WGMGROUP
Community Values. Inspired Futures.

wgm@wgmgroup.com
406.728.4611
www.wgmgroup.com

MEMORANDUM

DATE: August 8, 2025

TO: Jamie Price, Rules Coordinator via email to DNRCOAH@mt.gov

FROM: Julie A. Merritt, Water Resources Specialist, WGM Group, Inc.

RE: Amendment of ARM 36.12.101, 36.12.102, 36.12.103, 36.12.115, 36.12.117, and 36.12.1305 and Adoption of NEW RULES 1 through 7 pertaining to water right permitting

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Following are comments from WGM Group, Inc.

36.12.101 DEFINITIONS

(6) "Aquifer" means a geologic structure or unit that contains saturated and permeable material capable of yielding water in usable quantities.

(7) "Aquifer system" means a series of hydraulically connected aquifers whose horizontal and vertical extents could be limited by formation contacts, faults, surface water bodies, and less permeable materials.

While we agree with the need to define these two terms, the proposed language is not adequate to distinguish the two terms from each other.

The descriptor, "…whose horizontal and vertical extents could be limited by formation contacts, faults, surface water bodies, and less permeable materials" could apply equally to an 'aquifer' or an 'aquifer system'. The way this is written, it appears to say the thing that distinguishes an 'aquifer' from an 'aquifer system' is that an *aquifer system's* horizontal and vertical extents could be limited by formation contacts, faults, surface water bodies, and less permeable materials whereas an *aquifer's* horizontal and vertical extents CANNOT be defined as being limited by formation contacts, faults, surface water bodies, and less permeable materials. Unless this is what the Dept actually intended to convey, the following modifications to the above definitions would make them more clear.

> "Aquifer" means a geologic structure or unit **whose horizontal and vertical extents could be limited by formation contacts, faults, surface water bodies, and/or less permeable materials and** that contains saturated and permeable material capable of yielding water in usable quantities.

"Aquifer system" means a series of hydraulically connected aquifers ~~whose horizontal and vertical extents could be limited by formation contacts, faults, surface water bodies, and less permeable materials~~.

(49)(51) "Possessory interest" means the right to possess, use, or exert some interest or form of control over specific land. It is the legal right to possess or use property by virtue of an interest created in the property, though it need not be accompanied by fee title, such as the right of a tenant, easement holder, or lessee.

These added words don't resolve the common issue with this term. The Dept regularly refuses to accept an applicant's signature on an application as proof of possessory interest. Additional proof is demanded which is not always possible to provide. Especially in cases where the party's interest is NOT accompanied by fee title as is specifically contemplated in this definition. The applicant's signature on the affidavit and certification should be adequate. The person that signs is swearing under penalty of perjury that they have the authority. Is it really a common problem that people are committing perjury by signing applications when they have no authority to do so?

(55) "Project completion notice" means a notice by the appropriator on a form provided by the department that the project works are completed, and water is being appropriated in substantial accordance with the terms of the permit authorization, including any reduction or modification of the permit pursuant to 85-2-313, MCA, or change authorization.

The term 'permit authorization' has never been used before. Why are we introducing it now? What is the difference between a "permit" (the term that has been used throughout ARM for decades) and a "permit authorization"? Using the term 'permit' or 'provisional permit' would be consistent with the terminology that has been used historically and is used throughout the effective version of the ARM. This comment applies to every other location where the term 'permit authorization' is introduced throughout the proposed rule changes.

(78) "Verification" or "verify" means the process used by the department to determine whether completion of an appropriation of water and a project completion notice are in substantial accordance with the terms, conditions, restrictions, and limitations of the permit authorization, including any reduction or modification pursuant to 85-2-313, MCA, or change authorization.

The term 'verification' or 'verify' should not be used for the process described in this definition. It is a term that has already been used in the New Appropriations Program for the process of reviewing pre-1992 permits and changes and in the Adjudication Program for the process of reviewing Statements of Claim prior to the adoption of the MT Supreme Court Adjudication and Examination Rules. Importantly, the Verification process as it relates to pre-1992 permits and changes did not involve a requirement to submit a 'project completion notice'. The requirement was to file a 'notice of completion' which was nothing more than a statement that the project was complete and a signature of the applicant. By reusing this term and changing its meaning, the Dept is retroactively changing the rules that applied to permits and changes that were issued between 1973 and 1992.

Using the same term to apply to three different processes that are governed by distinctly different rules is confusing. At one time, the term 'Certification' was being used to describe the process that applies to review of post-1992 permits and changes in order to distinguish that process from the one that applies to pre-1992 permits and changes. If certification is not an acceptable term, let's select a different word.

How about ‘validation’, ‘authentication’, ‘reconciliation’…? The opportunity is wide open to increase clarity rather than cause confusion.

