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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, CLARK FORK COALITION, IDAHO CONSERVATION LEAGUE, IDAHO RIVERS UNITED,

Plaintiffs,

vs.

MONTANA BOARD OF ENVIRONMENTAL REVIEW, TECK COAL LIMITED, and THE BOARD OF COUNTY COMMISSIONERS OF LINCOLN COUNTY

Defendants.

No. _____

PETITION FOR JUDICIAL REVIEW AND DECLARATORY JUDGMENT

INTRODUCTION

1. Montana Environmental Information Center, Clark Fork Coalition, Idaho Conservation League, and Idaho Rivers United (Conservation Groups) petition for judicial review and seek declaratory relief from the Board of Environmental Review's Final Agency Action and Order (Final Order), Cause Nos. 2021-04 and 08 WQ (April 19, 2022). Attached as Exhibit 1.

2. In its Final Order, the Board acted arbitrarily and capriciously when it (1) erroneously determined that the administrative rule setting Lake Koocanusa's site-specific water column selenium rule was more stringent than the comparable federal guideline, and (2) exceeded its statutory authority by declaring the administrative rule invalid and by ordering new rulemaking as a remedy to its findings.

3. For decades, coal mines in Canada's Elk River Valley have leached harmful selenium into Lake Koocanusa—a 90-mile reservoir that stretches across the Montana-Canada border. Since 1986, selenium levels have more than quadrupled in the Elk River, contributing to more than 95 percent of the selenium pollution in Lake Koocanusa. The pollution in the lake is worsening as coal mining continues to expand.

4. Excessive selenium causes deformities and low reproductive rates in affected aquatic species, specifically threatening Lake Koocanusa's native West Slope Cutthroat Trout and the already endangered White Sturgeon populations in downstream waters of the Kootenai River in Montana and Idaho.

5. To protect Montana's water and its aquatic species from selenium pollution, the Board promulgated ARM 17.30.632(7)(a) on December 24, 2020, setting a site-specific selenium water quality standard of 0.8 µg/L for Lake Koocanusa.

6. The selenium standard, which was recommended by the Montana Department of Environmental Quality (DEQ) and later approved by the U.S. Environmental Protection Agency (EPA), was scientifically calculated to protect all aquatic species, including federally listed species from the harms of selenium pollution.

7. Approximately six months after the new administrative rule was adopted, Teck Coal Limited (Teck)—the Canadian mining company responsible for the selenium pollution in the Lake Koocanusa watershed—petitioned the Board to review the rule under Montana's Stringency Statute. Section 75-5-203(4), MCA. The Lincoln County Board of Commissioners (Lincoln County) filed its own petition for review several months later.

8. The Board consolidated the petitions and, after a limited review process, issued a Final Order attempting to unlawfully reverse its earlier promulgation of Lake Koocanusa's protective selenium rule and ordering remedies that exceed its statutory authority.

9. The Board's Final Order, which was not based on new facts or science, has created confusion and regulatory disagreement over the validity of ARM 17.30.632(7)(a) and Lake Koocanusa's selenium rule. This uncertainty threatens the Conservation Groups' rights to enjoy uncontaminated water in Lake Koocanusa and the Kootenai River as set forth in the Clean Water Act (CWA) and the Montana Water Quality Act (MWQA).

10. To protect these rights, Conservation Groups bring this action for judicial review of the Board's decision and seek declaratory relief to restore the validity of ARM 17.30.632(7)(a) and to clarify the Board's statutory authority when conducting a stringency review, as defined in the plain language of § 75-5-203(4), MCA.

JURISDICTION AND VENUE

11. Conservation Groups bring this action pursuant to the Uniform Declaratory Judgments Act, §§ 27-8-201, 202, MCA, and *Johansen v. State, Dep't of Nat. Res. & Conservation*, 1998 MT 51, ¶ 26, 288 Mont. 39, 955 P.2d 653 (granting the district court jurisdiction to review a non-contested case agency decision to determine the "legal rights of the parties involved" and 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." (quoting *N. Fork Pres. Ass'n v. Dep't of State Lands*, 238 Mont. 451, 456, 778 P.2d 862, 866 (1989)).

12. Venue is proper in the First Judicial District, Lewis and Clark County under § 75-5-107, MCA, because the Board resides in Lewis and Clark County, Montana, and the activity that is the subject of this action occurred within the First Judicial District on Montana.

13. Conservation Groups exhausted all administrative remedies available prior to filing this complaint, including submission of administrative comments during the stringency review process, but the Board ignored their concerns.

14. Conservation Groups have standing to seek judicial review and declaratory relief because their members have long established, enduring connections to the water that will be adversely impacted by the Board's Final Order. Further, the Board's Final Order causes organizational harm to Conservation Groups by requiring the diversion of resources to address this issue in lieu of other issues important to their organizational mission. Additionally, the Board's Final Order injures Conservation Groups members' rights to enjoy uncontaminated water as set forth in the CWA and MWQA. These harms and injuries would be redressed by the requested remedies; therefore, Conservation Groups have standing to file this lawsuit.

PARTIES

15. Plaintiff Montana Environmental Information Center (MEIC) is a nonprofit organization founded in 1973 with approximately 10,000 members and supporters. MEIC is dedicated to the preservation and enhancement of the natural resources and natural environment of Montana, particularly the protection of water quality. MEIC is committed to assuring that state and federal officials comply with and fully uphold the laws of the United States and the State of Montana that are designed to protect the environment from pollution. MEIC and its members have intensive, long-standing recreational, aesthetic, scientific, professional, and spiritual interests in the responsible production and use of energy, and the land, air, and waters across the state. As a part of these efforts, MEIC participated in the stringency review process conducted by the Board. MEIC and its members have conservation, recreation, and cultural interests in protecting aquatic life in Montana waters that are affected by selenium pollution and specifically Lake Koocanusa and the Kootenai River. MEIC members live, work, and recreate in areas that are adversely impacted by selenium pollution in Montana. MEIC brings this action on its own behalf and on behalf of its adversely affected members.

16. Plaintiff Clark Fork Coalition is a non-profit organization based in Missoula, Montana, that works to protect and restore the Clark Fork River and its watershed. The organization was founded in 1985 in response to the environmental damage caused by historic mining activities in the Clark Fork River Basin, which is one of the largest river systems in Montana. The Clark Fork Coalition works on a variety of issues related to water quality, habitat restoration, and public access to the river. The organization engages in advocacy and education to promote policies and practices that support a healthy and thriving river ecosystems, and when appropriate, the Coalition will advocate on issues that are outside or adjacent to the boundaries of

the Clark Fork Basin, recognizing that the health of one watershed impacts the health of surrounding watersheds. The Coalition also works closely with community members, government agencies, and other organizations to coordinate restoration efforts and implement on-the-ground projects that improve the health of the river and its surrounding landscape. Through its work, the Clark Fork Coalition aims to ensure that the Clark Fork River remains a vital resource for current and future generations. The Clark Fork Coalition participated in the public commenting process and the establishment of the Lake Koocanusa selenium rule and the subsequent stringency review process. Clark Fork Coalition and its members have conservation and recreation interests in protecting aquatic life in Montana waters that are affected by selenium pollution. Clark Fork Coalition members live, work, and recreate in areas that are adversely impacted by selenium pollution in Montana. The Clark Fork Coalition brings this action on its own behalf and on behalf of its adversely affected members.

