



DIVISION OF WATER RESOURCES

John Hickenlooper
Governor
Mike King
Executive Director
Dick Wolfe, P.E.
Director/State Engineer

August 8, 2011

GUIDELINE 2011 – 1

CONCERNING THE GROUND WATER COMMISSION STAFF'S PROCEDURE FOR THE INVESTIGATION OF POTENTIAL WELL PERMIT VIOLATIONS IN DESIGNATED BASINS

Purpose:

When working on enforcement actions involving a suspected well permit violation, the Ground Water Commission staff ("Staff") uses a combination of statutes to direct its efforts. This guideline summarizes the Staff's process established to act on a complaint and any subsequent well permit violations that may be identified

Relevant statutes used to help Staff develop a process for the enforcement of well permit violations: [Sections 37-90-110(1), 37-90-138(2), 37-90-111(1) and (2), and 37-90-111.5, C.R.S] Also see attachment.

I. WELL PERMIT VIOLATION COMPLAINTS

A. There are a number of channels through which staff may receive information pertaining to suspected well permit violations. This list includes, but is not limited to:

1. Public Complaints.

Most enforcement actions are initiated following a report/claim made by someone from the public; however, Staff will not act on a complaint that has been made over the phone. If a complaint involving a suspected well permit violation is made over the phone, Staff shall ask the party to send something in writing/email detailing the complaint. When possible, this correspondence should include: well permit number, well owner's name, legal location of the well, physical address where the well is located, and a detailed description of the perceived violation.

2. Ground Water Management Districts

The district's support is an integral part to the well permit enforcement process. Should a Ground Water Management District identify a potential well permit violation, Staff shall request that the district send something in writing (email is fine) detailing the matter that is to be investigated.

3. Division of Water Resources Staff

It is not uncommon for the Division of Water Resources Staff (Ground Water Commission staff or otherwise) to identify a potential violation while working on other matters. Often times water commissioners working on surface water related issues in a designated basin will refer suspected well permit violations to the Ground Water Commission Staff. Staff shall request that Division of Water Resources personnel send an email detailing any suspected well permit violations.

B. It is essential that Staff has something in writing to respond to.

1. To protect Staff from accusations of neglect.
 2. To establish a beginning date for the enforcement file.
 - a) Under the direction of **C.R.S 37-90-138(2)** Staff shall *notify the user in writing of such violation and give him such time as may reasonably be necessary to address deficiencies.*
- C. Upon receipt of a written complaint, Staff should create a new enforcement file.
1. This file will contain a copy of the complaint and any relevant well permits.
 2. Staff will compare the information in the written complaint to any relevant well permit files to:
 - a) Verify that the well permit nos., legal descriptions, and ownership information correspond with what has been provided in the written complaint.
 - b) Verify that what is being reported (the violation) is not actually allowed by the permit.
- D. It is important to remember that until a violation is verified in the field by Staff, or the owner of the well in question acknowledges that a violation of the well permit is indeed occurring, Staff should proceed with caution and assume the well is operating in compliance with its well permit.

II. SHOW CAUSE LETTER

Pursuant to 37-90-138(2) Staff shall "notify the user in writing of such violation and give him such time as may reasonably be necessary, not to exceed sixty days, to correct deficiencies."

- A. Once it has been confirmed that what has been reported in the complaint is not allowed by the well permit(s), staff will send a certified "show cause" letter to the well owner to verify the occurrence of a violation.
1. A "show cause" letter is Staff's first attempt at contacting a suspected well permit violator.
 2. This letter states that Staff has reason to believe a well permit violation **may** be occurring, and gives the well owner an opportunity to dispute or confirm the well permit violation in a timely manner.
 3. Typically, with this first letter, Staff shall require the owner to respond within 20 or 30 days of signature of the certified mail receipt. **C.R.S 37-90-138(2)**
 4. Staff may consider including a Well Permit Compliance Statement (*see attached example*) with the "show cause" letter. A Compliance Statement is something the well owner can sign if he is guilty of the violation suspected, and says something to the effect of: *I, owner's name, agree to operate this well in compliance with the permit OR make application to correct the violation and submit it to the Division of Water Resources within X amount of days.* This notice/affidavit provides Staff with something in writing from the owner that can be added to the enforcement file record, and it may be referred to if cease and desist orders become necessary. **See section IV of this guidelines document.**

III. STAFF'S ACTIONS FOLLOWING THE ISSUANCE OF A SHOW CAUSE LETTER

As it pertains to well permit enforcement actions, Staff's goal is to effectively use its time and resources to ensure well permit compliance.

Staff's actions following the "show cause" letter will depend on the response received from the well owner.

- A. The well owner responds to the "show cause" letter in a timely manner, and verifies the violation as suspected -- either by signing and returning the Compliance Statement, or calling appropriate Staff before the end of the "show cause" period to discuss the matter further:
1. Staff, working with the well owner, will determine an appropriate course of action to achieve well permit compliance and may offer a number of options to the owner to do so. This may include but is not limited to:
 - a. Requesting the well owner submit something in writing (like the Well Permit Compliance Statement or otherwise) whereby he agrees to operate the well only under the legal permit.
 - b. Directing the well owner to initiate the process of the changing the permit through application.
 - c. Any course of action and options will be clearly defined in writing by staff, and will include any predetermined date(s) for the owner to comply by.
 2. Staff may allow the well owner/user to temporarily continue operating the well in violation of the permit during this time, provided a solution is being worked on and appropriate steps are being taken by the well owner to achieve well permit compliance

For example, if a well owner is irrigating illegally expanded acres and receives a "show cause" letter from us in August (at the height of the irrigation year), we may allow him to continue operating the well in violation of the permit provided he: (1) responds within the time period we established in the show cause letter, and (2) takes actions (as determined by Staff) to correct the violation. This may include having the owner sign something that says he agrees to operate the well as legally permitted immediately following the completion of the irrigation year (or other date as determined by Staff) and from that point forward AND/OR initiate the process of changing the permit through application.

