



PO BOX 201706
Helena, MT 59620-1706
(406) 444-3064
FAX (406) 444-3036

Water Policy Interim Committee

60th Montana Legislature

SENATE MEMBERS

JIM ELLIOTT--Chair
GARY PERRY--Vice Chair
LARRY JENT
TERRY MURPHY

HOUSE MEMBERS

SCOTT BOGGIO
JILL COHENOUR
BILL MCCHESENEY
WALTER MCNUTT

COMMITTEE STAFF

JOE KOLMAN, Lead Staff
GREG PETESCH, Staff Attorney

MINUTES

Date Approved:¹

August 13, 2008

Room 152
State Capitol Building

Please note: These are summary minutes. Testimony and discussion are paraphrased and condensed. **Exhibits for this meeting are available upon request. Legislative Council policy requires a charge of 15 cents a page for copies of the document.**

Please note: These minutes provide abbreviated information about committee discussion, public testimony, action taken, and other activities. The minutes are accompanied by an audio recording. For each action listed, the minutes indicate the approximate amount of time in hours, minutes, and seconds that has elapsed since the start of the meeting. This time may be used to locate the activity on the audio recording.

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COMMITTEE MEMBERS PRESENT

SEN. JIM ELLIOTT, Chair
SEN. GARY PERRY, Vice Chair
SEN. LARRY JENT
SEN. TERRY MURPHY
REP. JILL COHENOUR
REP. WALTER MCNUTT

COMMITTEE MEMBERS EXCUSED

REP. SCOTT BOGGIO
REP. BILL MCCHESENEY

¹These minutes were completed after the interim recessed and were not approved by the committee.

STAFF PRESENT

JOE KOLMAN, Lead Staff
GREG PETESCH, Staff Attorney
CYNTHIA A. PETERSON, Committee Secretary

Visitors

Visitors' list ([Attachment 1](#))
Agenda ([Attachment 2](#))

COMMITTEE ACTION

- The WPIC voted to move LC 5014 forward.
- The WPIC voted to move LC 5020 forward.
- The WPIC voted to move LC 5015 forward.
- The WPIC voted to amend LC 5014 to include uniform standards for community water and sewer systems in all residential subdivisions in Montana except for those with 30 or fewer residential units or those with average minimum densities of five acres per unit.

CALL TO ORDER AND ROLL CALL

Sen. Jim Elliott, Chairman of the Water Policy Interim Committee (WPIC), called the meeting to order at 8:00 a.m. The secretary noted the roll ([Attachment 3](#)).

AGENDA

REPORT FROM WPIC/EQC SUBCOMMITTEE

Sen. Elliott

- 00:00:01 Chairman Elliott provided an update on the Environmental Quality Council (EQC)/WPIC Joint Subcommittee. Joe Kolman, Legislative Research Analyst, will draft legislation delineating the specific duties of the WPIC and the EQC regarding water issues. Chairman Elliott agreed if the WPIC were made a permanent subcommittee of the EQC, it would ensure there would be no duplication of water policy issues.
- 00:02:32 Rep. McNutt believed the WPIC would be the best forum to address water policy; however, Rep. McNutt wondered about the different agencies who report to the EQC since the agencies' reports often address water issues. Rep. McNutt believed water issues will not diminish in the future and, therefore, making the WPIC a permanent interim committee would be the best choice. Rep. McNutt agreed there would need to be a mechanism to prevent duplication of issues.
- 00:06:32 Sen. Perry agreed with Rep. McNutt and thought the task of caring for Montana's water is too large to be one issue before a large committee.

Committee Questions

00:07:29 Sen. Jent thought the complexity of issues was the most compelling reason for maintaining the WPIC. Sen. Jent was also concerned about the duplication of efforts between the EQC and the WPIC. Sen. Murphy agreed.

Public Comment

00:09:43 Larry Luloff, Deceased Water Advocates, thanked the WPIC for its efforts to maintain the WPIC as a permanent interim committee.

Committee Discussion and Action, if any

There was no Committee discussion or action.

MBMG CASE STUDY DRAFT

Overview - John Metesh

00:14:47 John Metesh, John LaFave, and Kirk Waren, Montana Bureau of Mines and Geology (MBMG), provided a PowerPoint presentation on the HB 831 Case Study in the Bitterroot Valley, Gallatin River, and Lower Beaverhead River ([EXHIBIT 1](#)).

Committee Discussion

00:50:13 Sen. Perry expressed concern about the Gallatin Valley since the northwest half lies in his district. Sen. Perry wondered whether farmers and ranchers could run into difficulty in 30 years if the cumulative effects of the wells on the plateau caused a depletion of surface water in the river. Sen. Perry noted that the senior water rights are down lower. Mr. Waren noted the wells have been in place for 18 years. Mr. Waren suggested a continued more advanced model would be helpful in determining surface water shortages in the future, whether the wells are a factor in the water shortage, and the impact of additional wells. Mr. Waren spoke about future water policy decisions, the use of public water systems during times of water shortages, and efforts to keep the water in the rivers for use when water is needed.

00:56:09 Chairman Elliott asked for an explanation of the difference between recharge and soil storage. Mr. Waren explained a detailed grid of monitoring wells throughout the Gallatin Valley was used to measure the ups and downs of the water table. Mr. Waren explained recharge causes the water table to rise up and down and soil storage occurs above the water table and measures water that is on its way to the water table.

