



## Water Policy Interim Committee

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### 65th Montana Legislature

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NADINE SPENCER, Secretary

September 25, 2017

To: Water Policy Interim Committee Members  
From: Erin Bills  
Re: Legislative Administrative Rule Review Report

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

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

**RULE CLASSIFICATION (e.g. substantive/interpretive/emergency/temporary):**  
Substantive

**SUBJECT:** Water Right Permitting

**NOTICE DESCRIPTION (e.g. proposal notice/adoption notice):** Notice of public hearing on proposed amendments and repeal

**SUMMARY OF RULE(S):** The Department of Natural Resource and Conservation (DNRC) is proposing to amend nine administrative rules pertaining to water right permitting. The water right permitting rules proposed to be amended are: 36.12.101\*, 36.12.105, 36.12.107, 36.12.117, 36.12.121, 36.12.1301, 36.12.1501, 36.12.1702, and 36.12.1801. The DNRC is proposing several revisions to these rules, including the following: (1) clarify defined terms; (2) extend the water right permit exemption for temporary emergency appropriations;<sup>1</sup> (3) eliminate filing fee refunds after a deficiency letter is issued; (4) expand requirements necessary to object to an application; (5) clarify aquifer testing requirements; (6) facilitate preapplication consultation between the applicant and the Montana Sage Grouse Habitat Conservation Program to ensure that Department permit and change application decisions are consistent with Executive Orders 12-2015 and 21-2015; (7) clarify the timeline and expected outcome when a deficiency letter is issued to an applicant; (8) clarify measurement data used to demonstrate physical surface water availability; and (9) require an explanation of the beneficial use flow rate for permit and change applications.

The DNRC is also proposing to repeal ARM 36.12.106. This rule pertains to testing and

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<sup>1</sup>See House Bill 429 (2017).

monitoring. In the statement of reasonable necessity, the DNRC indicates that this "rule restates verbatim statutory language in 85-2-369, MCA. Pursuant to 2-4-305, MCA, 'rules may not unnecessarily repeat statutory language.'" Because this rule is not compliant with the Montana Administrative Procedure Act (MAPA), no further explanation was provided.

**\*Defining "Combined Appropriation" (ARM 36.12.101):** The Department is proposing to adopt a new definition of the term "combined appropriation" for exempt wells to align with controlling judicial opinion.

The Water Use Act, passed in 1973, established a new process for formally permitting water rights in Montana. Among other things, permit requirements include an analysis of physical availability at the point of diversion, legal availability, and whether there are any adverse effects on existing water right holders. 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." 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 and is further defined by the DNRC. In 1987, the DNRC adopted a rule to define the term "combined appropriation" as an appropriation from the same source aquifer by two or more ground water developments that could have been accomplished by a single appropriation. In sum, the development did not have to be physically connected or combined to constitute a "combined appropriation" and trigger the need for a permit. The rule was revised in 1993 to provide that a "combined appropriation" is one that is physically manifold into the same system. Therefore, as long as the developments aren't connected, they are 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 rule. They also formally requested the agency to initiate rulemaking to revise the 1993 rule. The DNRC denied the petition in 2010, but said it would amend the rule to address concerns raised in the petition. The Clark Fork Coalition filed a petition for judicial review of the decision in the district court in Lewis and Clark County, but the parties ultimately stipulated that DNRC would conduct rulemaking and that the rule would broaden the "combined appropriation". The stipulation was then extended to allow the Water Policy Committee to study the exempt well issue. The extension was in response to a bill that prohibited DNRC from conducting rulemaking on the issue for a certain time while the study was being completed. Ultimately, the DNRC proposed a revised rule in August of 2013. The Water Policy Committee expressed concern about that proposal, and the Environmental Quality Council formally objected to the rule. DNRC proposed another version of the rule, but the rule was eventually withdrawn and the litigation resumed in the First Judicial District Court.

