

RURAL DEVELOPMENT STUDY

Final Report to the
Governor of the State of Montana
and the Montana Legislative Council

*Prepared by the Environmental Quality Council,
December, 1990*



STATE OF MONTANA
ENVIRONMENTAL QUALITY COUNCIL

STATE CAPITOL
HELENA, MONTANA 59620
(406) 444-3742

Deborah B. Schmidt, Executive Director

GOV. STAN STEPHENS
Designated Representative
Art Wittich

HOUSE MEMBERS
Bob Gilbert, Chairman
Jerry Driscoll
Ed Grady
Bob Raney

SENATE MEMBERS
Cecil Weeding, Vice Chairman
Tom Beck
John G. Harp
Bill Yellowtail

PUBLIC MEMBERS
Doug Crandall
Thomas M. France
Tom Roy
Everett E. Shuey

December 4, 1990

The Honorable Stan Stephens
Governor of the State of Montana
Representative Ralph Eudaily
Chairman, Legislative Council

As Chairman of the Montana Environmental Quality Council, I am pleased to transmit the Council's Rural Development Study final report. The Council was asked to review the adequacy of existing state law regarding the environmental impacts of development in rural Montana. This task was accomplished and the report presents brief discussions of the issues and problems and, where appropriate, the Council's final recommendations and implementation strategies.

Equally important however, the Council's consideration of these issues provided a public forum where the issues could be thoroughly discussed and placed into a broader statewide context. There are no easy answers to the problems identified in this report, but rational, coordinated, and cooperative efforts such as this study are an important first step.

Sincerely,

Representative Bob Gilbert
Chairman

Introduction

Responding to a request from the Governor and the Legislative Council, the EQC at the March 1990 meeting, agreed to undertake a study regarding the adequacy of state statutes and regulations that deal with rural development issues. The Governor identified four major areas of concern:

1. Sewage disposal
2. Geothermal resource development
3. Fallout shelter construction
4. Rural residential development

The report presented to the Council at the June 1990 meeting reviewed the major state statutes, administrative regulations and local ordinances governing these issues. Existing or potential problems associated with these issues were identified and potential solutions to the problems were presented.

In August, October, and November, 1990, the Council considered specific responses to these issues. The purpose of this memo is to briefly review the background of each issue and report to the Governor and the Legislative Council the Environmental Quality Council's deliberations and final recommendations regarding the environmental impacts of development in rural Montana.

I. SEWAGE

A. Individual Septic Systems

Background

The overriding purpose of the sewage disposal statutes and regulations is to protect public health. The consensus of the people in local and state government who deal with sewage issues is that the regulations adequately accomplish this task. As long as the minimum state sewage standards apply - because the system is classified as a public system, reviewed under the subdivision statutes, or the local governments have adopted adequate septic system regulations - the public health is protected.

Problems

Problems develop, or have the potential of developing, in areas where the state minimum standards do not apply. The DHES does not regulate individual septic systems, and while local Boards of Health may develop their own regulations, an estimated 20 counties in Montana have no sewage disposal regulations at all.

Deliberations

The Council considered a number of options to increase the review of individual septic systems. One option would have required the DHES to establish a state permit system for individual septic systems. However, EQC members were concerned by the large administrative burden that would be placed on the DHES by such a program.

Another option would have modified the statutory definition of a subdivision, e.g. removing the 20 acre provision. This would allow increased state or local government review of individual septic systems. The Council, apart from perceived political problems with this option, questioned whether a change in subdivision law was the appropriate place to address this specific issue.

The last option considered requires the DHES to establish state individual septic system standards and then requires local Boards of Health to adopt regulations as least as stringent as those standards. The Council decided that this was the most efficient and appropriate response to this issue.

Recommendations

1. The Department of Health and Environmental Sciences should be required to adopt, in administrative rules, minimum standards for individual sewage control and disposal systems.

2. Section 50-2-116 MCA should be modified to require local Boards of Health to adopt regulations at least as stringent as the state standards for individual septic systems.

Implementation

The Council, in conjunction with the SJR 22 Ground Water Protection and Management Study, has prepared draft legislation (see attachment A) that addresses these issues.

B. Sanitation in Subdivision Act.

Background

The only way that a non-failing individual septic system currently comes under state review is if the system is included in a subdivision. Section 76-4-104 et. al. MCA requires that any division of land that qualifies as a "subdivision" must show the availability of sufficient potable water and adequate sewage disposal capabilities before certification.

Problems

This statute only applies to developments that meet the legal definition of subdivision. Most developments in rural Montana do not meet this definition and therefore are not subject to review for sewage disposal or potable water supply. The largest problem is the provision that excludes any division of land in excess of 20 acres from the subdivision regulations. The other major exclusions to subdivision review, the "family" and "occasional" sales, are not excluded from the sanitation review.

