

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

*Attorney for Petitioner, Montana
Department of Environmental Quality*

FILED

JAN 09 2023

ANGIE SPARKS, Clerk of District Court
By *[Signature]* Deputy Clerk

MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS & CLARK COUNTY

<p>MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY</p> <p>Petitioner,</p> <p>v.</p> <p>MONTANA BOARD OF ENVIRONMENTAL REVIEW, TECK COAL LIMITED, and THE BOARD OF COUNTY COMMISSIONERS OF LINCOLN COUNTY</p> <p>Respondents</p>	<p>Case No. <u>CDV 2023-21</u></p> <p>KATHY SEELEY</p> <p><i>Email</i></p> <p>PETITION FOR JUDICIAL REVIEW AND FOR DECLARATORY JUDGMENT</p> <p>200</p>
---	--

Petitioner, Montana Department of Environmental Quality ("DEQ"), through counsel, hereby petitions for judicial review of the Final Agency Action and Order of the Board of Environmental Review ("Board") in the Matter Of:

Petitions of Teck Coal Limited and the Board of County Commissioners of Lincoln County, Montana for Review of Administrative Rule of Montana (ARM) 17.30.632(7)(a) Pursuant to § 75-5-203, Montana Code Annotated (MCA) – Stringency Review of Rule Pertaining to Selenium Standard for Lake Koocanusa (“the Board Order”) and the Board’s denial of DEQ’s Motion to Alter or Amend the Board Order. The Board Order is attached hereto as Exhibit 1, and the Board’s Order Denying DEQ’s Motion to Alter or Amend the Board Order is attached hereto as Exhibit 2.

1. INTRODUCTION

1. The Board reviewed and reconsidered its prior stringency determination under § 75-5-203, MCA in an informal proceeding that was neither a contested case nor a rulemaking under the Montana Administrative Procedure Act (MAPA), Title 2, Chapter 4 (MCA).

2. After the Board’s stringency review, the Board Order was issued reversing the Board’s previous determination that the site-specific selenium criterion for Lake Koocanusa of 0.8 micrograms per liter ($\mu\text{g/L}$) was consistent with, and not more stringent than, EPA’s current recommended selenium criterion guidelines for freshwater bodies because it was developed using federally recommended site-specific procedures.

3. On May 17, 2022, DEQ moved to alter or amend the Board Order by striking language in Part IV, Paragraph 6 of the order that provides: “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.”

4. Under the plain language of § 75-5-203(4), MCA, upon receipt of a petition to review a rule, the Board has authority to determine whether the rule is more stringent than federal.

5. Section 75-5-203(4), MCA provides if the Board finds a state rule more stringent than comparable federal regulations or guidelines, the DEQ shall either revise the rule to conform to the federal regulations or guidelines or make the written findings in § 75-5-203(2) and (3), MCA.

6. Upon finding ARM 17.30.632(7)(a) more stringent than comparable federal regulations or guidelines, the Board did not instruct DEQ to follow one of the two statutory remedies, but instead fashioned a remedy that conflicts with the plain language of § 75-5-203, MCA by pronouncing, in order for ARM 17.30.632(7)(a) to be valid and enforceable, new rulemaking must be initiated.

7. The Montana Uniform Declaratory Judgments Act (UDJA) provides that any person whose rights, status, or other legal relations are affected by a statute may have determined any question of construction or validity arising under

the statute and obtain a declaration of rights, status, or other legal relations thereunder. § 27-8-202, MCA.

8. DEQ seeks this Court's review and declaration that the Board misinterpreted § 75-5-203, MCA and erred as a matter of law in ordering DEQ to initiate rulemaking to have a valid and enforceable water column standard for Lake Koocanusa.

II. PARTIES

9. DEQ is a State of Montana executive branch agency created and existing under authority of § 2-15-3501, MCA. DEQ administers and enforces the Montana Water Quality Act (MWQA), the administrative rules adopted under the MWQA, and, as of July 1, 2021, DEQ has sole rulemaking authority under the MWQA, subject to the provisions of §75-5-203, MCA.

