



## **SPECIAL COMMITTEE ON HJ37**

### **67th Montana Legislature**

#### **SENATE MEMBERS**

Jill Cohenour  
Walt Sales  
Cary Smith  
Mark Sweeney

#### **HOUSE MEMBERS**

Willis Curdy  
Steve Gunderson  
Rhonda Knudsen  
Marilyn Marler

#### **COMMITTEE STAFF**

Jason Mohr - Research Analyst  
Nadine Spencer - Secretary

# **MINUTES LOG**

## **Special Committee on HJ37**

February 28, 2022  
State Capitol Building Room 455 and Zoom  
Helena, Montana

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#### **MEMBERS PRESENT:**

Sen. Walt Sales, Presiding Officer (R)  
Sen. Jill Cohenour (D)  
Rep. Willis Curdy (D)  
Rep. Steve Gunderson (R)  
Rep. Rhonda Knudsen (R)  
Rep. Marilyn Marler (D)  
Sen. Cary Smith (R)

#### **MEMBERS EXCUSED:**

Sen. Mark Sweeney (D)

#### **STAFF PRESENT:**

Jason Mohr, Research Analyst  
Nadine Spencer, Secretary

## **AGENDA** [\(Attachment 1\)](#)

## **VISITORS' LIST** [\(Attachment 2\)](#)

### **CALL TO ORDER/ROLL CALL**

08:30:57 Sen. Walt Sales called the meeting to order at 8:30 AM. The committee secretary took roll.

### **Meeting overview**

08:32:28 Jason Mohr, research analyst, Legislative Services Division (LSD), provided an overview for the meeting. He said the committee received information related to the Board of Environmental Review's meeting on Friday and said there will be a discussion on next steps later in the agenda. [\(Exhibit 1\)](#)

## **FEDERAL ANALYSIS OF ADOPTION OF SELENIUM RULE (ARM 17.30.632)**

### **EPA**

08:35:46 Jason Gildea, water policy advisor, U.S. Environmental Protection Agency (EPA) Region 8, provided an introduction and discussed EPA's participation in the monitoring and research working group to establish site specific selenium criteria for Lake Koocanusa. [\(Exhibit 2\)](#)

08:39:47 Tonya Fish, water quality standards contact, EPA Region 8, provided information on water quality criteria under the Clean Water Act and discussed EPA's review and action on Montana's selenium standards for Lake Koocanusa.

### **USGS**

08:47:59 John Kilpatrick, director, Wyoming-Montana Water Science Center, U.S. Geological Survey (USGS), provided information on USGS selenium research nationally and on Lake Koocanusa.

### **Public comment**

None

### **Committee discussion**

08:54:55 Sen. Cohenour asked Mr. Kilpatrick how long it takes for the USGS to do a study.

08:56:03 Sen. Cohenour asked Mr. Kilpatrick how robust USGS's participation in the process was.

08:56:52 Sen. Cohenour asked Mr. Gildea about EPA's participation in the process.

08:57:54 Sen. Cohenour asked Mr. Gildea about public participation.

08:58:24 Rep. Gunderson asked Mr. Gildea if the Department of Environmental Quality's (DEQ) model or its application was flawed, would the EPA change its position.

08:59:22 Rep. Gunderson asked Ms. Fish to answer the same question.

09:00:16 Rep. Gunderson asked Mr. Kilpatrick to answer the same question.

09:02:21 Sen. Sales asked Mr. Kilpatrick about the difference between the DEQ model and its application of the USGS model.

09:03:47 Sen. Sales asked Mr. Kilpatrick about future monitoring.

09:05:07 Sen. Sales asked Mr. Kilpatrick if the U.S. and Canada are working together and moving forward.

09:06:04 Rep. Marler asked Mr. Kilpatrick if the USGS feels that the process has been robust or if it has been somewhat flawed.

09:07:27 Rep. Marler asked Ms. Fish if the EPA feels that the process has been robust or if it has been somewhat flawed.

09:08:01 Sen. Cohenour asked Ms. Fish if all the different groups participated in crafting the model that was implemented by DEQ.

09:10:11 Sen. Cohenour asked Mr. Gildea about participation by the working group in creating the model and how it was going to be used.

09:13:09 Sen. Cohenour asked Mr. Gildea if the application of the model went through the working group.

09:13:45 Myla Kelly, Water Quality Standards and Modeling Section supervisor, DEQ, provided additional information.

09:14:51 Rep. Gunderson asked Ms. Kelly if public comment is science.

09:15:49 Sen. Sales asked Mr. Gildea what he meant by “complicated pollutant.”