00:57:44 Chairman Elliott commented that in the spring, there is a lot of water going in and going out, but the water is in excess of the capacity of community needs. Chairman Elliott wondered if the "useless" water was ignored, what depletion would look like. Mr. Waren responded someone downstream would more than

likely have water rights. Sen. Perry invited Mr. Waren to conduct a public meeting in the Gallatin Valley.

01:00:44 Mr. Metesh continued the PowerPoint presentation.

01:08:09 Sen. Murphy addressed the layer of clay in the Beaverhead and asked about the recharge ability under the layer of clay. Mr. Metesh explained that recharge comes from several places, and the clay layer tends to die out closer to Dillon. Mr. Metesh identified a higher elevation opportunity for recharge. Sen. Murphy asked Mr. Metesh whether he had a feel for how rapid the recharge could occur. Sen. Murphy asked whether deep wells drilled in that type of aquifer to serve a large population area would eventually deplete the water supply, or whether the water supply would eventually recharge. Mr. Metesh explained that in the Lower Beaverhead, the East Bench irrigation canal provides recharge opportunities, along with snow melt, so the aquifer is recharged. Mr. Metesh stated, generally, the Madison aquifer does not have good recharge opportunities.

01:11:59 Sen. Murphy asked whether the MBMG would be able to provide an idea of the recharge capabilities in the various basins over the next 8-10 years as models for closed basins are completed. Mr. Metesh agreed that was the goal of modeling.

Public Comment

01:14:09 Bill Thompson, Hydrometrics, commented on the case study modeling efforts, and suggested many issues are so complex it is extremely difficult to get an analysis through the regulatory process. Mr. Thompson spoke about the huge differences between short- and long-term effects. Mr. Thompson identified a need to look at whether it would be possible to meet challenges through the use of augmentation.

01:18:34 Chairman Elliott asked Mr. Thompson whether he was indicating it would be advantageous if the MBMG's research more closely answered the questions DNRC asks in its permitting process. Mr. Thompson agreed many of the questions are the same and, to the extent MBMG can answer the question, it would help resolve key issues. Chairman Elliott asked whether Mr. Thompson was familiar with other studies conducted in the Gallatin. Mr. Thompson replied he was not familiar with the other studies.

01:20:10 John Tubbs, Department of Natural Resources and Conservation (DNRC), stated he was available to answer questions.

Committee Action, if any

There was no Committee action taken.

(BREAK)

01:44:53 Sen. Perry addressed Mr. Waren's presentation regarding the wells on the Madison Plateau and the Gallatin River and stated he was very concerned. Sen.

Perry asked Mr. Tubbs to comment. Mr. Tubbs explained Idaho had expended \$60 million in the lower Snake River area and the ground water pumping by junior water users had resulted in depletion. Mr. Tubbs stated the springs for a fishery dried up and senior water right holders could not exercise their rights. Idaho has spent millions of dollars and shut off junior water users in anticipation of short-water years. Mr. Tubbs depicted the issues in Idaho as contentious and identified the issue as depletion over time. Mr. Tubbs clarified he did not believe the dates in LC 5020 were removed by Mr. Kolman.

COMMENT ON NICKLIN REPORT (Continued from June meeting)

Brief Review - Abigail J. St. Lawrence, Montana Association of Realtors

01:51:10 Abigail St. Lawrence, Montana Association of Realtors (MAR), noted the MBMG used the same methodologies Dr. Nicklin used in his report and arrived at similar conclusions. Ms. St. Lawrence stated fluctuations are due primarily to climatic changes, and there may be isolated localized impacts that are not considered and need to be studied. Ms. St. Lawrence suggested the studies on ground water need to continue since limited data and time resulted in seasonal impacts not being studied in great detail. Ms. St. Lawrence believed additional data will show how ground water can be utilized to attenuate stream flow. Ms. St. Lawrence noted that the MBMG's case study in the Beaverhead had an error margin of 10 percent in measuring stream flows. Ms. St. Lawrence stated the four rivers studied by Dr. Nicklin were well below the ten percent margin of error. Ms. St. Lawrence believed both studies demonstrated the need for continued and more detailed evaluation and modeling to identify perceptible localized impacts. Ms. St. Lawrence believed the studies indicated ground water storage has remained relatively stable over time, but agreed there are areas left to be investigated. Ms. St. Lawrence offered to answer any questions or have Dr. Nicklin answer any questions related to the study.

Committee Questions

01:59:22 Rep. Cohenour believed the inability to state there is no effect by exempt wells would not necessarily indicate there is an effect. Rep. Cohenour pointed out the results of climatic effects would be over time and also need to be considered. Ms. St. Lawrence noted the anecdotal impacts to wells were localized.

02:01:51 Chairman Elliott recalled Mr. Waren found a 36 cubic feet per second (cfs) net depletion and that amount was significant. Ms. St. Lawrence recalled 36 cfs was fairly insignificant when looking at the greater water availability in the basin. Ms. St. Lawrence clarified the Nicklin study found that within the data set, there have been no significant changes within ground water storage levels and surface flows. Ms. St. Lawrence believed it was necessary to make the distinction between measurable depletion and depletion that has an adverse effect over time.

