

CONTROLLED GROUND WATER AREAS

Water Policy Interim Committee
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- CGWAs are intended to address local concerns with ground water developments to protect the public, water users and existing water right holders.
- CGWAs can be established based on water quantity or water quality concerns.
- CGWAs can be temporary or permanent
- There are currently 9 CGWAs established for water quality concerns and 6 CGWAs established for water quantity concerns.
- CGWA offers a wide variety of tools and controls to address local ground water concerns.
- The CGWA statutes were revised in 2009 by SB 120 to address problems with the out-dated statutes.

CGWAs PRIOR TO 2009

- §§85-2-506 and 507 MCA
- Originated in the 1961 Ground Water Code
 - Predated 1973 Water Use Act
 - Predated 1971 Montana Administrative Procedure Act.
- Problems
 - Petition Process
 - Lack of defined hearing process
 - Outdated Criteria

Pre-2009: Petition

- Initiated by Petition
 - Department
 - state or local public health agency
 - at least 20 or one-fourth of the users, whichever is the lesser number, of ground water in proposed CGWA
 - No limit of the size of proposed area
- Petition need only "allege" facts; no threshold of supporting data required.
- Once Petition filed, process must begin.

Pre-2009: Procedure

- "Department shall fix a time and place for hearing" and hold a "full, fair, and orderly proceeding and permit all relevant evidence (oral and written) to be received."
- No specific hearing process defined.
- Parties unknown until hearing.
- Increasingly difficult to balance general public participation with represented interests for the taking of evidence.
 - Four Corners, Smith Valley

SB 120 - Petition

- Rulemaking process under MAPA (like basin closures §85-2-319, MCA).
- Department can initiate on its own.
- Petitions by:
 - state or local public health agency
 - municipality, county, conservation district, or local water quality district formed under Title 7, chapter 13, part 45
 - at least one-third of the water right holders in a proposed controlled ground water area

SB 120 - Petition Requirements

A petition must:

- contain analysis prepared by a hydrogeologist, a qualified scientist, or a qualified licensed professional engineer concluding that one or more of the criteria are met; and
- describe proposed measures, if any, to mitigate effects of the criteria that are alleged in the petition.

SB 120 Criteria

- DNRC may designate CGWA by rule if it finds by a preponderance of the evidence that any of the following criteria have been met and cannot be appropriately mitigated:

(a) current or projected reductions of recharge to the aquifer or aquifers in the proposed controlled ground water area will cause ground water levels to decline to the extent that water right holders cannot reasonably exercise their water rights;

(b) current or projected ground water withdrawals from the aquifer or aquifers in the proposed controlled ground water area have reduced or will reduce ground water levels or surface water availability necessary for water right holders to reasonably exercise their water rights;

(c) current or projected ground water withdrawals from the aquifer or aquifers in the proposed controlled ground water area have induced or altered or will induce or alter contaminant migration exceeding relevant water quality standards;

(d) current or projected ground water withdrawals from the aquifer or aquifers in the proposed controlled ground water area have impaired or will impair ground water quality necessary for water right holders to reasonably exercise their water rights based on relevant water quality standards;

(e) ground water within the proposed controlled ground water area is not suited for beneficial use; or

(f) public health, safety, or welfare is or will become at risk.

SB 120 Hearing Procedure

- Rulemaking hearing under MAPA.
- Notice of hearing complies with MAPA requirements and additional requirements similar to pre-2009 CGWA.
 - Notice must include summary of basis for proposed rule.
 - All of the technical information forming the basis for the rule would be available from the Department at the time of proposal.

SB120: TEMPORARY CGWA

- Temporary is set by rule not to exceed 6 years.
- Temporary designation is a study designation.
 - withdrawals are not restricted
 - can require measurement, water quality testing, and reporting requirements
- MBMG may study temporary CGWAs under its Ground Water Investigation Program
- Studies for temporary CGWAs are eligible for funding under renewable resource grant and loan program.

SB 120: Permanent CGWA

Potential Control Provisions:

- closing the controlled ground water area to further appropriation of ground water;
- restricting the development of future ground water appropriations by flow, volume, purpose, aquifer, depth, water temperature, water quality, density, or other criteria that the department determines necessary;
- measurement of future ground water or surface water appropriations;
- filing of notice on land records to inform prospective holders of existence of CGWA;

SB 120 Permanent CGWA

Potential Controls - continued

- well spacing, construction and prior approval requirements;
- mitigation of ground water withdrawals;
- water quality testing and data reporting; and
- other control provisions that the Department determines are appropriate and adopts through rulemaking.

Advantages of SB 120

- Address local ground water concerns.
- Wide variety of regulatory tools available to be tailored to local conditions.
- Defined MAPA rulemaking process.
- Allows for participation of wide array of the public.
- Criteria are updated to reflect today's world.

