

FAQs

REGARDING THE NEW WATER RIGHT PERMIT AND CHANGE APPLICATION PROCESS

WHY DID DNRC CHANGE THE PROCESS?

Many people including attorneys, consultants, private individuals, as well as DNRC staff, had expressed some level of frustration with the pre-reformed process. Under the pre-reformed process, the applicant was required to provide all information used in the decision making process even though this information often duplicated information that DNRC already had or developed for each application. The amount of information required to meet the criteria listed in § 85-2-311 and § 85-2-402, MCA is no doubt extensive. (The specific information required is listed in 36.12.1701 through 36.12.1904, ARM.) There was often a disconnect between the information DNRC needed to meet the criteria and what applicants and their representatives provided to DNRC. Deficiency letters were sent on most applications as it was difficult for applicants to fully understand everything that was required and it was difficult for DNRC to understand why some information was submitted.

On the converse, extensive amounts of information were often provided which delayed processing of the application as the DNRC employee assigned to the application would spend days or even weeks combing through information that was not necessary for the DNRC to make a decision on an application. Under the new process, DNRC will actually put together much of the information required to make a decision independently while only requesting minimal information from the applicant. The ultimate intent of the new process is to reduce the uncertainty and confusion often associated with the Permit and Change Process and to save applicants time and money putting together applications and throughout the review process.

WHAT IS THE PRE-APPLICATION MEETING AND IS IT REQUIRED?

The pre-application meeting is a meeting between the applicant and/or their representatives (including attorneys or consultants) and DNRC staff. While a pre-application meeting is not required it is highly encouraged and if a pre-application meeting is held, the applicant will be granted a \$200 reduction in the filing fee. Keep in mind, a pre-application meeting is not intended to be a “scoping” meeting in which a potential applicant simply asks numerous questions regarding the possibility of obtaining a water right. While these meetings often occur, they are not true pre-application meetings and will not qualify for a reduced application filing fee.

A pre-application meeting allows the applicant to actually see what will be required for their application while allowing DNRC staff to get a good grasp of what the applicant is proposing to do. Pre-application meetings held in the past have proven to be very helpful to both applicants and DNRC staff. A generalized pre-application meeting form can be found on the forms page. This form will be filled out by DNRC staff at the meeting; however, you can preview the form to get an idea of what will be discussed and what information you should have at the time of the meeting.

**A pre-application meeting is in no way a pre-approval meeting and attending a pre-application meeting does not guarantee a water right will be issued to you at the end of the process.*

WHAT FORMS DO I USE?

The “base form” for a Provisional Permit for a new appropriation of water is still the Application for Beneficial Water Use Permit (Form 600). There are separate 600 forms for surface and groundwater. The “base form” for a Change Authorization is still the Application to Change a Water Right (Form 606). There are separate 606 forms for irrigation and non-irrigation changes. There are also numerous addendums designed to elicit the specific information needed based upon the intended use of the water

right. This information will be discussed at the pre-application meeting. Feel free to contact DNRC to discuss the forms/addendums that will be needed for your application.

WHAT IF MY APPLICATION IS INCOMPLETE?

If the application is grossly deficient (i.e. missing addendums, blank pages, etc.), it will be returned to you without processing. If the application appears to be complete, DNRC will begin processing the application and a deficiency letter will be sent requesting the missing information within 180 days.

WHAT CAN I ATTACH TO MY APPLICATION?

When submitting the application, only attach information specifically asked for in the form. If information not requested by the department is attached at the time of receipt of the application, it will not be considered in determining whether the application is correct and complete. Part of the reason the process was reformed was to ensure that DNRC receives adequate information to review an application on the forms themselves without requiring the applicant to prepare and submit large amounts of additional information with their applications. Providing large amounts of additional information will simply slow the process. However, the next section outlines when and how the applicant may submit additional information later in the process.

CAN I AMEND OR CHANGE MY APPLICATION?

Any time the applicant chooses to change something on the application, it is considered an amendment. The applicant may amend the application at any time prior to a preliminary determination; however, amending an application will reset all statutory timelines. If the applicant chooses to amend the application all timelines are reset including the 180 day timeline for issuance of a deficiency letter and the priority date, in the case of permit applications, becomes the date the amendment was submitted. This has the potential to greatly delay the process. If the change is very minor and does not require any analysis, the timelines *may not* change. If the amendment completely changes the application, the applicant may be required to submit a new application.