Public Comment

- 02:04:37 Mr. Tubbs submitted and reviewed the DNRC's comments on the Nicklin report ([EXHIBIT 2](#)).
- 02:09:12 Chairman Elliott asked when the Gallatin basin was closed. Mr. Tubbs responded the Gallatin basin was closed in 1991 by the Montana State Legislature. Mr. Tubbs explained the process that was utilized to close the Gallatin basin.
- 02:11:07 Sen. Perry requested clarification whether the DNRC had ever advocated the closing of the provisions for exempt wells. Mr. Tubbs responded no. Sen. Perry asked whether the DNRC had ever supported, or currently supports, three gallons-per minute (gpm) as the exempt well criteria. Mr. Tubbs responded the DNRC had never advocated anything less than 35 gpm.
- 02:12:19 Mr. Luloff informed the WPIC that in the last two weeks of September, there would be a public meeting in Joliet and the 35 gpm exemption would be discussed. Mr. Luloff believed subdivisions do not need 35 gpm and that the public meeting would also address 15 acre-foot ponds. Mr. Luloff expressed concern that subdivisions could drain the aquifer.

Committee Discussion

- 02:15:11 Rep. McNutt thought the 35 gpm perceived problem with domestic wells is highly overrated and exaggerated. Rep. McNutt did not know of a pump that could deliver 35 gpm to a household. Rep. McNutt believed the concern should focus more on the ten acre-foot exemption. Rep. McNutt agreed the DNRC had never proposed reducing the 35 gpm exempt well provision, but recalled the DNRC did propose looking at the ten-acre foot exemption. Rep. McNutt believed a household could not use ten-acre feet in one year.
- 02:17:42 Chairman Elliot addressed Mr. LaFave and the study of the Bitterroot and asked what portion of the water was used for irrigation. Mr. LaFave explained he looked at the published values from the U.S. Geological Survey (USGS) on estimated water use in Montana and lumped together all the ground water withdrawals. Mr. LaFave stated irrigation withdrawals were the largest volume of the various uses. Chairman Elliott noted irrigation begins in late May and wondered when irrigation stops. Mr. LaFave could not confirm when irrigation stops. Mr. LaFave clarified the river flow in August and September is well below the average flow contained in the Nicklin study.
- 02:20:23 Chairman Elliott stated Mr. Waren's study had been compared to Dr. Nicklin's study and the two studies were depicted as being comparable. Mr. Waren agreed there were similarities in the subject matter of the report, but did not know whether the results are similar. Mr. Waren stated his model had similar numbers as Dr. Nicklin. Mr. Waren stated he is looking forward to discussing the results with Dr. Nicklin and obtaining data to study the Gallatin. Chairman Elliott agreed it would be helpful to utilize each other's models to see if results were comparable.

02:24:33 Sen. Perry asked whether the outflow at Logan was approximately 700,000 cfs. Mr. Waren stated the average discharge of the Gallatin River at Logan at this time of the year is 389 cfs, and earlier in the week had been 625 cfs. Sen. Perry was interested in the average annual flow, but Mr. Waren did not have the exact number available.

Committee Action, if any

There was no committee action.

PUBLIC COMMENT ON ANY MATTER NOT CONTAINED IN THIS AGENDA BUT IS WITHIN THE WPIC JURISDICTION

There was no public comment offered.

COMMITTEE DISCUSSION ON DRAFT REPORT/LEGISLATION, IF NECESSARY

02:28:19 Mr. Kolman reviewed LC 5014, which would require public water and sewer systems for subdivisions ([EXHIBIT 3](#)).

02:30:56 Ms. St. Lawrence explained the MAR' comment that granting local governments the authority to require public water and sewer systems could result in 54 sets of individual county standards. Ms. St. Lawrence emphasized local governments already have the ability to set density limits and requirements through zoning and long-term planning.

Committee Questions

02:33:43 Sen. Perry asked whether there was agreement, understanding, or acknowledgment that there could be a limit placed on subdivisions, such as the size of the lots for requiring community wells or sewer systems. Ms. St. Lawrence responded the counties currently have the authority and ability to establish lot size requirements. Sen. Perry wanted to know where the real estate industry stood on the issue of lot size. Ms. St. Lawrence was concerned LC 5014 could result in different requirements for each subdivision. Ms. St. Lawrence stated the MRA believes long-term zoning and planning would be preferred, so developers know the requirements up-front. Sen. Perry wanted to know what would be acceptable to the MAR. Ms. St. Lawrence acknowledged most of the MAR's conversation and focus had been on exempt wells.

02:38:18 Sen. Jent explained § 76-3-511, MCA, states local restrictions cannot be more stringent than state guidelines. Sen. Jent commented if the MAR is concerned about having 56 different standards, the DEQ could be mandated to set forth criteria for public water and sewer systems in subsection (3). Ms. St. Lawrence agreed that would set one single state-wide standard and stated she would need to discuss any specific approval with the MAR. Ms. St. Lawrence believed LC 5014 would allow local governments to require community water and sewer systems for subdivisions.