09:18:16 Sen. Sales asked Mr. Gildea about work between Canada and the U.S. and how he sees that moving forward.

09:19:29 Sen. Sales asked Ms. Fish about the second method the EPA included in its national recommendation for how states could translate the fish tissue numbers into a site-specific water column number.

09:20:37 Rep. Gunderson asked Mr. Kilpatrick about the data gap in the fish reproductive tissues and if the egg ovary data is reliable.

09:23:13 Rep. Gunderson requested that the committee be provided with information on how the data gap can be considered reliable data.

09:23:31 Rep. Gunderson asked Mr. Kilpatrick if the model and the results have been peer-reviewed.

09:24:10 Rep. Marler asked Mr. Kilpatrick if he would characterize part of the study and the model as having a data gap.

09:25:29 Rep. Marler asked Mr. Kilpatrick about participation by the Department of Fish, Wildlife, and Parks (FWP) fishery biologists.

09:26:22 Sen. Sales asked Mr. Kilpatrick why the USGS went above and beyond what normally takes place in a review.

## **TRIBAL PERSPECTIVE ON ADOPTION OF SELENIUM RULE**

### **CSKT**

09:28:31 Richard Janssen Jr., Natural Resources Department head, Confederated Salish and Kootenai Tribe (CSKT), presented information on CSKT’s perspectives on the Lake Koocanusa site-specific selenium criteria. [\(Exhibit 3\)](#)

09:34:52 Mr. Janssen said the CSKT submitted comments at the last meeting and will submit the same comments again. [\(Exhibit 4\)](#)

09:35:15 Genny Hoyle, aquatic biologist, Kootenai Tribe of Idaho (KTOI), said the KTOI fully supports DEQ’s adoption of the site-specific selenium criteria. [\(Exhibit 5\)](#)

### **Committee discussion**

09:41:26 Sen. Cohenour asked Ms. Hoyle about Montana’s responsibility for the selenium that goes through its border into Idaho. Ms. Hoyle redirected the question to Shawn Young, director, Fish and Wildlife Department, KTOI.

09:43:21 Sen. Cohenour asked Mr. Young about the responsibility for all the entities to work together and try to fix the problem.

09:44:42 Sen. Cohenour asked Mr. Young if the KTOI is running the levels seen in fish against the model.  
09:46:44 Ms. Hoyle provided additional information.  
09:47:18 Sen. Sales asked Mr. Young to provide his name and position.  
09:47:54 Rep. Curdy asked Ms. Hoyle if the KTOI has been interested in Montana setting the standard protective of the study.

**Public comment**

09:48:59 Stu Levit, attorney, CSKT

**ANALYSIS BY NON-MONTANA ENTITIES OF SELENIUM RULE**

**Idaho Department of Environmental Quality**

09:51:49 Mary Anne Nelson, Surface and Wastewater Division administrator, Idaho Department of Environmental Quality. ([Exhibit 6](#))

**Teck Resources Ltd.**

10:02:22 Vicki Marquis, attorney, Hollard & Hart. ([Exhibit 7](#))  
10:11:18 Dr. Samuel Luoma, research ecologist, University of California-Davis. ([Exhibit 8](#))

**Public comment**

10:27:57 Ms. Hoyle  
10:30:07 Tim Linehan, Linehan Outfitting

**Committee discussion**

10:34:09 Rep. Knudsen asked Mr. Luoma if he was one of the authors of the model that DEQ used in setting the standard for Lake Koocanusa and if he is implying that the DEQ did not use the model correctly.  
10:35:44 Rep. Knudsen asked Mr. Luoma if the model was not calibrated correctly, would it overpredict or over-anticipate harm and lead to a standard lower than what is scientifically supported.  
10:36:43 Rep. Knudsen asked Mr. Luoma if the water column standard would be higher if the model had been calibrated correctly.  
10:37:39 Rep. Knudsen asked Mr. Luoma what steps are needed to use the model correctly and if the model needs to be rerun and recalibrated.  
10:38:39 Sen. Cohenour asked Ms. Marquis if Mr. Luoma is being paid for his as a consultant for Teck Resources and for his participation in the meeting.  
10:39:50 Sen. Cohenour asked Mr. Luoma the same question and if his technical evaluation of the model used in Montana is selenium specific.  
10:41:10 Rep. Marler asked Ms. Kelly to respond to the statement that the model was misapplied.  
10:43:49 Rep. Marler asked Ms. Kelly if the entities in British Columbia have come up with the same recommended guidelines.  
10:45:18 Rep. Gunderson agreed with Mr. Linehan on the need to protect fisheries. He said no evidence has been produced indicating fish damage in the Kootenai River or Lake Koocanusa. He commented on needing to look at the standard that was used.

