
MEMORANDUM

TO: JIM ELLIOTT, CHAIR
WATER POLICY INTERIM COMMITTEE

FROM: JOHN TUBBS, ADMINISTRATOR
WATER RESOURCES DIVISION, DNRC

SUBJECT: HB 831 PROPOSED AMENDMENTS SUMMARY

DATE: 4/15/2008

CC: JOE KOLMAN

As requested by the Chairman, the Department has prepared a point by point analysis of the changes to statute proposed in the draft handed out to the Committee on March 6, 2008. In the future we will try to have a similar document prepared prior to submission of any draft proposal.

The Department has been working with MCA 85-2-360 through 85-2-369 for a year and believes that the very detailed text of the statutes limits the discretion of the Department to a point that permit applicant's costs and risks are unnecessarily high. The Department may also see increased costs associated with litigation over the detail in the statute. In proposing the changes to these statutes, the Department's intent is to try and keep the goals of HB 831 to protect senior water right holders and provide a process to get a ground water permit in a closed basin but reduce the detail. By reducing the detail, we believe the Department can be more flexible when faced with the facts of each proposed development we can reduce the possibility of technicalities being the basis for denial of permits which will, in turn, reduce the risk of litigation to the applicant and to the Department, and we can make the application process under these provisions more attractive to the development community. What we do know is we are seeing very few HB 831 applications and we are told that the reason is cost, risk and the ease of using exempt wells as a source of drinking water for subdivisions.

The following narrative tries to give the Committee some perspective as to the purposes and reasons we are proposing the changes to statute. Again I would ask the Committee to take these amendments in the same context as the draft reports prepared by Legislative staff. This is not an official agency legislative proposal; rather it is intended to focus the debate on the permitting process in closed basins.

- **Changes to 85-2-360:**

1. Page 1, Line 5: 85-2-321 is added to include the Milk River closure.

2. Page 1, Lines 5-10: These changes would require mitigation in order to consumptively use groundwater in a closed basin. The Department is considering these changes because of two facts: Consumptive use of groundwater will result in net depletion of surface water over time, and basins were closed to new surface water uses because the Legislature or the Department determined that surface water has been fully appropriated in the basin. Based on these reasons, the proposed changes eliminate the statutory questions of whether consumptive use of ground water will cause net depletion (it will) and whether net depletion will cause adverse affect (in a closed basin there is no legally available surface water). By eliminating these questions, applicants will know they have to offset consumptive use through mitigation which will make the process more certain and eliminate objections and legal actions to determine if there is net depletion and/or adverse affect.
3. Page 1, Lines 11, 12: This change excludes the non-consumptive use of ground water from the requirements of mitigation. The Department is seeing an increase in applications for use of ground water through "heat pumps" for climate control in buildings. This is a non-consumptive use of ground water and should not require mitigation.
4. Page 1, Lines 13-22: Same as lines 5-10 above.
5. Page 1, Lines 23-26: Clarify that if you develop a well for the purpose of conducting hydrogeologic tests, the use of the well must cease until a water right is obtained.
6. Page 1, Lines 27-34: Same as in lines 5-10 above.
7. Page 1, Lines 37-39: Simplify the language of the statute.
- **Changes to 85-2-361:**
 8. Page 1, Lines 48, 49: This change brings the requirement to have a qualified professional from (ii) below in order to simplify the wording of the section.
 9. Page 1, Lines 49-55: These changes list the topics that our professional hydrogeologists need in a hydrogeologic assessment associated with a ground water development to evaluate the application. This begins to simplify and clarify the detail of section 361.
 10. Page 1, Lines 55-58; Line 1 on Page 2: These changes pull together criteria to evaluate water quality in the hydrogeologic assessment.
 11. Page 2, Lines 1-5: These changes eliminate a long list of different surface water bodies. Note that on Page 1, Line 54 there is a reference to surface water. Surface water is already defined in rule [36.12.101(64)] to include this list so these changes are intended to simplify the language of the section while retaining its purpose.

