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AND CONSERVATION



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MEMORANDUM

To: Jim Elliot, Chair
Water Policy Interim Committee

From: John Tubbs, Administrator
Water Resources Division, DNRC

Date: February 29, 2008

Re: Water Legislation

The Department greatly appreciates the committee efforts to address the many and complex water policy issues facing the State of Montana and its citizens. We also appreciate your leadership and request for ideas from agencies and the public on this subject. This memorandum is intended to provide our Department's legislative priorities and to provide written comments that the Committee has heard before and some additional perspectives concerning the draft reports that Legislative staff prepared and provided the committee in January.

Let me begin by raising some of the Department's conceptual proposals for needed legislation. The Department has an initial draft of changes to 85-2-360, 361, 362, 364, and 369 (MCA). This proposal, much like the drafts prepared by the committee's staff, should be considered as concept paper in the form of legislation. It has not been reviewed and approved as a component of the Executives legislative proposals as that process is in its beginning stage. We also suggest three other areas of statute that we are considering legislation on in the next session. Further, like the Committee we continue to learn of new issues, concerns and opportunities through the interim process and pledge our support to the Committee to find solutions.

WATER POLICY INTERIM COMM.
MARCH 13, 2008
EXHIBIT 4

Amendments to 85-2-360 – 85-2-370 MCA (HB 831)

After administering the new HB 831 legislation (85-2-360 – 85-2-370) the Department has drafted proposed changes to the process adopted last session. Attached you will find a red-line version of a draft and a “gray bill” version for ease of reading.

Most of the changes in the draft are to clarify and simplify the statute. The key provisions for the “hydrogeologic report” (85-2-361, MCA) and the “mitigation and aquifer storage and recovery plan” (85-2-362, MCA) are the focus of the Department’s draft. A team in the Department has both developed the approach to implementing these new statutory provisions and at the same time kept track of issues and concerns with the new statute. This team is the source of the draft and includes representatives from the Legal Unit, Water Rights Bureau, Regional Water Resources Offices, and the hydrology and geo-hydrology professionals in the Water Management Bureau.

Also the Department sees this approach, simplifying the provisions of existing law, as an alternative to LC5001 the “bucket for bucket” proposal. By simplifying and providing more flexibility to the Department as to the specific requirements of a hydrogeologic assessment, we believe it will allow the facts and complexity of the individual applications to drive the complexity of the assessment. Current law is very specific and limits the Department’s ability to accept and approve assessments that may provide sufficient information for the agency to make a decision based on the criteria of 85-2-311 and 85-2-402, MCA, but fail to meet the many and specific requirements of 85-2-361, MCA. By providing the committee this draft we hope to broaden the review of this proposal and want to encourage a dialog between the Department, the Water Policy Interim Committee, and the public as to the merits of the proposed changes.

Exempt Wells (85-2-306, MCA)

The next critical water policy change requiring legislation which the Department is discussing are changes to the exempt well statute, 85-2-306 MCA. The Department does not have a draft for review at this time. However the draft white paper on exempt wells written by Russell Levens

and provided to the committee at the January meeting lays out the Department technical concerns. The final document is attached.

To be clear, the Department does not oppose all exempt wells. For a single family home, for stock, or other disperse and small uses the exempt statute provides a quick an easy solution to the issuance of a water right and allows the Department to protect these uses as part of the overall water right system. However, the Department is very concerned about the use of exempt wells as a source of water supply for large subdivisions. This provision of statute is being used to avoid the water right permitting statute.

As we have discussed with the Committee multiple exempt wells associated with dense subdivision development has essentially the same impact to the ground and surface waters as does a public water supply of the same size. Avoidance of permitting allows these developments to avoid environmental review, public participation, and the opportunity for senior water right holders to object in order to protect their rights. Also, the exemption as currently in statute in combination with the requirements of the permitting process in closed basins, discourages the use of public water supplies. A combination of improving and streamlining the permitting provisions along with limiting the exempt well statute is a strategy that we support to provide incentives for the use of public water supply wells.

Controlled Ground Water Areas (85-2-506)

This statute has only been raised as a side issue before the Committee and was not specifically listed in HB 304 which established the Committee. Controlled Ground Water Areas may be requested by governmental agencies (including the Department) or by petition of the public. The statute provides for the very strict regulation of ground water withdrawals within an established CGWA to protect existing uses or to protect against migration of contaminated ground water. The CGWA statute represents an important water management tool; however, the statute is sorely out of date. Preceding the Montana Administrative Policy Act (MAPA, 1971), the 1961 CGWA statute has become difficult to manage for the Department and the public. The Department offered proposed legislation last session, HB 203. However, the Legislation failed in the House Natural Resources Committee.

A competing bill HB 205 sponsored by Representative Everett amending the CGWA passed the committee and House. HB 205 died in the Senate

Natural Resources Committee. The Department was opposed to HB 205 as introduced and passed by the house. The opposition was based on two critical points. HB 205 required a contested case hearing (trial-type) under MAPA in order to establish a CGWA, which is a difficult process in which to involve effectively large numbers of the public. The Department believes that a rule making process under MAPA is the appropriate administrative process to create a CGWA. Secondly, HB 205 placed the entire cost of establishing and any long-term monitoring costs solely on the shoulders of the petitioners. This is not a reasonable standard.

The Department will prepare Legislation again on this subject and as a starting point will use HB 203.

