

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

PETITION TO MODIFY BENEFICIAL WATER USE PERMIT NO. 76LJ 30063778) PRELIMINARY DETERMINATION TO MODIFY PERMIT)

On June 6, 2014, Flathead County Water District #8 (Applicant) submitted a Petition to Modify Permit No. 76LJ 30063778 (Petition) to the Kalispell Water Resources Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The petition requests that the Department remove an 8-hour pump test condition placed on the permit when it was issued on March 24, 2014. The pump test condition was placed on the permit to satisfy physical availability criteria associated with increasing the pumping rate of PWS # 4 from 100 gallons per minute (GPM) to 150 GPM . The Petition was determined to be correct and complete as of April 28, 2016. An Environmental Assessment for the Petition was completed on May 16, 2016.

INFORMATION

The Department considered the following information submitted by the Applicant.

- Petition to Modify Permit, Form 651

Information within the Department’s Possession/Knowledge”

- Provisional Permit No. 76LJ 30063778 File
- Memo from Emily J. Gillespie, P.E., Public Water Supply and Subdivision Bureau, Montana Department of Environmental Quality (MDEQ) to the Deviation Committee entitled “Happy Valley-Flathead County Water District #8 – PWSID#MT000261. Deviation request to add connections to the existing PWS system” dated May 24, 2011.
- Letter from Emily J. Gillespie, P.E., Public Water Supply and Subdivision Bureau, MDEQ entitled “Flathead County Water District No.8 (Happy Valley Subdivision) PWSID#MT000261

Deviation Request for service up to 212 connections – Approval EQ#11-1895” dated June 2, 2011.

- Copy of a MDEQ Public Water and Sewage System Deviation Request for Deviations submitted by a professional Engineer, received by MDEQ June 9, 2011.
- Copy of Sanitary Survey Inspection of Flathead County Water District #8 (PWSID: MT0000261) Report, dated January 1, 2013 compiled by Michael Kropp, Environmental Science Specialist, MDEQ.

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, MCA).

PROPOSED MODIFICATION

FINDINGS OF FACT

1. Provisional Permit No. 76LJ 30063778 with a priority date of August 3, 2012, is for an appropriation of 250 GPM from PWS # 5 and an additional 50 GPM from PWS #4 up to an annual volume of 205.34 acre-feet (AF) diverted from two groundwater wells (PWS #5 and PWS #4) in Happy Valley Subdivision Gov. Lot 2 in the S2N2 Section 30, T30N, R21W, Flathead County. At full build out water will be diverted from the two wells to supply water to 212 homes and 60.10 acres of lawn and garden within the N2 Section 30, W2NW of Section 29, T30N, R21W and the E2E2 of Section 25, T30N, R22W Flathead County, MT.
2. A total of three wells are manifold into the existing public water supply system, that supplies a section of the Happy Valley Subdivision known as Flathead County Water District #8 (FCWD-8). PWS #2 is an existing well authorized under three existing water rights (76LJ 19238, 76LJ 14224 and 76LJ 32245) for a total of 97 GPM up to 116.5 AF. PWS #4 is an existing well authorized under two existing water rights (76LJ 17665 and 76LJ 32245) for a total of 100 GPM up to 162.5 AF. PWS #5 was the proposed new well with a pumping rate of 250

GPM. At full build out the FCWD-8 will service 212 lots and 60.10 acres of lawn and garden. Permit 76LJ 30063778 provided an additional 12.2 AF for 31 domestic uses not currently permitted under any water right and 17.8 AF for 60.10 acres of irrigation. Between the three wells and five rights total diverted volume cannot exceed 205.34 AF.

3. Permit 76LJ 30063778 expanded the capacity of PWS #4 from 100 GPM to 150 GPM. Originally, the Department granted the Applicant a variance which allowed the Applicant the ability to use aquifer characteristics and results derived from the aquifer test conducted on PWS #5 for PWS #4. The Applicant was required to conduct an 8-hour yield test at 150 GPM on PWS #4 and submit results to the Department within one year of permit issuance.

4. The Applicant proposes to modify provisional permit No. 76LJ 30063778 by removing the 8-hour yield test condition on PWS #4. The condition states as follows:

The Appropriator must conduct an 8-hour yield test on the Flathead County Water District #8 well, designated PWS #4 in this document, at 150 GPM and submit test results to the Department within one year of permit issuance.

5. Not submitting the 8-hour yield test would result in the provisional permit not otherwise being followed.

6. The provisional permit is not being followed because the Applicant never changed out the pump or increased the capacity of the PWS #4 pump. FCWD-8 does not require the increased capacity that the well would have produced. Therefore, the Applicant cannot pump test at a greater rate nor do they need to in order to meet Department criteria for physical availability.

**§ 85-2-314, REVOCATION OR MODIFICATION OF PERMIT OR CHANGE IN
APPROPRIATION RIGHT**

GENERAL CONCLUSIONS OF LAW

7. Section 85-2-311, MCA provides in relevant part:

85-2-311. Criteria for issuance of permit. (1) ... Except as provided in subsections (3) and (4), the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

(a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. ...

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit...

8. If the work on an appropriation is not commenced, prosecuted, or completed within the time stated in the permit or an extension of the time stated in the permit, if the water is not being applied to the beneficial use contemplated in the permit or change in appropriation right, or if the permit or change in appropriation right is otherwise not being followed, the department may,

after notice, require the permittee or the holder of the change in appropriation right to show cause why the permit or change in appropriation right should not be modified or revoked. If the permittee or holder of the change in appropriation right fails to show sufficient cause, the department may modify or revoke the permit or change in appropriation right. §85-2-314, MCA.

9. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge, as specifically identified in this document. ARM 36.12.221(4).

10. The Department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in §[85-2-311](#), MCA. 85-2-312, MCA.

11. The criterion at issue with the proposed modification is §85-2-311(1)(b), MCA, adverse effect to other appropriators.

Physical Availability

FINDINGS OF FACT

12. Conclusion of Law No. 22 in the Proposal for Decision issued by the Department in the matter of the Application for Beneficial Water Use Permit 76LJ 30063778 by FCWD-8 found that the Applicant must prove by a preponderance of the evidence that “there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate.” This information is considered necessary to satisfy the criteria in MCA § 85-2-311 (1). In this instance the Department found the 8-hour yield test condition was necessary to prove water physically available in the rate requested for PWS #4.

13. The Applicant never changed out the pump or increased the flow rate produced from PWS #4. In fact the Applicant is pumping less water (60 GPM) than what was originally permitted under 76LJ 17665 and 76LJ 32245. The Montana Department of Environmental Quality (MDEQ) currently only permits PWS #4 at 60 GPM.

14. A 2013 MDEQ Sanitary Inspection Report documents that the flow rate of PWS #4 has not been enlarged.

15. The Department finds that the Applicant does not need to pump test PWS #4 for 8 hours at 150 GPM. The current pumping rate of PWS #4 is smaller than the originally permitted rate of 100 GPM under 76LJ 17665 and 76LJ 32245.

CONCLUSIONS OF LAW

16. Pursuant to § 85-2-311(1)(a)(i), MCA, an applicant must prove by a preponderance of the evidence that “there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate.”

17. It is the applicant’s burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-411 by Anson* (DNRC Final Order 1987)(applicant produced no flow measurements or any other information to show the availability of water; permit denied); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

18. An applicant must prove that at least in some years there is water physically available at the point of diversion in the amount the applicant seeks to appropriate. *In the Matter of Application for Beneficial Water Use Permit No. 72662s76G by John Fee and Don Carlson* (DNRC Final Order 1990); *In the Matter of Application for Beneficial Water Use Permit No. 85184s76F by Wills Cattle Co. and Ed McLean* (DNRC Final Order 1994).

The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (Finding of Fact FOF, 12-15).

Adequate Diversion

FINDINGS OF FACT

19. Conclusion of Law No. 67 in the Proposal for Decision issued by the Department in the matter of the Application for Beneficial Water Use Permit 76LJ 30063778 by FCWD-8 found that the Applicant must demonstrate that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. This

information is considered necessary to satisfy the criteria in MCA § 85-2-311(1)(c). In this instance the Department found the 8-hour yield test condition was necessary to prove the water system, specifically PWS #4, was capable of producing and using 150 GPM.

20. The Applicant never changed out the pump or increased the flow rate produced from PWS #4. According to MDEQ FCWD-8 PWS #4 is not required to pump at 150 GPM. Based on 232,000 gallons of storage, PWS #2 producing 12 GPM and PWS #4 pumping 60 GPM adequate source production and storage is available to meet maximum day demand within the subdivision with a 2-hour fire event given the smaller wells are functioning while the largest well is turned off (PWS # 5 at 250 GPM).

21. The Department finds that the Applicant does not need to pump test PWS #4 for 8 hours at 150 GPM. The public water supply system is permitted by MDEQ and can operate adequately without PWS #4 pumping at a rate of 150 GPM.

CONCLUSIONS OF LAW

22. Pursuant to § 85-2-311(1)(c), MCA, an Applicant must demonstrate that the proposed means of diversion, construction, and operation of the appropriation works are adequate.

23. The adequate means of diversion statutory test merely codifies and encapsulates the case law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); § 85-2-312(1)(a), MCA.

24. Water wells must be constructed according to the laws, rules and standards of the Board of Water Well Contractors to prevent contamination of the aquifer. *In the Matter of Application for Beneficial Water Use Permit No. 41I-105511 by Flying J Inc.* (DNRC Final Order 1999).

25. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. § 85-2-311(1)(c), MCA (FOF 19-21).

PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Provisional Permit No. 76LJ 30063778 should be MODIFIED.

The Department determines the 8-hour pump test condition placed on Provisional Permit No. 76LJ 30063778 shall be removed, and that the Applicant is no longer required to submit 8-hour pump test data on PWS #4 to the Department. PWS #4 will be removed from Permit 76LJ 30063778 because 1) the flow rate has not increased beyond its current permitted rate under 76LJ 17665 and 76LJ 32245 and 2) the originally requested volume was the amount of water necessary to supply the entire subdivision from PWS #5, in the unlikely event the other existing wells are inoperable.

NOTICE

The Department will provide public notice to the objectors and their successors in interest of this Petition to Modify a Permit and the Department's Preliminary Determination to Modify pursuant to § 85-2-314, MCA. The Department will set a deadline for objections to this Petition to Modify pursuant to §§ 85-2-307, and -308, MCA. If this Petition to Modify receives no valid objections or all valid objections are unconditionally withdrawn, the Department will grant this Petition to Modify as herein approved. If this Application receives a valid objection, the application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to a Petition to Modify are received and withdrawn with stipulated conditions and the department preliminarily determined to grant the Petition to Modify, the department will modify the appropriation right to conditions necessary to satisfy applicable criteria. To exhaust administrative remedies, one must file a valid objection and proceed to hearing and final order by the Department. A final order of the Department is reviewable by a district court only if all administrative remedies are exhausted.

DATED this 16th day of May, 2016.

/Original signed by Kathy Olsen/
Kathy Olsen, Deputy Regional Manager
Kalispell Regional Office
Department of Natural Resources and Conservation