12. Page 2, Lines 8-12: These changes are intended to clarify and simplify what an applicant needs to show in predicting net depletions: the diverted amount, the consumed amount and the amount returned. Again the purpose of the original language is maintained but the language is simplified.
 13. Page 2, Lines 16-20: This requirement is moved to Page 1, Lines 48 and 49.
 14. Page 2, Lines 21-24: This sub-section has been very difficult for the Department to administer as it may lead an applicant to submit an application that we can not process under 85-2-311 MCA criteria. (In other words, if the effects cross the boundaries described in the existing sub-section the applicant may ignore these effects based upon this provision. However, the Department could not ignore the impacts beyond the boundary identified in the sub-section under 85-2-311. MCA, if it had the potential to adversely affect a water right holder outside of the boundary.) Rather than dictating an artificial surface area boundary in statute, the Department believes that the "qualified professional" should be allowed to define the extent of the influence of ground water development for the basis the hydrogeologic assessment. This eliminates potential conflict between the Department, the applicant, and the objectors.
 15. Page 2, Lines 25-56: These changes eliminate the specific list of requirements for aquifer properties and aquifer boundaries. The Department believes the "qualified professional" would have sufficient legislative guidance provided on Page 1, Lines 51 through Page 2 Line 1, to develop a hydrogeologic assessment. These changes would simplify the statute and eliminate the potential for law suits over technical oversights in an application while maintaining the purpose of the provisions.
 16. Page 2, Lines 57, 58; Page 3 Lines 1-8: These changes clarify the data requirements prior to submission to the Bureau of Mines and Geology for inclusion in the ground water data base. The Department receives applications where the initial hydrogeologic assessment is in error. Through the deficiency letter process, as well as consultation with the applicant's "qualified professional" these errors are corrected. These changes clarify that it is the corrected hydrogeologic assessment as deemed by the Department that is sent to the Bureau.
- **Changes to 85-2-362:**
 17. Page 3, Lines 15-21: These changes simplify statute by requiring mitigation of net depletions not mitigation of net depletions that cause adverse affect. Again, this statute only impacts closed basins and in closed basins the Legislature or the Department has determined that the surface water is fully appropriated.
 18. Page 3, Lines 23-58; Page 4 Lines 1-4: These changes clarify and simplify what is required in a mitigation plan by eliminating the duplicate requirements for mitigation plans and aquifer recharge plans. Yet the changes keep the unique water quality requirements needed for aquifer recharge plans in a separate sub-section.

19. Page 4, Lines 5-8: These changes are intended to identify proposals and actions that can not be considered a "mitigation" plan. These mirror a Colorado statute excluding the elimination of vegetation to reduce consumptive use and the paving or covering of land with hard surfaces again eliminating consumptive use as components of a mitigation plan.
 20. Page 4, Line 11 and Lines 13, 14: This change again eliminates the question of adverse affect and focuses mitigation on net depletion.
- **Changes to 85-2-634:**
 21. Page 4, Lines 23 – 26: These changes coordinate the acceptance of the water right permit application with required discharge permits issued by the Department of Environmental Quality. However, rather than requiring the applicant to have already obtained the discharge permit from DEQ before applying to DNRC for a water right (a sequential process that delays the submission of the water right permit application and increases the overall time frame for the developer) the changes provide for a coordinated but parallel process that should protect water quality and reduce overall time frames. It is important to note that in (2) Lines 27-29 the Department cannot issue the permit until the DEQ discharge permit is issued.
 - **Changes to 85-2-639:**
 22. Page 4 Lines 47, 48: Reiterates that once aquifer testing is completed any use of the water shall cease.

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2 **85-2-360. Ground water appropriation right in closed basins.** (1) An application
3 for a ground water appropriation right in a basin closed pursuant to 85-2-330,
4 85-2-336, 85-2-341, 85-2-343, or 85-2-344 or administratively closed pursuant to
5 85-2-319 or 85-2-321 must be accompanied by a hydrogeologic assessment
6 hydrogeologic assessment of ~~that has been conducted pursuant to 85-2-361 to~~
7 ~~predict whether the proposed appropriation right will result in a net depletion~~
8 ~~of to surface water pursuant to 85-2-361; and must be accompanied by an aquifer~~
9 ~~recharge or mitigation plan as provided in 85-2-362, if the assessment predicts~~
10 ~~a net depletion to surface water necessary.~~

11 (2) Ground water applications for uses non-consumptive to the source are
12 exempt from the requirements in (1) above.

