



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

September 12, 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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To view the minutes, locate the meeting date and click on minutes. To hear the audio recording, click on the Real Player icon. Note: You must have Real Player to listen to the audio recording.

COMMITTEE MEMBERS PRESENT

SEN. JIM ELLIOTT, Chair
SEN. TERRY MURPHY
REP. SCOTT BOGGIO
REP. JILL COHENOUR
REP. BILL MCCHESENEY
REP. WALTER MCNUTT

COMMITTEE MEMBERS EXCUSED

SEN. GARY PERRY, Vice Chair
SEN. LARRY JENT

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 approved LC5020 as amended.
- The WPIC approved LC5022 as amended.

CALL TO ORDER AND ROLL CALL

00:00:01 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

LC5020

00:00:26 Mr. Kolman submitted and reviewed a revised copy of LC5020 ([EXHIBIT 1](#)).

Committee Discussion

00:03:56 Sen. Murphy addressed page 7 and thought the time frame was to be 120 days rather than 180 days. Mr. Kolman deferred to Mike Murphy.

00:04:39 Mike Murphy, Montana Water Resources Association, clarified his suggestion was 120 days for the Department of Natural Resources and Conservation (DNRC) to make its preliminary determination.

00:05:17 Sen. Murphy explained he would support the bill with one additional amendment. Sen. Murphy suggested changing page 7 to include a provision that before the DNRC makes a preliminary determination to propose to grant an application, the senior water right holders be given an opportunity to meet informally with the DNRC, the same as the applicant. Sen. Murphy believed as currently proposed, the streamlined proposal would work well for the applicant, but would not assist senior water right holders.

00:08:07 John Tubbs, DNRC, had a question as to how to identify the parties to meet with. Mr. Tubbs stated DNRC could list all applications received and noted anyone could come in and meet with the DNRC to discuss an application. Mr. Tubbs struggled with triggering the public notice provision. Mr. Tubbs was interested in

moving the bill out of committee, but thought the amendment would bring the proposal close to the current process.

00:10:29 Sen. Murphy stated the amendment would be needed in order for the proposal to receive his support.

00:11:28 Rep. McNutt asked Sen. Murphy how he envisioned the DNRC knowing who the interested parties are. Rep. McNutt stated once a public notice is given, the senior water users could be harmed worse and could incur legal expenses. Rep. McNutt was curious how the DNRC should hold the meeting without inadvertently leaving someone out. Sen. Murphy was not certain, but thought the interested parties would be the senior water users on the particular drainage. Sen. Murphy spoke about problems occurring in his area. Sen. Murphy reiterated he would only support the legislation if it included a provision to let the senior water rights holders know what is occurring.

00:14:34 Rep. McNutt stated a senior water right holder may be some distance away and asked Mr. Tubbs how the process proposed by Sen. Murphy could work. Mr. Tubbs suggested on page 7(i) after "applicant", listing the parties named in subsection (d). Mr. Tubbs believed there would be a fiscal impact to the DNRC. Sen. Murphy commented that when the applicant has the informal meeting the only one who would be aware would be the applicant. Mr. Tubbs agreed and stated the purpose of the meeting was to bridge the gap with applicants. Mr. Tubbs stated the purpose of the meeting was to provide an opportunity for the applicant to know where there are gaps or problems with their application. Mr. Tubbs stated there is an interested party list as well and reiterated there would be a fiscal impact.

00:20:09 Sen. Murphy asked whether there could be a website that lists applicants. Mr. Tubbs stated applications could be listed upon receipt, and the public always has an opportunity to meet with the DNRC. Mr. Tubbs stated the applications could also be posted on a website as soon as the application is deemed correct and complete and accepted by the DNRC. Sen. Murphy wondered how much time there would be before DNRC notices the proposal to grant. Mr. Kolman recalled the proposal was for 120 days. Sen. Murphy requested Mr. Tubbs and Mr. Murphy to draft language for the amendment.

(RECESS)

00:36:41 Chairman Elliott reconvened the meeting.

00:36:55 Mr. Kolman submitted and reviewed the revised copy of LC5020 ([EXHIBIT 2](#)).

