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VIA U.S. MAIL

Lincoln County Planning Board
418 Mineral Avenue
Libby, Montana 59923

RE: Lakeshore Protection Regulations

Dear Board Members:

I own approximately 2.3 acres on Glen Lake with 340 feet of frontage. I practice law in the area of land use. I have reviewed the proposed amendments to the Lakeshore Protection Regulations. In anticipation of the planning board meeting on August 18, 2010, I submit my personal and professional comments as follows:

1. **Section 1.4, Jurisdiction.** Regarding the definition of “lake,” subparts A, B, and C are not provided for in MCA § 75-7-202(1), thus Lincoln County’s definition is inconsistent with the state statute. These subparts are not in the definition of “lake” in the existing regulations.
2. **Section 1.5, Interpretation.** This section provides that if these regulations are more stringent than what is required by any other regulation, resolution, ordinance, or statute, these regulations shall control. These regulations cannot be more stringent than the statutes because the County’s authority comes from the statutes.
3. **2.1, Permit Required.** This section is too broad and without statutory authority. The statutes clearly provide that a permit is required when work “will alter or diminish the course, current, or cross-sectional area of a lake or its lakeshore.” MCA § 75-7-204(1). The regulations require a permit for “any work,” which is clearly more broad than the statutory standard.
4. **2.1, Permit Required.** The lakeshore protection zone is too broad and without statutory authority. The statutes clearly provide that the definition of “lakeshore” is land within 20 feet from the high water elevation. MCA § 75-7-204(2). The regulations provide for a

distance of 35 feet. And the definition of “lakeshore protection zone” in section 6 provides for a distance of 50 feet. The existing regulations provide for a distance of 20 feet, as required by statute.

5. **Property Rights.** This section was deleted from the existing regulations. It read, “Work or development approved by permit under these regulations shall not create a vested property right in the permitted development, other than in the physical structure, if any, so developed.” This is taken from MCA § 75-7-206, so it is the law regardless of whether it is in the regulations.
6. **2.3, Permission to Enter.** There needs to be a limitation imposed on the County’s right to enter. As drafted, a county official can enter at any time of the day, without notice, and even at any time long after construction has taken place. Reasonable notice should be required as a courtesy. Also, limiting an inspection to one time is warranted.
7. **2.4, Work Requiring a Permit.** Some of this section is too broad and without statutory authority. Section 75-7-204, MCA, provides for examples of work requiring a permit when the work is “below mean annual high-water elevation.” The proposed regulations provide, in part, for the same work but only when the work is “within the lakeshore protection zone.” Note that the existing regulation mirrors the language in the statutes. § 76.10.201(3).

Regardless, the statutes clearly provide that a permit is required when work “will alter or diminish the course, current, or cross-sectional area of a lake or its lakeshore.” MCA § 75-7-204(1). Some of the listed examples do not meet this requirement. For example:

K. “Clearing or removal of natural vegetation.” This can be done without altering or diminishing the cross sectional area of the lakeshore.

L. “Reconstruction of existing facilities” can be accomplished without altering or diminishing the cross sectional area of the lakeshore so long as the foundation remains. A remodel, for example, is work that can be accomplished.

M. “Stockpiling brush, trees, vegetation, construction materials or debris” does not alter or diminish the cross sectional area of the lakeshore.

N. “Construction of . . . walkways” may not alter or diminish the cross sectional area of the lakeshore.

8. **2.4, Work Requiring a Permit.** The last part of this section is too broad and without statutory authority. The statutes clearly provide that a permit is required when work “will alter or diminish the course, current, or cross-sectional area of a lake or its lakeshore.” MCA § 75-7-204(1). The proposed regulations provide that a permit is required for “any other work . . . that may have *an impact* on a lake, lakebed or lakeshore.” “An impact” is

not only vague, but much broader than the standard under the statute. Note that the standard in the existing regulation mirrors the standard in the statutes. § 76.10.201(1).

9. **2.5, Exemptions from Regulations.**

Subpart B exempts repair work so long as the “materials to be used do not differ, in type, from existing materials.” The type of materials, of course, does not alter or diminish the cross sectional area of the lakeshore and is therefore not a basis upon which to deny an exemption.

Subpart C exempts work for normal maintenance for existing facilities “which will have insignificant or minimal environmental effects” upon the lake, lakebed, or lakeshore. This is not only vague, but much broader than the statutory requirement of work that will alter or diminish the cross sectional area of the lakeshore. Therefore, it is not a basis upon which to deny an exemption.

10. **2.6, Prohibited Uses or Activities in Lakeshore Protection Zones.** This entire section is unlawful. The statutes do not give authority to prohibit any activity. Rather, they presume the issuance of a permit. Section 75-7-208, MCA, provides that the regulations “shall favor issuance of a permit. . . .” Section 75-7-212, MCA, provides that if the proposed work conforms to the criteria for issuing a permit, the county “shall issue a permit.” Nothing in the statutes provide for a local governing body to prohibit uses. The existing regulations do not provide for any prohibited activities.

Personally, I favor the construction of artificial beaches. People have the right to enjoy and use their property as they see fit, so long as it does not materially diminish water quality or create an eyesore. Regulations can protect against this.

11. **3.3, Review Period.** What happens if the permit is not renewed within the 30 days? It should be deemed approved.

12. **4.1, Policy Criteria for Issuance of a Permit.** The language stricken is the exact language in the statute.

13. **4.1, Policy Criteria for Issuance of a Permit.** Subpart F, “Alter the characteristics of the shoreline” is not one of the delineated criteria set forth in section 75-7-208, MCA. Subparts A to E are set forth in statute. Subpart F is also not part of the existing regulations.

14. **4.3, Design Standards for Facilities.** Generally, this section is filled with what the County will and will not allow. However, the statutes do not give the County this authority. Only if the activity alters or diminishes a cross section of the lake or lakeshore can the county require a permit. If the proposed work conforms to the criteria for issuing a permit, the County shall issue the permit. MCA § 75-7-121(2). It does not have the right to blanketly deny what will happen in the lakeshore protection zone.

Subpart E(2)(i)(b.): The County does not have authority to require that “all lighting be designed to reflect light away from abutting or adjacent properties and the Lakeshore Protection Zone.” In fact, the County has no authority to direct anything beyond the 20 foot lakeshore protection zone.

Subpart E(2)(iv)(b): The County does not have authority to control anything outside of the 20 foot protection zone, including “wells located outside of the Lakeshore Protection Zone.”

15. **5.3 Non-Conforming Structures.** This is inconsistent with the statutes.

16. **Other Recommendations.** I do favor a setback distance from the shore in which a boat may not travel. The policy consideration here is the safety of children who like to swim near their dock – like mine.

Thank you for your attention to this matter.

Very truly yours,

Sean S. Frampton
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SSF/ww