



DEPARTMENT OF NATURAL RESOURCES

DIVISION OF WATER RESOURCES

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POLICY 2010-4 (AMENDED)

**CONCERNING APPLICATIONS TO THE STATE ENGINEER TO MAKE
DETERMINATIONS OF NONTRIBUTARY GROUND WATER IN THE
CASE OF APPLICATIONS FOR WELL PERMITS TO BE ISSUED PURSUANT
TO SECTION 37-90-137(4), C.R.S.**

This Policy 2010-4 was modified on June 13, 2014 and supersedes the version of Policy 2010-4 that was originally signed on July 23, 2010.

Objective

The State Engineer believes it is beneficial to provide a policy that informs applicants of the procedure for submission and review of requests for nontributary ground water determinations when accompanied by an application for a well permit to be issued pursuant to 37-90-137(4). The objective of this policy is to provide the State Engineer, water users, and other parties with a procedure for submission and review of requests for nontributary ground water determinations. The State Engineer believes that documenting a single procedure for processing requests for nontributary ground water determinations will clarify the process for submission and review of such determinations.

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 ground water tributary to an overappropriated surface stream 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

In some cases, 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,

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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1985, the withdrawal of which will not, within one hundred years of continuous withdrawal, 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 annual rate of withdrawal.”⁴ A party seeking to withdraw nontributary ground water for beneficial use must obtain a well permit from the State Engineer.⁵ Under Colorado law, ground water that has been determined to be nontributary is not administered within the prior appropriation system.⁶ Therefore, 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. Because the differing statutory requirements with respect to withdrawal of tributary and nontributary ground water affect the operation of wells, a party who will be withdrawing ground water from certain formations may request a determination that such ground water is nontributary. Currently, there are no rules, statutes, or other legal approaches that specifically describe the process for designating areas within the state where ground water is nontributary, with the exception of: the Denver Basin Rules 2 CCR 402-6, which delineate areas of nontributary ground water in specific bedrock aquifers; the Produced Nontributary Ground Water Rules, 2 CCR 402-17, which delineate areas of nontributary ground water in other geologic formations; and decrees issued for ground water based on findings that the ground water is nontributary. As a result, requests for determinations of nontributary ground water in aquifers or geologic formations not addressed by the foregoing rules typically have required case-by-case analysis consistent with the Statewide Nontributary Ground Water Rules, 2 CCR 402-7.

Historically, the State Engineer has reviewed such 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 meets the objective standard set forth at 37-90-103(10.5) through analytic or numeric modeling, or in some cases, site-specific geologic evidence. In the case of the “Complex Area” of the Denver Basin, the State Engineer has frequently considered the nontributary nature of the bedrock aquifers based only on existing well log information available in the State Engineer’s Office, without any information submitted from an applicant.

If the State Engineer accepted the demonstration that the subject ground water was nontributary ground water, the ground water was then deemed available for withdrawal pursuant to 37-90-137(4). In arriving at the finding, the State Engineer’s Office would either affirm or determine the saturated thickness and specific yield of the formation that is the source of the ground water.

This policy describes the State Engineer’s procedure to continue the review and evaluation of such well permit applications for the withdrawal of nontributary ground water.

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”).

Policy

The State Engineer adopts this policy providing direction for requests for nontributary ground water determinations for the purposes of issuing well permits pursuant to 37-90-137(4) and 37-90-137(10). The provisions of this policy shall be effective on the date of signing. This policy shall not be applicable to the Dawson, Lower Dawson, Denver, Arapahoe, Lower Arapahoe, or Laramie-Fox Hills aquifers in the geographic areas identified in the Denver Basin Rules. This policy shall also not apply to determinations of nontributary ground water for the purposes of permitting wells pursuant to 37-90-137(7), which requests are addressed pursuant to the Produced Nontributary Ground Water Rules.

Obtaining a Determination of Nontributary Ground Water

A. Submittal of an Application for a Determination of Nontributary Ground Water

A party seeking a nontributary determination for ground water to be withdrawn from wells completed in a specific formation associated with a specific parcel of land ("Applicant") shall file an application in the form of a letter and accompanying professional report to the State Engineer with two hard copies and one electronic copy.⁷ The application shall be addressed specifically to the State Engineer and shall, at a minimum, contain the following:

1. A complete well permit application demonstrating land ownership or consent of the landowner of the parcel of land that is the subject of the application, along with a legal description of the parcel, and the Applicant's proposed non-speculative uses for water to be withdrawn from the well.
2. Information sufficient to demonstrate, through analytic or numeric modeling, that the ground water in the specific formation underlying the land that is the subject of the application meets the nontributary standard found in section 37-90-103(10.5). In lieu of ground water modeling, the Applicant may provide geologic, hydrologic, and other information sufficient to demonstrate that the ground water in the specific formation underlying the land that is the subject of the application is hydraulically disconnected from all surface streams such that there will be no depletions to any surface stream as a result of pumping. An Applicant seeking a determination of nontributary ground water will have the burden to show with clear and satisfactory evidence that the ground water underlying the land that is the subject of the application is nontributary.⁸
3. The Applicant's determination of the saturated thickness of the water yielding formation materials and specific yield of the saturated zones of those materials in the specific formation underlying the land that is the subject of the application.
4. The total amount of nontributary ground water to be withdrawn by the well.

