

2024.09.30 Coordination and intent to appropriate.

*** Bill No. ***

Introduced By *****

A Bill for an Act entitled: “An Act; amending sections 76-3-604, 76-3-608, 76-3-622, 76-4-104, 76-4-108, 76-4-113, 76-4-114, 76-4-115, 76-4-122, 76-25-412, and 85-2-102, MCA; amending section 85-2-306, MCA.”

Be it enacted by the Legislature of the State of Montana:

New Section (76-3-407). **Recordation of water rights.** A county clerk and recorder may not accept for recording a subdivision plat, certificate of survey, or townhome, townhouse, or condominium declaration subject to review under 76-3-201(1)(a), (c), or (f), 76-3-201(5), 76-3-203, 76-3-205(1), 76-3-207(1)(a), (b), (c), (e), or (f), or parts 5 and 6 of this act that is not served by adequate municipal or adequate county water and/or sewer district facilities, as those terms are defined in 76-4-102, unless accompanied by and recorded with a determination of water rights under Title 85, Chapter 2 or authorized notice of intent to appropriate groundwater from the department of natural resources and conservation.

NEW SECTION 2. Independent Authority and Basis for Review and Determination. (1) Any review and decision by the department made under the authority of this chapter relates specifically and only to the criteria for review and authority provided to the department in this chapter.

(2) No decision made by the department under the authority of this chapter is intended to constrain, influence, or restrict any decision to be made by the department or by other state agency or local governmental entity under any other lawful authority.

Section 1. Section 76-3-604, MCA, is amended to read:

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"76-3-604. Review of subdivision application -- review for required elements and sufficiency of information. (1) (a) A subdivision application is considered to be received on the date of delivery to the reviewing agent or agency and when accompanied by the review fee submitted as provided in 76-3-602.

(b) Within 5 working days of receipt of a subdivision application, the reviewing agent or agency shall determine whether the application contains all of the listed materials as required by 76-3-504(1)(a) and shall notify the subdivider or, with the subdivider's written permission, the subdivider's agent of the reviewing agent's or agency's determination. If the reviewing agent or agency determines that elements are missing from the application, the reviewing agent or agency shall identify those elements in the notification.

(2) (a) Within 15 working days after the reviewing agent or agency notifies the subdivider or the subdivider's agent that the application contains all of the required elements as provided in subsection (1), the reviewing agent or agency shall determine whether the application and required elements contain detailed, supporting information that is sufficient to allow for the review of the proposed subdivision under the provisions of this chapter and the local regulations adopted pursuant to this chapter and shall notify the subdivider or, with the subdivider's written permission, the subdivider's agent of the reviewing agent's or agency's determination.

(b) If the reviewing agent or agency determines that information in the application is not sufficient to allow for review of the proposed subdivision, the reviewing agent or agency shall identify the insufficient information in its notification.

(c) A determination that an application contains sufficient information for review as provided in this subsection (2) does not ensure that the proposed subdivision will be approved or conditionally approved by the governing body and does not limit the ability of the reviewing agent or agency or the governing body to request additional information during the review process.

Commented [AP1]: Background: Element and sufficiency review for platting (e.g., correct and complete).

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(3) The time limits provided in subsections (1) and (2) apply to each submittal of the application until:

(a) a determination is made that the application contains the required elements and sufficient information; and

(b) the subdivider or the subdivider's agent is notified.

(4) After the reviewing agent or agency has notified the subdivider or the subdivider's agent that an application contains sufficient information as provided in subsection (2), the governing body shall approve, conditionally approve, or deny the proposed subdivision within 60 working days or 80 working days if the proposed subdivision contains 50 or more lots, based on its determination of whether the application conforms to the provisions of this chapter and to the local regulations adopted pursuant to this chapter, unless:

(a) the subdivider and the reviewing agent or agency agree to an extension or suspension of the review period, not to exceed 1 year; or

(b) a subsequent public hearing is scheduled and held as provided in 76-3-615.

(5) (a) If the governing body fails to comply with the time limits under subsection (4), the governing body shall pay to the subdivider a financial penalty of \$50 per lot per month or a pro rata portion of a month, not to exceed the total amount of the subdivision review fee collected by the governing body for the subdivision application, until the governing body denies, approves, or conditionally approves the subdivision.

(b) The provisions of subsection (5)(a) do not apply if the review period is extended or suspended pursuant to subsection (4).

(6) If the governing body denies or conditionally approves the proposed subdivision, it shall send the subdivider a letter, with the appropriate signature, that complies with the provisions of 76-3-620.