In addition, the process does not apply to appropriations of water in general, it only applies to appropriations under a provisional permit or affected by a change authorization. Suggested language:

…means the process used by the department to determine whether completion ~~of an appropriation of water~~ **a permit or change authorization** and a project completion notice are in substantial accordance…

NEW RULE 2 (36.12.810) PROJECT COMPLETION NOTICE

(1) For an appropriation completed after the effective date of this rule, the appropriator must file a correct and complete project completion notice with the department on or before the deadline specified in the permit authorization, including any order to reduce or modify the permit pursuant to 85-2-313, MCA, change authorization, or any written extension of time. A correct and complete project completion notice must be on a form provided by the department.

First, it needs to be specified which appropriations are subject to this rule. The term “appropriation” is too broad. For example, this rule does not apply to Groundwater Certificates, Stockwater Permits or changes approved under the exceptions to the change process.

Second, what does the Dept mean by “completed after the effective date of this rule”?

- Does it include permits/changes for which a PCN has been filed but not reviewed by the Dept?
- Does it include permits/changes that are complete before the PCN deadline but no PCN has been filed yet?
- Does it include permits/changes for which the PCN deadline has passed, the owner failed to file a PCN but has in fact completed all or a portion of the project?
- What about all the post-1992 permits/changes? Are we creating a third category of permits/changes with a different set of rules? (pre-1992, 1992-2025 and post-2025)

(2) If a water right has multiple change authorizations issued within the same project completion period, the appropriator may file a single project completion notice for all the authorized changes and the department will verify them at the same time.

I don’t think this says what is intended. Perhaps it should read, “If one or more water rights have multiple change authorizations…”

(3) A correct and complete project completion notice for a permit must include:
  (a) information about all completed elements of the permit;
  (b) a certified statement in compliance with 85-2-315, MCA;
  (c) a description explaining compliance or deviation from terms, conditions, or restrictions;
  (d) if a permit authorization is reduced or modified following the final decree pursuant to 85-2-313, MCA, a description explaining compliance with the order reducing or modifying the permit;

With regard to item (d) above, it will be common that the PCN deadline occurs before a final decree is issued in a basin. It needs to be understood that the reduction/modification may occur years after the PCN deadline. Perhaps some language is needed that explains when the Dept will review PCNs relative to the final decree/petition process.

> (5) For a project completion notice filed with the department prior to the effective date of this rule, the 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.

Again, what about projects that are wholly are partially completed but for which a PCN has not been filed? Suggested: “For permits/changes with PCN deadlines prior to the effective date of this rule…”

> (9)If a project completion notice for a permit was verified prior to the effective date of this rule, and the permit is reduced or modified following final decree pursuant to 85-2-313, MCA, the appropriator is required to file a subsequent project completion notice. Such a subsequent project completion notice is subject to the applicable sections of this rule.

It seems like there should be a requirement for the Dept to notify the permittee about this requirement and set a deadline for the permittee to file another PCN.

NEW RULE 3 (36.12.811) PERMIT VERIFICATION and NEW RULE 4 (36.12.812) CHANGE VERIFICATION

There should be a timeframe within which the Dept will process PCNs.

Both New Rule 36.12.811 and 36.12.812 are not internally consistent. Which is it, “substantial accordance”, which according to the proposed definition allows for minor deviation, or “may not exceed/be completed outside”? The qualifiers in items 36.12.811 (4) a-j and 36.12.812 (4) a-d are not necessary. The need for the project to be completed in substantial accordance with the authorized amounts and locations has been clearly established in other parts of this rule. The strict language in parts 4 of both of these proposed rules is going to create a lot of difficulty.

We all know that water use is not an exact science. If people have followed the law and applied for a permit or change before a project is complete, there will almost always be some minor ways that the project did not get completed EXACTLY as it was originally conceived. It is critical that the people reviewing PCNs have the ability to apply their best judgement as to whether or not deviations rise to the level of something that could adversely affect other water right holders.

It does not serve anyone to require additional permits or changes when a flow rate or volume ends up deviating from the authorized amount by some small percentage or if all the houses in a planned development don’t get built exactly where they were originally proposed. Especially for larger projects. We are asking people to apply for their water rights early in the process when engineering designs may be less than 50% done. Given the cost and time associated with obtaining water rights, it is unreasonable to expect that project design will be 100% done before a water right application is submitted.

The Dept should consider incorporating an option for additional public notice for some deviations. For example, if an irrigation project is completed but the configuration of the acreage is different than originally conceived but the flow rate, volume and number of acres remain the same, perhaps there

could be an allowance that a permit/change with modifications could be put out to public notice. This could be a much more effective use of everyone's time and energy than requiring new applications.

I would like the Dept to consider this – if a project was completed slightly differently than authorized and the Dept determines a change application needs to be filed, how would the applicant describe the historical use? If there has never been any other use than what the project is right now, how would the "historical use" be quantified? Wouldn't the main point of requiring a new application in this situation be to provide public notice to potentially affected water users? A new public notice process would be a more effective use of everyone's time, money and energy.

NEW RULE 5 (36.12.813) VERIFICATION DECISION

If the Dept is going to issue a certificate, why don't we call the process Certification?

Can you please allow 60-90 days for an appropriator to respond? Some of these PCNs have already been sitting in files for decades, it is unreasonable to put such a short time frame on a response.