Recommendations

By requiring review at the local level for compliance with state standards for individual septic systems, the recommendations in section A address this issue as well.

C. Cesspool, Septic Tank and Privy Cleaners Act

Background

Apart from the septic system itself, another method of disposing of sewage is by spreading cesspool or septic tank wastes. Section 37-41-105 MCA states:

This chapter does not prohibit the owner or lessee of the property from which the septage was removed from disposing or contracting for the disposal of his own septage upon land owned or leased by him if it does not create a nuisance or public health hazard.

Problems

The intent of this statute is reportedly to allow a single rural family to dispose of their own waste on land they control. Alleged abuses of this statute, where large amounts of waste have been spread, have been reported to the DHES.

Deliberations

The Council considered amending state law to include a maximum gallon-per-day sewage spreading rate. The maximum could be designed to allow only a standard "family" to qualify for this statutory exception. DHES personnel pointed out problems with establishing a maximum spreading rate that would be relevant for different site conditions as well as problems with enforcement of the maximum rate. DHES personnel told the Council that actual problems with improper sewage spreading were rare but there should be some guidelines established for people to follow when spreading sewage.

Recommendation

The DHES should establish minimum recommended guidelines for sewage spreading. The recommended guidelines should initially be published via DHES circular and incorporated into administrative rules if problems with improper sewage spreading develop.

Implementation

The DHES, in cooperation with local health officials, is developing sewage spreading guidelines. These will be published in DHES circular format in 1991.

II. GEOTHERMAL DEVELOPMENT

Background

Unlike many other states with geothermal resources, Montana does not recognize, under state water law, any difference between "hot" and "cold" water. Therefore, while a water right to a geothermal resource is subject to the same appropriation and adjudication procedures and protections as any other water right, only the quantity of the water is protected, not the temperature or other products, e.g. minerals or gas, commonly associated with geothermal resources. Additionally, use of a ground water geothermal resource, even a use that threatens the value of that resource to another user, is exempt from state water use permit requirements.

If the geothermal resource is used as a power source however, it may fall under the Major Facility Siting Act, (Act) section 75-20-101 et. al. MCA. The Act, implemented by the Department of Natural Resources and Conservation (DNRC), requires state certification of environmental compatibility before a geothermal power project can be developed. The Act also includes exploration notification provisions for geothermal projects that are potentially covered by the Act.

The DNRC has determined that use of a geothermal resource solely for space heat, e.g. greenhouses, residential or storage buildings, or spa use, could be defined as "geothermally derived power", and therefore be covered by the Act. The DNRC makes this determination based on the specific details of the plan as submitted by the developer. To date however, the DNRC has not applied the Act to any geothermal resource project.

Problems

Current and future users of geothermal resources have no means of protecting the heat or by-product value of the resource under state water law. This could lead to inefficient and wasteful use of the resource and cause irreparable harm to the resource in an entire area. Additionally, while the DNRC will determine if a geothermal development is covered by the Major Facility Siting Act based on the plans of the developer - it is unclear who must submit a plan to the DNRC.

Deliberations

The Council reviewed geothermal statutes in surrounding states and heard presentations by DNRC personnel regarding the potential for implementing similar legislation in Montana. The Council decided that geothermal resources are a unique asset in this state and should receive more protection than is currently available through the Water Use Act.

Recommendation

To adequately protect all of Montana's water resources, the Water Use Act should be modified to require a permit for the use of geothermal resources. Additionally, the Major Facility Siting Act should be clarified as applicable only to geothermal resource use for the production of electricity of 7.5 megawatts or greater.

Implementation

The Council has prepared draft legislation (see attachment B) that addresses this issue.

III. FALLOUT SHELTERS

Background

There are no specific state or local regulations that deal with this type of construction. However, the Montana Department of Commerce, Building Code Bureau, is in the process of preparing a recommendation to adopt Uniform Building Code appendix chapter 57 which governs fallout shelters. This would allow the state to ensure that any new fallout shelter met minimum construction and safety standards. It would not however, allow state or local governments to evaluate the scale or location of the shelter.

Deliberations

The Council considered requiring state review and approval of shelters larger than a certain capacity. Additionally, this could trigger environmental review of the shelter under the Montana Environmental Policy Act.

The Council also considered broader legislation that would require state review of any project that exceeded a specified parameter. Parameters might include the amount of money spent on the project, the amount of land cleared or soil removed, or the number of people employed, etc. Any project that met or exceeded the applicable parameter would then require state review and approval.

Recommendations

The Council questioned whether fallout shelter construction was a statewide problem that required increased legislative regulation. The Council noted that the on-going EQC review of MEPA implementation also addresses portions of this issue. However, recognizing that the recent shelter construction in Park County was the reason fallout shelters were included in the rural development study, the Council supported the Governor's efforts to ensure adequate disclosure of development plans early in the environmental review process.

