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**TO: Water Policy Interim Committee, Sen. Elliott, Chair**

**FROM: Montana Association of Realtors**

**RE: Comments on Water Policy Interim Committee draft legislation**

**DATE: September 11, 2008**

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The Water Policy Interim Committee ("WPIC") has recently made available a revised draft of LC 5020, as well as a new bill draft, LC 5022. The following comments are respectfully submitted on behalf of the Montana Association of REALTORS® ("MAR"). MAR may provide additional comments after further review or upon any additional revisions to the draft legislation. MAR appreciates the opportunity to comment on the draft legislation at this early stage.

**I. LC 5020**

As MAR advised in its earlier comments to WPIC on the initial draft of LC 5020, before undertaking significant revisions of a permit process that, up until the very recent past, has worked relatively well for both applicants and objectors, it is worthwhile to determine exactly what the source of the significant increase in the time, cost, and frustration required to process a permit application is. LC 5020 continues to provide no significant advantage in terms of the time to process a permit application, not does LC 5020 simplify the permit process for either applicants or objectors. Consequently, MAR seriously questions the benefit of or need for LC 5020.

The following is an outline of the process to obtain a decision from Montana Department of Natural Resources and Conservation ("DNRC") on an application for a new beneficial use permit or an authorization to change an existing water right under current statute.

1. Applicant submits an application to DNRC.
2. Within 180 days of receipt of application, DNRC must notify the applicant of any deficiencies in the application. Mont. Code Ann. § 85-2-302(5).
3. Within 90 days of the notice of deficiencies, the applicant must respond with information to make the application correct and complete. Mont. Code Ann. § 85-2-302(6).
4. Upon receipt of a correct and complete application, DNRC prepares public notice for service and publication as prescribed by law. Mont. Code Ann. § 85-2-307(1).
5. Objections must be filed with DNRC within the time period set forth in the public notice, which is no less than 15 days and no more than 60 days after publication of public notice. Mont. Code Ann. § 85-2-307(2).

6. If no objections are received, DNRC must grant, deny, or condition the application within 120 days of the last date of publication of public notice. If objections are received or a hearing is held, DNRC must grant, deny, or condition the application within 180 days of the last date of publication of public notice. Mont. Code Ann. § 85-2-310.

To summarize, the maximum amount of time allowed for processing an application under existing statute, from receipt to final decision, is 510 days if objections are received and 450 if no objections are received. The time for granting, denying, or conditioning an application after public notice may be extended, upon the agreement of the applicant or in extraordinary cases, but only for a maximum of 60 days.

In contrast, the following timeline sets out the process for application processing proposed under LC 5020.

1. The time period for deficiency notices and responses to the same remain unchanged. DNRC has 180 days from receipt of an application to notify the applicant in writing of any deficiencies, and the applicant has 90 days to make the application correct and complete. Mont. Code Ann. § 85-2-302(5) & (6).
2. DNRC can meet “informally” with the applicant to discuss the application and will make a written preliminary determination of whether to grant or deny the application. No time limit is set within which these informal discussion can take place and a written preliminary determination must be made. LC 5020, Sec. 2(1)(a).
3. If DNRC proposes to grant the application, public notice of the application and preliminary determination is prepared. Again, there is no time period after the preliminary determination within which public notice must be issued. LC 5020, Sec. 2(1)(b).
4. Objections must be filed with DNRC within the time period set forth in the public notice, which is no less than 15 days and no more than 60 days after publication of public notice. LC 5020, Sec. 2(2).
  - a. If valid objections are received, DNRC will hold a show cause hearing. There is no deadline by which DNRC must hold a show cause hearing. LC 5020, Sec. 4(1).
  - b. If objections are received and later unconditionally withdrawn or if no objections are received, DNRC shall grant the application, although there is no time period within which such grant must take place. LC 5020, Sec. 5(4).
  - c. If objections are received and withdrawn pursuant to stipulated conditions, DNRC may grant the application subject to conditions “as necessary to satisfy applicable criteria.” LC 5020, Sec. 5(5). There is no time period within which DNRC must take such action. Additionally, LC 5020, Sec. 5(5) leaves open the question of what other options are available to DNRC. Yes, DNRC may grant the application subject to conditions, but may it also grant the application unconditionally, or now even change course and deny the application? This is unclear.
  - d. Regardless of whether no objections are received or objections are received and a show cause hearing is held, DNRC will propose to deny or grant with or without conditions within 90 days after the close of the administrative record. LC 5020, Sec. 5(1).<sup>1</sup>

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<sup>1</sup> One assumes that the proposal to grant or deny an application referred to in LC 5020, Sec. 5 is different from the preliminary written determination to grant or deny an application referred to in LC 5020, Sec. 2, as the bill draft is not

- e. If DNRC proposes to deny the application, LC 5020, Sec.5(2) mandates that DNRC hold a show cause hearing in which the applicant must demonstrate by a preponderance of the evidence why the application should not be denied. It appears that this would be in addition to the hearing provided for in LC 5020, Sec. 4. Again, there is no time period within which this second hearing must take place, nor is there any deadline after the hearing within which DNRC must issue its final decision.
  - f. If DNRC proposes to grant the application following the first show cause hearing provided for in LC 5020, Sec. 4, the process for issuance of a final decision is not clear, nor is any timeline for the issuance of a final decision set forth.
5. If DNRC's preliminary determination is to deny the application, one assumes that LC 5020, Sec. 5(2) requires a show cause hearing. However, because LC 5020, Sec. 5 refers to a proposal to deny and not a preliminary determination, the procedure following a preliminary determination to deny is unclear. For example, LC 5020, Sec. 5(1) requires DNRC to propose to deny or propose to grant within 90 days after the close of the administrative record. If the preliminary determination is to deny, does the administrative record close after that preliminary determination and the 90 days starts to run from there? If that is the case, is the record re-opened for the show cause hearing required under LC 5020, Sec. 5(2)? Is it possible that the preliminary determination is to deny and then the proposal is to grant the application? If so, is public notice then required and the application subject to objections? These are all unanswered questions.

