

PGE bill draft (CGWA and measurement)

Draft concepts to be refined by CWR sub-working group. Note numbering and referencing need to be updated.

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draft

85-2-113. Department powers and duties.

85-2-113. Department powers and duties. (1) The department may prescribe fees or service charges for any public service rendered by the department under this chapter, including fees for the filing of applications or for the issuance of permits and certificates, for rulemaking hearings under 85-2-319, for administrative hearings conducted under this chapter, for investigations concerning permit revocation, for field verification of issued and completed permits, and for all change approvals. There may not be fees for any action taken by the department at the request of the water judge or for the issuance of certificates of existing rights.

(2) The department may adopt rules necessary to implement and carry out the purposes and provisions of this chapter. These rules may include but are not limited to rules to:

(a) govern the issuance and terms of interim permits authorizing an applicant for a regular permit under this chapter to begin appropriating water immediately, pending final approval or denial by the department of the application for a regular permit;

(b) require the owner or operator of appropriation facilities to install and maintain suitable controlling and measuring devices, ~~except that the department may not require a meter on a water well outside of a controlled ground water area or proposed controlled ground water area unless the maximum appropriation of the well is in excess of the limitation contained in 85-2-306;~~

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(c) require the owner or operator of appropriation facilities to report to the department the readings of measuring devices at reasonable intervals and to file reports on appropriations; and

(d) regulate the construction, use, and sealing of wells to prevent the waste, contamination, or pollution of ground water.

(3) The department shall adopt rules providing for and governing temporary emergency appropriations, including for emergency fire training and emergency fire-related operations, without prior application for a permit, necessary to protect lives or property.

(4) (a) The department shall adopt rules to require the owner or operator of an appropriation facility on a watercourse or portions of a watercourse identified as chronically dewatered by the department under 85-2-150 to acquire, install, and maintain a suitable controlling and measuring device no later than 2 years after designation of the watercourse or portions of the watercourse as chronically dewatered, except that when the department specifically finds that the installation of measuring devices along the entire watercourse or portions of the watercourse is not practicable within the 2-year deadline, it may establish a later deadline.

(b) For the purposes of subsection (4), an appropriation facility includes but is not limited to any method used to divert, impound, or withdraw water from a watercourse. Hydroelectric facilities that are using recognized methods of flow measurement, as determined by the department, are in compliance with subsection (4).

History: En. Sec. 5, Ch. 452, L. 1973; amd. Sec. 1, Ch. 238, L. 1974; amd. Sec. 2, Ch. 485, L. 1975;

85-2-306. Exceptions to permit requirements.

85-2-306. Exceptions to permit requirements. (1) (a) Except as provided in subsection (1)(b), ground water may be appropriated only by a person who has a possessory interest in the property where the water is to be put to beneficial use and exclusive property rights in the ground water development works.

(b) If another person has rights in the ground water development works, water may be appropriated with the written consent of the person with those property rights or, if the ground water development works are on national forest system lands, with any prior written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the certificate.

(c) If the person does not have a possessory interest in the real property from which the ground water may be appropriated, the person shall provide to the owner of the real property written notification of the works and the person's intent to appropriate ground water from the works. The written notification must be provided to the landowner at least 30 days prior to constructing any associated works or, if no new or expanded works are proposed, 30 days prior to appropriating the water. The written notification under this subsection is a notice requirement only and does not create an easement in or over the real property where the ground water development works are located.

(2) Inside the boundaries of a controlled ground water area, ground water may be appropriated only:

(a) according to a permit received pursuant to [85-2-508](#) or

(b) according to the requirements of a rule promulgated pursuant to [85-2-506](#).