10. The Board is an executive branch board, created and existing under authority of § 2-15-3502, MCA, attached to DEQ for administrative purposes.

11. Teck Coal Limited (Teck) is a Canadian company that owns and operates a coal mine in the Elk Valley of British Columbia. On June 30, 2021, Teck petitioned the Board to reconsider its December 2020 determination that ARM 17.30.632(7)(a) was consistent with EPA selenium criterion guidelines and not more stringent than comparable federal regulations or guidelines that address the same circumstance. Teck is not registered to conduct business in the State of

Montana and Teck is not directly regulated by ARM 17.30.632(7)(a), a site-specific water quality standard that applies to Lake Koocanusa within the State of Montana. Teck is a necessary party to this action as it claims an interest which would be affected by the declaration. § 27-8-301, MCA.

12. The Board of County Commissioners of Lincoln County (Lincoln County) is a political subdivision of the State of Montana. The Lake Koocanusa water column standard, codified at ARM 17.30.632(7)(a), applies to surface waters within Lincoln County, Montana. On October 14, 2021, Lincoln County petitioned the Board to reconsider its December 2020 determination that ARM 17.30.632(7)(a) was consistent with EPA selenium criterion guidelines and not more stringent than comparable federal regulations or guidelines that address the same circumstance. Lincoln County is a necessary party to this action as it claims an interest which would be affected by the declaration. § 27-8-301, MCA.

III. JURISDICTION AND VENUE

13. This Court has jurisdiction to declare rights, status, and other legal relations. § 27-8-201, MCA.

14. This Court also has jurisdiction to review an informal agency decision to determine the legal rights of the parties and to determine whether “the action of the [Board] is based upon any error of law, or is wholly unsupported by the

evidence or clearly arbitrary and capricious.” *Johansen v. Department of Natural Resources and Conservation*, 1998 MT 51, ¶ 26, 955 P.2d 653, 659, 288 Mont. 39.

15. Venue is proper in the First Judicial District, Lewis and Clark County, because the challenged action is the Board’s review and decision under § 75-5-203, MCA, which took place at the Montana Department of Environmental Quality Metcalf Building, 1520 East Sixth Avenue, Helena, Lewis and Clark County, Montana and via videoconference on the Zoom platform. § 75-5-107, MCA.

IV. FACTS

16. On December 11, 2020, the Board adopted site specific selenium standards for Lake Koocanusa and the Kootenai River in accordance with the MWQA, § 75-5-101, MCA *et seq.*, and the MAPA §§ 2-4-301 – 315, MCA.

17. At the time of the December 2020 adoption of selenium standards for Lake Koocanusa and the Kootenai River, the Board determined the site-specific selenium criterion for the Lake Koocanusa water column of 0.8 micrograms per liter ($\mu\text{g/L}$), codified at ARM 17.30.632(7)(a), was consistent with the United States Environmental Protection Agency’s (“EPA”) current recommended selenium criterion guidelines for freshwater bodies because it was developed using federally recommended site-specific procedures and, therefore, met the MWQA’s stringency requirement at § 75-5-203, MCA.

18. The applicable federal criteria and guidelines recognize that the federal selenium criterion for lentic (still) freshwater of 1.5 µg/L is not protective in all cases and provides guidance for states and tribes to develop site specific selenium criteria.

19. In Lake Koocanusa, the egg/ovary fish tissue standard has been exceeded 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.

20. ARM 17.30.632(7)(a) was developed in accordance with applicable federal guidelines and was based on a translation of federal fish tissue criteria to develop a water column standard that is protective of aquatic life in Lake Koocanusa, Montana.

21. On February 25, 2021, EPA approved ARM 17.30.632(7)(a) and determined Montana followed EPA's guidance for deriving a site-specific water column criterion for Lake Koocanusa.

22. On June 30, 2021, Teck, and on October 14, 2021, Lincoln County petitioned the Board to reconsider its December 2020 determination that ARM 17.30.632(7)(a) was consistent with EPA selenium criterion guidelines and not more stringent than comparable federal regulations or guidelines that address the same circumstance.

