

SENATE BILL NO. 358

INTRODUCED BY W. GALT, J. SECKINGER, K. WALSH, R. MINER, J. COHENOUR

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING GROUND WATER LAWS; REVISING EXCEPTIONS FROM WATER RIGHT PERMITTING; PROVIDING FOR CLOSURE AND MONITORING OF AQUIFERS; REVISING DESIGNATION OF CONTROLLED GROUND WATER AREAS; REVISING DEPARTMENT DUTIES; PROVIDING RULEMAKING AUTHORITY; AMENDING SECTIONS 85-2-113, 85-2-306, 85-2-381, 85-2-506, AND 85-2-524, MCA; PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-113, MCA, is amended to read:

"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~~

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Section 5. Section 85-2-506, MCA, is amended to read:

"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) There are ~~six-four~~ types of controlled ground water areas for:

(a) public health, safety, and welfare;

(b) temporary public health, safety, and welfare;

(c) water quantity; ~~or~~

(d) ground water monitoring for water quantity;

~~(e) water quality; or~~

~~(f) ground water monitoring for water quality.~~

~~(2)(3)~~ The department may initiate the rulemaking process for designation or modification of a controlled ground water area ~~may be initiated by~~ after the submission of a correct and complete petition for:

(a) ~~the department~~ a public health, safety, and welfare controlled ground water area pursuant to subsection (6), by the department, a state or local public health agency, a municipality, county, conservation district, or local water quality district formed under Title 7, chapter 13, part 45, the department of environmental quality, or at least one-third of the water right holders in a proposed area; ~~or~~

(b) ~~submission of a correct and complete petition from a state or local public health agency for identified public health risks~~ a water quantity controlled ground water area pursuant to subsections (8) and (9), by the department or at least one-third of the water right holders in a proposed area; ~~or~~

~~(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 water quality controlled groundwater area pursuant to subsections (10) and (11), by a municipality, county, conservation district, or local water quality district formed under Title 7, chapter 13, part 45, the department of environmental quality, or at least one-third of the water right holders in a proposed area.~~

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~~(3)(4)~~ (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)~~ subsections (6) through ~~(11)(9)~~ are met; and

(ii) describe proposed measures, if any, to mitigate effects of the criteria identified in ~~subsection (5)~~ subsections (6) or (7) that are alleged in the petition;

(b) For petitions submitted pursuant to subsection (8) or (9), the department shall conduct the data collection and analysis if more than 50% of the water right holders whose point of diversion falls within the proposed area sign the petition. The department may not conduct more than two analyses a year for a petition.

~~(b)(c)~~ 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.

~~(e)(d)~~ (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)(5)~~ (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)~~ (5)(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

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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)(e)~~ (5)(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)(6)~~ (a) The department may designate a ~~permanent public health, safety, and welfare~~ 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)~~(i) 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)~~(ii) 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)~~(iii) 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)~~(iv) 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

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1 to reasonably exercise their water rights based on relevant water quality standards;

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

3 or

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

5 (b) A public health, safety, and welfare controlled ground water area may include provisions for:

6 (i) closing a controlled ground water area to further appropriation of ground water;

7 (ii) restricting the development of future ground water appropriations in the controlled ground water
8 area by flow, volume, purpose, aquifer, depth, water temperature, water quality, density, or other criteria the
9 department determines are necessary;

10 (iii) requiring measurement of future ground water or surface water appropriations;

11 (iv) requiring the filing of notice on land records within the boundary of a permanent controlled
12 ground water area to inform prospective holders of an interest in the property of the existence of a permanent
13 controlled ground water area. This notice of the designation must be removed or modified as necessary to
14 accurately reflect the modification or repeal of a permanent designation within 60 days.

15 (v) well spacing requirements, well construction constraints, and prior department approval before
16 well drilling unless the well is regulated pursuant to Title 82, chapter 11;

17 (vi) mitigation of ground water withdrawals;

18 (vii) water quality testing;

19 (viii) data reporting to the department; and

20 (ix) other provisions the department determines are appropriate and adopts through rulemaking.

