

BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION OF THE STATE OF MONTANA

In the matter of the adoption of New) NOTICE OF ADOPTION
Rule I regarding the Horse Creek)
Controlled Groundwater Area)

To: All Concerned Persons

1. On October 27, 2011, the Department of Natural Resources and Conservation published MAR Notice No. 36-22-161 regarding a notice of public hearing on the proposed adoption of the above-stated rule at page 2218 of the 2011 Montana Administrative Register, Issue No. 20. Prior to filing and publication of the notice of public hearing on the proposed adoption, the department also held an open house for the public in Absarokee, Montana, on September 19, 2011.

2. Upon further review, the department has determined that the reference to "a Notice of Completion" in (2) should be clarified to make clear that only one Notice of Completion of Groundwater Development, Form 602, for each parent tract for any of the listed purposes will be allowed after the effective date of this rule. The department has replaced the term "a" with "one" and added a reference to "per parent tract" to confirm its original intent that the reference means specifically "one".

3. The department has adopted New Rule I (36.12.905) as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

NEW RULE I HORSE CREEK CONTROLLED GROUNDWATER AREA

(1) remains as proposed.

(2) The department shall accept a one Notice of Completion of Groundwater Development, Form 602, per parent tract within the HCCGWA if all of the following are met, otherwise an Application for Beneficial Water Use Permit, Form 600 must be filed.

(a) through (8) remain as proposed.

4. A summary of the written and oral comments from the November 17, 2011, public hearing appears below with the department's responses.

GENERAL COMMENT:

The DNRC received some comments regarding whether the criteria for establishing a Controlled Groundwater Area (CGWA) have been met in this instance. Specifically, comments were received that the DNRC had not met the burden in 85-2-506(5), MCA, that impacts due to groundwater withdrawals will reduce surface water availability *and cannot be appropriately mitigated*.

GENERAL RESPONSE: By proposing the rule, DNRC had considered whether water right holders could reasonably exercise their water rights where flows from springs decreased or ceased and surface water flows decreased. In DNRC's view,

surface and spring water right holders could not reasonably exercise their water rights where dropping groundwater levels would require the water right holders to put in a groundwater development to access their water rights. No comments were received suggesting any form of possible mitigation, including whether groundwater developments or any other alternative would effectively mitigate reduced groundwater levels and impacts to surface and spring water rights. The DNRC is not aware of any alternatives for appropriate mitigation. The DNRC finds that 85-2-506(5)(b), which reads: "current or projected ground water withdrawals from the aquifer or aquifers in the proposed controlled ground water area have reduced or will reduce ground water levels or surface water availability necessary for water right holders to reasonably exercise their water rights...", has been proven by a preponderance of the evidence and cannot be appropriately mitigated. Therefore, the requirement in 85-2-506(5), MCA: "...any of the following criteria have been met and cannot be appropriately mitigated...", has been established by a preponderance of the evidence.

COMMENT 1:

The current or projected reductions in recharges to the aquifer or aquifers in the proposed CGWA will cause groundwater levels to decline to the extent that water right holders cannot reasonably exercise their water rights.

RESPONSE 1:

DNRC is without information or knowledge that reductions in recharge to the Horse Creek aquifer(s) are occurring or will occur in the future. No information/evidence regarding this issue was submitted in response to the proposed rule.

COMMENT 2:

Current or projected groundwater withdrawals from the aquifer(s) in the proposed CGWA have reduced, or will reduce groundwater levels or surface water availability necessary for water right holders to reasonably exercise their water rights.

RESPONSE 2:

DNRC agrees. Data shows that groundwater withdrawals have, or will reduce surface water flows. Dr. Willis Weight provided extensive testimony regarding the geohydrologic conditions in the proposed CGWA. DNRC is addressing this situation through the proposed rule.

COMMENT 3:

Current or projected groundwater withdrawals from the aquifer(s) in the proposed CGWA have, or will induce or alter contaminant migration exceeding relevant water quality standards.

RESPONSE 3:

DNRC is without information or knowledge regarding contaminants in the proposed Horse Creek aquifer(s), or the potential migration of contaminants in the aquifer(s). No information/evidence regarding this issue was submitted in response to the proposed rule.

COMMENT 4:

Current or projected groundwater withdrawals from the aquifer(s) in the proposed CGWA have, or will impair groundwater quality necessary for water right holders to reasonably exercise their water rights based on relevant water quality standards.

RESPONSE 4:

DNRC is without information or knowledge that relevant water quality standards will be degraded to the point that water right holders will not be able to reasonably exercise their water rights. No information/evidence regarding this issue was submitted in response to the proposed rule.

COMMENT 5:

Two commenters testified generally in support of the proposed CGWA.

