

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

In the matter of the adoption of NEW)	NOTICE OF ADOPTION,
RULES I through V, the amendment)	AMENDMENT, AND REPEAL
of ARM 36.12.101 through 36.12.103,)	
36.12.110 through 36.12.113,)	
36.12.116, 36.12.117, 36.12.121,)	
36.12.1401, 36.12.1501, 36.12.1601,)	
36.12.1702 through 36.12.1704,)	
36.12.1706, 36.12.1707, 36.12.1801,)	
36.12.1903, and 36.12.1904, and the)	
repeal of ARM 36.12.1301,)	
36.12.1701, 36.12.1705, and)	
36.12.1901 pertaining to water right)	
permitting)	

TO: All Concerned Persons

1. On October 6, 2023, the Department of Natural Resources and Conservation published MAR Notice No. 36-22-219 pertaining to the public hearing on the proposed adoption, amendment, and repeal of the above-stated rules at page 1151 of the 2023 Montana Administrative Register, Issue Number 19.

2. The department has adopted the following rules as proposed: NEW RULE IV (36.12.1304) and NEW RULE V (36.12.1305).

3. The department has amended the following rules as proposed: ARM 36.12.102, 36.12.110, 36.12.111, 36.12.112, 36.12.113, 36.12.116, 36.12.117, 36.12.1501, 36.12.1601, 36.12.1703, 36.12.1706, 36.12.1707, 36.12.1903, and 36.12.1904.

4. The department has repealed the following rules as proposed: ARM 36.12.1301, 36.12.1701, 36.12.1705, and 36.12.1901.

5. The department has adopted the following rules as proposed but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

NEW RULE I (36.12.123) VARIANCE REQUESTS (1) and (2) remain as proposed.

(3) The department shall grant or deny the variance within 30 business days of receipt of the written request. ~~The department's grant of a variance request may impose conditions necessary to ensure the application materials and data provided is sufficient to evaluate the applicable criteria.~~ The department may only grant a variance request if it determines the application materials and data provide sufficient

information to complete any necessary technical analyses and to evaluate the applicable criteria.

AUTH: 85-2-113, MCA

IMP: 85-2-302, 85-2-307, 85-2-311, 85-2-330, 85-2-336, 85-2-341, 85-2-343, 85-2-344, 85-2-360, 85-2-361, 85-2-362, 85-2-402, 85-2-506, 85-2-508, MCA

NEW RULE II (36.12.1302) PREAPPLICATION MEETING (1) and (2) remain as proposed.

(3) A preapplication meeting must be documented by a department-provided checklist preapplication meeting form that identifies:

(a) and (b) remain as proposed.

(c) any additional information necessary for completion of the technical analyses identified by the checklist preapplication meeting form under (3)(a).

(4) If the technical analyses are to be completed by the department, the 45-day department deadline for completion of the technical analyses will be set upon receipt of the preapplication fee, receipt of the information provided for in (3)(b) and (c), and signed preapplication checklist meeting form. These items must be received within 180 days of the preapplication meeting.

(5) If the technical analyses are to be completed by the applicant, the 45-day department deadline for scientific credibility review of technical analyses (ARM 36.12.1303(8)) will be set upon receipt of the preapplication fee, receipt of the applicant's technical analyses, and signed preapplication checklist meeting form. These items must be received within 180 days of the preapplication meeting.

(6) remains as proposed.

(7) The preapplication meeting procedure for a combined permit and change application documented on the preapplication checklist meeting form, will be conducted as follows:

(a) through (8) remain as proposed.

AUTH: 85-2-302, MCA

IMP: 85-2-302, 85-2-307, 85-2-311, 85-2-330, 85-2-336, 85-2-341, 85-2-343, 85-2-344, 85-2-360, 85-2-361, 85-2-362, 85-2-402, 85-2-506, 85-2-508, MCA

NEW RULE III (36.12.1303) TECHNICAL ANALYSES (1) remains as proposed.

(2) For surface water permit applications, the following technical analyses are required:

(a) a surface water analysis pursuant to ARM 36.12.1702, which must include:

(i) through (b) remain as proposed.

(3) For surface water change applications, the following technical analyses are required:

(a) a historical use analysis pursuant to requirements in ARM 36.12.1902;

(b) remains as proposed.