- 02:43:04 Mark Aagenes, Trout Unlimited, commented LC 5014 would give local governments clear authority to preferentially approve subdivisions that have centralized water systems. Mr. Aagenes stated that he would like to see the proposal include water metering.
- 02:44:12 Sen. Perry addressed water metering and recalled in the past the topic had been very controversial and the subject of many e-mails and talk shows. Sen. Perry asked Mr. Aagenes to clarify whether his reference to water metering was limited to subdivisions with community water systems. Mr. Aagenes did not agree and stated he did not see anything wrong with placing meters on exempt wells and that the meters would provide information regarding the impact of exempt wells.

Committee Discussion

- 02:46:23 Rep. Cohenour stated the proposal would provide a county with the ability to require water metering in subdivisions in their area. Rep. Cohenour recalled past WPIC discussions about providing more local control for local governments to meet their community needs. Rep. Cohenour believed LC 5014 was necessary and would allow counties to address the needs of its citizens.
- 02:49:19 Sen. Jent agreed with Rep. Cohenour and referred to page 7 of LC 5014 and the suggestion of FWP to include "and/or". Sen. Jent suggested requiring all subdivisions to have water and sewer systems and then allow the counties to opt out under certain stringent conditions.
- 02:50:51 Sen. Perry addressed the topic of water metering and recalled the past debate on HB 22 did not include water metering; however, HB 22 created panic. Sen. Perry emphasized counties already have the authority to limit size and regulate subdivisions. Sen. Perry envisioned a need to look at the limitation of lot size and numbers in relation to the size of the plume of the septic tank. Sen. Perry did not believe LC 5014 headed in the direction he desired.
- 02:54:56 Rep. Cohenour emphasized LC 5014 would pass the decision to the counties as to who would be directly responsive to the local citizens. Rep. Cohenour recalled past testimony that the county commissioners would like their county authority clarified.
- 02:56:41 Sen. Jent reminded the WPIC that local governments get their authority from the constitution, charter, and statutes. Sen. Jent agreed county commissioners are uncertain of their authorities and thought LC 5014 would give counties the authority to mandate public water and sewer systems for subdivisions when needed.
- 02:57:41 Rep. McNutt recalled a presentation by Mr. Kilbreath, DEQ, that the DEQ is looking into mixing zone allotments, allocations, or permits and if they could establish a mixing zone, it could not exceed the lot boundary. Rep. McNutt thought that requirement could indirectly drive larger lot sizes for mixing zones. Rep. McNutt thought the issue was outside the bill.

- 02:58:53 Sen. Perry stated he would not consider LC 5014 as an individual or committee bill since he would want all interested parties to have input. Sen. Perry thought the proposal could be a potential for great misunderstandings in local communities. Sen. Perry expressed concern about an e-mail circulating stating he was against exempt wells. Chairman Elliott was also concerned about false information and hoped that any organization that had participated in the WPIC meetings would not broadcast misinformation to the public.
- 03:01:34 Rep. McNutt identified the operative word as "may" and thought high-growth areas may need clarification regarding their authority. Rep. McNutt recalled some counties and county commissioners were requesting the authority.
- 03:03:09 Chairman Elliott stated he opposed the proposal and thought it would be very difficult for county commissioners to say no.

FURTHER PUBLIC COMMENT

- 03:04:22 Nadia Beiser, a developer who works in Gallatin County, stated it is not uncommon to have a subdivision of one or two lots, and thought it would be inappropriate for those subdivisions to have a community sewer system. Ms. Beiser thought there could be unintentional consequences because local governments could use the statute to selectively stop development. Mr. Beiser thought LC 5014 would force a developer to guess which system it might be required to install. Ms. Beiser saw a need to bring uniformity across the cities. Ms. Beiser wondered who would regulate the scientific community water and sewer systems since most towns do not have the technology.
- 03:07:46 Chairman Elliott asked Ms. Beiser whether she had ever gone before a board of county commissioners or town council when developing subdivisions. Ms. Beiser responded she had appeared before many commissions, but prefers to meet with people ahead of time, including neighbors and regulatory agencies. Ms. Beiser noted board membership and technology changes, and the difficulty in determining which way to move forward. Ms. Beiser stated she has experienced unequal treatment, especially in Gallatin County. Ms. Beiser stated there is no uniform application of the type of system that should be used. Ms. Beiser believed a local municipality could use the authority to act in a non-uniform way. Ms. Beiser supported having a state-wide standard. Chairman Elliott noted the WPIC conducted approximately 140 hours of hearings across Montana, and that legislation is supposed to solve problems. Chairman Elliott identified development in Montana as one of the reasons the WPIC was formed, and the WPIC had been trying to develop legislation for the benefit of Montana citizens. Chairman Elliott reminded Ms. Beiser of the constitutional charge to protect and improve the environment. Chairman Elliott commented the WPIC had not had any help from the development community because the development community already has the ability to use exempt wells in closed basins. Chairman Elliott expressed his frustration with the development community. Ms. Beiser applauded the direction the WPIC was going with uniformity and thought uniformity should also apply to towns.