Senate Bill 120 (2009) Key Points
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Overview of SB 120 (§85-2-506, MCA):

- SB 120 brings the CGWA statutes into the twenty-first century. The pre-2009 statutes are a holder-over from the 1961 Ground Water Code predating the 1973 Water Use Act and the Montana Administrative Procedure Act (MAPA).
- The Bill updated the criteria for designation reflective of advances in science and in line with the Water Use Act.
- The Bill provided a defined, understandable MAPA process which allows for a wide range of participation by the public.
- The Bill 120 provided a wide variety of regulatory tools available to be tailored to local ground water conditions and concerns.

CGWA Designations:

STUDY DESIGNATION: TEMPORARY CONTROLLED GROUND WATER AREA

- The purpose of a Temporary CGWA study designation is to investigate the quantity and/or quality of ground water to determine if existing and future uses within the proposed CGWA should be further regulated.
- The CGWA study designation defines a geographical area to be investigated.
- During the study phase no regulatory requirements are placed on lands within the study area other than possibly measurement, water quality testing and reporting.
- A designated CGWA study area is eligible for funding in the Renewable Resource Grant program and for study under the ground water investigation program by the Montana Bureau of Mines and Geology.

REGULATORY DESIGNATION: PERMANENT CONTROLLED GROUND WATER AREA

- The purpose of a CGWA regulatory designation is to protect the public, water users and existing water right holders.
- Regulation may include, but is not limited to:
 - Limitations on current and future ground water use;
 - A requirement for water measurement;
 - A requirement to obtain a water use permit for future uses;
 - Mitigation of new uses; and
 - Other provisions DNRC determines appropriate.

CGWA Designation Process:

MONTANA ADMINISTRATIVE PROCEDURE ACT

The process is a rulemaking process, similar to basin closures (§85-2-319, MCA). This type of process is already established by the legislature and is used by every agency. Rulemaking is not adversarial like a contested case proceeding (mini-trial). Rulemaking allows for a wide range of participation by the public, not just those represented by attorneys. Anyone can participate at a rulemaking hearing. Neighbors as well as experts can participate.

Department of Natural Resources and Conservation (DNRC) is the decision-maker in designating a CGWA. The decision-making process follows the MAPA rulemaking authority provisions.

APPLICANTS

- DNRC, based on its own investigation, may propose a CGWA be designated.
- Other State or local public health agencies
 - Department of Environmental Quality may apply for protection of water quality and protection of health and human safety.
 - Other agencies
- Local Governments:
 - County Government
 - To protect public health and safety
 - To address water quantity for:
 - Areas demonstrating shortages associated with existing (ex. domestic, municipal, irrigation) use.
 - Designated growth areas.
 - Conservation Districts
 - To address water quantity for areas demonstrating shortages with existing (ex. irrigation, domestic, or instream) use.
 - To protect water quality in order to maintain current uses (ex. irrigation, domestic or instream).
 - Municipal Government:
 - To address water quantity or quality within a city or town or for protection of a municipal water supply.
 - Local Water Quality District
 - To address water quantity for areas within its boundaries demonstrating shortages with existing (ex. irrigation, municipal, or domestic) use.
 - To protect water quality in order to maintain current uses (ex. irrigation, municipal, or domestic).
- Public
 - At least one-third of the water right holders in a proposed controlled ground water area.

Montana Code Annotated 2009

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85-2-506. Controlled ground water areas -- designation or modification. (1) The department may by rule designate or modify permanent or temporary controlled ground water areas as provided in this part. The rule for each controlled ground water area must designate the boundaries of the controlled ground water area.

(2) The rulemaking process for designation or modification of a controlled ground water area may be initiated by:

(a) the department;

(b) submission of a correct and complete petition from a state or local public health agency for identified public health risks; or

(c) submission of a correct and complete petition:

(i) by a municipality, county, conservation district, or local water quality district formed under Title 7, chapter 13, part 45; or

(ii) signed by at least one-third of the water right holders in a proposed controlled ground water area.

(3) (a) A correct and complete petition must:

(i) be in a form prescribed by the department and must contain analysis prepared by a hydrogeologist, a qualified scientist, or a qualified licensed professional engineer concluding that one or more of the criteria provided in subsection (5) are met; and

(ii) describe proposed measures, if any, to mitigate effects of the criteria identified in subsection (5) that are alleged in the petition.

(b) When the department proposes a rule pursuant to this section, the place for the hearing must be within or as close as practical to the proposed or existing controlled ground water area.

(c) (i) The department shall notify the petitioner of any defects in a petition within 180 days. If the department does not notify the petitioner of any defects within 180 days, the petition must be treated as correct and complete.

(ii) A petition that is not made correct and complete within 90 days from the date of notification by the department of any defect is terminated.