If an agreement of this nature is made, Staff will create an entry in its enforcement calendar requiring a field inspection the following year to verify well permit compliance. If the violation continues to occur at that time, or reoccurs at any point thereafter, Staff may issue a cease and desist order. See section IV of this guidelines document. Staff uses a shared enforcement calendar to provide reminders for relevant dates in the enforcement process: (show cause end date, initial field inspection date, follow-up inspection date, cease and desist order issuance date, etc...) It is used primarily for referring to inspection dates that may be required.

3. Staff may create a different compliance structure than that identified in the example above as a means for the owner to work towards and achieve well permit compliance. This may be necessary in situations where well permit applications are not applicable and/or the well owner is working with counsel to address the issues. If this is the case, Staff shall establish specific dates for issues to be addressed/completed by.
- B. The well owner responds to the "show cause" letter in a timely manner, but disputes the suspected violation as stated:

1. If the dispute is a result of a conflicting interpretation of the well permit, Staff will reevaluate the matter internally and determine its next course of action.
 - a) Should Staff stand by its original interpretation of the permit, the well owner may be directed to request a variance hearing before the Ground Water Commission. Provided the well owner takes the appropriate steps to go before the Commission and follows the timeline set up by Staff to do so, Staff may allow the well owner to continue operating in violation of the well permit.

Pursuant to Section 37-90-138(2), C.R.S "if the well user fails or refuses to make the changes within the allowed time, the Staff is authorized to enter upon his land and do whatever is necessary in order that the user comply" with the well permit. While 37-90-110(1)(c), C.R.S gives staff the authority "to go upon lands, both public and private, for the purpose of inspection of wells", Staff will make a reasonable attempt to contact the owner (by phone) to let him know that a field inspection will occur.

2. If the well owner claims there is no violation, Staff will perform a field inspection to verify what is or is not occurring. Depending on the outcome of this inspection, Staff will:
 - a) Close the enforcement file with a memo stating that *there is no violation occurring at this time*. It is not uncommon for Staff to receive incorrect information concerning a well permit violation, but we must respond to every complaint made.
 - b) Proceed with a second certified letter verifying the violation as inspected, and provide the well owner with options, with a firm time schedule (10 days), to respond and correct the violation. Should the owner fail to respond to this letter, Staff shall proceed with cease and desist orders. *See section IV.*

C. Should the well owner fail to respond to the show cause letter:

1. If Staff does not receive the signed certified mail receipt, a courtesy call to the owner will be attempted, whereby Staff will notify the well owner of the suspected well permit violation.
 - b) Should Staff reach the owner in a reasonable time (2-3 days), Staff will arrange for the show cause letter to be emailed or mailed to the owner again; this time with a shortened response window (10 days).
2. If Staff receives the signed certified mail receipt but the show cause period ends without response, Staff will make reasonable attempts to contact the owner (by phone) before scheduling a field inspection.
3. If the show cause period ends without a response and Staff's second attempt at contacting the owner is unsuccessful, Staff shall schedule a field inspection to verify the occurrence of a violation. Staff will make reasonable efforts to perform a field inspection within one week from the end of the show cause period.
4. Depending on the outcome of the field inspection, Staff will:
 - a) Close the enforcement file with a memo indicating - *there is no violation occurring at this time, or*
 - b) Proceed with Cease and Desist Orders

IV. CEASE AND DESIST ORDERS

Staff may order the cessation of the use of a well pending the correction of any defect that the state engineer (as the executive director of commission), has ordered corrected, and take such actions as may be required to enforce compliance with a well permit. [37-90-110]

Such orders may carry fines of up to \$500 for every day the order is violated and the owner of the well that is operating in violation of the well permit may also be responsible for any costs awarded in the litigation process. [37-90-111.5]

- A. If all attempts to work with a well owner to correct a well permit violation have failed, Staff may proceed with a cease and desist order as a means of achieving well permit compliance.
- B. Administrative process for the issuance of a cease and desist order:
1. Upon completion of the cease and desist order, Staff will send a copy of the order to the owner and/or operator of the well through certified mail.
 2. On the same day the order is mailed, staff will also post a copy of the written order in plain sight, at the well head [37-90-110(g)].
 3. A copy of the cease and desist order and associated enforcement file shall be provided to Staff's attorney at the AG's office.
- C. If an order of the commission or the state engineer issued pursuant to section 37-90-105, 37-90-107, 37-90-108, 37-90-110 in relation to designated ground water, or 37-90-111 is not complied with, the commission or the state engineer in the name of the people of the state of Colorado, through the attorney general, shall apply to the district court in the county in which the water right or well is situated.
1. At this point, the matter is in the hands of the Attorney General's Office. Staff will continue to offer whatever support it can, which may include performing regular field inspections of the well in violation to determine status of well permit compliance.
 2. The up to \$500 per day fines shall begin accumulating from the day the order is posted to a point when the well is no longer operating in violation of the well permit.

The amount of additional work involved in administering a cease and desist order can be significant for Staff because Staff may be required to field inspect the well daily/weekly to help determine accumulated fines and penalties.

It is important to note that once a cease and desist order has been issued, it is valid indefinitely as it applies to the violation for the specific well identified in the order; therefore, if a well owner complies with the order and the enforcement action is closed, the order could be used again at anytime in the future should the same violation (of the same well) reoccur.



Executive Director
Colorado Ground Water Commission

8/8/2011
Date