

Water Policy  
Interim  
Committee

2021-  
2022

FINAL Work Plan  
for the 2021-22  
Interim





# CONTENTS

Introduction .....	4
How the WPIC plans its work.....	4
What does statute require? .....	5
Interim studies .....	5
Administrative rules .....	5
Monitor agencies.....	6
Review legislation .....	6
Member topics, emerging issues .....	7
Time allocation for committee work .....	8
The interim is comprised of 7 meetings. ....	9
Appendix A: WPIC leadership has alternated by political affiliation.....	9
Appendix B: Laws that guide WPIC's interim work.....	10
Appendix C: Water-related bills at 2019 Legislature.....	11
Appendix D: WPIC's work plan time line (as of June 14, 2021).....	12
Appendix E: 2021-22 WPIC work plan decision matrix .....	14
WPIC staff .....	18
HJ 37: Study of Lake Koochanusa selenium standard.....	19
SJ 28: Study of Flathead River erosion.....	21
Overview of administrative rulemaking and committee rule review.....	24

# 2021-22 WPIC WORK PLAN

## INTRODUCTION

This is the work plan for the Water Policy Interim Committee (WPIC) for the 2021- 22 interim. This document is meant to be comprehensive, yet flexible. Invariably, topics of interest will rise and fall away during the next 14 months. The work plan approved by the committee is designed to provide direction to staff.<sup>1</sup>

The WPIC was created in 2009 to study water policy. During the legislative interim, the WPIC may focus on the study topics assigned to it as well as any water policy issue. In 2015, the Montana Legislature expanded and focused WPIC duties to include oversight of issues **"where the primary concern is the quality or quantity of water."**

## HOW THE WPIC PLANS ITS WORK

The WPIC establishes a work plan at the beginning of the interim. The work plan and the accompanying work plan decision matrix (beginning on page 13) are decision-making tools to help the committee set priorities and decide how and where to spend the WPIC's time and resources. The committee's presiding officer, in consultation with the committee, works with staff to determine specific agenda items. (See **Appendix A** for a list of past and current officers.)

The primary constraint limiting the agenda for the interim are the number of issues that can be effectively addressed within the available time and resources of the committee and staff. However, the work plan is constructed with enough flexibility to accommodate emerging topics.

This work plan is a road map for the 2021-22 interim. Staff develops detailed plans and timetables for each task. A work plan timeline, which illustrates the overall schedule that these work plans will fit, is summarized on page 9 and specified beginning on page 12 of this document.

## WHAT DOES WPIC DO?

Conducts interim studies

Monitors agencies

Reviews administrative rules

Reviews councils, reports

Determines water policies to examine

Proposes and reviews legislation

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<sup>1</sup> See page 15 for a staff list and contact information.

# WHAT DOES STATUTE REQUIRE?

Three statutes provide primary guidance for interim committees. (See **Appendix B** for these sections of law.)

First, all interim committees<sup>2</sup> are expected to review administrative rules, conduct interim studies, monitor assigned executive branch agencies, review advisory councils and reports, review agency legislation and ballot initiatives, and provide any other relevant information.

Second, the WPIC is established by law to provide oversight “for issues where the primary concern is the quality or quantity of water”<sup>3</sup> in programs of the Department of Environmental Quality (DEQ), the Department of Fish, Wildlife, and Parks (FWP); and the Department of Natural Resources and Conservation (DNRC). The WPIC may determine what issues it examines and to conduct program evaluations of programs under its oversight. The program evaluation process allows for an in-depth and contextual review of a program, including applicable laws, rules, funding, and implementation. And finally, a third section of law provides for additional statutory duties, such as analyzing the state water plan, water-related research, and the water information system.<sup>4</sup>

**For water issues, WPIC provides oversight of the . . .**

Department of Environmental Quality

Department of Natural Resources and Conservation

Department of Fish, Wildlife, and Parks

## INTERIM STUDIES

The Legislative Council referred two studies passed by the 2021 Legislature to the WPIC. The committee subsequently agreed to conduct both studies.<sup>5</sup>

House Joint Resolution 37 (HJ 37) proposes a study of the data used by the Department of Environmental Quality for a 2020 administrative rule, setting selenium limits for Lake Koocanusa and the Kootenai River for fish tissue and the water column.

### 2 studies assigned to WPIC:

HJ 37	Study of Lake Koocanusa selenium standard
SJ 28	Study of Flathead River erosion

The Environmental Policy Agency approved these standards in early 2021, pursuant to the federal Clean Water Act.

Senate Joint Resolution 28 also examines water quality on a specific stretch of river. Lands along the lower Flathead River in Flathead County have been subject to increasing erosion, which is affecting

streambanks and phosphorus and nitrogen loading of Flathead Lake.

The study resolutions may be found beginning on page 19.

## ADMINISTRATIVE RULES

The Legislature often authorizes administrative agencies to carry out the Legislature’s intent by adopting administrative rules. These rules have the full force and effect of law. These rules may be adopted and revised throughout the year. Administrative rule functions are governed by the Montana Administrative Procedures Act (MAPA).

<sup>2</sup> Section 5-5-215, MCA.

<sup>3</sup> Section 5-5-231, MCA.

<sup>4</sup> Section 85-2-105, MCA.

<sup>5</sup> On July 15, 2021, the committee voted to form a HJ37 special committee with members from the Environmental Quality Council.

MAPA and court opinions govern the procedures and requirements for administrative rulemaking. However, only the Legislature may delegate the authority to an agency to adopt rules.

<b>During the 2019-20 interim, the WPIC...</b>
<b>reviewed 3 notices of administrative rulemaking</b>
<b>objected to 0 notices</b>

State law allows the WPIC to review and monitor administrative rules promulgated by the DNRC, FWP, and DNRC, where the primary concern is the quality or quantity of water. The committee may participate in the rulemaking process, ranging from offering comments or suggestions to objecting and delaying a rule implementation. (See attached memo beginning on page 24 for a more-thorough explanation of administrative rulemaking and the committee’s role.)