WHAT IS "CORRECT & COMPLETE?"

WHAT ARE THE PERMIT AND CHANGE APPLICATION CRITERIA I MUST MEET WHEN SUBMITTING AN APPLICATION?

The term "correct & complete" simply means that all information required from the applicant has been provided in order for DNRC to begin evaluating the criteria (§ 85-2-102(8), MCA). The information submitted for "correct and complete" must be substantial credible information. This means that the information contains probable believable facts sufficient to support a reasonable legal theory (§ 85-2-102(22), MCA).

The criteria for obtaining a Beneficial Water Use Permit (§ 85-2-311, MCA) are as follows and must be proven by a preponderance of the evidence

Physical Availability: It must be proven that the amount of water the applicant is requesting is physically available at the proposed point of diversion.

Legal Availability: Water must be reasonably legally available during the period in which the applicant seeks to appropriate, in the amount requested. The water rights on record with the DNRC within the area of impact are used in the legal demand analysis. The legal demands (other water rights on record with the DNRC) are subtracted from the physically available amount to determine if water is legally available for the requested new use.

Adverse Effect: Water is allocated based upon date of first proven use (priority date). New uses of water will have the latest priority dates and it must be proven that the new

proposed use with a later priority date will not adversely affect any senior water users (those with older priority dates). This is determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates the use of water will be controlled so that senior water users' rights will be satisfied.

Beneficial Use: The amount of water requested must be put to a beneficial use. The benefit may be to the applicant or any other persons including the general public. Water cannot be wasted in the State of Montana; therefore, the flow rate and volume requested must be the amount needed for the purpose.

Adequate Diversion: The applicant must show that the requested water can be properly conveyed from the point of diversion through to the place of use.

Possessory Interest: The applicant must have possessory interest in the place of use or the consent of the person with the possessory interest in the place of use.

*Also view the Administrative Rules of Montana 36.12 subchapters 17 and 18.

The criteria for obtaining a Change Authorization (§ 85-2-402, MCA) are as follows and must be proven by a preponderance of evidence.

Adverse Effect: Water is allocated based upon date of first proven use (priority date) and everyone has the right to maintenance of source conditions as they were when the user first came on the source. Changes in use cannot adversely affect any other water users on the source. The applicant has the right to change the amount of water put to historic beneficial use. An applicant may not expand their water right. Henceforth, an applicant must establish the amount of water historically put to beneficial use.

Beneficial Use: The amount of water requested must be put to a beneficial use. The benefit may be to the applicant or any other persons including the general public. Water cannot be wasted in the State of Montana; therefore, the flow rate and volume requested must be the amount needed for the purpose.

Adequate Diversion: The applicant must show that the requested water can be properly conveyed from the point of diversion through to the place of use.

Possessory Interest: The applicant must have possessory interest in the place of use or the consent of the person with the possessory interest in the place of use.

*Also view the Administrative Rules of Montana 36.12 subchapters 18 and 19.

WHAT CAN I EXPECT TO OCCUR AFTER I SUBMIT MY APPLICATION?

WHAT IF I DISAGREE WITH DNRC'S DECISION OR THE INFORMATION PROVIDED IN THE TECHNICAL REPORT?

After submitting an application, DNRC will conduct a "correct & complete" analysis. "Correct & complete" simply means that all information required to start evaluating the criteria is present, it does not mean the application can be granted. This is often a confusing concept for all parties involved. DNRC has 180 days to review the application and provide a deficiency letter to the applicant if it is determined that the application is not "correct & complete." The applicant then has up to 90 days to respond to the deficiency letter. If no response is received within the statutory timeline, the application will be terminated and the filing fee will not be refunded. Once the deficiency letter response is received, if the application is still deficient, the application will be terminated.

DNRC will provide the applicant with a technical report when the application is determined to be correct and complete. A technical report outlines the information prepared and obtained by DNRC that will be used in addition to the information submitted by the applicant to evaluate the statutory criteria under § 85-2-311, MCA for new appropriations and § 85-2-402, MCA for changes to water rights.