00:39:14 Sen. Murphy moved the proposed amendments to LC5020 be adopted.

00:39:32 Sen. Murphy's motion carried unanimously by voice vote. Sen. Jent and Sen. Perry voted by proxy.

00:40:03 Sen. Murphy moved LC5020 as a committee bill. The motion carried with Rep. Boggio voting no and Sen. Jent and Sen. Perry voting aye by proxy.

(RECESS)

LC5022

00:49:24 Mr. Kolman submitted and reviewed LC5022 ([EXHIBIT 3](#)).

Committee Questions

00:53:26 Upon question from Chairman Elliott, Anne Yates, Legal Counsel, DNRC, stated the applicant is required to prove the permit criteria by a preponderance of the evidence.

00:54:10 Rep. Boggio wondered if the average lot size is five acres or greater, whether LC5022 would apply. Mr. Kolman clarified the provision applies to subdivision with 30 or more lots and lots that are five acres or less. Chairman Elliott believed the DNRC had looked at some density figures.

00:55:25 Mr. Kilbreath, Department of Environmental Quality (DEQ), submitted and reviewed information regarding subdivision density ([EXHIBIT 4](#)). Mr. Kilbreath believed the five-acre average lot size is too large and should be reduced to between two- and three-acre lots.

00:59:51 Rep. Cohenour recalled past WPIC discussions regarding mixing zones and septics and asked for the DEQ's lot size recommendation. Mr. Kilbreath responded three acres.

01:00:35 Rep. McNutt asked whether the bill draft would be state wide. Mr. Kolman agreed.

01:01:04 Mr. Kilbreath agreed it would apply state wide, and that there were 32 counties that would not meet the requirement for this bill.

01:01:32 Chairman Elliott recalled a developer from the Gallatin Valley was interested in having state-wide standards, and the lot size was the point at which a developer could still make money developing a subdivision.

01:02:22 Rep. Cohenour moved LC5022 be adopted as a committee bill. Rep. Cohenour moved to amend LC5022 by reducing the acreage amount from five acres to three acres.

01:03:05 Sen. Murphy stated LC5022 is not what he envisioned. Sen. Murphy envisioned a system that would require public sewer without requiring public water. Sen. Murphy wondered if it could be determined that density is now too great and set a requirement that after a date certain, there has to be a public septic system.

01:05:43 Mr. Petesch agreed Sen. Murphy's suggestion could be done in statute, but noted coming up with a number would be difficult.

- 01:06:34 Rep. Boggio asked whether the number of lots could be increased, so as to not drive away all incentives.
- 01:06:56 Rep. Cohenour addressed Mr. Kilbreath and asked how many subdivisions were greater than 30 lots. Mr. Kilbreath responded approximately 215 subdivisions approved in the last five years were greater than 30 lots. Mr. Kilbreath addressed Sen. Murphy's earlier question regarding requiring public sewer systems without requiring public water systems and stated DEQ already has that practice with applications that do not pass non-degradation.
- 01:08:47 Sen. Murphy asked Mr. Kilbreath to identify where that situation may have occurred. Mr. Kilbreath identified a Butte Silver-Bow County subdivision.
- 01:09:49 Rep. Boggio asked Mr. Kilbreath to provide the approximate number of subdivisions that were more than 30 lots that had two-acre lot size or larger. Mr. Kilbreath provided statistics regarding lot sizes in subdivisions.
- 01:11:00 Rep. Boggio asked whether a lot size of three acres would be acceptable. Abigail St. Lawrence, Montana Association of REALTORS® (MAR), did not have the requested information.
- 01:11:38 Chairman Elliott asked Ms. St. Lawrence if a developer, who has designed a subdivision with individual septic and exempt wells, was told he would have to utilize public water and sewer, whether it would be an expense to the developer to redo the proposal. Ms. St. Lawrence agreed, but suggested a developer should be familiar with the regulations that were in place.
- 01:12:49 Rep. Cohenour suggested not many lots would fall under the provision and they would mostly be in high-growth areas. Rep. Cohenour saw a need for a place where the county can draw the line. Rep. Cohenour saw LC5022 as a good compromise that would provide certainty for counties and developers.
- 01:15:06 Rep. Cohenour's motion to reduce the lot size from five acres to three acres carried unanimously by voice vote with Sen. Perry and Sen. Jent voting by proxy.
- 01:15:38 Rep. Boggio moved to amend LC5022 by increasing the subdivision size from 30 lots to 60 lots. Rep. Cohenour stated she believed 30 lots was a good number.
- 01:16:50 Rep. Boggio noted three acres lots, on average, would be 180 acres. Rep. Boggio explained ranches in his area are selling out and subdividing, and Rep. Boggio believed 60 lots would be better.
- 01:17:50 Rep. Cohenour asked Rep. Boggio whether he would vote in favor of LC5022 if the number of lots were changed from 30 to 60. Rep. Boggio agreed he would support LC5022 if the number of lots were changed to 60.

