

Subject: Public Comment on Montana Department of Natural Resources and Conservation's (DNRC) Notice of Proposed Rulemaking MAR Notice No. 2025-157.1

From: Senior Ag Water Rights Alliance

Date: August 8, 2025

Introduction:

This comment is submitted in response to the DNRC's proposed New Rule 2 (ARM 36.12.810), published in the MAR Notice No. 2025-157.1. Members of SAWRA have a significant interest in this rule as it directly affects permits and change authorizations granted to them by the DNRC that will be subject to this new rule in the future.

Comment:

1. Specific Issue:

New Rule 2, subsection 5 states:

NEW RULE 2 (36.12.810) PROJECT COMPLETION NOTICE

(5) For a project completion notice filed with the department prior to the effective date of this rule, department will consider the information required by (3) for a permit or (4) for a change to determine whether the project completion notice includes adequate information.

"Prior to the effective date of this rule" appears to include any permits and change authorizations that have been granted and completed since the permit and change processes were created after the passage of the Montana Water Use Act in 1973.

The DNRC review pursuant to (3) or (4), to "determine whether the project completion notice includes adequate information" allows the department to review and reopen, and potentially reduce or revoke these previously accepted notices of completion, by now requiring "(c) a description explaining compliance or deviation from terms, conditions, or restrictions" and "(e) other information deemed necessary by the department."

Under previous DNRC new appropriations and change application policies and manuals, notices of completion were not always required, and DNRC recognizes that its policies have changed substantially over the past 50 years. See e.g. Internal Policy on Supplemental Rights.

Many water right files with change authorizations that have been completed by the applicant and verified by DNRC show only the DNRC's verification of the completed change- without a notice of completion form. The proposed rule is unclear as to how a verified change would be addressed when no "completion" form was required or filed. These verified changes have been

reviewed and confirmed after completion, by the Department, sometimes with a site inspection.

Numerous permits and changes also remain unverified although they have been completed for many years.

The proposed Rule 2, Subsection 5 would create a new step of DNRC review pursuant to (3) or (4), to "determine whether the project completion notice includes adequate information" and allow the department to review and reopen, and potentially reduce or revoke these previously accepted notices of completion, for reasons that are vague and extend far beyond a post decree legal availability review.

The reopening of tens of thousands of completed change authorizations was not referenced or included in HB 441. The proposed Subsection 5 from New Rule 2 appears to violate the Montana Administrative Procedure Act requirement that agencies may not conflict with a statute or add language not contemplated by the Legislature.

Reasoning:

Water users who followed existing law and agency procedures and subjected themselves to the DNRC permitting process for a provisional permit or change authorization are entitled to an expectation of finality of the completed change authorizations they received from the department many years ago. Enacting this rule allows the DNRC to unilaterally re-open those proceedings if its contemporaneous review of the department's previous actions do not comport with the list of factual requirements set out in New Rule 2 Subsections 3 & 4.

House Bill 441 limited the department's review of any provisional permit to the filing of a 3rd party petition raising issues with the permit. If no petition is filed, a certificate of water right is issued. House Bill 441 limited the department's review of change authorizations to confirming the change authorization and final decree abstracts were in agreement and taking steps to resolve any discrepancies. Nowhere in House Bill 441 is the DNRC authorization to review EVERY permit and change authorization under a new standard of review to justify re-opening a previous final decision by the department and force the water right owner to produce new evidence and submit a new Notice of Completion.

The proposed Subsection 5 from New Rule 2 appears to violate the Montana Administrative Procedure Act requirement that agencies may not conflict with a statute or add language not contemplated by the Legislature.

2. Alternative:

Instead of the current proposal, the agency should strike Subsection 5 from New Rule 2.

3. Economic Impact:

The economic impact of this rule should be carefully considered. New Rule 2 will impose unnecessary financial burdens on every permit and change authorization permittee who should be entitled to rely in the department's previous final record of decision and is forced to spend time and resources responding to the DNRC's new demands under this rule.