## MONITOR AGENCIES

The 2015 Legislature delegated certain oversight duties to the WPIC. Following the passage of Senate Bill 82, the WPIC reviews administrative rules and draft legislation, conducts program evaluations and monitor the functions of the Water Resources Division (DNRC) and the Water Quality Division (DEQ).

The committee’s oversight duties do not stop there, however, as issues of “the quality or quantity of water” may arise in the Department of Fish, Wildlife, and Parks—or even other agencies, such as the Department of Agriculture’s groundwater monitoring program. Additionally, certain agencies have reporting requirements to the WPIC, which are listed in the table at right. For example, the DNRC is required to consult the committee as it updates the state water plan.

<b>12 reports to WPIC</b>
Appropriation rights changed to instream flow (FWP, 85-2-436, MCA)
Consultation on state water plan (DNRC, 85-1-203)
Economic and environmental feasibility of small-scale hydroelectric power generating facility on a state water project (DEQ, 85-1-501)
Ground Water Investigation Program (MBMG, 85-2-525)
Prioritization of water storage projects (Governor's office, 85-1-704)
Progress of the adjudication of pre-1973 water rights (DNRC and Water Court, 85-2-281)
Status of the Renewable Resource Grant and Loan Program (DNRC, 85-1-621)
Stream gauge oversight work group (DNRC, 2-15-3308—expires July 1, 2023)
Review of state water reservations by 2026 (DNRC, 85-2-316)
Total maximum daily loads (TMDLs) for impaired and threatened water bodies (DEQ, 75-5-703)
Upper Clark Fork River Basin Steering Committee (85-2-338)
U.S. Forest Service state water reservation applications (DNRC, 85-20-1401)

## REVIEW LEGISLATION

As stated earlier, the committee’s duties include reviewing and preintroducing legislation. Beginning this interim,<sup>6</sup> the committee will also review proposed ballot initiatives within the committee's subject area.

The 2019-20 WPIC proposed 4 pieces of legislation, which were preintroduced at the 2019 session. This legislation was a result of the committee’s studies and discussion over the interim. Three of these bills passed the 2019 Legislature (see

<sup>6</sup> HB 651 (Generally revise ballot initiative laws).

**Appendix C** for more details). Unique to other interim committees, the WPIC requires 7 votes (of 10) to advance as a committee bill to the next legislative session.

## MEMBER TOPICS, EMERGING ISSUES

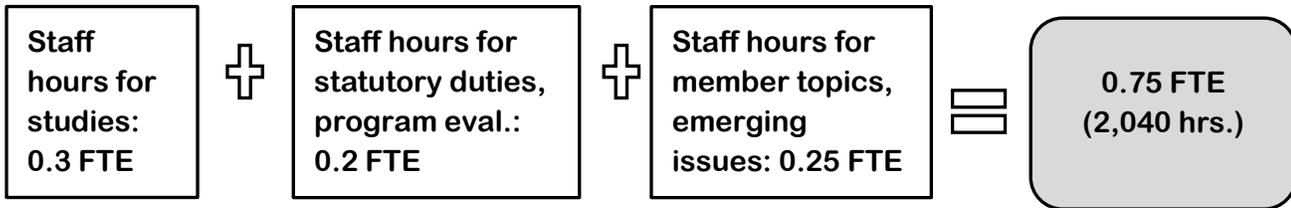
Committee member suggestions and emerging issues drive much of the WPIC's work. These usually cover a variety of water topics and may be answered with a single memo or presentation. Other topics may need a more-comprehensive review. The committee will prioritize member topics and emerging issues as the biennium progresses. The committee tentatively agreed to the following member topics (updated Sept. 24, 2021):

- BLM water rights on Taylor Grazing Act lands
- Impacts to water from proposed Great Falls meatpacking plant
- Development of narrative nutrient standards for water quality (SB 358)
- Weather modification (SB 29)
- Impact of WPIC's geocode bill (SB 55—Revise the process for water right ownership updates)
- Water projects and the American Rescue Plan Act of 2021 (ARPA)
- Litigation related to HB 286 (2019)
- Legislative audit of Water Right Information System (DNRC)
- LIDAR mapping technology
- Processing of HB110 claims
- Water storage and the State Water Plan
- Issues of drought: wildfires, water storage, local water restrictions, and repeat water supply updates (DNRC, FWP)
- Sunsetting water laws
- Repair and regulation of BLM stockwater ponds
- Mechanical irrigation
- Court decisions on expanded places of use for a water right
- Restrictions on a water right to an original decree
- Missouri River Headwaters Basin Study

## TIME ALLOCATION FOR COMMITTEE WORK

As indicated in the graphic on page 9, the WPIC is scheduled to meet 7 times during an interim to work on studies, statutory duties, and member topics. At the end of these meetings, the committee will have developed findings and recommendations for one or more reports. The committee may have also drafted legislation. The work plan timeline (see **Appendix D**) plots out a general idea of the committee's agenda at each meeting. This agenda will change once the committee identifies specific studies and member topics.

The WPIC's workload is limited only by the number of meetings and hours of available staff time. There is approximately 0.75 FTE of staff time available to conduct the work identified by the committee. In July 2021, the committee tentatively distributed this staff workload as:



This equation is computed by referring to the Work Plan Decision Matrix (**Appendix E**). This matrix allows the committee to select an appropriate level of review, analysis, and discussion for studies, member topics, statutory duties, and anything else.