10:47:01 Rep. Gunderson asked Mr. Linehan if there is physical evidence of damage to fish in the fisheries.

10:48:15 Rep. Gunderson asked Chris Dorrington, director, DEQ, if he thinks there needs to be a retest of how the data and model are being used based on the testimony from Mr. Luoma.

10:49:33 Rep. Gunderson asked Mr. Dorrington about his testimony on April 28, 2021, before the Senate Natural Resources committee, indicating that if there was something wrong with the model or the data that a new standard would be developed.

10:51:36 Rep. Curdy asked Mr. Luoma if water containing selenium affects fish species sensitive to selenium and their reproductive systems and if the rise in selenium will bioaccumulate and increase harm to those fish species.

10:53:18 Sen. Cohenour asked Mr. Luoma about the long-term health effects to fish if there is no effort to reduce the level of discharges of selenium into the environment.

10:55:57 Sen. Cohenour asked Ms. Hoyle about the steady state of selenium in the system and if they are seeing the reproductive effects in fish tissue in Idaho.

10:59:10 Rep. Marler asked Mr. Luoma if part of using the model was to come up with a range to consider. She also asked when they reverse modeled the selenium inputs, if they considered multiple, higher fish trophic levels or just one level of eating selenium in the food chain.

11:05:16 Rep. Gunderson asked Ms. Marquis to explain the distinction between water quality standards and objectives. Ms. Marquis referred the committee to the meeting notes from the Lake Koocanusa Monitoring and Research Working Group conference dated November 18, 2021. [\(Exhibit 9\)](#)

11:09:43 Rep. Gunderson asked Ms. Marquis about impacts from selenium levels in the Elk river. Ms. Marquis said she will find out.

11:11:19 Sen. Sales asked Ms. Marquis about Teck's concerns regarding flaws in the model.

11:13:31 Sen. Cohenour asked Ms. Kelly to respond to comments about the model. She asked about working with British Columbia and what they believe the proposal will be.

#### **Public comment**

11:16:58 Sen. Sales.

11:17:25 Sen. Mike Cuffe

11:21:48 Sen. Sales

11:21:56 Recess

11:34:02 Reconvene

#### **ONGOING COLLECTION OF FISH TISSUE SAMPLES**

11:34:35 Trevor Selch, fisheries pollution control biologist, FWP, provided an update on fish tissue sampling. [\(Exhibit 10\)](#)

#### **Public comment**

11:44:04 Sen. Cuffe asked Mr. Selch about the reference points in his presentation.

### **Committee discussion**

- 11:44:59 Rep. Knudsen asked Mr. Selch about the increase in selenium in the female peamouth chub eggs and the westslope cutthroat trout eggs in 2020.
- 11:46:26 Rep. Gunderson asked Mr. Selch if they have documented any fish damage in the Kootenai river or Lake Koocanusa from selenium.
- 11:47:30 Sen. Cohenour asked Mr. Selch if FWP does fish counts and has documentation on a loss of recruitment or ages of fish throughout the watershed.
- 11:49:03 Rep. Marler asked Mr. Selch to respond to the question she asked Mr. Luoma about calibrating the selenium model to Lake Koocanusa.
- 11:51:22 Rep. Marler asked Mr. Selch about the data he presented and which fish are piscivorous and which ones are not.

### **EFFECTS OF LIBBY DAM OPERATION ON LAKE KOOCANUSA**

- 11:53:42 Kevin Shaffer, chief, Water Management, Army Corps of Engineers (USACE), Seattle district, provided information on Libby Dam water management and water quality monitoring efforts.
- 11:58:36 Steve Barton, chief, Columbia Basin Water Management Division, USACE, said he is available to answer any questions.

### **Public comment**

- 11:59:03 Sen. Cuffe
- 11:59:49 Sen. Sales asked about the flow release and the way the water is managed. Mr. Schaffer provided the information.
- 12:01:32 Mr. Young

### **Committee discussion**

- 12:04:49 Rep. Marler asked Mr. Shaffer to speculate on whether dam operations have any effect on the level of selenium in the fisheries.

### **Public comment continued**

- 12:07:14 Mr. Young

### **Committee discussion continued**

- 12:09:17 Sen. Cohenour asked Mr. Young about the lack of fish moving to maturity and the long-term effect for fish to reproduce at levels that can replace the population.

