



Produced Water Rulemaking Concludes; General Assembly Acts; Litigation Commences

By: [Ken Wonstolen](#)

In the 2009 session, the Colorado General Assembly authorized the Office of the State Engineer (“SEO”) to conduct a rulemaking to facilitate its administration of groundwater under a provision of Colorado water law that allows the withdrawal (dewatering) of nontributary groundwater to facilitate or permit the mining of minerals (defined to include “produced water” withdrawn in conjunction with oil and gas extraction). CRS 37-90-137(7); HB 09-1303. This legislation was, in part, a reaction to a Colorado Supreme Court decision (the *Vance* decision) which held that production of groundwater pursuant to coalbed methane (“CBM”) operations is, in and of itself, a “beneficial use” of water, thereby subjecting such produced water to well permitting and water rights administration. Subsequently, the SEO decided, on its own initiative, that, under the presumption of tributary status applicable to all groundwater, non-CBM wells would also have to demonstrate compliance with the groundwater statutes.

Facing the prospect of evaluating and permitting over 40,000 oil and gas wells, the SEO commenced its rulemaking soon after the session ended. It proposed a rule whereby oil and gas operators could propose “alternate rules” designating wells, groups of wells, basins and formations as non-tributary (“NT”). The rule also specifies the methods for obtaining such NT determinations, via rulemaking or by adjudication, attendant notice requirements, and the content of NT applications – which may be based on hydrologic modeling or other geologic evidence. There was considerable jousting among the various stakeholders – industry, the Colorado River District, the Denver Water Board, the Cities of Boulder, Sterling and Raton (NM), the self-proclaimed “senior water users,” *et al* – regarding the rule itself, and the rulemaking procedures employed by the SEO.

There is a fundamental, and perhaps irreconcilable, difference in perspective between the water community and the oil and gas industry. On the one hand, oil and gas geologists and reservoir engineers hold to the common sense notion that the very existence of hydrocarbon accumulations is inconsistent with connection to surface water streams:

“Saline aquifers are important because you don’t want to mess with someone’s drinking water,” [Colorado State Geologist Vince] Matthews said. “It’s also deep enough that we’re not messing with anyone’s groundwater, and we have the kinds of shields that have shown they can hold natural gas and other things for thousands of years.”¹

On the other hand, the notion that the SEO could possibly declare multiple formations across entire basins encompassing tens of thousands of square miles, non-tributary in one fell swoop, boggles the minds of water lawyers who view the world with a certain degree of tunnel vision. After all, in Colorado, it is illegal to capture roof runoff in a rain barrel without special dispensation.

The SEO commenced its rulemaking in December, 2009, and concluded this first round of NT determinations in January, 2010. Besides adopting a final rule, the SEO reviewed and approved the following industry “alternate rules” designating NT basins and formations:

- Piceance Basin – Mesaverde Group, Cameo and South Canyon Coals, Weber, Morrison, Sundance/Entrada, Wasatch, Iles, Williams Fork, Mancos, Dakota, Neslen.
- Paradox Basin and Formation (a/k/a Gothic Shale).
- Sand Wash Basin – Wasatch (Hiawatha), Nugget, Dakota, Mowry Shale, Frontier, Baxter Shale, Mesaverde Group, Lewis Shale, Lance, Fort Union.
- Northern San Juan Basin – Fruitland (coal), Pictured Cliffs, Cliff House, Menefee, Point Lookout, Dakota.
- Denver Julesburg Basin – Parkman, Sussex, Shannon (Hygiene), Niobrara, Carlile, Greenhorn (Codell), Graneros (J Sand), Dakota, Lyons.
- Central Raton Basin – Vermejo and Raton Coals (this hearing was conducted as an adjudicatory proceeding in March, 2010).

As can be seen from this list, the rulemaking and underlying hydrologic modeling employed by the industry entailed a massive, multi-million dollar effort, and encompassed many days of hearings. The opposition to the industry proposals was also significant. At the end of the day, however, approximately 85% of the active basins and wells in the state have been addressed in this first round of rulemaking, leaving some 5,000-6,000 wells yet to be considered. This outcome can only be described as a great

¹ http://www.craigdailypress.com/news/2009/jul/29/state_seeks_5m_carbon_storage_project/

achievement. The produced water rule, including maps showing the areas listed above, as well as the rulemaking documents can be accessed at: <http://water.state.co.us/wateradmin/NontribGw.asp>.

Taking into consideration the time it took to get this far, the General Assembly revisited this issue in the 2010 session that is still underway. It adopted, and has sent to the Governor for signature, SB 10-165, which extends the HB 09-1303 deadline for well permit applications and, as necessary, submission of substitute water supply plans (for tributary produced water) until April 30, 2010, with SEO action to be completed by August 1, 2010. The bill also supersedes related SEO well permitting guidance that would have required non-CBM oil and gas wells to obtain well permits, even if non-tributary, if that produced water is put to beneficial use in oil and gas operations. Under the new statutory provision, non-CBM, NT wells may recycle produced water for drilling, well completion, well control, cementing, dust suppression and other purposes related to oil and gas operations without being required to obtain well permits.

Meanwhile, back at the ranch, a number of related water court proceedings have commenced. At the end of 2009, the Northern San Juan Basin operators filed claims for adjudicated water rights for their tributary and non-tributary produced water, as well as related "augmentation plans" (to replace modeled tributary depletion to senior water rights). These filings provoked numerous statements of opposition, as well as several takings claims by landowners asserting a property right to the groundwater underlying their surface. In March, came complaints filed by a coalition of water users attacking the legal authority of the SEO to adopt the produced water rule, the rulemaking procedures it followed, and the NT determination it made with respect to the Northern San Juan Basin Fruitland Formation. Another suit challenging the DJ Basin NT determinations is pending.

So, after one of the most lengthy and expensive rulemakings in Colorado history, as well as statutory enactments in successive legislative sessions, the industry still stands under a cloud of uncertainty, with well permitting and water replacement plan deadlines fast approaching.

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