~~(c) for applications where aquifer recharge is proposed for mitigation, an analysis of the monthly accretions to affected hydraulically connected surface water(s); and~~

~~(d)(c) for irrigation water rights changing the place of use or purpose, a return flow analysis of historical return flows and projected return flows for the amount of water being changed. This analysis must include:~~

~~(i) and (ii) remain as proposed.~~

~~(iii) if water rights are identified which will be impacted by a change in return flow, the return flow analysis must include a monthly breakdown of the rate and timing of return flow and evaluate impacts to the identified rights-;~~

~~(d) for applications with proposed mitigation, an analysis of the net effect to hydraulically connected surface water(s); and~~

~~(e) for applications where aquifer recharge is proposed for mitigation, an analysis of the monthly accretions to hydraulically connected surface water(s).~~

(4) For groundwater permit applications in an open basin, the following technical analyses are required:

(a) a groundwater analysis pursuant to ARM 36.12.1703, which must include:

(i) through (v) remain as proposed.

(vi) all groundwater rights with points of diversion within the 0.01-foot drawdown contour or area of potential impact;

(vii) through (x) remain as proposed.

(b) a surface water depletion analysis, which must include:

(i) all hydraulically connected surface water(s) to the source aquifer for the proposed point of diversion; and

(ii) through (d) remain as proposed.

(5) For groundwater change applications, the following technical analyses are required:

(a) a historical use analysis pursuant to requirements in ARM 36.12.1902;

(b) for applications changing the point of diversion, a groundwater analysis, which must include:

(i) through (vi) remain as proposed.

(c) for applications changing the point of diversion or place of use, surface water depletion analysis, which must include:

(i) all hydraulically connected surface water(s) to the source aquifer for the proposed point of diversion; and

(ii) and (iii) remain as proposed.

(d) for irrigation water rights changing the place of use or purpose, a return flow analysis of historical return flows and projected return flows for the amount of water being changed. This analysis must include:

(i) and (ii) remain as proposed.

(iii) if water rights are identified which will be impacted by a change in return flow, the return flow analysis must include a monthly breakdown of the rate and timing of return flow and evaluate impacts to the identified rights-;

(e) for applications with proposed mitigation, an analysis of the net effect to hydraulically connected surface water(s); and

(f) for applications where aquifer recharge is proposed for mitigation, an analysis of the monthly accretions to hydraulically connected surface water(s).

(6) For groundwater permit applications in a closed basin, in addition to technical analyses required under (4), ~~a hydrogeologic report conducted pursuant to 85-2-361, MCA~~, the following technical analyses are required:

(a) hydrogeologic report conducted pursuant to 85-2-361, MCA. ~~for applications with proposed mitigation, an analysis of the net effect to hydraulically connected surface water(s);~~

(b) ~~for applications where aquifer recharge is proposed for mitigation, an analysis of the monthly accretions to affected hydraulically connected surface water(s).~~

(7) remains as proposed.

(8) The department will evaluate technical analyses completed by the applicant for scientific credibility. The scientific credibility review will evaluate the methodology, quality of the analysis, and relevance of the data used for the technical analyses.

AUTH: 85-2-113, MCA

IMP: 85-2-302, 85-2-307, 85-2-311, 85-2-330, 85-2-336, 85-2-341, 85-2-343, 85-2-344, 85-2-360, 85-2-361, 85-2-362, 85-2-402, 85-2-506, 85-2-508, MCA

6. The department has amended the following rules as proposed but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

36.12.101 DEFINITIONS In addition to definitions provided for in ~~82-2-402 85-2-102~~, MCA, and unless the context requires otherwise, to aid in the implementation of the Montana Water Use Act, and as used in these rules:

(1) through (80) remain as proposed.

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, 85-2-351, 85-2-360, 85-2-361, 85-2-362, 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, MCA

36.12.103 FORMS AND SPECIAL FEES (1) through (2)(r) remain as proposed.

(s) \$150 for each exempted water right on Form No. 642, DNRC Ownership Update, Split ~~or Split~~ and Sever of a Water Right;

(t) through (4) remain as proposed.

