

STATE OF COLORADO

OFFICE OF THE STATE ENGINEER

Division of Water Resources
Department of Natural Resources

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POLICY 2002-2

IMPLEMENTATION OF HB 02-1414 (SECTION 37-92-308, C.R.S. (2002)) REGARDING SUBSTITUTE WATER SUPPLY PLANS

The following general statement of policy is adopted to explain the State Engineer's implementation of HB 02-1414 regarding substitute water supply plans.

Considerations and Background for Policy

Subsequent to the Supreme Court ruling in Empire Lodge Homeowners v. Moyer, the 2002 General Assembly granted additional authority to the State Engineer that allows limited approval of substitute water supply plans involving out-of-priority diversions. According to section 37-92-308(1)(a), C.R.S. (2002), "There are certain circumstances under which the time required to go through the water court adjudication process can be problematic for some water users. Prior to January 1, 2002, substitute water supply plans had come into common usage for a number of water users, and based on this precedent, it appears desirable to establish additional authority for the State Engineer to approve substitute water supply plans." Substitute water supply plans provide water users a mechanism to replace out-of-priority depletions on an interim basis. This allows temporary changes of use and in the case of permanent changes, the protection of other water rights during litigation involving water change cases and augmentation plans. Approved substitute water supply plans include stringent terms and conditions to ensure that operation of the plans will not injure other water rights.

Policy

- 1) Implementation of this policy hereby revokes Policy 2001-3.
- 2) Requests for substitute water supply plans for providing domestic water within new or proposed residential subdivisions will not be granted because of the potential of the substitute water supply plan not being renewed and a permanent plan for augmentation not being approved by the water court. Under these circumstances, persons purchasing lots and constructing homes could potentially be faced with mandatory curtailment of their water source.

- 3) Requests for substitute water supply plans involving not-nontributary ground water will not be granted because statutes specifically require a judicially approved plan for augmentation prior to the pumping of not-nontributary wells. See section 37-90-137(9)(c)(I), C.R.S. (2002).
- 4) Replacement plans submitted pursuant to the respective rules and regulations for qualifying users of ground water, as determined by the respective division engineers in water divisions 1 and 2, are outside the scope of section 37-92-308, C.R.S. (2002) and will be approved consistent with the terms of those rules.
- 5) The Proof of Notice required by section 37-92-308(4)(a)(II), C.R.S. (2002) shall be a copy of a certificate of mailing or equivalent by first-class mail from the applicant.
- 6) The notification required by sections 37-92-308(5)(a)(II) and 37-92-308(6), C.R.S. (2002) shall include a statement that a response to the notice is required to be considered a "party to the application" for purposes of section 37-92-308(5)(c), C.R.S. (2002). This response indicating party status must be sent to the State Engineer or his designated agent by first-class mail or by electronic mail. The applicant should state in the notice that a response to the State Engineer must be received within 30 days of notice.
- 7) Action after the 30-day comment period may occur on a request for approval of a substitute water supply plan if all comments have been received from the opposers or noticed parties as allowed under sections 37-92-308(4)(a)(III) and 5(a)(III), C.R.S. (2002).
- 8) Section 37-92-308 (6), C.R.S. (2002) directs the State Engineer to establish a notification list for each water division to notify interested parties of requests for approval of substitute water supply plans. To receive this information by first-class mail or electronic mail, submit your name, mailing address (or e-mail address), daytime telephone number and water division(s) to:

Substitute Water Supply Notification List
 Colorado Division of Water Resources
 1313 Sherman Street, Room 818
 Denver, Colorado 80203

Or e-mail to dwr-sspnotice@state.co.us.

There is a \$12 fee for this information per calendar year, per water division. The fee may be paid by Visa, MasterCard, check or money order payable to the Colorado Division of Water Resources. If paying by credit card, please include the credit card number and expiration date.

As a subscriber, you will be notified of all pending applications if still within the 30-day comment period. Any comments on the request for approval of a substitute water supply plan must be submitted within the 30-day comment period, which is based on the initial date of notification by the applicant. No comments will be considered unless you are on the official notification list.

