

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

In the matter of the amendment of) NOTICE OF PUBLIC HEARING ON
ARM 36.12.101, 36.12.105,) PROPOSED AMENDMENT AND
36.12.107, 36.12.117, 36.12.121,) REPEAL
36.12.1301, 36.12.1501, 36.12.1702,)
and 36.12.1801 and the repeal of)
ARM 36.12.106 pertaining to water)
right permitting)

To: All Concerned Persons

1. On October 6, 2017, at 10:00 a.m., the Department of Natural Resources and Conservation will hold a public hearing in the Ted Doney Conference Room (second floor), Water Resources Building, 1424 Ninth Avenue, Helena, Montana, to consider the proposed amendment and repeal of the above-stated rules.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m. on September 29, 2017, to advise us of the nature of the accommodation that you need. Please contact Millie Heffner, Montana Department of Natural Resources and Conservation, P.O. Box 201601, 1424 Ninth Avenue, Helena, MT 59620-1601; telephone (406) 444-0581; fax (406) 444-0533; e-mail mheffner@mt.gov.

3. The rules proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

36.12.101 DEFINITIONS Unless the context requires otherwise, to aid in the implementation of the Montana Water Use Act and as used in these rules:

- (1) and (2) remain the same.
- (3) "Animal unit ~~month~~ (AUM)" means a measurement of livestock numbers:
 - (a) one beef cow = 1 AUM
 - (b) one dairy cow = 1.5 AUM
 - (c) one horse = 1.5 AUM
 - (d) three pigs = 1 AUM
 - (e) five sheep = 1 AUM
 - (f) 300 chickens = 1 AUM
- (4) through (12) remain the same.

(13) "Combined appropriation" means an appropriation of water from the same source aquifer by two or more groundwater developments, ~~that are physically manifold into the same system.~~ the purpose of which, in the department's judgment, could have been accomplished by a single appropriation. Groundwater developments need not be physically connected nor have a common distribution system to be considered a "combined appropriation." They can be separate

developed springs or wells to separate parts of a project or development. Such wells and springs need not be developed simultaneously. They can be developed gradually or in increments. The amount of water appropriated from the entire project or development from these groundwater developments in the same source aquifer is the "combined appropriation."

(14) through (38) remain the same.

~~(39) "Municipal use" means water appropriated by and provided for those in and around a municipality or an unincorporated town.~~

(40) through (89) remain the same but are renumbered (39) through (88).

AUTH: 2-4-201, 85-2-113, 85-2-308, 85-2-370, MCA

IMP: 85-2-113, 85-2-301 through 85-2-319, 85-2-321 through 85-2-323, 85-2-329 through 85-2-331, 85-2-335 through 85-2-338, 85-2-340 through 85-2-344, 85-2-350, 85-2-351, 85-2-360 through 85-2-364, 85-2-368, 85-2-370, 85-2-401, 85-2-402, 85-2-407, 85-2-408, 85-2-410 through 85-2-413, 85-2-418, ~~85-2-520~~, MCA

REASONABLE NECESSITY: The proposed amendment deletes the word "month" when referring to an animal unit (AU) because the rule is intended to provide a definition for livestock numbers, not the amount of forage required for livestock per month.

The purpose of the amendment to the definition of "combined appropriation" is to comply with the controlling judicial decision. On Sept. 13, 2016 the Montana Supreme Court, in *Clark Fork Coalition v. Tubbs*, 2016 MT 229, 384 Mont. 503, 380 P.3d 771, upheld the *Order on Petition for Judicial Review*, Cause No. BDV-2010-874, Montana First Judicial District Court, Lewis and Clark County (Oct. 17, 2014), invalidating the department's 1993 administrative rule defining "combined appropriation" because the rule was inconsistent with the Montana Water Use Act. The court reinstated the department's previous rule defining "combined appropriation," originally adopted in 1987. *Clark Fork Coalition*, 2016 MT at ¶ 46, 384 Mont. at 520, 380 P.3d at 783.

The purpose of the repeal of the definition of "municipal use" is to make the department's rule consistent with the controlling judicial decision. The department previously repealed its administrative rule defining "municipal use" on June 2, 2006. The rule was reinstated on April 16, 2007 in compliance with the *Decision and Order*, Cause No. ADV-2006-454, Montana First Judicial District Court, Lewis and Clark County (March 26, 2007). On appeal, the Montana Supreme Court reversed the order of the Montana First Judicial District Court and held that the repeal was valid. *Lohmeier v. State*, 2008 MT 307, 346 Mont. 23, 192 P.3d 1137.

36.12.105 TEMPORARY EMERGENCY APPROPRIATIONS (1) A person may use water for a temporary emergency appropriation ~~may be made~~ necessary to protect lives or property without prior approval from the department, but the use appropriation must cease immediately when the water is no longer required to meet the emergency.