(c) [For controlled groundwater areas for water quantity metering and reporting will be required for all new water rights and authorizations pursuant to 85-2-311, 85-2-306, and 85-2-402 in controlled ground water areas for Critical Groundwater Needs.](#)

(d) [For controlled groundwater areas for water quantity study and monitoring will be required](#)

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(3) (a) Outside the boundaries of a controlled ground water area, a permit is not required before appropriating ground water by means of a well or developed spring:

(i) when the appropriation is made by a [local governmental fire agency](#) organized under Title 7, chapter 33, and the appropriation is used only for emergency fire protection, emergency fire training, and emergency fire-related operations, which may include enclosed storage;

(ii) when a maximum appropriation of 350 gallons a minute or less is used in nonconsumptive [geothermal heating or cooling exchange](#) applications, all of the water extracted is returned without delay to the same source aquifer, and the distance between the extraction well and both the nearest existing well and the hydraulically connected surface waters is more than twice the distance between the extraction well and the injection well;

(iii) when the appropriation is [outside a stream depletion zone](#), is 35 gallons a minute or less, and does not exceed 10 acre-feet a year, except that a combined appropriation from the same source by two or more wells or developed springs exceeding 10 acre-feet, regardless of the flow rate, requires a permit; or

(iv) when the appropriation is [within a stream depletion zone](#), is 20 gallons a minute or less, and does not exceed 2 acre-feet a year, except that a combined appropriation from the same source by two or more wells or developed springs exceeding this limitation requires a permit.

(b) (i) Within 60 days of completion of the well or developed spring and appropriation of the ground water for beneficial use, the appropriator [shall file a notice of completion](#) with the department on a form provided by the department through its offices.

(ii) Upon receipt of the notice, the department shall review the notice and may, before issuing a certificate of water right, return a defective notice for correction or completion, together with the reasons for returning it. A notice does

not lose priority of filing because of defects if the notice is corrected, completed, and refiled with the department within 30 days of notification of defects or within a further time as the department may allow, not to exceed 6 months.

(iii) If a notice is not corrected and completed within the time allowed, the priority date of appropriation is the date of refiled a correct and complete notice with the department.

(c) A certificate of water right may not be issued until a correct and complete notice has been filed with the department, including proof of landowner notification or a written federal special use authorization as necessary under subsection (1). The original of the certificate must be sent to the appropriator. The department shall keep a copy of the certificate in its office in Helena. The date of filing of the notice of completion is the date of priority of the right.

(d) (i) Construction of a water supply system subject to Title 75, chapter 6, part 1, and use of a permit exception for the appropriation of water pursuant to this section is proof of beneficial use.

(ii) The department shall allocate a volume of 10 acre-feet a year to the system and issue a certificate of water right after the conditions in subsection (3)(d)(i) are met.

(iii) The department shall consider a water right as perfected after the conditions in subsection (3)(d)(i) are met.

(iv) When the appropriation is for a water supply system that is subject to Title 75, chapter 6, part 1, and is located outside of a stream depletion zone and does not exceed 10 acre-feet a year:

(A) For the purposes of subsection (3)(b)(i), the appropriation will be considered perfected upon completion of construction of the water supply system.

(B) A copy of the department of environmental quality approval for the water supply system must be submitted with the notice of completion. This section does not preclude the public water supply developer or any subsequent owners from expanding the water system or from revising the water use restrictions within the subdivision, provided that the total amount does not exceed 10 acre-feet per year.

(C) Water appropriated under this exception must be measured and reported annually to the department.

(4) An appropriator of ground water by means of a well or developed spring first put to beneficial use between January 1, 1962, and July 1, 1973, who did not file a notice of completion, as required by laws in force prior to April 14, 1981, with the county clerk and recorder shall file a notice of completion, as provided in subsection (3), with the department to perfect the water right. The filing of a claim pursuant to 85-2-221 is sufficient notice of completion under this subsection. The priority date of the appropriation is the date of the filing of a notice, as provided in subsection (3), or the date of the filing of the claim of existing water right.

(5) An appropriation under subsection (4) is an existing right, and a permit is not required. However, the department shall acknowledge the receipt of a correct and complete filing of a notice of completion, except that for an appropriation of 35 gallons a minute or less, not to exceed 10 acre-feet a year, the department shall issue a certificate of water right. If a certificate is issued under this section, a certificate need not be issued under the adjudication proceedings provided for in 85-2-236.

(6) A permit is not required before constructing an impoundment or pit and appropriating water for use by livestock if:

(a) the maximum capacity of the impoundment or pit is less than 15 acre-feet;

(b) the appropriation is less than 30 acre-feet a year;

(c) the appropriation is from an ephemeral stream, an intermittent stream, or another source other than a perennial flowing stream; and

(d) the impoundment or pit is to be constructed on and will be accessible to a parcel of land that is owned or under the control of the applicant and that is 40 acres or larger.