AUTH: 85-2-113, MCA

IMP: 85-2-113, 85-2-302, 85-2-306, 85-2-307, 85-2-311, 85-2-312, 85-2-314, 85-2-402, 85-2-426, 85-2-436, 85-20-401, MCA

36.12.121 AQUIFER TESTING REQUIREMENTS (1) and (2) remain as proposed.

(3) Minimum testing procedures are as follows:

(a) through (d) remain as proposed.

(e) Minimum duration of pumping during an aquifer test must be 24 hours for a proposed pumping rate and volume equal to or less than 150 GPM or 50 acre-feet, or 72 hours for a proposed pumping rate and volume greater than 150 GPM or 50 acre-feet.

(i) ~~At a minimum if a variance from (e) is granted,~~ an eight-hour drawdown and yield test is required on all new production wells.

(ii) and (iii) remain as proposed.

(f) One or more observation wells must be completed in the same source aquifer as the proposed production well and close enough to the production well so that drawdown is measurable and far enough that well hydraulics do not affect the observation well.

(g) through (4) remain as proposed.

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

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

36.12.1401 PERMIT AND CHANGE APPLICATION MODIFICATION

(1) remains as proposed.

(2) Modification of an element of a permit or change application requires an application amendment Form No. ~~656~~ 655 to be submitted to the department which identifies the elements being modified;

(3) through (6) remain as proposed.

AUTH: 85-2-113, MCA

IMP: 85-2-302, 85-2-307, MCA

36.12.1702 PERMIT APPLICATION CRITERIA - PHYSICAL SURFACE WATER AVAILABILITY (1) Physical availability for perennial or intermittent streams will be determined based on monthly flow rate and volume.

(a) If stream gage records are available, or the source has been otherwise measured, or quantified, those measurement records will be used to quantify physical availability using the median of the mean monthly flow rate and volume during the proposed months of diversion.

(b) If measurement records pursuant to (1)(a) are not available, mean monthly flow rate and volume of water physically available ~~physical availability~~ may be estimated using a department-accepted method in conjunction with applicant collected flow measurements to validate the estimation technique. The applicant must collect a minimum of three measurements that reflect high, moderate, and low flows during the period of diversion. The applicant shall explain how the measurements are representative of high, moderate, and low flows.

(2) through (7) remain as proposed.

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

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

36.12.1704 PERMIT APPLICATION - LEGAL AVAILABILITY (1) The department will identify and quantify the existing legal demands of water rights on the source of supply and those waters to which it is tributary and which the department determines may be affected by the proposed appropriation. ~~Legal demands will be identified based on the water right records in the Water Rights Information System.~~

(a) For groundwater appropriations, this shall include identification and quantification of existing legal demands of water rights for any surface water source that the department determines will be depleted as a result of the groundwater appropriation.

(2) The department will compare the physical water supply at the proposed point of diversion and the legal demands of water rights within the area of potential impact to determine if water is legally available for the proposed permit. For groundwater permits, the department will compare the physical water supply and existing legal demands of water rights for impacted groundwater sources and surface water sources it determines will be depleted pursuant to (1)(a), to determine if water is legally available.

(a) and (b) remain as proposed.

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

IMP: 85-2-302, MCA

36.12.1801 PERMIT AND CHANGE APPLICATIONS - BENEFICIAL USE

(1) Water may be appropriated for beneficial use:

(a) by a governmental entity for the public;

(b) by a person for the sale, rent, or distribution to others; or

(c) by a person for the person's own use, unless provided otherwise by statute; or

(d) for other person's use, according to law.

~~(1)~~(2) The applicant must explain the following:

(a) and (b) remain as proposed.

~~(2)~~(3) The applicant does not need to explain that the flow rate or volume for each purpose is reasonable if:

(a) remains as proposed.

(b) there are no other associated or overlapping water rights appurtenant to the proposed place of use; ~~or~~

~~(c) the purpose of use, place of use, and operation of the proposed project is not changing from that found by the department's historical use analysis.~~

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

IMP: 85-2-302, MCA

7. The department has thoroughly considered the comments and testimony received. A summary of the comments received, and the department's responses are as follows:

COMMENT 1: One commenter expressed concern that the amendment to ARM 36.12.1401(3) will reset the timelines for any modification of any element of an application, however slight. The commenter believes that the resetting of timelines should be limited to modification of a significant element of an application and that the department should define what constitutes a significant element of an application.

