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**MEMORANDUM**

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**TO:** JIM ELLIOTT, CHAIR  
WATER POLICY INTERIM COMMITTEE

**FROM:** JOHN TUBBS, ADMINISTRATOR  
WATER RESOURCES DIVISION, DNRC

**SUBJECT:** HB 831 PROPOSED AMENDMENTS SUMMARY

**DATE:** 4/17/2008

**CC:** JOE KOLMAN

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As requested by the Chairman, the Department has prepared a point by point analysis of the changes to statute proposed in the draft handed out to the Committee on March 6, 2008. In the future we will try to have a similar document prepared prior to submission of any draft proposal.

The Department has been working with MCA 85-2-360 through 85-2-369 for a year and believes that the very detailed text of the statutes limits the discretion of the Department to a point that permit applicant's costs and risks are unnecessarily high. The Department may also see increased costs associated with litigation over the detail in the statute. In proposing the changes to these statutes, the Department's intent is to try and keep the goals of HB 831 to protect senior water right holders and provide a process to get a ground water permit in a closed basin but reduce the detail. By reducing the detail, we believe the Department can be more flexible when faced with the facts of each proposed development we can reduce the possibility of technicalities being the basis for denial of permits which will, in turn, reduce the risk of litigation to the applicant and to the Department, and we can make the application process under these provisions more attractive to the development community. What we do know is we are seeing very few HB 831 applications and we are told that the reason is cost, risk and the ease of using exempt wells as a source of drinking water for subdivisions.

The following narrative tries to give the Committee some perspective as to the purposes and reasons we are proposing the changes to statute. Again I would ask the Committee to take these amendments in the same context as the draft reports prepared by Legislative staff. This is not an official agency legislative proposal; rather it is intended to focus the debate on the permitting process in closed basins.

- **Changes to 85-2-360:**

1. Page 1, Line 5: 85-2-321 is added to include the Milk River closure.

2. Page 1, Lines 5-10: These changes would require mitigation in order to consumptively use groundwater in a closed basin. The Department is considering these changes because of two facts: Consumptive use of groundwater will result in net depletion of surface water over time, and basins were closed to new surface water uses because the Legislature or the Department determined that surface water has been fully appropriated in the basin. Based on these reasons, the proposed changes eliminate the statutory questions of whether consumptive use of ground water will cause net depletion (it will) and whether net depletion will cause adverse affect (in a closed basin there is no legally available surface water). By eliminating these questions, applicants will know they have to offset consumptive use through mitigation which will make the process more certain and eliminate objections and legal actions to determine if there is net depletion and/or adverse affect.
  3. Page 1, Lines 11, 12: This change excludes the non-consumptive use of ground water from the requirements of mitigation. The Department is seeing an increase in applications for use of ground water through “heat pumps” for climate control in buildings. This is a non-consumptive use of ground water and should not require mitigation.
  4. Page 1, Lines 13-22: Same as lines 5-10 above.
  5. Page 1, Lines 23-26: Clarify that if you develop a well for the purpose of conducting hydrogeologic tests, the use of the well must cease until a water right is obtained.
  6. Page 1, Lines 27-34: Same as in lines 5-10 above.
  7. Page 1, Lines 37-39: Simplify the language of the statute.
- **Changes to 85-2-361:**
    8. Page 1, Lines 48, 49: This change brings the requirement to have a qualified professional from (ii) below in order to simplify the wording of the section.
    9. Page 1, Lines 49-55: These changes list the topics that our professional hydrogeologists need in a hydrogeologic assessment associated with a ground water development to evaluate the application. This begins to simplify and clarify the detail of section 361.
    10. Page 1, Lines 55-58; Line 1 on Page 2: These changes pull together criteria to evaluate water quality in the hydrogeologic assessment.
    11. Page 2, Lines 1-5: These changes eliminate a long list of different surface water bodies. Note that on Page 1, Line 54 there is a reference to surface water. Surface water is already defined in rule [36.12.101(64)] to include this list so these changes are intended to simplify the language of the section while retaining its purpose.

12. Page 2, Lines 8-12: These changes are intended to clarify and simplify what an applicant needs to show in predicting net depletions: the diverted amount, the consumed amount and the amount returned. Again the purpose of the original language is maintained but the language is simplified.
13. Page 2, Lines 16-20: This requirement is moved to Page 1, Lines 48 and 49.
14. Page 2, Lines 21-24: This sub-section has been very difficult for the Department to administer as it may lead an applicant to submit an application that we can not process under 85-2-311 MCA criteria. (In other words, if the effects cross the boundaries described in the existing sub-section the applicant may ignore these effects based upon this provision. However, the Department could not ignore the impacts beyond the boundary identified in the sub-section under 85-2-311. MCA, if it had the potential to adversely affect a water right holder outside of the boundary.) Rather than dictating an artificial surface area boundary in statute, the Department believes that the “qualified professional” should be allowed to define the extent of the influence of ground water development for the basis the hydrogeologic assessment. This eliminates potential conflict between the Department, the applicant, and the objectors.
15. Page 2, Lines 25-56: These changes eliminate the specific list of requirements for aquifer properties and aquifer boundaries. The Department believes the “qualified professional” would have sufficient legislative guidance provided on Page 1, Lines 51 through Page 2 Line 1, to develop a hydrogeologic assessment. These changes would simplify the statute and eliminate the potential for law suits over technical oversights in an application while maintaining the purpose of the provisions.
16. Page 2, Lines 57, 58; Page 3 Lines 1-8: These changes clarify the data requirements prior to submission to the Bureau of Mines and Geology for inclusion in the ground water data base. The Department receives applications where the initial hydrogeologic assessment is in error. Through the deficiency letter process, as well as consultation with the applicant’s “qualified professional” these errors are corrected. These changes clarify that it is the corrected hydrogeologic assessment as deemed by the Department that is sent to the Bureau.

- **Changes to 85-2-362:**

17. Page 3, Lines 15-21: These changes simplify statute by requiring mitigation of net depletions not mitigation of net depletions that cause adverse affect. Again, this statute only impacts closed basins and in closed basins the Legislature or the Department has determined that the surface water is fully appropriated.
18. Page 3, Lines 23-58; Page 4 Lines 1-4: These changes clarify and simplify what is required in a mitigation plan by eliminating the duplicate requirements for mitigation plans and aquifer recharge plans. Yet the changes keep the unique water quality requirements needed for aquifer recharge plans in a separate sub-section.

19. Page 4, Lines 5-8: These changes are intended to identify proposals and actions that can not be considered a “mitigation” plan. These mirror a Colorado statute excluding the elimination of vegetation to reduce consumptive use and the paving or covering of land with hard surfaces again eliminating consumptive use as components of a mitigation plan.

20. Page 4, Line 11 and Lines 13, 14: This change again eliminates the question of adverse affect and focuses mitigation on net depletion.

- **Changes to 85-2-634:**

21. Page 4, Lines 23 – 26: These changes coordinate the acceptance of the water right permit application with required discharge permits issued by the Department of Environmental Quality. However, rather than requiring the applicant to have already obtained the discharge permit from DEQ before applying to DNRC for a water right (a sequential process that delays the submission of the water right permit application and increases the overall time frame for the developer) the changes provide for a coordinated but parallel process that should protect water quality and reduce overall time frames. It is important to note that in (2) Lines 27-29 the Department cannot issue the permit until the DEQ discharge permit is issued.

- **Changes to 85-2-639:**

22. Page 4 Lines 47, 48: Reiterates that once aquifer testing is completed any use of the water shall cease.