## THE INTERIM IS COMPRISED OF 7 MEETINGS.

July 14-15, 2021	Oct. 12-13	Jan. 18-19, 2022	March 15-16	May 17-18	July 12-13	Sept. 20-21
Draft work plan	Finalize work plan	Revise work plan, as necessary				
Begin statutory duties	Continue statutory duties					
Consider study resolutions	Begin studies	Gather background	Identify options		Consider draft findings, recommendations	Finalize findings, recommendations
Prioritize member topics	Explore member topics					
				Propose draft legislation	Review draft legislation	Approve legislation for preintroduction
						Approve agency legislation for preintroduction

## APPENDIX A: WPIC LEADERSHIP HAS ALTERNATED BY POLITICAL AFFILIATION

	Presiding officer	Vice Presiding officer
2007-08	Sen. Jim Elliott (D)	Sen. Gary Perry (R)
2009-10	Rep. Walt McNutt (R)	Sen. Dave Wanzonried (D)
2011-12	Sen. Brad Hamlett (D)	Rep. Walt McNutt (R)
2013-14	Sen. Chas Vincent (R)	Rep. Kathleen Williams (D)
2015-16	Sen. Brad Hamlett (D)	Rep. Carl Glimm (R)
2017-18	Sen. Pat Connell (R)	Rep. Zach Brown (D)
2019-20	Rep. Zach Brown (D)	Sen. Jeffrey Welborn (R)
2021-22	Sen. Jeffrey Welborn (R)	Rep. Willis Curdy (D)

## APPENDIX B: LAWS THAT GUIDE WPIC'S INTERIM WORK<sup>7</sup>

**5-5-215. Duties of interim committees.** (1) Each interim committee shall:

- (a) review administrative rules within its jurisdiction;
- (b) subject to 5-5-217(3), conduct interim studies as assigned;
- (c) monitor the operation of assigned executive branch agencies with specific attention to the following:
  - (i) identification of issues likely to require future legislative attention;
  - (ii) opportunities to improve existing law through the analysis of problems experienced with the application of the law by an agency; and

- (iii) experiences of the state's citizens with the operation of an agency that may be amenable to improvement through legislative action;

- (d) review, if requested by any member of the interim committee, the statutorily established advisory councils and required reports of assigned agencies to make recommendations to the next legislature on retention or elimination of any advisory council or required reports pursuant to 5-11-210;

- (e) review proposed legislation of assigned agencies or entities as provided in the joint legislative rules; and

- (f) accumulate, compile, analyze, and furnish information bearing upon its assignment and relevant to existing or prospective legislation as it determines, on its own initiative, to be pertinent to the adequate completion of its work.

(2) Each interim committee shall prepare bills and resolutions that, in its opinion, the welfare of the state may require for presentation to the next regular session of the legislature.

(3) The legislative services division shall keep accurate records of the activities and proceedings of each interim committee.

**5-5-231. Water policy committee.** (1) There is a water policy committee. The committee shall:

- (a) determine which water policy issues it examines;

- (b) conduct interim studies as assigned pursuant to 5-5-217;

- (c) subject to the provisions of 5-5-202(4), coordinate with the environmental quality council and other interim committees to avoid duplication of efforts;

- (d) report its activities, findings, recommendations, and any proposed legislation as provided in 5-11-210; and

- (e) in accordance with 5-5-215, for issues where the primary concern is the quality or quantity of water, perform the administrative rule review, draft legislation review, program evaluation, and monitoring functions of an interim committee for the following executive branch agencies and the entities attached to the agencies for administrative purposes:

- (i) department of environmental quality;

- (ii) department of fish, wildlife, and parks; and

- (iii) department of natural resources and conservation.

- (2) At least two members of the committee must possess experience in agriculture.

**85-2-105. Water policy committee duties.** (1) The water policy committee established in 5-5-231 shall meet as often as necessary, including during the interim between sessions, to perform the duties specified within this section.

(2) On a continuing basis, the water policy committee may:

- (a) advise the legislature on the adequacy of the state's water policy and on important state, regional, national, and international developments that affect Montana's water resources;

- (b) oversee the policies and activities of the department, other state executive agencies, and other state institutions as those policies and activities affect the water resources of the state;

- (c) assist with interagency coordination related to Montana's water resources; and

- (d) communicate with the public on matters of water policy as well as the water resources of the state.

(3) On a regular basis, the water policy committee shall:

- (a) analyze and comment on the state water plan required by 85-1-203, when filed by the department;

- (b) analyze and comment on the report of the status of the state's renewable resource grant and loan program required by 85-1-621, when filed by the department;

- (c) analyze and comment on water-related research undertaken by any state agency, institution, college, or university;

- (d) analyze, verify, and comment on the adequacy of and information contained in the water information system maintained by the natural resource information system under 90-15-305; and

- (e) report to the legislature as provided in 5-11-210.

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<sup>7</sup> These statutes were modified by SB 57, which modified reports, and HB 651, which added requirement to review ballot initiatives.

## APPENDIX C: WATER-RELATED BILLS AT 2019 LEGISLATURE

### 3 OF 4 WPIC BILLS PASS 2021 LEGISLATURE

Bill No.	Short title	Status
SB 13	Revise DNRC adjudication benchmarks	Passed, signed by governor
SB 20	Clarifying use of river basin councils	Passed, signed by governor
SB 29	Review weather modification and control laws	Failed to pass House of Representatives
SB 55	Revise the process for water right ownership updates	Passed, signed by governor

### 2021 LEGISLATURE PASS 1 AGENCY BILL

Bill No.	Short title (and proposing agency)	Status
SB 37	Permit exemption for Berkeley Pit water	Failed in Senate Natural Resources Committee