(7) (a) The governing body shall collect public comment submitted at a hearing or hearings regarding the information presented pursuant to 76-3-622 and shall make any comments

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submitted or a summary of the comments submitted available to the subdivider within 30 days after conditional approval or approval of the subdivision application and preliminary plat.

(b) The subdivider shall, as part of the subdivider's application for sanitation approval, forward the comments or the summary provided by the governing body to the:

(i) reviewing authority provided for in Title 76, chapter 4, for subdivisions that will create one or more parcels containing less than 20 acres; and

(ii) local health department or board of health for proposed subdivisions that will create one or more parcels containing 20 acres or more and less than 160 acres.

(8) (a) For a proposed subdivision that will create one or more parcels containing less than 20 acres, the governing body may require approval by the department of environmental quality as a condition of approval of the final plat.

(b) For a proposed subdivision that will create one or more parcels containing 20 acres or more, the governing body may condition approval of the final plat upon the subdivider demonstrating, pursuant to 76-3-622, that there is an adequate water source and at least one area for a septic system and a replacement drainfield for each lot.

(c) for each lot that is not served by adequate municipal or adequate county water and/or sewer district facilities, as those terms are defined in 76-4-102, a determination may be made that the application contains the required elements and sufficient information for review if the applicant can demonstrate they have a water right under Title 85, Chapter 2, an accepted water right application or completed technical analyses for preapplication meeting for water rights under Title 85, Chapter 2, or authorized notice of intent to appropriate groundwater for each lot.

(9) (a) Review and approval, conditional approval, or denial of a proposed subdivision under this chapter may occur only under those regulations in effect at the time a subdivision application is determined to contain sufficient information for review as provided in subsection (2).

Commented [AP2]: Background: allows concurrent processes between DNRC and local governing body. For element and sufficient review (i.e., going to public comment) you have to have the technical analyses completed.)

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(b) If regulations change during the review periods provided in subsections (1) and (2), the determination of whether the application contains the required elements and sufficient information must be based on the new regulations.

(10) Unless otherwise provided by law, the governing body may review but does not have approval authority of the governing documents of the subdivision or amendments to the governing documents unless the governing documents directly and materially impact a condition of subdivision approval."

{Internal References to 76-3-604:
76-3-504 76-3-601 76-3-608 76-3-609
76-3-615 76-3-620 76-4-125}

Section 2. Section 76-3-608 , MCA, is amended to read:

"76-3-608. Criteria for local government review. (1) The basis for the governing body's decision to approve, conditionally approve, or deny a proposed subdivision is whether the subdivision application, preliminary plat, applicable environmental assessment, public hearing, planning board recommendations, or additional information demonstrates that development of the proposed subdivision meets the requirements of this chapter. A governing body may not deny approval of a proposed subdivision based solely on the subdivision's impacts on educational services or based solely on parcels within the subdivision having been designated as wildland-urban interface parcels under 76-13-145.

(2) The governing body shall issue written findings of fact that weigh the criteria in subsection (3), as applicable.

(3) A subdivision proposal must undergo review for the following primary criteria:

(a) except when the governing body has established an exemption pursuant to subsection (6) or except as provided in 76-3-509, 76-3-609(2) or (4), or 76-3-616, the specific, documentable, and clearly defined impact on agriculture, agricultural water user facilities, local services, the

Commented [AP3]: Background: Approval of preliminary platt (up to 3 years), conditions, and final platt approval.

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natural environment, wildlife, wildlife habitat, and public health and safety, excluding any consideration of whether the proposed subdivision will result in a loss of agricultural soils;

(b) compliance with:

(i) the survey requirements provided for in part 4 of this chapter;

(ii) the local subdivision regulations provided for in part 5 of this chapter; and

(iii) the local subdivision review procedure provided for in this part;

(c) the provision of easements within and to the proposed subdivision for the location and installation of any planned utilities; and

(d) the provision of legal and physical access to each parcel within the proposed subdivision and the required notation of that access on the applicable plat and any instrument of transfer concerning the parcel.

(4) The governing body may require the subdivider to design the proposed subdivision to reasonably minimize potentially significant adverse impacts identified through the review required under subsection (3) but may not require a set-aside of land or monetary contribution for the loss of agricultural soils. Pursuant to 76-3-620, the governing body shall issue written findings to justify the reasonable mitigation required under this subsection (4).

(5) (a) In reviewing a proposed subdivision under subsection (3) and when requiring mitigation under subsection (4), a governing body may not unreasonably restrict a landowner's ability to develop land, but it is recognized that in some instances the impacts of a proposed development may be deemed unmitigable and will preclude approval of the subdivision.