- 03:15:32 Sen. Murphy served on the Jefferson County Planning Board during the rapid growth experienced in the Montana City area. Sen. Murphy recalled the Planning Board was much more concerned with septic systems rather than individual wells. The Jefferson County Planning Board was told by legal counsel it did not have the legal authority to require community septic systems. Sen. Murphy sought to know the real authority of planning boards and county commissioners.
- 03:18:03 Sen. Jent was not certain about the counties' authority and referred to Mr. Petesch. Mr. Petesch directed the WPIC to LC 5014, page 2, subsection (g). Mr. Petesch explained if standards are going to be developed that are more stringent than DEQ standards, it has to be based on protecting the environment and a finding of facts based on peer-reviewed science. Mr. Petesch believed local governments would have the ability to require community sewer systems to protect the environment and believed local governments have that ability right now.
- 03:20:24 Sen. Perry appreciated Ms. Beiser's traveling to Helena to testify on sensitive issues.
- 03:21:25 Myra Shults, Montana Association of Counties (MACo), is a former defense attorney and thought subsection (3), page 7, is necessary for self-governing county governments since they can only do what is allowed by statute. Ms. Shults agreed counties "may" use their authority but stated there will be lawsuits in every judicial district until the issue goes to the Montana Supreme Court. Ms. Shults was concerned about the cost of lawsuits and the need for clear statutory authority. Ms. Shults believed counties will still need to adopt their own regulations, which will require going through a public process. Ms. Shults addressed "long-term planning and zoning" and explained Ravalli County set a lot size limit of one residence per two acres for two years. However, a petition has been successfully promulgated and the issue of repealing the growth policy will be on the ballot. Ms. Shults thought Ravalli County could not solve its water and sewer problems through zoning. Ms. Shults requested a committee bill.
- 03:27:18 Sen. Perry asked Ms. Shults how she would respond to Ms. Beiser's concern that a door could be opened for preferential treatment for certain developers or subdivisions over others. Ms. Shults suggested local governments would first have to adopt regulations and noted there is a public process. Sen. Perry commented he could not vote for something that could be interpreted opposite of the intent of the legislation.
- 03:30:24 Rep. Cohenour requested clarification from Ms. Shults and stated she did not believe the bill would make things different from county to county but would clarify an already available avenue that people are afraid to use because the authority is not explicit. Ms. Shults agreed with Rep. Cohenour and the language in subsection (1)(g)(iii). Ms. Shults viewed the legislation as a specificity that would help avoid litigation. Rep. Cohenour asked whether the proposal would open additional doors of liability or potential gaming of the system which were previously not available. Ms. Shults believed the proposal would decrease liability

and added anytime something specific is placed into state legislation, attention is brought to the issue.

03:34:48 Rep. McNutt recalled the Legislature's past efforts to quit usurping local authority and bringing it to Helena. Rep. McNutt emphasized people on the local front have to get elected. Rep. McNutt supported clarifying local authority.

03:35:54 Chairman Elliott identified two reasons to discuss exempt wells: (1) exempt wells are being used in closed basins; and (2) the likelihood of septic systems polluting water supplies. Chairman Elliott stated community septic and water systems are cost prohibitive to some developers. Chairman Elliott asked Ms. Beiser for her opinion regarding state requirements for subdivisions, which would also give local governing authorities the ability to waive the requirements. Ms. Beiser identified uncertainty as a developer's greatest nemesis. Ms. Beiser believed Montana cities and towns do not have the technical expertise to evaluate community systems. Ms. Beiser would like to see clarification that cities, towns, and counties have the right to regulate, but was wary that the regulations could be used as *de facto* zoning. Ms. Beiser suggested developers mostly move in phases and that initial costs could be reduced by utilizing exempt wells and community sewer systems sized for each phase. Chairman Elliott asked Ms. Beiser what size lot and number of units would be desirable. Ms. Beiser responded it would depend on the soil. Chairman Elliott asked Ms. Beiser for her opinion on proposed language stating: "Subdivisions of over thirty units, with lots of five acres or less, must have either a community water supply system or community septic system unless upon the presentation of appropriate data that requirement is waived by the county commissioners." Ms. Beiser explained the economics involved in determining feasibility depend on the length of the lines. Chairman Elliott requested Ms. Beiser to contemplate the issue and report back to the WPIC.

03:44:33 Sen. Jent moved to adopt LC 5014 as drafted. Sen. Jent's motion carried 4-2 with Sen. Perry and Sen. Elliott voting no.

PUBLIC COMMENT

No further public comment was offered.

(LUNCH)

LC 5014 (Cont'd.)

05:07:54 Sen. Perry expressed his dismay about not being afforded an opportunity to comment after the motion. Sen. Perry inquired whether the vote was to move the bill as a committee bill. Chairman Elliott confirmed the bill would be a committee bill. Sen. Perry was also concerned about not being given an opportunity to vote Rep. Boggio's proxy.

- 05:08:36 Mr. Kolman reviewed the WPIC voting procedure and the three-quarter vote requirement. Mr. Kolman clarified LC 5014 would not become legislation until the WPIC votes in September.
- 05:09:29 Sen. Perry responded the current WPIC vote would move LC 5014 forward. Mr. Kolman clarified anything could be voted on in September. Sen. Perry stated it was not his purpose to distract from the will of the committee and recognized casting a vote in the negative for Rep. Boggio would kill the bill. Sen. Perry expressed his concern about not having an opportunity to comment and not following normal committee rules. Sen. Perry stated he would like the vote corrected and voted Rep. Boggio no by proxy. Chairman Elliott voted Rep. McChesney yes by proxy, and Chairman Elliott changed his vote to yes. The motion carried 6-2 with Rep. Perry and Rep. Boggio voting no. Chairman Elliott apologized for not following normal committee rules.
- 05:14:57 Chairman Elliott read comments from Ms. Beiser regarding what would be fair and reasonable criteria for establishing uniform state law regarding sewer and/or public water supply systems in subdivisions.