17. Plaintiff Idaho Conservation League (ICL) is an Idaho nonprofit founded in 1973 to protect state-wide conservation goals, with specific focus on clean water and landscape protection. As Idaho's largest state-based, non-profit conservation organization, ICL represents approximately 25,000 members and supporters, including members from all 44 of Idaho's counties. ICL staff work from four offices around the state (Boise, Ketchum, McCall, and Sandpoint) and its volunteer Board of Directors also geographically represents the state. While northern Idaho has always been in ICL's scope of work, ICL's north Idaho office in Sandpoint opened in 2008, providing the organization a local advocacy presence. While ICL's Sandpoint staff have consistently advocated for northern Idaho's lakes and rivers, in 2022, ICL established its first ever dedicated North Idaho Waterways Associate position, demonstrating the organization's commitment to the health of the Kootenai River and other north Idaho water

bodies. Members consistently cite concerns about clean water as a reason for their membership, reflecting their personal interests in protecting human health and the environment. The organization works to protect these values through public education, outreach, advocacy, and policy development. Through its work, ICL aims to ensure that North Idaho's waterways and upstream sources, remain a vital resource for current and future generations. Regarding selenium pollution specifically, ICL participated in the public commenting process associated with the establishment of the Lake Koocanusa selenium rule and the subsequent stringency review process. ICL and its members have conservation, recreation, and cultural interests in protecting aquatic life in downstream waters affected by selenium pollution. ICL members live, work, and recreate in the Lower Kootenai River Watershed, which is adversely impacted by selenium pollution. ICL brings this action on its own behalf and on behalf of its adversely affected members.

18. Plaintiff Idaho Rivers United is a statewide conservation organization committed to the conservation of rivers and wild fish. Founded in 1990 by a grassroots group of paddlers, anglers, and river conservationists, the organization represents those who live, fish, recreate, and otherwise depend on Idaho's rivers. For more than three decades, Idaho Rivers United has safeguarded imperiled wild steelhead and salmon, protected water quality, and defended and promoted the Wild & Scenic values of Idaho's rivers and upstream waterways. Idaho Rivers United submitted written comments during the public comment period and provided testimony at the public meeting associated with the stringency rule review process conducted by the Board. Idaho Rivers United and its members have conservation, recreation, and cultural interests in protecting aquatic life in downstream waters affected by selenium pollution. Idaho Rivers United members live, work, and recreate in areas that are adversely impacted by selenium pollution.

Idaho Rivers United brings this action on its own behalf and on behalf of its adversely affected members.

19. Defendant Montana Board of Environmental Review is an executive branch administrative board created under the authority of § 2-15-3502, MCA. The Board consists of seven members appointed by the governor, and the members must be representative of the geographic areas of the state. The Board is a quasi-judicial body that is attached to DEQ for administrative purposes. DEQ is responsible for the administration and enforcement of the MWQA and the administrative rules adopted under the MWQA. As of July 1, 2021, DEQ, not the Board, has sole rulemaking authority under the MWQA, subject to the provisions of §75-5-203, MCA.

20. Defendant Teck Coal Limited is a Canadian company that owns and operates coal mines upstream from Lake Koocanusa in Elk Valley, British Columbia. Teck petitioned the Board on June 30, 2021, for review of Lake Koocanusa's selenium standard. Teck's petition resulted in the Board's Final Order. As such, Teck is a "necessary party" to this action under MCA, § 27-8-301.

21. Defendant Board of County Commissioners of Lincoln County (Lincoln County) is the governing body of Lincoln County, a political subdivision of the State of Montana. Lincoln County petitioned the Board on October 14, 2021, for review of Lake Koocanusa's selenium standard. Lincoln County's petition resulted in the Board's Final Order. As such, Lincoln County is a "necessary party" to this action under MCA, § 27-8-301.

LEGAL BACKGROUND

I. THE CLEAN WATER ACT

22. Congress enacted the CWA with the goal of eliminating "the discharge of pollutants" into the waters of the United States. 33 U.S.C. § 1251(a)(1).

23. The objective of the law is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* § 1251(a).

24. To that end, the CWA provides for water quality standards. Water quality standards consist of the designated uses of the navigable waters, water quality criteria, and an antidegradation policy. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.3(i), 131.6.

25. Water quality standards are critical to ensuring the CWA's objective of assuring that our waters "provide[] for the protection and propagation of fish, shellfish, and wildlife and provide[] for recreation in and on the water." 33 U.S.C. § 1251(a)(2).

26. Under the cooperative federalism structure of the CWA, states must designate uses, and establish and periodically revise water quality standards for all waterbodies. 33 U.S.C. § 1313(a), (c).

27. New or revised water quality standards established by a state must be submitted to and approved by EPA before taking effect. *Id.* § 1313(c)(2), (3).

28. Water quality criteria must be based on sound scientific analysis and must be sufficient to assure protection of designated uses. 40 C.F.R. § 131.11(b). Water quality standards must also ensure protection of downstream waters. *Id.* § 131.10(b).

II. THE MONTANA WATER QUALITY ACT

29. DEQ administers Montana's water quality standards pursuant to the CWA and the MWQA. §§ 75-5-101–1126, MCA.

30. The MWQA, like the CWA, is intended to "protect[], maintain[], and improve[]" the waters of Montana and to "provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources." *Id.* § 75-5-102(1), § 75-5-101(1), MCA.

31. Beyond assuring compliance with the CWA, the MWQA provides "additional and cumulative remedies to prevent, abate, and control the pollution of state waters." *Id.* § 75-5-102(1).

32. Pursuant to the CWA and MWQA, Montana has established water quality standards for all waters within the state. *Id.* § 75-5-301; ARM 17.30.601–670.

III. MONTANA'S STRINGENCY STATUTE

33. Under Montana's Stringency Statute, DEQ may not promulgate a water quality rule that is more stringent than the comparable federal standard or guideline, except as provided in § 75-5-203(2)-(5), MCA.

34. A person affected by a water quality rule may petition the Board to review the rule to determine whether the rule is more stringent than the comparable federal guideline. *Id.* 75-5-203(4)(a).

35. The Board's authority under the Montana Stringency Statute is narrowly tailored and only allows the Board to review the rule and make a determination on whether the rule is more stringent than the comparable federal regulation or guideline.

36. If the Board determines that the rule is more stringent than the comparable federal regulation or guideline, the plain language of the Stringency Statute passes authority to DEQ to decide and implement one of two remedies; DEQ may choose to (1) revise the rule to conform to the federal regulations, or, alternatively, (2) make written findings that show how the standard

protects public health or the environment of the state, among other requirements provided under § 75-5-203(2)–(4), MCA.

FACTUAL BACKGROUND

37. Lake Koocanusa occupies a unique role in the Northern Rockies ecosystem. Framed by the Purcell and Salish Mountains and created by the construction of the Libby Dam on the Kootenai River, Lake Koocanusa supports a wide variety of fish and wildlife, including federally listed species.

