



ENVIRONMENTAL QUALITY COUNCIL

PO BOX 201704
HELENA, MONTANA 59620-1704
(406) 444-3742

GOVERNOR BRIAN SCHWEITZER
DESIGNATED REPRESENTATIVE
MIKE VOLESKY

HOUSE MEMBERS
DEBBY BARRETT
NORMA BIXBY
SUE DICKENSON
CHRISTOPHER HARRIS
WALTER MCNUTT
JIM PETERSON

SENATE MEMBERS
LANE LARSON
GREG LIND
DANIEL MCGEE
JIM SHOCKLEY
ROBERT STORY
MICHAEL WHEAT

PUBLIC MEMBERS
BRIAN CEBULL
KRIS KOK
BUZZ MATTELIN
DOUGLAS MCRAE

COUNCIL STAFF
KRISTA LEE EVANS, Research Analyst
JOE KOLMAN, Research Analyst
CYNTHIA PETERSON, Secretary
TODD EVERTS, Legislative Environmental Analyst

Memorandum

To: Environmental Quality Council Members

From: Krista Lee Evans, Research Analyst

RE: Surface Water/Ground Water Agency Bill Draft and Issues Update

Date: August 30, 2006

In order to provide you with some background information regarding the EQC surface water/ground water information item on the September 11th agenda, I have attached a copy of the bill draft developed by the Surface Water/Ground Water work group that was organized by DNRC over a year ago. This group of interested parties worked throughout the interim to try to address concerns related to the connectivity of surface water and ground water – especially in closed basins where the Legislature has stated that there is no additional water legally available for appropriation.

The work group reported to the EQC Study Subcommittee at each of the Subcommittee's meetings. At its last meeting in July, the Study Subcommittee chose not to move forward with suggesting the EQC request a bill to address the surface water/ground water concerns – essentially adopting the work of the DNRC work group. However, the EQC did approve the drafting of a surface water/ground water bill draft as part of DNRC's agency requested bill drafts. The bill draft that is attached is the language that will be submitted for this request.

The Smith River lawsuit addressed this specific issue and the court stated that "immediately and directly" connected had not been interpreted correctly by DNRC. In an effort to try to clear up the ambiguity in the statutes regarding closed basins the work group determined that the best answer would be to reduce the number of uses that are exempt from the basin closure law and instead create a process where new uses could "augment" the depletions caused by a new water use through either purchasing or leasing and existing water right.

Unofficial Draft Copy

As of: August 31, 2006 (11:13am)

LCswgw

**** Bill No. ****

Introduced By *****

By Request of the Department of Natural Resources and
Conservation

A Bill for an Act entitled: "An Act revising laws governing closed basins; defining terms in the water use act; removing the definition of groundwater from closed basin statutes; requiring that, in a closed basin, an application to appropriate ground water must be accompanied by a hydrologic report and an augmentation plan; providing that an application to appropriate surface water for certain response actions related to natural resource restoration is exempt from the closed basin requirements; providing the requirements for an augmentation plan in a closed basin; requiring combined proceedings when an augmentation plan requires a change of appropriation right; removing domestic use as an exemption to the closed basin requirements; requiring that in order to qualify as an exemption to the closed basin requirements an impoundment must have a capacity of 50 acre-feet or more; providing that the only nonconsumptive use allowed in certain closed basins is hydropower; amending sections 85-2-102, 85-2-329, 85-2-330, 85-2-336, 85-2-337, 85-2-340, 85-2-341, 85-2-342, 85-2-343, 85-2-344, and 85-2-506, MCA and providing an immediate effective 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:

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

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

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

(d) temporary changes or leases for instream flow to maintain or enhance instream flow to benefit the fishery resource in accordance with 85-2-408; or

(e) the use of water for augmentation.

(2) "Augmentation" means an arrangement, either temporary or permanent, to make water available for a new beneficial use in a water source or tributary through the development of a new or alternative water supply or a change of an existing water right that reasonably replaces, in the reach affected, the amount of water that will be consumed by the new proposed use.

~~(2)~~(3) "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 recreational uses;

Unofficial Draft Copy

As of: August 31, 2006 (11:13am)

LCswgw

(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;

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

(d) a use of water through a temporary change in appropriation right or lease to enhance instream flow to benefit the fishery resource in accordance with 85-2-408; or

(e) a use of water for augmentation.

