

ORIGINAL

BEFORE THE DEPARTMENT OF NATURAL RESOURCES
STATE OF NEBRASKA

IN THE MATTER OF)
THE RULEMAKING HEARING)
REGARDING TITLE 457, NEBRASKA)
ADMINISTRATIVE CODE, CHAPTER 24)

TRANSCRIPT

VOLUME I of I
(Pages 1 through 27)
EXHIBITS 1-17

Fairfield Inn and Suites
510 Talmadge Road
Kearney, NE

Convened, pursuant to notice, at 1:02 p.m., on
September 17, 2013,

BEFORE:

LEROY SIEVERS, Hearing Officer.

State of Nebraska
Department of
Natural Resources
Filed in the Department of
Natural Resources at 3:01
O'clock P M. this 24th
day of SEPTEMBER 20 13
L. Lower

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1 Copy of Current Rule, Title 457 NAC (3 pages)	6	6	7	Appendix
2 Copy of Proposed Rule, Title 457 NAC (8 pages)	6	7	7	Appendix
3 Notice of Hearing and Proof of Publication in <i>The Omaha World- Herald; Lincoln Journal Star; Kearney Hub; Grand Island Independent; Norfolk Daily News; Scottsbluff Star-Herald; York News-Times; Valentine Midland News</i> (16 pages)	6	7	7	Appendix
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1					
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3	5	6	7	8	Appendix
4	Department's Email dated 8-15-13 to Nebraska Secretary of State (15 pages)				
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6	Department's Email dated 8-15-13 to Senator John Wightman (21 pages)				
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8	Written Comments from Steve Smith on behalf of North Platte Natural Resources District; the North Platte Valley Water Association; and the North Platte Valley Irrigators Protective Association (5 pages)				
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19	11	12	12	12	Appendix
20	Written Comments from Ronald Cacek, North Platte Natural Resources District (3 pages)				
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23	Written Comments from Steven Huggenberger, City of Lincoln (5 pages)				
24	13	19	19	19	Appendix
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EXHIBITS:

Marked Offered Ruled On Found

14 Written Comments from 23 23 23 Appendix
Duane Hovorka, Nebraska
Wildlife Federation
(11 pages)

15 Additional Written 23 23 23 Appendix
Comments from Duane
Hovorka, Nebraska
Wildlife Federation
(11 pages)

16 Written Comments from 27 27 27 Appendix
Stan Staab, Lower
Elkhorn Natural
Resources District
(2 page)

17 Online Comments from 27 27 27 Appendix
Mike Delka, Nebraska
Bostwick Irrigation
District (1 page)

Reporter's Certificate 5

1 PROCEEDINGS:

2 (Exhibits 1 through 10 were marked for
3 identification.)

4 THE HEARING OFFICER: Good afternoon. It's about
5 1:02 p.m. on September 17th, 2013. My name is LeRoy
6 Sievers. I'm legal counsel for the Department of Natural
7 Resources and I am the hearing officer for this hearing.
8 This hearing is concerning the Revision of Department Rules
9 Title 457, Chapter 24, entitled "Determination of Fully
10 Appropriated Basins, Subbasins or Reaches." This hearing is
11 held under provisions of the State of Nebraska's
12 Administrative Procedures Act, Nebraska Revised Statutes
13 §§84-901 to 920. With me is Wendy Cutting from General
14 Reporting Service who will be making a verbatim record of
15 this hearing.

16 This is a public hearing. It is not an
17 evidentiary hearing. Those providing oral statements will
18 not be required to be sworn in. You'll be asked to sign the
19 appearance sheet located on the desk by the microphone.
20 Information may be either presented orally or in writing or
21 both. Written information will be marked as an exhibit and
22 made a part of the hearing record.

23 Initially, I am submitting into the record a copy
24 of the current rule, Title 457, Chapter 24, entitled
25 "Determination of Fully Appropriated Basins, Subbasins or

1 Reaches." This is marked as Exhibit 1.

2 Next, I am submitting into the record a copy of
3 the proposed rule Title 457, Chapter 24, entitled "Fully
4 Appropriated Basins, Subbasins or Reaches." This is marked
5 as Exhibit 2.

6 I'm also submitting into the record the original
7 notice of hearing signed by the Director attached to which
8 is a proof of publication pursuant to Nebraska Revised
9 Statute, §84-907, stating that publication of the Department
10 of Natural Resources Public Hearing Notice on this rule
11 occurred on August 16th, 2013, in the *Omaha World-Herald*;
12 the *Lincoln Journal Star*; the *Kearney Hub*; the *Grand Island*
13 *Independent*; the *Norfolk Daily News*; the *Scottsbluff*
14 *Star-Herald*; the *York News-Times*; and then on August 21st,
15 2013, in the *Valentine Midland News*. These are all marked
16 as Exhibit 3.

17 Further, I've been directed to offer what is
18 entitled "Proposed Regulation Policy Pre-Review Checklist
19 for Title 457, Chapter 24, to the Governor's Policy Research
20 Office," and the approval dated on July 22nd, 2013. These
21 are marked as Exhibit 4.

22 I also offer into the record a copy of the
23 Department's email of August 15th, 2013, addressed to the
24 Nebraska Secretary of State's Office, which was forwarded
25 along with a working copy of the proposed rules and the

1 hearing notice. A hard copy of the submission was
2 hand-delivered to the Secretary of State's Office on August
3 15, 2013. This submission is marked Exhibit 5.

4 I also offer a copy of the Department's email of
5 August 15th, 2013, addressed to Senator John Wightman, Chair
6 of the Executive Board of the Legislative Council of the
7 State Legislature, which was forwarded as required by
8 §84-907.06. Attached to the email was the a copy of the
9 hearing notice, a copy of the draft rule, and identified
10 material provided to the Governor's Policy Research Office.
11 This submission is marked as Exhibit 6.

12 The Department received written comments from
13 Steve Smith, an attorney, which were submitted on behalf of
14 the North Platte Natural Resources District, the North
15 Platte Valley Water Association, and the North Platte Valley
16 Irrigators Protective Association. This is marked as
17 Exhibit 7 and is introduced into the record.

18 The Department received written comments from the
19 Central Nebraska Public Power and Irrigation District. This
20 is marked as Exhibit 8 and is introduced into the record.

21 The Department received written comments from the
22 Metropolitan Utilities District. This is marked as Exhibit
23 9 and is introduced into the record.

24 The Department also received written comments from
25 the Nebraska Farm Bureau Federation. This is marked as

1 Exhibit 10 and is introduced into the record.

2 At this time, I would invite persons in attendance
3 who wish to provide an oral or written statement to come
4 forward so that such statements can be made a part of the
5 record. Please come forward, sign your name, and when
6 you -- if you're going to provide oral testimony, I would
7 ask that you also spell your name for the court reporter's
8 sake, because if your handwriting's anything like mine,
9 neither one of us will be able to read it.

10 RON CACEK

11 My name is Ron Cacek, R-o-n, C-a-c-e-k, and I am
12 the General Manager of the North Platte Natural Resources
13 District. I would like to provide the following comments on
14 behalf of the North Platte NRD for consideration as part of
15 the records for the September 17th, 2013, hearing related to
16 the proposed changes to the Nebraska Department of Natural
17 Resources final draft rules, Title 457, Chapter 24,
18 Determination of Fully Appropriated Basins, Subbasins and
19 Reaches.

20 It is our understanding that the methodology
21 described in the rules will be used in the determination of
22 the difference between fully and over-appropriated in the
23 over-appropriated portion of the Platte River Basin. We are
24 concerned about the applicability of this rule in the FA/OA
25 determination given the simplified approach of the proposed

1 methodology versus the complexity of the OA Platte Basin.
2 The proposed rule should have addressed this issue. It is
3 our expectation that the Department will work with the five
4 OA Platte Basin NRDs to amend the proposed rules prior to
5 their use in the FA/OA determination to account for the
6 complexity of the OA Platte Basin.

7 A comprehensive and detailed definition section is
8 missing from the draft rules. Because of this, terms such
9 as "developed" and "demands" are left undefined leading to a
10 multitude of interpretations. This situation can
11 potentially result in disagreements between competing
12 interests, significant changes in implementation methods by
13 future administrations, differing opinions among
14 policymakers, and potential unintended consequences.

15 A cornerstone of the proposed rule seems to be the
16 determination of downstream surface water and groundwater
17 demands, which would then be assigned to upstream portion of
18 the basin. The assignment of downstream demands to upstream
19 users has major policy, economic, and legal implications for
20 upstream users. If in the unlikely event upstream users are
21 charged with mitigation of the assessed downstream demands,
22 the economic and social impact to upstream users would be
23 untenable.

24 It is our very strong opinion that groundwater
25 depletions should only be accounted for as a demand where

1 the depletions occur within the river system, and which at
2 that point may be considered as a supply for downstream
3 users. These downstream groundwater demands should not be
4 placed as a demand on upstream users. Since the statute
5 gives an NRD the authority to manage groundwater only within
6 its boundaries, the premise of shifting downstream
7 groundwater depletions upstream would appear to give the
8 upstream NRD an interest in downstream NRD management of
9 groundwater. This would place an undue burden on upstream
10 NRD and its constituents due to items such as increased
11 costs for review and analysis of downstream management
12 activities and potentially require the mitigation of those
13 downstream depletions by upstream users.

