

# Summary of WPIC work group meeting - May 12, 2008

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## DRAFT

In April, the WPIC asked that a work group meet to discuss several issues being debated by the WPIC. The agenda included a prioritization of issues, DNRC revisions to HB831 statutes and permitting, funding sources, exempt wells and local and state issues.

Work group attendees were encouraged to bring copies of proposals.

Twenty-one people met for about five hours and discussed a wide range of issues. A list of attendees is attached.

The group was encouraged to find areas where there may be consensus. Toward that end, the group generally endorsed these bolded statements. Some of the discussion follows some statements.

**\* More study of groundwater resources is necessary, but work group members wanted detailed information about what sort of analysis the MBMG would be able to provide.**

**\* There is a need to increase the number of wells in the groundwater monitoring network as well as improve access to existing wells.**

It was suggested that easements be required for new wells in subdivisions as well as giving the MBMG specific authority to access existing wells.

**\* Exempt wells have a place in Montana, however there are concerns in some areas about their effect on water quality and quantity. Incentives are needed to encourage public water and sewer systems.**

It was suggested that there needs to be more study of exempt wells before policy is changed. Others disagreed and said exempt wells must be addressed now.

One proposal would require subdivisions with exempt wells to undergo the HB831 process.

Another suggestion was to limit the use of exempt wells for ponds.

**\* Controlled Groundwater Area statutes need revision. The petitions for CGWA could help guide MBMG studies.**

**\* Water right permitting needs to be easier to understand and faster. Revisions to HB831 statutes may be needed.**

It was acknowledged that DNRC is not always trusted to implement rules in line with the intent of the law. DNRC contends that the rule-level language in HB831 is too complex and in the

case of the hydrogeologic assessment, the language pertains more to aquifer storage and recovery projects than it does to hydrogeologic assessments.

Don MacIntyre submitted a proposal to give decision-making priority to permit or change applications from parties that agree to pay for the outsourcing of agency procured reviewers and hearing examiners. The bill draft it attached.

## **OTHER ISSUES**

### **Adverse effect**

Don MacIntyre submitted a definition for adverse effect. The proposal would define adverse effect as the lack of the legal availability of water. Currently, adverse effect is not specifically defined, rather it is determined "based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied."

The proposal is attached.

### **Enforcement**

Don MacIntyre submitted a proposal that would allow a person to direct the DNRC to pursue enforcement actions in district court, as long as the person pays legal fees. If the DNRC prevails and wins legal fees, the person would be reimbursed.

The proposal is attached.



Don MacIntyre WPIC work group 5-12-08

the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

(a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

(ii) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(a)(ii), adverse affect must be determined based on a consideration of whether water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Adverse affect is the lack of the legal availability of water. Legal availability Adverse affect is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water in consideration of the limitations of 85-2-401(1).

(b) ~~the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;~~

## Don MacIntyre WPIC work group 5-12-08

85-2-114. Judicial enforcement. (1) If the department ascertains, by a means reasonably considered sufficient by it, that a person is wasting water, using water unlawfully, preventing water from moving to another person having a prior right to use the water, or violating a provision of this chapter, it may, after reasonable attempts have failed to obtain voluntary compliance as provided in subsection (4), petition the district court supervising the distribution of water among appropriators from the source to:

(a) regulate the controlling works of an appropriation as may be necessary to prevent the wasting or unlawful use of water or to secure water to a person having a prior right to its use;

(b) order the person wasting, unlawfully using, or interfering with another's rightful use of the water to cease and desist from doing so and to take steps that may be necessary to remedy the waste, unlawful use, or interference; or

(c) issue a temporary, preliminary, or permanent injunction to prevent a violation of this chapter. Notwithstanding the provisions of Title 27, chapter 19, part 3, a temporary restraining order must be granted if it clearly appears from the specific facts shown by affidavit or by the verified complaint that a provision of this chapter is being violated.

(2) Upon the issuance of an order or injunction, the department may attach to the controlling works a written notice, properly dated and signed, setting forth the fact that the controlling works have been properly regulated by it. The notice constitutes legal notice to all persons interested in the appropriation or distribution of the water.

(3) The department may also direct its own attorney or request the attorney general or county attorney to bring suit to enjoin the waste, unlawful use, interference, or violation. The county attorney may prosecute under 85-2-122(1) or bring an action under 85-2-122(2) without being requested to do so by the department. The attorney general and a county attorney are subject to the voluntary compliance provisions of subsection (4).

(4) The department shall attempt to obtain voluntary compliance through warning, conference, or any other appropriate means before petitioning the district court under subsection (1). The attempts to obtain voluntary compliance under this subsection must extend over a period of at least 7 days and may not exceed 30 working days.

(5) If a person requests that the department take action under subsection (1), the department may not take action unless the person requesting the action agrees:

(a) to participate as a party in any legal action initiated by the department, or

(b) to pay the cost and attorney fees, at the prevailing rate charged by agency legal services bureau, of the department's attorney, the attorney assigned by the attorney general, or the attorney assigned by the county attorney to seek any relief under subsection (1). If relief is granted under subsection (1), the person must be awarded reasonable costs and attorney fees.

\*\*\*\* Bill No. \*\*\*\*

Introduced By \*\*\*\*\*

By Request of the \*\*\*\*\*

Don MacIntyre WPIC work group 5-12-08

A Bill for an Act entitled: "An Act providing that an applicant for permit for an appropriation right or a change authorization from the department of natural resources and conservation or a discharge permit from the department of environmental quality, may pay for the actual agency cost for out sourcing of agency procured reviewers and hearing examiners; and providing an immediate effective date."

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

**NEW SECTION Section 1. Outsourcing of agency services.** (1)

the department of environmental quality and the department of natural resources and conservation shall adopt rules providing for the outsourcing of agency procured reviewers and hearing examiners in order to expedite the processing of applications for discharge permits under Title 75, chapter 5, part \_\_\_\_, and of applications for appropriation rights or change authorizations under Title 85, chapter 2, parts 3 and 4.

(2) An applicant electing to have a permit or change authorization expedited through the outsourcing of services by an agency must agree to pay the actual cost of the outsourced services provided by the agency.

(3) The agency rules shall provide for a preference in decision-making over other applications pending before the agency. As between outsourced services, preference in decision-making shall be based on first in time of request for outsourcing.