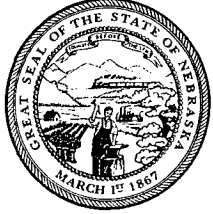


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STATE OF NEBRASKA




DEPARTMENT OF NATURAL RESOURCES
Roger K. Patterson
Director

April 27, 2005

IN REPLY REFER TO:

Mike Johanns
Governor

TO: Natural Resources Districts
FROM: Roger K. Patterson 
SUBJECT: Replacement/Abandoned Wells

In January of this year, Department staff sent letters regarding replacement wells to certain water well owners in your District. Copies were provided to each related NRD. Specifically, the letters were sent to water well owners who had registered water wells as replacement wells with the Department, but who, in the fourteen months following construction of the new water wells, had not filed a notice of abandonment for the original wells with the Department. Since the letters were sent out, the Department has received many calls from water well owners, water well contractors, and natural resources district staff with questions and concerns.

The Department received numerous questions about the application of Neb. Rev. Stat. § 46-602 and the natural resource district's regulations in a variety of situations. It is our hope that this letter helps to answer those questions.

Neb. Rev. Stat. §46-602

In order for the Department to properly register a well as a replacement well it must meet the requirements of Neb. Rev. Stat. § 46-602(2)(a)-(b) which reads in relevant part as follows:

.... For purposes of this section, replacement water well means a water well which (i) replaces an abandoned water well within three years after the last operation of the abandoned water well or replaces a water well that will not be used after construction of the new water well and the original water well will be abandoned within one year after such construction and (ii) is constructed to provide water to the same tract of land served by the water well being replaced.
.... No water well shall be registered as a replacement water well until the Department of Natural Resources has received a properly completed notice of abandonment for the water well being replaced..."

Put simply, the Department cannot register a water well as a replacement water well if the well does not meet the requirements of § 46-602(2). The Department does not have the authority to

grant variances to statutes or to waive the statutory requirements. Therefore, the Department must make sure that a water well registration form complies with all statutory requirements in order for the Department to properly register a well as a replacement well.

A natural resources district does have the authority to define for the District's purposes what constitutes a replacement water well. (See Neb. Rev. Stat. §§ 46-714(3)(h) and 46-739(6)(d)). The District's definition can be the same as the statutory definition, or it can be different. A natural resources district can also grant variances to its rules for good cause shown. However, it is very important to note that the District's definition **will not** impact the Department's requirements under § 46-602(2). If the well does not meet the requirements of § 46-602, the well will not be registered as a replacement well by the Department.

Based on the above analysis, the Department has made the following determinations with regard to well registrations:

1. If the original water well was not decommissioned within one year of construction of the new well, the new well is the illegal well—not the original well. In many instances, the new water well can be legally registered with the Department as a new water well if the natural resources district will give the landowner a new water well permit. This action may require the natural resources district to grant a variance to the rules on stays for new water wells.
2. If the new well is a replacement for surface water no longer being used, it is not a replacement well for the purposes of § 46-602 even though it may fit the definition of a replacement well for purposes of a natural resource district's regulations.
3. If the water well owner now wants to make the original water well a stock or domestic well or a back up irrigation well, the new well cannot be registered as a replacement well because no well has been abandoned. In many instances, the new well can be legally registered as a new well if the natural resources district will give the landowner a new well permit. This action may require the natural resources district to grant a variance to the rules on stays for new wells.
4. If a natural resources district has a moratorium on new wells, it can choose to grant a variance to the moratorium.
5. If the natural resources district is within an area designated as fully or over appropriated, the NRD can choose to grant a variance for a new water well as long as the new use is offset.

Therefore, although water wells that were originally registered as replacement wells cannot now be registered as replacement wells because the original well was not decommissioned within one year from construction of the new water well, as outlined above, there are several options available to a natural resources district. These will vary depending upon the natural resources district's rules, practices, and board decisions.