(b) When requiring mitigation under subsection (4) and consistent with 76-3-620, a governing body shall consult with the subdivider and shall give due weight and consideration to the expressed preference of the subdivider.

(6)(a) A governing body may conditionally approve or deny a proposed subdivision as a result of the water and sanitation information provided pursuant to 76-3-622 or public comment received pursuant to 76-3-604 on the information provided pursuant to 76-3-622 only if the

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conditional approval or denial is based on existing subdivision, zoning, or other regulations that the governing body has the authority to enforce.

(b) A governing body may condition the approval of a proposed subdivision on connection to adequate municipal or adequate county water and/or sewer district facilities, as those terms are defined in 76-4-102, by requiring water rights under Title 85, Chapter 2, or by requiring authorization of a notice of intent to appropriate groundwater by the department of natural resources and conservation. Water rights or authorization of a notice of intent to appropriate groundwater must be provided for each lot in the subdivision and the determination must come from the department of natural resources and conservation and must be recorded with the final plat.

(7) A governing body may not require as a condition of subdivision approval that a property owner waive a right to protest the creation of a special improvement district or a rural improvement district for capital improvement projects that does not identify the specific capital improvements for which protest is being waived. A waiver of a right to protest may not be valid for a time period longer than 20 years after the date that the final subdivision plat is filed with the county clerk and recorder.

(8) A governing body may not approve a proposed subdivision if any of the features and improvements of the subdivision encroach onto adjoining private property in a manner that is not otherwise provided for under chapter 4 or this chapter or if the well isolation zone of any proposed well to be drilled for the proposed subdivision encroaches onto adjoining private property unless the owner of the private property authorizes the encroachment. For the purposes of this section, "well isolation zone" has the meaning provided in 76-4-102.

(9) If a federal or state governmental entity submits a written or oral comment or an opinion regarding wildlife, wildlife habitat, or the natural environment relating to a subdivision application for the purpose of assisting a governing body's review, the comment or opinion may be included in the governing body's written statement under 76-3-620 only if the comment or opinion provides scientific information or a published study that supports the comment or

Commented [AP4]: Background: this is after public review and comments, this is governing body decision on the preliminary plat. approval requires water right or notice of intent. It is giving the authority of the local governing body to condition approval preliminary plat. The applicant has ~3 years to get the water rights for final plat approval.

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opinion. A governmental entity that is or has been involved in an effort to acquire or assist others in acquiring an interest in the real property identified in the subdivision application shall disclose that the entity has been involved in that effort prior to submitting a comment, an opinion, or information as provided in this subsection.

(10) Findings of fact by the governing body concerning whether the development of the proposed subdivision meets the requirements of this chapter must be based on the record as a whole. The governing body's findings of fact must be sustained unless they are arbitrary, capricious, or unlawful."

{Internal References to 76-3-608:
76-1-601 76-3-504 76-3-509 76-3-601 *
76-3-603 76-3-609 76-3-616}

Section 3. Section 76-3-622 , MCA, is amended to read:

"76-3-622. Water and sanitation information to accompany preliminary plat. (1)

Except as provided in subsection (2), the subdivider shall submit to the governing body or to the agent or agency designated by the governing body the information listed in this section for proposed subdivisions that will include new water supply or wastewater facilities. The information must include:

- (a) a vicinity map or plan that shows:
 - (i) the location, within 100 feet outside of the exterior property line of the subdivision and on the proposed lots, of:
 - (A) flood plains;
 - (B) surface water features;
 - (C) springs;
 - (D) irrigation ditches;
 - (E) existing, previously approved, and, for parcels less than 20 acres, proposed water wells and wastewater treatment systems, except that the subdivider may locate a water well anywhere

Commented [AP5]: Background: this is the water sanitation information that is needed for the preliminary platt review. Created in early 2000s

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on a lot, parcel, or tract of record if the subdivider maintains the minimum setback distances adopted in rule by the department of environmental quality;

(F) for parcels less than 20 acres, mixing zones identified as provided in subsection (1)(g); and

(G) the representative drainfield site used for the soil profile description as required under subsection (1)(d); and

(ii) the location, within 500 feet outside of the exterior property line of the subdivision, of public water and sewer facilities;

(b) a description of the proposed subdivision's water supply systems, storm water systems, solid waste disposal systems, and wastewater treatment systems, including:

(i) whether the water supply and wastewater treatment systems are individual, shared, multiple user, or public as those systems are defined in rules published by the department of environmental quality; and

