

Ann Diers

From: Barels, Brian L. [blbare1@nppd.com]
Sent: Wednesday, August 10, 2005 4:13 PM
To: Ann Diers; Roger Patterson (E-mail)
Subject: FW: Negotiating Rulemaking DRAFT 8-10-05.doc



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ulemaking DRAFT 8

<<Negotiating Rulemaking DRAFT 8-10-05.doc>> Ann and Roger -- attached are my comments on the departments proposed rules for the determination of fully appropriated basins under LB 962. A hard copy of the letter is also being sent in overnight mail. I will be unable to make it to Kearney tomorrow, but request these comments be entered into the record for the hearing on the proposed rules.

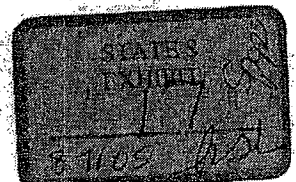
Should you have any questions, please let me know.

Brian

NPPD Water Resources Manager
402-563-5335 / 5095 Fax

-----Original Message-----

From: Rosendahl, Sharri N.
Sent: Wednesday, August 10, 2005 4:59 PM
To: Barels, Brian L.
Subject: Negotiating Rulemaking DRAFT 8-10-05.doc



August 08, 2005

Hearing Officer
August 11, 2005 Rulemaking Hearing
Regarding Determination of Fully Appropriated River Basins, Sec. 46-713
Nebraska Department of Natural Resources
301 Centennial Mall South, 4th Floor
PO Box 94676
Lincoln NE 68509-4676

RE: Proposed Rule Pursuant to Neb. Rev. Stat. 46-713

Dear Hearing Officer:

My name is Brian Barel; I am a member of the Water Policy Task Force and was a participant in the Negotiated Rulemaking Committee that was formed to address the fully appropriated designation rule. I am the Water Resources Manager for Nebraska Public Power District; NPPD uses both surface water and groundwater in our operations including the generation of electricity, irrigation, storage, cooling, and have customers who use both sources of water.

I believe it is important that the Department of Natural Resources consider the following information when developing the final rule for designation of Fully Appropriated under Stat. Sec. 46-713.

The Water Policy Task Force recommended LB-962 as a proactive approach to the management of integrated surface water and groundwater resources to sustain a balance between water use and water supplies so that existing uses are sustainable both in the short term and long term to avoid future conflict between surface water users and groundwater users in a river basin, sub basin or reach.

Stat. Sec 46-713(1)(a) requires that the DNR by January 1 of each year beginning in 2006 shall complete an evaluation of the expected long-term availability of hydrologically connected water supplies for both existing and new surface water uses and existing and new groundwater uses in each of the states river basins..... In addition, this section provides that the report shall describe the nature and extent of the surface water and groundwater in each basin considered and the geographic area within which the department preliminarily considers surface water and groundwater to be hydrologically connected.

In addition, Section 46-713(1)(b) provides that the department shall determine if a basin, sub basin or reach presently if fully appropriated without the initiation of additional uses and how the

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preliminary determination would change if no additional legal constraints were imposed on the future development of hydrologically connected surface water and groundwater and reasonable projections are made about the extent and location of future development in such river basin, sub basin, or reach. Any proposed rule that does not achieve these provisions will not fulfill the requirements of Nebraska's statutes.

Unfortunately in drafting section (3) of the statutes, the language does not include the new development consideration provided in section (1); however it appears clear the annual determination on whether a basin is to be considered fully appropriated is to include reasonable projections of new uses. I would recommend the department include in their rules what scientific data will be used for the evaluation of reasonable new uses. By considering new uses is the only way that LB-962 can be considered proactive as designed by the Water Policy Task Force.

