

Dear Ms. Theisen,

Could you please deliver the following letter to Mr. Vincent to be included in the record for the meeting dealing with CAPS, on 9/14? Thank you very much.

Mr. Chas. Vincent, Chair
Montana Environmental Quality Council (EQC)
State Capitol, Room 172
Helena, MT 59601

Re: Environmental Quality Council meeting, 9/13 & 9/14
Agenda Item: FWP – Critical Areas Planning System (CAPS)

Dear Mr. Vincent,

I attended the August 30, 2010 Madison County Planning Board meeting. I listened intently to Doris Fisher's presentation on CAPS. I heard her say that it was not to be used alone in making decisions. Then I listened to the Planning Board members one by one base their decision on a 300 foot setback for the Madison River on Doris Fisher's presentation.

I later reviewed the CAPS web site and found this: The following is from source: www.fwp.mt.gov/wildthings/conservationInAction/crucialAreas.html

“CAPS is not a substitute for a site-specific evaluation of fish, wildlife, and recreational resources. There is still no substitute for consulting with local FWP biologists to gain a better understanding of conditions and management challenges in a particular area of the state—but CAPS will help you start smart.”

Source: www.fwp.mt.gov/gis/maps/caps/ (User Agreement)

The Crucial Areas Planning System (CAPS) is intended to provide useful and non-regulatory information during the early planning stages of development projects, conservation opportunities, and environmental review.

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- CAPS is not intended to replace consultation with FWP staff.
- In cases where federally threatened or endangered species occur, CAPS does not replace a federal consultation under the Endangered Species Act.
- Finest data resolution is at the square mile section scale or waterbody. Use of these data layers at a more localized scale is not appropriate and may lead to inaccurate interpretations.

Let me repeat that. Source: www.fwp.mt.gov/gis/maps/caps/ (User Agreement)

The Crucial Areas Planning System (CAPS) is intended to provide useful and non-regulatory information during the early planning stages of development projects, conservation opportunities, and environmental review.

The Planning Board took it as gospel and made a decision that will negatively affect many people. They are proposing making a regulation on the basis of Doris Fisher's presentation.

I am very concerned that this CAPS program is going to be used to limit land use throughout Montana and that private property is going to be in jeopardy in the near future.

I hope you will give this serious consideration as it is a very serious matter and may make FWP the most powerful agency in the state of Montana, single handedly being the deciding factor in land use of private property. And, will it stop with stream side setbacks? Or will it go on to all lands. The AG lands, the prairie lands. Who knows where this will go.

Thank you for your concern in this important issue.

Tricia Stabler
1244 Hwy 287 N
Cameron, MT 59720
406-682-4849

From: Slsnipper@aol.com
Sent: Sunday, September 12, 2010 9:27 PM
To: Theisen, Maureen
Cc: slsnipper@aol.com
Subject: Letter to Mr. Vincent for EQC meeting 9/13 & 9/14 re: CAPS

Dear Ms. Theisen,

Could you please deliver the following letter to Mr. Vincent to be included in the record for the meeting dealing with CAPS, on 9/14? Thank you very much.

Mr. Chas. Vincent, Chair
Montana Environmental Quality Council (EQC)
State Capitol, Room 172
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Re: Environmental Quality Council meeting, 9/13 & 9/14
Agenda Item: FWP – Critical Areas Planning System (CAPS)

Dear Mr. Vincent,

I believe that your agency is responsible for the review of state programs related to the environment to ensure compliance with the Montana Environmental Policy Act (MEPA), and that you are reviewing the CAPS program on Tuesday, September 14th as part of your agency's oversight.

This week, I read with dismay an article in The Madisonian (local paper in Ennis), which covered the Madison County Planning Board's meeting on August 30, 2010 during which the board members contemplated streamside setbacks. At this meeting, Doris Fischer, an employee of Fish, Wildlife and Parks (FWP) and formerly the Madison County Planning Director, presented the CAPS tool to the Planning Board members with FWP's recommendation for a total setback of 300 feet.

My husband and I own land on the Madison River, and this land represents a substantial part of our retirement assets. While I was unable to attend the 8/30 meeting because of a family emergency, my husband was there, and questioned Ms. Fischer on aspects of her presentation. At one point, in response to one of the questions about the role of cattle eating streamside vegetation when humans aren't supposed to disturb the same plants, she indicated that she wasn't a biologist and she didn't know. Perhaps persons providing CAPS consultations, such as that given at the 8/30 board meeting, should be adequately prepared to answer such questions. I believe that reasonable questions should be given serious consideration and, if no answer is immediately available, a commitment should be made to find the answer and provide it in a follow-up communication.