(ii) if the water supply and wastewater treatment systems are shared, multiple user, or public, a statement of whether the systems will be public utilities as defined in 69-3-101 and subject to the jurisdiction of the public service commission or exempt from public service commission jurisdiction and, if exempt, an explanation for the exemption;

(c) a drawing of the conceptual lot layout at a scale no smaller than 1 inch equal to 200 feet that shows all information required for a lot layout document in rules adopted by the department of environmental quality pursuant to 76-4-104;

(d) evidence of suitability for new onsite wastewater treatment systems that, at a minimum, includes:

(i) a soil profile description from a representative drainfield site identified on the vicinity map, as provided in subsection (1)(a)(i)(G), that complies with standards published by the department of environmental quality;

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(ii) demonstration that the soil profile contains a minimum of 4 feet of vertical separation distance between the bottom of the permeable surface of the proposed wastewater treatment system and a limiting layer; and

(iii) in cases in which the soil profile or other information indicates that ground water is within 7 feet of the natural ground surface, evidence that the ground water will not exceed the minimum vertical separation distance provided in subsection (1)(d)(ii);

(e) for new water supply systems, unless cisterns are proposed, evidence of adequate water availability:

- (i) obtained from well logs and testing of onsite ~~or nearby~~ wells;
- (ii) obtained from information contained in published hydrogeological reports; or
- (iii) as otherwise specified by rules adopted by the department of environmental quality pursuant to 76-4-104;

(f) for lots not served by adequate municipal or adequate county water and/or sewer district facilities, as those terms are defined in 76-4-102, the applicant can demonstrate they have a water right under Title 85, Chapter 2, an accepted water right application or completed adequacy check for preapplication meeting for water rights under Title 85, Chapter 2, or an authorized notice of intent to appropriate groundwater for each lot.

~~(f)~~(g) evidence of sufficient water quality in accordance with rules adopted by the department of environmental quality pursuant to 76-4-104;

~~(g)~~(h) a preliminary analysis of potential impacts to ground water quality from new wastewater treatment systems, using as guidance rules adopted pursuant to 75-5-301 and 75-5-303 related to standard mixing zones for ground water, source specific mixing zones, and nonsignificant changes in water quality. The preliminary analysis may be based on currently available information and must consider the effects of overlapping mixing zones from proposed and existing wastewater treatment systems within and directly adjacent to the subdivision. Instead of performing the preliminary analysis required under this subsection (1)(g), the subdivider may

Commented [AP6]: Background: this is element and sufficiency review. allows concurrent processes between DNRC and local governing body

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perform a complete nondegradation analysis in the same manner as is required for an application that is reviewed under Title 76, chapter 4.

(2) A subdivider whose land division is excluded from review under 76-4-125(1) is not required to submit the information required in this section.

(3) A governing body may not, through adoption of regulations, require water and sanitation information in addition to the information required under this section unless the governing body complies with the procedures provided in 76-3-511."

{Internal References to 76-3-622:
76-3-504 76-3-601 76-3-604 76-3-608
76-4-104}

Section 4. Section 76-4-104 , MCA, is amended to read:

"76-4-104. Rules for administration and enforcement. (1) The department shall, subject to the provisions of 76-4-135, adopt reasonable rules, including adoption of sanitary standards, necessary for administration and enforcement of this part.

(2) The rules and standards must provide the basis for approving subdivisions for various types of public and private water supplies, sewage disposal facilities, storm water drainage ways, and solid waste disposal. The rules and standards must be related to:

- (a) size of lots;
- (b) contour of land;
- (c) porosity of soil;
- (d) ground water level;
- (e) distance from lakes, streams, and wells;
- (f) type and construction of private water and sewage facilities; and
- (g) other factors affecting public health and the quality of water for uses relating to agriculture, industry, recreation, and wildlife.

Commented [AP7]: Background: DEQ processes.

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(3) The storm drainage review requirements of this chapter do not apply to divisions or parcels of land that are exempt from review under 76-3-207(1)(a), (1)(d), (1)(e), or (1)(f) that:

- (a) are used for a single-family residential purpose; and
- (b) include no more than 25% that is impervious.

(4) (a) Except as provided in subsection (4)(b), the rules must provide for the review of subdivisions consistent with 76-4-114 by a local department or board of health, as described in Title 50, chapter 2, part 1, if the local department or board of health employs a registered sanitarian or a registered professional engineer and if the department certifies under subsection (5) that the local department or board is competent to conduct the review.

(b) (i) Except as provided in 75-6-121 and subsection (4)(b)(ii) of this section, a local department or board of health may not review public water supply systems, public sewage systems, or extensions of or connections to these systems.

