

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 East Valley)
Controlled Groundwater Area)

To: All Concerned Persons

1. On November 12, 2015, the Department of Natural Resources and Conservation published MAR Notice No. 36-22-180 pertaining to the public hearing on the proposed adoption of the above-stated rule at page 2020 of the 2015 Montana Administrative Register, Issue Number 21.

2. The department has adopted New Rule I (36.12.906) as proposed.

3. The department has thoroughly considered the written and oral comments received. A summary of the comments received and the department's responses are as follows:

COMMENT 1:

Commenters stated that the East Valley Controlled Groundwater Area (EVCGWA) is important to protect human health and to prevent additional spreading of the groundwater contaminants. At some point in the future hopefully the EVCGWA could be adjusted as conditions improve.

RESPONSE 1:

The department appreciates the efforts of the Montana Environmental Trust Group (Trust), Hydrometrics, the U.S. Environmental Protection Agency (EPA), and Lewis and Clark County (County) in responding to the contaminated site.

COMMENT 2:

Commenter asked the Trust and consultants to provide data to support their conclusions about the boundaries of the groundwater area. Commenter was concerned about impacts to streamflow in Prickly Pear Creek. Commenter wants an alternative study to show what the migration paths of plumes might be if the stream is dewatered during the irrigation season. Commenter stated they were told [by who was not stated] that additional information was in the works but nothing has been forthcoming.

RESPONSE 2:

The department encourages surrounding landowners to contact the Trust or Hydrometrics in order to stay abreast of the progress and impacts of the remediation. Information regarding the contaminant plume and all supporting documentation for the EVCGWA is included in the petition, which is available to the public, and posted on the department's web site. Additional specific information regarding the EVCGWA should be directed to the Trust or Hydrometrics.

COMMENT 3:

Commenter's well was supposed to be a monitoring well, but to his knowledge it has never been monitored. Commenter wonders where Hydrometrics data is being acquired. Commenter has not seen maps of where the contaminant plume is located, or where it is moving.

RESPONSE 3:

Information regarding the contaminant plume and all supporting documentation for the EVCGWA is available in the petition submitted to the department. The petition is available to the public and was posted to the department's web site when the proposed rules were noticed and has not been removed from the web site. The link was contained within the notice. Bob Anderson, Hydrometrics, responded at the hearing offering to share all the information Hydrometrics has regarding the contaminated site, plume migration, and impact due to the creek flow.

COMMENT 4:

Commenter questioned if there is any way in the future to negate the EVCGWA. Land values have dropped and this will further decrease the land value in the area.

RESPONSE 4:

Under 85-2-506, MCA, it is possible to modify the boundaries, or eliminate an established CGWA, through a petition to the department. The department encourages surrounding landowners to contact the Trust or Hydrometrics in order to monitor the progress and impacts of the remediation.

COMMENT 5:

Commenter suggested establishing a technical advisory group (TAG) as a clearinghouse for approvals by the County Board of Health, the Water Quality Protection District, the EPA, the Montana Department of Environmental Quality (DEQ), and the Department of Natural Resources and Conservation (DNRC) to facilitate applications for new groundwater developments in Zone 2.

RESPONSE 5:

The rule provides that a TAG can be established to satisfy the prior written approvals provided for in (3)(b) and (4)(b) of the rule.

COMMENT 6:

Commenter stated that over time as groundwater quality improves, the EVCGWA boundaries could be adjusted. The TAG should annually review water quality data to make recommendations to DNRC on changes to EVCGWA boundaries, groundwater use restrictions, or other recommendations based on groundwater quality trends.

RESPONSE 6:

The boundaries of the EVCGWA may be modified by a new rulemaking process, which would require a new petition conforming to the requirements of 85-2-506, MCA.

COMMENT 7:

Commenter stated the rule, as proposed, defines the vertical boundaries of sub-area 1 as either 200 or 300 feet below the water table. The intent of the petitioners was to make those vertical boundaries as being 200 or 300 feet below the ground surface. They recommend making this correction in the final rule.

RESPONSE 7:

The water table reference in the proposed boundary is taken from page 4-4 of the petition and states, "The upper boundary is proposed to coincide with the top of the saturated zone, or groundwater table, throughout the entire CGWA." Figure 4-2 in the petition also clearly truncates the top of the vertical boundary at the water table. The petition is contradictory on whether the lower vertical boundary should be measured from the ground surface or the water table. In order to ensure maximum public health benefits from the EVCGWA, the department will use the more conservative approach and measure the lower boundary from the water table.

COMMENT 8:

Commenter stated that at some future date, they may need to add capacity to their public supply system. Commenter's proximity to the EVCGWA may require them to add that capacity from either Zone 1 or 2. As written, the rules would limit commenter to applying for new rights only in Zone 2. Commenter urges the department to add an exception to Zone 1 to allow for new applications for the limited purpose of complying with DEQ regulations for added capacity for an existing public water supply system.

RESPONSE 8:

Water quality in Zone 1 is the most hazardous to public health. Greater restrictions in Zone 1 are necessary to accomplish the objective of protecting public health. Accordingly, the department will not add an exception to Zone 1.

COMMENT 9:

The rules for Zone 2 should be adopted as proposed.

RESPONSE 9:

The department agrees.

COMMENT 10:

Commenter is concerned that additional restrictions may be put on surface water applications that could affect commenter's strategies for utilization of its existing water rights to address future needs.

RESPONSE 10:

Should the remediation of the East Valley area require restrictions on surface water applications at some time in the future, those restrictions will be addressed in a different proceeding.

COMMENT 11:

Commenter stated all affected landowners need a reliable and contaminant-free source of water. Commenter stated that since ASARCO ruined their water rights, ASARCO, or the state, should be obligated to bring in a new source of water at the expense of ASARCO or the state.

RESPONSE 11:

The establishment of the EVCGWA is a part of an overall remediation plan for the ASARCO site. Liability for damages already incurred is not a part of the EVCGWA or subject to department authority pursuant to 85-2-506, MCA.

/s/ John E. Tubbs
John Tubbs
Director, Natural Resources and Conservation

/s/ Brian Bramblett
Brian Bramblett
Rule Reviewer

Certified to the Secretary of State on January 25, 2016.