(7) (a) Within 60 days after constructing an impoundment or pit, the appropriator shall apply for a permit as prescribed by this part. Subject to subsection (7)(b), upon receipt of a correct and complete application for a stock water provisional permit, the department shall automatically issue a provisional permit. If the department determines after a hearing that the rights of other appropriators have been or will be adversely affected, it may revoke the permit or require the permittee to modify the impoundment or pit and may then make the permit subject to terms, conditions, restrictions, or limitations that it considers necessary to protect the rights of other appropriators.

(b) If the impoundment or pit is on national forest system lands, an application is not correct and complete under this section until the applicant has submitted proof of any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

(8) A person may also appropriate water without applying for or prior to receiving a permit under rules adopted by the department under [85-2-113](#).

(9) Pursuant to [85-20-1902](#), the provisions of this section do not apply within the exterior boundaries of the Flathead Indian reservation.

History: En. Sec. 16, Ch. 452, L. 1973; amd. Sec. 2, Ch. 238, L. 1974; amd. Sec. 8, Ch. 485, L. 1975; amd. Sec. 4, Ch. 416, L. 1977; amd. Sec. 1, Ch. 470, L. 1977; R.C.M. 1947, 89-880(5), (7); amd. Sec. 1, Ch. 30, L. 1981; amd. Sec. 1, Ch. 160, L. 1981; amd. Sec. 1, Ch. 357, L. 1981; amd. Sec. 8, Ch. 448, L. 1983; amd. Sec. 1, Ch. 499, L. 1985; amd. Sec. 2, Ch. 535, L. 1987; amd. Sec. 1, Ch. 432, L. 1989; amd. Sec. 13, Ch. 769, L. 1991; amd. Sec. 4, Ch. 805, L. 1991; amd. Sec. 9, Ch. 629, L. 1993; amd. Sec. 447, Ch. 418, L. 1995; amd. Sec. 1, Ch. 250, L. 1999; amd. Sec. 3, Ch. 78, L. 2001; amd. Sec. 3, Ch. 161, L. 2005; amd. Sec. 5, Ch. 213, L. 2007; amd. Sec. 1, Ch. 86, L. 2009; amd. Sec. 1, Ch. 96, L. 2011; amd. Sec. 1, Ch. 97, L. 2011; amd. Sec. 2, Ch. 421, L. 2013; amd. Sec. 8, Ch. 294, L. 2015; amd. Sec. 1, Ch. 455, L. 2015; amd. Sec. 1, Ch. 243, L. 2017; amd. Sec. 2, Ch. 264, L. 2017; amd. Sec. 1, Ch. 561, L. 2023.

85-2-506. Controlled ground water areas -- designation or modification.

85-2-506. Controlled ground water areas -- designation or modification. (1) The department may by rule designate or modify permanent or temporary controlled ground water areas as provided in this part. The rule for each controlled ground water area must designate the boundaries of the controlled ground water area.

(2) (a) The department shall by rule designate or modify permanent controlled ground water areas for water quantity.

(b) The criteria for designation of controlled ground water areas for Critical Groundwater Needs shall be:

(i) Groundwater Quantity Limitations where there is a statistically significant decreasing groundwater level trend has been documented.

(ii) Surface Water with Legal Availability limitations where there is a demonstrated hydraulic connection between groundwater and surface water and the legal demand on connected surface water exceeds 10% of the appropriation threshold of the stream for any month.

(c) The analysis of the criteria for designation of controlled ground water areas for Critical Groundwater Needs shall be conducted by the Department if petitioned in accordance with (2)(c).

(d) Metering and reporting will be required for all new water rights and authorizations pursuant to 85-2-311, 85-2-306, and 85-2-402 in controlled ground areas for water quantity.