(ii) A local department or board of health may be certified by the department to review subdivisions proposed to connect to existing municipal or county water and/or sewer district water and wastewater systems previously approved by the department if no extension of the systems is required.

(5) (a) The department shall also adopt standards and procedures for certification and maintaining certification to ensure that a local department, local board of health, or independent reviewer is competent to review the subdivisions as described in subsection (4).

(b) On or before December 31, 2023, the department shall develop procedures for certification of prequalified independent reviewers and develop a training curriculum to ensure compliance with this part.

(6) The department shall review those subdivisions described in subsection (4) if:

(a) a proposed subdivision lies within more than one jurisdictional area and the respective governing bodies are in disagreement concerning approval of or conditions to be imposed on the proposed subdivision; or

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(b) the local department or board of health elects not to be certified.

(7) The rules must further provide for:

(a) providing the reviewing authority with a copy of the plat or certificate of survey subject to review under this part and other documentation showing the layout or plan of development, including:

(i) total development area; and

(ii) total number of proposed units and structures requiring facilities for water supply or sewage disposal;

(b) adequate evidence that a water supply that is sufficient in terms of physical quality, quantity, and dependability will be available to ensure an adequate supply of water for the type of subdivision proposed;

Commented [AP8]: Background: clarifying that DEQ is looking at Physical water; DNRC is looking at legal water

(c) evidence concerning the potability of the proposed water supply for the subdivision;

Commented [AP9]: DEQ will add the municipality language

(d) adequate evidence that a sewage disposal facility is sufficient in terms of capacity and dependability;

(e) standards and technical procedures applicable to storm drainage plans and related designs, in order to ensure proper drainage ways, except that the rules must provide a basis for not requiring storm water review under this part for parcels 5 acres and larger on which the total impervious area does not and will not exceed 5%. Nothing in this section relieves any person of the duty to comply with the requirements of Title 75, chapter 5, or rules adopted pursuant to Title 75, chapter 5.

(f) standards and technical procedures applicable to sanitary sewer plans and designs, including soil testing and site design standards for on-lot sewage disposal systems when applicable;

(g) standards and technical procedures applicable to water systems;

(h) standards and technical procedures applicable to solid waste disposal;

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(i) adequate evidence that a proposed drainfield mixing zone and a proposed well isolation zone are located wholly within the boundaries of the proposed subdivision where the proposed drainfield or well is located or that an easement or, for public land, other authorization has been obtained from the landowner to place the proposed drainfield mixing zone or proposed well isolation zone outside the boundaries of the proposed subdivision where the proposed drainfield or proposed well is located.

(i) A proposed drainfield mixing zone or a proposed well isolation zone for an individual water system well that is a minimum of 50 feet inside the subdivision boundary may extend outside the boundaries of the subdivision onto adjoining land that is dedicated for use as a right-of-way for roads, railroads, or utilities.

(ii) This subsection (7)(i) does not apply to the divisions provided for in 76-3-207 except those under 76-3-207(1)(b). Nothing in this section is intended to prohibit the extension, construction, or reconstruction of or other improvements to a public sewage system within a well isolation zone that extends onto land that is dedicated for use as a right-of-way for roads, railroads, or utilities.

~~(j)~~(k) criteria for granting waivers and deviations from the standards and technical procedures adopted under subsections (7)(e) through (7)(i);

~~(k)~~(l) evidence to establish that, if a public water supply system or a public sewage system is proposed, provision has been made for the system and, if other methods of water supply or sewage disposal are proposed, evidence that the systems will comply with state and local laws and regulations that are in effect at the time of submission of the subdivision application under this chapter. Evidence that the systems will comply with local laws and regulations must be in the form of a certification from the local health department as provided by department rule.

~~(l)~~(m) evidence to demonstrate that appropriate easements, covenants, agreements, and management entities have been established to ensure the protection of human health and state

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waters and to ensure the long-term operation and maintenance of water supply, storm water drainage, and sewage disposal facilities;

~~(m)~~(n) eligibility requirements for municipalities and county water and/or sewer districts to qualify as a certifying authority under the provisions of 76-4-127;

~~(n)~~(o) construction details for individual and shared onsite wastewater systems to be reviewed by the local board of health at the time of septic permitting, except that the reviewing authority may require additional construction detail if the wastewater is not residential strength;

~~(o)~~(p) simplified methods for storm water reviews, including acceptable minimum storm water volumes based solely on impervious area for proposed lots with one or two single-family residences; and

~~(p)~~(q) a basis for exempting from review facilities previously approved under this chapter or by a local reviewing authority of the facility is not proposed to be changed, is not affected by a proposed change to another facility, and meets the design conditions of its existing approval under this chapter or by the local authority and is operating properly. Existing systems must meet the current setbacks established in rule and subsection (7)(i), unless the lot was created before the relevant effective dates for mixing zones and isolation zones.