~~(3)~~(4) "Certificate" means a certificate of water right issued by the department.

~~(4)~~(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.

~~(5)~~(6) "Commission" means the fish, wildlife, and parks commission provided for in 2-15-3402.

~~(6)~~(7) "Correct and complete" means that the information required to be submitted conforms to the standard of substantial credible information and that all of the necessary parts of the form requiring the information have been filled in with the required information.

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

~~(8)~~(9) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

Unofficial Draft Copy

As of: August 31, 2006 (11:13am)

LCswgw

~~(9)~~(10) "Developed spring" means any artificial opening or excavation in the ground, however made, including any physical alteration at the point of discharge regardless of whether it results in any increase in the yield of ground water, from which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn.

~~(10)~~(11) "Existing right" or "existing water right" means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law.

~~(11)~~(12) "Ground water" means any water that is beneath the ground surface.

~~(12)~~(13) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive presumption of abandonment under 85-2-226.

(14) "Municipality" means any incorporated city or town in the state organized and incorporated under Title 7, chapter 2.

~~(13)~~(15) "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.

~~(14)~~(16) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency of the United States, or any other entity.

~~(15)~~(17)(a) "Political subdivision" means any county, incorporated city or town, public corporation, or district

Unofficial Draft Copy

As of: August 31, 2006 (11:13am)

LCswgw

created pursuant to state law or other public body of the state empowered to appropriate water.

(b) The term does not mean a private corporation, association, or group.

~~(16)~~ (18) "Salvage" means to make water available for beneficial use from an existing valid appropriation through application of water-saving methods.

~~(17)~~ (19) "State water reservation" means a water right created under state law after July 1, 1973, that reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of water throughout the year or at periods or for defined lengths of time.

(20) "Stock water" means the use of water to provide drinking water for livestock which includes, but is not limited to, cattle, sheep, swine, goats, horses, mules, asses, llamas, alpacas, bison, ostriches, rheas, emus, and domestic ungulates.

~~(18)~~ (21) "Substantial credible information" means probable, believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested by the person providing the information.

~~(19)~~ (22) "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.

~~(20)~~ (23) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface

water, and sewage effluent.

~~(21)~~(24) "Water division" means a drainage basin as defined in 3-7-102.

~~(22)~~(25) "Water judge" means a judge as provided for in Title 3, chapter 7.

~~(23)~~(26) "Water master" means a master as provided for in Title 3, chapter 7.

~~(24)~~(27) "Watercourse" means any naturally occurring stream or river from which water is diverted for beneficial uses. It does not include ditches, culverts, or other constructed waterways.

~~(25)~~(28) "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, 2009--sec. 9, Ch. 123, L. 1999.)

85-2-102. (Effective July 1, 2009) Definitions. Unless the context requires otherwise, in this chapter, the following definitions apply:

(1) "Appropriate" means:

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

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

(c) temporary changes or leases for instream flow to maintain or enhance instream flow to benefit the fishery resource in accordance with 85-2-408; or

Unofficial Draft Copy

As of: August 31, 2006 (11:13am)

LCswgw

(d) the use of water for augmentation.

(2) "Augmentation" means an arrangement, either temporary or permanent, to make water available for a new beneficial use in a water source or tributary through the development of a new or alternative water supply or a change of an existing water right that reasonably replaces, in the reach affected, the amount of water that will be consumed by the new proposed use.

~~(2)~~(3) "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 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; or

(c) a use of water through a temporary change in appropriation right or lease to enhance instream flow to benefit the fishery resource in accordance with 85-2-408; or

(d) a use of water for augmentation.

~~(3)~~(4) "Certificate" means a certificate of water right issued by the department.

~~(4)~~(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.

~~(5)~~(6) "Correct and complete" means that the information required to be submitted conforms to the standard of substantial

credible information and that all of the necessary parts of the form requiring the information have been filled in with the required information.

~~(6)~~ (7) "Declaration" means the declaration of an existing right filed with the department under section 8, Chapter 452, Laws of 1973.

~~(7)~~ (8) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

~~(8)~~ (9) "Developed spring" means any artificial opening or excavation in the ground, however made, including any physical alteration at the point of discharge regardless of whether it results in any increase in the yield of ground water, from which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn.

~~(9)~~ (10) "Existing right" or "existing water right" means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law.