RESPONSE 1: The department disagrees for the following reason: Modification of any "element" (as defined in amended ARM 36.12.101(22)) of an application is significant, particularly as it relates to the technical analysis required under NEW RULE III. The timelines for processing an application would be reset but the expedited timelines under the pre-application meeting rules would remain in effect if the technical analyses did not require amendment. It is necessary to reset timelines to give the department time to review the modified application and update any impacted analyses and the decision document.

COMMENT 2: One commenter expressed concern that NEW RULE III(4)(a)(v) references all groundwater rights within the 0.01-foot drawdown contour. The commenter believes this rule should specify all groundwater rights with a point of diversion within the 0.01-foot drawdown contour (rather than place of use).

RESPONSE 2: The department disagrees for the following reason: NEW RULE III(4)(a)(v) does not reference all groundwater rights within the 0.01-foot drawdown contour. NEW RULE III(4)(a)(v) is for calculation of annual groundwater flux. Nothing in this rule is dependent on points of diversion or places of use for groundwater rights.

COMMENT 3: One commenter expressed concern that NEW RULE III(4)(a)(vi) references all groundwater rights within the 0.01-foot drawdown contour or area of potential impact. The commenter believes this rule should specify all groundwater rights whose point of diversion is within the 0.01-foot drawdown contour (rather than place of use).

RESPONSE 3: The department agrees and is modifying NEW RULE III(4)(a)(vi) to read: "all groundwater rights with points of diversion within the 0.01-foot drawdown contour or area of potential impact;"

COMMENT 4: Three comments were received regarding NEW RULE III (4)(b)(i) and (5)(c)(i) that refer to "all hydraulically connected surface water(s) ..." A commenter stated that this reference is too broad and should be limited to the parameters noted in NEW RULE III(4)(a)(vi). The comments suggest this phrase should be modified to clarify that the depletion analysis should only be undertaken for those surface water sources that will be depleted by the proposed groundwater appropriation (see also ARM 36.12.1704(1)(a)). The comments suggest that the department instead insert "within the 0.01ft drawdown contour."

RESPONSE 4: The department agrees that the term is too broad and is modifying NEW RULE III(4)(b)(i) and (5)(c)(i) to remove the word "all" The department disagrees with the suggestion that the rule use the 0.01-foot drawdown contour because doing so would overlook pre-stream capture.

COMMENT 5: One commenter expressed concern that NEW RULE III(5) might be required for a simple groundwater change application.

RESPONSE 5: The department agrees that NEW RULE III(5)(b) and (c) should not always be required and added for applications changing the point of diversion, to NEW RULE III(5)(b), and for applications changing the point of diversion or place of use, to NEW RULE III(5)(c).

COMMENT 6: One commenter expressed concern that observation wells under the amendment to ARM 36.12.121(3)(f) could now be located within the cone of depression. The commenter maintains "...and far enough that well hydraulics do not affect the observation well" should not be deleted from the rule.

RESPONSE 6: The department agrees, and the language will not be removed from rule.

COMMENT 7: Four commenters expressed concern about the term "scientific credibility review" in NEW RULE II(5). Commenters believe the term "scientific credibility review" contained in NEW RULE II(5) is an undefined term, and should be removed, or modified to include a direct cross reference to NEW RULE III(8). The commenters believe a more accurate explanation of what a "scientific credibility review" entails to satisfy departmental standards should be set forth in rule. One commenter believes it is likely not necessary to include clarification directly in the rule, but for applicants it would be beneficial to understand what level of review they are being held to in the process.

RESPONSE 7: The department agrees. The department added a direct cross reference in NEW RULE II(5) to NEW RULE III(8). The department modified NEW RULE III(8) to include: The scientific credibility review will evaluate the methodology, quality of the analysis, and relevance of the data used for the technical analyses.

COMMENT 8: Three comments expressed concern regarding the term "historical use analysis" contained in NEW RULE III(3)(a), (5)(a), and the amendment to proposed ARM 36.12.1801(2)(c). Commenters believe the term "historical use analysis" in NEW RULE III(3)(a) and (5)(a) is undefined and these rules should be modified to directly cross reference ARM 36.12.1902.

RESPONSE 8: The department agrees that it is appropriate to reference ARM 36.12.1902 under which historical use is detailed. The department added a reference to ARM 36.12.1902 and NEW RULE III(3)(a) and (5)(a). The department removed ARM 36.12.1801(3)(c) per another public comment.