38. For example, Lake Koocanusa hosts a large and stable population of Kokanee salmon, Kamloops (rainbow) trout, West slope cutthroat trout, burbot, and endangered bull trout, among other species. Below Libby Dam, the lake's downstream waters crucially support the habitat of the endangered White Sturgeon in the Kootenai River. The watershed is also home to abundant wildlife, including bald eagles, elk, Canada lynx, and grizzly bears.

39. Lake Koocanusa, with its crystal-clear water and mountainous landscape, is a popular recreation destination for fishing, hiking, boating, rock climbing, and camping. Its extensive, forested shoreline hosts public campgrounds, picnic areas, swimming beaches, boat ramps, and day-use facilities. The area draws visitors from both sides of the international border and provides opportunities for outdoor recreation-based businesses and lodging facilities.

40. Lake Koocanusa and the Kootenai River are contaminated with selenium pollution.

IV. SELENIUM CONTAMINATION IN THE LAKE KOOCANUSA WATERSHED

41. Teck owns four metallurgical coal mines in Canada's Elk River Valley—a main tributary of Lake Koocanusa.

42. Selenium enters surface and groundwater in the Elk River Valley from Teck's waste rock piles that are a byproduct of its open pit coal mining operations. The Elk River flows directly into Lake Koocanusa.

43. Selenium levels in the Elk River have more than quadrupled since 1986, continually increasing each year.

44. The Elk River contributes approximately ninety-five percent (95%) of the selenium pollution in Lake Koocanusa.

45. In 2012, DEQ designated Lake Koocanusa as an impaired water body under section 303(d) of the CWA due to selenium contamination from sources outside of Montana's borders, identifying that the lake's condition did not fully support aquatic life as a beneficial use.

46. Idaho has also listed the Kootenai River as impaired due to selenium pollution.

47. Selenium contamination harms aquatic life in Lake Koocanusa and its downstream waters primarily in its reproductive stage. The damage can lead to reduced production of viable eggs, reduced fish growth, mortality, or deformity, altered liver enzyme function, and winter stress syndrome. Selenium can also cause harm to people consuming fish that have accumulated high levels of selenium.

V. THE LAKE KOOCANUSA SELENIUM RULE

48. In response to this worsening selenium pollution in Lake Koocanusa, the governments of Montana and British Columbia, tribes, and scientists began a years-long

intensive scientific review process to develop a site-specific selenium rule for the reservoir that would protect its aquatic life and beneficial uses.

49. In 2010, DEQ and British Columbia Environmental Ministry began coordinated efforts to address regional transboundary water quality issues, including those in the Elk River. A 2013 British Columbia ministerial order was signed to recognize water quality impacts in Lake Koocanusa from past, current, and future mining activities in the Elk Valley, to remediate water quality effects, and to guide environmental management. This order led to the 2015 establishment of the bi-national Lake Koocanusa Monitoring and Research Working Group (Working Group).

50. The Working Group, comprised of U.S. and Canadian stakeholders, met twice a year and formed a Selenium Technical Subcommittee with top experts in selenium, which met almost 30 times to guide the data collection and standard development process.

51. In 2016, the EPA updated its federal selenium criteria guideline pursuant to section 304(a) of the CWA, which urged states and tribes to develop site-specific selenium standards, whenever possible, due to the local environmental factors that affect selenium accumulation in aquatic ecosystems. “Aquatic Life Ambient Water Quality Criterion for Selenium – Freshwater 2016”, United States Environmental Protection Agency at K-2.

52. The 2016 Federal Selenium Guideline recognized that the national water column criterion elements concentrations of 3.1 µg/L for lotic (flowing) waters and 1.5 µg/L for lentic (still) waters provide a high probability of protection for most, but not all, aquatic systems.

53. The 2016 Federal Selenium Guideline recognizes that “for particular sites, the appropriateness of the national criterion can be resolved by site specific criteria when necessary, as recommended in Appendix K.”

54. Appendix K of the Federal Selenium Guideline recognizes that in certain circumstances, such as when "threatened or endangered fish species are present, states and tribes may need to derive alternative water column elements with a refined protection goal that account for site-specific bioaccumulation characteristics."

55. Appendix K provides two EPA-approved approaches, the mechanistic modeling approach and the empirical bioaccumulation factor (BAF) approach, which states and tribes can use for calculating site-specific selenium standards.

56. Based on data collected through the years-long standard development process, DEQ determined that the generalized, national EPA selenium criteria for lentic water of 1.5 μg/L would not be protective of the aquatic life beneficial use for Lake Koocanusa.

57. In 2020, at the completion of a multi-year, coalition-led data collection effort, DEQ relied on the formulas in Appendix K of the 2016 Federal Selenium Guideline to calculate and propose a water column selenium standard of 0.8 μg/L for Lake Koocanusa.

58. DEQ's proposed standard was the result of a comprehensive process between 2015 and 2020 that involved significant stakeholder collaboration and included more public meetings and external expertise than any process DEQ had previously undertaken. The process included seven large panel discussion public meetings in northwest Montana, as well as smaller meetings with local officials in the area.

59. Conservation Group members participated in the public rule adoption process and encouraged the Board to adopt the site-specific rule to protect their interests in clean water. In light of water quality and fish tissue data documenting increasing selenium levels in several species of fish in Lake Koocanusa, Conservation Groups and others commented on the need to protect aquatic life in Lake Koocanusa and downstream waters.

60. The Board carefully considered and adopted the 0.8 μg/L site-specific water column selenium rule for Lake Koocanusa in accordance with the MWQA, § 75-5-101, MCA *et seq*. The rule was formally adopted and codified in ARM 17.30.632(7)(a), on December 24, 2020.

61. In adopting ARM 17.30.632(7)(a), the Board determined that the standard was not more stringent than EPA's 2016 Federal Selenium Guideline because it was developed through EPA's federally recommended site-specific procedures set forth in Appendix K.

62. Appendix K is included in the EPA's 2016 Federal Selenium Guideline—the same guideline that the Board compared ARM 17.30.632(7)(a) to determine that the rule was not more stringent than the federal guideline addressing the same circumstance. Section 75-5-203(1), MCA.

63. In February of 2021, the EPA reviewed and approved the selenium standard set forth in ARM 17.30.632(7)(a), determining that the rule was based on sound scientific rationale, protective of designated uses, and compliant with the CWA.

VI. THE BOARD'S REVERSAL OF ITS STRINGENCY DETERMINATION

64. Just months following the Board's and EPA's approval of the Lake Koocanusa site-specific selenium rule, in June of 2021, Teck petitioned the Board pursuant to the Montana Stringency Statute to review the rule. Teck argued that, despite the Board's recent findings, the rule was more stringent than its comparable federal regulation or guideline. Teck argued that the Board should not consider EPA's site-specific modeling included in Appendix K of the 2016 Federal Selenium Guideline. Instead, the mining company wanted the Board to discard the EPA's Appendix K and only compare ARM 17.30.632(7)(a)'s 0.8 μg/L site-specific water column standard to the general selenium standard of 1.5 μg/L—which applies in non-site-specific cases.