### **UPDATE ON RULE IMPLEMENTATION**

- 12:12:13 Amy Steinmetz, Water Quality Division administrator, DEQ, provided an update on selenium standards for the Kootenai river and Lake Koocanusa .
- 12:17:26 Ms. Steinmetz discussed next steps for implementation of the selenium standard.
- 12:21:52 Ms. Steinmetz discussed next steps regarding the stringency review by the Board of Environmental Review (BER).

### **Public comment**

None

### **Committee discussion**

12:23:16 Rep. Gunderson asked Ms. Steinmetz about the tributary samples DEQ took in 2021. Ms. Steinmetz redirected the question to Ms. Kelly.

12:25:48 Rep. Gunderson asked Ms. Kelly about the data being used.

12:26:21 Rep. Gunderson asked Ms. Kelly how much DEQ spent on sampling. Ms. Kelly said she will get the information.

12:26:45 Sen. Sales asked Rep. Gunderson to clarify his request.

12:27:21 Sen. Cohenour asked Ms. Kelly about further bioaccumulation in soils, how selenium works in the environment, and if it continues to be a problem.

12:30:05 Ms. Hoyle said she can address Rep. Gunderson's question regarding tributary data and general lab costs.

12:32:41 Rep. Gunderson asked Ms. Hoyle about the frequency of testing.

12:33:44 Rep. Gunderson asked Ms. Hoyle to provide the data.

### **UPDATE ON STRINGENCY REVIEW BY BOARD OF ENVIRONMENTAL REVIEW**

12:35:45 Katherine Orr, legal counsel, BER and assistant attorney general, Department of Justice, provided an overview of the BER meeting last Friday.

### **Public comment**

None

### **Committee discussion**

12:38:21 Sen. Cohenour said the committee received information about the meeting from an unknown source and is concerned about actions by the Board without legal counsel being present. She asked Ms. Orr to look at the information the committee received and provide information on whether the Board exceeded its authority. [\(see exhibit 1\)](#)

12:40:38 Ms. Orr said she was unable to attend the meeting, but that she discussed many of the questions before the meeting with the chairman. She said she has not read the document given to the committee.

12:41:13 Sen. Sales said the document is a summary of the meeting from Teck Resources.

12:42:16 Rep. Knudsen said she recommends viewing the documents as draft notes, regarding an individual's interpretation, and not official findings or legal documents from the hearing.

12:43:01 Sen. Sales asked Rep. Knudsen if it should be considered background information for the committee about what took place and not information from the Board. Rep. Knudsen agreed and said it is a working document.

12:43:22 Sen. Cohenour said she would like to get more information from Ms. Orr regarding her perspective on whether the documentation comports with her work in supporting the work of the Board, and about the Board's actual mission and statutory authority at the next meeting.

12:44:16 Sen. Sales agreed and said he expects a lot of the discussion will be included on the agenda for the Water Policy Interim Committee meeting (WPIC) on March 15-16.

12:45:04 Sen. Sales asked Jon Metropolitous, representing Teck Resources, about the document.

12:46:40 Sen. Cohenour said Clayton Elliott, Montana Trout Unlimited, attended the BER meeting and asked if he could provide his comments.

12:46:52 Mr. Elliott.  
12:47:57 Sen. Sales commented on the timing of the BER meeting and disseminating the information to the committee.  
12:49:56 Mr. Dorrington requested that the DEQ be included on the WPIC agenda with Ms. Orr.  
12:50:24 Sen. Sales said the WPIC chair and staff will put together the agenda.  
12:50:33 Rep. Gunderson asked Mr. Dorrington about extending the HJ37 April deadline.

## **ADMINISTRATIVE MATTERS**

### **Future meeting dates**

12:52:25 Sen. Sales said he recommends waiting to determine the future work of the special committee until after the WPIC meets.  
12:53:41 Rep. Gunderson said the HJ37 special committee members who are members of the EQC should be a part of the WPIC meeting. He asked about getting a written statement from DEQ regarding their interpretation of the BER decisions.  
12:54:32 Sen. Sales said it will probably be included at the WPIC meeting.  
12:55:14 Mr. Dorrington provided information regarding Rep. Gunderson's request.  
12:57:18 Rep. Knudsen said she recommends not making any decisions until after the order from BER is received.  
12:58:02 Sen. Smith said the information received today will help the committee move forward.  
12:58:24 Sen. Sales asked Mr. Mohr if he had any additional direction or thoughts for the committee.

### **Public comment**

12:58:49 Sen. Cuffe commented on the concentration of selenium in Lake Koocanusa.  
13:02:30 Sen. Cohenour provided a closing statement.  
13:02:55 Sen. Sales commented on the WPIC meeting and moving forward.

## **ADJOURNMENT**

13:03:36 Sen. Sales adjourned the meeting at 1:03 p.m.