(2) The rulemaking process for designation or modification of a controlled ground water area may be initiated by:

(a) the department;

(b) submission of a correct and complete petition from a state or local public health agency for identified public health risks; or

Commented [PSA2]: "red areas"
•Criteria in development and will be further refined at the March SWG meeting
•Addresses the SWG concern that politics would prevent the department from designation
•Has DNRC do the study if petitioned

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(c) submission of a correct and complete petition:

(i) by a municipality, county, conservation district, or local water quality district formed under Title 7, chapter 13, part 45; or

(ii) signed by at least one-third of the water right holders in a proposed controlled ground water area.

(a) A correct and complete petition must:

(i) be in a form prescribed by the department and must contain analysis prepared by a hydrogeologist, a qualified scientist, or a qualified licensed professional engineer concluding that one or more of the criteria provided in subsection (5) are met; and

(ii) describe proposed measures, if any, to mitigate effects of the criteria identified in subsection (5) that are alleged in the petition.

(b) When the department proposes a rule pursuant to this section, the place for the hearing must be within or as close as practical to the proposed or existing controlled ground water area.

(c) (i) The department shall notify the petitioner of any defects in a petition within 180 days. If the department does not notify the petitioner of any defects within 180 days, the petition must be treated as correct and complete.

(ii) A petition that is not made correct and complete within 90 days from the date of notification by the department of any defect is terminated.

~~(4)~~ (a) Within 60 days after a petition is determined to be correct and complete, the department shall:

(i) deny in writing the petition in whole or in part, stating the reasons for denial;

(ii) inform the petitioner that the department will study the information presented in the petition for a period not to exceed 90 days before denying or proceeding with the petition; or

(iii) initiate rulemaking proceedings in accordance with Title 2, chapter 4, part 3.

(b) Failure of the department to act under subsection (4)(a) does not mandate that the department grant the petition for rulemaking.

(c) In addition to the notice requirements of Title 2, chapter 4, parts 1 through 4, the department shall provide public notice of the rulemaking hearing by:

(i) publishing a notice at least once each week for 3 successive weeks, with the first notice not less than 30 days before the date of the hearing in a newspaper of general circulation in the county or counties in which the proposed controlled ground water area is located;

(ii) serving by mail a copy of the notice, not less than 30 days before the hearing, upon each person or public agency known from an examination of the records of the department to be a water right holder with a diversion within the proposed controlled ground water area, all landowners of record within the proposed controlled ground water area, and each well driller licensed in Montana whose address is within any county in which any part of the proposed controlled ground water area is located; and

(iii) serving by mail a copy of the notice upon any other person or state or federal agency that the department feels may be interested in or affected by the proposed designation or modification of a controlled ground water area.

(d) The notice under subsection (4)(c) must include a summary of the basis for the proposed rule. Publication and mailing of the notice as prescribed in this section, when completed, is considered to be sufficient notice of the hearing to all interested persons.

~~(5)~~ The department may designate a permanent controlled ground water area by rule if it finds by a preponderance of the evidence that any of the following criteria have been met and cannot be appropriately mitigated:

(a) current or projected reductions of recharge to the aquifer or aquifers in the proposed controlled ground water area will cause ground water levels to decline to the extent that water right holders cannot reasonably exercise their water rights;

(b) current or projected ground water withdrawals from the aquifer or aquifers in the proposed controlled ground water area have reduced or will reduce ground water levels or surface water availability necessary for water right holders to reasonably exercise their water rights;

(c) current or projected ground water withdrawals from the aquifer or aquifers in the proposed controlled ground water area have induced or altered or will induce or alter contaminant migration exceeding relevant water quality standards;

(d) current or projected ground water withdrawals from the aquifer or aquifers in the proposed controlled ground water area have impaired or will impair ground water quality necessary for water right holders to reasonably exercise their water rights based on relevant water quality standards;

(e) ground water within the proposed controlled ground water area is not suited for beneficial use; or

(f) public health, safety, or welfare is or will become at risk.

(67) (a) If the department finds that sufficient facts are not available to designate a permanent controlled ground water area, it may designate by rule a temporary controlled ground water area to allow studies to obtain the facts needed to determine whether or not it is appropriate to designate a permanent controlled ground water area. The department shall set the length of time that the temporary controlled ground water area will be in effect. Subject to subsection (6)(c), the term of a temporary controlled ground water area may be extended by rule.

