



Montana Legislative Services Division
Legal Services Office

January 29, 2018

To: Water Policy Interim Committee Members
From: Erin Bills, Legal Staff
Re: Letter dated January 26, 2018, advising that the Department of Natural Resources and Conservation will submit an adoption notice for MAR Notice 36-22-196 by February 13, 2018

On January 26, 2018, the Department of Natural Resources and Conservation (Department) sent a letter to the Montana Legislative Services Division, Legal Services Office. The letter advised our office that the Department will be submitting the adoption notice for Montana Administrative Register (MAR) Notice 36-22-196 to the Secretary of State, Administrative Rules of Montana (ARM) Bureau by the February 13, 2018, deadline to ensure publication in the February 23, 2018, edition of the MAR. The letter was shared with the Water Policy Interim Committee (WPIC) members via email on January 26, 2018. Legislative legal staff has reviewed the letter and does not concur with the Department's interpretation of section 2-4-305(7), MCA, in relation to the informal objection lodged by the WPIC under 2-4-305(9), MCA.

The WPIC is responsible to review administrative rules proposed by the Department.¹ After consideration, a majority of the members of the WPIC notified the WPIC's presiding officer on October 10, 2017, that they objected to MAR Notice 36-22-196 relating to the Department's proposed rules pertaining to water right permitting in order to address the proposed rule at the WPIC's next committee meeting. The WPIC lodged the objection pursuant to section 2-4-305(9), MCA, commonly referred to as an "informal" objection. The effect of the WPIC's informal objection is that following the receipt of the WPIC's notice by the Department, the proposed rule may not be adopted until publication of the last issue of the register that is published before expiration of the six-month period during which the adoption notice must be published if, every time that the WPIC meets in the six-month period, the WPIC decides to sustain the objection.² On January 9, 2018, the WPIC renewed its objection to MAR Notice 36-22-196 and intended to address the proposed rule at its next regularly scheduled meeting on March 5, 2018.

At issue is when does the six-month period end allowing the Department to adopt MAR Notice 36-22-196, as proposed. Logically, the answer depends upon when the six-month period begins, and the beginning of the period is based on publication of the notice by the Department. Here, the answer is slightly complicated by the fact that two separate notices were published to the MAR by the Department. The first original publication of MAR Notice 36-22-196 of proposed rulemaking is dated September 8, 2017. To accommodate the WPIC's regularly scheduled meetings, the Department published a second notice. On September 22, 2017, the Department published a Notice of Extension of Public Comment Period to meet the WPIC's request to participate by extending the comment period to October 20, 2017.

¹ Mont. Code Ann. § 85-2-105(2)(b) (2017).

² Mont. Code Ann. § 2-4-305(9).

Under the Montana Administrative Procedure Act (MAPA), if an amended or supplemental notice of either a proposed or final rulemaking is published concerning the same rule, the six-month period must be determined based on the "latest notice."³ Legislative legal staff maintains that the Notice of Extension of Public Comment published by the Department to MAR Notice 36-22-196 on September 22, 2017, qualifies as a supplemental notice and, therefore, the latest notice. Section 2-4-305(7) does not direct use of the original notice in determining the six-month period.⁴ Although the terms "amended" and "supplemental" are not defined under MAPA, section 2-4-305(8)(c), MCA, provides context of legislative intent. Under this section, the statute only identifies correction in citation to authority, citations of sections being implemented, or of a clerical nature as nonsubstantive changes.⁵ This suggests that any other change to a notice would be considered a procedural or substantive change and would be an amended or supplemental notice. Therefore, legislative legal staff maintains that the supplemental notice published by the Department on September 22, 2017, should be used to initiate the six-month period to delay adoption of MAR Notice 36-22-196 based on the WPIC's sustained informal objection under 2-4-305(9), MCA. In short, the end of the six-month period is March 16, 2018. To ensure compliance with MAPA, the Department should not submit MAR Notice 36-22-196 to the Secretary of State before the March 6, 2018, deadline for publication in the March 16, 2018, edition of the MAR.

Here lies the difference in statutory interpretation between legislative legal staff and the Department. The Department has concluded that the second notice published September 22, 2017, is not an amended or supplemental notice because, in the Department's opinion, a notice to the public extending the comment period does not constitute an amended or supplemental notice.⁶ The Department suggests that an amended or supplemental notice would require a procedural or substantive change, or perhaps a change to the public hearing date. No justification is provided as to why changing the date that ends the comment period would not be considered an amended or supplemental notice. Regardless, the Department has concluded that the first or original notice, published on September 8, 2017, initiated the six-month period in which the Department may not adopt the notice. Based on the Department's analysis of section 2-4-305(7), the end of the six-month period would be March 8, 2018, since the Department does not consider the Notice of Extension of Comment Period published on September 22, 2017, an amended or supplemental notice. Therefore, the Department has advised legislative legal staff that it will submit MAR Notice 36-22-196 to the Secretary of State by the February 13, 2018, deadline for publication in the February 23, 2018, edition of the MAR. This decision was shared to members of the WPIC on January 26, 2018.

³ Mont. Code Ann. § 2-4-305(7).

⁴ In 1981, the Legislature inserted the language allowing for supplemental notice. Ch. 381, L. 1981.

⁵ Mont. Code Ann. § 2-4-305(8)(c).

⁶ See Letter from Barbara Chillcott, Department of Natural Resources and Conservation, to Erin Bills, Montana Legislative Services Division, Legal Services Office (January 26, 2018) (on file with the Legal Services Office).

Based on the Department's decision to submit the adoption notice of MAR Notice 36-22-196 prior to the expiration of the six-month period delaying adoption of this notice pursuant to 2-4-305(9), MCA, members of the WPIC have scheduled a meeting for February 9, 2018, to review rules proposed under this notice.

In deciding how to proceed, the WPIC may want to consider the following actions at its February 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;⁷ or
3. Request that staff draft a formal objection letter for the WPIC's consideration. The WPIC may only formally object if the proposed rule is not in substantial compliance with specific provisions of MAPA.⁸ A formal objection requires the WPIC to identify specific reasons for this action and must include the portions of the rule that is objectionable in the WPIC's opinion. If the WPIC pursues this option, it may want to approve a letter of objection before the Department's perceived deadline of February 13, 2018, to avoid any statutory interpretation disputes.⁹

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⁷ Mont. Code Ann. §§ 2-4-402, 2-4-411, and 2-4-412.

⁸ Mont. Code Ann. § 2-4-406. [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.]

⁹ Chief Legal Counsel, Todd Everts, reviewed this memorandum and agrees with the legal conclusions in this memorandum.