65. Lincoln County filed a petition requesting the same on October 14, 2021. The Board accepted and consolidated Teck and Lincoln County's petitions for the sole question of stringency review under § 75-5-203(4), MCA.

66. At a public hearing held on January 31, 2022, DEQ testified in opposition of Teck and Lincoln County's petitions, reminding the Board that the selenium rule was promulgated in compliance with the EPA's 2016 Federal Selenium Guideline which specifically encourages the adoption of site-specific standards in accordance with the scientifically approved methods set forth in Appendix K. DEQ further pointed out that the selenium standard is fish tissue based, rather than water column based, and that the 0.8 μg/L water column standard was translated from the egg-ovary criteria of 15.1 μg/L, which is also in alignment with the 2016 Federal Selenium Guideline. DEQ urged the Board to reject the petitions based on either method of showing that the Selenium Rule was not more stringent than its federal counterpart.

67. EPA also weighed in with public comment during the Board's stringency review process, stating that "[t]he state concluded 0.8 µg/L was necessary based on site-specific data from Lake Koocanusa to achieve EPA's recommended fish tissue concentrations, or stated another way, that 1.5 µg/L would not protect the aquatic life use. Montana met the federal requirements and followed EPA's guidance for deriving a site-specific water column element." EPA further commented that "EPA approved ARM 17.30.632(7) and it remains in effect for CWA purposes unless and until EPA approves a new state submission consistent with the CWA and EPA's WQS regulation."

68. The Board's limited stringency review process did not constitute a contested case hearing or an agency rulemaking under Montana Administrative Procedure Act (MAPA).

69. No new factual evidence or science was presented during the petition process.

70. On April 19, 2022, the Board issued its Final Order, finding that ARM 17.30.632(7)(a) is more stringent than the 2016 Federal Selenium Guideline—completely reversing its adoption of the selenium rule in December of 2020. Final Order, section IV, ¶ 2.

71. The Board based its decision solely on the generalized 1.5 µg/L numeric value of the water column criterion element for lentic aquatic systems and wholly discarded the rest of the 2016 Federal Selenium Guideline that allows for site-specific standards to be calculated under Appendix K.

72. The Board also erroneously determined that the initial rulemaking was defective because the public did not have an opportunity to comment on the Board's initial stringency determination despite DEQ's assurance that the Board received public comments in its initial stringency determination.

73. After the Board made its determination on stringency, it went a step further and declared ARM 17.30.632(7)(a) invalid and ordered new rulemaking to be conducted—actions that exceed the Board's statutory authority under the Montana Stringency Statute, § 75-2-207, MCA. Final Order, section IV, ¶ 6.

74. Recognizing that the Board overstepped its statutory authority, DEQ filed a motion to alter or amend the Board's Final Order, asking the Board to strike the clause that 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."

75. The Board denied DEQ's motion to alter or amend and carried on with its erroneous and unlawful ruling.

76. The Board ordered Teck and Lincoln County to draft a letter for the Board's signature to be sent to the EPA, notifying the agency that ARM 17.30.632(7)(a) and, consequently, the 0.8 µg/L selenium rule for Lake Koocanusa was no longer valid—despite EPA's prior approval under the CWA.

77. Answering the Board's letter, EPA replied that the 0.8 µg/L standard had already been approved and would remain in effect.

78. DEQ has not initiated any new rulemaking as directed in the Board's Final Order.

79. Instead, DEQ filed a Petition for Judicial Review and for Declaratory Judgment on January 9, 2023, in the First Judicial District, Cause No. CDV-2023-21, to seek "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."

80. Conservation Groups file this action seeking identical relief as DEQ in Cause No. CDV-2023-21 while also raising an additional claim that challenges the Board's finding that the water column selenium standard in ARM 17.30.632(7)(a) is more stringent than the federal guideline. The Board's Final Order was made in error and was not supported by any substantial evidence.

81. Conservation Groups are harmed by the Board's arbitrary and capricious findings and by the Board's actions that exceed its statutory authority as set forth below:

FIRST CLAIM
(THE BOARD'S FINAL ORDER IS ARBITRARY, CAPRICIOUS, UNLAWFUL, AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE)

82. Conservation Groups hereby reallege and incorporate all preceding paragraphs.

83. Agency decisions not classified as a contested case under MAPA are reviewed by district courts to determine whether the decision was "arbitrary, capricious, unlawful, or unsupported by substantial evidence." *Johansen*, ¶ 19.

84. The court conducts this review "based on a consideration of the relevant factors and whether there has been a clear error of judgment." *N. Fork Pres. Ass'n*, 238 Mont. at 465, 778 P.2d at 871 (quoting *Marsh v. Or. Nat. Resources Council*, 490 U.S. 360, 378 (1989)).

85. The court will not "automatically defer to the agency 'without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision.'" *Friends of the Wild Swan v. DNRC*, 2000 MT 209, ¶ 28, 301 Mont. 1, 6 P.3d 972 (quoting *Marsh*, 490 U.S. at 378); *Clark Fork Coalition* v. *Mont. Dep't of Env't Quality*, 2008 MT 407, ¶ 21, 347 Mont. 197, 197 P.3d 482.

86. The Board did not make a "reasoned decision" when it determined that ARM 17.30.632(7)(a) was more stringent than the comparable federal guideline. Final Order at 17, ¶ 13, section IV, ¶ 2.

87. The federal guideline that the Board was required to compare ARM 17.30.632(7)(a) to is EPA's 2016 Federal Selenium Guideline, which sets a general, nationwide selenium standard at 1.5 µg/L and urges state and tribal governments to depart from that general standard "with a refined protection goal that account for site-specific bioaccumulation characteristics." The 2016 Federal Selenium Guideline also includes Appendix K, which recognizes and encourages states and tribes to implement site-standards in areas where the general 1.5 µg/L standard falls short of protecting beneficial uses.

88. The Board's finding is clear erroneous because ARM 17.30.632(7)(a) was created under the approved methods contained in the 2016 Federal Selenium Guideline. The rule's 0.8 µg/L selenium standard cannot be more stringent than the Federal Selenium Guideline that was used to create it.

89. The Board's Final Order considers no new fact or scientific evidence that would warrant a complete reversal of its findings, and, therefore, remains wholly unsupported by the facts contained in the record.

90. The Board, in making its erroneous finding, simply compared the numeric values between the rule's 0.8 µg/L selenium standard and the 2016 Federal Selenium Guideline's general, standardized federal recommendation, willfully ignoring the site specific modeling set forth under Appendix K of the 2016 Federal Selenium Guideline.

91. The Board erroneously and without substantial evidence determined that Appendix K modeling was not part of the 2016 Federal Selenium Guideline for comparison under the Selenium Statute.

92. The Board further erred when it found: "[a]lthough the EPA Site-Specific Models are not the comparable guideline, it is significant to note that the modeling conducted by DEQ to determine the Lake Numeric Standard used an input criterion more stringent than the federal guideline, thus, rendering the Lake Numerical Standard more stringent even under DEQ's theory." Final Order at 18. The 0.8 μg/L water column standard is not more stringent than the standards recommended in the 2016 Federal Selenium Guideline.