Due to the significant lack of clarity and the number of open-ended timelines, it is impossible to determine what the maximum number of days allowed for processing an application under LC 5020 is. Additionally, as is demonstrated in the above outline, LC 5020 takes what has been a relatively straightforward process and introduces a large amount of uncertainty and lack of clarity.

In addition to simple lack of clarity or timelines, LC 5020's reliance on show cause hearings raises another concern. DNRC has been in the practice recently of issuing Statements of Opinion and then allowing the applicant a hearing to "show cause" why the Statement of Opinion should not be adopted with the presiding hearing examiner being the same DNRC employee who authored the proposal for decision. DNRC has analogized this practice to the situation of a judge who, in the matter of Party A vs. Party B, rules against Party B and then later presides over a case of Party B vs. Party C, in which case the judge's previous ruling in a separate case involving a different opposing party and different issues does not prevent the judge from presiding over a case involving Party B again. However, the more accurate analogy is to a judge

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clear. Additionally, because Sec. 5 raises at least the possibility that DNRC may issue a preliminary written determination to deny under Sec. 2, in which case no public notice would be required, but then propose to grant the permit under Sec. 5. In this case, what process will follow? Will the application then be sent out to public notice, subject to objections and a hearing? This is unknown in the current bill draft language. Additionally, there is an open question as to what constitutes the close of the administrative record where the preliminary written determination under Sec. 2 is to deny the application. Is the administrative record closed upon issuance of that preliminary written decision? One assumes that if the preliminary written determination under Sec. 2 is to grant the application and objections are received, the administrative record closes upon conclusion of the show cause hearing mandated under Sec. 5, but what if the preliminary written determination is to grant and no objections are received? Does the administrative record close upon close of the objection period? Although Sec. 5(4) requires DNRC to grant the application, the time period for such action is unclear. Finally, there is a substantial question as to what constitutes the administrative record in light of Sec. 2's allowance for "informal" discussions between DNRC and the applicant. Are these "informal" discussions and the information provided to DNRC during those discussions part of the record? This is also unclear.

who presides over Party A vs. Party B and rules against Party B, with Party B's appeal of the decision being to the same judge. This is, of course, a situation that the justice system does not allow for because of the obvious denial of due process. DNRC's practice in show cause hearings raises the same concerns for due process, concerns that are not addressed but, rather, heightened, in LC 5020.

In short, LC 5020 provides no advantage in terms of expedited or simplified processing. If anything, it creates a much more convoluted system that is more expensive to all parties involved, including DNRC, as it creates the possibility of not one, but two different hearings. As the Montana Supreme Court noted in its recent decision in Lohmeier, et al. v. DNRC & Utility Solutions, LLC, DNRC argued to the Montana Supreme Court that as senior water right holders,

Lohmeiers' rights were wholly and adequately protected under § 85-2-311(1)(b), MCA, which requires a new water right applicant to show by a preponderance of the evidence that "the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected." The DNRC further argues that §85-2-307(2), MCA, affords the Lohmeiers the opportunity to object to a new water right application and void objections before the DNRC.

Lohmeier, 2008 MT 307, ¶ 22. Given DNRC's advocacy before the Montana Supreme Court that the existing statutes for processing applications provide sufficient protections to senior water rights holders and ample opportunity to object, it begs the question as to the need for the sweeping, confusing, and ultimately most costly and time-consuming proposal of LC 5020.

## **II. LC 5022**

As MAR has urged before, science should drive legislation. Rather than being based on science, LC 5022 is based upon an impromptu response from an independent Three Forks area developer who, to the best of MAR's knowledge is not a member of MAR or the Montana Building Industry Association. Although 30 or more lots with an average lot size of under five acres may be the estimated break-even point for an individual developer, to blanketly apply that standard to all development across Montana is unwarranted and unsupported. Additionally, as MAR has stated before, the data presented to WPIC during this interim has consistently demonstrated that exempt wells constitute a minority of groundwater consumption in Montana, particularly when compared with agricultural irrigation, and that groundwater is available even within closed basins to provide adequate supply for existing and new uses. This lack of supporting science is further emphasized by the fact that LC 5022 does not require local governments to comply with Mont. Code Ann. § 76-3-511 prior to adopting public system requirements. Rather, by amending Mont. Code Ann. § 76-3-504 to require public water and sewer systems for all subdivisions of 30 or more lots with an average lot size under five acres and to mandate that subdivision regulations so require public systems, LC 5022 raises questions as to loss of local control.

A developer could propose an alternative to a public system for acceptance by the local governing body as part of preliminary plat approval under Mont. Code Ann. § 76-3-622, but such a proposal would have to include information showing by a preponderance of the evidence that the proposed alternative protects public health and the environment, can mitigate harm to public health and the environment, and is achievable under current technology. Such information would have to be supported by peer-reviewed scientific studies. Additionally, the proposal would have to include a comparison of costs between a public system and the proposed alternative. In short, LC 5022 shifts the burden that a local government must currently meet before requiring a public system to a developer who wants to choose to not use a public system and significantly increases that burden. **In short, LC 5022 is the antithesis to LC 5014, which is the lesser of two evils.**