MANHATTAN WATER ISSUES

Manhattan Representatives

- 05:16:29 Richard Kerin, Kerin and Associates, P.C., Consulting Engineers, spoke about the DNRC permitting process (**EXHIBIT 4**). Mr. Kerin submitted a map of future development in the Manhattan area (**EXHIBIT 5**).

Committee Questions and Discussion

- 05:34:43 Sen. Perry asked Mr. Kerin whether the question was with one or two wells. Mr. Kerin responded in Manhattan there are two existing wells that were placed into service in 2002, where the beneficial use permit did not get filed, and the Vidar well is in the permitting process and is under the provisions of HB 831.
- 05:36:46 Chairman Elliott sought to know the applicant's name. Mr. Kerin was uncertain of the applicant's name.
- 05:37:20 Chairman Elliott asked Mr. Tubbs whether the property Mr. Kerin was referring to was subject to the HB 831 requirements. Mr. Tubbs responded it was not and the application was submitted in April 2006. Mr. Tubbs explained he could not discuss the details of a pending permit but, to date, the applicant had requested five hearing extensions. Mr. Tubbs further explained there were objections, and that he understood the objections have been resolved.
- 05:39:27 Sen. Perry requested clarification as to whether the application was subject to HB 831. Mr. Tubbs clarified the application was pending before HB 831. However, the application is in a closed basin and is subject to the *TU* decision. Sen. Perry asked whether the DNRC was objecting, and Mr. Tubbs responded he did not believe the DNRC was an objector.

05:41:00 Rep. Cohenour addressed Mr. Kerin and asked if the applicant requested extensions, and Mr. Kerin responded, apparently, the applicant did request the extensions.

Public Comment

05:42:50 Ms. Beiser has a 365-lot approved residential subdivision across from the subdivision Mr. Kerin spoke about. Ms. Beiser identified the applicant as the Town of Manhattan, and stated the Town of Manhattan needed help. Ms. Beiser stated she was impressed with the work done by the Town of Manhattan in developing a growth policy. Ms. Beiser believed the Town of Manhattan tried to do the right thing. Ms. Beiser explained the Town of Manhattan upgraded its sewer treatment plant and developed an augmentation system for the city's water supply. The new sewer plant was to be paid for with user fees from the new subdivisions. However, the subdivisions cannot be built. Therefore, the sewer rates will be assessed on existing users only. Ms. Beiser requested help for the Town of Manhattan. Ms. Beiser noted the DNRC is requiring the augmentation only be done through aquifer recharge, and Ms. Beiser thought the requirement was 180 degrees from the objectives. Ms. Beiser addressed the new well and the DNRC's requirement that augmentation only be performed through aquifer recharge. Ms. Beiser sought assistance for the Town of Manhattan.

05:50:58 Doug Chandler, Allied Engineering in Bozeman, reviewed Dr. Nicklin's report and the MBMG report and agreed with their conclusion that in the right geology and situation, aquifers can be used as a water resource tool. Mr. Chandler noted the law does not mention a growing cities doctrine and thought municipalities should be given an exemption for ground water withdrawals.

05:54:28 Mr. Tubbs supplied the committee with a time line ([EXHIBIT 6](#)). Mr. Tubbs clarified the DNRC is accepting mitigation through instream flow. Mr. Tubbs stated abandonment of a surface water right would unlikely be considered as mitigation and only provides water for the next senior water user in the priority system. Mr. Tubbs added abandonment does not protect a water right into the future.

Committee Questions

05:56:53 Sen. Murphy stated he received complaints from agricultural producers that Manhattan was attempting to take their agricultural water rights through eminent domain. Sen. Perry did not have any knowledge of Sen. Murphy's charge and suggested it was a misunderstanding. Sen. Perry offered to look into the issue.

05:58:51 Chairman Elliott asked Mr. Petesch whether a water right could be taken by eminent domain. Mr. Petesch agreed water could be condemned in Montana.

05:59:46 Chairman Elliott asked Krista Lee Evans whether the WPIC toured the Manhattan properties that were currently being discussed. Ms. Evans responded the WPIC drove by the subject subdivisions and toured the new sewage treatment facility.