Other Department Water Legislation:

The Department is also reviewing a number of process changes that may be able to improve the current system that the Department currently follows. Litigation over the last three years have identified areas where applicants, objectors and the Department would benefit from a general clean-up of the water right processing statutes.

The Department is preparing a general clean up legislation that may include improvements to:

- Correct and complete determinations;
- Objections;
- Hearings process – both contested case and show cause; and
- Time lines for processing.

WPIC Drafts:

LC5001 – No hydrologic assessment with 100 percent offset

The Department provided a memorandum to the Committee describing our concerns with the elimination of the requirement for a hydrogeologic report (Memorandum from John Tubbs to the WPIC dated November 28, 2007, attached). We continue to be concerned with this approach for the stated reasons. In addition, the Department believes that its recommendations to amend current statute in this area addresses some of the process concerns some may have (see amendments the discussion above).

LC5002 – Notice of Intent to Drill

The Department cannot support the issuance of a provisional permit if upon the notice of intent to drill no objections are received. First, applicants can already self notice by simply contacting their neighbors about a proposed development to see if anyone is concerned about the development and its impacts on their water rights. Secondly, existing water right holders cannot make an informed decision about the potential for impact if a pump test is not conducted and a hydrogeologic assessment prepared.

LC5003 – Water Rights Enforcement Division

The Department agrees that it is important to enforce the water use violations. The Department has prepared for the committee a summary from the 8 regional offices as to the complaints that were made during 2007 over water rights. Upon review you will see that 111 complaints were received in the eight regional offices. The large majority of these complaints were resolved. Several are under the jurisdiction of the water court. A handful is being pursued in district court as part of a legal action between the parties. Less than 10 are on-going and may be the subject of an enforcement action by the Department.

In addition the Department assists the Water Court in its efforts to provide water commissioners with the tools to enforce court decrees under the adjudication. The Department has prepared 30 enforcement projects at the request of the court covering over 8,000 points of diversion. Attached is memorandum summarizing the Department's assistance in these enforcement actions.

The Department enforces water rights. What the Department does rarely is take enforcement to the point of bringing legal actions and taking water users to District Court. We have done this but frankly the Department does not have the legal and professional hydrology resources to take legal action in all but the worst cases. We have the necessary authority but not the resources. As Director Sexton has discussed with the Committee in past meetings, the Department is determined to pursue legal action in cases where we have a complaint, support at the local government level and a likely hood of success.

LC5004 – Local Government Authority of Water Quality

The Department of Environmental Quality is the lead state agency on this draft report. However, the Department is proactively working with DEQ and local governments on trying to find ways to encourage public water supplies. This draft is a step in that direction. Testimonies from county representatives at the Hamilton meeting of the Committee suggested that changes are needed in this provision of the law in addition to the proposed changes outlined in the draft. The Department has agreed to meet with DEQ, counties and legislative staff to find a way for this process to be more efficient.

LC5005 – Water Reservations for MDOT compliance with CWA

The Department of Transportation and the Department continue to work cooperatively to find a process that recognizes the need for wetland mitigation under section 404 of the Clean Water Act. The Army Corps of Engineers requires the protection afforded by a water right in order for wetland mitigations efforts by the Department of Transportation to qualify. We continue to focus on a form of an exception for this purpose. The Department at this time does not feel the complex process contemplated under the Water Reservation Statute is the best method to achieve the goal.

LC5006 – Final Plat Approval Conditional on a Water Right

The Department of Environmental Quality is the lead state agency on this draft report. As with LC5004 the Department sees this draft as a step in the right direction. However, as was stated by the Ravalli County Commissioner at the last meeting, as long as the provision on page 5, 3(b) recognizes the use of exempt wells as sufficient the other provisions could be considered as “window dressing.”

LC5007 – Ground Water Investigation Program

In general the Department is in support of this legislation. That is not to say that the budgetary obligations proposed under the bill have been reviewed by the Executive. As I understand, the Montana Bureau of Mines and Geology has submitted a budget request through the University System and that is in process. Also, I met with representatives of the Bureau earlier this week and

tried to tease out some of the differences between this proposal and the existing program.

The differences between the proposed draft and the existing ground water assessment program as seen by the Department are as follows: The assessment program is a large scale data collection program providing general information about the states many aquifers. The investigation program will focus on specific and well defined areas for detailed investigation. Secondly, the investigation program will develop models that allow decision makers to look at various scenarios of changing water and land uses. Finally, the investigation program will provide interpretation of these models and sensitivity analysis.

The investigation under this program will provide good base information. However, the Committee needs to recognize that this program will not take the place of the hydrogeologic assessments required under 85-2-361, MCA. Project specific hydrogeologic assessments will still be necessary. The pump tests that are required prior to application provide the site specific information needed to analyze the impacts of the specific proposed use. Much like the investigation program proposed in LC5007 is a more specific level of information than the assessment program, the hydrogeologic assessment in 85-2-361, MCA, brings the analysis down another level and provides the site specific information. While the investigation program will allow applicants, objectors and the public, and the Department with improved base level information, it will not take the place of the application specific analysis required by statute.

LC5008 – Resolution of Issue Remarks by Water Court

The Water Court is the lead agency on this issue. The Department is willing to work with the Court and the Committee as to our role in developing issue remarks and how the court resolves these remarks.