IV. RURAL RESIDENTIAL DEVELOPMENTS

Background

Unregulated residential developments have been, and continue to be, a problem in rural Montana. These unregulated developments, in other words - developments not reviewed under the Subdivision and Platting Act or the Sanitation in Subdivision Act, escape the following partial list of minimum requirements:

1. an environmental assessment of the development;
2. identification of unsuitable areas for development;
3. prescription of standards for:
 - a. roads, lots, grading and drainage;
 - b. adequate water supply and sewage and solid waste disposal services;
 - c. utility installation;
4. adequate fire and police services etc.

A new and growing facet of this problem concerns multiple ownership of a single 20 acre parcel. The resulting increase in density compounds the above problems.

Deliberations

The Council considered the following options regarding this issue:

1. *Specifically amend the definition of subdivision.*
If increased state review of residential developments is desired, the definition of subdivision could be changed by removing the 20 acre subdivision definition and/or removing the "occasional" and "family sale" review exemptions.
2. *Allow local governments to define subdivision.*
Alternatively, the state definition of subdivision could be recast as a minimum definition, specifically allowing local governments to define subdivision in a manner that is appropriate for their area.
3. *Encourage local planning and/or zoning.*
Correcting the subdivision laws will not solve the entire problem, however. Even if a development complies with the subdivision regulations, it still may be viewed by some citizens as an inappropriate land use for a specific area. Under current statutes, local governments, or groups of citizens, have the authority to direct area land use through planning and zoning, but few areas have done so. To foster local control of land use issues, the state could design and implement incentives for local planning and zoning. For example, increased state technical and financial assistance could be made available to communities that expressed an interest in maintaining local control over land use issues.

4. *Require local comprehensive planning and zoning.*

Alternatively, if, as discussed above, local governments are unwilling, or unable, to regulate land use, a state mandated county-wide planning and zoning program similar to Oregon's would solve that aspect of the problem. The requirement could be very general, e.g. mandating the planning and zoning action and leaving all but the most basic requirements up to the local governments.

5. *Implement state-wide land use plans.*

Finally, the state could take on the role of planner. This could be accomplished through state-wide land use plans or identification of critical areas and areas of special significance. These options could provide strong state leadership on land use policy - yet remain flexible enough to be responsive to the special needs of Montana's diverse climate, topography and population.

Recommendations

The Council decided that revising the subdivision laws was a necessary first step in improving Montana's land use policy. The Council supports removing "loop holes" in the current subdivision laws such as the 20 acre definition and the "family" and "occasional" sale review exemptions.

Implementation

While supporting these modifications, the Council did not endorse specific legislation. The Council reviewed draft subdivision amendment legislation and the Council members will individually consider the legislation again when it is introduced.

V. CONCLUSION

The Council was asked to evaluate the adequacy of state regulation on four separate, but related, rural development issues. Seeing these issues, and attempting to resolve them as distinct, separate problems, underscores the basic shortcoming of Montana's land use policy.

The EQC, in its third annual report of December 1974, stated that:

Montana has a land use policy. But it is implicit, hidden away in the nooks and crannies of the law and of the administrative codes of the many agencies of state government. For the people, the legislature, and the governor, an unstated policy is hard to evaluate. It is difficult to suggest changes in an unstated policy or use it to measure the efforts of state agencies.

This statement remains true today. Only by bringing the diffuse policy elements together into a cohesive structure - only by explicitly identifying the form, function and goals of Montana's land use policy - can these issues truly be addressed and resolved.

Draft Copy

Printed 3:15 pm on December 19, 1990

ATTACHMENT A

LC789

**** Bill No. ***

Introduced By *****

By Request of ENVIRONMENTAL QUALITY COUNCIL

A Bill for an Act entitled: "AN ACT TO REQUIRE THE BOARD OF HEALTH AND ENVIRONMENTAL SCIENCES TO ADOPT MINIMUM STANDARDS FOR THE CONTROL AND DISPOSAL OF SEWAGE FROM PRIVATE AND PUBLIC BUILDINGS; REQUIRING LOCAL BOARDS OF HEALTH TO ADOPT REGULATIONS FOR THE CONTROL AND DISPOSAL OF SEWAGE FROM PRIVATE AND PUBLIC BUILDINGS THAT ARE NO LESS STRINGENT THAN STATE STANDARDS; AMENDING SECTIONS 50-2-116 AND 75-5-305, MCA; AND PROVIDING AN APPLICABILITY DATE."

STATEMENT OF INTENT

A statement of intent is required for this bill in order to provide guidance to the board of health and environmental and sciences concerning rulemaking to establish minimum standards for the design, installation, and maintenance of new septic and sewage disposal systems that are connected to individual public and private buildings. Following the adoption of minimum state standards, local boards of health shall adopt regulations for new septic and sewage disposal systems that are no less stringent than the state standards. Local governments are not required to regulate septic and sewage disposal systems that the department of health and environmental sciences reviews and regulates under the requirements of Title 75, chapter 6, pertaining to public

Draft Copy

Printed 3:15 pm on December 19, 1990

water supply systems, or the requirements of Title 76, chapter 4, pertaining to subdivisions.

