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January 21, 2014

Senator John Brenden, Chair
Environmental Quality Council
P.O. Box 201704
Helena, Montana 59620-1704

Dear Chairman Brenden,

The Department of Natural Resources and Conservation (DNRC) provides this response to the Environmental Quality Council (EQC's) Letter of January 9, 2013 (Letter), objecting to MAR Notice 36-22-176 pursuant to §2-4-305(9), MCA. MAR Notice No. 36-22-176 contained the DNRC's proposed amendment to the definition of "combined appropriation" found in §85-2-306, MCA. This is the second notice of objection provided by EQC to DNRC regarding a proposed amendment to the "combined appropriation" definition in ARM 36.12.101(13). It is with great regret and as a result of this latest objection, the Department recognizes that it is unable to solve the "combined appropriation" issue and any further attempts to do so at this time would be futile. The Department hereby provides notice to the Committee that it has no choice but to withdraw the proposed rule in MAR Notice No. 36-22-176.

As you are aware, the exception to permitting for small wells under §85-2-306, MCA (exempt wells), and the exclusion from the exception for a "combined appropriation," have been controversial topics for well over a decade. In its 2012 Report, *The Exemption: To Change or Not to Change*, the Water Policy Interim Committee (WPIC) acknowledged that exempt wells had been part of the Committee's work for the four consecutive interims. There is no question that use of the exception under §85-2-306, MCA, has proliferated during the last decade. This proliferation is problematic particularly for multiple exempt wells because these wells do not go through the permitting process under §85-2-311, MCA, and specifically the legal availability and adverse effect analyses, in place to protect senior water rights, and they cannot effectively be called by more senior water rights as WPIC's 2012 Report noted.

The Department has spent countless hours working with stakeholders and legislators to find a mutually agreeable solution over the last 10 years. Important events and efforts regarding this issue include the following:

- In 2006, Gallatin County petitioned the Department to conduct rulemaking on the definition of "combined appropriation." The Department denied the petition because of resource and legal concerns with the specific language proposed.
- In 2006, the DNRC convened and conducted extensive meetings with a stakeholders' groundwater working group in anticipation of 2007 Legislature to discuss potential solutions to the exploitation of the 306 exception for exempt wells. House Bill 104 (reducing the exempt well exception to 1 acre-foot) grew out this working group, but it did not become law. Neither the working group nor the 2007 Legislature were able to formulate a solution supportable by all stakeholders.
- On November 9, 2009, a Petition for Declaratory Ruling and Request to Amend Rule 36.12.101(13) was filed with the DNRC by Katrin R. Chandler, Betty J. Lannen, Polly Rex, Joseph Miller, and the Clark Fork Coalition. The Department denied the rulemaking request but held a multi-month, public declaratory ruling proceeding. Notice of the proceeding and the ability to participate was provided statewide.
- In the Declaratory Ruling proceeding, the Department received briefing from thirteen parties and held a public hearing where it received comments from twelve organizations/persons regarding the definition of "combined appropriation."
- In August 2010, the Department concluded in the Declaratory Ruling that although its current definition of "combined appropriation" was not inconsistent with the law, exempt wells were being used in ways not anticipated under the current definition of "combined appropriation." The Department agreed to pursue rulemaking to revise the definition.
- A Petition for Declaratory and Injunctive Relief regarding the Department's Declaratory Ruling decision was filed in September 2010, in the District Court for the First Judicial District.
- The Department settled with the Plaintiffs in the court case and agreed to conduct rulemaking on the definition of "combined appropriation" within certain timeframes. Given the upcoming 2011 Legislature, the settlement allowed for action of the 2011 Legislature prior to the deadline for final rulemaking. The settlement was subsequently revised to allow for action by the 2013 Legislature.
- 2011 Legislature did not solve the exempt well issue but passed House Bill 602 requiring formal study of the issue by the Water Policy Interim Committee (WPIC).
- The WPIC studied the issue and gathered information from the public and DNRC. See 2012 WPIC Report, *The Exemption: To Change or Not to Change.* The Committee proposed five different bills to address the use of exempt wells, including combined appropriation, and took comment on the bills in Bozeman, Kalispell, Hamilton, and Helena.
- At the September 10-11, 2012 meeting, the Committee initially proposed and then adopted two new bills defining "combined appropriation" and providing for "stream depletion zones." The other five bills did not move forward.
- A stream depletion zone bill (SB 346) became law in the 2013 Legislature and the bill defining "combined appropriation" (SB 19) did not become law.

- In accordance with the district court settlement, the Department commenced rulemaking on the definition of "combined appropriation" after the close of the 2013 Legislature because the term was not defined by law.
- On August 22, 2013, after meeting with all the major stakeholders, the Department proposed an amendment to the definition of combined appropriation in ARM 36.12.101(13).
- This Committee objected to the proposed rule under §2-4-305(9), MCA, by Letter dated September 13, 2013.
- Although the Department could have withdrawn its proposed rule, proposed a different rule, and completed a new rulemaking on the definition of "combined appropriation" before this EQC met in January, it purposefully did not, in an effort to work cooperatively with the Committee and stakeholders.
- The Department took comment on the proposed rule by public hearing and written comment. The Department received 346 comments on the proposed rule, of which 318 comments were in favor of the proposal.
- The Department considered the comments and withdrew its proposed rule on November 11, 2013, to revise and propose a new definition in light of the comments received and to try to find a workable and middle ground solution.
- The Department revised its proposed rule and published the proposal December 26, 2014, in time for the Committee's January meeting. Again, the Department deliberately proposed the revised rule prior to the EQC meeting in order to give the Committee the chance to review the proposed rule prior to the Department's administrative hearing.
- By Letter dated January 9, 2014, EQC objected to the Department's second proposed rule regarding combined appropriation.

The Department endeavored to work with stakeholders and the legislature to solve this issue. Despite the Department's efforts to find a workable solution, the divide is too great and some interests have refused to compromise. The Department is resigned to the fact that any rule it proposes on the definition of "combined appropriation" cannot be successful before this Committee. It is futile for the Department to continue to pursue rulemaking at this point and to do so would be a misuse of limited state resources. The Department has no option but to withdraw its proposed rule and await what is likely to be the inevitable litigation that will follow.

Sincerely,

Tim Davis
Administrator, Water Resources Division
DNRC

Cc –
Senator Chas Vincent, Chair, WPIC
Joe Kolman