



Water Rights Permitting Criteria and Process

The **Montana Water Use Act of 1973** established a permit system for new uses of water. The Montana Department of Natural Resources and Conservation (DNRC) administers this system by approving new water uses through an application process.

What are water rights?

In Montana, all water is owned by the State for the benefit of its people. Individual Montanans have the right to use waters of the State if they hold a valid water right. Water rights are characterized by their source, diversion location (point of diversion, or POD), place of use (PLOU), and priority date. Montana prioritizes water rights by when they were appropriated for beneficial use, and the first in time is the first in right.

How are water rights evaluated?

DNRC evaluates six permit criteria when reviewing water right applications. To meet the six criteria for issuing a water permit, an applicant must demonstrate by a preponderance of the evidence that:

1. Water is physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate.
 2. Water is legally available in the amount requested during the period in which the applicant seeks to appropriate.
 3. The water rights of a prior appropriator (i.e., senior water right user that has higher priority relative to junior rights) will not be adversely affected by the proposed use. This is demonstrated by considering the applicants' plan for controlling their water use in a way that ensures that senior water rights will be satisfied first, in times when there is not enough water to go around.
 4. The diversion and conveyance system is adequate for providing the requested amount of water.
 5. The proposed use of water is a beneficial use, meaning that it is recognized as a permissible use under Montana law, and that the amount requested is needed to accomplish that use without waste.
 6. The applicant has a possessory interest (i.e., right to occupy and/or control the property) in the place where water will be used, or the consent of the person with the possessory interest.
- **Note:** DNRC is not authorized to conduct any criteria assessments related to **water quality**; however, applicants may need to prove water quality criteria in an administrative proceeding *if a valid objection to water quality is filed*. There are three different water quality criteria which can be objected to: MCA 85-2-311(1)(f), (1)(g), and (1)(h). Only the Department of Environmental Quality (DEQ) has standing to file an objection on MCA 85-2-311(1)(g); the other two can be objected to by any party with standing. Water quality is discussed in greater detail below.

What happens after an application is received by DNRC?

DNRC reviews the application to determine whether it is correct and complete (i.e., whether the applicant has supplied all the necessary information for the DNRC to assess the six criteria). If the application is not correct and complete, the DNRC sends the applicant a deficiency letter requesting the missing information.

Once an application is deemed correct and complete, the DNRC evaluates the application and issues a draft Preliminary Determination (PD). The DNRC must issue the draft PD within 60 days if the applicant had a pre-application meeting, or 120 days if the applicant did not. If an applicant for a water right proves all of the criteria, the draft PD will propose to *grant* the permit, and the application will be publicly noticed for a public comment period.

Public engagement

The public comment period: The public comment period is designed to allow public feedback prior to the objection period. The purpose of soliciting public comments is to address specific concerns and provide a better decision document. If an individual disagrees with the department's assessment of a criterion, the public comment they provide should address how the application does not meet that criterion.

- **DNRC can only accept public comments filed on Form 654: a public comment form:** <https://dnrc.mt.gov/docs/water/Water-Rights-Forms/654.pdf>
- Statute requires that a commenter **identify how one or more of the application criteria is not adequately addressed in the draft PD for the application**. Generalized complaints that do not assert a specific failure to meet permit criteria will not be considered valid.

DNRC considers public comments and is then required to update the draft PD. This allows DNRC to address anything that may have been missed in the draft decision document, make corrections, or provide clarity on DNRC's analysis of the criteria.

- If public comments are submitted, the next step is an objection period, even if the comments do not result in DNRC making substantive changes to the draft PD.
- If no public comments are submitted, the permit is issued.

Objection period: Once public comments are addressed, DNRC issues the Preliminary Determination and publicly notices the application for objections. If valid objections are received, the application will be *sent to a hearing*. If no valid objections are received, the permit is issued.

- Please note that for applications received by DNRC on or after January 1, 2024, there will be an opportunity to object to an application **only if public comments are received** (§85-2-307(5)(c), MCA). Objections will be limited to only the permit criteria on which a public comment was received (§85-2-308(1)(b), MCA).