# APPENDIX D: WPIC'S WORK PLAN TIME LINE (AS OF AUGUST 10, 2021)

Tasks	
July 14-15, 2021	<ul style="list-style-type: none"> <li>▪ Elect officers</li> <li>▪ Review 2019 water legislation</li> <li>▪ Discuss and adopt draft work plan</li> <li>▪ Identify committee studies</li> <li>▪ Identify and prioritize committee member topics</li> <li>▪ Adopt committee rules</li> <li>▪ Review budget</li> <li>▪ Adopt meeting dates</li> <li>▪ Agency/program overviews — DEQ, DNRC, FWP, Ag, MBMG</li> <li>▪ Adjudication update (85-2-281, MCA) — DNRC, WC</li> <li>▪ Update on drought, water supply, wildfires</li> <li>▪ Review litigation related to HB 286 (2019)</li> <li>▪ Update from Nutrient Work Group (SB 358)</li> <li>▪ Update on aquatic invasive species</li> <li>▪ Water research (85-2-105, MCA): Montana Water Center, Montana Bureau of Mines and Geology</li> </ul>
Oct. 12-13	<ul style="list-style-type: none"> <li>▪ Adoption of final work plan</li> <li>▪ Committee studies: Receive background information; appoint members to HJ37 special committee and set meeting date</li> <li>▪ Finalize list of committee member topics</li> <li>▪ Adjudication update (85-2-281, MCA) — DNRC, WC</li> <li>▪ Stream gauge oversight work group (2-15-3308, MCA) — DNRC</li> <li>▪ Member topics and emerging issues</li> <li>▪ Update from Nutrient Work Group (SB 358)</li> <li>▪ Prioritization of water storage projects (85-1-704, MCA)</li> <li>▪ Agency rulemaking update — LSD staff</li> <li>▪ Water research (85-2-105, MCA): Water Information System (State Library)</li> </ul>
Jan. 18-19, 2022	<ul style="list-style-type: none"> <li>▪ Committee studies: <ul style="list-style-type: none"> <li>○ Receive additional background information</li> <li>○ Identify further issues and options</li> </ul> </li> <li>▪ Member topics and emerging issues</li> <li>▪ Adjudication update (85-2-281, MCA) — DNRC, WC</li> <li>▪ Instream leasing report, (85-2-436, MCA) — FWP</li> <li>▪ U.S. Forest Service water reservations (85-20-1401, MCA) — DNRC, USFS</li> <li>▪ GWIP report (85-2-525)</li> <li>▪ Implementation of State Water Plan (85-1-203, MCA) — DNRC</li> <li>▪ Agency rulemaking update — LSD staff</li> </ul>
March 15-16	<ul style="list-style-type: none"> <li>▪ Committee studies: Identify further issues and options</li> <li>▪ Committee member topics</li> <li>▪ Renewable Resource Grant and Loan Program update, (85-1-621, MCA) — DNRC</li> <li>▪ Agency rulemaking update — LSD staff</li> </ul>

## Tasks

May 17-18	<ul style="list-style-type: none"> <li>▪ Committee studies:             <ul style="list-style-type: none"> <li>○ Discuss options</li> <li>○ Propose recommendations</li> </ul> </li> <li>▪ Committee member topics</li> <li>▪ Adjudication update (85-2-281, MCA) — DNRC, WC</li> <li>▪ Update on drought, water supply — DNRC</li> <li>▪ Agency rulemaking update — LSD staff</li> </ul>
July 12-13	<ul style="list-style-type: none"> <li>▪ Committee studies:             <ul style="list-style-type: none"> <li>○ Draft recommendations, legislation</li> <li>○ Discuss draft report(s)</li> </ul> </li> <li>▪ Committee member topics</li> <li>▪ TMDL list update (75-5-703, MCA) — DEQ</li> <li>▪ Hydroelectric potential report (85-1-501, MCA)</li> <li>▪ Temporary leasing report (85-2-427, MCA)</li> <li>▪ Clark Fork River Basin Steering Committee update (85-2-338, MCA)</li> <li>▪ Water and Wastewater Operators' Advisory Council (2-15-2105, MCA)</li> <li>▪ Water Pollution Control Advisory Council (2-15-2107, MCA)</li> <li>▪ Drought, water supply, wildfire update — DNRC</li> <li>▪ Agency rulemaking update — LSD staff</li> </ul>
Sept. 20-21	<ul style="list-style-type: none"> <li>▪ Committee studies:             <ul style="list-style-type: none"> <li>○ Review public comment on draft report, committee legislation</li> <li>○ Revise draft report, committee legislation, if necessary</li> <li>○ Approve final report(s)</li> </ul> </li> <li>▪ Consider proposed agency legislation — DNRC, DEQ, FWP</li> <li>▪ Approve other WPIC report(s), if necessary</li> <li>▪ Adjudication update (85-2-281, MCA) — DNRC, Water Court</li> <li>▪ Agency rulemaking update — LSD staff</li> <li>▪ Consider/propose areas of study for 2021-22 interim</li> </ul>

# APPENDIX E: 2021-22 WPIC WORK PLAN DECISION MATRIX

	Full review	Medium review	Minimum review	Resources Allocated
<b>Sample study</b>	<p>0.3 FTE</p> <ul style="list-style-type: none"> <li>•All components of medium review</li> <li>•In-depth legal analysis of study issues</li> </ul> <p><b>Deliverables:</b></p> <ul style="list-style-type: none"> <li>•Final report with recommendations</li> <li>•Legislation</li> </ul>	<p>0.2 FTE</p> <ul style="list-style-type: none"> <li>•All components of minimum review</li> <li>•Field trip(s)</li> <li>•Analyze relevant laws, actions, policies, legal decisions, and experiences in other states</li> <li>•Create work group of interested parties to suggest options</li> </ul> <p><b>Deliverables:</b></p> <ul style="list-style-type: none"> <li>•Report</li> <li>•Legislation</li> </ul>	<p>0.1 FTE</p> <ul style="list-style-type: none"> <li>•Review relevant laws, policies, and legal decisions</li> <li>•Summarize related information in other states</li> <li>•Panel discussion</li> </ul> <p><b>Deliverables:</b></p> <ul style="list-style-type: none"> <li>•Legislation</li> <li>•Brief report</li> </ul>	<p>0.3 FTE for HJ37, SJ28 studies</p>