My specific comments on the proposed rule are as follows:

1. 001.01 Paragraph 1 Provides -, it is projected during the period of May 1 thorough September 30, inclusive any irrigation right will be unable to divert sufficient surface water to meet on average eighty-five percent of the annual crop irrigation requirement, or, during the period of July 1 through August 31, inclusive, will be unable to divert sufficient surface water to meet at least sixty-five percent of the annual crop irrigation requirement.
 - a. I am concerned that this proposed criteria was not the basis for granting the last irrigation right. As such, if an existing right is used in the determination, it should be the appropriated amount of water based on the frequency of flow that was available when the water right was granted. If the criteria is used as proposed, it should be applied as if it were for the next new irrigation right in a basin, sub basin, or reach.
 - b. The criteria of meeting the annual crop irrigation requirement "on average" is not appropriate, the water must be available in each and every year to have an adequate crop - as such, I recommend deleting the words "on average".
2. 001.01 Paragraph 2 of the proposed criteria indicates that the crop irrigation requirement will be for corn. The crop used should be the crop being grown in the basin, sub basin, or reach that has the highest crop irrigation requirement.
3. 001, 01 Paragraph 3 of this section also includes criteria for evaluating the impacts of depletions on stream flows due to the lag effect from existing wells over the next 25 years. In order to adequately protect surface and groundwater users within the hydrologically connected area and prevent an over appropriated condition from occurring, it would seem a longer time period for the lag effect would be better for a proactive approach - more like the 50 year time frame being proposed in Section 002.01 of the proposed rule.

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4. 001.01 Paragraph 4 states that if the junior water right is not irrigation a standard of interference appropriate for the purpose will be used. I believe the Department's rules should address other uses as it is possible that the junior right in a reach would be an induced recharge right an instream flow right or an industrial water right. The process on how the department will incorporate those types of water rights into the determination should be included in the rule being adopted. The reason these should be included are 1) that a municipal induced recharge right can be back dated potentially causing the basin to become fully appropriated at an earlier date 2) rules related to the administration of instream flow, and how they would be considered, have been questioned by some on the WPTF, and 3) and industry must have a firm water supply.
5. 001.02 Proposes that **The geographical area which the Department preliminarily considers surface water and groundwater to be hydrologically connected for the purposes provided in Section 46-713(3) is the area within which pumping of a well for 50 years will deplete the river or a base flow tributary thereof by at least 10% of the amount pumped in that time.**
 - a. I am concerned that the above definition is (1) not consistent with the scientific definition of hydrologically connected; (2) is not consistent with the statutes in Section 46-713(1) (a) and (b); (3) may unnecessarily limit the department or the NRD in administering the designation of the geographical area of the hydrologically connected surface and groundwater; and (4) has a high likelihood of not preventing a stream or reach from becoming over appropriated in the long-term. The department needs to utilize scientifically identified information to determine the hydrologically connected area which will prevent a basin sub basin or reach from becoming over appropriate and minimize the likelihood of future conflict between surface and groundwater users, over the long-term
 - b. Line 4 of this paragraph uses the term "base flow tributary". I would suggest that the criteria developed should apply to all tributaries which contribute water to the flow regime. As such I recommend deleting the words "base flow".

I have read in the newspapers and heard at meetings that a reason not to implement the proposed 10%/50 year line for the geographical area of hydrological connection, or a more scientifically based geographic area, is that it could cause an overlap into another NRD and require that NRD to develop an integrated management plan for water users in its NRD for a stream in another NRD. I believe the intent of LB - 962 is clear and that is to use the best scientific information to determine the hydrologically connected area, so as to sustain existing uses of surface water and groundwater. In addition, I know that the NRD's can work together in preparation of an integrated management plan through a joint planning effort similar to the basin wide plan for the over appropriated portion of the Platte River.

In summary I believe it is important for the department's rule, which determines the geographical extent of the hydrologically connected area, to meet the intent of LB 962 for identifying those areas proactively and in a manner that will maintain a fully appropriated condition over the long term to prevent conflicts between users. I believe doing so will be in the

best interest of existing surface water and groundwater users. Also, by doing so will enable appropriate measures to be developed in the integrated management plan that will provide for new uses of water in a fair and equitable manner. I would also like to say that while some view LB 962 as the end of new water use in some Nebraska basins, that I believe Nebraskan's have the character to provide for our future water needs by thinking and planning at a higher level. While it may be going forward in a different manner than the past, Nebraskans will find ways to use our water resources wisely for our future needs while also avoiding conflicts in integrated areas.

I appreciate the opportunity to provide comments on the Departments proposed rules for the designation of fully appropriated basins sub basins or reaches per Section 46 -713.

Brian L Barel

Brian L. Barels
Water Resources Manager

/sr

cc Roger Patterson

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