Public Comment Criteria

Physical availability: The amount of water physically available.

- To make a public comment regarding physical availability, the comment should demonstrate how the applicant or DNRC **may have erred in calculating that amount of water that is physically available**.

Legal availability: The amount of water physically available, minus the amount of water that has already been allocated to other water rights.

- To make a public comment regarding legal availability, the comment should demonstrate how the applicant or DNRC **may have erred in calculating the amount of water that is legally allocated through other water rights**.

Adverse effect: The adverse effect analysis evaluates whether and how the proposed water use **may impact existing water rights**. The applicant must provide a plan that explains how the proposed diversion would be controlled to avoid adverse effect to another water user.

- To make a public comment regarding adverse effect, the comment should demonstrate **how the application would cause an adverse effect to a senior water right holder**.

Adequacy of diversion: This criterion answers the question of whether the applicant can reasonably divert and use the amount of water requested. The design and operation of the proposed system must be able to divert and convey the amount of water requested.

- To make a public comment regarding adequacy of diversion, the comment should demonstrate **how the diversion or conveyance system would not be able to produce the flow rate or volume that has been requested**.

Beneficial use: Beneficial use is the purpose the water is used for. Montana recognizes a number of beneficial uses, including but not limited to:

- Agricultural (including stock water)
- Domestic
- Fish and wildlife
- Industrial
- Irrigation
- Mining
- Municipal
- Power
- Recreational uses
- Instream flow enhancement
- Water marketing

There is no hierarchy among beneficial uses beyond priority date. Analysis of this criterion is focused on whether the applicant can reasonably use the requested amount of water.

- Public comments addressing the beneficial use criteria should **demonstrate how the proposed use is not a beneficial use, or how the flow rate or volume requested are not needed to satisfy the beneficial use proposed.**

Possessory interest: The applicant must provide evidence of possessory interest in the place where water is used. If the applicant does not own the property where the water will be used, they must provide written consent of the person with the possessory interest in the property where water will be used.

- Public comments addressing the possessory interest use criteria should demonstrate that **the applicant does not own or have written consent of the person with the possessory interest in the place where water is put to beneficial use.**

Water quality: An applicant is only required to prove the water quality criterion if a public comment on water quality, followed by a valid objection, is filed. The applicant is not required to provide any water quality analyses or information when they file the application. DNRC regulates water quantity and water rights. The Montana Department of Environmental Quality (DEQ) are the subject matter experts on water quality.

- Public comment and objections addressing water quality should provide facts demonstrating one of the following:
 1. The water quality of a prior appropriator will be adversely affected.
 2. The proposed use would not be in accordance with the classification of water set for the source of supply pursuant to section 75-5-301(1), MCA.
 3. That the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will be adversely affected.

Only DEQ or a local water quality district established under Title 7, chapter 13, part 45, has standing to file an objection on the classification of water set for the source of supply pursuant to section 75-5-301(1), MCA; the other two issues can be objected to by any party with standing.

If a Valid Objection is Received:

If a valid objection related to the criteria is received, the objector and the applicant will each have the opportunity to present information and evidence at an administrative hearing. The hearing examiner will review the information and evidence provided and make a determination on this criterion in the hearing Final Order.

Frequently Asked Questions:

How do I find my nearest DNRC water resource office?

DNRC water resource offices can be found on the DNRC website at: [Regional Offices](#)

If I have concerns with my well and feel impacted by a water right application, are there avenues outside this process to resolve the issues?

There are a number of avenues that can be pursued, depending on the situation. If there is insufficient water to satisfy senior water users, the senior water users have the right to make a “call” and demand a junior water right user stop pumping.

Damage to a well or water diversion and conveyance infrastructure can be pursued in District Court.

If a person is wasting water, using water unlawfully, preventing water from moving to a prior appropriator, or otherwise violating the Water Use Act, a complaint can be submitted to the DNRC local water office. For more information, please read the Illegal Water Use fact sheet.