With this in mind, it seems that the purpose of CAPS is to influence planning decisions at the local levels of government. Certainly, according to citations in The Madisonian, this "tool" seemed to be the main focus and deciding factor in the Board's support of a 300-foot setback. In addition, I believe that "Appendix C – Rationale for Recommended Wildlife and Wildlife Habitat Standards, with Pertinent Scientific References," which may not be a part of CAPS but which accompanies the FWP personnel recommendations and rationale, is being erroneously applied as it relates to the "science" surrounding streamside setbacks.

Now, I am not an attorney, and sometimes I have a very difficult time processing all of the information available to arrive at some general understanding of the issues. I do not plan to bore you with the details, but after reading Appendix C, and several of the scientific studies cited therein, I still come to the conclusion that the scientific literature is being regurgitated and misconstrued to support setbacks where little or no riparian area exists, rather than applying these studies to the areas that they were meant to support. If this is being done on the subject of waterways, what else is being misstated or misrepresented in the name of environmental protection?

Again, I stress that I am not an attorney, but being curious about the EQC's role, I was further drawn into the Montana Environmental Policy Act (MEPA), and I find that the MCA, 75-1-102(2) states:

"The purpose of parts 1 through 3 of this chapter is to declare a state policy that will encourage productive and enjoyable harmony between humans and their environment, **to protect the right to use and enjoy private property free of undue government regulation**, to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans, to enrich the understanding of the ecological systems and natural resources important to the state, and to establish an environmental quality council."

In addition, MCA 75-1-103(3) states:

"The legislature recognizes that each person is entitled to a healthful environment, **that each person is entitled to use and enjoy that person's private property free of undue government regulation**, that each person has the right to pursue life's basic necessities, and that each person has a responsibility to contribute to the preservation and enhancement of the environment. The implementation of these rights requires the balancing of the competing interests associated with the rights by the legislature in order to protect the public health, safety, and welfare."

Am I taking these out of context? Perhaps you can shed light on the role of the EQC in this regard. I understand that the legislature has the right to use its power to balance competing interests, but does this same right extend to the local level and input from other state agencies such as the FWP? Does the EQC oversee state agencies such as the FWP, and the use of taxpayer dollars to fund programs/research (CAPS) that will be used to influence public policy? What is the future intended use of CAPS, and what qualifications will employees disseminating this information be required to have? If recommendations will be provided by FWP employees, shouldn't the "science" be quoted/interpreted in its purest, intended context (i.e. riparian areas not being generalized into standard setbacks having nothing to do with riparian cover, which may in fact be non-existent or minimal and therefore of no value in providing cover for riparian wildlife?)

I would very much appreciate your response to my concerns, as there is a lot at stake here for my husband and I, and it seems that our Planning Board is using CAPS to justify their recommendation to the County Commissioners to implement an ill-advised, and much-opposed, streamside setback.

Sincerely,

Lorraine Snipper

Lorraine Snipper

(208) 558-7360

Theisen, Maureen

From: dave arterburn [burnart1@yahoo.com]
Sent: Tuesday, September 14, 2010 7:39 AM
To: Theisen, Maureen
Subject: cattle pictures

I sent you 2 sets of pictures of cattle in the Madison River at the suggestion of Lorraine Snipper. Hope you and the EQC can do something about this or refer me to someone who can. thanks.



Ennis, MT 59729
September 10, 2010

Mr. Chas. Vincent, Chair
Montana Environmental Quality Council (EQC)
State Capitol, Room 172
Helena, MT 59601
RE: FWP -- Critical Areas Planning System (CAPS)

Dear Mr. Vincent:

I am a fourth generation Montanan, resident of Madison County, landowner and a registered voter.

I would like to understand the intended role of the FWP and its CAPS system as it applies to local governmental processes and regulations. Is it intended to influence local government regulations? The question is based on actions at the August 30th Madison County Planning Board. To quote from the Madisonian (the local newspaper):

- "This idea was introduced to the board, in a way, by Montana Fish, Wildlife and Parks land use planner, Doris Fischer."
- "After Fischer's presentation, the board took up the subject of streamside setbacks. Ultimately, the discussion came back to Fischer's presentation and the concepts FWP is working on in regard to streamside setback."
- "In addition (sic) CAPS, Fischer and FWP have been working with the Montana Commerce Department on revising the Montana model subdivision regulations, which many counties use as a basis for their subdivision regulations."