14 The surface water priority and surface water and
15 groundwater preference system has been the standard in
16 Nebraska for generations, and this rule does not address the
17 priority and the preference system. If equal consideration
18 will be given to determining downstream demands for
19 appropriations of differing priorities and/or preference,
20 the upstream users will have to review and analyze
21 downstream surface water activities for local impacts. Such
22 impacts may require further regulation by upstream NRDs
23 necessitating the collection of significant tax dollars from
24 local residents in addition to the sacrifice required of
25 local water users.

1 I want to thank you for your consideration of our
2 oral testimony. And I have some additional written
3 testimony that we would like entered into the record and to
4 be addressed. And we ask that the Department not adopt the
5 proposed rules until such time as the issues raised by the
6 North Platte NRD are addressed. Thank you very much.

7 THE HEARING OFFICER: Thank you, Mr. Cacek. Your
8 written document has been marked as Exhibit 11 and will be
9 introduced into the record.

10 (Exhibit 11 was marked for identification and
11 received in evidence. See Index.)

12 MR. CACEK: Thank you.

13 JOEL CHRISTENSEN

14 My name is Joel Christensen, J-o-e-l,
15 C-h-r-i-s-t-e-n-s-e-n. I'm the Vice-president of Water
16 Operations for the Metropolitan Utilities District of Omaha.
17 We previously submitted a letter, which was Exhibit 9, I
18 believe.

19 The Metropolitan Utilities District has submitted
20 a comment letter, dated September 12, 2013, and signed by
21 Scott Keep, Senior Vice-president of Operations. I would
22 like to briefly summarize our comments. First of all, it is
23 imperative for the health and well-being of hundreds of
24 thousands of people that the appropriated flows in the Lower
25 Platte River are protected. We are not convinced that the

1 draft rule and methodology provide that protection. We are
2 uncertain about the logic regarding selected time periods.
3 We are concerned about inordinate delays resulting in the
4 erosion of water rights and eventual over-appropriation and
5 about excess flows that are counted as available that are,
6 in fact, unavailable.

7 The District firmly believes that to maintain the
8 integrity of this system, it requires a program which will
9 do all it can to ensure the maintenance of water flow in the
10 Lower Platte River. Nebraska Revised Statute 46-713 seeks
11 to protect existing users from encroachment of these rights
12 and appropriations from future uses. Both the final draft
13 versions of 457 NAC 24, along with the draft methodologies,
14 appears to give too much priority to future uses by delaying
15 determination of fully appropriated status. It appears that
16 457 NAC 24, along with the draft methodologies, simply
17 assume that the integrated management plans' controls
18 enacted by numerous NRDs will be coordinated and effective
19 and appears to allow for the Department to change the
20 determination without a full reevaluation.

21 In the case where full appropriation is, in fact,
22 needed to protect existing uses, final draft 457 will cause
23 inordinate delays and inaction. The result could easily be
24 critical shortages and an eventual determination of
25 over-appropriation.

1 The District appreciates the opportunity to
2 comment on this final draft rule proposal. We are available
3 to discuss this matter at any time. Thank you.

4 THE HEARING OFFICER: Thank you.

5 JERRY OBRIST

6 My name is Jerry Obrist and I'm the Water
7 Operations Manager for the City of Lincoln, Nebraska. And
8 the City of Lincoln provides the following comments to
9 proposed rules for determining full appropriation basins.

10 THE HEARING OFFICER: Excuse me, could you spell
11 your name for the record, please?

12 MR. OBRIST: Sure, O-b-r-i-s-t. Sorry. And it's
13 Jerry with a J.

14 I'm just going to hit a couple high points in the
15 written testimony is all. The methodology appears to
16 directly state that even though the statute requires a
17 consideration of reasonably foreseeable future impacts, the
18 Department will not use this information. The City would
19 argue that current uses language in NRS 46-713(a) includes
20 the future component of a granted appropriation. Any
21 non-recognition of the full amount of the City's
22 appropriation causes the City of Lincoln concern because
23 the permitted amount of stream flow in our induced recharge
24 permit is partially based on future demand component. We
25 are left wondering what good is our permit if it is not

1 considered in its entirety.

2 In light of the statutory requirements in
3 NRS 46-235 required prior to the granting of an induced
4 recharge right, the lack of recognition of the full amounts
5 of stream flow seems to be bad policy at best. Before
6 granting an induced recharge right, the Director is
7 required to find the appropriation is required to maintain
8 the wells for the uses requested; the rate and timing is
9 necessary to maintain the wells for the uses requested,
10 which include a future component; the application is in the
11 public interest; the wells were located and constructed to
12 take reasonable advantage of the aquifer conditions. If
13 the State in conducting a determination of a fully
14 appropriated basin were to fail to recognize a public water
15 supplier's full water right amount under an induced
16 groundwater recharge permit, it seems confused and
17 inconsistent policy.

18 And lastly, appreciate the opportunity to provide
19 comments on behalf of the City of Lincoln and would welcome
20 any further clarification discussions. Thank you.

21 THE HEARING OFFICER: Thank you, Mr. Obrist. The
22 written comments are marked as Exhibit 12 and will be
23 admitted into the hearing record.

24 (Exhibit 12 was marked for identification and
25 received in evidence. See Index.)

BRIAN BARELS

1
2 Good afternoon. I have provided a copy of written
3 comments addressed to Director Dunnigan regarding NPPD's
4 comments on the proposed rules for Administrative Title 457,
5 Chapter 24. My name is Brian Barels, B-r-i-a-n, and the
6 last name is Barels, B-a-r-e-l-s.

7 NPPD opposes the changes to the Department of
8 Natural Resources rules, Administrative Code, Title 457,
9 Chapter 24, "Determination of Fully Appropriated Basins,
10 Subbasins or Reaches." This is because the proposed rules
11 are unclear and appear to be flawed and hydrologically
12 inaccurate.

13 NPPD holds nearly 100 surface water appropriations
14 for irrigation, power production, water storage, and storage
15 use across the state of Nebraska, as well as nearly 200
16 permits for the use of groundwater for power production,
17 industrial uses, groundwater recharge, and irrigation, and
18 other miscellaneous activities.

19 One of the main concerns within the rules is that
20 there is a definite lack of definitions for the terms found
21 in the rules, which can make it impossible to understand how
22 the rules will be applied. The proposed rules utilize a
23 variety of terms that can be interpreted in different ways
24 or may be implemented or calculated in a variety of ways.
25 For example, the proposed rules indicate a summation of

1 consumptive uses. It is not known what is included in this
2 category or how it will be determined. And also, if the
3 determining actions by the Department will be complete. It
4 is also not known what the Department intends without
5 definitions of terms utilized by the rule.

6 Additionally, the methodology for completing the
7 analysis needs to be codified in the rules. The rules
8 themselves lack detail necessary to understand how they will
9 be applied or how the lack of the necessary data will be
10 provided for.

11 The proposed rules do not accomplish the purpose
12 of Nebraska Revised Statute 46-713(3) which provides for the
13 evaluation of whether existing uses would cause individual
14 uses or aquifers to be unsustainable or Nebraska to be in
15 noncompliance.

16 The statute is clear. Impact to supplies must be
17 evaluated and then the supply impact must be applied to the
18 existing appropriations. It appears the Department is
19 exceeding its statutory authority by altering the purpose of
20 46-713.

21 The concept of the proposed rule's supply and
22 demand calculations are incomplete and flawed when compared
23 to the water budget supply and demand equations found in any
24 basic hydrology textbook. The proposed rules are
25 hydrologically flawed because they require the summing of

1 multiple years to determine the supply. The quantity of
2 water flowing in a river in the first year or first few
3 years of an analysis period can meet the demands of the last
4 year of the analysis period only when there is an unlimited
5 water storage capability available in the basin. We've
6 provided an exhibit which shows the last 20 years flows in
7 the Platte River at Grand Island. Also, water flowing at
8 the end of the analysis period cannot meet the demands which
9 occurred during the earlier years in the analysis period.
10 The proposed rules as written finds that water flowing out
11 of the basin at any time during the period can meet the
12 demands which occur at any time during the period, which is
13 a physical impossibility.

14 The same flaw occurs when supplies are cumulated
15 within the sub-periods within the proposed rules. Exhibit B
16 attached to the letter shows that the 2013 Platte River
17 flows at Grand Island, over half, in fact, 58 percent of the
18 total flow between June 1st and August 31st occurred in June
19 and was gone and useless to meet the irrigation demands in
20 July and August.

21 Additionally, we believe there are three areas
22 within the proposed rules that appear to allow the
23 Department to exceed its statutory authority. Rules 01.002B
24 and 01.002C would allow the Department to find a subbasin or
25 reach not fully appropriated when the rest of the rules

1 would indicate that it is a fully appropriated basin. The
2 existing rules look at conditions in the future based on
3 recent trends to evaluate whether conditions of fully
4 appropriated are eminent. The proposed rules do not meet
5 the intent of looking into the future as existing rules do
6 and as is intended by the statutes.

7 Proposed rule section 001.01E seems to give the
8 Department the ability to create methodology on the fly for
9 any other use and the ability to change that methodology at
10 any time. This also exceeds the statutory authority of the
11 Department. All criteria and methodology the Department
12 intends to implement must be included in the rules.

13 Based on the above, I urge Director Dunnigan to
14 reject the rules as proposed. I also urge the Department to
15 continue to meet with both groundwater and surface water
16 interests to develop new proposed rules that reflect the
17 purposes of the statutes and reflect the water supplies and
18 uses within the basin.

19 THE HEARING OFFICER: Thank you, Mr. Barels. Your
20 written statement has been marked as Exhibit 13 and will be
21 made a part of the record.

22 (Exhibit 13 was marked for identification and
23 received in evidence. See Index.)