21 ~~(6)~~(7) (a) If the department finds that sufficient facts are not available to designate a permanent public
22 health, safety, and welfare controlled ground water area, it may designate by rule a temporary public health,
23 safety, and welfare controlled ground water area to allow studies to obtain the facts needed to determine
24 whether or not it is appropriate to designate a permanent controlled ground water area. The department shall
25 set the length of time that the temporary ~~controlled ground water~~ area will be in effect. Subject to subsection ~~(6)~~
26 ~~(7)~~(c), the term of a temporary ~~controlled ground water~~ area may be extended by rule.

27 (b) A temporary public health, safety, and welfare controlled ground water area designation is for

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the purpose of study and cannot include the control provisions provided in subsection ~~(7)~~ (6), other than measurement, water quality testing, and reporting requirements.

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

(d) Prior to expiration of a temporary public health, safety, and welfare 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 public health, safety, and welfare 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 public health, safety, and welfare controlled ground water areas for study.

~~(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~~

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(i) ~~other control provisions that the department determines are appropriate and adopts through~~
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(8) (a) The department shall designate or modify a water quantity controlled ground water area by rule if it finds by a preponderance of the evidence that there is a high concentration of ground water use exempt from permitting pursuant to 85-2-306(4), and the department determines:

(i) the ground water level is declining or is projected to decline due to pumping based on a review of the most recent 10-year period of record that demonstrates a chronic lowering of the ground water table or permanent loss of aquifer storage. This review must be based on available data or in consultation with the Montana bureau of mines and geology or other relevant agencies;

(ii) that 80% or more of the ground water in the aquifer has been appropriated; or

(iii) that 100% or more of the hydraulically connected surface water has been appropriated during any month. Ground water that is hydrologically connected to surface water is all ground water that, if extracted, may cause stream depletion by induced infiltration or pre-stream capture of tributary ground water.

(b) Control provisions for a water quantity controlled ground water area must include but are not limited to:

(i) closing the water quantity controlled ground water area to all exceptions from the permitting process pursuant to 85-2-306, except for those specific appropriations authorized by rule pursuant to this section;

(ii) requiring metering and reporting for all new water rights and authorizations pursuant to 85-2-306, 85-2-311, and 85-2-402 in water quantity controlled ground water areas. A totalizing metering device must be used and measurements must be reported annually on a form provided by the department. The department may issue a fine for noncompliance with this metering and reporting requirement;

(iii) allowing for the completion of appropriations on parcels created after October 17, 2014, that received a certificate of subdivision approval from the department of environmental quality and a predetermination letter from the department of natural resources and conservation before February 14, 2024;

(iv) closing an aquifer area to all exceptions from the permitting process pursuant to 85-2-306, except for appropriations pursuant to subsection (8)(b)(iii) or one exception allowing for up to 0.5 acre-feet a

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year without a permit that is authorized by the department for a single living unit on a tract of record in existence on January 1, 2025, when connection to a public water system and mitigation is infeasible or for stockwater. A change in the purpose of a water right excepted from permitting pursuant to this subsection (8)(b)(iv) is prohibited;

(v) other control provisions the department determines are appropriate and adopts through administrative rule.

(9) (a) The department shall designate or modify a water quantity ground water monitoring area by rule if it finds by a preponderance of the evidence that there is a high concentration of ground water use exempt from permitting pursuant to 85-2-306(4), and the department:

(i) determines the ground water level is declining or is projected to decline due to pumping based on a review of the most recent 10-year period of record that demonstrates a chronic lowering of the ground water table or permanent loss of aquifer storage. This review must be based on available data or in consultation with the Montana bureau of mines and geology or other relevant agencies.

(ii) determines that 70% or more of the ground water in the aquifer has been appropriated;

(iii) determines that aquifer recharge is reliant on irrigation losses or where the geologic structure or formation has limited storage or limited storage potential based on available data or in consultation with the Montana bureau of mines and geology or other relevant agencies; or

(iv) determines that 90% or more of the hydraulically connected surface water has been appropriated during any month.

