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## Water Policy Interim Committee

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### 65th Montana Legislature

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ERIN BILLS, Legal Staff

December 20th, 2017

To: Water Policy Interim Committee Members  
From: Erin Bills, Legal Staff  
Re: Legislative Administrative Rule Review -- Committee Objection Update

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**MAR NOTICE NUMBER:** 36-22-196

**AGENCY/BOARD:** Department of Natural Resources and Conservation

**RULE CLASSIFICATION:** Substantive

**SUBJECT:** Water Right Permitting

**PENDING OBJECTIONS:** The Legislature carved out an exception to the Water Use Act for small ground water developments (*i.e.*, exempt wells). Currently, a permit is not required to develop a well or a ground water spring that uses 35 gallons per minute or less or up to 10 acre-feet per year, unless it constitutes a “combined appropriation.”<sup>1</sup> What constitutes a “combined appropriation” is the crux of the issue with exempt wells. The term is used but is not defined in the Water Use Act. The Legislature delegated the authority to define the term to the DNRC. In 1987, the DNRC adopted a rule to define the term “combined appropriation” as:

"an appropriation of water from the same source aquifer by two or more groundwater developments, the purpose of which, in the department's judgment, could have been accomplished by a single appropriation. Groundwater developments need not be physically connected nor have a common distribution system to be considered a 'combined appropriation.' They can be separate developed springs or wells to separate parts of a project or development. Such wells and springs need not be developed simultaneously. They can be developed gradually or in increments. The amount of water appropriated from the entire project or development from these groundwater developments in the same source aquifer is the 'combined appropriation.'"<sup>2</sup>

The rule was revised in 1993 to provide that a “combined appropriation” is one that is physically

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<sup>1</sup> Section 85-2-402(15)(a)(iii)(B), MCA.

<sup>2</sup> Mont. Admin. R. 36.12.101 (1987); and 17 Mont. Admin. Reg. (Sept. 08 2017).

manifold into the same system. Therefore, as long as the developments aren't connected, they were exempt from permitting. In 2009, the Clark Fork Coalition and several senior water right holders filed a petition under the Montana Administrative Procedure Act with the DNRC to invalidate the 1993 rule. After several years for litigation, in September 2016, the Montana Supreme Court invalidated the 1993 rule and reinstated the 1987 rule defining "combined appropriation" until a new rule was initiated at the discretion of the DNRC.<sup>3</sup> On September 8, 2017, the DNRC initiated the rulemaking process defining "combined appropriation" and proposed the 1987 rule verbatim.

The WPIC informally objected to the proposed definition on October 10, 2017. An informal objection is lodged pursuant to 2-4-305(9), MCA, when a majority of the Committee notifies the chair that they object to a proposed administrative rule. The effect of this objection is that it can delay the adoption of a proposed rule for up to approximately 6 months from the date of the publication of the proposed rule if, every time that the Committee meets in the 6-month period, the Committee decides to sustain the objection. The Committee's objection effectively delayed the adoption of the rule until publication of the last issue of the Montana Administrative Register that is within the 6-month period: the adoption of MAR notice number 36-22-196 (published September 8, 2017) is **delayed until March 30, 2018**. If the Committee takes no further action prior to this date, the DNRC may proceed with adoption of the rule as proposed.

In deciding how to proceed, the Committee may want to consider the following actions at its January 8-9, 2018, meeting:

1. Take no action, which would allow the Department to proceed with adopting the rules as proposed;
2. Submit a letter to the Department recommending adoption, amendment, rejection, or repeal of the rule;<sup>4</sup> or
3. Request that staff draft a formal objection letter for the Committee's consideration at the March 5-6, 2018, meeting. **The Committee may only formally object if the proposed rule is not in substantial compliance with specific provisions of MAPA.**<sup>5</sup> A formal objection requires the Committee to identify specific reasons for this action and must include the portions of the rule that is objectionable, in the Committee's opinion.

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<sup>3</sup> *Clark Fork Coalition v. Tubbs*, 384 Mont. 503, ¶ 45 (Mont. 2016).

<sup>4</sup> Sections 2-4-402, 2-4-411, and 2-4-412, MCA.

<sup>5</sup> Section 2-4-406, MCA. Note: Under the formal objection, the Committee may object **only if** the rule violates specific provisions of MAPA, such as 2-4-302, MCA (dealing with proper procedures for notice and filing of rules), 2-4-303, MCA (dealing with emergency and temporary rules), and 2-4-305, MCA (specifying multiple requirements for proposed rules, including time requirements for adopting rules, citations required for each rule, and requirements for the statement of reasonable necessity), and is required to give the Department written notice of its objections. The Department is required to respond in writing to the objection within 14 days.