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TO: Water Policy Interim Committee and Environmental Quality Council
FROM: Helen Thigpen, Staff Attorney
DATE: June 28, 2012
RE: Senate Bill 35 (2011) administrative rule update -- MAR Notice No. 36-22-144

I. Background

On June 21, 2012, the Department of Natural Resources and Conservation (DNRC) published MAR Notice No. 36-22-144, which proposes several new rules to implement the provisions of Senate Bill No. 35 (2011). SB 35 was enacted as Chapter 359, Laws of 2011, and took effect on October 1, 2011. SB 35 was introduced at the request of the Water Policy Interim Committee (WPIC) and the Environmental Quality Council (EQC). Generally, the purpose of SB 35 was to "clarify the process for the use of the beds of navigable rivers and how the state should be compensated for that use". SB 35 is codified in Title 77, chapter 1, part 11.

SB 35 requires a person proposing to use the bed of a navigable river to obtain a lease, license, or easement from the DNRC. In addition, SB 35 provides that a person who has historically used the bed of a navigable river may continue using the bed of the river if certain statutory requirements are satisfied. If a river has already been deemed navigable, a person must file for authorization to use the bed by July 15, 2017. If a river is deemed navigable after October 1, 2011, a person must file for authorization to use the bed within 5 years after the date notice is issued by the DNRC.

The notice requirement is set forth in 77-1-1114, MCA, and requires the DNRC to notify persons owning property adjacent to rivers determined to be navigable as of October 1, 2011. For rivers determined to be navigable after October 1, 2011, the DNRC must also notify adjacent property owners. However, the 5-year period within which a person must file for authorization to use the riverbed does not begin to run until the DNRC issues the notice. *See* 77-1-1114, MCA.

Section 77-1-1117, MCA, states that the Board of Land Commissioners (Board) shall adopt rules to implement SB 35. Specifically, 77-1-1117, MCA, provides:

> **77-1-1117. Board to adopt rules.** To fulfill the requirement of this part, the board shall adopt rules to:
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> (1) determine the full market value for the use of the bed of a navigable river and establish a minimum payment for leases and easements;
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> (2) allow an applicant to choose to apply for a lease, license, or easement depending on the type of proposed use and the duration of the use; and

(3) allow the holder of a lease, license, or easement to relocate or increase the size of a footprint based on natural relocation of a navigable river or other factors.

During the course of the interim, members of the Environmental Quality Council (EQC) and the WPIC expressed concern about the delay of the adoption of the rules to implement SB 35. As a result, committee staff has updated the EQC and WPIC on the status of the rulemaking on several occasions. During the March WPIC meeting, the committee again requested to be appraised of the status of the rulemaking. At that time, staff noted that SB 35 did not denote a specific time by which the DNRC had to adopt the rules. Staff did note, however, that SB 35 required DNRC to provide notice of the requirements of the bill to persons owning property adjacent to rivers that were deemed navigable as of October 1, 2011. To staff's knowledge, these notices have not been sent to property owners.

II. MAR Notice No. 36-22-144 -- In the matter of the adoption of New Rules I through VIII pertaining to state-owned navigable waterways.

As noted above, the DNRC recently published a proposal notice to adopt several new rules to implement SB 35. The proposed rules address several items, and the pertinent provisions are summarized as follows:

- Proposed Rule I provides several definitions, including a definition of "navigable river". This definition is consistent with the definition provided in SB 35, which provides that a "navigable river" is "a river adjudicated as navigable by a court of competent jurisdiction".

- Proposed Rule II relates to the purpose and applicability of the rules. It provides, in part, that the DNRC may issue a lease, license, or easement for the use of a bed that has not yet been adjudicated as navigable. The interest conveyed is a contingent right to use the bed based upon the validity and extent of the Board's title to the riverbed.

- Proposed Rule III is a severability section, meaning that if any rule or a part of rule is determined to be invalid, the remaining valid parts of the rule or rules remain in effect.

- Proposed Rule IV addresses the authorization for the use of navigable "waterways" and addresses several items, including the uses that do not require prior written authorization from the DNRC. Proposed Rule IV also provides that the DNRC is exempt from the provisions of Title 75, chapter 1, parts 1 and 2, MCA (the Montana Environmental Policy Act), when the issuance of a lease, license, or easement is subject to further permitting under Title 75 or Title 82.

- Proposed Rule V outlines the fees for the application ($50) and establishes the annual fee for a land use license ($150), the fee for a lease, which is the "greater of the product of the

lease rate multiplied by the calculated market value of the footprint of a minimum fee of $150", and the fee for an easement. For additional information on the fee for an easement, see subsection (6) of Proposed Rule V. Finally, Proposed Rule V specifies the funds in which the revenue will be deposited.

- Proposed Rule VI outlines the terms for the lease, license, or easement. A license for a noncommercial or nonresidential lease is 10 years or less; a lease for a commercial or residential use is 99 years; and an easement for use that serves a public purpose is permanent.