(b) (i) Control provisions for water quantity ground water monitoring areas must include but are not limited to:

(A) requiring the department to develop a monitoring plan for each designated ground water monitoring area in consultation with the Montana bureau of mines and geology or other relevant agencies;

(B) requiring metering and reporting for all new water rights and authorizations pursuant to 85-2-306, 85-2-311, and 85-2-402 in water quantity ground water monitoring areas. A totalizing metering device must be used and measurements must be reported annually on a form provided by the department. The department may issue a fine for noncompliance with this metering and reporting requirement;

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(ii) The department shall review the monitoring data and plan provided for in subsection (8)(b)(i)(A) each biennium to determine if a change in area status is necessary.

~~(10) (a) The department shall designate or modify a water quality controlled ground water area by rule if it finds by a preponderance of the evidence that using site specific data, 50% of the designated area is classified as high septic system density, as defined in department circular PWS 6 from the department of environmental quality, and one of these criteria is met:~~

~~(i) nitrate concentrations exceed standards in department circular DEQ-7, department circular DEQ-12A, or department circular DEQ-4 from the department of environmental quality;~~

~~(ii) exceedance of a ground water human health standard in department circular DEQ-7 in more than 25% of a set of no fewer than 30 ground water wells;~~

~~(iii) exceedance of a U.S. environmental protection agency human health advisory for a toxic or carcinogenic compound is more than 25% of a set of no fewer than 30 ground water wells; or~~

~~(iv) (A) if the aquifer is known or may be demonstrated to be interconnected with surface water;~~

~~(I) aquatic life or recreation beneficial uses of the connected surface water are listed as impaired by the department of environmental quality pursuant to Title 75, chapter 5; and~~

~~(II) impaired by total nitrogen or total phosphorus attributable to on-site subsurface wastewater treatment and disposal systems sources at a source contribution rate equal to or greater than 10%; or~~

~~(B) if a connected surface water is not listed as impaired by the department of environmental quality, the petitioner may provide substantial credible data and analysis conducted in accordance with water quality assessment methods prescribed by the department of environmental quality to demonstrate an impairment:~~

~~(I) to aquatic life or recreation beneficial uses; and~~

~~(II) based on total nitrogen or total phosphorous attributable to on-site subsurface wastewater treatment and disposal system sources at a source contribution rate of equal to or greater than 10%.~~

~~(b) The department shall determine appropriate control provisions for a water quality controlled ground water area by rule.~~

~~(11) (a) The department shall designate or modify a water quality ground water monitoring areas by~~

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~~rule if it finds by a preponderance of the evidence that using site-specific data, 50% of the designated area is classified as moderate septic system density, as defined in department circular PWS-6 from the department of environmental quality, and one of these criteria is met;~~

~~(i) background nitrate as nitrogen levels are 5.0 micrograms a liter or more using nondegradation methods for drainfields that are not required to get a discharge permit;~~

~~(ii) exceedance of a ground water human health standard in department circular DEQ-7 in more than 10% of a set of no fewer than 30 ground water wells; or~~

~~(iii) exceedance of a U.S. environmental protection agency human health advisory for a toxic or carcinogenic compound is more than 10% of a set of no fewer than 30 ground water wells.~~

~~(b) The department shall determine appropriate control provisions for a water quality ground water monitoring area by rule.~~

~~(12)(10)(a)~~ The department may initiate rulemaking for the modification or removal of an area designated pursuant to subsections (6), ~~and (8) through (11)(8), and (9)~~, if the area no longer meets the designation criteria.

~~(b)~~ A petition may be filed pursuant to subsection (3) to modify or remove an area designated pursuant to subsections (6), ~~and (8) through (11)(8), and (9)~~. The petitioners shall provide facts of how the area no longer meets the designation criteria. If the petitioners prove the criteria are no longer being met, the department shall modify or remove the designation.

~~(c)~~ The entities in subsection (3) may file a petition to modify or remove a designated area to the department.

~~(8)(13)(11)~~ Pursuant to 85-20-1902, the provisions of this section do not apply within the exterior boundaries of the Flathead Indian reservation."

Section 6. Section 85-2-524, MCA, is amended to read:

"85-2-524. Criteria for petition applications. Municipalities, counties, conservation districts, and local water quality districts may establish specific criteria for acceptance of an application to the municipality, county, conservation district, or local water quality district to petition for creation of a controlled ground water