~~(10)~~ (11) "Ground water" means any water that is beneath the ground surface.

~~(11)~~ (12) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive presumption of abandonment under 85-2-226.

(13) "Municipality" means any incorporated city or town in the state organized and incorporated under Title 7, chapter 2.

~~(12)~~(14) "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.

~~(13)~~(15) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency of the United States, or any other entity.

~~(14)~~(16) (a) "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.

(b) The term does not mean a private corporation, association, or group.

~~(15)~~(17) "Salvage" means to make water available for beneficial use from an existing valid appropriation through application of water-saving methods.

~~(16)~~(18) "State water reservation" means a water right created under state law after July 1, 1973, that reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of water throughout the year or at periods or for defined lengths of time.

(19) "Stock water" means the use of water to provide drinking water for livestock which includes, but is not limited to cattle, sheep, swine, goats, horses, mules, asses, alpacas, bison, ostriches, rheas, emus, and domestic ungulates.

~~(17)~~(20) "Substantial credible information" means probable, believable facts sufficient to support a reasonable legal theory

upon which the department should proceed with the action requested by the person providing the information.

~~(18)~~(21) "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.

~~(19)~~(22) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

~~(20)~~(23) "Water division" means a drainage basin as defined in 3-7-102.

~~(21)~~(24) "Water judge" means a judge as provided for in Title 3, chapter 7.

~~(22)~~(25) "Water master" means a master as provided for in Title 3, chapter 7.

~~(23)~~(26) "Watercourse" means any naturally occurring stream or river from which water is diverted for beneficial uses. It does not include ditches, culverts, or other constructed waterways.

~~(24)~~(27) "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."

{ Internal References to 85-2-102:
82-4-355 x 85-2-141x 85-2-506a }

Section 2. Section 85-2-329, MCA, is amended to read:

"85-2-329. Definitions. Unless the context requires otherwise, in 85-2-330 and this section, the following definitions apply:

(1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state water reservation pursuant to 85-2-316.

~~(2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface water.~~

~~(3)~~(2) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions.

~~(4)~~(3) "Teton River basin" means the drainage area of the Teton River and its tributaries above the confluence of the Teton and Marias Rivers."

{ Internal References to 85-2-329: None. }

Section 3. Section 85-2-330, MCA, is amended to read:

"85-2-330. Basin closure -- exceptions. (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department may not process or grant an application for a permit to appropriate water or for a reservation to reserve water within the Teton River basin.

(2) The provisions of subsection (1) do not apply to:

(a) an application for a permit to appropriate ground water when the application is accompanied by the hydrologic report and augmentation plan required by 85-2-337;

(b) an application for a permit to appropriate surface water for a nonconsumptive hydropower use;

(c) an application for a permit to appropriate surface water for ~~domestic, municipal,~~ use by a municipality or stock water use;

(d) an application to store water during high spring flows in an impoundment with a capacity of 50 acre-feet or more; or

(e) emergency temporary appropriations as provided for in 85-2-113(3); or

(f) an application for a permit to appropriate surface water to conduct response actions related to natural resource restoration required as:

(i) remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended;

(ii) aquatic resources mitigation activities done in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251-1376; or

(iii) remedial actions taken pursuant to Title 75, chapter 10, part 7.

(3) A permit issued to conduct mitigation or remedial actions under subsection (2)(f) may not be used for dilution.

(4) A change of use authorization for changing the purpose

of use may not be issued for any permit issued pursuant to subsections (2)(b), (2)(c), (2)(e), and (2)(f) of this section."

{ Internal References to 85-2-330:
85-2-329x }

Section 4. Section 85-2-336, MCA, is amended to read:

"85-2-336. Basin closure -- exception. (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department may not process or grant an application for a permit to appropriate water within the Upper Clark Fork River basin.

(2) The provisions of subsection (1) do not apply to:

(a) an application for a permit to appropriate ground water when the application is accompanied by the hydrologic report and augmentation plan required by 85-2-337;

(b) ~~an application filed prior to January 1, 2000, for a permit to appropriate water to conduct response actions or remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, or Title 75, chapter 10, part 7, at sites designated as of January 1, 1994. The total flow rates for all permits issued under this subsection (2)(b) may not exceed 10 cubic feet per second. A permit issued to conduct response actions or remedial actions may not be used for dilution and must be limited to a term not to exceed the necessary time to complete the response or remedial action, and the permit may not be transferred to any person for any purpose other than the~~

~~designated response or remedial action~~ an application for a permit to appropriate surface water to conduct aquatic resources mitigation activities done in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251-137. A permit issued to conduct mitigation actions may not be used for dilution.