COMMENT 9: One commenter expressed concern that the term "area of potential impact" used in NEW RULE III(2)(b), (4)(a)(vi) and (4)(d), and the amendment to ARM 36.12.1704(2) is undefined, vague, and overbroad. The commenter states that the term should either be defined or the language modified to clarify what precisely is requested under the analysis. The commenter notes that NEW RULE III(4)(a)(vi) requires an analysis showing "all groundwater rights within the 0.01-foot drawdown contour or area of potential impact" and believes that 0.01-foot drawdown contour is an established numeric basis for most of the groundwater data analysis in NEW RULE III. The commenter expressed concern that the applicant might be unable to use determinations of hydrogeologic boundaries of the aquifer to guide their analysis of potentially impacted water rights and that the term "area of potential impact" could allow the department discretion to broadly expand beyond the 0.01-foot drawdown contour.

RESPONSE 9: The department disagrees. The term "area of potential impact" is included in 85-2-311(1)(a)(ii)(B), MCA. The amendment to ARM 36.12.1704 combines the existing language from ARM 36.12.1704 and 36.12.1705. The amendment to ARM 36.12.1704(2) uses the same terminology as existing ARM 36.12.1705(1). The amendment will not change the method of comparing physical water supply at the point of diversion and the legal demands for permits.

NEW RULE III TECHNICAL ANALYSES lists the analyses required for criteria analysis and incorporates the terminology in ARM 36.12.1704. Use of the term "area of potential impact" is reasonable because it allows for flexibility to use hydrogeologic boundaries in cases where they are known, or to use robust individual studies in areas such as the Lower Yellowstone Buried Channel Aquifer of eastern Montana or the Deep Aquifer in the Flathead Valley. An all-encompassing, universally applicable definition of "area of potential impact" is not feasible.

COMMENT 10: One commenter expressed concern that NEW RULE V(2)(a) could be interpreted as either requiring or allowing a change application for elements of a water right such as flow, volume, or period of use (which are "elements" of a water right under ARM 36.12.101(24)), despite statute requiring a change application only for changes to point of diversion, place of use, purpose of use, or place of storage (85-2-102(7)(a), MCA). The commenter recommends re-phrasing NEW RULE V(2)(a) to state "the water rights element(s) under the proposed change."

RESPONSE 10: The department disagrees. The water right element(s) proposed for change are limited to the four elements that require a change authorization pursuant to statute. The language in the proposed rule is clear.

COMMENT 11: One commenter expressed concern that the amendments to ARM 36.12.1401 are confusing as to what constitutes a modification to an element of a permit or change application. The commenter supports the proposed changes but seeks greater clarification.

RESPONSE 11: The department provides the following clarification. "Element" is defined in amended ARM 36.12.101(22). A modification of an element includes any increase or decrease in what the applicant is requesting. It is necessary to reset timelines to give the department time to review the modified application and update any impacted analyses and the decision document. See also Response to Comment 1.

COMMENT 12: One commenter expressed concern that ARM 36.12.1702(1) and (4) refer to "monthly flow rate" which is an ambiguous term in both instances. The commenter suggested that based on NEW RULE III(2)(a)(i) and (ii), that ARM 36.12.1702(1) should be modified to read "calculated median of the mean monthly flow rate" and ARM 36.12.1702(4) should be modified to read "estimated mean monthly flow rate."

RESPONSE 12: The department disagrees that reference to "monthly flow rate" in the proposed amendment to ARM 36.12.1702(1) is ambiguous. The language is intended to provide a broad requirement that applies to all perennial and intermittent surface water sources. The subsections of the proposed amendments to ARM 36.12.1702 provide detailed explanations of the type of information required to satisfy the general monthly flow rate requirement. The department agrees that the subsections of ARM 36.12.1702(1) could be clearer. The department is updating ARM 36.12.1702(1)(a) to state that measurement records will be used to quantify physical availability using the median of the mean monthly flow rate and volume during the proposed months of diversion. The department is updating ARM 36.12.1702(1)(b) to state that if measurement records pursuant to (1)(a) are not available, mean monthly flow rate and volume of water physically available may be estimated using a department-accepted method in conjunction with applicant-collected flow measurements to validate the estimation technique. The department will not be changing ARM 36.12.1702(4) because the source type could influence how the monthly flow rate and volume are quantified. In some cases, an estimation technique calculating mean flow and volume may be applicable but in other cases, physical availability may only be able to be determined using the measurements provided.

