



DEPARTMENT OF NATURAL RESOURCES

DIVISION OF WATER RESOURCES

Bill Ritter, Jr.
Governor

Harris D. Sherman
Executive Director

Dick Wolfe, P.E.
Director/State Engineer

NOTICE OF PROPOSED RULEMAKING

Office of the State Engineer Produced Nontributary Ground Water Rules 2 CCR 402-17

Pursuant to § 24-4-103(3)(a), C.R.S. (2009) and 2 CCR 402-5 ¶ 1.1.3 C.3), the Office of the State Engineer hereby gives notice of proposed rulemaking. All interested persons will be afforded an opportunity to be heard on the adoption by the State Engineer of Rules and Regulations for the Determination of the Nontributary Nature of Ground Water Produced through Wells in Conjunction with the Mining of Minerals ("Produced Nontributary Groundwater Rules"), as more fully described below in this notice.

Subject Matter and Scope of the Proposed Rulemaking

The subject of the proposed rulemaking is the adoption by the State Engineer of rules and regulations to assist the State Engineer in the administration of the dewatering of geologic formations by withdrawing nontributary ground water to facilitate or permit mining of minerals. The State Engineer proposed rules establish procedures pursuant to which an operator may obtain a determination from the State Engineer that water that is being or that may be withdrawn from geologic formations to facilitate or permit the mining of minerals is nontributary. Additionally, the proposed rules identify certain areas or formations within the State as nontributary or tributary for the purposes of the dewatering of geologic formations to facilitate or permit mining of minerals. The rules as currently proposed may be modified in the course of the rulemaking hearing to revise the proposed procedures and to identify additional areas or formations within the state as nontributary or tributary.

The scope of this proposed rulemaking includes matters that the State Engineer determines are ancillary to or implicated by the nontributary determinations that are the central subject of this rulemaking. For example, the scope of the proposed rulemaking includes, but is not limited to, such matters as potential conflicts between State and Tribal regulatory jurisdiction over nontributary water withdrawn to facilitate or permit mining of minerals. In addition, the scope of the proposed rulemaking includes consideration of provisions intended to coordinate nontributary determinations made pursuant to the rules with other activities of the State Engineer, such as State Engineer review and approval of well permits and substitute water

Office of the State Engineer

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supply plans. The State Engineer anticipates that the rules may be modified to address these and other ancillary issues.

For the purpose of these rules, mining of minerals includes all methods of production of oil and gas, specifically but not limited to any boring or well into the earth's surface designed to find and produce petroleum oil and/or gas hydrocarbons.

Authority for Proposed Rulemaking

The State Engineer proposes to adopt the Produced Nontributary Groundwater Rules pursuant to House Bill 09-1303, Section 3, as codified at § 37-90-137(7)(c), C.R.S., which provides that “the State Engineer may, pursuant to the ‘State Administrative Procedure Act’, adopt rules to assist with the administration of this subsection (7).” The State Engineer will conduct the proposed rulemaking pursuant to the rulemaking provisions of the State Administrative Act, at § 24-4-103, C.R.S., and the Division of Water Resources Procedural Regulations, at ¶1.1.3, 2 CCR 402-5.

Date and Time for Rulemaking Hearing

The rulemaking hearing will commence at 9:00 am on December 2, 2009 at the following: **Colorado State Capitol Building:**200 East Colfax
Colorado State Capitol Basement Hearing Room 0112
Denver CO 80203

Please note that the hearing room is located in the Committee hallway. The State Engineer anticipates completing the hearing by December 11, 2009.

Oral and Written Comment

The State Engineer encourages all interested persons to provide their opinions or recommendations regarding the matters to be addressed in this rulemaking, either orally at the hearing or in writing at or prior to the hearing. Written Comments submitted prior to the hearing are encouraged, so as to allow for review by the State Engineer prior to the hearing. **Written Comments should be submitted to the Office of the State Engineer no later than November 20, 2009 pursuant to the procedures set forth below in this notice.**

Applications for Party Status

Any interested person may request to participate as a “party” to this hearing by submitting an application for party status in accordance with Division of Water Resources Procedural Regulations ¶1.1.3.(D), 2 CCR 402-5. **Any request for party status must be submitted to the State Engineer no later than 5:00 p.m. on Friday, September 25, 2009, pursuant to the procedures set forth below in this notice.**

Consistent with ¶1.1.3.(D), applications for party status must set forth the name of the person or agency seeking party status, the interest of the person in the proposed rules, and a description of the general nature of the evidence to be presented in the course of the proceedings. Applications must also include the person's street address and electronic mail address.