(c) an application for a permit to appropriate surface water for stock water use;

(d) an application to store water during high spring flows in an impoundment with a capacity of 50 acre-feet or more; or

(e) an application for power generation at existing hydroelectric dams. The department may not approve a permit for power generation if approval results in additional consumption of water.

(3) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsections (2)(b), (2)(c), (2)(d) and (2)(f) of this section.

(4) Applications for state water reservations in the Upper Clark Fork River basin filed pursuant to 85-2-316 and pending as of May 1, 1991, have a priority date of May 1, 1991. The filing of a state water reservation application does not provide standing to object under 85-2-402.

~~(4)~~(5) The department may not process or approve applications for state water reservations in the Upper Clark Fork River basin filed pursuant to 85-2-316."

{ Internal References to 85-2-336:
85-2-335* x 85-2-337x 85-2-338x }

Section 5. Section 85-2-337, MCA, is amended to read:

"85-2-337. **Ground water permit applications -- report and augmentation plan required -- combined proceeding.** (1) During the period of basin closure provided in 85-2-330, 85-2-336(1), 85-2-340, 85-2-342, 85-2-344, or any administratively closed basin that is closed pursuant to 85-2-319, an applicant for a ground water permit in ~~the Upper Clark Fork River~~ a closed basin shall submit a report prepared by a ~~professional engineer or hydrologist~~ person educated and experienced in ground water science. The report must analyze addressing the hydrologic hydraulic connection between the source of the ground water and surface water and quantify depletions to surface water that result from the proposed appropriation. If the applicant fails to submit the report required in this section, the application is considered defective and must be processed pursuant to 85-2-302.

~~(2) Except as provided in subsection (3), the department may not issue a permit to appropriate ground water in the Upper Clark Fork River basin unless the applicant proves by a preponderance of evidence, in addition to the criteria of 85-2-311, that the source of the ground water is not a part of or substantially or directly connected to surface water.~~

~~(3)~~(2) The department may issue a permit to appropriate ground water if the application includes an augmentation plan and if the applicant proves by a preponderance of evidence, in addition to the criteria of 85-2-311, that the augmentation plan provides for sufficient augmentation water ~~in amount, time, and~~

location to replace depletions to senior water rights to reasonably replace, in each reach affected, the amount of water that will be consumed by the proposed new use.

(3) If an augmentation plan requires an application for change of appropriation right under 85-2-402, the change of appropriation right application must be submitted with the application for beneficial water use permit, the hydrologic report, and the augmentation plan. These applications must be evaluated in a combined proceeding."

{ Internal References to 85-2-337:
85-2-335*x }

Section 6. Section 85-2-340, MCA, is amended to read:

"85-2-340. Definitions. Unless the context requires otherwise, in 85-2-341 and this section, the following definitions apply:

(1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state water reservation pursuant to 85-2-316.

(2) "~~Ground water" means water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface water~~ has the same meaning as that provided in 85-2-102.

(3) "Jefferson River basin" means the drainage area of the Jefferson River and its tributaries above the confluence of the Jefferson and Missouri Rivers.

(4) "Madison River basin" means the drainage area of the Madison River and its tributaries above the confluence of the Madison and Jefferson Rivers.

(5) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions."

{ Internal References to 85-2-340:
85-20-501x }

Section 7. Section 85-2-341, MCA, is amended to read:

"85-2-341. Basin closure -- exceptions. (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department may not process or grant an application for a permit to appropriate water or for a state water reservation to reserve water within the Jefferson River basin or Madison River basin.

(2) The provisions of subsection (1) do not apply to:

(a) an application for a permit to appropriate ground water when the application is accompanied by the hydrologic report and augmentation plan required by 85-2-337;

(b) an application for a permit to appropriate surface water for a nonconsumptive hydropower use;

(c) an application for a permit to appropriate surface water for ~~domestic, municipal,~~ use by a municipality or stock water use;

(d) an application to store water during high spring flows in an impoundment with a capacity of 50 acre-feet or more; or

(e) temporary emergency appropriations as provided for in 85-2-113(3); or

(f) an application for a permit to appropriate surface water to conduct response actions related to natural resource restoration required as:

(i) remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended;

(ii) aquatic resources mitigation activities done in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251-1376; or

(iii) remedial actions taken pursuant to Title 75, chapter 10, part 7.