24 DUANE HOVORKA

25 Good afternoon. My name's Duane, D-u-a-n-e,

1 Hovorka, H-o-v-o-r-k-a. I'm here on behalf of the Nebraska
2 Wildlife Federation to comment on the proposed rules. We,
3 back in June, submitted a letter on the draft rules and I've
4 got a copy of that for reference. And in that letter, we
5 identified nine different critical flaws that we saw in the
6 draft rules at that time. In looking through the
7 revised -- the proposed rules, it appears that two or
8 perhaps three of those were addressed in the new rule, in
9 the new proposed rules. But the others were not, as far as
10 we can tell.

11 I also have some written comments on the proposed
12 rule and I'll give those to you and I'll just highlight a
13 couple of the areas where we see continued problems in the
14 proposed rule. One is with respect to the impacts on fish
15 and wildlife. We have situations where one State agency,
16 the Nebraska Game and Parks Commission has said pretty
17 clearly that continued development in a watershed would put
18 at jeopardy state-protected species. In that case, that
19 opinion should have a place in this determination. So, if
20 one State agency says we have a problem like that, that
21 should specifically be considered by the Department of
22 Natural Resources in determining whether that watershed
23 should continue to be developed or should be considered
24 fully appropriated. That's not included in the rule or the
25 methodology, and we think that's a serious flaw. Once the

1 determination would be made that it was, in fact, fully
2 appropriated, then my understanding is that decision would
3 be subject to review by the Game and Parks Commission under
4 current statute. But the failure to determine that it's
5 fully appropriated is, at least as the Department has
6 interpreted it, not open to review by the Game and Parks
7 Commission. And we think that, again, that's a serious
8 flaw. That opinion needs to be considered in making the
9 determination up front.

10 Second, it appears that the proposed rule and the
11 methodology would allow for the erosion of in-stream flow
12 rights both for fish and wildlife and for other uses. And
13 that would happen in a couple ways. One, that in our
14 opinion, the rules as proposed would allow development in a
15 basin to continue well beyond the point where the new uses,
16 new permits, new water rights were harming existing
17 beneficial uses. And that would allow any of those surface
18 water rights to be eroded because of the new uses upstream
19 taking water out of the river. But second, with respect
20 specifically to the in-stream fish and wildlife uses. We
21 think that the statute is pretty clear that the in-stream
22 flow water rights that are granted are based on the
23 beneficial and useful purposes of those rights at the time
24 of approval. And for the Department to allow -- essentially
25 to change the intent that we think is there and to allow the

1 erosion of those rights by allowing -- by essentially
2 charging the groundwater uses, the lag flow of groundwater
3 uses that were in place at the time the right is granted, to
4 charge those against the in-stream flow water rights when
5 we're figuring what the demand is, that at least is how we
6 read the proposed rules. And we think that is not the way
7 the statute was intended. So we think that's another flaw
8 where those in-stream flow water rights should be better
9 protected by the proposed rules.

10 And then the third area, and I guess a number of
11 other folks have already commented on some of the things
12 that are in our letters, so I won't repeat those, but we do
13 think that as the -- conceptually, as the rules are
14 proposed, the notion that you need to, in a watershed be
15 able to perfectly manage all the water in the river, with
16 the exception of the five percent exceedance, but
17 essentially to be able to store the water implies that you
18 would have a dam at the bottom of every watershed that would
19 be able to store all those storable flows. And if there's
20 nothing to store in such a dam, then you would finally have
21 a fully appropriated watershed. And if you could still
22 build a dam and catch some flows, then you're not yet fully
23 appropriated. And we think that goes beyond the intent of
24 the statute in 962, which was to prevent future conflicts
25 between ground and surface water users by finding that point

1 at which new uses are going to impact existing uses. And at
2 that point, we start the planning process. And we think
3 that the -- conceptually, the way the rules were constructed
4 to try to measure an overall long-term water balance between
5 demands and supplies doesn't meet that statutory
6 requirement, doesn't meet the purpose of the statute that we
7 look at the impacted new uses on uses that are already in
8 place.

9 So, we also would be glad to be available for
10 further discussions on changes to this rule or, in our view,
11 changes to the existing rule, which could allow it to meet
12 the Supreme Court -- Nebraska Supreme Court objections to
13 the rule would be a preferable way of proceeding. Thank
14 you.

15 THE HEARING OFFICER: Thank you, Mr. Hovorka.
16 You'd provided a copy of the original letter of June 6th.
17 That's been marked Exhibit 14. And your letter of September
18 16th has been marked as Exhibit 15 and both of those are
19 admitted into the hearing record.

20 (Exhibits 14 and 15 were marked for identification
21 and received in evidence. See Index.)

22 LYNDON VOGT

23 Good afternoon. My name is Lyndon Vogt, that
24 L-y-n-d-o-n, V-o-g-t. I'm the General Manager of the
25 Central Platte Natural Resources District in Grand Island,

1 Nebraska. I have a very short testimony. Central Platte
2 has participated along with DNR in studying approaches to
3 determining basin and subbasin fully and over-appropriated
4 conditions. The Central Platte believes the basin-wide
5 supply approach is appropriate and will provide for analysis
6 to determine not only if a basin or subbasin is fully
7 appropriated, but can help determine what can be done to
8 change over-appropriated areas back to fully appropriated
9 basins.

10 The Central Platte supports the proposed changes
11 in DNR rules to use the basin-wide supply approach as we
12 manage all water for a sustainable future. Thank you for
13 the opportunity to speak.

14 THE HEARING OFFICER: Thank you, Mr. Vogt.

15 MIKE DELKA

16 Good afternoon. My name is Mike Delka, M-i-k-e,
17 D-e-l-k-a, and I have submitted comments online, so I would
18 hope that they were received. If not, then I will try to
19 summarize.

20 The draft review for Chapter 24 has several issues
21 we believe as well. Some of them have already been
22 mentioned, such as the time frame. Also, there was a place
23 in 001.01B where they talked about high capacity wells, but
24 did not define them as they -- but they did later in 001.01C
25 as greater than 50 gallons per minute.

1 The intent of the legislation or these rules were,
2 I believe, to get equitable use among water users. The IMPs
3 mentioned, the integrated management plans, from our
4 experience where they seem to be more reactive than
5 proactive. We just came out of a year where the State, in
6 order to meet Compact compliance, created a Compact call,
7 which took water from surface water users and shut down
8 surface water use so that the wells could continue to pump.
9 The amount of administration was fairly minimal.

10 Another issue that we would have is that the
11 determination in 001.02B where it states -- it talks about
12 some of the natural resource districts. The criteria of a
13 natural resource district that has not taken more than three
14 years to complete an integrated management plan is not sound
15 science. That is a political -- and I do not know why the
16 rest of the surface users or other NRDs should be held
17 accountable for a time frame.

18 The 001.02C seems to be primarily talking about
19 the administration and regulation of new water uses where no
20 mention is given to existing water uses.

21 The 001.03 paragraph wants to -- basically, the
22 geographic area within the Department preliminary considers
23 surface water and groundwater to be hydrologically connected
24 for the purpose prescribed in §46-713(3) is the area with
25 which pumping a well for 50 years will deplete the river

1 base flow tributary by at least 10 percent. I think that
2 needs to be reviewed primarily because the development of
3 most basins is now more than 50 years old. If we want to be
4 proactive, I think we should go out to 100 or even further
5 depending on what the water models and things suggest. The
6 50 years, 50 years ago this year was 1963. And that is when
7 a lot of the major development started. If we don't get
8 ahead of it, then we will always be reactive rather than
9 proactive.

10 And I will stop with that. Thank you for the
11 opportunity to comment.

12 THE HEARING OFFICER: Mr. Delka, thank you. I did
13 not have a record of the online comments coming in. Do you
14 know how they were submitted?

15 MR. DELKA: There was a box for comments
16 underneath that and that's where it was submitted.

17 THE HEARING OFFICER: Okay, we'll have to double
18 check, because when I left the office this morning, it --

19 MR. DELKA: I noticed it wasn't said, so that's
20 why I thought I should mention it.

21 THE HEARING OFFICER: We'll look for that.
22 Assuming that that's there, then that will become a part of
23 the record. I apologize that that's not here now.

24 Anyone else wish to make -- submit oral or written
25 comments?

1 (No response.)

2 Well, not seeing anybody that wishes to make
3 comments, I will say that this hearing is concluded. I wish
4 to thank everybody who's participated in this hearing.
5 Appreciate the written comments as well as the oral comments
6 that were submitted today. Thank you very much for your
7 time and interest.

8 (Exhibits 16 and 17 were marked for identification
9 and received in evidence. See Index.)

10 (Whereupon, at 1:41 p.m. on September 17, 2013,
11 the proceedings were concluded.)

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NEBRASKA ADMINISTRATIVE CODE

Title 457 - DEPARTMENT OF NATURAL RESOURCES
RULES FOR SURFACE WATER

Chapter 24 - DETERMINATION OF FULLY APPROPRIATED BASINS, SUB-BASINS OR
REACHES

001 FULLY APPROPRIATED. Pursuant to Neb. Rev. Stat. § 46-713(3) (Reissue 2004, as amended), a river basin, subbasin, or reach shall be deemed fully appropriated if the Department of Natural Resources determines that then-current uses of hydrologically connected surface water and ground water in the river basin, subbasin, or reach cause or will in the reasonably foreseeable future cause (a) the surface water supply to be insufficient to sustain over the long term the beneficial or useful purposes for which existing natural flow or storage appropriations were granted and the beneficial or useful purposes for which, at the time of approval, any existing instream appropriation was granted, (b) the streamflow to be insufficient to sustain over the long term the beneficial uses from wells constructed in aquifers dependent on recharge from the river or stream involved, or (c) reduction in the flow of a river or stream sufficient to cause noncompliance by Nebraska with an interstate compact or decree, other formal state contract or agreement, or applicable state or federal laws.

