



April 1, 2022

Submitted via electronic mail to: planning@co.broadwater.mt.us

Broadwater County Planning Board
Ms. Nicole Brown, Broadwater County Community Development Director
515 Broadway
Townsend, MT 56944

Re: Comment in Opposition to Horse Creek Hills Subdivision Preliminary Plat Application and Urging the Planning Board to Recommend Denial

Dear Broadwater County Planning Board:

Upper Missouri Waterkeeper submits this letter in opposition to the proposed Horse Creek Hills Subdivision Preliminary Plat (hereinafter 'HCH'). As outlined herein the County's evaluation of this subdivision is lacking material data and/or an adequate analysis in several critical aspects. At the same time data provided to support the preliminary plat application by the applicant is deficient or misleading and unable to provide Broadwater County a sound evidentiary basis to approve the plat application. These unresolved issues individually and in the aggregate provide a clear basis for the Planning Board to recommend project denial to the Broadwater County Commission.

About Us

Upper Missouri Waterkeeper (hereinafter 'Waterkeeper') is a 501(c)3 not-for-profit membership based advocacy organization that defends fishable, swimmable, drinkable water, promotes sound land use, and supports community health throughout the 25,000 sq. miles of southwest and west-central Montana's Upper Missouri River Basin. Broadwater County is centrally located within our geographic focus and, of course, acutely aware of the value the Missouri River, its tributaries, and its reservoirs – such as Canyon Ferry – provide our state and communities.

Our staff collectively possess over 20 years of professional experience and scientific expertise in natural resources management, water rights, water quality protection, and government decisionmaking. Our members and supporters live, recreate, work, and enjoy the natural resources and unique outdoors heritage of this river basin, many of which reside within Broadwater County, and are concerned by the unprecedented subdivision proposal embodied in the Horse Creek Hills preliminary plat application. Our comments here are written on the organization's and our members' behalf to inform Broadwater County decisionmaking on a proposal that entails far more questions than answers, and which has the potential to cause or contribute to potentially significantly negative effects on the local environment, public safety, and wildlife.

Comments Relevant to Matters Raised for Public Comment at the Upcoming April 5, 2022 Planning Board Meeting

Broadwater County published a public notice and new staff summaries concerning additions and revisions to the Horse Creek Hills major subdivision application on February 17, 2022 and scheduled a new public hearing on those matters for March 2, 2022. That Planning Board meeting and hearing has since been rescheduled for April 5, 2022. Of the matters specifically noted for consideration at the upcoming public hearing Waterkeeper is concerned by potentially significant adverse impacts related to (a) the phasing plan, (c) water quantity and availability data, and (d) water quality and sanitation matters. We offer comments on each matter below. We also explicitly incorporate by reference previous comments made on behalf of our membership in opposition to this project, including but not limited to comments from the Big Belt Watershed Coalition.

A. The Horse Creek Hills' Phasing Plan

The issue here is the scope of the proposed project and whether the diversity of potentially significant adverse impacts associated with the build-out of a multi-phase residential subdivision, including commercial lots, within a rural, agrarian landscape have been identified and adequately mitigated.

Multi-phase development of a new major subdivision, much less the development of commercial lots, directly implicates the concepts of a project's relative intensity and the severity of impacts on its local environment. While the phasing of major subdivisions is authorized pursuant to MCA § 76-3-618, the Environmental Analysis found in Appendix D, staff findings, new supplementation information, and recommended mitigations do not adequately reconcile a diversity of impacts resulting from transforming present open space into a developed residential and/or commercial setting over the course of potentially six years.

Waterkeeper's review of staff findings concerning the phasing plan suggests Broadwater County staff view the "new information" for review at this juncture to solely relate to the "schedule" of the Horse Creek Hills preliminary plat's phases. However, as a fundamental matter the County cannot separate the task of considering a schedule for phasing a subdivision without wholistically considering and taking a hard look at reasonably foreseeable impacts that the conversion of over 400 acres of open space, surrounded overwhelming by agricultural or rural public lands and bordering sensitive water resources, into residential and/or commercial development entails.

As members of the public, including Waterkeeper's members, have pointed out in testimony and written comments to this Board previously, the proposed project entails potentially significant adverse impacts to agriculture, agricultural water use, local services, the natural environment, wildlife, wildlife habitat, and public health and safety. The timing and schedule for development of phases can incite potentially significant adverse impacts on any of the aforementioned resources by virtue of how quickly – or slowly – a phased development progresses. The staff report and Environmental Analysis fail to adequately examine how the project and its phased components will materially impact agriculture, agricultural water use, local services including transportation and roads, the natural environment, wildlife, wildlife habitat, and public health and safety, and contain zero discussion of how phasing schedules affect those resources.