	Full review	Medium review	Minimum review	Resources Allocated
<b>Statutory duties</b>	<p>0.25 FTE</p> <ul style="list-style-type: none"> <li>•All components of medium review</li> <li>•Participate in water-related meetings (agencies, outside groups)</li> <li>•Accept reports and select some for WPIC review, analysis, and comment</li> <li>•Background summaries and legal analysis</li> <li>•Review and discuss applicability of statutory responsibilities related to water policy issues</li> </ul> <p><b>Deliverables:</b></p> <ul style="list-style-type: none"> <li>•Recommendations or WPIC position letters</li> <li>•Legislation to address statutory responsibilities</li> </ul>	<p>0.1 FTE</p> <ul style="list-style-type: none"> <li>•All mandatory duties</li> <li>•Water issues identified during 2019-20 interim</li> <li>•Public involvement through WPIC meetings</li> <li>•Basic involvement and oversight</li> </ul> <p><b>Review reports related to:</b></p> <ul style="list-style-type: none"> <li>•Nutrient standards</li> <li>•TMDLs</li> <li>•State Water Plan</li> <li>•Small scale hydro on state water projects</li> <li>•Renewable Resource grants and loans</li> <li>•Water rights adjudication</li> <li>•State water reservations</li> <li>•Upper Clark Fork River Basin Steering Committee</li> <li>•FWP instream flow rights</li> <li>•USFS water reservations</li> <li>•Temporary leases of water rights</li> </ul> <p><b>Deliverables:</b></p> <ul style="list-style-type: none"> <li>•Recommendations or WPIC position letters</li> <li>•Legislation to address statutory responsibilities</li> </ul>		0.2 FTE for statutory duties, including program evaluation

	Full review	Medium review	Minimum review	Resources Allocated
<p><b>Program evaluation</b> <i>(*the 2019-20 WPIC selected no programs for evaluation)</i></p>	<p>0.2+ FTE (per program evaluated)</p> <ul style="list-style-type: none"> <li>•Multiple staff reports on issues within program, including history, overview of applicable laws and rules, and summary of timely issues</li> <li>•Interview with program personnel</li> <li>•Possible multiple staff site visits</li> <li>•Multiple agency presentations</li> <li>•Multiple regulated community panels</li> <li>•Staff summaries on related audits, fiscal analyses, court decisions</li> <li>•Possible presentations from LAD, LFD on issues of interest</li> <li>•Possible legal review of specific issues</li> <li>•Additional staff research in particular areas</li> <li>•Additional information from agency and staff analysis</li> <li>•Possible subcommittees or work groups</li> <li>•One or more field trips</li> </ul> <p><b>Deliverables:</b></p> <ul style="list-style-type: none"> <li>•Staff report(s)</li> <li>•Recommendations</li> <li>•Legislations</li> </ul>	<p>0.06-0.2 FTE (per program evaluated)</p> <ul style="list-style-type: none"> <li>•Staff report on program, including history, overview of applicable laws and rules, and summary of timely issues within program</li> <li>•Interview with program personnel</li> <li>•Possible staff site visit</li> <li>•Multiple agency presentations</li> <li>•Multiple regulated community panels</li> <li>•Staff summaries on related audits, fiscal analyses, court decisions</li> <li>•Possible presentations from LAD, LFD on issues of interest</li> <li>•Possible legal review of specific issue</li> <li>•Additional staff research in particular areas</li> <li>•Additional information from agency and staff analysis</li> <li>•Possible field trip</li> </ul> <p><b>Deliverables:</b></p> <ul style="list-style-type: none"> <li>•Staff report</li> <li>•Recommendations</li> <li>•Legislation</li> </ul>	<p>0.02-0.06 FTE (per program evaluated)</p> <ul style="list-style-type: none"> <li>•Staff summary of program. May include interview with program lead</li> <li>•Agency presentation</li> <li>•Regulated community panel</li> <li>•Bibliography or related materials, including audits, fiscal analyses, court decisions</li> <li>•Limited follow up by WPIC staff</li> </ul> <p><b>Deliverables:</b></p> <ul style="list-style-type: none"> <li>•Recommendations</li> <li>•Legislation</li> </ul>	<p>0.2 FTE for statutory duties, including program evaluation</p>

	Full review	Medium review	Minimum review	Resources Allocated
<b>Member topics (as selected by the committee)</b>		0.1 FTE (per issue selected) <ul style="list-style-type: none"> <li>•All components of minimum review</li> <li>•Review of relevant laws, policies, legal decisions</li> <li>•Panel discussion</li> <li>•Possible field trip</li> </ul> <b>Deliverables:</b> <ul style="list-style-type: none"> <li>•Report</li> <li>•Legislation</li> </ul>	0.03 FTE (per issue selected) <ul style="list-style-type: none"> <li>•Agency or expert presentation on member issue</li> </ul> <b>Deliverables:</b> <ul style="list-style-type: none"> <li>•Short report or “white paper”</li> <li>•Legislation</li> </ul>	0.2 FTE for member topics and emerging issues

**Hourly breakdown of WPIC interim FTE:**

0.02 FTE = 54 hours

0.03 FTE = 82 hours

0.05 FTE = 136 hours

0.06 FTE = 163 hours

0.1 FTE = 272 hours

0.2 FTE = 544 hours

0.25 FTE = 680 hours

0.3 FTE = 816 hours

0.75 FTE = 2,040 hours

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A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA REQUESTING AN INTERIM STUDY OF SELENIUM LEVELS IN LAKE KOOCANUSA, INCLUDING A COLLABORATIVE REVIEW OF THE MODELING, ANALYSIS, AND WATER QUALITY STANDARDS ADOPTED IN 2020.

WHEREAS, the Board of Environmental Review promulgated a site-specific selenium standard for Lake Kooconusa on December 11, 2020, and the United States Environmental Protection Agency approved the board's new standard in early 2021; and

WHEREAS, some affected stakeholders question the 2020 site-specific selenium standard for Lake Kooconusa and request a cooperative review of the new administrative rule, ARM 17.30.632, technical support documents, background data, and assumptions used in the previous modeling process, and stakeholder desire to complete the model validation process; and

WHEREAS, these affected stakeholders desire an opportunity to engage in additional, thoughtful, collaborative, and scientifically defensible analysis with state regulators to determine whether the 2020 site-specific standards for Lake Kooconusa are appropriate.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

That the Legislative Council be requested to designate the Environmental Quality Council, subject to section 5-5-217, MCA, and to direct sufficient staff resources, pursuant to section 5-11-112, MCA, to establish a collaborative process with the Department of Environmental Quality to:

(1) analyze the data and processes referenced in and used to support rulemaking to determine if ARM 17.30.632, as it pertains to Lake Kooconusa, complies with the Montana Water Quality Act and the

federal Clean Water Act; and

(2) offer recommendations on what changes, if any, are needed to ARM 17.30.632 or supporting documentation.

