



# Water Policy Interim Committee

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## 68th Montana Legislature

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January 5, 2024

TO: Water Policy Interim Committee  
FROM: Alexis Sandru, Staff Attorney  
RE: Administrative Rule Report – January 2024 Meeting (MAR 20 through 24)

This report summarizes administrative rules concerning the quality or quantity of water that have been proposed or adopted by the Department of Environmental Quality (DEQ), the Department of Fish, Wildlife, and Parks (FWP), and the Department of Natural Resources and Conservation (DNRC) since WPIC's October 2023 meeting. Rule notices are available at <https://rules.mt.gov>.

## PROPOSAL NOTICES

**MAR Notice Number: 17-433** (Issue 20, October 20, 2023)

Subject: Montana ground water pollution control system permits

Summary: The DEQ is proposing to adopt two new rules and to amend several existing rules pertaining to Montana ground water pollution control system permits. The proposed new rules: (1) provide for the continuation of an expired permit until a new permit is issued if certain conditions are met; and

(2) obligate interested parties to raise all reasonably ascertainable issues and arguments regarding a tentative permit decision by the end of the public comment period.

The proposed amendments:

- (1) revise definitions;
- (2) clarify that permit exclusions apply to the total nitrogen load from a public sewage system reviewed and approved by the DEQ under a common design plan or serving a common development;
- (3) provide that an application for a permit is not complete until a fee is remitted to the DEQ;
- (4) require that public notice be provided of every tentative determination to issue a permit (currently notice of a completed permit application is required);
- (5) require that a request for reissuance of a permit must be submitted at least 180 days prior to the date of expiration (currently 90 days);
- (6) revise public notice procedures involving the DEQ's tentative determination to issue a permit, including to whom notice must be provided; and
- (7) remove federal agencies from the list of entities to whom public notice of tentative determinations to issue permits must be provided.

Notes/Hearing: A public hearing was held on November 15, 2023. Written public comment was due on November 17, 2023.

## **ADOPTION NOTICES**

**MAR Notice Number: 36-22-218** (Proposed Issue 15, August 4, 2023; Adopted Issue 21, November 3, 2023)

Subject: Navigable waterways

Summary: The DNRC proposed to amend an existing administrative rule (36.25.1102, ARM) concerning the use of a river bed that has not yet been adjudicated as navigable. Under the existing ARM, the DNRC may issue an easement, a lease, or a license for the Board of Land Commissioner's approval of the use of a river bed that has not yet been adjudicated navigable. The proposed amendment would allow the DNRC, without approval of the Board of Land Commissioners, to issue a license for the use of a river bed that has not yet been adjudicated as navigable. In its rationale for the rulemaking, the DNRC noted: (1) the licenses are mostly used for erosion control, flood impact reduction, and general irrigations systems maintenance; (2) the existing added step of requiring approval by the Land Board costs critical waiting time; and (3) the proposed amendment increases efficiencies and improves the ability to respond to floods and other impacts.

Notes/Hearing: A public hearing was held on September 7, 2023. Written public comment was due on September 7, 2023.

*Adoption Notice Notes:* DNRC received no public comment and adopted the rulemaking as proposed.

**MAR Notice Number: 36-22-219** (Proposed Issue 19, October 6, 2023; Adopted Issue 24, December 22, 2023)

Subject: Water right permitting

Summary: The DNRC proposed to adopt five new rules and to amend and repeal existing rules pertaining to water right permitting. The proposed new rules:

- (1) allow an applicant to make a written request for a variance from the requirements of ARM 36.12.121(aquifer testing requirements) or 36.12.1702 (permit application criteria – physical surface water availability) and provide procedures and timelines for granting or denying the variance request;
- (2) establish the requirements and procedures for a preapplication meeting;
- (3) provide the required technical analyses for surface and groundwater permit and change applications;
- (4) provide procedures for filing a permit application for surface or groundwater that does not meet an exception to permit requirements under 85-2-306 and provide procedures for acceptance of the application; and
- (5) provide procedures for filing a change application and provide procedures for acceptance of the application.

The proposed amendments:

- (1) update definitions and update references to forms;
- (2) increase filing fees, which the DNRC stated is necessary to hire staff to meet the deadlines associated with HB 114 (2023). The DNRC estimated that the monetary impact of the proposed increase in fees will result in a total cumulative annual amount of \$1,069,500 (see proposal notice pages 30-31 for detailed fiscal analysis).

- (3) revise legal land use description standards for identifying points of diversion;
- (4) revise standards for maps that must be included with applications;
- (5) revise period of diversion and period of use standards to include a standard for climatic area VI and require documentation for certain period of use purposes and deviations from standards;
- (6) revise reservoir standards to require that an application for a new or existing reservoir must identify the capacity of the reservoir and the annual volume of net evaporation;
- (7) revise standards for calculating net evaporation;
- (8) in accordance with HB 114 (2023) timeframes, revise the timeframe for an objector to respond to a deficiency letter;
- (9) revise aquifer testing requirements;
- (10) provide revised procedures for modifying a permit or change application once the application has been accepted;
- (11) revise timeframes for notifying applicants of defects;
- (12) clarify requirements for a correct and complete application determination;
- (13) revise criteria by which physical surface water availability is determined for the different surface water sources;
- (14) revise criteria by which physical groundwater availability is determined;
- (15) revise procedures for DNRC determining legal availability;
- (16) revise permit application criteria requirements addressing adverse effect, adequate diversion means and operation, and beneficial use; and
- (17) revise change application criteria concerning adequate diversion means and operation and to clarify that the department evaluates net depletion.

The DNRC also proposed to repeal several existing ARMs because the content is either incorporated in the proposed new rules or proposed amendments.

Notes/Hearing: A public hearing was held on October 26, 2023. Written public comment was due on November 3, 2023.

*Adoption Notice Notes:* The DNRC responded to 28+ public comments and, in response to the comments received, adopted the rulemaking with revisions, including but not limited to the following (please see the adoption notice for all comments/responses and revisions):

- (1) revised new rule I to clarify that the DRNC may only grant a variance request if it determines that the application materials and data provide sufficient information;
- (2) in new rule III, clarified the scope and applicability of the new rule and clarified that the scientific credibility review required under the rule “will evaluate the methodology, quality of the analysis, and relevance of the data used for the technical analyses”;
- (3) revised aquifer testing requirements to clarify that an observation well must be completed in the same source aquifer as the production well but far enough away that well hydraulics do not affect the observation well;
- (4) revised the analysis for physical availability for perennial or intermittent streams to provide that if measurement records are available, physical availability is quantified using the median of the mean monthly flow rate and volume during the proposed months of diversion and, if measurement records aren’t available, the mean monthly flow rate and volume of water physically available may be estimated;
- (5) re-inserted existing language regarding who may appropriate water for beneficial use;
- (6) revised rules regarding legal availability by deleting language stating that legal demands will be identified based on water right records in the WRIS and substituted “legal demands of water rights” for “legal demands”; and

(7) made additional clerical changes, such as updating erroneous citations and references to forms.

The rulemaking went into effect January 1, 2024.