93. Further, the Board's determination was arbitrary and capricious in that the Board failed to consider or cite to any new factual or scientific evidence that would support its decision. The result of the Board's arbitrary and capricious decision is a wholly erroneous finding that the rule is more stringent than the 2016 Federal Selenium Guideline.

94. The Board's Final Order is therefore arbitrary, capricious, and unlawful in its findings, and remains unsupported by any substantial evidence.

95. The Board's erroneous findings in its Final Order causes injury to Conservation Groups by casting doubt on the validity of ARM 17.30.632(7)(a) and compromising their rights to clean water.

SECOND CLAIM
(VIOLATION OF § 75-5-203(4), MCA)

96. Conservation Groups hereby reallege and incorporate all preceding paragraphs.

97. The plain language of §75-5-203(4)(a), MCA, grants the Board the authority to review a water quality rule and make a determination as to whether the rule is more stringent than the comparable federal guideline that addresses the same circumstances.

98. The Board reviewed ARM 17.30.632(7)(a) and determined that it was more stringent than the federal guideline.

99. Setting aside that the Board's determination was in error, the Board's next step—declaring ARM 17.30.632(7)(a) invalid—was outside the scope of its authority under plain language of §75-5-203, MCA.

100. Section 75-5-203, MCA, does not give the Board authority to invalidate a rule, even upon a finding that the rule is more stringent than the federal regulations or guidelines.

101. By invalidating ARM 17.30.632(7)(a), the Board exceeded its authority and violated the plain language of §75-5-203, MCA.

102. The Board's erroneous findings in its Final Order and its actions exceeding its statutory authority causes injury to Conservation Groups by casting doubt on the validity of ARM 17.30.632(7)(a) and compromising their rights to clean water.

THIRD CLAIM
(VIOLATION OF § 75-5-203(4), MCA)

103. Conservation Groups hereby reallege and incorporate all preceding paragraphs.

104. Once the Board made its determination in its Final Order that ARM 17.30.632(7)(a) was more stringent than the comparable federal guideline, then DEQ, not the Board, shall comply by either revising the rule to conform to the federal guidelines or by making written finding as provided in the Stringency Statute. § 75-5-203, MCA.

105. The Board ignored DEQ's statutory authority to select the remedies under the plain language of § 75-5-203, MCA, and instead ordered new rulemaking to take place.

106. Setting aside the Board's erroneous conclusion that ARM is more stringent than federal guideline, the Board's next step—ordering new rulemaking—exceeded its authority under §75-5-203, MCA.

107. The Board's erroneous findings in its Final Order and its actions exceeding its statutory authority causes injury to Conservation Groups by casting doubt on the validity of ARM 17.30.632(7)(a) and compromising their rights to clean water.

REQUEST FOR RELIEF

THEREFORE, Conservation Groups respectfully request that this Court:

1. Declare that, based on the record, the Board's Final Agency Action and Order was unlawful, arbitrary and capricious, or unsupported by evidence, and, therefore, in error when it found that ARM 17.30.632(7)(a) was more stringent than the federal guideline;

2. Declare that the Board exceeded its statutory authority under § 75-5-203, MCA when it declared ARM 17.30.632(7)(a) invalid;

3. Declare that the Board exceeded its statutory authority under § 75-5-203, MCA by ordering new rulemaking instead of allowing DEQ to administer remedies under the statute, and;

4. Any other relief that the Court deems proper and just.

Respectfully submitted this 18th day of May, 2023.

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EXHIBIT 1

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: PETITIONS OF TECK COAL LIMITED AND THE BOARD OF COUNTY COMMISSIONERS OF LINCOLN COUNTY, MONTANA, FOR REVIEW OF ARM 17.30.632(7)(A) PURSUANT TO MONT. CODE ANN. SECTION 75-5-203 – STRINGENCY REVIEW OF RULE PERTAINING TO SELENIUM STANDARD FOR LAKE KOOCANUSA	**CAUSE NOS. BER 2021-04 and 08 WQ** **FINAL AGENCY ACTION AND ORDER OF THE BOARD OF ENVIRONMENTAL REVIEW**

I. PROCEDURAL HISTORY

On June 30, 2021, Teck Coal Limited ("Teck") petitioned the Board of Environmental Review ("Board" or "BER") under § 75-5-203, MCA (the "Stringency Statute"), to determine whether Administrative Rules of Montana (ARM) 17.30.632(7)(a) (the "Lake Numeric Standard"), which sets a water column standard for selenium in Lake Koocanusa of 0.8 micrograms per liter, is more stringent than the comparable federal guideline. On October 14, 2021, the Board of County Commissioners of Lincoln County ("Lincoln County") filed a similar petition with the Board. The Board consolidated the two petitions (collectively, the "Petitions") and determined, with Teck's waiver, that the eight-month period provided in § 75-5-203(4)(a), MCA, would commence on October 14, 2021, the

date Lincoln County filed its petition. The rulemaking record that culminated in the promulgation of the Lake Numeric Standard (the "Record" or "RR") was compiled and made available to the public and the Board on December 15, 2021.[1] The Board requested submission of written comments addressing the issues presented by the Petitions by January 13, 2022. The Board received comments from the Idaho Conservation League; the Confederated Salish and Kootenai Tribes, together with the Kootenai Tribe of Idaho (collectively, the "Tribes"); Lincoln County; the Montana Department of Environmental Quality ("DEQ" or the "Department"); the Montana Environmental Information Center together with the Clark Fork Coalition (collectively, "MEIC/CFC"); the U.S. Environmental Protection Agency ("EPA"); Montana Trout Unlimited; the Montana Mining Association; the Treasure State Resources Association of Montana; Wildsight; and Teck. The Board requested that responsive comments be submitted by January 21, 2022. The Board received responses from Teck, DEQ, EPA, and Lincoln County.

On January 31, 2022, the Board held a public hearing to receive oral comments on the Petitions. Oral comments were received from Montana Senator Mike Cuffe (Senate District 1); Teck; Lincoln County; Mr. John O'Connor from

[1] The Record or "RR" can be found on the BER Website under the Selenium Rule Review "Record Supporting the Promulgation of ARM 17.30.632" https://deq.mt.gov/files/DEQAdmin/BER/Documents/Record.pdf

Bonners Ferry, Idaho; Lincoln County Commissioner Jerry Bennett; Lincoln County Commissioner Josh Letcher; EPA; DEQ; the Tribes; the Idaho Conservation League; MEIC/CFC; Wildsight; Idaho Rivers United; Ms. Erin Sexton; Montana Trout Unlimited; Ms. Lexie Defremery from Bonner County, Idaho; Ms. Becca Rodack from Boundary County, Idaho; and the British Columbia and Montana chapters of the Back Country Hunters and Anglers. A transcript of the public hearing was made available to the Board. The Board requested proposed decision documents by February 11, 2022, and received proposed documents from DEQ, MEIC/CFC, and Teck.