BE IT FURTHER RESOLVED, that the Legislative Council requests that the Environmental Quality Council invite two members of the Water Policy Interim Committee, including a member of the Senate and a member of the House of Representatives with one each from the majority party and the minority party, to participate as ex officio members of this study.

BE IT FURTHER RESOLVED, that the study be conducted and recommendations be developed with consultation of interested stakeholders, including:

- (1) the Lincoln County Board of Commissioners;
- (2) selenium experts and other experts who have experience proposing and reviewing water quality standards; and
- (3) other appropriate agencies, including the Governor's Office, the Board of Environmental Review, and the Department of Environmental Quality.

BE IT FURTHER RESOLVED, that all aspects of the study, including presentation and review requirements, be concluded prior to April 1, 2022.

BE IT FURTHER RESOLVED, that the final results of the study, including any findings, conclusions, comments, or recommendations of the appropriate committee, be reported to the 68th Legislature, the Governor's natural resources policy advisor, and the British Columbia Ministry of the Environment.

- END -



A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA REQUESTING AN INTERIM STUDY OF EROSION ALONG THE FLATHEAD RIVER.

WHEREAS, the Flathead River originates in the MacDonald Range in southeastern British Columbia before flowing south to Montana and emptying first into Flathead Lake and eventually into the Clark Fork River; and

WHEREAS, the three forks of the Flathead River and other tributaries comprise the Flathead River basin watershed, which drains 8,587 square miles; and

WHEREAS, the Flathead River is important for the natural and economic life of the Flathead Valley; and

WHEREAS, economists estimate significant fiscal impacts associated with the Flathead River and Flathead Lake, including shoreline property values of \$6 billion to \$8 billion, nature-based tourism that comprises roughly 20% of the \$7.8 billion local economy, and ecological services, such as water supply and purification and flood and drought mitigation, that contribute more than \$20 billion in benefits to human society; and

WHEREAS, the lower Flathead River in Flathead County is bordered by private lands of agricultural, ecological, and economic importance; and

WHEREAS, the Flathead Lake Biological Station lists erosion as negatively impacting water quality on Flathead Lake; and

WHEREAS, the total maximum daily load report for Flathead Lake identifies suspended sediments, caused by streambank erosion, to be a major contributor to phosphorus and nitrogen loading of Flathead Lake; and

WHEREAS, the Flathead-Stillwater watershed restoration plan identifies streambank erosion as a

major concern and calls for a significant reduction in streambank erosion; and

WHEREAS, many landowners and agricultural producers have recently reported substantial increases in streambank damage due to erosion; and

WHEREAS, recreational use of the Flathead River has increased, including boat use, which causes streambank erosion; and

WHEREAS, decreases in water quality have led federal and state agencies to classify Flathead Lake as "impaired" due to human-caused increases in nutrients and sediment, requiring a long-term plan for water quality protection; and

WHEREAS, excessive erosion to Flathead River streambanks endangers important agricultural lands, water resources, riparian vegetation, and aquatic systems.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

That the Legislative Council be requested to designate an appropriate interim committee or statutory committee, pursuant to section 5-5-217, MCA, or direct sufficient staff resources to review issues of erosion along the Flathead River, including:

- (1) compiling existing data on the causes and impacts of erosion on the Flathead River;
- (2) determining the impacts of recreational boat use to streambanks on the lower Flathead River and how to lessen those impacts; and
- (3) examining information gaps and collecting additional data, as necessary.

BE IT FURTHER RESOLVED, that the assigned interim committee include the participation of stakeholders in this study process, including the Flathead Conservation District, Flathead River Commission, Flathead Basin Commission, Department of Fish, Wildlife, and Parks, the Confederated Salish and Kootenai Tribes, the National Park Service or Glacier National Park, the cities and towns in the Flathead River basin, and at least two members of the public representing recreational and agricultural groups.

BE IT FURTHER RESOLVED, that if the study is assigned to staff, any findings or conclusions be presented to and reviewed by an appropriate committee designated by the Legislative Council.

BE IT FURTHER RESOLVED, that all aspects of the study, including presentation and review

requirements, be concluded prior to September 15, 2022.

BE IT FURTHER RESOLVED, that the final results of the study, including any findings, conclusions, comments, or recommendations of the appropriate committee, be reported to the 68th Legislature.

- END -



# Water Policy Interim Committee

67th Montana Legislature

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## SENATE MEMBERS

JILL COHENOUR  
SHANE MORIGEAU  
WALT SALES  
JEFF WELBORN

## HOUSE MEMBERS

WILLIS CURDY  
ROBERT FARRIS-OLSEN  
TOM FRANCE  
RHONDA KNUDSEN  
MARTY MALONE  
BOB PHALEN

## COMMITTEE STAFF

JASON MOHR, Lead Staff  
CORI HACH, Legal Staff  
NADINE SPENCER, Secretary

TO: Water Policy Interim Committee Members  
FROM: Cori Hach, Staff Attorney  
RE: Overview of Administrative Rulemaking and Committee Rule Review

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The Water Policy Interim Committee ("WPIC" or "Committee") is required to monitor and review administrative rules promulgated by the Department of Environmental Quality (DEQ), the Department of Fish, Wildlife, and Parks (FWP), and the Department of Natural Resources and Conservation (DNRC) where the primary concern is the quality or quantity of water.<sup>1</sup>

To assist the Committee in carrying out its administrative rule review functions, legal staff for the committee will provide regular updates to the Committee regarding agency rulemaking activities involving the quality or quantity of water. Legal staff will also inform Committee members of specific issues associated with rulemaking if and when such issues arise. Specific information regarding proposed rules will also be available on the WPIC interim committee website.