23. The only question presented to the Board by the Teck and Lincoln County Petitions was whether ARM 17.30.632(7)(a) is more stringent than comparable federal regulations or guidelines that address the same circumstance.

24. In a special meeting, held October 29, 2021, the Board voted to accept the petitions presented by Teck and Lincoln County (“the Petitions”), to consolidate the petitions so that the stringency review under § 75-5-203(4), MCA was initiated on October 14, 2021 (the date of the Lincoln County petition), and to review and reconsider the Board’s prior stringency determination under § 75-5-203, MCA in an informal proceeding that was neither a contested case nor a rulemaking under MAPA.

25. The Board received written comments, written responses to comments, and testimony on the Petitions from a variety of public and private entities including representatives of the Petitioners, DEQ, EPA, Tribal First Nations, Montana State Senator Cuffe, Public Interest Groups, and Private Citizens from Canada, Montana, and Idaho.

26. In its February 25, 2022 regularly scheduled meeting, and in response to the Petitions, the Board reversed its December 2020 stringency determination and found the Lake Koochanusa water column standard more stringent than comparable federal regulations or guidelines.

27. In response to the Board's Stringency determination, DEQ began drafting the findings required in § 75-5-203(2) and (3) to support a more stringent than federal standard.

28. DEQ's proposed stringency findings were made available for public review and comment on April 4, 2022.

29. On April 19, 2022, the Board issued the Board Order, which determined ARM 17.30.632(7)(a) is more stringent than comparable Federal regulations or guidelines.

30. DEQ held a public hearing on the proposed stringency findings on April 26, 2022, received comments at the hearing and took written comments on the proposed findings through May 4, 2022.

31. DEQ received nearly 150 comments from the public, the majority of which supported DEQ's stringency findings and the Lake Kooconusa water column standard for selenium.

32. DEQ responded to substantive comments from the public on its stringency findings and the findings were finalized on June 14, 2022.

33. As required by § 75-5-203(4), MCA, DEQ made the written findings, as provided under § 75-5-203(2), MCA, after a public hearing and public comment and based on evidence in the record that:

- a) The Lake Koocanusa water column standard is necessary to protect aquatic life from the toxic effects of selenium; and
- b) The Lake Koocanusa water column standard can mitigate harm to the environment by protecting beneficial uses, preventing impacts to state surface water and aquatic life, and protecting downstream uses and the standard is achievable under current technology including best management practices (BMPs) that prevent storm water from coming into contact with pollutants, minimize impervious surface area and retain runoff where it can be treated through infiltration, and measures that provide riparian buffers and reduce erosion to protect surface water from direct site runoff that may contain pollutants. There are no current or planned point source dischargers to Lake Koocanusa, within Montana, with selenium as a pollutant of concern. Based on evidence in the record there is no significant geological source of selenium in Montana contributing to selenium concentrations in Lake Koocanusa and the two main anthropogenic activities that cause selenium mobilization to the aquatic environment (mining and irrigation of selenium-rich soil) do not occur around Lake Koocanusa in Montana.

34. As required by § 75-5-203(3), MCA, DEQ's written findings reference pertinent, ascertainable, and peer-reviewed scientific studies contained in

the record that contain the basis for DEQ's conclusions. DEQ's findings reference EPA's 304(a) selenium guidance (2016) and scientific studies by Jenni et al. (2017), Presser and Luoma (2010), Presser and Naftz (2020), and a peer-reviewed database and interactive spreadsheets by Jenni and Schmidt (2020).

35. As required by § 75-5-203(3), MCA, DEQ's written findings include information from the hearing record regarding costs to the regulated community that are directly attributable to the proposed standard and there is no evidence in the record to suggest ARM 17.30.632(7)(a), a site-specific standard applicable to Lake Koocanusa, Montana, will result in increased treatment costs for Montana regulated owners or operators of land disturbing activities or facilities that discharge to Lake Koocanusa.

36. DEQ implemented the remedy available to a successful petitioner under § 75-5-203, MCA, which provides DEQ will either make the written findings to support the more stringent standard or revise the rule to conform to the federal standard. *See* 75-5-203(4), MCA.