Expert agency letters indicate potentially significant wildlife impacts and the presence of critical trout spawning grounds in Confederate Gulch, while public testimony has pinpointed a variety of public safety, transportation, and water resource concerns. In response the applicant only alleges that phasing is a procedural convenience to the County and offers flexibility to the applicant for market return. The record before the Board fails to demonstrate adequate consideration of ‘specific, documentable, and clearly defined impact[s]’ arising from a phased major subdivision, and therefore we find proposed conditions of approval specious in their ability to reasonably mitigate prospective impacts.

Further, the application, supplemental information, and staff reports fail to provide sufficient documentation of proposed commercial lots, especially in terms of their actual uses. Without understanding the nature of commercial uses it is impossible to identify, much less evaluate, the impacts of such development as required by MCA §§ 76-3-603(1), 608(3)(a). Commercial use, including a potential gas station and/or convenience store or other facilities, implicate ‘local services’ and ‘public health and safety.’ Similarly, such facilities likely require specific review as public water supplies, yet without further description that determination remains lacking and any review of impacts stymied. Put simply, because there is insufficient detail provided on the nature of the commercial lots phased review has been unreasonably stunted and therefore the County does not possess an evidentiary record capable of satisfying the criteria of MCA § 76-3-618.

Put another way, HCH’s proposal to develop each respective phase over consecutive two-year time frames means that the 400+ acre will change in character, irreversibly, over the span of a handful of years. The addition of commercial lots in particular pose special significance to an assessment of phased development. Given HCH’s subdivision project is unprecedented within the local geography at hand and in terms of its land use, and given the record of overwhelming opposition from adjacent and nearby landowners, including continued objections pertaining to stunted analysis of the project’s foreseeable impacts, the Planning Board’s findings of facts must recognize the potentially significant adverse impacts to the aforementioned resource categories.

Presently, the EA and staff reports fail to adequately identify and examine these issues within the context of considering approval of a novel, multi-phase major subdivision development that includes two commercial lots. Further, Waterkeeper disputes any assertion that prospective consideration of particular resource issues by state agencies, such as consideration of wastewater disposal by the DEQ or water rights consideration by the DNRC, relieves the County of its independent obligation to specifically assess potential resource impacts. In short, the County is obligated to both specifically identify *and* to take a hard look at reasonably foreseeable impacts of a multi-phase major subdivision in a rural environment under MCA § 76-3-608, yet has failed to do so thus far. We urge the Planning Board to thoroughly consider these impacts during its deliberations on the project’s phasing at its April 5th meeting.

B. Water Use, Water Quantity & Water Availability

The applicant’s Environmental Analysis, supplemental information, and the County’s cursory review of water use, water quantity, and water availability do not satisfy requirements of the Subdivisions Act. The public notice for the April 5th hearing on the HCH preliminary plat states that the application amendment from surface water to irrigation is ministerial, yet the opposite is true. The HCH preliminary plat application directly implicates water use, water quantity impacts, and water availability, core preliminary elements of any proposed subdivision.

First, it is important to note that the entire HCH subdivision is reliant solely on exempt groundwater wells. The application alleges and staff reports rely on the use of 5x exempt groundwater wells at 10 ac/ft-yr each, for a total of 50 ac/ft-yr, to address criteria concerning water supplies and usage under the MSPA. To be clear, the applicant's and county's reliance on exempt wells to supply the HCH subdivision as proposed is misplaced and unlawful. All subdivisions that create one or more parcels under 20 acres in size are limited to a single exempt well appropriation with a total, maximum depletion of 10 acre-feet/year from a single source. *See Clark Fork Coalition v. Tubbs*, 2016 MT 229 at ¶ 24; MCA § 85-2-306; ARM 36.12.101(12); 2016 DNRC Combined Appropriations Guidance.

The DNRC's issuance of letters to the applicant do not, as suggested by the applicant, provide any confirmation of legal rights to the purported 50 ac/ft-yr. Rather, the plain language of DNRC's letters explicitly state that the letters do not provide pre-approval for a water right or pre-approval to use up to 10-ac/ft-yr for each phase. In fact, DNRC letters clearly state that new subdivisions wells are considered a single combined appropriation, contradicting the applicant's and the county's reliance on exempt wells as an adequate water supply for the HCH subdivision. The applicant's amendment of its preliminary plat application clearly states the applicant's intent to rely solely on exempt wells, yet its proposed calculations unreasonably construe the law, DNRC rules, and binding Montana Supreme Court precedent to support its application. The County should not blindly take the applicant at its word. The Planning Board cannot reasonably find that water supplies are available for the proposed project based on a lay reading of the law, the application or supplemental information and public comment, and on this basis alone the Board should recommend denial of the preliminary plat application.