- 06:00:29 Sen. Perry explained the WPIC traveled to Bozeman and Manhattan as an example of how to do things correctly. Sen. Perry stated the subdivisions were approved by the county and how the subdivisions chose to develop a community water system. Sen. Perry suggested Manhattan is experiencing an unforeseen glitch. Sen. Perry believed when the law prevents people from doing the right thing, the Legislature falls short of its duties. Sen. Perry believed it was not necessary to point fingers at the DNRC. Sen. Perry envisioned a need to be flexible enough in the law to find solutions.
- 06:04:16 Rep. McNutt empathized with Manhattan's problems but believed to suggest this is such a special issue that the DNRC should issue a permit without any consideration for senior water right holders would create chaos. Rep. McNutt stated Manhattan has two wells without permits and stated he was confused why there were no permits. Rep. McNutt wondered why it should be made easier for someone to walk on a senior water right. Rep. McNutt emphasized the DNRC cannot issue permits unless they prove they have the water. Rep. McNutt depicted the issue as complicated.
- 06:09:06 Sen. Jent addressed the Manhattan situation and disclosed that his law partner was involved in the *Bostwick* litigation. Sen. Jent depicted the DNRC's process as cumbersome and suggested if the process is cumbersome, it provides an incentive for exempt wells.

LC 5020

- 06:12:11 Candace West, Legal Counsel, DNRC, addressed LC 5020 (Exhibit 12, Minutes, August 12, 2008) and asked Chairman Elliott to restate the specific question. Chairman Elliott summarized his question as whether a hearings officer is under the purview of the department and wondered how a fair hearing could be conducted on an issue the department had already ruled against. Ms. West explained the hearings examiner is delegated with the responsibility of making a determination for the department. The hearings examiner weighs the evidence presented. Ms. West explained it would be no different than a judge that would be presented proposed findings and conclusions. Ms. West clarified the department neither advocates for, or is an adversary against, any application for a permit or a change of use because they are statutorily charged with applying the law fairly. Ms. West added state water projects are Chinese walled from the DNRC. Ms. West did not believe there was a conflict of interest. Ms. West re-emphasized the final decision maker would independently weigh the evidence.
- 06:19:26 Mr. Kolman explained LC 5020 contains the new provisions for the DNRC to issue a preliminary determination. Mr. Kolman outlined the issues contained in LC 5020.

Committee Discussion

- 06:20:49 Sen. Murphy stated after listening to the comments and testimony, he believed LC 5020 had promise and a whole lot of problems. Sen. Murphy would not support making LC 5020 a committee bill.

- 06:21:34 Rep. Cohenour asked whether there was support from the WPIC.
- 06:22:05 Sen. Murphy thought the bill was salvageable with substantial changes, but did not believe the WPIC could make the bill suitable within its allotted time frame.
- 06:22:51 Sen. Jent stated he would support LC 5020. Chairman Elliott, Sen. Perry, Rep. Cohenour, and Rep. McNutt stated they would like to see LC 5020 move forward.
- 06:23:57 Rep. Cohenour liked the idea of individuals being able to make their case rather than having to hire lawyers. Rep. Cohenour did not want to have issues become a contested case hearing.
- 06:25:34 Rep. McNutt recalled the WPIC decided the time lines would go back in the bill. Mr. Kolman requested clarification on the time lines.
- 06:26:11 Rep. Cohenour recalled the time lines were not in there because they did not fit. Rep. Cohenour suggested staff work with Mr. Tubbs to match the time lines currently in law.
- 06:27:02 Rep. McNutt asked Mr. Tubbs to review the process. Mr. Tubbs explained there is a 90-day provision, which is expedited from the current law. The DNRC intends to allow examination of professional witnesses, so applicants and objectors have an opportunity to lay down the facts and build a record. Mr. Tubbs explained the DNRC already has certain provisions for show cause hearings, so the issue to be addressed is cross-examination of an expert witness.

Committee Action, if any

- 06:31:14 Rep. Cohenour moved to bring LC 5020 forward to the final WPIC meeting. Rep. Cohenour's motion carried with Sen. Murphy voting no. Rep. Boggio and Rep. McChesney voted aye by proxy.

LC 5015

- 06:32:28 Mr. Kolman explained LC 5015, and that he worked with Anna Miller from the DNRC ([EXHIBIT 7](#)). LC 5015 would provide loans for new sewer and water systems or updates or expansion of existing water systems.
- 06:34:29 Sen. Jent asked about the definition of "authority" in § 75-6-304, MCA, and Mr. Kolman read the definition. Mr. Kolman continued reviewing LC 5015.

Committee Questions

- 06:38:58 Rep. Cohenour asked about the funding and recalled past discussion that the current revolving fund program is not depleted on a regular basis. Mr. Kolman did not have any information on the issue. Rep. Cohenour suggested obtaining further information.

- 06:40:12 Rep. McNutt asked where the funding for the revolving fund program would come from. Mr. Kolman stated he patterned the legislation off the state drinking water revolving fund program and that money, in part, comes from the federal government.
- 06:41:13 Mr. Tubbs explained the provisions allow for the authorization of general obligation funds, use of the general fund, or state special revenues. Generally, the state has not been issuing bonds on the collection of loans.
- 06:42:29 Mr. Petesch explained revolving loan funds and stated that, generally, once the fund is capitalized, the money repaid on the loans is returned to the fund to be paid out at another time. Mr. Petesch stated the bill lacks the initial capitalization of the fund. Rep. McNutt was concerned about how the initial capitalization would occur.