001.01A Except as provided in 001.01C below, for purposes of Section 46-713(3)(a), the surface water supply for a river basin, subbasin, or reach shall be deemed insufficient, if, after considering the impact of the lag effect from existing groundwater pumping in the hydrologically connected area that will deplete the water supply within the next 25 years, it is projected that during the period of May 1 through September 30, inclusive, the most junior 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.

For purposes of this rule, the “annual crop irrigation requirement” will be determined by the annual irrigation requirement for corn. This requirement is based on the average evapotranspiration of corn that is fully watered to achieve the maximum yield and the average amount of precipitation that is effective in meeting the crop water requirements for the area.

The inability to divert will be based on stream flow data and diversion records, if such records are available for the most junior surface water appropriator. If these records are not available, the inability to divert will be based on the average number of days within each time period (May 1 to September 30 and July 1 to August 31) that the most junior surface water appropriation for irrigation would have been closed by the Department and therefore could not have diverted during the previous 20 year period. In making this



calculation, if sufficient stream flow data and diversion data are not available, it will be assumed that if the appropriator was not closed, the appropriator could have diverted at the full permitted diversion rate. In addition the historical record will be adjusted to include the impacts of all currently existing surface water appropriations and the projected future impacts from currently existing ground water wells. The projected future impacts from ground water wells to be included shall be the impacts from ground water wells located in the hydrologically connected area that will impact the water supply over the next 25 year period.

001.01B In the event that the junior water rights are not irrigation rights, the Department will utilize a standard of interference appropriate for the use, taking into account the purpose for which the appropriation was granted.

001.01C If, at the time of the priority date of the most junior appropriation, the surface water appropriation could not have diverted surface water a sufficient number of days on average for the previous 20 years to satisfy the requirements of 001.01A, the surface water supply for a river basin, subbasin, or reach in which that surface water appropriation is located shall be deemed insufficient only if the average number of days surface water could have been diverted over the previous 20 years is less than the average number of days surface water could have been diverted for the 20 years previous to the time of the priority date of the appropriation.

When making this comparison, the calculations will follow the same procedures as described in 001.01A. When calculating the number of days an appropriator could have diverted at the time of the priority date of the appropriation, the impacts of all appropriations existing on the priority date of the appropriation and the impacts of wells existing on the priority date of the appropriation shall be applied in the same manner as in 001.01A. As in 001.01A above, in making this calculation, if sufficient stream flow data and diversion data are not available, it will be assumed that if the appropriator was not closed, the appropriator could have diverted at the full permitted diversion rate.

Use of the method described in this rule is not intended to express or imply any mandate or requirement that the method used herein must be included in the goals and objectives of any integrated management plan adopted for a river basin, subbasin or reach determined to be fully appropriated under this rule. Further, nothing in this section is intended to express or imply a priority of use between surface water uses and ground water uses.

001.02 The geographic area within which the Department preliminarily considers surface water and ground water to be hydrologically connected for the purpose prescribed 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.

002 INFORMATION CONSIDERED. For making preliminary determinations required by Neb. Rev. Stat. Section 46-713 (Reissue 2004, as amended) the Department will use the best

scientific data and information readily available to the Department at the time of the determination. Information to be considered will include:

- Surface water administrative records
- Department Hydrographic Reports
- Department and United States Geological Survey stream gage records
- Department's registered well data base
- Water level records and maps from Natural Resources Districts, the Department, the University of Nebraska, the United States Geological Survey or other publications subject to peer review
- Technical hydrogeological reports from the University of Nebraska, the United States Geological Survey or other publications subject to peer review
- Ground water models
- Current rules and regulations of the Natural Resources Districts

The Department shall review this list periodically, and will propose amendments to this rule as necessary to incorporate scientific data and information that qualifies for inclusion in this rule, but was not available at the time this rule was adopted.

NEBRASKA ADMINISTRATIVE CODE

Title 457 - DEPARTMENT OF NATURAL RESOURCES
RULES FOR SURFACE WATER

Chapter 24 - DETERMINATION OF FULLY APPROPRIATED BASINS, SUB-BASINS OR
REACHES

~~001 FULLY APPROPRIATED. Pursuant to Neb. Rev. Stat. § 46-713(3) (Reissue 2004, as amended), a river basin, subbasin, or reach shall be deemed fully appropriated if the Department of Natural Resources determines that then-current uses of hydrologically connected surface water and ground water in the river basin, subbasin, or reach cause or will in the reasonably foreseeable future cause (a) the surface water supply to be insufficient to sustain over the long term the beneficial or useful purposes for which existing natural flow or storage appropriations were granted and the beneficial or useful purposes for which, at the time of approval, any existing instream appropriation was granted, (b) the streamflow to be insufficient to sustain over the long term the beneficial uses from wells constructed in aquifers dependent on recharge from the river or stream involved, or (c) reduction in the flow of a river or stream sufficient to cause noncompliance by Nebraska with an interstate compact or decree, other formal state contract or agreement, or applicable state or federal laws.~~

~~001.01A Except as provided in 001.01C below, for purposes of Section 46-713(3)(a), the surface water supply for a river basin, subbasin, or reach shall be deemed insufficient, if after considering the impact of the lag effect from existing groundwater pumping in the hydrologically connected area that will deplete the water supply within the next 25 years, it is projected that during the period of May 1 through September 30, inclusive, the most junior 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.~~

~~For purposes of this rule, the "annual crop irrigation requirement" will be determined by the annual irrigation requirement for corn. This requirement is based on the average evapotranspiration of corn that is fully watered to achieve the maximum yield and the average amount of precipitation that is effective in meeting the crop water requirements for the area.~~

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FINAL DRAFT RULES
Redline showing changes to the current rules

August 14, 2013

Title 457 - DEPARTMENT OF NATURAL RESOURCES
RULES FOR SURFACE WATER

Chapter 24 - DETERMINATION OF FULLY APPROPRIATED BASINS, SUB-BASINS OR
REACHES

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~~001.01B In the event that the junior water rights are not irrigation rights, the Department will utilize a standard of interference appropriate for the use, taking into account the purpose for which the appropriation was granted.~~

~~001.01C If, at the time of the priority date of the most junior appropriation, the surface water appropriation could not have diverted surface water a sufficient number of days on average for the previous 20 years to satisfy the requirements of 001.01A, the surface water supply for a river basin, subbasin, or reach in which that surface water appropriation is located shall be deemed insufficient only if the average number of days surface water could have been diverted over the previous 20 years is less than the average number of days surface water could have been diverted for the 20 years previous to the time of the priority date of the appropriation.~~

~~When making this comparison, the calculations will follow the same procedures as described in 001.01A. When calculating the number of days an appropriator could have diverted at the time of the priority date of the appropriation, the impacts of all appropriations existing on the priority date of the appropriation and the impacts of wells existing on the priority date of the appropriation shall be applied in the same manner as in 001.01A. As in 001.01A above, in making this calculation, if sufficient stream flow data and diversion data are not available, it will be assumed that if the appropriator was not closed, the appropriator could have diverted at the full permitted diversion rate.~~

FINAL DRAFT RULES
Redline showing changes to the current rules

August 14, 2013

Title 457 - DEPARTMENT OF NATURAL RESOURCES
RULES FOR SURFACE WATER

Chapter 24 - DETERMINATION OF FULLY APPROPRIATED BASINS, SUB-BASINS OR
REACHES

~~Use of the method described in this rule is not intended to express or imply any mandate or requirement that the method used herein must be included in the goals and objectives of any integrated management plan adopted for a river basin, subbasin or reach determined to be fully appropriated under this rule. Further, nothing in this section is intended to express or imply a priority of use between surface water uses and ground water uses.~~

~~001.02 The geographic area within which the Department preliminarily considers surface water and ground water to be hydrologically connected for the purpose prescribed 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 percent of the amount pumped in that time.~~

~~002 INFORMATION CONSIDERED. For making preliminary determinations required by Neb. Rev. Stat. Section 46-713 (Reissue 2004, as amended) the Department will use the best scientific data and information readily available to the Department at the time of the determination. Information to be considered will include:~~

~~Surface water administrative records
Department Hydrographic Report
Department and United States Geologic Survey stream gage records
Department's registered well data base
Water level records and maps from Natural Resources Districts, the Department, the University of Nebraska, the United States Geological Survey or other publications subject to peer review
Technical hydrogeological reports from the University of Nebraska, the United States Geological Survey or other publications subject to peer review
Ground water models
Current rules and regulations of the Natural Resources Districts~~

FINAL DRAFT RULES
Redline showing changes to the current rules

August 14, 2013

Title 457 - DEPARTMENT OF NATURAL RESOURCES
RULES FOR SURFACE WATER

Chapter 24 - DETERMINATION OF FULLY APPROPRIATED BASINS, SUB-BASINS OR
REACHES

~~The Department shall review this list periodically, and will propose amendments to this rule as necessary to incorporate scientific data and information that qualifies for inclusion in this rule, but was not available at the time this rule was adopted.~~

EFFECTIVE DATE: ~~December 4, 2006~~

DRAFT

NEBRASKA ADMINISTRATIVE CODE

Title 457 - DEPARTMENT OF NATURAL RESOURCES
RULES FOR SURFACE WATER

Chapter 24 - DETERMINATION OF FULLY APPROPRIATED BASINS, SUBBASINS OR
REACHES

001 FULLY APPROPRIATED. Pursuant to *Neb. Rev. Stat.* § 46-713(3) a river basin, subbasin, or reach shall be deemed fully appropriated if the Department of Natural Resources (Department) determines based upon its annual evaluation and information presented at hearings subsequent to a preliminary determination of fully appropriated that then-current uses of hydrologically connected surface water and groundwater in the river basin, subbasin, or reach cause or will in the reasonably foreseeable future cause (a) the surface water supply to be insufficient to sustain over the long term the beneficial or useful purposes for which existing natural flow or storage appropriations were granted and the beneficial or useful purposes for which, at the time of approval, any existing instream appropriation was granted, (b) the streamflow to be insufficient to sustain over the long term the beneficial uses from wells constructed in aquifers dependent on recharge from the river or stream involved, or (c) reduction in the flow of a river or stream sufficient to cause noncompliance by Nebraska with an interstate compact or decree, other formal state contract or agreement, or applicable state or federal laws.