Be it enacted by the Legislature of the State of Montana:

Section 1. Section 75-5-305, MCA, is amended to read:

"75-5-305. Adoption of requirements for treatment of wastes. The board may establish minimum requirements for the treatment of wastes, except that the board shall establish minimum requirements for the control and disposal of sewage from private and public buildings."

Section 2. Section 50-2-116, MCA, is amended to read:

"50-2-116. Powers and duties of local boards. (1) Local boards shall:

(a) appoint a local health officer who is a physician or a person with a master's degree in public health or equivalent and appropriate experience as determined by the department and fix his salary;

(b) elect a chairman and other necessary officers;

(c) employ necessary qualified staff;

(d) adopt bylaws to govern meetings;

(e) hold regular meetings quarterly and hold special meetings as necessary;

(f) supervise destruction and removal of all sources of filth which cause disease;

(g) guard against the introduction of communicable disease;

(h) supervise inspections of public establishments for sanitary conditions;

Draft Copy

Printed 3:15 pm on December 19, 1990

(i) adopt necessary regulations that are no less stringent than state standards for the control and disposal of sewage from private and public buildings not currently connected to any municipal system that is not regulated by the provisions of Title 75, chapter 6, or Title 76, chapter 4.

(2) Local boards may:

(a) quarantine persons who have communicable diseases;

(b) require isolation of persons or things which are infected with communicable diseases;

(c) furnish treatment for persons who have communicable diseases;

(d) prohibit the use of places which are infected with communicable diseases;

(e) require and provide means for disinfecting places which are infected with communicable diseases;

(f) accept and spend funds received from a federal agency, the state, a school district, or other persons;

(g) contract with another local board for all or a part of local health services;

(h) reimburse local health officers for necessary expenses incurred in official duties;

(i) abate nuisances affecting public health and safety or bring action necessary to restrain the violation of public health laws or rules;

(j) adopt necessary regulations and fees to administer regulations for the control and disposal of sewage from private and public buildings ~~not currently connected to any municipal~~

Draft Copy

Printed 3:15 pm on December 19, 1990

system (fees ~~shall~~ must be deposited with the county treasurer);

— (k) adopt rules which do not conflict with rules adopted by the department:

(i) for the control of communicable diseases;

(ii) for the removal of filth which might cause disease or adversely affect public health;

(iii) on sanitation in public buildings which affects public health;

(iv) for heating, ventilation, water supply, and waste disposal in public accommodations which might endanger human lives; and

(v) ~~for the control and disposal of sewage from private and public buildings and~~ for the maintenance of sewage treatment systems which do not discharge an effluent directly into state waters and which are not required to have an operating permit as required by rules adopted under 75-5-401."

NEW SECTION. Section 3. Applicability. [This act] applies to proceedings begun after October 1, 1991.

-END-

Draft Copy

LC0959

**** Bill No. ***

Introduced By *****

By Request of *****

A Bill for an Act entitled: "AN ACT TO REQUIRE A WATER USE PERMIT FOR THE USE OF GEOTHERMAL RESOURCES; CLARIFYING THE MAJOR FACILITY SITING ACT AS NOT APPLICABLE TO ANY GEOTHERMAL USE OTHER THAN FOR THE PRODUCTION OF 7.5 MEGAWATTS OF ELECTRICITY OR MORE; amending sections 75-20-104, 75-20-211, 75-20-225, 85-2-102, 85-2-306, and 85-2-311, MCA; repealing sections 75-20-1001, MCA; providing an effective date; and providing an applicability date."

Be it enacted by the Legislature of the State of Montana:

Section 1. Section 85-2-102, MCA, is amended to read:

"85-2-102. (Temporary) Definitions. Unless the context requires otherwise, in this chapter the following definitions apply:

(1) "Appropriate" means to:

(a) divert, impound, or withdraw (including by stock for stock water) a quantity of water;

(b) in the case of a public agency, to reserve water in accordance with 85-2-316; or

(c) in the case of the department of fish, wildlife, and parks, to lease water in accordance with 85-2-436.

(2) "Beneficial use", unless otherwise provided, means:

(a) a use of water for the benefit of the appropriator,

Draft Copy

Printed 8:59 am on December 27, 1990

other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses;

(b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141; and

(c) a use of water by the department of fish, wildlife, and parks pursuant to a lease authorized under 85-2-436.

(3) "Board" means the board of natural resources and conservation provided for in 2-15-3302.

(4) "Certificate" means a certificate of water right issued by the department.

