. Also, in response to comments in the rulemaking process concerning the Stringency Statute, the

¹ This matter does not present, and the Board need not address, the effect of a determination that a validly adopted rule is more stringent than a subsequently established comparable federal regulation or guideline under Subsection (4) (b) of the Stringency Statute.
Board again misinformed the public that the Lake Water Column Standard was not more stringent than the comparable federal guidelines and thus that the finding called for by the Stringency Statute was not required. See Order, p. 6. Although the public was seriously misinformed during the rulemaking process, DEQ has attempted to rectify the deficiencies by making the required Stringency Statute finding without undertaking a new rulemaking process. These facts are similar to the facts in *Rosebud County v. Dep't of Revenue*, 257 Mont. 306, 849 P.2d 177 (1993).

In the *Rosebud County* case, the Montana Department of Revenue (“DOR”) adopted an amended “rule” without compliance with MAPA and an attempt by DOR to cure the deficiency after the fact by then conducting a rulemaking proceeding was held to be “in essence, a sham” in which interested parties “were denied their right to participate effectively in the governmental process.” *Id.*, at 311. The course of action undertaken by DEQ in this case is subject to the same criticisms. DEQ’s attempt to justify the Lake Water Column Standard after the fact amounts to “post hoc rationalization” which has been repeatedly condemned by the courts in rulemaking proceedings. *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d at 799.

Because the Board has considered and ruled on the merits of DEQ’s Motion, it need not address the arguments regarding the alleged procedural deficiencies of
the Motion. However, the Board’s consideration of DEQ’s Motion on its merits may not be construed as precedent for considering such motions in other cases.

For the reasons stated above, DEQ’s Motion is hereby DENIED.

DATED this 9th day of December, 2022.

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STEVEN RUFFATTO
Board Chair
Board of Environmental Review