(The entire Madisonian article is attached, for reference, to understand the context of the quotes).

Now I must confess that I am a small-government type of guy, but I must also confess as a taxpayer that I like government to work effectively and efficiently, regardless of size. As such, I have some more questions regarding the intended role of FWP & CAPS.

- What is the desired relationship between state and county or city governments when advising on the use of CAPS? What pay grade of FWP employee should provide this policy guidance? Are there guidelines to govern this relationship?
- Animals don't recognize regulatory boundaries, so how will CAPS be implemented in a manner which achieves its desired intent across various county boundaries, or even boundaries of zoning districts?
- What is the intended role of FWP & CAPS, and the desired relationship between governments, in issues such as wolves, where federal and state governments are not in agreement? The same question applies to adjoining states, as animals cross state lines.

In summary, I encourage the EQC to carefully consider these questions so that the role of FWP and CAPS is clearly focused and does not become a point of contention between various levels of government, landowners and/or environmental groups.

Sincerely


Duane Thexton

Attachment: Quoted Madisonian article

EQC
SEPTEMBER 14, 2010
EXHIBIT 23

The Madisonian, September 2, 2010

<http://www.madisoniannews.com/2010/09/planning-board-looks-to-300-foot-setback-and-october-public-hearing/>

Written on September 1, 2010 at 12:53 pm by Greg Lemon

Planning board looks to 300-foot setback and October public hearing

Filed under [Community News](#) [no comments](#)

VIRGINIA CITY -- The Madison County Planning Board has seemed to settle on a setback distance for the Madison River and its tributaries and is now planning a public hearing on the draft ordinance.

The planning board met Monday night, the focus of the meeting again being a proposed streamside setback ordinance.

The board voted that a streamside setback would include a 500-foot jurisdictional area, a 300-foot building setback and 150-foot streamside buffer zone.

The idea would that the 150-foot streamside buffer zone would have no disturbance and buildings must be at least 300-feet back from the high water mark.

This idea was introduced to the board, in a way, by Montana Fish, Wildlife and Parks land use planner, Doris Fischer.

Fischer, who is also the former Madison County planning department director, gave a presentation at Monday night's meeting about tools FWP is developing concerning wildlife habitat and land use planning.

The agency has developed a program called crucial areas planning system, which is a map based program to help land-use planners identify wildlife habitat conditions on the land and juxtapose them with a variety of human impacts including development, transportation systems and energy infrastructure.

The CAPS is based on geographic information system, or GIS, layers to compile maps with a variety of layers.

In addition CAPS, Fischer and FWP have been working with the Montana Commerce Department on revising the Montana model subdivision regulations, which many counties use as a basis for their subdivision regulations.

The model regulations in the past have included precious little about how development impacts wildlife habitat and what mitigation measures could be taken, Fischer said.

Often developers won't contact FWP biologists about the impacts their subdivision will have on wildlife until they are already well along in the subdivision review process, she said.

"We hear about it late in the game when there's already an application prepared," Fischer said.

One of the things FWP is going to suggest be added to the model subdivision regulations is a recommended streamside setback, which would include a 150-foot vegetative buffer and 300-foot building setback.

"The building setback is intended to recognize what is human nature, that is to encroach on a buffer," she said.

After Fischer's presentation, the board took up the subject of streamside setbacks. Ultimately, the discussion came back to Fischer's presentation and the concepts FWP is working on in regard to streamside setback.

The contention surrounding the streamside setbacks on the Madison River seem to have focused on distance.

A streamside setback steering committee was formed in 2008. Their recommendations were given to the planning board about a year ago and included a minimum 75-foot setback on the Madison River and tributaries.

This past spring the planning board decided they would like a 500-foot setback on the Madison River and 150-foot setback on the tributaries.

Those against the larger setback have said it violates private property rights and will unfairly limit what landowners can do with their property.

In working to settle on a setback distance, the planning board has been discussing a tiered system, where the area closest to the river would have no disturbance, but farther away from the river, things like lawns, swing sets, and other recreation improvements could be allowed, but not a permanent structure.

On Monday night, planning board member Donald Loyd focused on Fischer's presentation. The tiered setback she presented seemed like a good solution for the Madison River, Loyd said.

"I think it would put us on very solid ground to go with the same standard FWP has set," he said.