(8) The requirements of subsection (7)(i) regarding proposed drainfield mixing zones and proposed well isolation zones apply to all subdivisions or divisions excluded from review under 76-4-125 created after October 1, 2021, except as provided in subsections (7)(i)(i) and (7)(i)(ii).

(9) The department shall:

(a) conduct a biennial review of experimental wastewater system components that have been granted a waiver or deviation as provided in subsection (7)(j);

(b) utilize relevant analysis of wastewater system components approved in other states and data from peer-reviewed third-party studies to conduct the review provided in subsection (9)(a);

(c) propose those experimental wastewater system components that meet the purposes and provisions of this part for adoption into the rules pursuant to this section; and

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(d) report to the local government interim committee biennially, in accordance with 5-11-210, the number and type of experimental wastewater system components reviewed and the number and type of system components approved and provide written findings to explain why a system component was reviewed but not approved.

(10) Review and certification or denial of certification that a division of land is not subject to sanitary restrictions under this part may occur only under those rules in effect when a complete application is submitted to the reviewing authority, except that in cases in which current rules would preclude the use for which the lot was originally intended, the applicable requirements in effect at the time the lot was recorded must be applied. In the absence of specific requirements, minimum standards necessary to protect public health and water quality apply.

(11) The reviewing authority may not deny or condition a certificate of subdivision approval under this part unless it provides a written statement to the applicant detailing the circumstances of the denial or condition imposition. The statement must include:

- (a) the reason for the denial or condition imposition;
- (b) the evidence that justifies the denial or condition imposition; and
- (c) information regarding the appeal process for the denial or condition imposition. (12)

(a) Subject to subsection (12)(b), the department may adopt rules that provide technical details and clarification regarding the water and sanitation information required to be submitted under 76-3-622.

(b) A subdivider may locate a water well anywhere on a lot, parcel, or tract of record if the subdivider maintains the minimum setback distances adopted in rule. The reviewing authority may not limit a subdivider to a single proposed well location.

(13) (a) The rules must provide for the review of subdivisions consistent with 76-4-114 by an independent reviewer if the department certifies under subsection (5) of this section that the independent reviewer is competent to conduct the review.

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(b) (i) Except as provided in subsection (13)(b)(ii), an independent reviewer may not review public water supply systems, public sewage systems, or extensions of or connections to these systems.

(ii) An independent reviewer may be certified by the department to review subdivisions proposed to connect to existing municipal or county water and/or sewer district water and wastewater systems previously approved by the department if no extension of the system is required.

(c) If 110 or more new files are submitted to the department for review in any 1 month, the department shall assign applications received in that month to independent reviewers unless an independent reviewer is not available.

(d) The department shall reimburse independent reviewers at the same rate the department reimburses local departments or local boards of health certified under subsection (4).

(14) Prior to being assigned an application for review, an independent reviewer shall identify any conflict of interest related to the project under potential review. If the independent reviewer identifies a conflict of interest, the application for review must be assigned to a different independent reviewer.

(15) An independent reviewer acting under the requirements of this chapter shall comply with the provisions of Title 2, chapter 6, for public information requests.

(16) An independent reviewer conducting reviews under this section shall complete documents necessary to complete the review and to comply with:

(a) the Montana Environmental Policy Act provided for in Title 75, chapter 1, parts 1 through 3; and

(b) real property takings requirements in accordance with Title 70."

{Internal References to 76-4-104:

*76-3-504 76-3-622 76-4-102 76-4-105
76-4-108 76-4-125}*

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76-25-412. NEW SUBSECTION (9) A county clerk and recorder may not accept for recording a subdivision plat, certificate of survey, or townhome, townhouse, or condominium declaration subject to review under this part that is not served by adequate municipal or adequate county water and/or sewer district facilities, as those terms are defined in 76-4-102, unless accompanied by and recorded with a determination of water rights under Title 85, Chapter 2 or authorized notice of intent to appropriate groundwater from the department of natural resources and conservation.