37. DEQ acknowledged the Board's authority to reconsider and reverse its previous stringency determination and made the findings required in § 75-5-203(2) and (3), MCA, after a public hearing and public comment and based on evidence in the record in compliance with § 75-5-203(4), MCA.

38. The Board acted outside the express authority delegated by the legislature and in conflict with the plain language of § 75-5-203, MCA by directing DEQ to initiate new rulemaking in order to have a valid and enforceable lake water column standard.

39. Under the plain language of § 75-5-203, MCA, DEQ has authority to implement the remedy when a state standard is determined more stringent than comparable federal regulation or guidance by either revising the state rule to conform to the federal regulations or guidelines or by making the written findings necessary to support a more stringent than federal standard. *See* § 75-5-203(4), MCA.

40. On May 17, 2022, DEQ filed a motion to alter or amend the Board Order by striking the portion of the Board Order that provides: “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.” *See* Paragraph IV(6) of the Board Order.

41. In its October 14, 2022 regularly scheduled meeting, the Board denied DEQ’s motion to alter or amend the Board Order and further moved to direct the Board’s attorney, working with the Board Chair, to draft a reasoned decision supporting the Board’s denial of DEQ’s motion to alter or amend the Board Order.

42. The Board adopted the Board Chair's and Board Attorney's proposed written Order Denying DEQ's Motion to Alter or Amend the Board Order at its December 9, 2022 meeting.

43. During the October 14, 2022 Board meeting, the Board also granted a motion by Teck and Lincoln County to submit the Board Order to EPA requesting that EPA vacate its approval of ARM 17.30.632(7)(a) as a water quality standard for federal Clean Water Act purposes and the Board further moved to request that Lincoln County and Teck jointly draft the letter submitting the Board Order to EPA.

44. The Board adopted the Teck and Lincoln County proposed letter submitting the Board Order to EPA with some revisions proposed by the Board Chair at its December 9, 2022 meeting.

45. As the agency charged with administration and enforcement of the MWQA; and, as of July 1, 2021, as the agency with sole rulemaking authority under the MWQA, subject to the provisions of §75-5-203, MCA, DEQ has standing to seek review of the Board Order and the Board's denial of DEQ's motion to alter or amend the Board Order.

46. The Board Order and the Board's denial of DEQ's motion to alter or amend the Board Order are based on clear legal error because the Board acted outside its statutory authority by fashioning a remedy that conflicts with the plain

language of § 75-5-203, MCA, causing injury to DEQ's administration and enforcement of the MWQA by casting doubt on the validity of ARM 17.30.632(7)(a).

47. DEQ seeks redress through this Court's review and declaration that the Board exceeded its authority under § 75-5-203, MCA and erred as a matter of law in ordering that DEQ must initiate new rulemaking to have a valid and enforceable water column standard for Lake Koocanusa.

REQUEST FOR RELIEF

THEREFORE, DEQ respectfully requests that the Court:

1. Pursuant to Title 27, chapter 8, MCA:
 - a. Declare the Board misinterpreted the plain language of § 75-5-203, MCA by ignoring the alternative remedies in 75-5-203(4), MCA which provide, if the Board finds a state rule more stringent than comparable federal regulations or guidelines, DEQ shall either revise the rule to conform to the federal regulations or guidelines or make the written findings in § 75-5-203(2) and (3), MCA.
 - b. Declare the Board misinterpreted the plain language of § 75-5-203, MCA by invalidating ARM 17.30.632(7)(a) upon finding the Lake Koocanusa water column standard more stringent than comparable federal regulations or guidelines under § 75-5-203, MCA.

2. Award such other and further relief as the Court may deem just and proper pursuant to § 27-8-313, MCA.

Dated this 9th day of January, 2023.

STATE OF MONTANA
DEPARTMENT OF ENVIRONMENTAL
QUALITY

By: /s/Kirsten Bowers
KIRSTEN H. BOWERS
Attorney
Mont. Dept. of Environmental Quality
1520 East Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901
(406) 444-4222