⁷ The State Engineer's Office strongly advises an Applicant that will request a nontributary determination to meet with the staff of the State Engineer's Office before formally submitting the application. In an effort to ensure a more efficient process for the Applicant and any noticed persons, the staff of the State Engineer will provide a detailed review of the proposed submittal to help identify problems with an application that would prevent a successful determination.

⁸ See *Buffalo Park Development Co. v. Mountain Mut. Reservoir Co.*, 195 P.3d 674, 685 (Colo. 2008) ("Colorado law includes a presumption that all groundwater is tributary to and subject to appropriation and administration as part of the waters of a surface stream, unless a person proves by clear and satisfactory evidence that the ground water is not tributary."); *Stonewall Estates v. CF & I Steel Corp.*, 592 P.2d 1318, 1320 (Colo. 1979); *Safranek v. Town of Limon*, 228 P.2d 975, 977 (Colo. 1951).

An Applicant's failure to provide the minimum information requested above may form the basis for the State Engineer's denial of the application.

B. Notice and Comment

1. Concurrent with submission of the application to the State Engineer, the Applicant shall file notice of the application. The notice shall be sent to all persons on the Notification List, which includes the SWSP Notification List and additional notification lists that may be developed by the State Engineer specifically for this purpose, for the water division in which the parcel is located. In addition, the Applicant shall publish the notice for a period of one week as a legal notice in the primary newspaper of general circulation in the county where the parcel is located. Proof of publication shall be provided to the State Engineer, with a copy to all persons on the Notification List. After an initial review of the application, the State Engineer may request additional subsequent notice he finds appropriate and it will become part of the Notification List for the purposes of this policy. The notice and publication shall include all information required for the submittal described in A.1-4 above.

The Applicant's notice shall provide the requirements for submitting responses to the application and information on how to obtain copies of all materials provided to the State Engineer in support of the application and any additional materials submitted to the State Engineer thereafter at no cost to such persons.

The Applicant shall provide copies of or electronic access to all such materials requested by persons at no cost to the requestor. Once such a request has been made, the requestor shall, without having to make an additional request, be provided by the Applicant with copies of or electronic access to all additional materials at the same time the Applicant provides the materials to the State Engineer.

2. Persons on the Notification List shall be provided the notice required pursuant to this policy by electronic mail, or first-class mail if indicated by any person on the lists. The Applicant's failure to provide the notice and information described in this policy and in the manner described in this policy may be the basis for the State Engineer's denial of the application.
3. The State Engineer will allow 35 days after the application has been noticed or last published, whichever is later, for any person to respond to the application. The State Engineer may allow an enlargement of time for responses to the application based on a written request submitted to the State Engineer prior to the expiration of the 35-day period showing that a person was not timely provided or given access to materials provided to the State Engineer in support of the application.
 - a. To be considered, any response to the application shall be filed with the State Engineer, persons on the Notification List, and the Applicant in writing either by submitting comments on the application, by requesting inclusion in the distribution of the Initial Staff Determination described below, or by requesting that the application be referred for hearing.
 - b. Any person requesting a hearing shall state the basis for such a request in sufficient detail to allow the State Engineer to determine whether a hearing is

appropriate prior to or after an Initial Staff Determination as described below. The State Engineer will provide copies of all such comments or hearing requests to the Applicant and will make the same available upon request to all persons who file responses to the application. The Applicant or the staff of the State Engineer may also request a hearing.

4. Unless the State Engineer has already set the matter of the application for an adjudicatory hearing, the staff of the State Engineer may at any time ask for additional information from the Applicant as necessary to properly evaluate the application. In that case, the Applicant shall provide the additional information to the staff of the State Engineer. In addition, the Applicant may provide additional information in reply to responses to the application submitted to the State Engineer. If the Applicant provides additional information requested by the staff of the State Engineer or in reply to responses, the Applicant shall provide copies of or electronic access to all such information to all responders at no cost to the responders. If the Applicant submits additional information, the State Engineer shall determine whether new notice, consistent with steps 1 through 3 of section B of this policy, is required. The Applicant's failure to provide any of the additional information requested by the State Engineer may form the basis for denial of the application.

C. No Hearing Requested: Initial Staff Determination

1. If no person requests a hearing, the staff of the State Engineer will evaluate the application and any written comments on the application, and produce an Initial Staff Determination with respect to whether ground water to be withdrawn by the well from the formation underlying the land that is subject of the application is nontributary.
2. The staff of the State Engineer will provide a copy of its Initial Staff Determination to the Applicant, any person who submitted written comments, and any person who may have requested a copy of the Initial Staff Determination. If neither the Applicant nor any other person objects to the Initial Staff Determination within 35 days, the staff of the State Engineer will submit the Initial Staff Determination to the State Engineer for review, approval, and certification as a Final Decision. If any person objects to the Initial Staff Determination, the objection shall be submitted in writing to the State Engineer and shall state in detail the basis for such an objection. An objection may include a request for a hearing before the State Engineer stating the basis for such a request in sufficient detail to allow the State Engineer to determine whether a hearing is appropriate.
3. If any person submits an objection to the Initial Staff Determination, the State Engineer may, with or without a hearing, approve, reject, or approve with modifications the Initial Staff Determination. The State Engineer may certify any such decision as a Final Decision on the application or may request that his staff reconsider and resubmit its Initial Staff Determination to the State Engineer, subject to the provisions of this paragraph C.