(2) A person may use water for temporary emergency fire training without prior approval of the department. A person who uses water for temporary emergency fire training must publish notice of the proposed use of water once in a newspaper of general circulation in the area of the diversion or mail notice to each potentially affected appropriator in the area of the proposed point of diversion 30 days prior to the planned appropriation.

(a) The notice must include:

(i) the name and address of the person conducting the training;

(ii) the purpose for which the water is being used;

(iii) the source of water being appropriated;

(iv) the starting and ending date of the proposed use of water;

(v) the point of diversion;

(vi) the proposed place of use; and

(vii) the diversion flow rate and volume of water to be used during the period of use.

(b) A copy of the published notice or the individual notice must be provided to the department at least two days prior to the use of water.

(c) The duration of a temporary emergency appropriation for fire training may not exceed seven consecutive or nonconsecutive days per year.

(23) A temporary emergency appropriation does not include the use of water for the ordinary operation and maintenance of any trade or business.

AUTH: 85-2-113, MCA

IMP: 85-2-113, 85-2-306, 85-2-330, 85-2-341, 85-2-343, 85-2-344, MCA

REASONABLE NECESSITY: The 2017 Montana Legislature enacted Chapter 264, Laws of 2017 (House Bill 429), an act extending the water right permit exemption for certain operations and training of a local government fire agency, effective October 1, 2017. House Bill 429 allows for "...temporary emergency appropriations, including for emergency fire training..." without obtaining a permit from the department. While the controlling language in House Bill 429 is for temporary emergency appropriations, meaning the appropriation is both temporary and done in the instance of an emergency, training done to prepare for emergency fires is not typically conducted in the midst of an emergency. Given that there is generally planning involved in a training exercise, and individuals with existing water rights on the source proposed to be used for emergency fire training have a property right that could be adversely affected by the temporary appropriation, notice of the planned appropriation is reasonable.

36.12.107 FILING FEE REFUNDS (1) through (3) remain the same.

(4) No refund will be authorized once the department has sent the applicant a deficiency letter.

(4) through (8) remain the same but are renumbered (5) through (9).

AUTH: 85-2-113, 85-2-302, MCA

IMP: 85-2-113, 85-2-302, MCA

REASONABLE NECESSITY: The purpose of this proposed amendment is to ensure the filing fees collected and retained by the department are commensurate with its costs in processing the application. The department spends a significant amount of resources processing an application in order to identify deficiencies in the application. Refunding the filing fee if an application is withdrawn after a deficiency letter is issued to the applicant results in the department's costs exceeding the fees. The department has been following this practice since 2012.

36.12.117 OBJECTION TO APPLICATION (1) through (8) remain the same.

(9) An Objection to Application is correct and complete if it includes the following legible information:

(a) through (f) remain the same.

(g) facts explaining how the person has standing to object. To have standing, a person must have property, water rights, or other interests that would be adversely affected were the application to be granted. The objection must describe how the person's property, water rights, or interests will be adversely affected if the water right application were granted; and

(h) if an objector is claiming adverse effect to instream flow water rights for fish, wildlife, and recreation, the objector must:

(i) describe the reach or portion of the reach of the stream or river subject to the instream flow water right and the beneficial use that is adversely affected;

(ii) identify the point or points where the instream flow water right is measured and monitored; and

(h) remains the same but is renumbered (i).

(10) through (17) remain the same.

AUTH: 85-2-308, MCA

IMP: 85-2-308, MCA

REASONABLE NECESSITY: This amendment is proposed to make the department's rules consistent with the controlling statute. For instream water rights for fish, wildlife, and recreation, 85-2-308(5), MCA, requires the department's rules to include language requiring the objector to provide the information contained in the amended rule in a correct and complete objection.

36.12.121 AQUIFER TESTING REQUIREMENTS (1) and (2) remain the same.

(3) Minimum testing procedures are as follows.

(a) Pumping must be maintained at a constant discharge rate ~~equal to or greater than the proposed pumping rate for the entire duration of the test.~~

(b) The discharge rate must be equal to or greater than the proposed rate for the entire duration of the test if the application is for one well or if the total proposed rate for multiple wells can be obtained from a single well. The discharge rate may be less than the proposed rate if the application is for multiple wells and the total proposed rate cannot be obtained from a single well, so long as the remainder can be demonstrated from the remaining wells under (f).

(b) through (j) remain the same but are renumbered (c) through (k).

AUTH: 85-2-113, 85-2-370, MCA

IMP: 85-2-302, 85-2-311, 85-2-330, 85-2-337, 85-2-341, 85-2-343, 85-2-344,
85-2-360, 85-2-361, 85-2-362, 85-2-402, 85-2-419, 85-2-506, 85-2-508, MCA

REASONABLE NECESSITY: The proposed language is intended to more clearly state the aquifer testing requirements, resulting in less ambiguity.