- 01:18:24 Chairman Elliott asked Mr. Kilbreath how many subdivisions had lots of 60 or more. Mr. Kilbreath estimated significantly less than half of the 215 subdivisions had 60 or more lots, and added there were six subdivisions in Carbon County.
- 01:19:20 Rep. McNutt addressed large acreage being subdivided in Rep. Boggio's area and wondered if those subdivisions have a three acre lot size average. Rep. McNutt wondered if it would help in the process if they get greater than three acres but fewer lots. Rep. Boggio responded that when looking at larger parcels, the subdivisions in Joliet and Roberts would fall into the three-acre criteria. Rep. Boggio believed the number was totally appropriate.
- 01:21:25 Rep. Cohenour reminded the WPIC that the three-acre requirement and 30-lot requirement would both need to be met.
- 01:21:52 Chairman Elliott reminded the WPIC that the amendment will require a majority vote, not a super majority. Chairman Elliott stated it was possible that when the WPIC is done amending LC5022, the draft may not be voted on until Sen. Perry is contacted.
- 01:23:14 Rep. Boggio's motion to amend LC5022 failed by roll call vote.

(RECESS)

Public Comment on LC5022

- 01:26:51 Ms. St. Lawrence depicted LC5022 as a blanket provision that would apply state wide and was the result of information from only one developer, who was neither a member of the Montana Building Industry Association nor the MAR. Ms. St. Lawrence believed LC5022 does not consider individual county situations and variables for developers. Ms. St. Lawrence emphasized counties do have the authority to put in place regulations more stringent than state levels to protect public health and the environment. Ms. St. Lawrence stated the MAR would be opposing LC5022.
- 01:29:09 Rep. Cohenour addressed mixing zones and the need to keep mixing zones on one's own property. Rep. Cohenour believed the level of lot size is an issue regarding where subdivisions are going to take place. Rep. Cohenour stated there is a need to encourage people to do the right thing. Rep. Cohenour believed LC5022 is a good compromise.
- 01:31:00 Chairman Elliott supported LC5022 and noted it is not consensus legislation because no one has come forth with a proposal for consensus legislation. Chairman Elliott noted the issue of exempt wells has been before the WPIC since the onset. Chairman Elliott recalled the WPIC was convened to address exempt wells and their impact on senior water users and the health and well being of the people of the state of Montana. Chairman Elliott commented that he was proud of the work the WPIC had done. Chairman Elliott expressed his dismay at the development community for not making a reasonable proposal. Chairman Elliott stated the parties could be at the table or on the table and make compromises

and believed incremental change is the route to take to accomplish goals. Chairman Elliott believed a developer could make money and still serve the public good.

01:36:33 Rep. Cohenour moved LC5022 as amended. The motion carried by roll call vote.

LC5014

01:38:20 Rep. Cohenour moved to reconsider LC5014, which would clarify the ability of local governments to require public water and sewer systems under certain conditions. Rep. Cohenour recalled during the WPIC's travels, counties had requested clarification. Rep. Cohenour believed LC5014 would make it easier for people to determine what they can and cannot do.

01:40:44 Rep. Boggio commented the WPIC had spent an adequate amount of time on LC5014.

01:41:10 Rep. Cohenour asked Sen. Murphy to think about the counties and the local control. Rep. Cohenour reminded the WPIC that the counties had requested the legislature to clarify the statute.

