

From: Patrick Byorth
To: [Mohr, Jason](#)
Cc: [Laura Ziemer](#); [Stan Bradshaw](#); [Megan Casey](#)
Subject: RE: WPIC bill draft on legal availability and change applications
Date: Friday, August 24, 2018 12:47:55 PM
Attachments: [image001.png](#)

Hi Jason,

Thank you for the chance to provide some feedback on the language in LWC004. No doubt you have wrestled with the same issues we have in trying to untangle the DNRC's unwarranted cross-over between the legal availability analysis required in section 85-2-311 for a new appropriation, and the change authorization in Section 85-2-402, requiring DNRC authorization for post-'73 changes in uses or elements of a water right. I've proposed a small language change in LWC004 to try and clarify the intent and purpose of LWC004, with my explanation for the change as follows:

Under the law, an applicant for a new water right must prove there is water physically and legally available for a new appropriation. The standard for proving legal availability is comparing the sum all water rights on a given source against the median of the mean monthly stream flow. If there is more water on average available in a given month than the maximum possible appropriation, then there is water legally available.

In practice, DNRC improperly applies the legal availability analysis required in section 311 *for a new water permit* to analyze adverse effects *in the water right change process* required in section 402. By doing so, DNRC has improperly created a presumption of adverse effects whenever the legal availability formula indicates less water available on average than maximum legal demands. For most streams in Montana, in which more water is claimed than actually available, any change would result in a determination of adverse effects. If over-appropriation of a source creates a presumption of adverse effects, the prior appropriation doctrine is turned on its head and few changes will ever occur.

The proposed language of LWC004 is designed to address this conundrum. The goal being to ensure that DNRC properly processes permits and changes by requiring an "on-the-ground" adverse effects analysis specific to the given application rather than relying on a formula that doesn't belong.

As an alternative to this current proposed language in 402(2)(a):

...if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been

issued under part 3. For purposes of this section, the department may not use the legal availability analysis in subsection 85-2-311(1)(a)(ii) to determine adverse effects.

We'd propose this amendment:

...if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3. For purposes of this section, **adverse effects analysis is specific to the proposed change, and the department may not use the legal availability analysis in subsection 85-2-311(1)(a)(ii) to create a presumption of adverse effects.**

We appreciate the opportunity to weigh in. Please feel free to contact me, Laura or Stan if you have any further questions. Best,

Pat



PATRICK BYORTH | Montana Water Director, Western Water and Habitat Project
321 E. Main Street, Suite 411, Bozeman, MT 59715
406.522.7291 | 406.548.4830 c | www.tu.org

From: Mohr, Jason <JasonMohr@mt.gov>

Sent: Tuesday, August 7, 2018 7:50 AM

To: Patrick Byorth <Patrick.Byorth@tu.org>; Abigail St. Lawrence (abigail@stlawrencelaw.com) <abigail@stlawrencelaw.com>; Abigail St. Lawrence <abigail.stlawrence@gmail.com>; Langel, Jan <jlangel@mt.gov>; Andrew Gorder <andrew@clarkfork.org>; 'holly@franzdriscoll.com'

<holly@franzdriscoll.com>; Julie Merritt <Jmerritt@wgmgroup.com>; blakecrk@gmail.com; Schenk, Bill <BSchenk@mt.gov>; Heffner, Millie <MHeffner@mt.gov>; brian ohs <brianohs212@gmail.com>

Cc: Bills, Erin <Erin.Bills@mt.gov>

Subject: WPIC bill draft on legal availability and change applications

On July 17, the Water Policy Interim Committee voted unanimously to ask interest groups and stakeholders for your ideas concerning bill draft LCw004, "Clarify that legal availability analysis does not determine adverse effects as criteria in a water right change application."

Please send any suggestions (or general comments) you may have to me by Aug. 24. I'll draft as many options as necessary.

Please note that I'm working remotely until Aug. 16, so email is the best way to contact me until then.

Thanks,

Jason Mohr, research analyst
Montana Legislative Environmental Policy Office
Capitol Building, room 171
P.O. Box 201704
Helena, MT 59620-1704
(406)444-1640