Commented [AP10]: Background: this is the same recording language for SB 382

Section 5. Section 85-2-102 , MCA, is amended to read:

"85-2-102. Definitions. Unless the context requires otherwise, in this chapter, the following definitions apply:

- (1) "Appropriate" or "appropriation" means:
 - (a) to divert, impound, or withdraw, including by stock for stock water, a quantity of water for a beneficial use;
 - (b) in the case of a public agency, to reserve water in accordance with 85-2-316;
 - (c) in the case of the department of fish, wildlife, and parks, to change an appropriation right to instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource in accordance with 85-2-436;
 - (d) in the case of the United States department of agriculture, forest service:
 - (i) instream flows and in situ use of water created in 85-20-1401, Article V; or
 - (ii) to change an appropriation right to divert or withdraw water under subsection (1)(a) to instream flow to protect, maintain, or enhance streamflows in accordance with 85-2-320;
 - (e) temporary changes or leases for instream flow to maintain or enhance instream flow to benefit the fishery resource in accordance with 85-2-408;

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(f) a use of water for aquifer recharge or mitigation; or

(g) a use of water for an aquifer storage and recovery project as provided in 85-2-368.

(2) "Appropriation right" has the same meaning as "water right" as defined in this section.

(3) "Aquifer recharge" means either the controlled subsurface addition of water directly to the aquifer or controlled application of water to the ground surface for the purpose of replenishing the aquifer to offset adverse effects resulting from net depletion of surface water.

(4) "Aquifer storage and recovery project" means a project involving the use of an aquifer to temporarily store water through various means, including but not limited to injection, surface spreading and infiltration, drain fields, or another department-approved method. The stored water may be either pumped from the injection well or other wells for beneficial use or allowed to naturally drain away for a beneficial use.

(5) "Beneficial use", unless otherwise provided, means:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses;

(b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141;

(c) a use of water by the department of fish, wildlife, and parks through a change in an appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource authorized under 85-2-436;

(d) a use of water through a temporary change in appropriation right or lease to enhance instream flow to benefit the fishery resource in accordance with 85-2-408;

(e) a use of water for aquifer recharge or mitigation; or

(f) a use of water for an aquifer storage and recovery project as provided in 85-2-368.

(6) "Certificate" means a certificate of water right issued by the department.

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(7) (a) "Change in appropriation right" means a change in the place of diversion, the place of use, the purpose of use, or the place of storage.

(b) The term does not include a change in water use related to the method of irrigation.

(8) "Commission" means the fish and wildlife commission provided for in 2-15-3402.

(9) "Correct and complete" means that the information required to be submitted conforms to the standard of substantial credible information and that all of the necessary parts of the form requiring the information have been filled in with the required information for the department to begin evaluating the information.

(10) "Declaration" means the declaration of an existing right filed with the department under section 8, Chapter 452, Laws of 1973.

(11) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

(12) "Developed spring" means any point where ground water emerges naturally, that has subsequently been physically altered, and from which ground water flows under natural pressures or is artificially withdrawn.

(13) "Existing right" or "existing water right" means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law.

(14) "Ground water" means any water that is beneath the ground surface.

(15) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive presumption of abandonment under 85-2-226.

(16) "Mitigation" means the reallocation of surface water or ground water through a change in appropriation right or other means that does not result in surface water being introduced into an aquifer through aquifer recharge to offset adverse effects resulting from net depletion of surface water.

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(17) "Municipality" means an incorporated city or town organized and incorporated under Title 7, chapter 2.

(18) (a) "National forest system lands" means all lands within Montana that are owned by the United States and administered by the secretary of agriculture through the forest service.

(b) The term does not include any lands within the exterior boundaries of national forest system units that are not owned by the United States and administered by the secretary of agriculture through the forest service.

(19) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions.

(20) "Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

(21) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency of the United States, or any other entity.

(22) (a) "Political subdivision" means any county, incorporated city or town, public corporation, or district created pursuant to state law or other public body of the state empowered to appropriate water.

(b) The term does not mean a private corporation, association, or group.

(23) "Salvage" means to make water available for beneficial use from an existing valid appropriation through application of water-saving methods.

(24) "State water reservation" means a water right created under state law after July 1, 1973, that reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of water throughout the year or at periods or for defined lengths of time.

(25) "Stream depletion zone" means an area where hydrogeologic modeling concludes that as a result of a ground water withdrawal, the surface water would be depleted by a rate equal to at

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least 30% of the ground water withdrawn within 30 days after the first day a well or developed spring is pumped at a rate of 35 gallons a minute.

(26) "Substantial credible information" means probable, believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested by the person providing the information.

(27) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

(28) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

(29) "Water division" means a drainage basin as defined in 3-7-102.

(30) "Water judge" means a judge as provided for in Title 3, chapter 7.

(31) "Water master" means a master as provided for in Title 3, chapter 7.

