Ann Diers

From: Jim Cook [jcook@dnr.state.ne.us]
Sent: Thursday, April 21, 2005 3:59 PM
To: Roger Patterson >
Cc: Ann Bleed; Ann Diers >; Tina Kurtz >
Subject: Monday's meeting with CPNRD and TPNRD

Roger,

Since I will not be present for Monday's meeting, this is my analysis of the issues relating to the subject of that meeting, i.e. do the depletions caused by wells constructed outside the current moratorium lines in the CPNRD and TPNRD have to be offset and if so, by whom? It is offered for consideration by you and others who will participate in that meeting.

In my opinion, current law clearly answers the first part of that question; the IMP for the fully appropriated area, including that portion outside of the current moratorium lines, must "protect the ground water users whose water wells are dependent on recharge from the river or stream involved and the surface water appropriators on such river or stream from streamflow depletion caused by ....." any well that was constructed after 7-16-04, the date of the preliminary FA determination for both TPNRD and CPNRD (46-715(3)(c)). In other words, if there are appropriators who are harmed by those new wells, that harm must be overcome through implementation of the IMP.

The second part of the question, i.e. who is responsible, is not answered by the statute. If just the policy outlined in the new depletion plan is to be relied upon, the state is to accept responsibility for all such harm to the extent it is caused by new uses begun by the end of this year and the NRD will be responsible for all such harm caused by new uses that are begun on or after Jan. 1, 2006 and are inside the 28% in 40 year line. However, I think there has been general, though not universal, agreement that because of LB962, the state has already taken some steps to reduce its pre 2006 exposure. For at least those areas where LB962 resulted in state-imposed stays, the state should not agree to an IMP that would make the state responsible for the impacts of new wells or increases in irrigated acres. In those areas, adverse Impacts of new uses will occur only if they are caused by new wells and/or by increased irrigation that is allowed because the NRD either lifted the state-imposed stay or granted variances to it. When that occurs, the NRD (or water users) should be responsible for any required offsets or other methods that are needed to overcome the adverse effects of those new uses.

The issue is more complex in the FA portions of the TPNRD and the CPNRD because both those districts have areas that were not made subject to a stay or moratorium by LB962. Those districts have done what was asked of them before LB962 took effect (they were only asked to stop the construction of new wells inside the 28% in 40 year lines) and have chosen not to reduce the area covered by the LB962 stays that went into effect in July and September. Those stays include some area that the models now indicate are outside the 28% in 40 year lines. For those districts to "protect" surface water appropriators from new uses begun in the remainder of the FA area, they would have to take additional affirmative action to impose their own moratoria in those areas. CPNRD could have done that because it already has a ground water management area but it has not been asked to do so. TPNRD would first have to establish such an area. As you know, that NRD is now preparing to do that, but it is unlikely it will get anything in place before the January 1, 2006.

Bottom line for me—the equity is on the side of these two districts on this issue until 1-1-06 and on the side of the state after that.. The state should accept responsibility, as per the NDP, for new depletions caused by uses begun prior to that date if those new uses are outside the FA area subject to stays. After that, the NRDs, again as per the NDP, will need to take responsibility for any new uses allowed **inside** the 28% in 40 year lines. **Outside** the 28% in 40 year lines, the NDP provides no help. It does not require either the state or the NRDs to accept responsibility for that area. New uses outside those lines are to be identified and the impacts quantified and reported to the GC but they do not have to be offset. On the other hand, unless future decisions to the contrary are made, LB962 is more demanding relative to areas outside the 28% in 40 year lines. Those future decisions could include use of the 28% in 40 year lines as the basis for reevaluation of the FA area designation in those two NRDs or use of it as the basis for water management inside the FA areas. Until any such decision is made, however, the IMP, as required by section 46-715(3)(c), will have to assign the responsibility for protecting the

appropriators from new uses outside those lines to either DNR or the NRD. In my opinion, that responsibility ought to be assumed by the NRD once sufficient time has passed for it to implement the rules necessary to control the exposure that comes with new uses allowed in the FA area. 1-1-06 is already a long established date for NRD acceptance of NDP responsibilities and I would argue that it is a reasonable date for shifting the consequences of exposure for the new uses in the remaining FA area from the state to the district.

Jim