4. Conclusion:

The agency should carefully consider the potential consequences of New Rule 2 Subsection 5 and recognize the legally sound basis for removing it before finalizing the rule.

Internal Policy / Guidelines for adding Supplemental Rights to Authorized Changes

The Department proposes to update verification/certification procedures to include the following option.

Background

The goal of this proposed language is to allow some latitude for older change applications so that there is a path forward to either verify or certify a change as it was actually completed, when supplemental rights were involved but not listed in the Change Application. This avenue is needed because the Dept's policy and procedures for processing and analyzing changes is substantially different now than it was prior to the 2012 Reform, HB40 Updates, and adoption of Consumptive Use Rules in 2005. The differences are especially pronounced with changes that were filed prior to the claim filing period but changes that were filed up until the Consumptive Use Rules were enacted can also fall into this category. There were at least 2 major distinctions:

1. Supplemental water rights were often not officially considered as part of the change process because they were not listed in the application, but when the change was implemented on the ground, the supplemental water rights were affected.
2. Partial changes were not well reflected in the change files and the legacy water rights database did not contain information about portions of water rights that were not part of a change application.

This latitude should be granted in part because the process for matching Statement of Claim numbers with change authorizations, for those changes filed prior to the claim filing period, was completely determined by the Department. The applicants were generally not involved in this step of the process. What was treated as a simple record keeping action, in fact had ramifications that are now becoming evident.

There is a group of Change Authorizations out there that were issued without all of the considerations we currently apply. Authorizations that fall into this category are generally ones that were completed in good faith by the applicant as they thought it was authorized. This often did not actually match what the paper said.

Procedure

Moving forward, the Department proposes an option for Change Authorization holders to file a "Request to Include Supplemental Rights" which would be processed as part of the verification/certification procedure. To be eligible for this process, the following must apply:

- Must be an active Change Authorization that was submitted prior to January 1, 2005
- Submission of a form and fee will be required.
- Change Authorization has not been verified/certified. If the Change has been verified/certified, the Department may "re-verify/cerify" in limited circumstances. If this is the case, contact CO to discuss options moving forward.
- Can demonstrate that the project was completed within the time stated in the Change Authorization or an extension of the time stated in said Change Authorization – This must include the use of supplemental water rights in practice at the time of completion

- This does not necessarily mean a Project Completion Notice has been filed
- The owner must provide historical use information indicating that the supplemental rights were, in fact, used in conjunction with the changed appropriation right prior to the grant of the Change Authorization.
 - Historical use information must conform to that of substantial credible information.
- The owner of the Change Authorization must be the sole owner of the supplemental rights proposed for inclusion or the co-owner(s) of said supplemental rights must authorize the request. This authorization is solely to allow the Change Authorization to encompass the supplemental portion of the shared water rights and does not include a full historical use assessment of the entire rights.

If all requirements above are met, the Department may include supplemental rights at time of verification/certification of the Change Authorization with the following requirements:

- If the original Change Authorization was publicly noticed, the verification/certification including supplemental rights must also be publicly noticed. If the original Change Authorization was not publicly noticed, the verification/certification including supplemental rights may proceed without public notice.
- A remark will be placed on the newly included supplemental water rights' Change Authorization version stating "The following water right(s): XXX were included in Change Authorization YYY after issuance, during the verification/certification of use procedure. This water right was included because it currently is and was historically used in a supplemental fashion with Water Right # ZZZ and should have been included at the time the Change Authorization was originally processed."

Additional Considerations

- A *full* historical use analysis will not be provided or assessed, therefore, full historical use information must be provided on any future Change Applications. Inclusion of supplemental rights will have no bearing on actual historical use determinations, other than the fact that the rights were considered supplemental. Historical use for any future Change Applications will be assessed for the original completion of the underlying right.