However, planning board member Dave Maddison continued his support for the 75-foot setback proposed by the steering committee.

“I still think we ought to respect the streamside setback steering committee’s recommendation,” Maddison said. “Not that I don’t understand where everybody is coming from ... I just think it’s too much property.”

Board member Lane Adamson went the other way. He still felt that a 500-foot setback was appropriate.

“I think our responsibility as citizens is long term and big picture,” Adamson said. “I don’t think that’s such a large distance when you have a workable variance process.”

After deliberating, the board voted in favor of Loyd’s suggestion: 500-foot jurisdictional area, 300-foot setback and 150-foot streamside buffer.

After the vote, the board took public comment.

Tricia Stabler was frustrated with the board’s lack of appreciation of the sacrifice landowners would be asked to make if such a setback were put into law.

“You’re asking us landowners to sacrifice, what are you going to sacrifice?” Stabler asked.

The proposed setback is a violation of private property rights, which are important to her and should be important to the planning board.

“I would consider private property rights, that’s what I would consider first and foremost even above the animals,” she said.

Chris Murphy, a local Realtor and member of the streamside setback steering committee, told the board that the proposed setback would reduce values on empty lots along the river.

In some cases, people with river front property wouldn’t be able to build a home where they could see the river, Murphy said.

Besides the setback distance, the board also voted to strengthen the variance language in the ordinance.

Board members Richard Meehan and Jan Kluver Banks worked on the language and tried to make it firm in regards to solidifying private property rights.

The general idea is to modify the variance language in the ordinance to assure that someone with a lot that has special circumstance, like a lot narrower than the setback distance, will get a variance from the ordinance, Meehan said.

At their September meeting the board will make any final changes to the draft ordinance and then plan a public hearing on the ordinance for October.

After the public hearing the board will make a recommendation on the ordinance to the county commissioners, who will have the final decision on the ordinance.

Filed under **Community News** Tags: Madison River, setbacks

Kolman, Joe

From: MAXINE KORMAN [kormanmax@hotmail.com]
Sent: Saturday, September 11, 2010 4:08 PM
To: Kolman, Joe; Maurier, Joe; Jeff Pattison; kormanmax@hotmail.com
Subject: comments to eqc Sept 14,2010 re fwp "streamside land management"

EQC meeting in Helena on September 14th at 11:30am. Chairman Chas Vincent will be discussing new private property land takings by FWP for proposed stream setbacks under a near web-based program called "Crucial Areas Planning System" (CAPS).

The Madison County Planning Board listened to a presentation by FWP staffer Doris Fisher at their August 30th meeting. Several comments by Ms. Fisher should concern every property owner in Montana. It seems the FWP will now engage in land use planning. Here are a few of Ms. Fisher's comments at this meeting.

- Buffers and setbacks for water bodies (130 to 300 feet)
- Buffers and setbacks along with density requirements for native grasslands and shrubs.
- "the smaller the setback range, the greater the human encroachment."
- "it would be ideal for people to consult with FWP before they made a land purchase."
- create "living with Wildlife" covenants for projects.
- "The goal is to decrease habitat fragmentation and increase habitat connectivity and habitat corridors across state lines."
- "entire counties in Montana have been identified as **Areas of Concern.**"

Ron Korman and Maxine Korman are serving notice to this committee and this agency of the state of Montana, that we have recorded DECLARATION OF ACCEPTANCE OF LAND PATENTS for those patented land parcels that we own. This Declaration is recorded in the Valley County Clerk and Recorder. Some land patents conveyed land that included Larb Creek within the legal description on the face of the land patent. The case entry files from the National Archives do not show any record of the state appearing and objecting prior to the land patent issuance.

A reading on the issue of "Sovereignty" in WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES by Wells A. Hutchins and published by the United States Department of Agriculture, 1977 states that non-navigable streams were not conveyed to the states but remained in the public domain. At the time that water rights vested and the easements that were obviously intended to go with a water right (see Montana Supreme Court case Smith v. Denniff) vested as well and the United States issued the land patent. We suggest studying Miranda v. Arizona where rights secured under the federal Constitution may not be abridged by a state. We also point out another US supreme court case Summa Corp. v. California where the United States Supreme Court invalidated an action by the state of California because it would be a third party collateral attack against the land patent . There are other cases on this issue as well. If the state acts to retroactively impair our vested rights, we will have a damage and standing. We recommend the state not proceed. Ron and Maxine Korman Hinsdale, Montana