01:42:59 Sen. Murphy stated he was not on the WPIC when the request from the counties was heard. Sen. Murphy stated while he was on the Jefferson County Planning Board, applications were denied based on health and public safety, so it can be done in certain cases. Sen. Murphy stated he discussed LC5014 with the Jefferson County Planning Board, and they identified several pitfalls with the proposal and stated they did not believe LC5014 would be good for the commissioners in smaller counties.

01:45:07 Rep. Cohenour pointed out the reference to "may," and emphasized counties would not be required, but the counties that need the provision would have it.

01:46:47 Rep. McNutt recalled Ms. St. Lawrence's testimony that the counties already have the authority. Rep. McNutt explained the bill will clarify that the counties have the authority and then litigation will be over the appropriateness of a county's decision, not whether the county had the authority.

01:49:18 Rep. Cohenour's motion to reconsider carried with Sen. Murphy and Rep. Boggio voting no, and Sen. Perry voting no by proxy. Sen. Jent voted yes by proxy.

01:50:10 Rep. Cohenour moved LC5014 be advanced as a committee bill. The motion failed 5-3 by roll call vote.

(BREAK)

WPIC Findings and Options for Recommendations

02:04:33 Mr. Kolman submitted and reviewed the revised WPIC Findings and Options for Recommendations ([EXHIBIT 5](#)).

- 02:07:58 Rep. McNutt addressed Government Issues, Finding 2, and stated he was confused about the statement "The passage of House Bill 831 made evaluating those applications more complex." Rep. McNutt believed without the passage of HB 831, there would have not been any applications to review. Rep. McNutt believed something was needed to give guidelines to overcome the *Trout Unlimited* decision. Mr. Kolman suggested inserting substitute language stating "passage of HB 831 resulted in additional requirements for evaluating ground water appropriations in closed basins." Rep. McNutt agreed.
- 02:10:40 Chairman Elliott provided opportunity for committee comments and discussion on the individual sections.
- 02:11:33 Rep. Cohenour addressed General Water Quantity and Quality, Finding 7, and stated she would like to see a statement saying the WPIC believed it was important to include the seven closed basins in the study.
- 02:12:31 Rep. Cohenour addressed Government Issues, Finding 3, Recommendation A, and suggested including a statement regarding notifying the parties. Sen. Murphy suggested referencing applicant and affected senior water right holders. Rep. Cohenour depicted notification as an important concept of the bill draft. Rep. Cohenour thought there was no question that counties have the authority, so she would like to see a finding that the counties have the authority to address health and safety needs.
- 02:16:09 Rep. Cohenour addressed Water Supply & Sewage, and noted Recommendation A should show that lot size was changed from five to three acres.
- 02:16:48 Rep. Cohenour thanked Mr. Kolman for his work on the Findings and Recommendations.
- 02:17:11 Mr. Kolman directed the WPIC to "Water - Montana's Treasure, An Analysis of Water Management in Montana" ([EXHIBIT 6](#)).
- 02:19:08 Rep. Cohenour suggested waiting to decide who will carry the legislation approved by the WPIC.
- 02:19:55 Mr. Petesch clarified it is possible to have potentially re-elected representatives designated to carry a bill, as long as there is a backup appointed as well.
- 02:20:37 The following legislators were assigned to carry the WPIC's proposed legislation:
- LC5007--Rep. McNutt
 - LC5009--Rep. Cohenour (McNutt)
 - LC5012--Rep. McChesney (Murphy)
 - LC5016--Sen. Elliott (Murphy)
 - LC5020--Rep. Cohenour (McNutt)
 - LC5021--Sen. Jent
 - LC5022--Sen. Elliott (Perry)

PUBLIC COMMENT ON ANY ISSUE THAT HAS COME BEFORE THE WPIC

- 02:23:59 Mr. Tubbs thanked the WPIC for their work over the interim.
- 02:24:52 Chairman Elliott thanked the staff for their work and each individual member of the WPIC for their work.
- 02:26:17 There being nothing further to come before the WPIC, the meeting was adjourned.