(5) "Change in appropriation right" means a change in the place of diversion, the place of use, the purpose of use, or the place of storage.

(6) "Commission" means the fish and game commission provided for in 2-15-3402.

(7) "Declaration" means the declaration of an existing right filed with the department under section 8, Chapter 452, Laws of 1973.

(8) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

(9) "Existing right" means a right to the use of water which would be protected under the law as it existed prior to July 1, 1973. (1) "Appropriate" means to divert, impound, or withdraw (including by stock for stock water) a quantity of water

Draft Copy

Printed 8:59 am on December 27, 1990

or, in the case of a public agency, to reserve water in accordance with 85-2-316.

(10) "Geothermal Resource" means water with a temperature at the wellhead or ground surface greater than 84 degree Fahrenheit and includes:

(i) the energy that may be extracted from that natural heat; and

(ii) geothermal byproducts.

~~(10)~~(11) "Ground water" means any water beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water, and which is not a part of that surface water.

~~(11)~~(12) "Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

~~(12)~~(13) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency thereof, or any other entity.

~~(13)~~(14) "Political subdivision" means any county, incorporated city or town, public corporation, or district created pursuant to state law or other public body of the state empowered to appropriate water but not a private corporation, association, or group.

~~(14)~~(15) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

Draft Copy

Printed 8:59 am on December 27, 1990

~~(15)~~(16) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal resources water, diffuse surface water, and sewage effluent.

~~(16)~~(17) "Water division" means a drainage basin as defined in 3-7-102.

~~(17)~~(18) "Water judge" means a judge as provided for in Title 3, chapter 7.

~~(18)~~(19) "Water master" means a master as provided for in Title 3, chapter 7.

~~(19)~~(20) "Well" means any artificial opening or excavation in the ground, however made, by which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn. (Terminates June 30, 1993--sec. 11, Ch. 658, L. 1989.)

85-2-102. (Effective July 1, 1993) Definitions. Unless the context requires otherwise, in this chapter the following definitions apply:

(1) "Appropriate" means to divert, impound, or withdraw (including by stock for stock water) a quantity of water or, in the case of a public agency, to reserve water in accordance with 85-2-316.

(2) "Beneficial use", unless otherwise provided, means:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and

Draft Copy

Printed 8:59 am on December 27, 1990

recreational uses; and

(b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141.

(3) "Board" means the board of natural resources and conservation provided for in 2-15-3302.

(4) "Certificate" means a certificate of water right issued by the department.

(5) "Change in appropriation right" means a change in the place of diversion, the place of use, the purpose of use, or the place of storage.

(6) "Declaration" means the declaration of an existing right filed with the department under section 8, Chapter 452, Laws of 1973.

(7) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

(8) "Existing right" means a right to the use of water which would be protected under the law as it existed prior to July 1, 1973.

(9) "Geothermal Resource" means water with a temperature at the wellhead or ground surface greater than 84 degree Fahrenheit and includes:

(i) the energy that may be extracted from that natural heat; and

(ii) geothermal byproducts.

~~(9)~~(10) "Ground water" means any water beneath the land surface or beneath the bed of a stream, lake, reservoir, or other

Draft Copy

Printed 8:59 am on December 27, 1990

body of surface water, and which is not a part of that surface water.

~~(10)~~(11) "Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

~~(11)~~(12) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency thereof, or any other entity.

~~(12)~~(13) "Political subdivision" means any county, incorporated city or town, public corporation, or district created pursuant to state law or other public body of the state empowered to appropriate water but not a private corporation, association, or group.

~~(13)~~(14) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

~~(14)~~(15) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal resources water, diffuse surface water, and sewage effluent.

~~(15)~~(16) "Water division" means a drainage basin as defined in 3-7-102.

~~(16)~~(17) "Water judge" means a judge as provided for in Title 3, chapter 7.

~~(17)~~(18) "Water master" means a master as provided for in Title 3, chapter 7.

Draft Copy

Printed 8:59 am on December 27, 1990

~~(18)~~(19) "Well" means any artificial opening or excavation in the ground, however made, by which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn."

Section 2. Section 85-2-306, MCA, is amended to read:

"85-2-306. Exceptions to permit requirements. (1) Ground water may be appropriated only by a person who has a possessory interest in the property where the water is to be put to beneficial use and exclusive property rights in the ground water development works or, if another person has rights in the ground water development works, the written consent of the person with those property rights. Outside the boundaries of a controlled ground water area, and except for all ground water classified as a geothermal resource, a permit is not required before appropriating ground water by means of a well or developed spring with a maximum appropriation of less than 100 gallons per minute, except that a combined appropriation from the same source from two or more wells or developed springs exceeding this limitation requires a permit. Within 60 days of completion of the well or developed spring and appropriation of the ground water for beneficial use, the appropriator shall file a notice of completion with the department on a form provided by the department at its offices and at the offices of the county clerk and recorders. Upon receipt of the notice, the department shall review the notice and may, before issuing a certificate of water right, return a defective notice for correction or completion, together with the reasons for returning it. A notice does not