36.12.1301 PERMIT AND CHANGE APPLICATION ACCEPTANCE (1) A permit application will not be assigned a priority date and will be returned to the applicant if any of the following is not completed on the application form or included with the application:

(a) through (h) remain the same.

~~(i) a map conforming to standards identified in ARM 36.12.111; and~~

~~(j) the appropriate filing fee found at ARM 36.12.103-; and~~

(i) for projects proposed in sage grouse habitats designated as a core area, general habitat, or a connectivity area, a letter from the Montana Sage Grouse Habitat Conservation Program stating the project is consistent with Executive Orders 12-2015 and 21-2015.

(2) A change application will be returned to the applicant if any of the following is not completed on the application form:

(a) through (d) remain the same.

~~(e) a map conforming to standards identified in ARM 36.12.111; and~~

~~(f) the appropriate filing fee found at ARM 36.12.103-; and~~

(f) for projects proposed in sage grouse habitats designated as a core area, general habitat, or a connectivity area, a letter from the Montana Sage Grouse Habitat Conservation Program stating the project is consistent with Executive Orders 12-2015 and 21-2015.

AUTH: 85-2-113, MCA

IMP: 85-2-302, 85-2-310, MCA

REASONABLE NECESSITY: While a map conforming to the standards identified in ARM 36.12.111 is required for a correct and complete application, such a map is not required in order to accept the application.

The purpose of the proposed amendment is to facilitate pre-application consultation between the applicant and the Montana Sage Grouse Habitat Conservation Program, if the project is located within sage grouse habitat, in order for the department to ensure its decisions on permit and change applications are consistent with the Conservation Strategy. Pursuant to Executive Orders 12-2015 and 21-2015, regarding the implementation of the Montana Sage Grouse Conservation Strategy, all new land uses or activities subject to state agency review, approval, or authorization must be consistent with the Conservation Strategy. Because the department must adhere to statutory timelines that are triggered with the submittal and acceptance of an application, it is appropriate for an applicant to consult with the Program prior to submitting an application. Consistency with Executive Orders 12-2015 and 21-2015 is not part of the department's review criteria for applications.

However, unless the applicant demonstrates consistency with the Executive Orders, the department cannot accept the application for processing.

36.12.1501 PERMIT AND CHANGE APPLICATION DEFICIENCY LETTER AND TERMINATION (1) remains the same.

(2) The priority date on a permit application or the date received on a change application will not be changed if:

(a) all of the requested information in the deficiency letter is postmarked and submitted to the department within 30 days of the date of the deficiency letter; or

(b) within 45 days of the date of the deficiency letter, the department has granted an extension. The department may only grant an extension if the applicant submits a written request for an extension within 30 days of the date of the deficiency letter.

(3) The permit application priority date or change application date received will be changed to the date when the department receives all of the requested information if:

(a) all of the requested information in the deficiency letter is postmarked and submitted between 31 and 90 days of the date of the deficiency letter; or

(b) in cases where an extension is granted by the department, 45 to 90 days of the date of the deficiency letter.

~~(2) If all of the requested information in the deficiency letter is postmarked and submitted to the department within 30 days of the date of the deficiency letter or an extension of time of no more than 15 days, the priority date on a permit application will not be changed, or for change applications, the date received will not be changed. A request for extension of time must be submitted in writing.~~

~~(3) If all of the requested information in the deficiency letter is postmarked or submitted within 31 to 90 days of the date of the deficiency letter unless extended under (2), the permit application priority date will be changed to the date when the department receives all of the requested information, or for a change application, the date received will be changed.~~

(4) remains the same.

AUTH: 85-2-113, MCA

IMP: 85-2-302, MCA

REASONABLE NECESSITY: The proposed amendment is necessary to more clearly state the timelines and outcomes when a deficiency letter is sent to an applicant.

36.12.1702 PERMIT APPLICATION CRITERIA - PHYSICAL SURFACE WATER AVAILABILITY ~~(1) Substantial credible information must be provided showing there is surface water physically available at the flow rate and volume that the applicant seeks to appropriate for the proposed period of diversion.~~

~~(2) If actual stream gaging records are available, or the source has been otherwise measured, and or quantified by a public entity, the records shall be used to estimate the median of the mean monthly flow rates and volumes for the stream~~

gaging station period of record during the proposed months of diversion at the source of supply in the amount the applicant seeks to appropriate.