After detailed consideration and analysis of the records, documents, transcripts, and comments; and the relevant rules, statutes, and other authorities; and after in-depth deliberations at its February 25 and April 8, 2022 meetings; the Board makes the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

1. The controlling statute is § 75-5-203, MCA, the Stringency Statute, which reads in relevant part, following its amendment in 2021:

> **State regulations no more stringent than federal regulations or guidelines.** (1) Except as provided in subsections (2) through (5) …. the department [previously board] may not adopt a rule to implement **75-5-301**, **75-5-302**, **75-5-303**, or **75-5-310** that is more stringent than the comparable federal regulations or guidelines that address the same circumstances. …

(2) The department [previously board] may adopt a rule to implement this chapter that is more stringent than comparable federal regulations or guidelines only if the department [previously board] makes a written finding after a public hearing and public comment and based on evidence in the record that:

(a) the proposed state standard or requirement protects public health or the environment of the state; and

(b) the state standard or requirement to be imposed can mitigate harm to the public health or environment and is achievable under current technology.

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

(4) (a) A person affected by a rule that the person believes to be more stringent than comparable federal regulations or guidelines may petition the board to review the rule. If the board determines that the rule is more stringent than comparable federal regulations or guidelines, the department [previously board] shall comply with this section by either revising the rule to conform to the federal regulations or guidelines or by making the written finding, as provided under subsection (2), within a reasonable period of time, not to exceed 8 months after receiving the petition….

2. Upon request of DEQ, acting under its authority provided in §§ 75-5-201 and 75-5-301, MCA, the Board initiated rulemaking of the new selenium rules (ARM 17.30.632), including the Lake Numeric Standard, by publication in the Montana Administrative Register on October 9, 2020. RR 000044 (9/24/20 BER Mtg. Agenda); RR 001326-31 (10/09/20 Notice to Hold Hr'g on Prop. Amend. ARM 17.30.602 and ARM 17.30.632).

3. In conjunction with its request for rulemaking, DEQ advised the Board that the Lake Numeric Standard is not more stringent than the EPA recommended criteria because it was "developed using federally-recommended site-specific procedures." RR 000001-2 (9/09/20 Mem. from Kirsten H. Bowers [DEQ Att'y] to BER). The Board's initiation of rulemaking for the Lake Numeric Standard adopted DEQ's conclusion asserting that "[t]he 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; therefore, it is more accurate than the *generally applicable national lentic (lake) number*." RR 001330 (19 Mont. Admin. Reg., 1793 (Oct. 9, 2020)) (emphasis added). Thus, DEQ and the Board rejected the "generally applicable national lentic (lake) number" as the comparable federal guideline. The Board relied on DEQ's conclusion regarding stringency throughout the rulemaking. RR 002333-2334, 2422, 2427 (12/11/20 BER Transcript); RR 002544-45 (12/24/20 Notice of Amend. and Adoption for ARM 17.30.602 and ARM 17.30.632 in Mont. Admin. Reg.).

4. The Board finalized promulgation of the new selenium rules by publication in the Montana Administrative Register on December 24, 2020. RR 002482-2546 (12/24/20 Notice of Amend. and Adoption for ARM 17.30.602 and ARM 17.30.632 in Mont. Admin. Reg.).

5. Regarding stringency of the Lake Numeric Standard compared to the federal guideline, the Board's final promulgation stated that the Lake Numeric Standard was not more stringent than the federal guideline because "[t]he 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 the site-specific procedures set forth by EPA in its current 304(a) guidance." RR 002544-45 (12/24/20 Notice of Amend. and Adoption for ARM 17.30.602 and ARM 17.30.632 in Mont. Admin. Reg.). Because the Board concluded that the Lake Numeric Standard was not more stringent than the federal guideline, it also concluded that it "is not required to make written findings required by § 75-5-203(2), MCA." *Id*.

6. The Petitions sought the Board's review of the Lake Numeric Standard pursuant to the Stringency Statute to determine if it is more stringent than the comparable federal guideline that addresses the same circumstances and, if it is, whether the Stringency Statute's requisite findings had been or could be made based on the Record and whether the rulemaking publications complied with the Stringency Statute.[2]

[2] *See* Petition to Review ARM 17.30.632 For Compliance with MCA § 75-5-203 ("Teck Petition"), June 30, 2021, BER Mtg. Materials for Aug. 13, 2021, pg. 105, retrieved from https://deq.mt.gov/files/DEQAdmin/BER/Documents/2021%20Agendas/BER-Packet-20210813.PDF (on March 25, 2022); Petition to Review ARM 17.30.632

7. Teck is a company conducting coal mining operations in the Elk Valley area in British Columbia. Teck's Elk Valley operations are subject to regulation by British Columbia pursuant to, among other laws, Ministerial Order No. M113, the 2014 Elk Valley Water Quality Plan, and Permit 107517 issued to Teck by the B.C. Ministry of Environment under the B.C. Environmental Management Act. Permit 107517 includes selenium water quality compliance limits and site performance objectives for Teck's discharges that eventually enter the Elk River, which is a tributary to Lake Koocanusa. RR 000087-88, 91-92, 94-99 (9/2020, DEQ, *Derivation of a Site-Specific Water Column Selenium Standard for Lake Koocanusa* ("DEQ Derivation Doc."); *see also* Teck Petition, pp. 14-15.

8. Teck participated in collaborative efforts, initiated by Teck's Canadian regulators, to consider whether British Columbia's Water Quality Objective of 2.0 micrograms per liter is protective of Lake Koocanusa. DEQ participated in the collaborative efforts. Some of the information and data used, developed, and considered during that process, including information and data provided by Teck, are referenced and relied upon in the technical support documents that serve as the basis for the new rule, ARM 17.30.632. *Id.*

For Compliance with MCA § 75-5-203 ("Lincoln County Petition"), Oct. 14, 2021, BER Mtg. Materials for Oct. 29, 2021, pg. 161, retrieved from https://deq.mt.gov/files/DEQAdmin/BER/Documents/2021%20Agendas/20211029_Packet.pdf (on March 25, 2022).

9. Teck participated in the rulemaking for ARM 17.30.632 by attending public meetings, submitting formal written comments and delivering oral comments at public meetings, including the November 5, 2020 public hearing. RR 001269-73 (9/24/20 BER Transcript); RR 001465-71 (11/5/20 BER Transcript); RR 001894-2091 (11/23/20 Teck Comment Letter). Teck's comments included its assertion that the Lake Numeric Standard failed to comply with the Stringency Statute. *Id.*

10. On December 31, 2020, DEQ Director McGrath wrote to the International Joint Commission, which has authority to enforce the Boundary Waters Treaty, requesting action against transboundary pollution stemming from Elk River valley mining operations. Teck Petition, Ex. D.

11. On December 11, 2020, DEQ Director McGrath testified before the Board that "[b]y us adopting this standard today, what that does is continue to put the pressure on British Columbia to indeed adopt their own standard that is aligned with us." RR 002402 (12/11/20 BER Transcript).

12. The Board of County Commissioners of Lincoln County is a political subdivision of the State of Montana. That portion of Lake Koocanusa located in the United States is within Lincoln County. Lincoln County Petition, p. 14.