Draft Copy

Printed 8:59 am on December 27, 1990

lose priority of filing because of defects if the notice is corrected, completed, and refiled with the department within 30 days or within a further time as the department may allow, not to exceed 6 months. If a notice is not corrected and completed within the time allowed, the priority date of appropriation shall be the date of refileing a correct and complete notice with the department. A certificate of water right may not be issued until a correct and complete notice has been filed with the department. The original of the certificate shall be sent to the appropriator. The department shall keep a copy of the certificate in its office in Helena. The date of filing of the notice of completion is the date of priority of the right.

(2) An appropriator of ground water by means of a well or developed spring first put to beneficial use between January 1, 1962, and July 1, 1973, who did not file a notice of completion, as required by laws in force prior to April 14, 1981, with the county clerk and recorder shall file a notice of completion, as provided in subsection (1) of this section, with the department to perfect the water right. The filing of a claim of existing water right pursuant to 85-2-221 is sufficient notice of completion under this subsection. The priority date of the appropriation shall be the date of the filing of a notice as provided in subsection (1) of this section or the date of the filing of the claim of existing water right. An appropriation under this subsection is an existing right, and a permit is not required; however, the department shall acknowledge the receipt of a correct and complete filing of a notice of completion,

Draft Copy

Printed 8:59 am on December 27, 1990

except that for an appropriation of less than 100 gallons per minute, the department shall issue a certificate of water right. If a certificate is issued under this section, a certificate need not be issued under the adjudication proceedings provided for in 85-2-236.

(3) A permit is not required before constructing an impoundment or pit and appropriating water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is less than 30 acre-feet per year and is from a source other than a perennial flowing stream and the impoundment or pit is to be constructed on and will be accessible to a parcel of land that is owned or under the control of the applicant and that is 40 acres or larger. As used in this subsection, a perennial flowing stream means a stream which historically has flowed continuously at all seasons of the year, during dry as well as wet years. However, within 60 days after constructing the impoundment or pit, the appropriator shall apply for a permit as prescribed by this part. Upon receipt of a correct and complete application for a stockwater provisional permit, the department shall then automatically issue a provisional permit. If the department determines after a hearing that the rights of other appropriators have been or will be adversely affected, it may revoke the permit or require the permittee to modify the impoundment or pit and may then make the permit subject to such terms, conditions, restrictions, or limitations it considers necessary to protect the rights of other appropriators.

Draft Copy

Printed 8:59 am on December 27, 1990

(4) A person may also appropriate water without applying for or prior to receiving a permit under rules adopted by the board under 85-2-113.

(5) Except as provided in subsection (1) a permit is not required before the development or exploration of hydrocarbons if the development or exploration is in accordance with a valid permit issued by the board of oil and gas conservation as provided in section 2-15-3303. However, within 60 days after drilling an oil or gas well that produces water or a geothermal resource, the appropriator shall apply for a permit as prescribed by this part. Upon receipt of a correct and complete application for a provisional permit, the department shall then automatically issue a provisional permit. If the department determines after a hearing that the rights of other appropriators have been or will be adversely affected, or that a geothermal resource is being wasted, it may require the permittee to modify the development and may then make the permit subject to such terms, conditions, restrictions, or limitations it considers necessary to protect the rights of other appropriators or the geothermal resource.

Section 3. Section 85-2-311, MCA, is amended to read:

"85-2-311. Criteria for issuance of permit. (1) Except as provided in subsections (2) and (3), the department shall issue a permit if the applicant proves by substantial credible evidence that the following criteria are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed

Draft Copy

Printed 8:59 am on December 27, 1990

by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator, including rights to a geothermal resource, will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use; and

(g) if a permit application involves a geothermal resource:

(i) the geothermal resource will be used primarily for its heat value. Usage of a geothermal resource primarily for some purpose other than its heat value is not a beneficial use of the resource unless:

(A) no other water is reasonably available;

(B) the water rights of a prior appropriator, including the right to a geothermal resource, will not be adversely affected;
and

(C) the geothermal resource in the geothermal aquifer or area will not be significantly diminished to prevent or unduly restrict the future development of the geothermal aquifer or area

Draft Copy

Printed 8:59 am on December 27, 1990

for its geothermal resource value;

(ii) the geothermal resource will not be wasted. For the purpose of this subsection waste means any physical waste, including but not limited to:

(A) underground waste resulting from the inefficient, excessive or improper use or dissipation of a geothermal resource; or

(B) the inefficient above ground transport or storage of a geothermal resource.