The State Engineer's staff will compile a list of the street addresses and electronic mail addresses for all persons granted party status, and will post the list on the State Engineer's website.

Proposed Alternate Rules

Any person who has submitted an application for party status may propose Alternate Proposed Rules to be adopted by the State Engineer in lieu of or in addition to all or a portion of the State Engineer's proposed rules. **All Proposed Alternate Rules must be submitted to the State Engineer no later than 5:00 p.m. on Friday, October 2, 2009 pursuant to the procedures set forth below in this notice.** The submission to the State Engineer shall include the Alternate Proposed Rule and the information required by this notice to accompany such Alternate Proposed Rule, and shall be provided in electronic format and as three paper copies.

In addition, any person submitting an Alternate Proposed Rule must no later than 5:00 p.m. on Friday, October 2, 2009 provide all persons who have been granted party status, by delivery via electronic mail to the applicant addresses listed on the State Engineer's website, a copy of the Alternate Proposed Rule and the information required by this notice to accompany such Alternate Proposed Rule. The Alternate Proposed Rule and accompanying information may be provided to persons who have been granted party status in electronic form or by means of a link to a website including the required information.

Alternate Proposed Rules may only be considered by the State Engineer if the subject matter of the Alternate Proposed Rules is consistent with and fits within the Subject Matter and Scope of the Proposed Rulemaking as set forth in this notice. Any Alternate Proposed Rule must include the following information:

- (1) An identification of the person or persons submitting the Alternate Proposed Rule;
- (2) A clear statement of the Alternate Proposed Rule;
- (3) A statement of the State Engineer's authority to promulgate the Alternate Proposed Rule;
- (4) A statement describing how the Alternate Proposed Rule is consistent with and fits within the Subject Matter and Scope of the Proposed Rulemaking as set forth in this notice.

- (5) A clear and concise statement of the basis and purpose for the Alternate Proposed Rule. If the rule involves technical issues, the rule must include a detailed, analytical statement of the scientific or technical rationale justifying the proposed rule. If the rule involves legal issues, the rule must include a statement of the legal justification for the rule.

Any Alternate Proposed Rule that includes a request that the State Engineer find a certain area of the State to be nontributary must include with the submittal the following additional information:

- (1) A map depicting the areal limits of the nontributary zone and the formation or formations to which it is limited. The areal limits shall be depicted relative to Section, Township and Range and the map shall clearly show Section, Township and Range; or the areal limits shall be depicted relative to physical landmarks shown on the map; or the areal limits shall be based on an attached set of UTM coordinates.
- (2) A description of the hydrogeologic justification for submitting the Alternate Proposed Rule. The description should include whether the Alternate Proposed Rule is based on modeling or alternate methods; the type of model used; the data sources, reports and maps relied upon to formulate the rule; and whether the data sources and documents relied upon are in-house or published. If published, the title and publication number should be included.

Submission Requirements

Applications for Party Status, Proposed Alternate Rules, and Written Comments must be submitted by delivery to the following address:

Office of the State Engineer
Produced Water Rulemaking
1313 Sherman Street, 8th Floor
Denver, Colorado 80203

Any such communication must include the applicant's or commenter's name, phone number, and electronic and street addresses. In addition, any such communication must include a plain statement identifying the communication as an Application for Party Status, Proposed Alternate Rule, or Written Comment. Any communication not so clearly identified will be considered a Written Comment.

Applications for Party Status, Proposed Alternate Rules, and Written Comments may alternatively be submitted via electronic mail addressed to: laura.kalafus@state.co.us. Applications so submitted must include in the electronic mail subject line a statement identifying the submission as a "Produced Water Request for Party Status", "Produced Water Proposed Alternate Rule," or "Produced Water Written Comment."

Initial Status Conference

The Hearing Officer will hold an Initial Status Conference on this matter on Friday, October 9, 2009, at 10:00 am at the following location:

Colorado State Capitol Building:

200 East Colfax

Colorado State Capitol Basement Hearing Room 0112

Denver CO 80203

At initial status conference, the Hearing Officer will discuss issues relating to requests for party status, discovery, procedural deadlines, and other matters. All persons who have requested party status or submitted Alternate Proposed Rules must participate in this Status Conference, or the Hearing Officer may deny the party status request and dismiss the Proposed Alternate Rule.

