



Water Policy Interim Committee

68th Montana Legislature

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October 11, 2023

TO: Water Policy Interim Committee
FROM: Alexis Sandru, Staff Attorney
RE: Administrative Rule Report – October 2023 Meeting (MAR Issues 14 through 19)

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 July 2023 meeting. Rule notices are available at <https://rules.mt.gov>.

PROPOSAL NOTICES

MAR Notice Number: 36-22-218 (Issue 15, August 4, 2023)

Subject: Navigable waterways

Summary: The DNRC is proposing 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 notes: (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.

MAR Notice Number: 36-22-219 (Issue 19, October 6, 2023)

Subject: Water right permitting

Summary: The DNRC is proposing 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 states is necessary to hire staff to meet the deadlines associated with HB 114 (2023). The DNRC estimates 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 is also proposing to repeal several existing ARMs because the content is either incorporated in the proposed new rules or proposed amendments.

Notes/Hearing: A public hearing is scheduled on October 26, 2023, at 11 a.m. at the Montana Room, 1539 Eleventh Ave., Helena, MT and via Zoom (see proposal notice for additional details). Written public comment is due by 5 p.m. on November 3, 2023.

ADOPTION NOTICES

None.