



Montana Legislative Services Division

Legal Services Office

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TO: Water Policy Interim Committee Members
FROM: Cori Hach, Staff Attorney
RE: Administrative Rule Report for October 2020 Meeting

The Board of Environmental Review (Board) for the State of Montana has voted to initiate rulemaking for selenium water quality standards in Lake Koocanusa and the Kootenai River. The Board filed a Notice to Hold Virtual Public Hearing on Proposed Amendment and Adoption with the Secretary of State for publication in the Montana Administrative Register (MAR). The Department of Natural Resources and Conservation and Department of Fish, Wildlife, and Parks have not filed any notices related to water quality or quantity since the September, 2020 WPIC meeting. Full text for the Board notice summarized below is available at <http://www.mtrules.org> (search by notice number).

DEPARTMENT OF ENVIRONMENTAL QUALITY:

MAR Notice Number: 17-414

Notice Description: Notice to Hold Virtual Public Hearing on Proposed Amendment and Adoption

Subject: Establishment of site-specific water quality standards for selenium in Lake Koocanusa and the Kootenai River in Lincoln County, Montana. The rule initiation follows a request made by the Montana Department of Environmental Quality (DEQ).

Summary: Lake Koocanusa is the reservoir formed by Libby Dam and is fed by the Kootenai River. Both Lake Koocanusa and the Kootenai River are international water bodies, extending into the United States and British Columbia. Rising levels of selenium in Lake Koocanusa were identified in about 2005 and are believed to originate from the Elk River Valley, where selenium leaches out of waste rock from high-grade coal mining operations and enters the Elk River, which is a tributary of the Kootenai River.

The current Montana selenium standard for the water bodies was established in 1987 at 5 µg/L. DEQ listed Lake Koocanusa as threatened for selenium in 2012, and in 2015 DEQ began working with an international group of stakeholders to develop a site-specific selenium standard. In 2016, the Environmental Protection Agency (EPA) released updated recommended national criteria at a value of 1.5 µg/L for lakes and reservoirs and 3.1 µg/L for rivers. EPA also included guidance for states and tribes wishing to develop site-specific standards.

The Board has proposed to amend ARM 17.30.602 and adopt New Rule 1. In ARM 17.30.602, a definition for "steady state" would be added to differentiate between when fish tissue standards versus water column standards for selenium concentrations would be applicable. New Rule I would implement standards for both steady state and non-steady state conditions. The following standards for selenium concentration in fish tissue would apply when the conditions are deemed steady state:

Fish Tissue	Selenium Concentration
Eggs/Ovaries	15.1 mg/kg dry weight (dw)
Muscle	11.3 mg/kg dw
Whole Body	8.5 mg/kg dw

During times when the conditions are deemed non-steady state, the following water column standards would apply:

Water Body	Selenium Concentration
Lake Koocanusa from the US-Canada international boundary to the Libby Dam	0.8 µg/L
Kootenai River mainstem from the outflow below the Libby Dam to the Montana-Idaho border	3.1 µg/L

Pursuant to § 75-5-301(2), MCA, the Board shall "formulate and adopt standards of water quality," and pursuant to § 75-5-203(1), MCA, such standards may not be "more stringent than the comparable federal regulations or guidelines that address the same circumstances." The Notice states that although the 0.8 µg/L standard for Lake Koocanusa is lower than the EPA's national criteria value of 1.5 µg/L for lakes, the "proposed Lake Koocanusa water column standard (30-day chronic) is no more stringent than the recommended EPA 304(a) criteria because it was developed using federally-recommended site-specific procedures; therefore, it is more accurate than the generally applicable national lentic (lake) number."

The Board's proposal contains information about the effects of selenium on aquatic life and how the standards were designed to protect water quality and the health of aquatic life.

Notes/hearing: A virtual public hearing is scheduled for November 5, 2020. Public comment must be submitted no later than November 23, 2020. Assuming that the Notice will be published in the October 9, 2020 volume of the MAR, these dates comply with the 20-day notice from the date of publication to the public hearing required under § 2-4-302(4), MCA, the 28-day notice from the date of publication and the deadline for submission of comments required under § 2-4-302(4), MCA, and the 30 days from the date of publication and the date of the proposed action required under § 2-4-302(2)(c), MCA.

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION:

None.

FISH, WILDLIFE AND PARKS:

None.