Prehearing Conference

The Hearing Officer will hold Prehearing Conference in this matter on Friday, November 13, at 10:00 am at the following location:

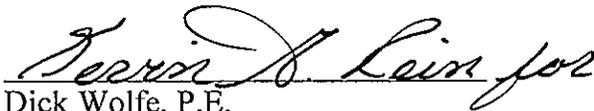
Colorado State Capitol Building:

200 East Colfax

Colorado State Capitol Basement Hearing Room 0112

Denver CO 80203

All persons who have been granted party status or submitted Alternate Proposed Rules must participate in this Status Conference, or the Hearing Officer will revoke the party status and dismiss the Proposed Alternate Rule.



Dick Wolfe, P.E.

Director/State Engineer



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PROPOSED STATEMENT OF BASIS, PURPOSE, AND SPECIFIC AUTHORITY

Office of the State Engineer
Produced Nontributary Ground Water Rules
2 CCR 402-17

BASIS AND PURPOSE

This statement pertains to the proposed adoption by the State Engineer of rules and regulations to assist the State Engineer in the administration of the dewatering of geologic formations by withdrawing nontributary ground water to facilitate or permit mining of minerals.

Background

Ground water in Colorado is presumed to be “tributary,” or hydraulically connected to surface water in such a fashion so as to require administration within the prior appropriation system in conjunction with surface rights.¹ A party seeking to withdraw tributary ground water for application to beneficial use must first obtain a ground water well permit from the State Engineer.² Because tributary ground water is administered within the prior appropriation system, a party applying for a well permit to withdraw tributary ground water must first demonstrate that all depletions resulting from such withdrawal will be replaced pursuant to an augmentation plan or substitute water supply plan, or otherwise demonstrate that the well can be operated in a manner that will not cause injury to vested water rights.³

Ground water may instead be “nontributary,” defined as “that ground water, located outside the boundaries of any designated ground water basins in existence on January 1, 1985, the withdrawal of which will not, within one hundred years, deplete the flow of a natural stream, including a natural stream as defined in sections 37-82-101 (2) and 37-92-102 (1) (b), at an annual rate greater than one-tenth of one percent of the

¹ See *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50, 57 n.7 (Colo. 2003) (“Absent a showing to the contrary, Colorado law presumes that (1) ground water is tributary to the stream, and (2) that where surface water is over-appropriated, groundwater depletions through well pumping causes material injury to senior appropriators”).

² See C.R.S. § 37-90-103(21)(a); C.R.S. § 37-90-137(1).

³ See, e.g. *Simpson v. Bijou*, 69 P.3d at 60-61.

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annual rate of withdrawal.”⁴ A party seeking to withdraw nontributary ground water for beneficial use must also obtain a well permit from the State Engineer.⁵ However, under Colorado law, ground water that has been determined to be nontributary is not administered within the prior appropriation system.⁶ Accordingly, a party seeking to obtain a ground water well permit to withdraw nontributary ground water is not required to obtain an augmentation plan or substitute water supply plan. In addition, pursuant to C.R.S. § 37-90-137(7), a party who withdraws nontributary ground water in order to facilitate the mining of minerals is not required to obtain a water well permit, unless the ground water being removed will be beneficially used.

Because of the differing statutory requirements with respect to withdrawal of nontributary and tributary ground water, parties who will be withdrawing ground water from certain formations may request determinations that such ground water is nontributary. Currently, there are no rules or statutes designating areas within the state where ground water is nontributary with the exception of the Denver Basin Rules, which delineate areas of nontributary ground water, in specific bedrock aquifers that rarely are used for the mining of minerals. Thus, requests for determinations of nontributary groundwater typically have required case-by-case analysis.