(b) A temporary controlled ground water area designation is for the purpose of study and cannot include the control provisions provided in subsection (7), other than measurement, water quality testing, and reporting requirements.

(c) A temporary controlled ground water area designation may not exceed a total of 6 years, including any extensions.

(d) Prior to expiration of a temporary controlled ground water area, the department may amend or repeal the rule establishing the temporary controlled ground water area or may designate a permanent controlled ground water area through the rulemaking process under this section.

(e) Studies for temporary controlled ground water areas may be considered for funding under the renewable resource grant and loan program in Title 85, chapter 1, part 6.

(f) If there is a ground water investigation program within the bureau, the ground water assessment steering committee established by [2-15-1523](#) shall consider temporary controlled ground water areas for study.

(8) (a) The department shall designate by rule a temporary controlled ground water areas for water quantity ~~to~~ allow studies to obtain the facts needed to determine whether or not it is appropriate to designate a permanent controlled groundwater area for water quantity. The department shall set the length of time that the temporary controlled groundwater area will be in effect. Subject to subsection (6)(c), the term of a temporary controlled ground water area may be extended by rule.

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(b) The criteria for designation of temporary controlled ground area water area for water quantity shall be:

(i) Groundwater Quantity Limitations where:

(1) Groundwater trends: A decreasing groundwater level trend has been documented, but is statistically insignificant.

(2) Recharge and regional groundwater flows: Recharge is dependent on artificial sources and/or aquifer is vulnerable to any land use changes. Recharge is variable, and the variability is a result of climate, not extraction or artificial recharge.

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(3) Groundwater discharge to hydrologically connected sources: groundwater discharge trend is observed but is statistically insignificant and reductions in groundwater discharge will have a moderately negative impact on surface water features.

(4) Aquifer storage potential: Formation or structure with moderate storage or potential for storage.

(ii) Groundwater connection to Surface Water with Legal Availability limitations where:

(1) Legal demand on connected surface water is within 10% above or below the appropriation threshold of the stream (physical availability) for all months.

(c) The analysis of the criteria for designation of temporary Managed controlled ground area shall be conducted by the Department if petitioned in accordance with **(2)(c)**.

(d) Metering and reporting will be required for all new water rights and authorizations pursuant to 85-2-311, 85-2-306, and 85-2-402 in temporary controlled ground areas for water quantity.

(7) A controlled ground water area may include but is not limited to the following control provisions:

- (a) a provision closing the controlled ground water area to further appropriation of ground water;
- (b) a provision restricting the development of future ground water appropriations in the controlled ground water area by flow, volume, purpose, aquifer, depth, water temperature, water quality, density, or other criteria that the department determines necessary;
- (c) a provision requiring measurement of future ground water or surface water appropriations;
- (d) a provision requiring the filing of notice on land records within the boundary of a permanent controlled ground water area to inform prospective holders of an interest in the property of the existence of a permanent controlled ground water area. Notice of the designation must be removed or modified as necessary to accurately reflect modification or repeal of a permanent designation within 60 days.
- (e) a provision for well spacing requirements, well construction constraints, and prior department approval before well drilling, unless the well is regulated pursuant to Title 82, chapter 11;
- (f) a provision for mitigation of ground water withdrawals;
- (g) a provision for water quality testing;
- (h) a provision for data reporting to the department; and
- (i) other control provisions that the department determines are appropriate and adopts through rulemaking.

(8) Pursuant to **85-20-1902**, the provisions of this section do not apply within the exterior boundaries of the Flathead Indian reservation.

History: En. Sec. 4, Ch. 237, L. 1961; amd. Sec. 168, Ch. 253, L. 1974; R.C.M. 1947, 89-2914; amd. Sec. 2, Ch. 561, L. 1979; amd. Sec. 1, Ch. 189, L. 1985; amd. Sec. 4, Ch. 460, L. 1993; amd. Sec. 460, Ch. 418, L. 1995; amd. Sec. 13, Ch. 391, L. 2007; amd. Sec. 5, Ch. 86, L. 2009; amd. Sec. 10, Ch. 294, L. 2015.

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