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Water Policy Interim Committee 63rd Montana Legislature

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Millie Heffner
Department of Natural Resources and Conservation
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Sept. 10, 2013

Ms. Heffner,

As the legislative committee tasked with studying water policy in Montana, the Water Policy Interim Committee has debated water wells exempt from permitting since 2007. It is under this mandate and years of experience that the WPIC submits comments on the proposed rule to define the term "combined appropriation" as it applies to exempt wells.

The majority of the committee's work during the 2011-2012 interim was devoted to this topic. Out of that interim came several recommendations and two bill drafts.

Those recommendations were:

- * It is reasonable to restrict the use of exempt wells in basins where new surface water uses are mostly limited and where hydrogeologic modeling concludes that surface waters would be depleted by an exempt well within a fairly short period of time that would be most likely to affect senior water right holders.
- * Restrictions on exempt wells in certain areas should be limited to areas where hydrogeologic data exists, including studies conducted by the Ground Water Investigation Program or other hydrogeologic studies.
- * The term "combined appropriation" should be defined by the Legislature. That definition should be appropriation from the same source aquifer of more than 35 gallons per minute and 10 acre-feet by two or more wells or developed springs that are physically connected into the same system.

The sentiments of these recommendations were incorporated into Senate Bills No. 19 and 346. Senate Bill No. 346 outlined the process to create stream depletion zones, areas where scientific modeling demonstrates ground water withdrawals effect surface water. Within these zones, water wells exempt from permitting are further limited.

Senate Bill No. 19 defined the term "combined appropriation" as referenced above. This definition essentially codifies the rule that has been in place since 1993. Senate Bill No. 19 passed the Senate and the House, but was vetoed by the governor.

The WPIC is concerned that the proposed rules are not consistent with the statute and ignores the history of the department's own rule making. Since 1987, the term "combined appropriation" has not been defined in statute. Yet the department has adopted two different definitions and is now proposing a third. A representative of the department told the Water Policy Interim Committee that these definitions of the same term are "diametrically opposed."

How can three different definitions be consistent and reflect the intent of a term that has not changed in statute?

Furthermore, how does the department justify its position that the current rule reflects the intent of the law, while ignoring the intent of SB19, and proposing a new rule that is completely different from the current rule?

The WPIC also has concerns about the proposed rule related to the Montana Administrative Procedure Act.

The statement of reasonable necessity provided does not appear to state the principal reasons or the rationale for the particular approach that is being proposed, as is required in 2-4-305(6), MCA. The stipulation cited does not specifically mandate the approach being proposed. Nor do any of the stipulations agreed to by the DNRC mandate this specific approach.

The notice states in paragraph 9 that the "bill sponsor requirements of 2-4-302, MCA, apply and have been fulfilled." It appears Senator Vincent was contacted as the sponsor of SB 346 (the stream depletion zone bill). However it does not appear that these proposed rules are related to the implementation of SB 346 other than the same section of law is amended.

Even if the department was trying to comply with the law, it appears the requirements of 2-4-302, MCA were not followed.

Sen. Vincent was neither informed "of the known dates by which each step of the rulemaking process must be completed" nor was Sen. Vincent provided with "information about the time periods during which the legislator may comment on the proposed rules, including the opportunity to provide comment to the appropriate administrative rule review committee."

While the WPIC disagrees that the proposed rule is related to SB346, if the department believes the rule implements that statute, then it should be noted that SB346 differentiates exempt well use between open basins and closed basins. But in testimony about the proposed rule, it is the department's stance that the rule must be applied statewide, because it does not have the legal authority to do so.

Please explain this apparent conflict.

Lastly, the proposed rule uses the terms "tract of record" and "subdivision" but only the term "subdivision" is linked to the definition in 76-3-103, MCA. How is the term "tract of record" defined?

Sincerely,

A handwritten signature in cursive script that reads "Chas Vincent".

Chas Vincent
Chairman, Water Policy Interim Committee