



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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February 17, 2022

Ref: 8ORA-IO

Jason Mohr, Research Analyst
Montana Legislative Environmental Policy Office
Capitol Building, room 171
1301 East 6th Avenue
P.O. Box 201706
Helena, Montana 59620-1706

Dear Mr. Mohr:

The Environmental Protection Agency (EPA) Region 8 received your request for EPA participation in the February 28, 2022, meeting of the HJ37 Special Committee on Selenium Standards on February 8, 2022. Specifically, you requested testimony from an EPA employee to describe the EPA's "evaluation of Montana's selenium rule for approval and adoption, which may include discussion of data analysis, jurisdiction, and other information."

The EPA's *Touhy* regulations at 40 C.F.R. part 2, subpart C, set forth the procedures to be followed when an Agency employee is requested to provide testimony concerning information acquired in the course of performing official duties in administrative proceedings where the United States is not a party. See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). The purpose of these regulations is to ensure that employees' official time is used only for official purposes, to maintain the impartiality of the EPA among private litigants, to ensure that public funds are not used for private purposes and to establish procedures for approving testimony or production of documents. 40 C.F.R. § 2.401(c).

Title 40 C.F.R. § 2.402(a) provides that an EPA employee may provide testimony in response to a request from a State government or State legislative committee when the cognizant Assistant Administrator, Regional Administrator, Office Director, or designee of such official, determines that such testimony is "in the interests of EPA." As the Regional Administrator, I am responsible for making this determination for your request. I have reviewed the request and determined that it is in the interests of EPA to provide testimony in the above-referenced legislative committee proceeding, with the limitations described in the paragraph below. EPA has worked in partnership with the State of Montana and many other parties for over 6 years to protect the aquatic life of Lake Koocanusa. The Agency remains committed to this mission and is thus willing to use official time and public funds in assisting the HJ37 Special Committee on Selenium Standards with its task under HJ37 to "analyze the data and processes referenced in and used to support rulemaking to determine if ARM 17.30.632, as it pertains to Lake Koocanusa, complies with the Montana Water Quality Act and the federal Clean Water Act" in consultation with "selenium experts and other experts who have experience proposing and reviewing water quality standards."

Two of my staff, Ms. Tonya Fish and Mr. Jason Gildea, will be available on February 28 to provide testimony. Ms. Fish was the lead reviewer of Montana's December 2020 water quality standards submission. Her testimony will be limited to the Agency's review of Montana's December 2020 water quality standards submission for consistency with the Clean Water Act and EPA's implementing regulations at 40 C.F.R. part 131. Mr. Gildea is the Region 8 Water Division Policy Advisor and is a member of the Monitoring and Research Committee (MRC) of the Lake Kooocanusa Monitoring and Research Working Group. His testimony will be limited to the subject of his participation in the MRC.

If you have any questions, please contact Tonya Fish on my staff at fish.tonya@epa.gov.

Sincerely,

KC Becker
Regional Administrator