Public Comment

- 06:44:02 Ms. St. Lawrence explained the MAR's comments and that individual developers were not included. Ms. St. Lawrence also believed that given the information presented, the MAR was not convinced the WPIC's discussion supported the finding regarding the use of exempt wells in high-growth areas.
- 06:45:38 Rep. Cohenour addressed Section 2, subsection (a), and suggested removal of the word "rural." Rep. Cohenour also suggested changing the language in Section 2, subsection (b) to "may be" and changing the language in subsection (e) and removing the reference to single wells and septic systems. Rep. Cohenour wanted to close the loophole that did not allow existing systems to build infrastructure out to development areas. Ms. St. Lawrence agreed with Rep. Cohenour's changes.
- 06:47:22 Chairman Elliott asked Ms. St. Lawrence to clarify her earlier comments, and Ms. St. Lawrence clarified water and sewer districts are also entities. Ms. St. Lawrence clarified developers can form water and sewer districts if the developer meets the requirements.
- 06:49:28 Rep. McNutt addressed the approved development projects in Manhattan and wondered if that government entity could apply for a loan to develop a sewer and water system.
- 06:50:13 Mr. Kolman agreed a city or town could be an applicant.
- 06:50:50 Rep. McNutt suggested the developer could work with the Town of Manhattan to obtain funding to build the infrastructure.
- 06:51:48 Mr. Aagenes recalled the WPIC's desire for carrots and believed LC 5015 addressed that issue. Mr. Aagenes suggested placing a fee on tracts of land less than 100 acres.

- 06:52:59 Rep. Cohenour agreed funding would be an issue, and stated she would work to come up with several suggestions before the next meeting. Rep. Cohenour moved to support LC 5015, with the amendments, as a committee bill.
- 06:54:57 Mr. Kolman directed the WPIC to Rep. Pomnichowski's comments.
- 06:55:47 Rep. Cohenour's motion carried unanimously by voice vote.
- (BREAK)
- 07:17:17 Chairman Elliott requested the WPIC's opinion on the comments by Ms. Beiser which suggested putting into statute requirements for subdivisions of certain densities and sizes to have public water and sewer systems and allowing local governments to opt out upon presentation of credible evidence. Ms. Beiser suggested the limit should be 30 or fewer residential units or average minimum densities of five-acre lots. Chairman Elliott recalled at 30 residential units and above it makes economic sense.
- 07:19:20 Mr. Kolman referred back to LC 5014, which would allow local governments to require public water and sewer systems as defined in DEQ's rules. Chairman Elliott stated LC 5014 would allow county commissioners to mandate public water and/or sewer systems.
- 07:21:19 Sen. Jent believed it may be better to go forward with two bills. One bill would mandate public water and sewer systems as defined in rule and place the burden of proof on the applicant to show by a preponderance of the evidence that a public water and/or sewer system is not required due to one of the following factors. Rep. McNutt thought the proposal made sense and wondered whether the proposal would conflict with the current rule.
- 07:24:07 Rep. Cohenour agreed the proposal should be a separate bill. Rep. Cohenour stated the county could still individually address 15-30 unit subdivisions. Rep. Cohenour agreed at 30 and above, it could be mandated.
- 07:25:50 Sen. Murphy agreed with moving forward with the idea, but cautioned anytime a number is set, people will deliberately come in just under that number.
- 07:26:28 Sen. Perry agreed.
- 07:26:58 Mr. Kolman will get the bill draft out before the next meeting.

Public Comment

- 07:27:38 Steve Kilbreath, DEQ, stated the proposal would affect only a small number of subdivisions.
- 07:28:28 Ms. Shults reserved her public comment until she could see the proposal.

- 07:28:55 Chairman Elliott moved the WPIC instruct Mr. Kolman to write a bill draft with uniform standards for community water and sewer systems in all residential subdivisions in Montana except for those with 30 or fewer residential units or those with average minimum densities of five acres per unit. An exception would be allowed upon presentation of evidence by the developer to the board of county commissioners or governing body that public water and sewer systems are not needed. Sen. Jent added the developer would have the burden of proving the exceptions by a preponderance of the evidence.
- 07:30:37 Chairman Elliott's motion carried unanimously by voice vote.

WPIC REPORT AND FINDINGS

- 07:31:33 Mr. Kolman directed the WPIC's draft WPIC report and findings ([EXHIBIT 8](#)).
- 07:32:20 Rep. McNutt suggested adding a section to the report which would include all public comments. The WPIC agreed to include public comments in the draft report.
- 07:33:37 Mr. Kolman stated there were also comments on the draft findings, and stated those comments would be included in the appendix (EXHIBIT 9). Mr. Kolman noted the underlined portions in the draft findings represented changes from the last meeting. Mr. Kolman stated he would continue to update the findings and recommendations.
- 07:35:43 Rep. Cohenour inquired whether the report would reflect discussion of issues even though there was no legislation proposed. Mr. Kolman responded if recommendations no longer apply, he would strike them. Mr. Kolman pointed out he added a section regarding the tours given to the WPIC.

ADMINISTRATIVE MATTERS

WPIC Budget Overview - Mr. Kolman

- 07:38:22 Mr. Kolman reported the WPIC had a remaining balance of \$14,600.

September Meeting

The next WPIC meeting will be in Helena on September 11-12, 2008.

- 07:40:59 Rep. Cohenour emphasized when the WPIC traveled to its destinations and participated in tours, there was a theme to each out-of-town meeting. Rep. Cohenour would like to see those themes identified in the report.
- 07:42:26 ADJOURN