13 (2) If the hydrogeologic assessment conducted pursuant to 85-2-361 predicts
14 that the proposed appropriation right will not result in a net depletion of
15 surface water, the department shall proceed under the criteria provided in
16 85-2-311.

17 (3) (a) If the hydrogeologic assessment predicts that the proposed
18 appropriation right will result in a net depletion of surface water, the
19 applicant shall analyze whether the net depletion results in an adverse effect
20 on a prior appropriator. If the applicant provides a correct and complete
21 application, the department shall proceed to process the application as provided
22 in 85-2-363.

23 (3) (b) If the applicant has used the water for the purpose of conducting
24 the hydrogeologic assessment testing, the applicant shall terminate the use of
25 the water after testing is completed. Failure to terminate use of the water
26 may result in a fine of not more than \$1,000 for each day of the violation.

27 (4) If the hydrogeologic assessment predicts that there will be net
28 depletion as provided in subsection (3) (a), the department may proceed to
29 process the application pursuant to 85-2-363 if, in addition to other applicable
30 criteria, the applicant complies with 85-2-362.

31 (4) (5) For the purposes of 85-2-360 through 85-2-362, the prediction of net
32 depletion does not mean that an adverse effect on a prior appropriator will
33 occur or if an adverse effect does occur that the entire amount of net depletion
34 is the cause of the adverse effect. A determination of whether or not there is
35 an adverse effect on a prior appropriator as the result of a new appropriation
36 right is a determination that must be made by the department based on the
37 amount, location, and duration of the amount of net depletion that causes the
38 adverse effect relative to the historic beneficial use of the appropriation
39 right that may be adversely affected.

40 (5) (6) The priority date for an appropriation right that is granted to an
41 entity whose permit application was returned after April 11, 2006, and before
42 May 3, 2007, because of the department's interpretation of a court decision is
43 the date of the initial application to the department.
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46 **85-2-361. Hydrogeologic assessment -- definition -- minimum requirements.**

47 (1) (a) For the purposes of 85-2-360 through 85-2-362, "hydrogeologic
48 assessment" means a report ~~for~~ prepared by a hydrogeologist, a qualified
49 scientist, or a qualified licensed professional engineer the project for or
50 through which water will be put to beneficial use, the point of diversion, and
51 the place of use that describes the geology, hydrogeologic environment including
52 hydraulic properties and boundaries, water quality with regard to the provisions
53 of 75-5-410 and 85-2-364, and predicted net depletion, if any, including the
54 amount, timing, and location of any net depletion, to ~~for~~ surface water within
55 the potentially affected area. Further, the report must describe water quality
56 with regard to the provisions of 75-5-410 and 85-2-364, and any water treatment
57 method that will be used at the time of any type of injection or introduction of
58 water to the aquifer to ensure compliance with 75-5-410 and 85-2-364 and the

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1 ~~water quality laws under Title 75, chapter 5. described in subsection (2) (a)~~
2 ~~(i) within the closed basins that are subject to an appropriation right,~~
3 ~~including but not limited to rivers, streams, irrigation canals, or drains that~~
4 ~~might be affected by the new appropriation right and any predicted water quality~~
5 ~~changes that may result.~~

6 (b) In predicting net depletion of surface water from a proposed use,
7 consideration must be given, at a minimum, to:

8 (i) ~~the actual amount diverted and consumed; and for like beneficial uses;~~
9 ~~(ii) any amounts that will likely be lost in conveyance, if any, and~~
10 ~~whether any lost amounts are lost to the system through evaporation or other~~
11 ~~means or whether those amounts are returned to the system through percolation or~~
12 ~~other means; and~~

13 ~~(iii) any return flows from the proposed use, including but not limited~~
14 ~~to any treated wastewater return flows if the treated wastewater that is~~
15 ~~considered effluent meets the requirements of 75-5-410 and 85-2-364.~~

16 ~~(2) (a) A hydrogeologic assessment that will be used to predict net~~
17 ~~depletion of surface water resulting from a new appropriation right must include~~
18 ~~hydrogeologic data or a model developed by a hydrogeologist, a qualified~~
19 ~~scientist, or a qualified licensed professional engineer that incorporates for~~
20 ~~the new appropriation:~~