(2) The department may not issue a permit for an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the applicant proves by clear and convincing evidence that:

(a) the criteria in subsection (1) are met;

(b) the rights of a prior appropriator will not be adversely affected;

(c) the proposed appropriation is a reasonable use. Such a finding shall be based on a consideration of the following:

(i) the existing demands on the state water supply, as well as projected demands such as reservations of water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;

(ii) the benefits to the applicant and the state;

(iii) the effects on the quantity and quality of water for existing beneficial uses in the source of supply;

(iv) the availability and feasibility of using low-quality

Draft Copy

Printed 8:59 am on December 27, 1990

water for the purpose for which application has been made;

(v) the effects on private property rights by any creation of or contribution to saline seep; and

(vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

(3) (a) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for reserved water rights held by the United States for federal reserved lands and in trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the criteria in this subsection (3) must be met before out-of-state use may occur.

(b) The department may not issue a permit for the appropriation of water for withdrawal and transportation for use outside the state unless the applicant proves by clear and convincing evidence that:

(i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection (1) or (2) are met;

(ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

Draft Copy

Printed 8:59 am on December 27, 1990

(iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

(c) In determining whether the applicant has proved by clear and convincing evidence that the requirements of subsections (3)(b)(ii) and (3)(b)(iii) are met, the department shall consider the following factors:

(i) whether there are present or projected water shortages within the state of Montana;

(ii) whether the water that is the subject of the application could feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

(d) When applying for a permit or a lease to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation, lease, and use of water.

(4) To meet the substantial credible evidence standard in this section, the applicant shall submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies, demonstrating that the criteria are

Draft Copy

Printed 8:59 am on December 27, 1990

met.

(5) An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this section."

Section 4. Section 75-20-104, MCA, is amended to read:

"75-20-104. Definitions. In this chapter, unless the context requires otherwise, the following definitions apply:

(1) "Addition thereto" means the installation of new machinery and equipment which would significantly change the conditions under which the facility is operated.

(2) "Application" means an application for a certificate submitted in accordance with this chapter and the rules adopted hereunder.

(3) "Associated facilities" includes but is not limited to transportation links of any kind, aqueducts, diversion dams, pipelines, transmission substations, storage ponds, reservoirs, and any other device or equipment associated with the production or delivery of the energy form or product produced by a facility, except that the term does not include a facility or a natural gas

Draft Copy

Printed 8:59 am on December 27, 1990

or crude oil gathering line 17 inches or less in inside diameter.

(4) "Board" means the board of natural resources and conservation provided for in 2-15-3302.

(5) "Board of health" means the board of health and environmental sciences provided for in 2-15-2104.

(6) "Certificate" means the certificate of environmental compatibility and public need issued by the board under this chapter that is required for the construction or operation of a facility.

(7) "Commence to construct" means:

(a) any clearing of land, excavation, construction, or other action that would affect the environment of the site or route of a facility but does not mean changes needed for temporary use of sites or routes for nonutility purposes or uses in securing geological data, including necessary borings to ascertain foundation conditions;

(b) the fracturing of underground formations by any means if such activity is related to the possible future development of a gasification facility or a facility employing geothermal resources but does not include the gathering of geological data by boring of test holes or other underground exploration, investigation, or experimentation;

(c) the commencement of eminent domain proceedings under Title 70, chapter 30, for land or rights-of-way upon or over which a facility may be constructed;

(d) the relocation or upgrading of an existing facility defined by (b) or (c) of subsection (10), including upgrading to

Draft Copy

Printed 8:59 am on December 27, 1990

a design capacity covered by subsection (10)(b), except that the term does not include normal maintenance or repair of an existing facility.

(8) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

(9) "Department of health" means the department of health and environmental sciences provided for in Title 2, chapter 15, part 21. (11) "Person" means any individual, group, firm, partnership, corporation, cooperative, association, government subdivision, government agency, local government, or other organization or entity.

(10) "Facility" means:

(a) except for crude oil and natural gas refineries and those facilities subject to The Montana Strip and Underground Mine Reclamation Act, each plant, unit, or other facility and associated facilities designed for or capable of:

(i) generating 50 megawatts of electricity or more from any source other than a geothermal resource or any addition thereto (except pollution control facilities approved by the department of health and environmental sciences added to an existing plant) having an estimated cost in excess of \$10 million;

(ii) generating 7.5 megawatts of electricity or more from a geothermal resource or any addition thereto having an estimated cost in excess of \$10 million;

~~(ii)~~(iii) producing 25 million cubic feet or more of gas derived from coal per day or any addition thereto having an estimated cost in excess of \$10 million;

Draft Copy

Printed 8:59 am on December 27, 1990

~~(iii)~~(iv) producing 25,000 barrels of liquid hydrocarbon products per day or more or any addition thereto having an estimated cost in excess of \$10 million;

~~(iv)~~(v) enriching uranium minerals or any addition thereto having an estimated cost in excess of \$10 million; or