The Department has listed procedures below, for the registration of wells that will generally apply to those natural resource districts that are similarly situated.

Non-Management Areas

For those water wells that were registered as a replacement water well but did not meet the statutory requirements for registration as a replacement water well, if the well is located within an area not included within a ground water management area, the Department shall notify the water well owner that he or she must file a Water Well Registration Modification form as required by §46-602(7) to show that their well is a new water well, not a replacement well. Once such a form is received, the Department will assign a new registration number to the new well.

1. If no modification form is received, the Department shall notify the water well owner that the water well is an illegal water well and order him or her to decommission the water well.
2. Copies of all letters and orders shall be sent to the local natural resources district.
3. The District, of course, has the ability to issue any orders concerning the illegal well that are consistent with the District's rules and regulations.

Ground Water Management Areas Not Subject to Moratoriums or Stays

1. The Department will notify the water well owner that the new well cannot be registered as a replacement water well and request that the owner submit a Water Well Registration Modification form.
2. The form must be accompanied by a permit from the local natural resources district for a new water well (unless the well was constructed prior to the formation of the ground water management area).
3. Whether the District grants the permit will be up to each District.
4. The District can choose to modify the original permit for such well (if one exists) to show that it is a new well for purposes of water well registration, or the District can issue a new construction permit.
5. At the District's discretion, it may choose to say that for purposes of the District, the well will be a replacement well.
6. Each District must determine whether its rules, policies and board allow for such a designation.
7. If this designation is made on the permit, the Department will capture such designation in the Department's database.

8. Once the Water Well Registration Modification form is received, the Department will assign a new registration number to the new well.
9. If the District chooses not to allow for a new well or to change the original permit, or if the water well owner fails to file a Modification form, the Department shall notify the water well owner that their water well is an illegal water well and order him or her to decommission the water well.
10. Copies of all letters and orders shall be sent to the local natural resources district.
11. The District, of course, has the ability to issue any orders concerning the illegal well that are consistent with the District's rules and regulations.

Ground Water Management Areas Subject to Moratoriums or Stays

1. The Department will notify the water well owner that the new well cannot be registered as a replacement water well and request that the owner submit a Water Well Registration Modification form.
2. The form must be accompanied by a permit from the local natural resources district for a new water well (unless the well was constructed prior to the formation of the ground water management area).
3. Whether the District grants the permit will be up to each District.
4. If the water well is located in an area designated as fully or over appropriated, the District may have defined a replacement water well under the terms of Neb. Rev. Stat. § 46-714(3)(h) or § 46-739(6)(d).
5. The District may need to grant a variance to the stay under the terms of Neb. Rev. Stat. § 46-714(3)(j).
6. In such instances where variances are granted, the District must have a plan for the offsets required, if applicable.
7. The District can choose to modify the original permit for such well (if one exists) to show that it is a new well for purposes of water well registration, or the District can issue a new construction permit.
8. The well may be a replacement well, pursuant to the provisions of District rules and regulations.
9. Each District must determine whether its rules, policies and board allow for such a designation.

10. If this designation is made on the permit, the Department will capture such designation in the Department's database.

If a water well cannot come into compliance with the registration statutes, the Department will notify the water well owner that he or she must decommission the water well in compliance with Neb. Rev. Stat. § 46-602(8) (or, if the District has declined to issue a permit, it may issue a cease and desist order or an order to decommission in accordance with District rules). If compliance is not forthcoming, such matter will be referred to the Attorney General pursuant to Neb. Rev. Stat. § 46-613.02 (Reissue 2004).

Once again, we hope this letter helps to clarify some of the outstanding questions and concerns regarding the applicability of Neb. Rev. Stat. § 46-602 and the Department's procedures in registering water wells. Department staff met with a committee appointed by the Manager's Group President, Butch Koehlmoos to determine whether there were comments or questions concerning this letter. The committee comments are reflected in this letter. Please let me know if you have any further questions regarding the above.