Historically, the State Engineer has reviewed requests for determinations of nontributary ground water in the context of the well permit application process. In reviewing a permit application to withdraw nontributary ground water, the State Engineer has imposed a strict requirement that the applicant demonstrate the subject ground water met the objective standard set forth at C.R.S. § 37-90-103(10.5) through analytic or numeric modeling, or in some cases, site-specific geologic evidence. If the State Engineer accepted the demonstration that the subject ground water was nontributary ground water, the ground water was then deemed available for appropriation pursuant to C.R.S. § 37-90-137(4) or (if the water was withdrawn in connection with the mining of minerals) as allowed by § 37-90-137(7). However, the State Engineer has not established a formal procedure for the review of such nontributary determinations, other than in the context of challenges to the well permitting process. In addition, the State Engineer has not established a procedure for submission or review of requests for nontributary ground water determinations where well permits may not be required; specifically, in the context of requests for withdrawal of nontributary ground water to facilitate the mining of minerals. Finally, the State Engineer has not sought to enact rules delineating those areas of the State where the State Engineer shall regard groundwater withdrawn to facilitate or permit

⁴ See C.R.S. § 37-90-103(10.5). Water users must note that this is a unitless depletion standard and represents a percentage of the pumping not a volume. The Colorado Revised Statutes do not provide for or imply a volumetric amount of depletion that is de minimis and, therefore, indicative of nontributary ground water

⁵ See, e.g. C.R.S. § 37-90-103(21)(a); § 37-90-137(1); § 37-90-137(4).

⁶ See C.R.S. § 37-92-305(11)(“Nontributary ground water shall not be administered in accordance with priority of appropriation”).

the mining of minerals to be tributary or nontributary without the necessity for a case-by-case analysis.

Basis for Rulemaking

For the following reasons, the State Engineer believes it is now beneficial to adopt rules that establishes a standardized and open procedure for submission and review of requests for nontributary ground water determinations in the context of the withdrawal of ground water to facilitate or permit mining of minerals, and to delineate those areas of the State where the State Engineer shall regard groundwater withdrawn to facilitate or permit the mining of minerals to be tributary or nontributary without the necessity for a case-by-case analysis.

First, adoption of such a policy is necessary in light of the Colorado Supreme Court's recent decision in *Vance v. Wolfe*, 205 P.3d 1165, 1173 (Colo. 2009). In *Vance*, the Supreme Court held that "while the production of oil and gas is subject to extensive regulation by [the Colorado Oil and Gas Conservation Commission], it is also subject to the 1969 Act and the Ground Water Act." Thus, the *Vance* decision confirms that the more than 34,000 existing oil and gas wells that produce ground water in the course of oil and gas operations are potentially subject to administration pursuant to the Water Rights Determination and Administration Act of 1969, §§ 37-92-101 through -601, C.R.S. (the "Water Rights Act"), and the water well permitting requirements of the Colorado Ground Water Management Act, §§ 37-90-101 to -143, C.R.S. (the "Ground Water Act"). The *Vance* decision confirms that these oil and gas wells must demonstrate that operation of such wells do not injure vested water rights, and that, such wells must be in compliance with applicable well permitting requirements. Consistent with House Bill 09-1303, as codified at C.R.S. § 37-90-138(2), the State Engineer will require oil and gas wells to demonstrate such compliance by April 1, 2010. The State Engineer believes it will greatly facilitate the ability of oil and gas operators to demonstrate such compliance and that operation of their oil and gas wells do not injure vested water rights if they are provided a procedure for obtaining a determination that ground water withdrawn by an oil and gas well or group of oil and gas wells is nontributary, and are provided with a rule delineating those areas of the State where the State Engineer shall regard groundwater withdrawn to facilitate or permit the mining of minerals to be tributary or nontributary without the necessity for a case-by-case analysis..

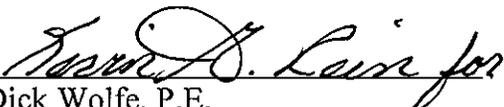
Second, adoption of such a policy provides the State Engineer, water users, and other parties with a published procedure for submission and review of requests for nontributary determinations. As noted, the State Engineer has processed requests for nontributary determinations in the context of well permitting applications. The State Engineer has not documented a procedure for review of requests of nontributary determinations where such a request is made outside of the context of a well permit application or where a well permit may not be required; for example, a request for a nontributary determination in the context of C.R.S. § 37-90-137(7). The State

Engineer believes that documenting a single procedure for processing requests for nontributary ground water determinations will clarify the process for submission and for obtaining judicial review of such determinations.

Authority for Proposed Rulemaking

The State Engineer proposes to adopt the Produced Nontributary Groundwater Rules pursuant to House Bill 09-1303, Section 3, as codified at § 37-90-137(7)(c), C.R.S., which provides that “the State Engineer may, pursuant to the ‘State Administrative Procedure Act’, adopt rules to assist with the administration of this subsection (7).

Dated this 31st day of August, 2009.



Dick Wolfe, P.E.
Director/State Engineer