(32)(a) "Water right" means the right to appropriate water pursuant to an existing right, a permit, a certificate of water right, a state water reservation, or a compact.

(b) The term does not include an authorized notice of intent to appropriate groundwater.

(33) "Watercourse" means any naturally occurring stream or river from which water is diverted for beneficial uses. It does not include ditches, culverts, or other constructed waterways.

(34) "Well" means any artificial opening or excavation in the ground, however made, by which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn."

*{Internal References to 85-2-102:
75-5-410 82-4-355 85-2-141 85-2-340}*

Section 6. Section 85-2-306, MCA, is amended to read:

Commented [AP11]: Background: notice of intent does not become a water right until a notice of completion is filed. This is also when it becomes a legal demand

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"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.

(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:

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(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) A person may not appropriate groundwater by means of a well or developed spring without a permit pursuant to subsection 3(a)(ii), 3(a)(iii) or 3(a)(iv) unless a notice of intent to appropriate groundwater is authorized by the department. All water use under this part must be measured and reported annually to the department.

(ii) A person must file a correct and complete notice of intent to appropriate on a form provided by the department. The department shall review a notice of intent to appropriate and may return a defective notice for correction or completion together with the reasons for returning it.

(iii) A notice of intent to appropriate groundwater not corrected and completed within 60 days of a notice of defects is terminated.

Commented [AP12]: Background:
appropriation is to use the water; a well can be drilled at any time; if people want to drill before the 10days for DNRC review, that is their choice.

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(iv) Within 10 business days of a correct and complete form being received, the department shall review the notice materials, evaluate the notice for combined appropriation, and approve or deny the correct and complete notice of intent to appropriate groundwater. If the department denies the notice of intent to appropriate groundwater, it shall include the reasons for the denial.

(v) An appropriation under this subpart must be completed **within ten years** from the date the notice of intent to appropriate groundwater is authorized by the department.

(vi) Upon completion of construction of the diversion works and appropriation of water for beneficial use, the appropriator shall file a notice of completion pursuant to subsection 3(c).

(vii) A notice of intent to appropriate groundwater for a water supply system subject to Title 75, chapter 6, part 1, may be submitted pursuant to this subsection.

~~(b)(c)~~ (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) Water use by a water supply system filed on under (3)(b)(iii) will be considered perfected and the appropriation of water for beneficial use complete once construction of the water supply system is finished. A notice of completion may be filed at this time and must include a copy of the department of environmental quality approval for the water supply system.

(iii) Upon receipt of the notice of completion, 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 correct and complete notice of completion for an appropriation under 3(a)(ii), 3(a)(iii) or 3(a)(iv) must establish the appropriation was completed in substantial accordance with the notice of intent to appropriate groundwater acknowledged by the department under subsection 3(b). A notice does not lose priority of filing because of defects if the notice is corrected, completed, and refiled with the department within ~~30~~60 days of

Commented [AP13]: Background: incorporates HB 435 language from the 2023 legislative session

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notification of defects ~~or within a further time as the department may allow, not to exceed 6 months.~~

~~(iii)(iv)~~ (iv) If a notice of completion is not corrected and completed within the time allowed, the department authorization expires and a new notice of intent to appropriate will be required to use water under this subsection. ~~priority date of appropriation is the date of re-filing a correct and complete notice with the department.~~

~~(e)(d)~~ (d) A certificate of water right may not be issued until a correct and complete notice of completion 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 and a duplicate will be maintained in a centralized database. 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~~

Commented [AP14]: Background: (3) (b) (iii) makes clear that a water supply system subject to Title 75, chapter 6, part 1, may be submitted pursuant to this subsection.

(3) (c) (ii) makes clear that the appropriation is complete and a project completion notice can be filed once construction of the water supply system is complete.

In total, we have incorporated (d) (i), (iii), (iv) (B), and (iv) (C). I don't think the remaining parts of (d) from HB 435 are necessary to incorporate as I think the draft already accounts for them more generally.

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~~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.

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(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."

{Internal References to 85-2-306:

*85-2-102 * 85-2-113 85-2-236 85-2-302
85-2-322 85-2-330 85-2-341 85-2-343
85-2-355 85-2-381 85-2-401 85-20-601
85-20-901 85-20-1501 85-20-1701 85-20-1801
85-20-1901}*

CODIFICATION SECTION. NEW SECTION 2 is intended to be codified in Title 76, Chapter 3, Part 1, Title 76, Chapter 4, Part 1, Title 76, Chapter 25, Part 4, and Title 85, Chapter 2, Part 3.

-END-