

an increasing trend in selenium, in spite of the BER's most recent decision that the standard violates the law, and in spite of the fact that other waterbodies in Montana with higher levels of selenium and with documented aquatic and bird impacts are governed by a much higher standard. That is not "best available science," instead, it is arbitrary and capricious science.

Second, regarding protection of aquatic life in the watershed, the most sensitive species is White Sturgeon, which do not exist in Lake Kooconusa but do exist downstream in the Kootenai River.⁷ The federal guideline established by EPA recommends water quality standards for rivers at 3.1 micrograms per liter and for lakes at 1.5 micrograms per liter. Both recommended standards are specifically designed to protect White Sturgeon, but DEQ did not adopt both.

DEQ's "risk decisions," applied only to Lake Kooconusa, are arbitrary, capricious, unexplained, unwarranted and inconsistent with their decision to set the Kootenai River standard at the federal guideline. Arbitrary and capricious "risk decisions" not based on the best available science are wrong and set a bad precedent. This bad precedent is concerning because many surface waters across Montana have even higher selenium levels than found in Lake Kooconusa.

5. DEQ's Implementation Will Bring Unwanted Federal Regulation to Montana

Despite the fact that the Board of Environmental Review had, just three days prior on February 25th, invalidated the selenium standard by finding that it is more stringent than the federal guideline and that the rulemaking did not comply with state law (see Testimony of V. Marquis and Testimony of K. Orr (February 28, 2022)), DEQ testified on February 28th that it intends to implement the standard by first completing an assessment of Lake Kooconusa and then proceeding with a TMDL to address impairment. See Testimony of A. Steinmetz (February 28, 2022). Thus, DEQ seems to have already presumed that the lake is impaired. This will have real and adverse impacts for Montana, given that EPA and the Tribes testified to ongoing conversations with the U.S. Department of State and the International Joint Commission. See Testimony of J. Gildea and R. Janssen (February 28, 2022). By creating a scenario that leads to an impairment (i.e.: setting a standard lower than the existing water quality),

⁷ Joe Beaman, lead selenium scientist with EPA concluded that "selenium concentrations in sturgeon eggs do not show an increasing trend between 2015 and 2019" in the Kootenai River downstream from Lake Kooconusa." See J. Beaman Comments, p. 8 (available in Appendix A of DEQ's Derivation of a Site-Specific Water Column Selenium Standard for Lake Kooconusa).