- Proposed Rule VII provides that the size of a footprint may be relocated or increased in size and outlines the specific procedures the DNRC will follow when determining whether to authorize the relocation or increase. Subsection (8) exempts the relocation or increase in the size of a footprint for historic use from the provisions of the Montana Environmental Policy Act (MEPA).

- Proposed Rule VIII addresses the historical use of navigable riverbeds as provided in SB 35 and outlines the circumstances in which the rule does not apply. Proposed Rule VIII also describes the type of evidence that may be submitted to demonstrate the historic use of the footprint, including aerial photographs, construction or engineering documents, and a water right pertinent to the structure to be permitted.

III. Analysis

Legal staff has reviewed MAR Notice No. 36-22-144 for compliance with the Montana Administrative Procedure Act (MAPA),[1] and it appears that aspects of proposed Rule VII may incorporate additional or contradictory requirements that were not provided in SB 35. Specifically, proposed Rule VII exempts the relocation or increase of the size of a footprint for the historic use of the bed of a navigable river from MEPA. SB 35, however, does not specifically exempt the relocation or increase of the size of a footprint from MEPA.

MAPA provides that a rule is not valid or enforceable unless it is "consistent and not in conflict with the statute" that the rule implements. Section 2-4-305(6)(a), MCA. As such, "the courts have uniformly held that administrative regulations are out of harmony with legislative guidelines if they: (1) engraft additional and contradictory requirements on the statute; or (2) if they engraft additional, noncontradictory requirements on the statute which were not envisioned by the legislature." *Mont. Soc'y. of Anesthesiologists v. Bd. of Nursing*, 2007 MT 290, 339 Mont. 472, 171 P.3d 704 (2007). A rule must also be "reasonably necessary to effectuate the purpose of the statute". Section 2-4-305(6)(b), MCA.

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[1] *See* 75-1-324, MCA (Duties of environmental quality council), which requires the EQC to review administrative rules.

In this case, the proposed adoption of subsection (8) of Rule VII does not appear to comply with the requirements outlined above. Subsection (8) provides that:

> Relocation and expansion of a footprint under a lease, license, or easement which represents a historic use under [New Rule VIII] is exempt from the Montana Environmental Protection Act (MEPA), 77-1-201, et seq., MCA, and the Antiquities Act, 22-3-401, et. seq., MCA. (Emphasis added).

As such, this means the DNRC would not have to comply with MEPA if a person who has historically used the bed of a navigable river seeks to relocate or increase the size of a footprint. A footprint is defined in proposed Rule I as "(a) an area which may be occupied by a structure; (b) an area which may be occupied for the construction or maintenance of a structure; or (c) an area of the bed of a navigable river below the low-water mark as provided in 70-16-201, MCA, which may be modified for a private use".

Section 77-1-1116(2)(a), MCA, provides that "the holder of a lease, license, or easement under 77-1-1112 or 77-1-1115 **may relocate or increase** the size of a footprint and associated facilities due to the natural relocation of a navigable river or other factors". (Emphasis added). This section authorizes either a historic user or a new user to relocate or increase the size of a footprint, but the DNRC must be notified in writing when a footprint or associated facilities "**are proposed** to be relocated or increased in size". (Emphasis added).

The question, then, is whether MEPA applies to a lease, license, or easement for the historic use of a footprint or a new footprint and, similarly, whether MEPA applies to a proposal to relocate or increase the size of the footprint. Under 77-1-121(1), MCA, the Board and the DNRC are required to comply with MEPA when implementing Title 77 if either entity is actively proposing a sale or exchange or to issue a right-of-way, easement, placement of improvement, lease, license, or permit or if either entity is "acting in response to an application for an authorization for a proposal". However, this requirement **does not** apply to an authorization for the historic use of a footprint. *See* 77-1-121(1), MCA. Therefore, a lease, license, or easement for the historic use of a navigable riverbed is not subject to MEPA review.

While the issuance of lease, license, or easement for historic use does not trigger MEPA, the exemption provided in 77-1-121, MCA, is silent on the expansion or increase in the size of a footprint. Nevertheless, subsection (8) of proposed Rule VII specifically exempts the relocation and increase in the size of a footprint for historic use from MEPA. The exemption from MEPA for historic use may be logical given that the impacts that would be reviewed under MEPA have already occurred. However, the same may not be true for the expansion or increase in the size of a footprint. In addition, 77-1-121(1), MCA, does not appear to exempt the relocation or increase of the size of a footprint from MEPA review if the Board or DNRC are acting in response to an application for an authorization for a proposal. Given that 77-1-1116(2)(b)(i), MCA, provides that the holder of a lease, license, or easement is to notify the DNRC "when a footprint or associated facilities are proposed to be relocated or increased in size," it is possible that the

Board and DNRC could be acting in response to an application for an authorization, which appears to trigger MEPA.

IV. Conclusion

Proposed Rule VII appears to add additional provisions to the statute (77-1-121, MCA) that exempts the application of MEPA to a lease, license, or easement for a historic footprint by also exempting the *relocation* and *increase* in the size of a footprint from MEPA. As a result, it appears that proposed Rule VII adds or engrafts additional and perhaps contradictory requirements to the statute. These requirements may be invalid or deemed unenforceable under MAPA.

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