001.01A For purposes of *Neb. Rev. Stat.* § 46-713(1)(b), the Department shall reach a preliminary conclusion that a river basin, subbasin, or reach is fully appropriated if based on the Department's annual evaluation, it is determined that the cumulative near-term Total Demand and/or the cumulative long-term Total Demand of hydrologically connected groundwater and surface water exceeds the cumulative basin water supplies (BWS) that occur in either of the two sub-periods within the year when summed over the representative period of record used in the annual evaluation. The two sub-periods within the year are June 1 through August 31, inclusive and September 1 through May 31, inclusive. The length of the representative period of record will be determined through statistical analyses of the annual BWS as the set of years, extending back in time from the most recently available data, which captures long-term wet and dry cycles that may exist.

001.01B For purposes of 001.01A, the BWS is the streamflow water supply estimated to be available without the initiation of groundwater pumping from high capacity wells and surface water uses of natural flow and storage. The BWS is calculated by combining the following for each sub-period: gaged streamflows truncated at the 5% exceedence flow probability value plus streamflow depletions due to high capacity (greater than 50 gallons per minute) well groundwater pumping plus consumptive surface water uses minus the BWS originating upstream of the basin, subbasin, or reach.

001.01C For purposes of 001.01A, the cumulative near-term Total Demand of groundwater and surface water is calculated by summing the water demands associated with the following activities for each sub-period within a basin, subbasin, or reach that have not previously been represented as a non-tributary downstream demand: (1) streamflow depletions due to high capacity (greater than 50 gallons per minute) well groundwater pumping; (2) consumptive water demands for surface water uses, inclusive of consumptive uses associated with storage appropriations and the use of such stored water; (3) any additional water (accounting for return flows) determined to be necessary to deliver streamflows to meet consumptive surface water demands; (4) streamflow available to meet instream flow appropriations (accounting for all development in place at such time the appropriation was granted); (5) any additional streamflow demands for hydropower operations not accounted for in the instream flow water demands; and (6) the BWS necessary to meet the proportionate amount of non-tributary demands downstream of a basin, subbasin, or reach. The non-tributary downstream demands of a basin, subbasin, or reach will be proportioned in accordance with that basin, subbasin, or reaches BWS relative to the total basin BWS. In calculating the cumulative near-term Total Demand no water uses developed subsequent to a fully appropriated designation or overappropriated designation shall be assigned to those fully appropriated or overappropriated basins as non-tributary downstream demands.

001.01D For purposes of 001.01A, the cumulative long-term Total Demand of groundwater and surface water is calculated by summing the water demands associated with the following activities for each sub-period within a basin, subbasin, or reach that have not previously been represented as a non-tributary downstream demand: (1) consumptive water demands for hydrologically connected high capacity (greater than 50 gallons per minute) groundwater well pumping; (2) consumptive water demands for surface water uses, inclusive of consumptive uses associated with storage appropriations and the use of such stored water; (3) any additional water (accounting for return flows) determined to be necessary to deliver streamflows to meet consumptive surface water demands; (4) streamflow available to meet instream flow appropriations (accounting for all development in place at such time the appropriation was granted); (5) any additional streamflow demands for hydropower operations not accounted for in the instream flow water demands; and (6) the BWS necessary to meet the proportionate amount of non-tributary demands downstream of a basin, subbasin, or reach. The non-tributary downstream demands of a basin, subbasin, or reach will be proportioned in accordance with that basin, subbasin, or reaches BWS relative to the total basin BWS. In calculating the cumulative long-term Total Demand no water uses developed subsequent to a fully appropriated designation or overappropriated designation shall be assigned to those fully appropriated or overappropriated basins as non-tributary downstream demands.

001.01E In the event that water demands are for a beneficial use other than irrigation, municipal, industrial, instream flow, or hydropower, (for example aquifers dependent on recharge from streamflow, induced recharge, flood control, aquaculture, etc.) the Department will evaluate such use and if necessary determine a methodology to incorporate such demand into any relevant analysis.

FINAL DRAFT RULES

August 14, 2013

Redline showing changes to the current rules

001.01F Use of the method described in this rule is not intended to express or imply any mandate or requirement that the method used herein must be included in the goals and objectives of any integrated management plan. Further, nothing in this section is intended to express or imply a priority of use between surface water uses and groundwater uses.

001.01G Pursuant to *Neb. Rev. Stat. §46-713(1)(d)* the Department shall rely on the best scientific data, information, and methodologies readily available to ensure that the conclusions and results contained in the annual evaluation are reliable. Prior to the release of the annual evaluation the Department shall provide sufficient documentation of the data, information, and methodologies used to reach its conclusions such that those conclusions could be independently replicated and assessed. The documentation will specify the specific data, information, and methodologies utilized in the annual evaluation to represent the BWS, near-term Total Demand, and long-term Total Demand.

001.02A For purposes of *Neb. Rev. Stat. § 46-713(3)*, the Department shall deem a basin, subbasin, or reach as fully appropriated if such preliminary determination is reached pursuant to 001.01A-G and if information provided at a subsequent hearing pursuant to subsection (4) of *Neb. Rev. Stat. § 46-714* does not indicate that the criteria set forth in 001.02B or 001.02C apply or unless the Director finds based on written or oral testimony and evidence concerning the appropriation status for the river basin, subbasin, or reach, that a final designation of fully appropriated is not warranted at that time.

001.02B For any basin, subbasin, or reach preliminarily determined to be fully appropriated pursuant to 001.01A-G in which integrated management plan(s) have been initiated by all Natural Resources Districts within the hydrologically connected area, the Natural Resources Districts within that same hydrologically connected area have designated a management area for which a purpose is the integrated management of hydrologically connected groundwater and surface water, and the Natural Resources Districts and Department have not taken more than three years to complete such integrated management plan(s) the Department may reach a final determination that such basin, subbasin, or reach is not fully appropriated at that time.

001.02C For any basin, subbasin, or reach preliminarily determined to be fully appropriated pursuant to 001.01A-G in which integrated management plan(s) have been completed by all Natural Resources Districts within the hydrologically connected area, the Department will review the contents of such integrated management plan(s) to ensure that appropriate limitations on new water uses are included in such integrated management plan (s), inclusive of controls on such new uses pursuant to *Neb. Rev. Stat. § 46-739(6)(b)*, and such integrated management plan(s) includes a plan to monitor water uses in a manner consistent with 001.01A-G. Upon the Department completing this review the Department may reach a final determination that such basin, subbasin, or reach is not fully appropriated at that time.

001.03 The geographic area within which the Department preliminarily considers surface water and groundwater to be hydrologically connected for the purpose prescribed in *Neb. Rev. Stat. §*

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 ten (10) percent of the amount pumped in that time.

002 INFORMATION CONSIDERED. For making preliminary determinations required by *Neb. Rev. Stat. § 46-713* the Department will use the best scientific data and information readily available to the Department at the time of the determination. Information to be considered will include:

1. Department records on the regulation of surface water appropriations;
2. Department databases and maps of surface water appropriations;
3. Department Hydrographic Reports;
4. Department and United States Geologic Survey stream gage records;
5. Department's registered well data base;
6. Technical hydrogeological reports and publications subject to Department peer review;
7. Department reviewed groundwater models and resulting model outputs;
8. Certified irrigated acres provided by the natural resources districts;
9. Water use information provided by other state agencies, natural resources districts, irrigation districts, reclamation districts, public power and irrigation districts, mutual irrigation companies, canal companies, municipalities, and other water users; and
10. Any other information deemed appropriate by the Department for the purpose of conducting the determination

EFFECTIVE DATE: DATE, 2013



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STATE OF NEBRASKA

DEPARTMENT OF NATURAL RESOURCES

NOTICE OF RULEMAKING HEARING

NOTICE IS HEREBY GIVEN THAT THE Nebraska Department of Natural Resources (Department) will hold a public rulemaking hearing pursuant to Neb. Rev. Stat. § 84-907. The hearing will be held at 1:00 p.m. (CDT) on Tuesday, September 17, 2013, at the Fairfield Inn & Suites, 510 Talmadge Rd., Kearney, Nebraska.

The purpose of the hearing is to take public comments about the proposed changes to Department rules Nebraska Administrative Code Title 457, Chapter 24, entitled "Determination of Fully Appropriated Basins, Subbasins or Reaches." The proposed change will make the rule more consistent with integrated management plans' goals and objectives and better align the technical analyses with the planning process.