DNRC recommends the applicant review this technical report thoroughly to see if anything appears to be missing or if there is site specific information that the applicant can provide to DNRC. At this point, an applicant may provide additional information to challenge or expand upon the information in the technical report. If an applicant wishes to submit additional information then he/she must request a meeting with DNRC within 15 days of the "correct and complete" determination and complete a timeline waiver form allowing DNRC extra time to consider the additional information that may be provided since DNRC is statutorily bound to make a decision on the application within 120 days of stating the application is "correct & complete." Check with the person processing the application first, however, to see what information is allowable and necessary for making a decision on the application. Once additional information is submitted, DNRC will immediately resume the review of the application. If a meeting is not requested with DNRC within 15 days of the "correct and complete" determination and no additional information is submitted on the application then DNRC will move forward with making a preliminary determination. This should result in a faster decision on the application.

If the statutory criteria are proven, the DNRC will prepare a preliminary determination to grant the application and will move forward to public notice. Typically, the application is noticed to other water users and in a newspaper of general circulation in the area. Up to 60 days are allowed for objections and if objections are not received, the DNRC will issue the Provisional Permit or Change Authorization. If valid objections are filed, the application is moved to the DNRC Hearings Unit and the contested case hearings process will be initiated.

If it is determined that one or more of the criteria cannot be proven without a modification of the application, the DNRC will prepare a draft preliminary determination to grant with modifications. The applicant will have 15 days to contact the DNRC in order to schedule a meeting and offer additional information as to why the application should be granted as submitted. If the information provided is adequate, DNRC will create the preliminary determination to grant the application and the application will move to public notice as addressed above. If the information is not deemed adequate, a preliminary determination to grant with modifications will stand. If the applicant agrees with the modifications, the application will proceed to public notice. If the applicant disagrees with the modifications, the applicant will be provided an opportunity for a show cause hearing.

If it is determined that one or more criteria have not been proven and the DNRC is unable to modify the application, the DNRC will prepare a draft preliminary determination to deny. The applicant will have 15 days to contact the DNRC in order to schedule a meeting and offer additional information as to why the application should be granted. If the information provided is adequate, DNRC will create the preliminary determination to grant the application and the application will move to public notice as discussed above. If the information is not deemed adequate, a preliminary determination to deny will stand and the application will move to our Hearings Unit and a show cause hearing will be held if the applicant does not withdraw the application.

WHAT ARE THE DIFFERENT TYPES OF HEARINGS AND WHAT SHOULD I EXPECT IF MY APPLICATION GOES TO A HEARING?

There are two types of hearings to which an application may be subject. A show-cause hearing is initiated if the DNRC proposes to deny an application or grant an application with modifications. The hearing will be held within 45 days of issuance of the preliminary determination. This hearing allows the applicant to provide additional information showing why the DNRC erred in its preliminary determination. The burden of proof will be on the applicant. The Hearing Examiner's Final Order will be issued within 90 days of the hearing or 90 days of the close of the record, whichever is later.

A contested case hearing occurs if, after public notice, valid objections have been received on an application that the DNRC has preliminarily determined to grant or preliminarily determined to grant with modifications. The hearing will be scheduled within 90 days of the objection deadline unless all

parties agree to postpone the hearing to an agreed upon date. The objectors will be required to provide evidence indicating how the criteria have not been proven. The Hearing Examiner's decision will be issued within 90 days of the hearing or 90 days of the close of the record, whichever is later.

HOW LONG WILL IT TAKE TO GET OR CHANGE AN EXISTING WATER RIGHT?

DNRC always seeks to review applications as expeditiously as possible; however, actual processing time depends upon many factors. Statutorily DNRC has 180 days to review the application and provide a deficiency letter to the applicant if it is determined that the application is not "correct & complete." The applicant then has up to 90 days to respond to the deficiency letter. DNRC is statutorily bound to make a decision on the application within 120 days of stating the application is "correct & complete." Up to 60 days are allowed for objections and if objections are not received the DNRC will adopt the Preliminary Determination and issue the authorization. The quality of the initial application is a significant determining factor in processing timelines. The better an initial application is, the faster DNRC will be able to process it. Of course other factors include current DNRC workload (applications are processed in the order received), the timeliness of the applicant in responding to deficiencies, if the applicant chooses to supply additional information, whether valid objections are received and if a hearing is pursued as well as other unforeseen issues. The application processing time through issuance is typically between 8-12 months depending on the complexity of the application and other factors.