21 ~~(i) the area or estimated area of ground water that will be affected, not~~
22 ~~to exceed the boundaries of the drainage subdivisions established by the office~~
23 ~~of water data coordination, United States geological survey, and used by the~~
24 ~~water court, unless the applicant chooses to expand the boundaries;~~

25 ~~(ii) the geology in the area identified in subsection (2) (a) (i), including~~
26 ~~stratigraphy and structure;~~

27 ~~(iii) the parameters of the aquifer system within the area identified in~~
28 ~~subsection (2) (a) (i) to include, at a minimum, estimates for:~~

29 ~~(A) the lateral and vertical extent of the aquifer;~~

30 ~~(B) whether the aquifer is confined or unconfined;~~

31 ~~(C) the effective hydraulic conductivity of the aquifer;~~

32 ~~(D) transmissivity and storage coefficient related to the aquifer; and~~

33 ~~(E) the estimated flow direction or directions of ground water and the rate~~
34 ~~of movement;~~

35 ~~(iv) the locations of surface waters within the area, described in~~
36 ~~subsection (2) (a) (i) that are subject to an appropriation right, including but~~
37 ~~not limited to springs, creeks, streams, or rivers that may or may not show a~~
38 ~~net depletion;~~

39 ~~(v) evidence of water availability; and~~

40 ~~(vi) the locations of all wells or other sources of ground water of record~~
41 ~~within the area identified in subsection (2) (a) (i).~~

42 ~~(b) A hydrogeologic assessment must also include a water quality report~~
43 ~~that includes:~~

44 ~~(i) the location of existing documented hazards that could be affected or~~
45 ~~exacerbated by the appropriation right, such as areas of subsidence, along with~~
46 ~~a plan to mitigate any conditions or impacts;~~

47 ~~(ii) other water quality information necessary to comply with 75-5-410 and~~
48 ~~85-2-364; and~~

49 ~~(iii) a description of any water treatment method that will be used at the~~
50 ~~time of any type of injection or introduction of water to the aquifer to ensure~~
51 ~~compliance with 75-5-410 and 85-2-364 and the water quality laws under Title 75,~~
52 ~~chapter 5.~~

53 ~~(3) The hydrogeologic assessment must include an analysis of whether the~~
54 ~~information required by subsection (2) predicts that there may be a net~~
55 ~~depletion of surface water in the area described in subsection (2) (a) (i) and the~~
56 ~~extent of the depletion, if any.~~

57 ~~(24) The final corrected hydrogeologic assessment, the model if used~~
58 ~~provided, the test well data, the monitoring well data, and other related~~

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1 information must be submitted to the department. The department shall submit
2 this information from a correct and complete application to the bureau of mines
3 and geology. The bureau of mines and geology shall ensure that information
4 submitted pursuant to this section is entered into the ground water information
5 center database as part of the ground water assessment program. The department
6 and bureau shall determine the required format of the information to allow entry
7 into the ground water database

8 (35) An entity that has previously conducted some type of hydrogeologic
9 assessment may submit the information from that assessment as the hydrogeologic
10 assessment required by this section if the information meets the criteria and
11 requirements of this section.

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14 **85-2-362. Aquifer recharge or mitigation plans in closed basins -- minimum**
15 **requirements.** (1) An aquifer recharge or mitigation plan must provide evidence
16 of how the plan will offset the required amount of net depletion to surface
17 water from an appropriation of water, including at a minimum: (1) An applicant
18 whose hydrogeologic assessment conducted pursuant to 85-2-361 predicts that
19 there will be a net depletion of surface water shall offset the net depletion
20 that results in the adverse effect through a mitigation plan or an aquifer
21 recharge plan.

22 ~~(2) A mitigation plan must include:~~

23 ~~(a) the amount of water reallocated through exchange or substitution;~~
24 ~~(b) timing and location, generally, of water reallocated through exchange~~
25 ~~or substitution;~~

26 ~~(c) how the mitigation water in the plan will be put to beneficial use;~~

27 ~~(e) how the water in the plan will be measured; and~~

28 ~~(a) where and how the water in the plan will be put to beneficial use;~~

29 ~~(b) when and where, generally, water reallocated through exchange or~~
30 ~~substitution will be required;~~

31 ~~(c) the amount of water reallocated through exchange or substitution that~~
32 ~~is required;~~