In October 2014, Judge Sherlock ruled that the 1993 definition of the term "combined appropriation" violated the Water Use Act. The court stated that the 1993 rule allowed large

consumptive uses without the need of going through the permitting process in violation of the Water Use Act. The court recognized that the Legislature intended to allow small uses of ground water without the need of going through the permitting process, but according to the court, the 1993 rule violated the intent of the Water Use Act. The court also noted that the rule denied senior water users an effective means of enforcing their senior priority dates. Judge Sherlock then reinstated the 1987 rule, which the court found to be more consistent with the Water Use Act. The court also ordered DNRC to initiate rulemaking consistent with its decision.<sup>2</sup>

The decision was appealed by the Montana Well Drillers Association, and other parties intervened in the case, including the Montana Association of Realtors and the Montana Building Association. In a subsequent order, the district court stayed the DNRC rulemaking process until a final decision from the Montana Supreme Court was received.

In September 2016, the Montana Supreme Court affirmed the district court's invalidation of the DNRC rule defining "combined appropriation," holding that the term refers to the total amount or maximum quantity of water that may be appropriated without a permit and not the manner in which wells or developed springs may be connected.<sup>3</sup> The Court reinstated the 1987 rule until a new rule is initiated at the discretion of the DNRC.<sup>4</sup>

On September 8, 2017, the Department proposed a new definition of the term "[combined appropriation](#)". The proposed definition is consistent with the 1987 rule that the Court reinstated; however, it does not provide factors necessary to determine whether a combined appropriation exists. The proposed rule defines what would not be considered a combined appropriation, but what a combined appropriation actually is remains unclear. As currently proposed, combined appropriation is defined as "an appropriation of water from the same source aquifer by two or more groundwater developments, ~~that are physically manifold into the same system.~~ the purpose of which, in the department's judgment, could have been accomplished by a single appropriation."

**COMMITTEE OPTIONS (e.g. objection process):** If the majority of the Committee objects to the proposed rule, the Montana Administrative Procedure Act (MAPA) provides two processes for objecting to a proposed administrative rule. For the purposes of this memorandum, these processes for objecting are referred to as an informal objection and a formal objection. A summary of the two objection processes are provided below.

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<sup>2</sup> *Clark Fork Coalition v. Tubbs*, No. BDV-2010-87, (Mont. First Jud. Dist. Ct. Lewis and Clark Cnty. Oct. 17, 2014).

<sup>3</sup> *Clark Fork Coalition v. Tubbs*, 384 Mont. 503, ¶ 24 (Mont. 2016).

<sup>4</sup> *Id.* at ¶ 45.

### *Informal Objection*

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.** Under the informal objection, the Committee must notify the agency in writing that it objects. But, the Committee is not required to set forth reasons for the objection. This objection may delay the adoption of the rule up 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) can be delayed up until late March 2018.<sup>5</sup>

### *Formal Objection*

A formal objection is lodged pursuant to 2-4-406, MCA. The effect of this objection is that the effective date of a rule is delayed up until the end of the next legislative session unless the Committee withdraws the objection before the rule is adopted or unless the rule is adopted with changes that make it comply with the Committee's objection and concerns. 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. If the Committee files the objection with the Secretary of State, the burden of proving the validity of the rule shifts to the Department if there is ever a lawsuit challenging the validity of the rule.

In deciding how to proceed, the Committee may want to consider the following actions at its October 9-10, 2017, meeting:

1. Take no action, which would allow the Department to proceed with adopting the rules as proposed;
2. Vote to informally object until the Committee's January 8-9, 2018, meeting, which would delay the adoption of the rules until that meeting; or
3. Vote to object until the Committee's January 8-9, 2018, meeting, which would delay the adoption of the rules until that meeting, and request that staff draft a formal objection letter for the Committee's consideration at the next meeting. The Committee may formally object if the proposed rule is not in substantial compliance with specific provisions of MAPA referred to in the formal objection section of this memorandum. A

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<sup>5</sup>As of September 21, 2017, the 2018 MAR Publication Schedule had not been published.

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.

**NOTES (e.g. hearing dates):** A hearing is scheduled on the above referenced rules on October 6, 2017, at 10:00 a.m., in the Ted Doney Conference Room, Water Resources Building, 1424 Ninth Avenue, Helena, Montana.

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