Second, MCA § 76-3-608 and the County's 2020 growth policy require evaluation of impacts on agricultural water uses, including in particular irrigation systems or agricultural operations in the area. Neither the Environmental Analysis, the applicant's supplemental "Water Use Summary," or staff reports identify or evaluate potential impacts on agricultural water uses; instead, the only review of water availability is that proposed water supplies are allegedly exempt groundwater wells.

Based on Waterkeeper's knowledge of regional hydrology surrounding Canyon Ferry and the Upper Missouri River we are dismayed and concerned that neither the applicant or county have undertaken a groundwater model to both identify the gross volume of groundwater available (and to be clear, groundwater availability significantly changes in accordance with seasonality and precipitation patterns) and how existing uses of groundwater by nearby agricultural operations might be impacted by the subdivision, both in the short term and long term. We are particularly concerned by the failure to take a hard look at what is likely a singular, unconfined underground aquifer connected to local groundwater and how placing, functionally, dozens of new straws in the same glass of water, will create potentially significant impacts for existing uses of water, particularly existing agricultural uses within the vicinity.

The applicant's Environmental Analysis in its soils section provides data that supports our concerns by finding no confining soil layers. The lack of confining soil layers and consistent loamy and cobble soils again strongly suggests from a groundwater and geomorphology perspective that local groundwater and the deeper aquifer used by residences and agricultural operations in the vicinity are one finite resource across the eastern front of Canyon Ferry and potentially linked beneath surface drainages such as Confederate Gulch and other adjacent subwatersheds. Similarly, there is zero evaluation of how new prospective water use as contemplated by the project could affect flows within Confederate Gulch. This is of concern due to existing senior water rights on the gulch and due to the potentially significant impacts that

dewatering events could entail for rainbow trout habitat and spawning. At this late stage the failure to identify or meaningfully assess these reasonably foreseeable groundwater and aquifer availability concerns pose direct threats to existing water uses, including agricultural uses and undermines any finding that water availability impacts have been adequately identified, assessed, or mitigated.

Third and last, we note that neither the Environmental Analysis or the applicant's supplemental Water Use Summary provide accurate estimated water use. Residential water use averages drawn from DEQ and DNRC data sets suggest the applicant's estimated water uses for each subdivision phase and cumulatively for the project are unreasonably minimized. Whether it be estimated water use for irrigation and gardens, or residential consumption per household, the applicant's proposed 10-ac/ft-yr per phase appears wildly insufficient based on a single family needing approximately 1 ac/ft-yr. Under DNRC and DEQ water consumption estimates phase 1 alone would require nearly 40 ac/ft-year. Proposed mitigation of requiring water meters at residences to track water use, without any means of enforcing caps on water use, render such mitigation meaningless. The County must take a hard look at available agency data demonstrating far greater water consumption patterns than provided by the applicant and identify likely impacts, including a thorough assessment of groundwater availability as discussed above.

C. Water Quality & Sanitation

The County is required to assure a preliminary plat application contains sufficient data necessary to assess potentially adverse water quality impacts under MCA § 76-3-622. Each lot is proposed to use an individual septic system and much ado is made to prospective DEQ review. Waterkeeper's review of the HCH application before the County indicates an unreasonable reliance on categorical exemptions for widespread septic systems given the low suitability of the landscape soils for septic disposal, while simultaneously a failure to account for potential cumulative water quality impacts on Confederate Gulch or downgradient Canyon Ferry.

A preliminary plat application must provide a preliminary analysis of impacts to groundwater quality using the rules adopted pursuant to MCA §§ 75-5-301, 303 as guidance for such assessment. *See* MCA § 76-3-622(1)(g). DEQ's nondegradation implementing rules at ARM 17.30.715(2) are therefore directly relevant to the County's consideration of potential adverse water quality impacts. This regulation requires the assessment of potential cumulative or synergistic effects of new wastewater pollution. A reasonable cumulative impacts analysis requires the evaluation of other past, present and future activities "seemingly tied" to the project at issue, including application of those potential polluting activities to the resources at-hand. DEQ is on the record as stating that it will not consider off-site cumulative impacts, and because as discussed herein cumulative water quality impacts may be significant the County must adequately identify and assess these impacts.

The applicant's nondegradation analysis solely considers whether individual lot septic systems comply with trigger values for waste concentrations at the end of mixing zones without considering the potential cumulative effects of dozens of such systems on downgradient water quality. There is no assessment of how local groundwater quality might be affected outside of respective lot mixing zones by cumulative waste discharges. And there is scant discussion of how septic systems discharging pollution upgradient from new residential development may affect drinking water wells located downgradient, much less how septic pollution from lots may trespass onto adjoining lots given the proximate location between lots 18 and 19, 30, 31, 35, and 40.

