

STATE OF COLORADO

OFFICE OF THE STATE ENGINEER

Division of Water Resources
Department of Natural Resources

1313 Sherman Street, Room 818
Denver, Colorado 80203
Phone (303) 866-3581
FAX (303) 866-3589

www.water.state.co.us

AUGUST 10, 2006



Bill Owens
Governor

Russell George
Executive Director

Hal D. Simpson, P.E.
State Engineer

GUIDELINE 2006-2

CONCERNING THE STATE ENGINEER'S APPLICATION OF RULE 11.A OF THE STATEWIDE NONTRIBUTARY GROUND WATER RULES

Purpose:

The purpose of this guideline is to document the State Engineer's application of Rule 11.A of the Statewide Nontributary Ground Water Rules in the evaluation of well permit applications submitted pursuant to 37-90-137(4) and 37-90-137(10), C.R.S., and when reviewing water court applications for the adjudication of Denver Basin ground water.

Outside the Designated Basins

In the matter of issuing well permits for wells pursuant to Sections 37-90-137(4) and 37-90-137(10), C.R.S., Rule 11.A of the Statewide Nontributary Ground Water Rules (Rules) states:

"All wells, including additional wells applied for pursuant to Section 37-90-137(10), C.R.S., must be located on the overlying land as defined at Rule 4.A.8)."

Rule 4.A.8) defines "overlying land" as follows:

"Overlying Land" means that land owned by the applicant or by another who has consented to the applicant's withdrawal of ground water which overlies ground water as described in Section 37-90-137(4), C.R.S., and which the applicant requests be considered in determining the allowed average annual amount of withdrawal sought in the application."

The application of this rule requires that, for a well permit application to withdraw Denver Basin ground water, the well must be located on the same land that was considered when the amount of water was determined. The State Engineer's Office (SEO) has consistently applied this rule to well permit applications in the situation where bedrock aquifer ground water was quantified as part of the application process, pursuant to the provisions of Section 37-90-137(4) and the Rules, and to well permit applications to withdraw previously adjudicated ground water. The exception to this is in the case where a decree adjudicating Denver Basin ground water specifically provided for withdrawal of the water from land other than the Overlying Land as defined in the Rules. The SEO has not objected to Water Court applications that seek to include specific provisions in a Water Court decree to allow withdrawal of the bedrock aquifer ground water from land that was not part of the Overlying Land, as long as there was no other identified potential for material injury. This approach, however, has not been consistently applied.

Beginning immediately, the SEO will implement the following practice regarding the application of Rule 11.A of the Rules. The SEO will continue to apply Rule 11.A when evaluating well permit

applications where the ground water is quantified as part of the evaluation process (that is, the ground water has not been previously adjudicated). Also, the SEO will strictly apply Rule 11.A when evaluating well permit applications where the ground water has been previously adjudicated, if the decree does not provide an explicit provision allowing the ground water to be withdrawn from land that is not part of the Overlying Land.

Should an application to the Water Court request a provision allowing the water to be withdrawn from land that is not part of the Overlying Land, the SEO will not object under the following conditions:

1. The applicant states the intention in the published Water Court application.
2. The applicant specifically identifies the land from which the water is to be withdrawn.
3. The specifically identified land that is not part of the Overlying Land, is contiguous to the Overlying Land or satisfies Rule 11.B of the Rules.
4. The SEO has not identified any other material injury concerns associated with withdrawal of water from land that is not part of the Overlying Land.

The SEO may choose to object to the Water Court application if, in the SEO's opinion, the provision would allow material injury. Once the Water Court enters a decree allowing water to be withdrawn from land that is not part of the Overlying Land, the SEO will not deny the well permits due to consideration of Rule 11.A of the Rules.

Basis

The basis for the practice described in this guideline is that Rule 11.A was intended to direct the State Engineer to restrict the location of wells permitted pursuant to Section 37-90-137(4) and 37-90-137(10), C.R.S., when that permit issuance is based solely on the SEO's administrative authority. However, the Water Court judge may allow a decree even if it is in conflict with Rule 11.A, especially if no party, including the SEO, objects due to the potential for material injury. While Section 37-90-137(10) might be interpreted to require that the well be on the "land referred to in subsection (4) of this section", it is not clear that the objective of that reference was to preclude a water right that would allow ground water to be withdrawn from land that is not part of the Overlying Land. This provision appears intended to secure an entitlement for an existing permit holder to obtain permits for additional wells on the Overlying Land rather than to limit the allowable locations of wells.

In light of the fact that the SEO and all notified parties will retain the ability to object to a Water Court application requesting that a well be located on land other than the Overlying Land, it is prudent to not subject ground water users to court costs and/or well construction costs that are necessary only to satisfy Rule 11.A and 37-90-137(10) when a reasonable alternative is available.

Inside the Designated Basins

In the matter of issuing well permits for wells pursuant to Section 37-90-107(7), C.R.S., Rule 5.3.7 of the Designated Basin Rules states:

"Well Location: All wells, including additional wells, withdrawing water from the Denver Basin aquifers, must be located on the overlying land."


Rule 4.2.21 of the Designated Basin Rules defines "overlying land" as follows:

"Overlying Land" means that land owned by the applicant, or by another who has consented to the applicant's withdrawal of ground water, which overlies the bedrock aquifers as described in Rule 5.3 and 5.4 of these Rules, and which the applicant requests be considered in determining the allowed average annual amount of withdrawal sought in the application."

The application of this rule requires that, for a well permit application to withdraw Denver Basin ground water, the well must be located on the same land that was considered when the amount of water was determined. The Ground Water Commission staff (staff) has applied this rule to well permit applications in the situation where bedrock aquifer ground water was quantified as part of the application process, pursuant to the provisions of Section 37-90-107(7) and the Designated Basin Rules, and to well permit applications to withdraw ground water that was subject of a Determination of Water Right granted by the Ground Water Commission (Commission). Since the Commission and the staff are both the permitting authority and the adjudicatory authority, and since the staff is bound by the Designated Basin Rules, the only opportunity for the Commission to allow an exception to this rule for a Determination of Water Right is under Commission Rule 11 regarding variances from the strict application of Rules 5 and 7. Variances may only be granted when a rule would cause unusual hardship.

Therefore, there is no further direction necessary from this guideline regarding requests to locate wells on land other than the Overlying Land in the Designated Basins.

Approved:


Hal Simpson, State Engineer

Date: 8/14/06