The following memorandum contains background information on administrative rulemaking in Montana, as well as a summary of WPIC's administrative rule review authority.

## I. Overview of Administrative Rulemaking

Administrative agencies are often authorized to carry out the Legislature's intent by adopting administrative rules, which have the full force and effect of law. There are several reasons why the Legislature may choose to authorize an agency to adopt administrative rules; the most common reason, however, is that administrative agencies are oftentimes better suited to flesh out technical and scientific details than the Legislature. In addition, unlike statutes that may only be adopted every 2 years in Montana, administrative rules may be adopted and revised throughout the year as circumstances change or as issues arise.

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<sup>1</sup> See 5-5-231(e), MCA.

Administrative rule functions are governed by the Montana Administrative Procedures Act (MAPA), Title 2, chapter 4, MCA, and relevant court cases. In Montana, an administrative rule is an “agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of an agency.”<sup>2</sup>

Administrative rules are published in the Administrative Rules of Montana (ARM), which is updated twice a month by a publication known as the Montana Administrative Register (MAR). The MAR contains notices of proposed, amended, transferred, repealed, and adopted rules. The MAR also contains notices of public hearings, Attorney General’s opinions, and notices of vacancies on state boards. The ARM and the MAR may be accessed electronically at the following website: <http://www.mtrules.org/>. The ARMs are broken down into Title, chapter, and subchapter (i.e., 17.30.101). The DEQ’s water quality rules are located in Arm Title 17, chapter 30. The DNRC’s water-related rules are located in Title 36, chapters 12-16, 19-21, 23, 24, 26, and 30. FWP has promulgated rules related to recreational water use in Title 12, chapter 11.

MAPA and various court opinions govern the procedures and requirements for administrative rulemaking in Montana.<sup>3</sup> However, MAPA does not provide the authority for an agency to adopt rules. The authority for an agency to adopt rules is delegated from the Legislature to the agency. A substantive rule may not be proposed or adopted unless “a statute granting the agency authority to adopt rules clearly and specifically lists the subject matter of the rule as a subject upon which the agency shall or may adopt rules” or “the rule implements and relates to a subject matter or an agency function that is clearly and specifically included in a statute to which the grant of rulemaking authority extends.”<sup>4</sup> An agency rule may be invalidated if it exceeds the scope of the enabling statute, if it is inconsistent with statutory requirements, or if it adds requirements not contemplated by the Legislature.

## **II. Summary of WPIC Administrative Rule Review Authority**

As noted above, where the primary concern is the quality or quantity of water, the Committee is responsible for reviewing and monitoring administrative rules promulgated by DEQ, FWP, and DNRC. The Committee’s authority with respect to administrative rule review is further described in MAPA in Title 2, chapter 4, parts 3 and 4, MCA. Before an agency can adopt, amend, or repeal a rule, the agency must give written notice of its proposed action (proposal notice) and, upon adoption, amendment, or repeal of a rule, must issue a written statement of its reasons for and against the adoption (adoption notice).

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<sup>2</sup> See 2-4-102(11), MCA.

<sup>3</sup> MAPA may be supplanted by specific procedures or requirements set forth in statute that are applicable to the agency.

<sup>4</sup> See 2-4-305(3)(a) and (b), MCA.

Effective October 1, 2021, when a rule is filed with the Secretary of State, an agency is required to concurrently send an electronic copy of the rule directly to the appropriate rule review committee. This requirement is satisfied if the rule is sent to each member of the staff of the rule review committee. (Chapter 519, Laws of 2021). In addition, effective October 1, 2021, the agency is required to make a good faith effort to provide special notice to each committee member and staffer prior to the adoption of an emergency rule and state in the adoption notice the manner in which contact was made or attempted with each person required under the section. (Chapter 199, Laws of 2021). Chapter 199, Laws of 2021, details the required contents of the special notice for emergency rules.

Committee legal staff reviews each proposal and adoption notice for conformance with MAPA, which requires that these proposal and adoption notices be published in the MAR within a certain timeframe and contain certain information, both of which are described in detail below. If a potential issue is noted, staff will contact the agency rule reviewer to address the issue. If staff cannot resolve the issue with the agency, the issue will be brought to the Committee's attention for further direction.

Committee legal staff reviews proposal notices for compliance with the following requirements of MAPA:

- Notice of the proposed rule must be published in the MAR, which is published by the Secretary of State. The notice must comply with specific timelines that vary depending on whether a public hearing is held or not. (2-4-302, MCA).
- The agency must contact the primary sponsor of legislation if the agency begins to work on the substantive content and the wording of a proposal notice for a rule that initially implements legislation. The purpose of the notification to the primary sponsor is to obtain the legislator's comments, inform the legislator of the date by which each step of the rulemaking process must be completed, and provide the legislator with information about the time periods during which the legislator may comment on the proposed rules. (2-4-302, MCA).
- An agency must consider all oral and written submissions respecting a proposed rule. (2-4-305, MCA).
- A proposal notice must include a description of the substance of the intended action or subjects and issues involved, cite to the specific statutory grant of rulemaking authority pursuant to which the rule is adopted and to the specific statutes being implemented, and include a statement of reasonable necessity, which identifies the principal reasons for the intended action and for each adoption, amendment, or repeal and, if alternative approaches are available, explains the rationale behind the particular approach taken. (2-4-305, MCA).