In the same vein, there is little meaningful assessment of how local surface water downgradient of the project may be impacted. Instead, the applicant relies on the arbitrary setback of 1,000' to determine that any surface water impacts will be nonsignificant. However, there is no scientific record support to show that nutrient pollution from septic wastewater magically becomes less severe or potent at 1,000', nor any specific information in the record to indicate that the receiving soils have specific pollution adsorption capacity capable of mitigating new nutrient pollution impacts on surface waters. In fact, the soil tests and the applicant's own admissions reflect that the soils receiving potentially dozens of septic systems wastes are marginal at best. The applicant also suggests that the volume of water in Canyon Ferry makes septic pollution from the subdivision inconsequential, yet that assumption is neither the legal test applicable to considering the subdivision's potential impact on water quality nor does the record contain scientific demonstration that new septic pollution would not in fact cause or contribute to negative local water quality conditions. In fact, and as noted below, it is likely that new septic pollution discharges could exacerbate existing pollution trends in local surface waters.

The causal relationship between septic systems and downgradient water quality degradation is well-established in scientific literature, known in Montana, and should not be casually dismissed by the Planning Board.¹ Best available science from the Montana DEQ in the form of its numeric nutrient criteria² for Wadeable Streams indicate that the trigger level for potential negative nutrient pollution impacts to a downgradient surface water like Confederate Gulch begin at .3 mg/L nitrogen. Septic systems in the subdivision would each discharge waste concentrations approaching 5 mg/L nitrogen, more than 10x the concentration at which surface water quality becomes legally degraded.

Additionally, the Environmental Analysis and staff report each categorically fail to identify or discuss the existing legal impairment status of both Confederate Gulch and Canyon Ferry for nutrient wastes. The DEQ's 2020 Integrated Report and 303(d) List of Impaired Waters³ indicates that Confederate Gulch remains a surface water classified as degraded specifically by nitrate pollution. Similarly, Canyon Ferry is classified as impaired specifically by ammonia pollution. Ammonia is a chemical relative and derivative of human wastewater. Likewise, nitrate is a chemical derivative of human wastewater. The addition of more nutrient pollutants into local groundwater that the applicant's own data indicates will empty into Confederate Gulch and/or Canyon Ferry is a potentially significant adverse impact of the HCH subdivision and which has not been identified or assessed and calls into question the "suitability" of proposed waste disposal systems.

Last but not least, the project entails consistent discussion of irrigation practices on lawns yet fails to adequately assess the runoff potential or impacts that use of herbicides or pesticides would have on local water quality. The scale of the HCH major subdivision represents a significant change in land use that may incite new consequences for local water quality, not the least of which is chronic new pollution inputs from stormwater, lawn care practices/fertilizers,

¹ Suplee, M.W., and V. Watson, 2013, Scientific and Technical Basis of the Numeric Nutrient Criteria for Montana's Wadeable Streams and Rivers—Update 1, *and addendums*. Helena, MT: Montana Dept. of Environmental Quality, available online at: <http://deq.mt.gov/wqinfo/standards/NumericNutrientCriteria.mcp> ; Tri-State Water Quality Council, "Septic System Impacts on Surface Water", A Review for the Inland Northwest, 2005, available online at: <https://clarkfork.org/wp-content/uploads/2016/03/septic-system-impact-surface-waters-2005.pdf>

² Montana Numeric Nutrient Criteria, Circular 12-A, available online: https://deq.mt.gov/files/Water/WQPB/Standards/PDF/NutrientRules/CircularDEQ12A_July2014_FINAL.pdf

³ See "2020 Impaired Water", Integrated Report, Montana DEQ. Available online at: https://deq.mt.gov/files/Water/WQPB/CWAIC/Reports/IRs/2020/Appendix_A_Final.pdf

pesticides, and herbicides. Given the landscape at-hand both on the subdivision property and adjacent regions provides important wildlife habitat and is adjacent to sensitive water resources, there should be a thorough assessment of how irrigation practices and lawn care may affect wildlife and local water quality.

Conclusion

The application and staff reports suggest that recommended conditions will mitigate impacts to water, wastewater, stormwater and solid waste, yet as demonstrated in this letter several significant impacts have not been identified or adequately assessed. In particular, the HCH major subdivision has the potential to adversely impact agricultural water use, local wells, aquifer and groundwater connectivity and availability, fisheries habitat, and increased wastewater pollution to sensitive local water resources. Unless and until these issues are adequately assessed the preliminary plat application continues to be deficient and non-compliant with the Subdivision Act.

For these reasons we urge the Planning Board to recommend denial to the Broadwater County Commission.

Respectfully submitted-

A handwritten signature in black ink, appearing to read "Guy Alsentzer", with a long horizontal flourish extending to the right.

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