- 9) Only one emergency request pursuant to section 37-92-308(7), C.R.S. (2002) will be allowed per applicant in any 12-month period unless the State Engineer specifically allows a subsequent request. The applicant must then apply for approval under section 37-92-308(5) or (4), C.R.S. (2002), which must be submitted within 60 days of emergency approval. If approved by the State Engineer, the applicant may add other sources of water under its emergency approval. Emergency requests are limited to situations affecting the public health and safety and are not intended to be used for situations including, but not limited to, crop relief, stock watering, piscatorial or recreational purposes.
- 10) Applicant must request approval of a substitute water supply plan under section 37-92-308(4), C.R.S. (2002) if stream depletions are projected to occur more than five years after diversions begin.
- 11) Fees will be required for substitute water supply plans submitted pursuant to section 37-92-308, C.R.S. (2002) starting July 1, 2002.
- 12) No water use will be allowed under a proposed substitute water supply plan until approved by the State Engineer.
- 13) The conversion of a substitute water supply plan applied for under section 37-92-308(5), C.R.S. (2002) to a substitute water supply plan applied for under section 37-92-308(4), C.R.S. (2002) shall not occur without prior approval from the State Engineer.
- 14) The time periods allowed for approvals and renewals of requests submitted under section 37-92-308(4), C.R.S. (2002) shall not be dependent upon the time the water court application has been pending with the water court prior to the request.
- 15) Emergency requests for substitute water supply plans under section 37-92-308(7), C.R.S. (2002) shall have the highest priority for evaluation. Every attempt will be made to process emergency requests as soon as possible. Requests submitted under sections 37-92-308(4) and (5), C.R.S. (2002) shall be evaluated chronologically based on the date of submittal unless directed otherwise by the State Engineer.
- 16) Water from wells decreed in Larimer County District Court Civil Action 11217 shall not be used as a source of replacement supply or substituted water supply in a substitute water supply plan.
- 17) The State Engineer's Office does not have the authority or resources to provide consulting engineering services. Thus, a substitute water supply plan request must be complete upon submittal to the State Engineer. Often, consultation with a professional engineer may be necessary to address the technical and engineering issues involved and to assure that a complete request is prepared. The following items must be addressed when submitting a request for approval of a substitute water supply plan.
 - a) Provide a statement regarding the justification and need. Please cite the subsection of section 37-92-308, C.R.S. (2002) under which the request is being made.

- b) Show Proof of Notice as required in section 37-92-308(4)(a)(II), C.R.S., (2002), by providing a copy of a certificate of mailing or equivalent by first-class mail from the applicant.
- c) Provide an affidavit of ownership or a consent agreement to utilize an existing water right. If leased water is being used, a copy of the agreement between the applicant and the lessor must be submitted.
- d) Provide an engineering report for the substitute water supply plan. The report should include, but is not limited to, all pertinent information regarding the replacement water and its water quality, historical and proposed consumptive uses, return flows, diversion records, aerial photographs to document historical use, well permit numbers, location maps, transit losses and the time, location and amount of stream depletions.
- e) Submit a proposed monthly accounting form for the substitute water supply plan that includes all diversions, stream depletions, and replacement water deliveries. The accounting must be provided to the Water Commissioner and Division Engineer on forms and a reporting schedule that is acceptable to them. The accounting form should contain all information necessary for the administration of the plan. The name, mailing address, and phone number of the contact person who is responsible for operation and accounting of this plan must be provided on the accounting form.
- f) All water diverted or used for augmentation in the proposed substitute water supply plan shall be adequately measured to the satisfaction of the Division Engineer or a designee.
- g) The approval of a substitute water supply plan may require the issuance of a well permit, if applicable. The well permit application process, timelines and fees are not waived under this policy. Consent of adjacent well owners or a hearing may be required prior to issuance of a well permit if another well is located within 600 feet. See section 37-90-137(2)(b)(I), C.R.S. (2002).
- h) An approved substitute water supply plan may be revoked or modified at any time should it be determined that injury to other water rights has or will occur as a result of the approved plan, or if the applicant has violated any term and condition contained in this or any prior plan.

This policy becomes effective immediately and can only be modified or revoked in writing by the State Engineer.

Hal D. Simpson
State Engineer

July 2, 2002
Date