~~(v)~~(vi) utilizing or converting 500,000 tons of coal per year or more or any addition thereto having an estimated cost in excess of \$10 million;

(b) each electric transmission line and associated facilities of a design capacity of more than 69 kilovolts, except that the term:

(i) does not include an electric transmission line and associated facilities of a design capacity of 230 kilovolts or less and 10 miles or less in length; and

(ii) does not include an electric transmission line with a design capacity of more than 69 kilovolts and up to and including 115 kilovolts for which the person planning to construct the line has obtained right-of-way agreements or options for a right-of-way from more than 75% of the owners who collectively own more than 75% of the property along the centerline;

(c) each pipeline, whether partially or wholly within the state, greater than 17 inches in inside diameter and 30 miles in length, and associated facilities;

~~(d) any use of geothermal resources, including the use of underground space in existence or to be created, for the creation, use, or conversion of energy, designed for or capable of producing geothermally derived power equivalent to 25 million~~

Draft Copy

Printed 8:59 am on December 27, 1990

~~Btu per hour or more or any addition thereto having an estimated cost in excess of \$750,000;~~

~~(e)~~(d) any underground in situ gasification of coal.

(11) "Person" means any individual, group, firm, partnership, corporation, cooperative, association, government subdivision, government agency, local government, or other organization or entity.

(12) "Transmission substation" means any structure, device, or equipment assemblage, commonly located and designed for voltage regulation, circuit protection, or switching necessary for the construction or operation of a proposed transmission line.

(13) "Utility" means any person engaged in any aspect of the production, storage, sale, delivery, or furnishing of heat, electricity, gas, hydrocarbon products, or energy in any form for ultimate public use."

Section 5. Section 75-20-211, MCA, is amended to read:

"75-20-211. Application -- filing and contents -- proof of service and notice. (1) (a) An applicant shall file with the department and department of health a joint application for a certificate under this chapter and for the permits required under the laws administered by the department of health and the board of health in such form as the board requires under applicable rules, containing the following information:

(i) a description of the proposed location and of the facility to be built thereon;

(ii) a summary of any studies which have been made of the

Draft Copy

Printed 8:59 am on December 27, 1990

defined in 75-20-104(10)(a)(i) and (10)(a)(ii) may apply for renewal of a certificate prior to the certificate lapsing.

(2) An applicant for a renewal of a certificate shall file with the department and department of health a joint application in such form as the board requires by rule.

(3) An application for renewal of a certificate must include updated information on the matters listed in 75-20-211(1)(a) that have changed since the original application and such other information as the board requires by rule for certification. The matters listed in 75-20-211(1)(a)(iv) and (1)(a)(v) for the alternate locations must be updated only if the board determines that within the certified location significant changes have occurred to warrant a review of alternate locations.

(4) An application filed under subsection (1) must comply with the provisions of 75-20-211(3) through (5).

(5) Except as provided in this subsection, the applicant shall pay a filing fee to the department in accordance with 75-20-215(2). The fee is in addition to any previous filing fee paid for processing the original application for a certificate pursuant to 75-20-215. The fee may not exceed the following scale:

- (a) 0.125% of any estimated cost up to \$300 million; plus
- (b) 0.063% of any estimated cost over \$300 million."

NEW SECTION. **Section 7. {standard} Repealer.** Section 75-20-1001 MCA, is repealed.

NEW SECTION. **Section 8. Applicability.** [This act] applies to water permit and change in appropriation application

Draft Copy

Printed 8:59 am on December 27, 1990

(3) An application shall be accompanied by proof of service of a copy of the application on the chief executive officer of each unit of local government, county commissioner, city or county planning boards, and federal agencies charged with the duty of protecting the environment or of planning land use in the area in which any portion of the proposed facility is proposed or is alternatively proposed to be located and on the following state government agencies:

- (a) environmental quality council;
- (b) department of public service regulation;
- (c) department of fish, wildlife, and parks;
- (d) department of state lands;
- (e) department of commerce;
- (f) department of highways;
- (g) department of revenue.

(4) The copy of the application shall be accompanied by a notice specifying the date on or about which the application is to be filed.

(5) An application shall also be accompanied by proof that public notice thereof was given to persons residing in the area in which any portion of the proposed facility is proposed or is alternatively proposed to be located, by publication of a summary of the application in those newspapers that will substantially inform those persons of the application."

Section 6. Section 75-20-225, MCA, is amended to read:

"75-20-225. Certificate renewal -- application -- contents -- filing fee. (1) Any certificate holder for a facility as

Draft Copy

Printed 8:59 am on December 27, 1990

proceedings commenced after [the effective date of this act].

NEW SECTION. **Section 9. Saving clause.** All permits, certificates, decreed rights and valid claims to a right to the use of water which are classified as a geothermal resource under [this act] having a priority date prior to [the effective date of this act] are valid.

-END-

{}