(3) A permit issued to conduct mitigation or remedial actions under subsection (2)(f) may not be used for dilution.

(4) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsections (2)(b), (2)(c), (2)(e), and (2)(f) of this section."

{ *Internal References to 85-2-341:
85-2-340x* }

Section 8. Section 85-2-342, MCA, is amended to read:

"85-2-342. Definitions. Unless the context requires otherwise, in 85-2-343 and this section, the following definitions apply:

(1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state water reservation pursuant to 85-2-316.

~~(2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface water.~~

~~(3)~~ (2) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions.

~~(4)~~ (3) "Upper Missouri River basin" means the drainage area of the Missouri River and its tributaries above Morony dam."

{*Internal References to 85-2-342: None.*}

Section 9. Section 85-2-343, MCA, is amended to read:

"85-2-343. Basin closure -- exceptions. (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department may not process or grant an application for a permit to appropriate water or for a reservation to reserve water within the upper Missouri River basin until the final decrees have been issued in accordance with part 2 of this chapter for all of the subbasins of the upper Missouri River basin.

(2) The provisions of subsection (1) do not apply to:

(a) an application for a permit to appropriate ground water

when the application is accompanied by the hydrologic report and augmentation plan required by 85-2-337;

(b) an application for a permit to appropriate surface water for a nonconsumptive hydropower use;

(c) an application for a permit to appropriate surface water for ~~domestic, municipal,~~ use by a municipality or stock water use;

(d) an application to store water during high spring flows in an impoundment with a capacity of 50 acre-feet or more;

(e) an application for a permit to use water from the Muddy Creek drainage, which drains to the Sun River, if the proposed use of water will help control erosion in the Muddy Creek drainage; or

(f) temporary emergency appropriations as provided for in 85-2-113(3); or

(g) an application for a permit to appropriate surface water to conduct response actions related to natural resource restoration required as:

(i) remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended;

(ii) aquatic resources mitigation activities done in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251-1376; or

(iii) remedial actions taken pursuant to Title 75, chapter 10, part 7.

(3) A permit issued to conduct mitigation or remedial

actions under subsection (2)(g) may not be used for dilution.

(4) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsections (2)(b), (2)(c), (2)(e), (2)(f), and (2)(g) of this section."

{Internal References to 85-2-343:
85-2-342x}

Section 10. Section 85-2-344, MCA, is amended to read:

"85-2-344. Bitterroot River subbasin temporary closure -- definitions -- exceptions. (1) Unless the context requires otherwise, in this section, the following definitions apply:

(a) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state water reservation pursuant to 85-2-316.

(b) "Bitterroot River basin" means the drainage area of the Bitterroot River and its tributaries above the confluence of the Bitterroot River and Clark Fork of the Columbia River and designated as "Basin 76H".

(c) "Bitterroot River subbasin" means one of the following hydrologically related portions of the Bitterroot River basin:

- (i) the mainstem subbasin, designated as "Subbasin 76HA";
- (ii) the north end subbasin, designated as "Subbasin 76HB";
- (iii) the east side subbasin, designated as "Subbasin 76HC";
- (iv) the southeast subbasin, designated as "Subbasin 76HD";
- (v) the south end subbasin, designated as "Subbasin 76HE";
- (vi) the southwest subbasin, designated as "Subbasin 76HF";

(vii) the west central subbasin, designated as "Subbasin 76HG"; or

(viii) the northwest subbasin, designated as "Subbasin 76HH".

(2) As provided in 85-2-319, the department may not process or grant an application for a permit to appropriate water or for a state water reservation within a Bitterroot River subbasin until the closure for the basin is terminated pursuant to subsection (3) of this section, except for:

(a) an application for a permit to appropriate ground water when the application is accompanied by the hydrologic report and augmentation plan required by 85-2-337;

(b) an application for a permit to appropriate surface water for a municipal water supply;

(c) temporary emergency appropriations pursuant to 85-2-113(3); or

(d) an application to store water during high spring flow in an impoundment with a capacity of 50 acre-feet or more; or

(e) an application for a permit to appropriate surface water to conduct response actions related to natural resource restoration required as:

(i) remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended;

(ii) aquatic resources mitigation activities done in compliance with and as required by the federal Clean Water Act of 1977, 33 U.S.C. 1251-1376; or

(iii) remedial actions taken pursuant to Title 75, chapter 10, part 7.