The proposed rule is available at the offices of the Secretary of State, Regulations Division, Room 1305, State Capitol, Lincoln, Nebraska 68509-4696, or at the Department's website at www.dnr.ne.gov/rules/Proposed_dnrrules.htm. The description of the fiscal and other impacts may be inspected and obtained at the Department of Natural Resources, Nebraska State Office Building, 301 Centennial Mall South, 4th floor, PO Box 94676, Lincoln, Nebraska 68509-4676.

All interested persons are invited to attend and make oral or written comments at the hearing. Interested persons may also submit written comments to the Department of Natural Resources address above prior to the hearing which will be made part of the hearing record at the time of hearing. Comments must be received by the Department of Natural Resources on or before 5:00 p.m. (CDT) September 16, 2013. If auxiliary aids or reasonable accommodations are needed to participate in the hearing, please call the Department at 402-471-2363 by August 30, 2013.

Date: August 12, 2013
Brian P. Dunnigan, P.E., Director
Department of Natural Resources

Proof of publication

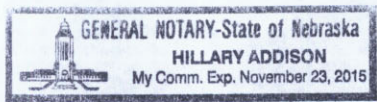
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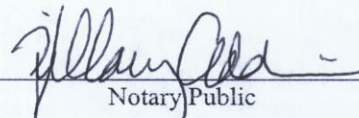
State of Nebraska, County of Douglas, ss:

Kiley Petersen, being duly sworn, deposes and says that she is an employee of The Omaha World-Herald, a legal daily newspaper printed and published in the county of Douglas and State of Nebraska, and of general circulation in the Counties of Douglas, and Sarpy and State of Nebraska, and that the attached printed notice was published in the said newspaper on the 16 day of August, 2013, and that said newspaper is a legal newspaper under the statutes of the State of Nebraska. The above facts are within my personal knowledge. The Omaha World-Herald has an average circulation of 136,645 Daily and 170,486 Sunday, in 2013.

(Signed)  Title: Account Executive

Subscribed in my presence and sworn to before me this 16 day of August, 2013.




Notary Public

Printer's Fee \$ _____
Affidavit _____
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NATURAL RESOURCES

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State of Nebraska }
LANCASTER COUNTY, } ss.

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STATE OF NEBRASKA
DEPARTMENT
OF NATURAL RESOURCES
NOTICE
OF RULEMAKING HEARING
NOTICE IS HEREBY GIVEN
THAT THE Nebraska Department
of Natural Resources
(Department) will hold a public
rulemaking hearing pursuant to
Neb. Rev. Stat. § 84-907. The hear-
ing will be held at 1:00 p.m.
(CDT) on Tuesday, September 17,
2013, at the Fairfield Inn & Sultes,
510 Talmadge Rd., Kearney, Ne-
braska.

The purpose of the hearing is to
take public comments about the
proposed changes to Department
rules Nebraska Administrative
Code Title 457, Chapter 24, enti-
tled "Determination of Fully Ap-
propriated Basins, Subbasins or
Reaches." The proposed change
will make the rule more consis-
tent with integrated management
plans' goals and objectives and
better align the technical analyses
with the planning process.

The proposed rule is available at
the offices of the Secretary of
State, Regulations Division, Room
1305, State Capitol, Lincoln, Ne-
braska 68509-4696, or at the Depart-
ment's website at [www.dnr.ne.gov/
rules/Proposed_dnrules.html](http://www.dnr.ne.gov/rules/Proposed_dnrules.html). The
description of the fiscal and other
impacts may be inspected and ob-
tained at the Department of Natu-
ral Resources, Nebraska State Of-
fice Building, 301 Centennial Mall
South, 4th floor, PO Box 94676, Lin-
coln, Nebraska 68509-4676.

All interested persons are invit-
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written comments at the hearing.
Interested persons may also sub-
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dress above prior to the hearing
which will be made part of the
hearing record at the time of hear-
ing. Comments must be received
by the Department of Natural Re-
sources on or before 5:00 p.m.
(CDT) September 16, 2013. If auxil-
iary aids or reasonable accommo-
dations are needed to participate
in the hearing, please call the De-
partment at 402-471-2363 by August
30, 2013.

Date: August 12, 2013
Brian P. Dunnigan, P.E., Director
Department of Natural Resources
#7430224 11 Aug 16

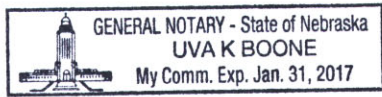
The undersigned, being first duly sworn, deposes and says that she/he is a Clerk of the Lincoln
Journal Star, legal newspaper printed, published and having a general circulation in the County of
Lancaster and State of Nebraska, and that the attached printed notice was published in said
newspaper one successive time(s) the first insertion having been on
August 16, 2013 and thereafter
on _____, 20____

and that said newspaper is the legal newspaper under the statutes of the State of Nebraska.

The above facts are within my personal knowledge and are further verified by my personal inspection
of each notice in each of said issues.

Barbara Chesnut

Subscribed in my presence and sworn to before me on August 16, 2013
U. Boone Notary Public



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DEPARTMENT OF
NATURAL RESOURCES

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**Public Notice
NOTICE OF RULEMAKING
HEARING**

NOTICE IS HEREBY GIVEN THAT THE Nebraska Department of Natural Resources (Department) will hold a public rulemaking hearing pursuant to Neb. Rev. Stat. § 84-907. The hearing will be held at 1:00 p.m. (CDT) on Tuesday, September 17, 2013, at the Fairfield Inn & Suites, 510 Talmadge Rd., Kearney, Nebraska.

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Date: August 12, 2013

Brian P. Dunnigan, P.E., Director
Department of Natural Resources
ZNEZ Ag16,t1

Lines 56 Times 1 Amount \$ 27.49

AFFIDAVIT OF PUBLICATION

The State of Nebraska }
The County of Buffalo } ss:

Lori Guthard, being first duly sworn, says that she is Advertising Manager of The KEARNEY HUB, a daily newspaper printed in whole and published in its entirety at its office maintained in Kearney, in said county and of general circulation therein and been published for more than 52 weeks in said county prior to the first publication of the annexed notice and has a bona fide circulation of more than 300 copies, and that the notice, a true copy of which is hereto annexed, was published in said paper as follows:

the first publication being on the 16 day of Aug. 2013,
and subsequent publication(s) on the

----- day of -----, 2013
----- day of -----, 2013
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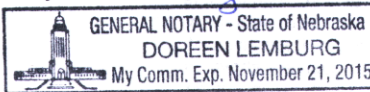
AUG 20 2013

DEPARTMENT OF
NATURAL RESOURCES

Lori Guthard

Subscribed in my presence and sworn to before me this

19 day of August, 2013



Doreen Lemburg
Notary Public

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Nebr. Dept. of Natural Resources
C/O: Heather L. Stream
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Lincoln, NE 68509

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DEPARTMENT OF
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GAABSM 68509



6

AFFIDAVIT OF PUBLICATION

THE STATE OF NEBRASKA
HALL COUNTY

Grand Island Independent

STATE NEBRASKA NTRL RESOURCES COMMISSI
P.O. BOX 94676

LINCOLN NE 685094676

REFERENCE: 10078626
20267186

Heather Stream

Terri Trejo being first duly sworn on his/her oath, deposes and says that he/she is the Legals Clerk of the Grand Island Independent, a newspaper printed and published at Grand Island, in Hall County, Nebraska, and of general circulation in Hall County, Nebraska, and as such has charge of the records and files of the Grand Island Independent, and affiant knows of his/her own personal knowledge that said newspaper has a bona fide circulation of more than 500 copies of each issue, has been published at Grand Island, Nebraska, for more than 52 weeks successively prior to the first publication of the annexed printed notice, and is a legal newspaper under the statutes of the State of Nebraska; that the annexed printed notice was published in said newspaper.

PUBLISHED ON:
08/16/13

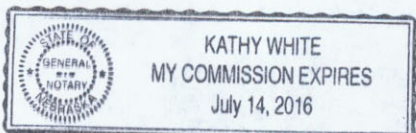
Terri Trejo

TOTAL COST: 42.03
AD SPACE:

Subscribed in my presence and sworn to before me this 16 th day of August, 2013.

My commission expires

7-14, 2016
Kathy White
Notary Public



1439045
#11760

STATE OF NEBRASKA

DEPARTMENT OF
NATURAL RESOURCES

NOTICE OF RULEMAKING
HEARING

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Date: August 12, 2013
/s/ Brian P. Dunnigan, P.E.,
Director
Department of
Natural Resources

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DEPARTMENT OF
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DEPARTMENT OF
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Norfolk Daily News

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1438752
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PROOF OF PUBLICATION

THE STATE OF NEBRASKA
Madison County

Debbie Warneke, being first duly sworn on oath says that she is the Business Manager of **The Huse Publishing Company**, a corporation, publishers of the **Norfolk Daily News**, a legal daily newspaper published at Norfolk, Madison County, Nebraska, and of general circulation in said county; that a notice entitled

Notice of Rulemaking Hearing – September 17, 2013; a

true copy of which, as printed in said paper, is hereto attached and made a part hereof, was published in the issue of said paper for **one time**, the publication being on **August 16, 2013**; that said newspaper was published daily in the City of Norfolk within said County for more than 52 consecutive weeks immediately prior to the commencement of the publication of said notice and every week consecutively since that time; and during all of said time said newspaper had a bona fide circulation of more than 300 copies daily and was printed wholly in the English language and in whole or in part in an office maintained by the publisher at said place of publication.