~~(32) If actual flow rate and volume data stream gaging records are not available, or the source has not been otherwise measured or quantified by a public entity, to estimate the median of the mean monthly flows, then the department shall use an accepted method for estimating surface water flow rates and volumes shall be used in conjunction with discharge measurements to validate the estimation technique used. Some accepted methods are listed in (5).~~

~~(4) When stream flow gaging station data are not available and monthly median flow estimation techniques are used, the following stream discharge data must be collected:~~

~~(a3) Except as provided in (4), Stream-flow measurements in cfs or gpm must be collected at least once every month during the proposed period of diversion at the most suitable location on the source of supply, and which is typically at or directly upstream of the proposed point of diversion.~~

~~(b4) If it is not possible to take measurements every month due to high spring flow conditions or other limiting conditions, the department may grant a variance to the measurement requirements in (3). approved by the department, at least three measurements must be collected during the period of proposed appropriation. These measurements should be taken during each of the following periods:~~

~~(i) high flow conditions (May through June for mountain streams and March through May for prairie streams);~~

~~(ii) following runoff and prior to baseflow (July through August for mountain streams and May through June for prairie streams); and~~

~~(iii) baseflow (August through March for all streams).~~

~~(a) A request for a variance from measurement requirements must be submitted in writing to the appropriate regional office.~~

~~(b) A variance may not completely relieve the applicant of the requirement of taking measurements.~~

~~(e5) Measurements must be submitted on Form 649 in electronic format with all information and data provided.~~

~~(d) A request for a variance from measurement requirements may be submitted for nonperennial streams. The request must be submitted in writing to the appropriate regional office.~~

~~(6) In addition to validating estimation techniques, measurements may, in some cases and upon approval of the department, be used as evidence of physical availability.~~

~~(57) The methods described in the following reports may ~~contain~~ be acceptable ~~accepted methods~~ for estimating surface water flow rates and volumes:~~

~~(a) through (n) remain the same.~~

~~(60) Other professionally documented hydrologic methods for estimating stream flow or annual runoff which may be applicable and acceptable to the department, including the Orsborn method, Mannings equation, U.S. Natural Resources and Conservation Service-developed mean annual runoff data, and drainage area information paired to gaged streams in similar type basins may be acceptable. The department will determine the acceptability of other methods on a case-by-case basis.~~

AUTH: 85-2-113, 85-2-302, MCA
IMP: 85-2-302, 85-2-311, MCA

REASONABLE NECESSITY: The proposed amendment is intended to clarify what measurement data may be used to demonstrate physical surface water availability and to validate estimation techniques. The proposed language also allows for a variance from specific measurement requirements in order to provide more flexibility when considering specific source types and conditions while still soliciting information needed for the department to process the application.

36.12.1801 PERMIT AND CHANGE APPLICATIONS - BENEFICIAL USE

(1) and (2) remain the same.

(3) The applicant does not need to explain that the flow rate ~~and~~ or volume for each purpose is reasonable if:

(a) and (b) remain the same.

AUTH: 85-2-113, 85-2-302, MCA
IMP: 85-2-302, MCA

REASONABLE NECESSITY: The "and" implied that the department did not need an explanation of the flow rate if the volume being requested conformed to standard amounts. The proposed language clarifies that an explanation of the flow rate is needed even if the volume conforms to the standards set out in ARM 36.12.115 or 36.12.1902.

4. The department proposes to repeal the following rule:

36.12.106 TESTING AND MONITORING

AUTH: 85-2-113, MCA
IMP: 85-2-113, MCA

REASONABLE NECESSITY: This rule restates verbatim statutory language in 85-2-369, MCA. Pursuant to 2-4-305, MCA, "rules may not unnecessarily repeat statutory language."

5. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted in writing to: Millie Heffner, Department of Natural Resources and Conservation, P.O. Box 201601, 1424 Ninth Avenue, Helena, MT 59620-1601; fax (406) 444-0533; or e-mail mheffner@mt.gov, and must be received no later than 5:00 p.m., October 6, 2017.

6. Ada Montague, Department of Natural Resources and Conservation, has been designated to preside over and conduct this hearing.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Aliselina Strong, PO Box 201601, 1539 Eleventh Avenue, Helena, MT 59620; fax (406) 444-2684; e-mail astrong@mt.gov; or may be made by completing a request form at any rules hearing held by the department.

8. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted by email on August 21, 2017.

9. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment and repeal of the above-referenced rules will not significantly and directly impact small businesses. Documentation of the board's above-stated determination is available upon request to Montana Department of Natural Resources and Conservation Water Rights Bureau, P.O. Box 201601, Helena MT 59620-1601, or to mheffner@mt.gov.

/s/ John E. Tubbs
JOHN E. TUBBS
Director
Natural Resources and Conservation

/s/ Barbara Chillcott
BARBARA CHILLCOTT
Rule Reviewer

Certified to the Secretary of State August 28, 2017.