- If an agency is proposing a fee increase or decrease, the agency must include an estimate of the cumulative amount of the increase or decrease or new amount and an estimate of the number of persons affected. (2-4-302, MCA).
- Prior to the adoption of a proposed rule, an agency is required to determine if the rule will significantly and directly impact a small business, defined in 2-4-102(13), MCA as a business entity, including its affiliates, that is independently owned and operated and that employs fewer than 50 full-time employees. The determination must be published in the MAR when the proposed rule is published. (2-4-111, MCA).
- An agency may adopt by reference a publication if it would be unduly cumbersome, expensive, or otherwise inexpedient and it is reasonable. An adoption by reference must contain a citation to the material adopted by reference and where it may be found, must contain a statement of the general subject matter of the omitted rule, must be in existence at the time the proposed rule is published, may not be altered between the time of publication of the proposed rule and the adoption of the rule except to respond to comments received in the rulemaking record, and must be available to the public for comment through publication in the register or in an electronic format while the rule is subject to public comment. Any alteration to the material adopted by reference may not be made without being subject to the rulemaking process. (2-4-307, MCA).
- MAPA contains additional requirements particular to adoption notices:
  - The time between publication of the proposal notice and publication of the adoption notice may not be more than 6 months. Failure to publish an adoption notice within 6 months after the date of publication of the proposal notice invalidates the proposal and makes it necessary to publish a new proposal notice, unless the time limit was extended by the publication of an amended or supplemental notice of proposed or final rulemaking before the time limit expired. (2-4-302, MCA; 2-4-305, MCA).
  - If the agency received public comment or comments from the primary sponsor, the agency must include in the adoption notice a statement of reasons, including reasons for overruling (or accepting) considerations submitted via public comment or from the primary sponsor. (2-4-305, MCA).
  - Effective October 1, 2021, in a year preceding a legislative session, a rule may not be adopted between October 1 and the end of the year unless the rule is an emergency rule or the rule is adopted to implement a program or policy and the unavailability of information, guidance, or notice prevented the adoption of the rule prior to October 1. (Chapter 519, Laws of 2021).

### **III. Committee Involvement in Rulemaking**

MAPA provides separate processes for objecting to proposed rules and adopted rules. For the purposes of this memorandum, when a rule is proposed, the process is referred to as an informal objection and when the rule is adopted the objection is referred to as a formal objection. Note that as of April 1, 2021, the Speaker of the House and the President of the Senate are ex officio members of a rule review committee for the purpose of breaking a tie vote on a question before the committee involving an objection to an administrative rule. (Chapter 102, Laws of 2021).

#### *Informal Objection*

If a majority of the Committee members notify the chair that they object to a proposed rule, the Committee must notify the agency of the objection and that the Committee intends to address the objection at the next meeting of the Committee. Following notice of the objection, the agency may not adopt the rule until publication of the last issue of the MAR that is published before the 6-month period during which the adoption notice must be published UNLESS the Committee withdraws its objection or meets during the 6-month period and does not sustain the objection. Under the informal objection, the Committee is not required to set forth in writing its reasons for the objection. (2-4-305, MCA).

#### *Formal Objection*

If the Committee informally objects to a proposed rule and believes that all or a portion of the rule was not proposed in substantial compliance with 2-4-302 (notice, hearing, and submission of views requirements), 2-4-303 (emergency or temporary rules requirements), or 2-4-305 (authority and reasonable necessity requirements), the Committee may formally object to the proposed rule. The objection must be in writing and describe the Committee's reasons for the objection. The agency is required to respond in writing to the objection within 14 days of the mailing of the objection. Unless the Committee withdraws its objection before the proposed rule is adopted or determines, as communicated in writing by a majority of the Committee members to the presiding officer and staff, that the rule has been adopted with changes that make the rule comply with the Committee's objections and concerns, the rule is not effective until the day after final adjournment of the next regular session of the Legislature. (2-4-306(4)(c), MCA; 2-4-406, MCA).

If the Committee does not withdraw its objection to the adopted rule, it may also vote to send the objection to the Secretary of State for publication, at the Committee's expense, in the MAR and ARM adjacent to the rule. If an objection is published, the agency bears the burden in any action challenging the legality of the rule of proving that the rule was adopted in substantial compliance with 2-4-302, 2-4-303, or 2-4-305. If the rule is invalidated by the court because the agency failed to meet its burden of proof, and the court finds that the agency acted in arbitrary and capricious disregard of the authorizing statute, the court may award costs and attorney fees against the agency. (2-4-406, MCA).

Failure of a committee to object to the adoption, amendment, or repeal of a rule is inadmissible in court to prove the validity of the rule. In addition, the agency must report to the committee any judicial proceedings in which the construction or interpretation of MAPA is at issue.

In addition to the informal and formal objection processes described above, the Committee may do one or more of the following:

- request an agency's rulemaking records for checking compliance with MAPA. (2-4-402(2)(a), MCA).
- prepare written recommendations for the adoption, amendment, or rejection of a rule and submit those recommendations to the department proposing the rule and submit oral or written testimony at a rulemaking hearing. (2-4-403(3), MCA).
- require that a rulemaking hearing be held in accordance with the provisions of 2-4-302 through 2-4-305, MCA. (2-4-402(2)(c), MCA).
- institute, intervene in, or otherwise participate in proceedings involving this chapter in the state and federal courts and administrative agencies. (2-4-402(2)(d), MCA).
- review the incidence and conduct of administrative proceedings under this chapter. (2-4-402(2)(e), MCA).
- commence a poll of the Legislature on a rule to determine whether the rule is consistent with legislative intent. (2-4-403, MCA).
- require an economic impact statement relating to the adoption of a rule. (2-4-405, MCA).
- request publication of material adopted by reference in a rule. (2-4-307, MCA).
- recommend a rule adoption or change. (2-4-411, MCA).

### **Individual Committee Member Involvement**

Members of the Committee may individually engage in the rulemaking process in the following ways:

- petition for the adoption, amendment, or repeal of a rule (2-4-315, MCA);
- if a rule initially implements legislation of which the individual was a primary sponsor, provide comments and receive notice (2-4-302, MCA);

- request an agency to hold an informal conference or appoint a committee to develop a proposed rule before the agency publishes notice(2-4-304, MCA);
- join an agency's list of interested persons for purposes of rulemaking (2-4-302, MCA); or
- contribute to the rulemaking process by submitting oral or written testimony on a proposed rule.