RESPONSE 5:

DNRC thanks the commenters for their input in the rulemaking process.

COMMENT 6:

Commenter testified in opposition to the proposed CGWA based on the "Hydrologic/Hydrogeologic Assessment Proposed Horse Creek Controlled Ground Water Area" prepared by Nicklin Earth and Water 2008 (rev.001).

RESPONSE 6:

The report entitled "Hydrologic/Hydrogeologic Assessment Proposed Horse Creek Controlled Ground Water Area" was prepared by Nicklin Earth and Water for testimony at a DNRC hearing scheduled for December 18, 2007, that was subsequently vacated. Nicklin concludes that the source to wells in Crow Chief Meadows is the Tullock Aquifer and that recharge greatly exceeds consumptive use by prospective homes in the subdivision. Nicklin also concludes that future development in the proposed controlled groundwater area will likely be limited because the petitioner group owns most of the land and that there is no evidence that groundwater levels are declining. The findings in the Nicklin report are generally consistent with the findings in the April 2009 DNRC report, "Ground Water Conditions at the Horse Creek Temporary Controlled Ground Water Area" ("DNRC April 2009 report") with the exception of the assessment of the potential for significant impacts to springs resulting from prospective groundwater development. The water balance assessment in the DNRC report indicates that groundwater development, even limited to established lots, could reduce or eliminate discharge along faults to springs and Horse Creek.

COMMENT 7:

DNRC previously designated a temporary CGWA for Horse Creek which expired in 2006. Designation of a CGWA now, through the rulemaking process using data which is three to five years old and outdated, is not appropriate. The DNRC should, at most, designate another temporary CGWA to collect current data and then proceed as appropriate based on that data.

RESPONSE 7:

DNRC's proposed designation of the Horse Creek CGWA through rule is authorized by 85-2-506(1), MCA: "The DNRC may by rule designate or modify [a] permanent or temporary controlled ground water area[] as provided in this part". DNRC's current proposed designation is based primarily upon the DNRC April 2009 report. This report is based on the most current information regarding groundwater conditions in the Horse Creek area.

COMMENT 8:

The record does not show that the criteria for establishment of a CGWA has been met by a preponderance of the evidence. The DNRC April 2009 report only indicates that springs in the area "could" dry up and average annual flow in Horse Creek "could" be reduced by 25 percent. Those conclusions do not show that springs "will" dry up or that flows "will" be reduced. In any event, the data does not show that water right holders will not be able to reasonably exercise their water rights in the event that springs actually do dry up, or flows in Horse Creek are reduced. The record also does not show that any potential adverse effect cannot be adequately mitigated.

RESPONSE 8:

Preponderance of the evidence is "[e]vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it," (Black's Law Dictionary, Fifth Edition). The DNRC April 2009 report, supported by the testimony of Dr. Willis Weight at the hearing on the proposed rule clearly demonstrates the potential for adverse effect due to withdrawals of groundwater. Factual findings in opponents' expert report by Nicklin Earth and Water, Inc. are generally consistent with the findings of both DNRC and Dr. Weights—only Dr. Nicklin's conclusions are different. DNRC is without information on potential mitigation measures which would allow springs to flow with continued unrestricted development. No information/evidence regarding this issue was submitted in response to the proposed rule.

COMMENT 9:

The Crow Chief Meadows Subdivision will never be fully built out because of the real estate market and the fact that some current owners in the subdivision have multiple lots that they have no intention of developing. Thus, the estimates of potential impact are overstated.

RESPONSE 9:

As platted, the Crow Chief Meadows Subdivision could, at some future time be fully developed despite the current real estate market and the current intentions of the existing lot holders.

COMMENT 10:

The proposed CGWA is nothing more than an attempt to prevent the development of the Crow Chief Meadows Subdivision.

RESPONSE 10:

DNRC is under an obligation to protect senior water right holders. Establishment of CGWAs is a tool that DNRC may use to fulfill that obligation.

COMMENT 11:

Two commenters testified that they wished their property to be excluded from the CGWA.

RESPONSE 11:

The boundary of the proposed Horse Creek CGWA is generally based on hydrogeologic conditions, not property ownership.

COMMENT 12:

Commenter provided testimony and exhibits, including water quality data, as to why his parcel should be excluded from the CGWA.

RESPONSE 12:

The water quality data provided is not conclusive as to whether this parcel is not hydrologically connected with the Horse Creek aquifers. The boundary of the proposed Horse Creek CGWA is generally based on hydrogeologic conditions.

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

/s/ Mary Sexton

MARY SEXTON

Director

Natural Resources and Conservation

/s/ Anne Yates

ANNE YATES

Rule Reviewer

Certified to the Secretary of January 3, 2012.