D. Hearing Requested

1. If any person requests a hearing on the application, the State Engineer will determine whether a hearing is appropriate. The State Engineer may hold a conference with the Applicant and all responders to discuss whether a hearing is appropriate, alternatives to an adjudicatory hearing, and potential pre-hearing procedures and deadlines. If the State Engineer determines that a hearing will not be held, he will inform all responders to the application of that decision in writing. If the State Engineer determines at any time that a hearing is appropriate, the matter will be set for an adjudicatory hearing before the State Engineer. The State Engineer may submit the matter to a designated Hearing Officer at his discretion.
2. Before the hearing, the State Engineer or the designated Hearing Officer will hold a setting conference during which the dates of the hearing and other relevant deadlines leading up the hearing will be set after input by all parties to the hearing.
3. The hearing shall be conducted pursuant to the Division of Water Resources Procedural Regulations, 2 CCR 402-5, and applicable provisions of the State Administrative Procedure Act (Section 24-4-101, *et seq*, C.R.S.). The State Engineer will provide notice of the hearing to any person who responded to the application.
4. For purposes of the hearing, the Applicant will be considered the party requesting the hearing and the proponent of the nontributary well permit application, and will have the initial burden of proof. Any person who responded to the application may participate as a party to the hearing. The staff of the State Engineer may participate as a party.
5. The State Engineer may consider the Initial Staff Determination and any revisions thereto as evidence; however, the hearing will be de novo, based upon the evidence presented at the hearing.

E. Final Decision

If no hearing is held, the Initial Staff Determination shall be submitted to the State Engineer for review, approval, and certification as a Final Decision of the State Engineer with respect to the Applicant's application, subject to the provisions of paragraph C above. If there has been a hearing on the application, the written decision of the State Engineer after the conclusion of the hearing shall become the Final Decision. At or after the hearing and prior to issuing the written Final Decision, the State Engineer will provide the parties with a summary of his findings and conclusions. Within 35 days of the date of the summary, the Applicant may file a motion with the State Engineer to stay the proceedings to allow the Applicant to file an application with the Water Court within 35 days for the same or a substantially similar nontributary determination, as provided by section 37-90-137(6), C.R.S. Any such motion shall be granted by the State Engineer, subject to the conditions for the stay. The outcome of any such Water Court action may result in an order by the State Engineer lifting the stay, which order will be served on all parties, and in further action by the State Engineer consistent with the outcome of any such Water Court action. If no such motion is filed with the State Engineer within the 35-day period, the State Engineer will serve his written Final Decision on all parties.

F. Effect of Final Decision

The State Engineer may rely on the Final Decision to evaluate well permit applications submitted pursuant to 37-90-137(4) or 37-90-137(10) to withdraw the water underlying the land from the formation that was subject of the well permit application where a landowner, or party with the landowner's consent, has submitted a properly completed well permit application for non-speculative uses. The State Engineer may also rely on the Final Decision or any other relevant factual information obtained, developed, or determined during any proceeding under this policy when filing a determination as to the facts of an application to the water court, as required by 37-92-302(2), for the formation underlying the land that is the subject of the Water Court application. The State Engineer's approval or denial of the well permit applications shall not shift the burden of proof or serve as a defense in any legal action that may arise concerning the well permit applications.

G. Appeal of Final Decision

As provided by the State Administrative Procedure Act and section 37-92-203(1) of the Water Right Determination and Administration Act of 1969, any appeal of the State Engineer's Final Decision regarding the application shall be filed in the Water Court for the water division in which the subject ground water is located within 35 days after service of the Final Decision of the State Engineer regarding the application.

H. Standard of Review

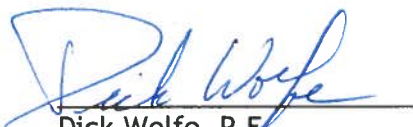
In any appeal of the State Engineer's Final Decision, the Final Decision shall be reviewed by the Water Court as provided under section 24-4-106 of the State Administrative Procedure Act.

I. Conflicting Water Court Decree or Supreme Court Decision

To the extent any final and un-appealable judgment and decree of the Water Court or decision of the Supreme Court, including but not limited to the Water Court's or the Supreme Court's ruling on any appeal of the State Engineer's Final Decision, conflicts with the State Engineer's Final Decision, the decree of the Water Court or decision of the Supreme Court will control for the purpose of the State Engineer's well permitting under 37-90-137(4), and the administration of any such decree as required under 37-92-304(8).

Except as described herein, this policy may be modified or revoked only in writing by the State Engineer.

Approved this 13th day of June, 2014.


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Director/State Engineer