13. Lincoln County participated in the rulemaking for ARM 17.30.632 by attending public meetings, submitting formal written comments, and delivering

oral comments at public meetings. RR 001796-1801 (Lincoln County Comment Letter); RR 001439-1443 (11/5/20 BER Transcript).

14. When promulgating the Lake Numeric Standard, the Board "recognize[d] that the lake will probably be considered impaired for selenium." RR 002505 (20 Mont. Admin. Reg. 2359 (12/24/20)).

15. When promulgating the Lake Numeric Standard, the Board noted that if Lake Koocanusa is listed as impaired for selenium, "then new projects would need to discharge at concentrations equal to or less than the proposed standard of 0.8 [micrograms per liter]." RR 002497 (20 Mont. Admin. Reg. 2351 (12/24/20)).

16. There is no federal standard for selenium, but there is a federal guideline. RR 000306 (2016 EPA Guideline, explaining the distinction between a CWA Section 304(a)(1) guideline, which "represents a non-regulatory, scientific assessment of ecological effects" and a water quality standard which is associated with a specific designated use and adopted by a state or tribe).

17. On July 13, 2016, EPA announced the release of final updated guidelines to states and tribes for selenium. 81 Fed. Reg. 45285-86 (7/13/16). "EPA's recommended water quality criteria are scientifically derived numeric values that protect aquatic life or human health from the deleterious effects of pollutants in ambient water." *Id*. For selenium in lentic water (still or slow-moving fresh water), EPA recommends a water column numeric value of 1.5 micrograms per

liter (the "EPA National Lake Numeric Guideline"); a fish whole body tissue numeric value of 8.5 mg/kg dw; a fish muscle tissue numeric value of 11.3 mg/kg dw; and a fish egg/ovary numeric value of 15.1 mg/kg dw. *Id*.; RR 000313 (EPA, *Aquatic Life Ambient Water Quality Criterion for Selenium – Freshwater 2016,* Table 1).

18. The 2016 EPA Guideline was "derived for the protection of 95% of species nation-wide," specifically including white sturgeon in the Kootenai River, from impacts of selenium, including selenium released by "resource extraction activities." RR 000090 (DEQ Derivation Doc.); RR 000320, 455-456 (2016 EPA Guideline). Appendix K to the 2016 EPA Guideline provides suggested models (the "EPA Site-Specific Models") for use by states and tribes if they choose to deviate for specific sites from the generally applicable national guideline. RR 001035-78 (2016 EPA Guideline, Appendix K). The "site-specific procedures" referenced by DEQ and the Board (*see* Findings of Fact ¶3 and ¶5 *supra*) are the EPA Site-Specific Models. RR 002544-45 (24 Mont. Admin. Reg. 2398-99 (12/24/20); BER Hr'g Tr. ("Jan. 31 Hearing") 30:1-8 (1/31/22).

19. The EPA Site-Specific Models consist of complicated mathematical formulas using assumptions and inputs determined by the user. The user has discretionary latitude in selecting the assumptions and inputs and changes in the

assumptions and inputs of course change the result. *Id*.; RR 002544-45 (24 Mont. Admin. Reg. 2398-99 (12/24/20)); RR 000078-119 (DEQ Derivation Doc.).

20. The new selenium rules provide "[n]umeric selenium standards," including a "water column standard" for Lake Koocanusa of 0.8 micrograms per liter: the Lake Numeric Standard. ARM 17.30.632.

21. DEQ and EPA agree that the Lake Numeric Standard is a water quality standard for Montana Water Quality Act and federal Clean Water Act purposes. Jan. 31 Hearing 23:3-6, 31:24-25.

22. Using an EPA Site-Specific Model, the Lake Numeric Standard was supported by modeling scenarios that use a whole-body fish 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 Derivation Doc.). As stated by DEQ testimony to the Board, "the 5.6 was used as an input to come up with a water column value of .8." RR 001251 (testimony of Myla Kelly, DEQ Manager of Water Quality Standards and Modeling Section, 9/24/20 Board Transcript). A model scenario using the federally recommended level of 8.5 mg/kg dw was also presented, but that scenario altered other model inputs (bioavailability and Kd percentile) to be more "conservative" (i.e., more stringent). RR 000125-27 (DEQ Derivation Doc.).

23. In its rationale for approval of the new selenium rule, EPA noted that the Lake Numeric Standard "is more stringent than the recommended water column

criterion element for lentic aquatic systems in EPA 2016 (1.5 µg/L)." Teck Petition, Exhibit B (EPA Letter to Board, EPA Rationale (February 25, 2021), p. 12 (pdf p. 15) n. 22; *see also* p. 2 (pdf p. 5), n. 6; p. 6 (pdf p. 9), n.11).

24. Concerned that "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," the Montana Legislature enacted House Bill 521 in 1995, which was codified as the Stringency Statute. Mont. HB 521, 54th Leg. (1995).

25. In enacting House Bill 521, the Legislature intended that the agency promulgating a standard or requirement must "include as part of the initial publication and all subsequent publications a written finding if the rule in question contains any standards or requirements that exceed the standards or requirements imposed by comparable federal law." *Id*.

26. The Legislature intended that 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 public health or the environment and are achievable under current technology." *Id*.

27. Based on the Board's conclusion that the Lake Numeric Standard was not more stringent than the comparable federal guideline, the Board did not make the written findings required by § 75-5-203, MCA, when it promulgated the Lake Numeric Standard. RR 002544-45 (24 Mont. Admin. Reg. 2398-99 (12/24/20)) and it did not have reason to include in the Record evidence specifically to support such findings. *Id.* Whether the Record contains such evidence is questionable. Teck Comments pp. 16-24 (1/13/22).

28. Teck and the Lincoln County argue that the Stringency Statute requires peer-reviewed studies to support the findings required by the statute. Teck Petition p. 2; Lincoln County Petition p. 2. DEQ argues to the contrary. DEQ Comments p.11-13 (1/13/22).

III. CONCLUSIONS OF LAW

1. This matter regards compliance with the Stringency Statue, not whether the Lake Numerical Standard is the appropriate standard.

2. The Board is an "agency" an "entity or instrumentality of the executive branch of state government." Section 2-15-102(2), MCA.

3. Pursuant to § 2-15-3502(4), 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." Section 2-15-102(10), MCA. This includes "interpreting,

applying, and enforcing existing rules and laws" and "evaluating and passing on facts." *Id*.

4. One such issue that the law places within the Board's authority is, upon petition, to review a rule pursuant to the Stringency Statute. Therefore, the Board has a statutory duty to consider the Petitions and issue final agency action on them. Section 75-5-203(4)(a), MCA.

5. Prior to July 1, 2021, setting water quality standards—including the Lake Numeric Standard—was solely within the Board's authority. Section 75-5-301(2), MCA (2019); 2021 Mt. SB 233; § 75-5-301(2), MCA (2021). Pursuant to that authority, the Board created the Record and promulgated the Lake Numeric Standard. (*See* Findings of Fact ¶¶ 2-4 *supra*).

