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August 8, 2025

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*Via E-mail:* DNRCOAH@mt.gov

**Re: Comments to MAR No. 2025-157.1 Notice of Proposed Rulemaking**

To Whom It May Concern,

The undersigned respectfully submits the foregoing comments to MAR No. 2025-157.1, in particular, proposed rulemaking to ARM 36.12.117 (Objection to Application).

## I. Proposed Changes to ARM 36.12.117(8)(f) (formerly (9)(f)) Regarding Content Required for Objections to Applications.

The Department proposes that instead of "facts indicating that the application does not meet one or more of the applicable criteria" and to merely "specifically describe why or how one or more of the criteria are not met" that Objectors must provide "*probable, believable facts sufficient to support a reasonable legal theory* that the application does not meet one or more of the applicable criteria[.]" For the foregoing reasons, the undersigned respectfully requests that this subpart (f) of ARM 36.12.117(8) (formerly (9)) remain unchanged.

As explained below in Part II, the "probable believable facts sufficient to support a reasonable legal theory" impose a lofty burden upon average Objectors to a water right permit or change application seeking to protect their water right interests.

Additionally, the purpose of contested cases under the Montana Administrative Procedural Act ("MAPA") is for Objectors to prove to a Hearing Examiner that one or more of the permitting criteria have not been satisfied as determined by the Department in the Preliminary Determination to Grant. The Department's "correct and complete" assessment of Objections does not, and should not, replace the role of a Hearing Examiner. The Hearing Examiner's Final Order follows discovery requests, depositions, submission of pre-filed expert testimony, staff expert report(s), motions, and a hearing on the merits of Objectors' Objections and also allows the Applicant to defend its permit by providing evidence establishing that the permitting criteria

have been satisfied.[1] It is for the Hearing Examiner following a MAPA contested case, not the Department at the "correct and complete" stage of an Objection, to weigh Objectors' evidence regarding the permitting criteria to determine whether a Final Determination to Grant the Application should issue.[2]

Thus, the proposed new language not only imposes a higher burden of proof upon Objectors, but it also undercuts the role of the Hearing Examiner in the contested case process. The language in ARM 36.12.117(8)(f) (formerly (9)(f)) should remain unchanged such that Valid Objections require only "facts indicating the application does not meet one or more of the applicable criteria" and such "facts provided must specifically describe why or how one or more of the criteria are not met."

## II. Proposed Changes to ARM 36.12.117(10) (formerly (11)) Regarding Time for Receipt of Responses to Objection Deficiency Notices.

Water users' due process rights to participate in the permitting process of new or changed water rights should not be eliminated due to an unreasonably short time provided in rule to substantively respond to Objection Deficiency Notices. Here, the Department proposes that responses to Objection Deficiency Notices, in order to be accepted, "must be *received* by the Department *within 15 business days* from the date [stated] on the Objection Deficiency Notice" which is likely the date that the Objection Deficiency Notice was signed and issued by the Department if the Department follows current practices. Under this scenario, the date on the Notice will likely be earlier in time than the date the Objection Deficiency Notice is postmarked or sent to the water user.

If such an Objection Deficiency Notice is mailed to the Objector, and Objector must mail back the response, the remaining time allowed for drafting a response, or seeking legal counsel for assistance with the response, is very limited or may be completely eliminated due to unavoidable delays by the mail carrier. While electronic submissions are to be accepted, as this Department likely knows, there are still many Montanans who do not utilize email and will need to mail such responses to the Department. Thirty (30) **calendar** days, at a minimum, would be more appropriate. The Department should also consider consistently using either "business days" or "days" throughout its proposed rules. These proposed rules mix the two types of time calculations, which may be a barrier for water users who do not retain legal counsel. Compare proposed ARM 36.12.117 with proposed New Rule 2 (ARM 36.12.810(7)) and New Rule 5 (ARM 36.12.813(3)-(5)).

[1] *See,* Mont. Code Ann. § 2-4-612(1) and (5): "Opportunity shall be afforded to all parties to respond and present evidence and argument on all issues involved. … [a] party shall have the right to conduct cross-examinations required for a full and true disclosure of facts, including the right to cross-examine the author of any document prepared by or on behalf of or for the use of the agency and offered in evidence."

[2] *See,* Mont. Code Ann. § 2-4-623: the Final Order following a contested case "adverse to a party in a contested case" must be in writing and contain findings of fact "based exclusively on the evidence and on matters officially noticed" and conclusions of law "supported by authority or by a reasoned opinion."

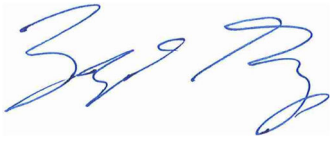
Under the current proposed rule, even if an Objection Deficiency Notice was emailed to an Objector, due to the proposed changes to ARM 36.12.117(8)(f), the "burden" of proof placed by the Department upon an Objector will make it very difficult for such an Objector, even with the assistance of legal counsel, to respond with the requisite facts or "reasonable legal theories" to support a valid objection. For example, as the Department is likely aware, multiple Objectors to Application 42M 30163320 received Objection Deficiency Notices in March 2025 which purported to require such "probable believable facts sufficient to support a reasonable legal theory" and the Department explained in the Deficiency Notices that "[p]robable believable facts adequate to support an objection typically include" the following:

- Published studies;
- Well data;
- Discharge measurements;
- Hydrogeologic information;
- Aquifer lithology;
- Groundwater models;
- Diversion capacity and infrastructure;
- Water chemistry information; or
- Other credible evidence; and
- Specific to objections based on the water quality criteria: forward looking quantitative groundwater modeling demonstrating increased contamination from further depletion.

Fifteen (15) business days is insufficient time for average Objectors to respond to Objection Deficiency Notices with the types of "probable believable facts" requested by the Department. In the example given above in Basin 42M, only the Objectors who were able to retain legal counsel were able to cure their Objection Deficiency Notices because they, unlike the other Objectors to the same Application who provided the same or similar information with their Objections, had the benefit of the assistance of legal counsel and a draft expert report from a hydrogeologist who had previously done work in the vicinity to explain "reasonable legal theories" to the Department. Such a scenario is unlikely to be repeatable by average water users, particularly given the truncated 15-business day deadline.

Sincerely,

PARSONS BEHLE & LATIMER



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