COMMENT 13: One commenter seeks greater clarification about the meaning of "department-approved location on the source supply" in the amendment to ARM 36.12.1702(6). The commenter seeks clarification about how and when in the process is that approval determined, and how the approval affects the timelines that are in statute and now proposed rule.

RESPONSE 13: In practice, the term means that the applicant must consult with the department regarding the location at which measurements are to be taken. This consultation could occur at an informal scoping meeting or the preapplication meeting. If an applicant completes a preapplication meeting and it is identified that they will need to collect measurements that cannot be completed within the 180-day

period after the preapplication meeting, the applicant will have to complete a new preapplication meeting.

COMMENT 14: Four comments were received questioning the proposed amendment to ARM 36.12.1704(1) that states "Legal demands will be identified based on the water right records in the Water Rights Information System." A commenter suggests that it is more appropriate to leave specific reference of the Water Rights Information System out of the rule at this time and another commenter believed that the "Water Rights Information System" is a vague and undefined term. The commenter stated that while the online website maintained by DNRC appears to be the "Water Rights Information System," it appears DNRC custom is to use the DNRC database, which is likely satisfactory as a DNRC tool, but should not be regulatorily defined to be the only record of water rights which DNRC relies upon for its legal availability analysis.

RESPONSE 14: The department agrees with the comments and removed the sentence in amended ARM 36.12.1704(1) referring to the Water Rights Information System.

COMMENT 15: One commenter suggested that ARM 36.12.1704(1), (1)(a), and (2) should be modified to specifically refer to "legal demands of water rights" because 85-2-311(1)(a)(ii)(B) and (C), MCA was amended in 2021 to clarify that legal availability is based upon "legal demands of water rights" and ARM 36.12.1704(1), (1)(a), and (2) implement 85-2-311, MCA.

RESPONSE 15: The department agrees that consistency with the wording in Montana Code Annotated is desirable. The amendment to ARM 36.12.1704 has been updated to state "legal demands of water rights."

COMMENT 16: Three comments were received about the amendments to ARM 36.12.1704(2) raising concern that this statement conflicts with 85-2-360(3)(b), MCA, that allows the department to issue a permit if adverse effect is offset through an aquifer recharge or mitigation plan – not depletion.

RESPONSE 16: The amendment to ARM 36.12.1704(2) combines the current requirements of ARM 36.12.1704(3) (requires the "identification of existing legal demands on any surface water source that could be depleted as a result of the groundwater appropriation.") and the current requirements of ARM 36.12.1705(2) (requires the department to "compare the physical water supply for any surface water source in which water flow could be reduced by any amount as a result of the groundwater appropriation and the legal demands within the area of potential impact.") The amendment does not substantively alter the requirements of the previous rule and is consistent with 85-2-311(1)(a), MCA.

The amendment to ARM 36.12.1704(2) applies to the legal availability criterion. Evaluation of depletion to hydrologically connected surface water sources for legal availability does not determine adverse effect and does not conflict with the

statement in 85-2-360(3)(a), MCA, that "a prediction of net depletion does not mean that an adverse effect on a prior appropriator will occur."

COMMENT 17: A commenter was concerned that both amended ARM 36.12.1702(4) and (5) and amended ARM 36.12.1703(1) require measurements up to once per month over a year, which may conflict with NEW RULE II(4) and (5), which require all required information be submitted within 180 days of the preapplication meeting. NEW RULE II would close the deadline for submission of analyses – including flow measurements – after 180 days, even if the measurements could not be physically taken to satisfy ARM 36.12.1703(1) or 36.12.1702(4) or (5) during that time period.

RESPONSE 17: A meeting with an applicant prior to collection of necessary measurements is considered a scoping meeting. A preapplication meeting should not be scheduled until after measurements are collected. 180 days is the limit for which the discussions and initial information shared at a preapplication meeting is valid. In addition, technical analyses cannot be completed until all necessary measurements have been completed. If an applicant completes a preapplication meeting and it is identified that they will need to collect measurements that cannot be completed within the 180-day period after the preapplication meeting, the applicant will have to complete a new preapplication meeting.