(3) A permit issued to conduct mitigation or remedial actions under subsection (2)(e) may not be used for dilution.

~~(3)~~(4) Each Bitterroot River subbasin is closed to new appropriations and new state water reservations until 2 years after all water rights in the subbasin arising under the laws of the state are subject to an enforceable and administrable decree as provided in 85-2-406(4).

(5) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsections (2)(b), (2)(c), and (2)(e) of this section"

{*Internal References to 85-2-344:
85-2-350x*}

Section 11. Section 85-2-506, MCA, is amended to read:

"85-2-506. Controlled ground water areas -- designation or modification. (1) The department may designate or modify controlled ground water areas as provided in this part.

(2) Designation or modification of an area of controlled ground water use may be proposed to the department on its own motion, by petition of a state or local public health agency for identified public health risks, or by petition signed by at least 20 or one-fourth of the users (whichever is the lesser number) of ground water in a ground water area in which there are alleged to be facts showing:

(a) that ground water withdrawals are in excess of recharge

to the aquifer or aquifers within the ground water area;

(b) that excessive ground water withdrawals are very likely to occur in the near future because of consistent and significant increases in withdrawals from within the ground water area;

(c) that significant disputes regarding priority of rights, amounts of ground water in use by appropriators, or priority of type of use are in progress within the ground water area;

(d) that ground water levels or pressures in the area in question are declining or have declined excessively;

(e) that excessive ground water withdrawals would cause contaminant migration;

(f) that ground water withdrawals adversely affecting ground water quality within the ground water area are occurring or are likely to occur; or

(g) that water quality within the ground water area is not suited for a specific beneficial use defined by ~~85-2-102(2)(a)~~ 85-2-102(3)(a).

(3) When a proposal is made, the department shall fix a time and place for a hearing, which time may not be less than 90 days from the making of the proposal. The place for the hearing must be within or as close as practical to the controlled ground water area.

(4) The department shall publish a notice of the hearing, setting forth:

(a) the names of the petitioners;

(b) the description by legal subdivisions (section, township, range) of all lands included in or proposed to be

included in the ground water area or subarea;

(c) the purpose of the hearing; and

(d) the time and place of the hearing where any interested person may appear, either in person or by attorney, file written objections to the granting of the proposal, and be fully heard.

(5) The notice of hearing must be published at least once in each week for 3 successive weeks not less than 30 days before the date of the hearing in a newspaper of general circulation in the county or counties in which the ground water area or subarea is located. The department shall also cause a copy of the notice, together with a copy of the petition, to be served by mail, not less than 30 days before the hearing, upon each well driller licensed in Montana whose address is within any county in which any part of the area in question is located; upon each person or public agency known from an examination of the records in the department's office to be a claimant or appropriator of ground water in the area in question (claimant or appropriator meaning one who diverts, impounds, or withdraws ground water and not merely one who uses or obtains ground water from another who diverts, impounds, or withdraws ground water); upon the bureau; and upon the mayor or presiding officer of the governing body of each incorporated municipality located in whole or in part within the proposed ground water area. The department may also serve notice upon any other person or state or federal agency that the department feels may be interested in or affected by the proposed designation or modification of a controlled ground water area. The petition need not be served on any petitioner. A copy of the

notice, together with a copy of the proposal, must be mailed to each person at the person's last-known address, and service is complete upon depositing it in the post office, postage prepaid, addressed to each person on whom it is to be served. Publication and mailing of the notice as prescribed in this section, when completed, is considered to be sufficient notice of the hearing to all interested persons."

{ Internal References to 85-2-506:
85-2-507x 85-2-507x 85-2-509 x 85-20-1001x
85-20-1001x 85-20-1001x }

NEW SECTION. **Section 12. {standard} Saving clause.** [This act] does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act].

NEW SECTION. **Section 13. {standard} Effective date.** [This act] is effective on passage and approval.

- END -

{ Name : Krista Lee Evans
Title : Resource Policy Analyst
Agency: Legislative Environmental Policy Office
Phone : 444-1640
E-Mail: kevens@mt.gov }