(4) (a) Within 60 days after a petition is determined to be correct and complete, the department shall:

(i) deny in writing the petition in whole or in part, stating the reasons for denial;

(ii) inform the petitioner that the department will study the information presented in the petition for a period not to exceed 90 days before denying or proceeding with the petition; or

(iii) initiate rulemaking proceedings in accordance with Title 2, chapter 4, part 3.

(b) Failure of the department to act under subsection (4)(a) does not mandate that the department grant the petition for rulemaking.

(c) In addition to the notice requirements of Title 2, chapter 4, parts 1 through 4, the department shall provide public notice of the rulemaking hearing by:

(i) publishing a notice at least once each week for 3 successive weeks, with the first notice 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 proposed controlled ground water area is located;

(ii) serving by mail a copy of the notice, not less than 30 days before the hearing, upon each person or public agency known from an examination of the records of the department to be a water right holder with a diversion within the proposed controlled ground water area, all landowners of record within the proposed controlled ground water area, and each well driller licensed in Montana whose address is within any county in which any part of the proposed controlled ground water area is located; and

(iii) serving by mail a copy of the 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.

(d) The notice under subsection (4)(c) must include a summary of the basis for the proposed rule. 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.

(5) The department may designate a permanent controlled ground water area by rule if it finds by a preponderance of the evidence that any of the following criteria have been met and cannot be appropriately mitigated:

(a) current or projected reductions of recharge to the aquifer or aquifers in the proposed controlled ground water area will cause ground water levels to decline to the extent that water right holders cannot reasonably exercise their water rights;

(b) current or projected ground water withdrawals from the aquifer or aquifers in the proposed controlled ground water area have reduced or will reduce ground water levels or surface water availability necessary for water right holders to reasonably exercise their water rights;

(c) current or projected ground water withdrawals from the aquifer or aquifers in the proposed controlled ground water area have induced or altered or will induce or alter contaminant migration exceeding relevant water quality standards;

(d) current or projected ground water withdrawals from the aquifer or aquifers in the proposed controlled ground water area have impaired or will impair ground water quality necessary for water right holders to reasonably exercise their water rights based on relevant water quality standards;

(e) ground water within the proposed controlled ground water area is not suited for beneficial use; or

(f) public health, safety, or welfare is or will become at risk.

(6) (a) If the department finds that sufficient facts are not available to designate a permanent controlled ground water area, it may designate by rule a temporary controlled ground water area to allow studies to obtain the facts needed to determine whether or not it is appropriate to designate a permanent controlled ground water area. The department shall set the length of time that the temporary controlled ground water area will be in effect. Subject to subsection (6)(c), the term of a temporary controlled ground water area may be extended by rule.

(b) A temporary controlled ground water area designation is for the purpose of study and cannot include the control provisions provided in subsection (7), other than measurement, water quality testing, and reporting requirements.

(c) A temporary controlled ground water area designation may not exceed a total of 6 years, including any extensions.

(d) Prior to expiration of a temporary controlled ground water area, the department may amend or repeal the rule establishing the temporary controlled ground water area or may designate a permanent controlled ground water area through the rulemaking process under this section.

(e) Studies for temporary controlled ground water areas may be considered for funding under the renewable resource grant and loan program in Title 85, chapter 1, part 6.

(f) If there is a ground water investigation program within the bureau, the ground water assessment steering committee established by 2-15-1523 shall consider temporary controlled ground water areas for study.

(7) A controlled ground water area may include but is not limited to the following control provisions:

(a) a provision closing the controlled ground water area to further appropriation of ground water;

(b) a provision restricting the development of future ground water appropriations in the controlled ground water area by flow, volume, purpose, aquifer, depth, water temperature; water quality, density, or other criteria that the department determines necessary;

(c) a provision requiring measurement of future ground water or surface water appropriations;

(d) a provision requiring the filing of notice on land records within the boundary of a permanent controlled ground water area to inform prospective holders of an interest in the property of the existence

of a permanent controlled ground water area. Notice of the designation must be removed or modified as necessary to accurately reflect modification or repeal of a permanent designation within 60 days.

(e) a provision for well spacing requirements, well construction constraints, and prior department approval before well drilling, unless the well is regulated pursuant to Title 82, chapter 11;

(f) a provision for mitigation of ground water withdrawals;

(g) a provision for water quality testing;

(h) a provision for data reporting to the department; and

(i) other control provisions that the department determines are appropriate and adopts through rulemaking.

History: En. Sec. 4, Ch. 237, L. 1961; amd. Sec. 168, Ch. 253, L. 1974; R.C.M. 1947, 89-2914; amd. Sec. 2, Ch. 561, L. 1979; amd. Sec. 1, Ch. 189, L. 1985; amd. Sec. 4, Ch. 460, L. 1993; amd. Sec. 460, Ch. 418, L. 1995; amd. Sec. 13, Ch. 391, L. 2007; amd. Sec. 5, Ch. 86, L. 2009.

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