COMMENT 18: A commenter questioned the use of "may" instead of "shall" in amended ARM 36.12.1704(2)(a) and (b) regarding the use of mitigation or aquifer recharge plans and additional water right information. Second, in new (2)(a) and (b) the commenter is curious to better understand the distinction of using the word "may" versus "shall" for both consideration of a mitigation or aquifer recharge plan and additional water rights information as evidence of legal availability.

RESPONSE 18: Use of the word "may" in this context provides the department discretion to consider whether a mitigation plan, aquifer recharge plan, or additional water right information provided by an applicant is evidence that establishes water is legally available. Use of the term "shall" in this context would require the department to consider this information as evidence that establishes water is legally available regardless of its credibility.

COMMENT 19: A commenter suggested relaxing the 5% threshold requirement in amended ARM 36.12.121(3)(a), stating they believe although a constant pumping rate is the goal, it is not required for analysis of the pumping test, especially when the timing and magnitude of pumping rate change are recorded, citing as an example Kruseman and de Ridder, 19901; Duffield, 20232. The commenter states that pumping test analysis methods, including those in AQTESOLV software used by DNRC, can account for variable pumping rates. Therefore, the commenter feels that the 5% requirement language may put an unnecessary burden on applicants (in the form of unnecessarily or infeasibly strict testing protocol) and DNRC (e.g., additional applicant variance requests when the test protocol is not or cannot be met) without improving test or analysis results.

RESPONSE 19: Existing ARM 36.12.121(3)(a) requires "constant discharge rate," and as a result many applicants request a variance from this rule because "constant" is not defined. Allowing a +/- 5% deviation from the average pumping rate provides a conservative definition of constant rate that most pump tests would satisfy. If a pump test exceeds a +/- 5% deviation from the average pumping rate, the applicant can still apply for a variance.

COMMENT 20: A commenter suggests that the wording of amended ARM 36.12.121(3)(e)(i) and (ii) be changed to remove the word "all." The commenter suggests, instead, language that would allow, if a variance is granted from (e), that eight-hour drawdown and yield tests be performed on new production wells until the overall peak flow rate being requested in the application is reached (instead of being required on **all** new production wells). The commenter suggests this change apply to both (i) and (ii). The commenter believes that the proposed language as it stands, and as demonstrated by this example, would be unduly burdensome on an owner/applicant. Testing more wells beyond the point at which the peak overall pumping rate is reached seems excessive and unnecessary.

RESPONSE 20: The department agrees in part that in specific circumstances an eight-hour drawdown and yield test would not be necessary for all production wells. Rather than accepting the commenter's proposed language, the department has removed the phrase "if a variance from (e) is granted" from ARM 36.12.121(3)(e)(i). This maintains an eight-hour drawdown standard for all production wells but allows for a variance in specific circumstances.

COMMENT 21: A commenter expressed concern that ARM 36.12.1801 facially applies to both change applications and applications for new appropriations and that ARM 36.12.1801(2)(c) requires a historical use analysis, which has never been required of applicants for new appropriations, as no historical use exists. The commenter suggested that ARM 36.12.1801(2)(c) be amended to make clear it applies only to change applications.

RESPONSE 21: The department agrees in part. The comment raises a valid concern about historical use analysis being completed for a new permit. Upon further review, the proposed language could lead to confusion as to when the proposed amendment to the existing rule would apply in the event the applicant performs the historical use analysis. The department foresees implementation concerns with this proposed amendment to the existing rule and is removing it. Note that existing ARM 36.12.1801(1) was added back based on another public comment, so ARM 36.12.1801(3)(c) – rather than ARM 36.12.1801(2)(c) – is removed based on this response.

COMMENT 22: One commenter expressed concern over what happens if the department misses a timeline under the new statutes.

RESPONSE 22: No rule changes with respect to this comment are proposed.

COMMENT 23: Four comments were received supporting the increase in filing fees under proposed ARM 36.12.103, and one comment was received supporting proposed amendments to ARM 36.12.110.

RESPONSE 23: The department appreciates this feedback.

COMMENT 24: Two comments were received on NEW RULE I recommending that criteria be established for consideration of variance requests.