33 ~~(d) how the proposed project or beneficial use for which the mitigation~~
34 ~~plan is required will be operated;~~

35 ~~(fe) evidence that an application for a change in appropriation right, if~~
36 ~~necessary, has been submitted.~~

37 ~~(f) evidence of water availability; and~~

38 ~~(g) evidence of how the mitigation plan will offset the required amount of~~
39 ~~net depletion of surface water in a manner that will offset an adverse effect on~~
40 ~~a prior appropriator.~~

41 (2) In addition to the requirements listed in (1), an aquifer recharge plan
42 must also include:

43 ~~(3) An aquifer recharge plan must include:~~

44 ~~(a) evidence that the appropriate water quality related permits have been~~
45 ~~granted pursuant to Title 75, chapter 5, and pursuant to 75-5-410 and 85-2-364;~~

46 ~~(b) where and how the water in the plan will be put to beneficial use;~~

47 ~~(c) when and where, generally, water reallocated through exchange or~~
48 ~~substitution will be required;~~

49 ~~(d) the amount of water reallocated through exchange or substitution that~~
50 ~~is required;~~

51 ~~(e) how the proposed project or beneficial use for which the aquifer~~
52 ~~recharge plan is required will be operated;~~

53 ~~(f) evidence that an application for a change in appropriation right, if~~
54 ~~necessary, has been submitted;~~

55 ~~(ag) a description of the process by which water will be reintroduced to~~
56 ~~the aquifer;~~

57 (b) evidence that the appropriate water quality related permits have been
58 granted pursuant to Title 75, chapter 5, and pursuant to 75-5-410 and 85-2-364;

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1 ~~(h) evidence of water availability; and~~

2 ~~(i) evidence of how the aquifer recharge plan will offset the required~~
3 ~~amount of net depletion of surface water in a manner that will offset any~~
4 ~~adverse effect on a prior appropriator.~~

5 (3) Mitigation water does not include the salvage of tributary waters by
6 the eradication of phreatophytes, nor does it include the use of tributary water
7 collected from land surfaces that have been made impermeable, thereby increasing
8 the runoff but not adding to the existing supply of tributary water.

9 (4) The department may not require an applicant, through a mitigation plan
10 or an aquifer recharge plan, to provide more water than the quantity needed to
11 offset the adverse effects on a prior appropriator caused by the net depletion.

12 (5) An appropriation right that relies on a mitigation plan or aquifer
13 recharge plan to offset net depletion of surface water ~~that results in an~~
14 ~~adverse effect on a prior appropriator~~ must be issued as a conditional permit
15 that requires that the mitigation plan or aquifer recharge plan must be
16 exercised when the appropriation right is exercised.

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19 **85-2-364. Department permit coordination -- requirements for aquifer**
20 **recharge plans. To ensure that the department and the department of**
21 **environmental quality are coordinating their respective permitting activities:**

22 (1) an applicant for a new appropriation right pursuant to 85-2-360 that
23 involves aquifer recharge and requires a discharge permit, shall provide
24 evidence that an application for the discharge permit has been submitted to the
25 appropriate agency; the department with a copy of a relevant discharge permit if
26 necessary; and

27 (2) the department may not grant a new appropriation right pursuant to
28 85-2-360 that involves aquifer recharge until the discharge permit, if
29 necessary, has been obtained and presented to the department.

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32 **85-2-369. Aquifer testing, test well, or monitoring well data submission -- not**
33 **beneficial use.**

34 (1) All aquifer testing data and other related information from test wells,
35 monitoring wells, or other sources that is collected for the purpose of
36 obtaining a new appropriation right or a change in appropriation right must be
37 submitted to the department and the bureau of mines and geology in a form
38 prescribed by the department and the bureau of mines and geology. The bureau of
39 mines and geology shall ensure that information submitted pursuant to this
40 section is entered into the ground water information center database as part of
41 the ground water assessment program.

42 (2) (a) Water testing or monitoring is not a beneficial use of water
43 requiring the filing of a permit application.

44 (b) A permit is not required if the intent of a person is to conduct
45 aquifer tests, water quality tests, water level monitoring, or other testing or
46 monitoring of a water source.

47 (c) Upon completion of the activities described in (2) (b), the applicant
48 shall terminate use of the water.