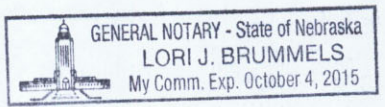
STATE OF NEBRASKA DEPARTMENT OF NATURAL RESOURCES
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Debbie Warneke

Subscribed and sworn to before me this 16 day of August, 2013

Lori J. Brummels
Notary Public

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State of Nebraska
Natural Resources Commission
Attn: Heather L Stream
PO Box 94676
Lincoln NE 68509

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DEPARTMENT OF
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Star Herald
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State of Nebraska
County of Scotts Bluff } ss.

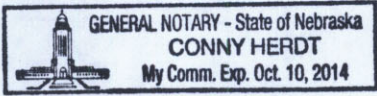
I, Shelby Mullins do solemnly swear that I am the Accounts Receivable Bookkeeper of the Star-Herald, a legal newspaper of general circulation, published daily except Mondays, at Scottsbluff, Scotts Bluff County, Nebraska; that the notice hereto attached and which forms a part of this affidavit was Published in said paper 1 (one) consecutive week (s) in the issues published, respectively August 16, 2013

that said notice was published in the regular and entire issues and every number of the paper on the days mentioned, the same being the corresponding day of each week during the period of time of publication and that said notice was published in the newspaper proper and not in the supplement.

Shelby Mullins

SUBSCRIBED in my presence and sworn to before me on Aug. 16, 2013

Conny Herdt
Notary Public



The publication fees amount to \$ 33.21

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DEPARTMENT OF
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Date: August 12, 2013

**Brian P. Dunnigan, P.E.,
Director
Department of Natural Resources**

Published in the Star-Herald
Scottsbluff, Nebraska
11. August 16, 2013

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Star-Herald

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THE STATE OF NEBRASKA
YORK COUNTY

York News-Times

DEPT. OF NATURAL RESOURCES
301 CENTENNIAL MALL 4TH S
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LINCOLN NE 685094676

REFERENCE: 20007550
20267136

STATE OF NEBRASKA DEPARTMENT OF NATURAL RESOURCES
NOTICE OF RULEMAKING HEARING NOTICE IS HEREBY GIVEN THAT
THE Nebraska Department of Natural Resources (Department) will hold a
public rulemaking hearing pursuant to Neb. Rev. Stat. § 84-907. The hearing
w

Kathy Larson being first duly sworn on his/her oath, deposes and says that
he/she is the Ad Manager of the York York News-Times, a newspaper
printed and published at York, in York County, Nebraska, and of general
circulation in York County, Nebraska, and as such has charge of the records
and files of the York York News-Times, and affiant knows of his/her own
personal knowledge that said newspaper has a bona fide circulation of more
than 500 copies of each issue, has been published at York, Nebraska, for
more than 52 weeks successively prior to the first publication of the annexed
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Nebraska.

Kathy Larson
Signature

Subscribed in my presence and sworn to before me this 13 th day of August,
2013.

PUBLISHED ON:
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DEPARTMENT OF
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TOTAL COST: 31.78 AD SPACE: Lines: 109

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March 18, 20 *16*

Tammi J Eikenhorst
Notary Public, York County, Nebraska

GENERAL NOTARY - State of Nebraska
TAMMI J EIKENHORST
My Comm. Exp. March 18, 2016



1438751
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STATE OF
NEBRASKA

DEPARTMENT OF
NATURAL
RESOURCES

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Department rules Ne-
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Code Title 457, Chap-
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"Determination of
Fully Appropriated
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Reaches." The pro-
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with the planning proc-
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of the Secretary of
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State Capitol, Lincoln,
Nebraska 68509-4696,
or at the Department's
website at
www.dnr.ne.gov/rules/Proposed_dnrrules.html.
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sources, Nebraska State
Office Building, 301
Centennial Mall South,
4th floor, PO Box
94676, Lincoln, Ne-
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5:00 p.m. (CDT) Sep-
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sonable accommoda-
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ticipate in the hearing,
please call the Depart-
ment at 402-471-2363
by August 30, 2013.

Date: August 12, 2013

Brian P. Dunnigan,
P.E., Director
Department of Natural
Resources
August 16

York
News-Times

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P.O. Box 279
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State of Nebraska } SS
County of Cherry

RaeMalea K. Kalenda

being by me first duly sworn on oath says that he/she is employed by the Valentine Midland News, a newspaper published in Valentine, Nebraska, and personally knows that said newspaper is a legal weekly newspaper under the statutes of the state of Nebraska, having a bonafide circulation of over three hundred copies, has been published in said county for more than fifty-two successive weeks prior to the first publication of the attached notice and is printed in an office maintained in the City of Valentine, in said county, which said city is the place of its publication; that the notice hereto attached was published in said newspaper in the regular issues thereof.

Date of Publication _____

8-21

Dated this 21 day of

August, 2013

Subscribed and sworn to before

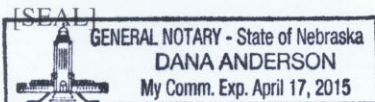
me dated this 21st day of

August, 2013

Dana Anderson

Notary Public

Fees \$ 24.87



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DEPARTMENT OF NATURAL RESOURCES

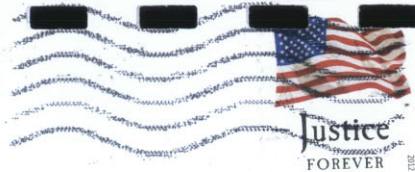
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DEPARTMENT OF
NATURAL RESOURCES



6850882529



01

**PROPOSED REGULATION
POLICY PRE-REVIEW CHECKLIST**

Agency: Nebraska Department of Natural Resources
Title, Chapter of Rules submitted: Title 457 Chapter 24
Subject: Determination of Fully Appropriated Basins, Subbasins, or Reaches
Prepared by: Jesse Bradley
Telephone: (402) 471-0586

A. Policy Changes and Impacts

1. What does the regulation do and whom does it impact? Provide a brief description of the proposed rule or regulation and its impacts on state agencies, political subdivisions, and regulated persons or entities.

This rule describes the scientific data and other information that will be considered by the Department and guides the detailed technical analyses conducted by the Department to assess the water supplies and water uses in a given basin, subbasin, or reach of stream. The Department is required, pursuant to *Neb. Rev. Stat. § 46-713(1)(d)*, to promulgate rules that support making this preliminary determination. *Neb. Rev. Stat. § 46-713(1)(b)* requires that the Department conduct an annual evaluation and arrive at a preliminary determination as to whether a basin is or is not currently fully appropriated.

One of the key purposes of conducting this analysis and reaching a preliminary designation of fully appropriated is to protect water uses in existence prior to the designation. Thus, persons with existing water uses should see limited impact. Persons seeking new water uses may be impacted depending on the limits placed on the availability of water supplies to support these new uses. However, any such limitations on the future availability of water supplies for existing or new uses would be determined in the subsequent integrated management planning process that is required by statute. The effect on other state agencies should be negligible.

2. Describe changes being proposed to current policy and briefly provide rationale.

The rationales for the changes are two-fold. The first rationale is that a technical analysis of the difference between overappropriated and fully appropriated, which is required in the overappropriated portion of the Platte River Basin, must be performed in a manner consistent with the Department's regulations. The current regulations do not accommodate such an analysis in a manner that is consistent with the integrated management plans' goals and objectives in that portion of the basin.



That is why the Department first initiated review of these regulations in conjunction with those NRDs in 2009. The second rationale is that the current regulations used for conducting this evaluation are very limited in their ability to meet the needs of subsequent integrated management planning processes. The change being proposed will much better align the technical analyses necessary to understand water supplies and water uses with the planning process that seeks to balance water supplies and water uses over the long term.

- B. Why is the rule necessary? Explain and provide an identification of authorizing statute(s) or legislative bill(s).

The Department is required by *Neb. Rev. Stat. § 46-713* to annually evaluate those areas of the state not currently designated as fully or overappropriated or for which a status change (i.e., reversal of previous designation) has occurred in the past four years. *Neb. Rev. Stat. § 46-713(1)(b)* requires that the Department conduct this annual evaluation and arrive at a preliminary determination as to whether a basin is or is not currently fully appropriated. Additionally, rules are required to be promulgated by the Department pursuant to *Neb. Rev. Stat. § 46-713(1)(d)*. The Department does currently have promulgated rules; however A.2. above describes the Department's rationale for seeking this rule change.

1. Update of regulation (repeal of obsolete statutes, reflect current policy, editing or technical language changes, etc.).

The updated regulation is an improved means for conducting the annual evaluation and provides for more consistent application of methods in line with the current integrated management planning processes and in support of conducting analyses required pursuant to *Neb. Rev. Stat. § 46-715(5)(c)*.

2. Annual changes – cost of living, hunting season schedules, etc.

N/A

3. Law was changed – federal ___ or state ___ [Cite authorizing statute(s) or legislative bill(s)].

N/A

4. Extension of established policy or program, new initiatives or changes in policy (within statutory authority).

N/A

5. Constituent initiated.

N/A

6. Financial needs – increases/decreases in fees.

N/A

7. Litigation requires changes in rules.

The Nebraska Supreme Court set aside the Department's preliminary determination of fully appropriated in the Niobrara River Basin, as a result of the 2008 Annual Evaluation. The revised rule is consistent with the integrated planning process and should be more easily understood.