RESPONSE 24: The department agrees and is modifying NEW RULE I(3) to set a standard for approval. The department is removing "The department's grant of a variance request may impose conditions necessary to ensure the application materials and data provided is sufficient to evaluate the applicable criteria" and is instead adding The department may only grant a variance request if it determines the application materials and data provide sufficient information to complete any necessary technical analyses and to evaluate the applicable criteria.

COMMENT 25: Two comments were received about the amendments to ARM 36.12.111. The commenters recognize the effort to allow aerial photos from other sources but raise concern about lack of detail on what is considered adequate mapping. The commenters raised a specific concern that a hand-drawn map would meet the requirements and that, in most circumstances, this should not be considered adequate.

RESPONSE 25: The department disagrees. This rule still requires a north arrow, scale bar, section number and corners marked, and township and range identified. The rule requires maps or aerial photographs with these specific requirements. If an applicant hand draws the required elements onto a printed topographic map or aerial photograph, the map should be considered adequate.

COMMENT 26: Two comments were received on the amendments to ARM 36.12.1703, which require monthly measurement of permits proposing to use a developed spring as a means of diversion. The commenters were concerned about not allowing a variance for the monthly measurement requirement due to year-round use, potential safety concerns, and other unknowns.

RESPONSE 26: The department disagrees. Monthly measurement is the only way to quantify physical availability of a developed spring.

COMMENT 27: Two comments were received on ARM 36.12.1801, raising concern that removing who can appropriate water for beneficial use in ARM 36.12.1801(1) could inadvertently cause a problem with water for sale, rent, or distribution.

RESPONSE 27: The department agrees and will leave the language in ARM 36.12.1801(1) about who can appropriate water for beneficial use in the rule.

COMMENT 28: Two comments noted that amended ARM 36.12.1401(2) incorrectly refers to Form No. 656 instead of Form No. 655.

RESPONSE 28: The department agrees and has fixed this error by changing Form No. 656 to Form No. 655 in ARM 36.12.1401(2).

8. In addition to edits made in response to comments, the department is making the following changes to fix errors in the proposed rules:

The department has updated NEW RULE II(4) to state the deadline for technical analyses is set upon receipt of information under (3)(b) and (c). Aquifer testing, measurements, variances, and mitigation, if required, are necessary for completion of the technical analyses.

The department has updated the references of "preapplication checklist" in NEW RULE II to instead state "preapplication meeting form," which is more consistent with department naming conventions.

The department has updated the statutory reference under amended ARM 36.12.101 to 85-2-102, MCA. The proposed amendment to ARM 36.12.101 incorrectly referenced 82-2-102, MCA.

The department has amended ARM 36.12.103(2)(s) to accurately list the form name as "DNRC Ownership Update, Split and Sever of a Water Right," which matches the name of the same form in amended ARM 36.12.102(2)(aa).

The department has updated NEW RULE III to fix an error in the placement of the technical analyses for mitigation plans and aquifer recharge, which were misplaced under the requirements for a groundwater permit application in a closed basin instead of under the requirements for change applications. NEW RULE III(6) is updated to no longer include analyses for proposed mitigation or aquifer recharge, and instead states that the technical analyses required for a groundwater permit in a closed basin includes a hydrogeologic report conducted pursuant to 85-2-361, MCA, in addition to the technical analyses required for a groundwater permit in an open basin under NEW RULE III(4). The technical analyses for proposed mitigation or applications where aquifer recharge is proposed for mitigation is moved to NEW RULE III(3)(d) and (e) for surface water change applications and to NEW RULE III(5)(e) and (f) for groundwater change applications. The technical analysis for applications where aquifer recharge is proposed for mitigation was previously included as NEW RULE III(3)(c) and is moving to (3)(e) to maintain consistent formatting between NEW RULE III(3) and (5).

The department added a reference to ARM 36.12.1703 in NEW RULE III(4)(a) to connect the groundwater analysis to the requirements in rule for physical groundwater availability.

The department added a reference to ARM 36.12.1702 in NEW RULE III(2)(a) to connect the surface water analysis to the requirements in rule for physical surface water availability.

9. The effective date of this rulemaking is January 1, 2024.

/s/ Brian Bramblett
Brian Bramblett
Rule Reviewer

/s/ Amanda Kaster
Amanda Kaster
Director
Natural Resources and Conservation

Certified to the Secretary of State December 12, 2023.