



COLORADO

Division of Water Resources

Department of Natural Resources

Guideline 2009-1

CONCERNING THE STATE ENGINEER'S PERMITTING AUTHORITY OVER WELLS LOCATED ON HAZARDOUS WASTE REMEDIATION SITES

Purpose

The purpose of this guideline is to clarify the State Engineer's interpretation of the permitting authority over wells located on hazardous waste remediation sites under the federal Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), other federal programs, and the state Colorado Hazardous Waste Management Act (CHWMA).

Under the McCarran Amendment, Federal Agencies are generally subject to state water adjudications and administration. However, specific aspects of state water administration can be preempted by other federal legislation in specific circumstances. There are two general types of preemption: express and implied. Implied preemption requires a complex, fact-specific analysis, and it should not be assumed that any state water law or regulation is impliedly preempted unless there is a case directly on point holding that the law or regulation is preempted in the specific circumstances. As further described below, CERCLA contains express provisions related to state well permitting. In contrast, the Uranium Mill Tailings Radiation Control Act (UMTRCA), does not contain any express well permitting preemption provision, and DWR is unaware of any case law holding that a state well permitting requirement is impliedly preempted by UMTRCA, and therefore sites operating solely under UMTRCA should be treated as subject to Colorado well permitting requirements.

RCRA is delegated to the State under CHWMA

Under RCRA the Environmental Protection Agency (EPA) may authorize a state to run its own hazardous waste program which operates "in lieu" of the federal RCRA program. In 1984, the EPA authorized Colorado to operate its hazardous waste program pursuant to the provisions of CHWMA.

The State Engineer's well permitting authority does not conflict with CHWMA. There is no express conflict between the State Engineer's well permitting and CHWMA hazardous waste permitting requirements because both requirements may apply. There is no implied conflict because CHWMA does not occupy the field of hazardous waste management to the exclusion of the State Engineer's permitting authority.

There is no provision in RCRA specifically prohibiting well permitting by individual states. RCRA authorizes States to impose additional requirements beyond those imposed by RCRA and the State's well permitting requirement is a legitimate response to an issue of local concern. A notice of intent (NOI) is required for monitoring holes and applications for well permits. Therefore, a NOI, along with the required filing fees, must be submitted to the Division of Water Resources for monitoring wells, recovery wells, or any other type of well.



Well permitting requirements for sites operating under a program without a well permitting preemption, including UMTRCA and RCRA sites operating solely under CHWMA

1. Monitoring wells must comply with all the provisions of 2 CCR 402-2 Rules and Regulations for Water Well Construction, Pump Installation, Cistern Installation, and Monitoring and Observation Hole/Well Construction (“Construction Rules”) Rule 14.
2. Recovery wells, that is, wells that pump groundwater for treatment, will require a well permit issued for such recovery/treatment purposes and may not cause material injury to senior vested water rights. For wells outside of the Designated Basins, all recovery operations on the site, including the pumping of recovery wells from a tributary aquifer in an overappropriated area¹, must occur pursuant to a court approved augmentation plan or current Substitute Water Supply Plan approved by the State Engineer unless such pumping adheres to State Engineer [Policy 94-5](#), available on the [Well Permitting page](#) of the Division of Water Resources’ website. Wells outside of the Designated Basins that are found to be out of compliance with Policy 94-5, and presumed to cause injury, will be subject to curtailment. For wells within the Designated Basins, all recovery operations on the site, including the pumping of recovery wells, must comply with the Rules and Regulations for the Management and Control of Designated Ground Water 2CCR-410-1 (“Designated Basin Rules”) and may require a replacement plan approved by the Colorado Groundwater Commission.
3. The construction and abandonment of each well must be in compliance with the Construction Rules.

CERCLA provisions preempt state permitting requirements for groundwater remediation wells

Provisions under CERCLA, commonly known as Superfund, expressly preempt well permit and fee provisions required by state law for monitoring and remediation wells constructed entirely on the Superfund site as part of the cleanup of a Superfund site. Well permits will not be required for any groundwater remediation project conducted entirely on the Superfund site whose operator demonstrates that the project is under federal authority and supervision and directed by CERCLA requirements. Projects operating under both CERCLA and RCRA are similarly exempt.

Division of Water Resources Provisions applying to wells constructed under CERCLA

1. Monitoring wells at the site will not require that a notice of intent be filed prior to construction nor will they require a permit.
2. The operator at the site must maintain accurate information for each well that has been constructed, including the well location (UTM coordinates; or Section, Township, Range, and distances from section lines), construction date, and abandonment date. In addition the operator must maintain a well construction report and a well abandonment report using the forms supplied by the Division of Water Resources. This information must be submitted to the Division of Water Resources on request.
3. The construction and abandonment of each well must be in compliance with the Construction Rules except that well permits are not required and work reports are not

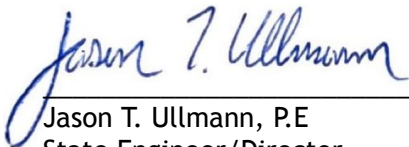
¹ A court approved augmentation plan would also be required if the recovery wells are withdrawing water from a not nontributary Denver Basin aquifer and such pumping does not adhere to State Engineer Policy 94-5.

required to be submitted to the Division of Water Resources, unless requested in accordance with #2.

4. Recovery wells, that is, wells that will actually pump groundwater for treatment, also will not require a well permit. However, no well can be used to cause material injury to senior vested water rights as further described in paragraph 2 under the "Well permitting requirements for RCRA sites operating solely under CHWMA" section above.

Approval

This guideline may only be modified or revoked in writing by the State Engineer. This guideline originally became effective February 13, 2009. It was amended on April 29, 2024 to provide background information and clarify the permitting and reporting requirements.

A handwritten signature in blue ink, reading "Jason T. Ullmann".

Jason T. Ullmann, P.E
State Engineer/Director

Background information

For a period of time before Guideline 2009-1 was approved, the Division of Water Resources allowed the construction of wells on RCRA or CHWMA sites without well permits and the associated fees. If such wells are encountered the well owners are required to come into compliance with the permitting statutes, and ensure the wells are permitted pursuant to the relevant statute. This guideline supersedes any correspondence from the Division of Water Resources prior to the original approval of guideline 2009-1, if such correspondence conflicts with this guideline.