6. 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, 82. 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 Lake Numeric Standard. Section 75-5-203(4)(a), MCA. The statute does not condition the amount or type of effect required. It simply requires that the person be "affected by" the Lake Numeric Standard. A "person" is defined in the Montana Water

Quality Act to include a "firm, corporation, partnership, individual, or other entity and includes persons resident in Canada." Section 75-5-103(26), MCA.

7. Teck's Petition and the Record demonstrate that it is affected by the Lake Numeric Standard because its Canadian coal mining operations, monitoring data and other information, and the regulatory requirements placed upon it by provincial and Canadian authorities were used during rulemaking. The Lake Numeric Standard was aimed at Teck and was immediately used by DEQ in a manner adverse to Teck. *See* Findings of Fact ¶¶ 7-11 *supra*.

8. Lincoln County's Petition and the Record demonstrate that it is affected by the Lake Numeric Standard because Lake Koocanusa is in Lincoln County and, as the Board recognized, an impairment listing of the lake is probable and would impact discharge limitations for new projects in Lincoln County. *See* Findings of Fact ¶¶ 12-15 *supra*.

9. The Lake Numeric Standard is a water quality standard subject to the Stringency Statute. *See* Findings of Fact ¶¶ 21, 25 *supra*; ARM 17.30.632(7); § 75-5-302, MCA.

10. The EPA National Lake Numeric Guideline is "comparable" to and "address[es] the same circumstances" as the Lake Numeric Standard because both are definitive numeric criteria, both address the same "particular parameter," which is selenium, both address lentic/lake waters, and both aim to protect aquatic life

from the effects of selenium, including the release of selenium related to resource extraction. *See* Findings of Fact ¶¶ 16-18 *supra*; § 75-5-203(1), MCA; *Pennaco Energy v. Mont. Bd. of Envtl. Review*, 2007 Mont. Dist. LEXIS 513, *44 (affirmed *Pennaco Energy, Inc. v. Mont. Bd. of Envtl. Review*, 2008 MT 425, 347 Mont. 415, 199 P.3d 191).

11. In *Pennaco*, the Court held that the Stringency Statute is "triggered only when EPA has promulgated a federal regulation, guideline or criteria addressing the particular parameter involved" and since the parties agreed "there [were] no national numeric criteria for [the particular parameters involved]," the statute was not triggered. 2007 Mont. LEXIS at *44 (Dist. Ct. reasoning upheld 347 Mont. at 428, 199 P.3d at 200). In the present case, the Stringency Statute is triggered by the EPA National Lake Numeric Guideline. *See* Findings of Fact ¶ 17 *supra*.

12. DEQ's theory that the EPA National Lake Numeric Guideline is not the "comparable" guideline on the grounds that the Lake Numeric Standard is site-specific fails, not only because it is contrary to the plain statutory language, but also because this argument would render the Stringency Statute a nullity as to site-specific rules which is directly contrary to the express terms of the statute making it applicable to site-specific standards. Section 75-5-203(1), MCA (specifically stating its applicability to standards set pursuant to § 75-5-310, MCA, which allows site specific standards). Also, this argument would be counter to the intent

and purpose of the stringency statute. *See* Findings of Fact ¶¶ 24-25 *supra*. Mont. HB 521, 54th Leg. (1995).

13. The Lake Numeric Standard is mathematically lower and thus more stringent than the comparable federal guideline (the EPA National Lake Numeric Guideline). *See* Findings of Fact ¶¶ 17, 20 *supra*. The Board erred when it determined that the Lake Numeric Standard is not more stringent than the comparable federal guideline. Section 75-5-203(1), MCA.

14. While the EPA lacks authority under Montana's Stringency Statute, its conclusion that the Lake Numeric Standard "is more stringent than the recommended water column criterion element for lentic aquatic systems in EPA 2016 (1.5 µg/L) [the EPA National Lake Numeric Guideline]" is confirming evidence that the comparable federal guideline is the EPA National Lake Numeric Guideline. *See* Findings of Fact ¶ 23 *supra.*

15. The EPA Site-Specific Models are not "comparable" to the Lake Numeric Standard because the Lake Numeric Standard is a definitive numeric water quality standard while the EPA Site-Specific Models consist of complicated mathematical formulas using assumptions and inputs determined by the user who has discretionary latitude in selecting the assumptions and inputs and changes in the assumptions and inputs change the result. *See* Findings of Fact ¶¶ 19-20 *supra*.

The Board erred when it treated the EPA Site-Specific Models as comparable to the Lake Numeric Standard. Section 75-5-203(1), MCA.

16. Although the EPA Site-Specific Models are not the comparable guideline, it is significant to note that the modeling conducted by DEQ to determine the Lake Numerical Standard used an input criterion more stringent than the federal guideline, thus, rendering the Lake Numerical Standard more stringent even under DEQ's theory. *See* Findings of Fact ¶ 22 *supra*.

17. No written findings were provided by the Board for the Lake Numeric Standard. Written findings are required by the Stringency Statute under MCA §§ 75-5-203(2) and (3) when the standard is more stringent than the comparable federal guideline. Therefore, by not providing written findings the Board erred and the Lake Numeric Standard violates the Stringency Statute. *See* Findings of Fact ¶¶ 26-27 *supra*. Section 75-5-203(1), MCA.

18. Because the initial publication of the new selenium rules failed to inform the public that the Lake Numeric Standard is more stringent than the federal guideline and failed to provide the written findings required by the Stringency Statute for public review and comment, the rulemaking for the Lake Numeric Standard violates the Stringency Statute. Section 75-5-203, MCA; *See* Findings of Fact ¶¶ 3, 25 *supra*.

19. The Stringency Statute requires evidence in the rulemaking record supporting the required findings for a rule more stringent than the federal guideline. Sections 75-5-203(2) and (3), MCA. However, it is not necessary for the Board to determine now whether the Record contains the necessary evidence, because if DEQ determines to make the findings required by the Stringency Statute, DEQ must ensure that such evidence exists in the record. Section 75-5-203, MCA; *See* Findings of Fact ¶¶ 26-27 *supra*.

20. The Stringency Statute expressly requires "peer-reviewed scientific studies" to support a more stringent than federal rule. Section 75-5-203(3), MCA. The legislative history supports this reading of the statute. *See* Minutes, MT. Senate, 54th Leg. Reg. Session, Comm. on Natural Resources, March 28, 1995, p. 5.

IV. ORDER

Based on the Board's full consideration of the foregoing Findings of Fact and Conclusions of Law, and the supporting record, as well as arguments submitted, IT IS ORDERED that:

1. Teck and Lincoln County each has standing to bring its Petition.

2. The Lake Numeric Standard is more stringent than the comparable federal guideline.

3. 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 §§ 75-5-203(2) and (3), MCA.

4. The Lake Numeric Standard and the rulemaking upon which it is based fail to comply with the Stringency Statute. Sections 75-5-203(1), (2) and (3), MCA.

5. The Stringency Statute sets forth the applicable remedy to be implemented by DEQ. Section 75-5-203(4)(a), MCA.

6. 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.

7. That this is the Final Agency Decision of the Board.

DATED this 19th day of April, 2022.

/s/ *Steven Ruffatto*
STEVEN RUFFATTO
Chairman
Board of Environmental Review