8. Addresses legal or constitutional concerns of Attorney General's office.

N/A

9. Implements federal or court mandate.

N/A

10. Other (explain).

N/A

C. What happens if these rules are not adopted?

If the suggested regulations are not adopted the current process will continue. The continuance of this process may result in continued confusion related to how a designation of fully appropriated translates through to the integrated management planning process. Additionally, the Department and NRDs in the overappropriated basin would be left with limited means to conduct the technical analyses required to assess the difference between current and fully appropriated levels of development.

D. Policy Checklist

1. Is this an update or editorial change reflecting essentially no change in policy?

No

2. Does the policy in the proposed regulation reflect legislative intent?

Yes

3. Is the policy proposed in the regulation a state mandate on local government?

No

Is it funded? N/A

4. Is the policy proposed in the regulation a federal mandate on local government?

No

Is it funded? N/A

E. Fiscal Impact. In addition to completing the required Fiscal Impact Statement (a copy must be attached to this document), the agency must address the following:

1. Will the proposed regulation reduce, increase, or have no change in resources – funds, personnel or FTE?

The proposed regulations will have no additional fiscal impact.

2. Have initial contacts been made with citizens or organizations that may be impacted by the proposed regulation?

Yes. The Department has made extensive efforts to reach out to organizations and citizens that may be affected by this regulation (please see the additional documents provided).

3. Does the proposed regulation impact another agency? Explain the impact.

The proposed regulation does not impact another state agency. *Neb. Rev. Stat. § 46-713(1)(b)* requires that the Department conduct this annual evaluation and arrive at a preliminary determination as to whether a basin is or is not currently fully appropriated. Additionally, the Department is required to have rules promulgated pursuant to *Neb. Rev. Stat. § 46-713(1)(d)*.

4. Will the proposed regulation reduce, increase, or have no change on reporting requirements of businesses?

The proposed regulation should not increase the reporting requirements for businesses. The statutes already provide for the Department to request information to support the evaluation, and thus, this regulation would not add any additional reporting requirements for businesses. Furthermore, the Department is not looking to expand any of the current reporting requirements in support of this evaluation.

5. What is the agency's best estimate of the additional or reduced spending? If there is none, please note. If receipt of federal funds is contingent upon approval of the proposed regulation, then indicate the amount and nature of the federal funds affected, and enclose laws or correspondence from federal officials substantiating the information.

The proposed regulations are not anticipated to require additional spending or reduce current spending.

6. Include a description of the impact that the proposed regulation will have on the number of state employees and how the agency intends to address proposed increases or decreases in FTE.

The proposed regulation will not have an impact on the number of state employees or FTEs.

- F. Unique problems or issues and recommendations.

None

- G. Who is expected to be affected, or to oppose or support the proposed regulation? Explain what initial informal contacts have been made with organizations or citizens who may be affected by the regulation prior to the public hearing.

Several efforts have been made to contact organizations and citizens that may be affected by this regulation. These efforts have included working with outside agencies (natural resources districts, irrigation districts, and other water management entities) to evaluate new methods to be implemented in the regulation. Additionally, several stakeholder meetings, presentations and public comment forums have been held throughout the four-year period in which these new regulations have been developed (see attachments to Question E.2.). Furthermore, the Department has adapted the original draft rule (April 8, 2013) to include modifications in line with addressing various public comments which were largely aimed at greater clarity of key points.

Based on comments received, opposition is likely strongest from those water use groups with current surface water appropriations and environmental interest. This opposition is seemingly aimed less at this specific rule and more at the general statutory structure for regulating surface water and groundwater. Much of this opposition appears to be aimed at having the Department implement more stringent criteria in the rules with the desired outcome of immediate basin designations (for those areas not already fully appropriated) or for raising the bar higher with regard to reducing the impacts of groundwater use in future increments of integrated management planning efforts in the overappropriated basin.

- H. Are these proposed rules a likely candidate for negotiated rulemaking?

No

Explain.

As referenced above (Question E.2.) the Department has worked with a broad-based group of stakeholders in the development and refinement of these rules for a period of almost four years. Given this work with stakeholders and the input provided by various stakeholders, the Department does not believe that the rule is a candidate for the negotiated rulemaking process.

Has the process been completed?

No

If so, explain how the issues were addressed.

N/A

Director's Verification of Review

I have reviewed these proposals and verify that, at this stage of the regulation's development, these questions have been accurately addressed.

Director's Signature

Brian P. Dunne

Date

7-9-13

**SUBMIT TO GOVERNOR BEFORE SUBMITTING TO EXECUTIVE BOARD AND
BEFORE PUBLIC HEARING DATE IS SET**

**PROPOSED REGULATION
GPRO COVERPAGE
(ATTACH TO PRE-REVIEW CHECKLIST)**

RECEIVED

JUL 09 2013

Gov's Policy Research

Agency: Nebraska Department of Natural Resources
Title, Chapter of Rules submitted: Title 457 Chapter 24
Subject: Determination of Fully Appropriated Basins, Subbasins, or Reaches
Prepared by: Jesse Bradley
Telephone: (402) 471-0586
Date submitted to Governor: July 9, 2013

Projected dates for public hearings: The week of August 26th.

Projected deadline for final approval: October 31, 2013.

N/A A copy of the section of laws or federal regulations that triggered these changes is attached.

FOR GOVERNOR OFFICE RECORDS

Advisor Assigned: MARK L. MATULKA
Date approved to proceed: 07/22/2013
Options for proceeding: SEE BELOW

- a) No further contact with GPRO is necessary until final rules have been approved by the Attorney General.
- b) Contact Governor through GPRO concerning issues raised in Negotiated Rulemaking procedures.
- c) Submit Rules and Regulations Policy Review Checklist to Governor if rules are changed hereafter and a new public hearing is scheduled.
- d) Keep the Governor informed through GPRO as issues arise in negotiations, drafting sessions, advisory board meetings, and public hearings.
- e) Specific policy comments per Governor's instructions is attached.

Gower, Laurie

From: Gower, Laurie
Sent: Thursday, August 15, 2013 9:27 AM
To: Boesiger, Bess
Cc: Sievers, LeRoy; Bradley, Jesse; Paeglis, Laura
Subject: Submission of Title 457 Chapter 24 Rule Changes
Attachments: 3_DRAFT_RULES_CHANGESredlinedfromcurrent.pdf; 20130814_Tittle457Ch24_DNRtoSecOfState.pdf

Good morning, Ms. Boesiger,
I am submitting the attached documents for the Department of Natural Resources. If you have any questions, please feel free to call Laura Paeglis at 471-2366. Thank you.

Laurie Gower

Administrative Assistant
NE Department of Natural Resources
301 Centennial Mall South
P.O. Box 94676
Lincoln, NE 68509-4676
(402) 471-2363 – Main
(402) 471-3944 – Direct
e-mail: Laurie.Gower@nebraska.gov



STATE OF NEBRASKA
DEPARTMENT OF NATURAL RESOURCES
NOTICE OF RULEMAKING HEARING

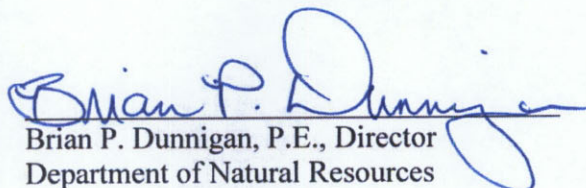
NOTICE IS HEREBY GIVEN THAT THE Nebraska Department of Natural Resources (Department) will hold a public rulemaking hearing pursuant to *Neb. Rev. Stat. § 84-907*. The hearing will be held at 1:00 p.m. (CDT) on Tuesday, September 17, 2013, at the Fairfield Inn & Suites, 510 Talmadge Rd., Kearney, Nebraska.

The purpose of the hearing is to take public comments about the proposed changes to Department rules *Nebraska Administrative Code* Title 457, Chapter 24, entitled "Determination of Fully Appropriated Basins, Subbasins or Reaches." The proposed change will make the rule more consistent with integrated management plans' goals and objectives and better align the technical analyses with the planning process.

The proposed rule is available at the offices of the Secretary of State, Regulations Division, Room 1305, State Capitol, Lincoln, Nebraska 68509-4696, or at the Department's website at www.dnr.ne.gov/rules/Proposed_dnrrules.html. The description of the fiscal and other impacts may be inspected and obtained at the Department of Natural Resources, Nebraska State Office Building, 301 Centennial Mall South, 4th floor, PO Box 94676, Lincoln, Nebraska 68509-4676.

All interested persons are invited to attend and make oral or written comments at the hearing. Interested persons may also submit written comments to the Department of Natural Resources address above prior to the hearing which will be made part of the hearing record at the time of hearing. Comments must be received by the Department of Natural Resources on or before 5:00 p.m. (CDT) September 16, 2013. If auxiliary aids or reasonable accommodations are needed to participate in the hearing, please call the Department at 402-471-2363 by August 30, 2013.

Date: August 12, 2013


Brian P. Dunnigan, P.E., Director
Department of Natural Resources

FINAL DRAFT RULES
Clean Version for September 17, 2013, hearing

August 14, 2013

NEBRASKA ADMINISTRATIVE CODE

Title 457 - DEPARTMENT OF NATURAL RESOURCES
RULES FOR SURFACE WATER

Chapter 24 - DETERMINATION OF FULLY APPROPRIATED BASINS,
SUBBASINS OR REACHES

001 FULLY APPROPRIATED. Pursuant to *Neb. Rev. Stat. § 46-713(3)* a river basin, subbasin, or reach shall be deemed fully appropriated if the Department of Natural Resources (Department) determines based upon its annual evaluation and information presented at hearings subsequent to a preliminary determination of fully appropriated that then-current uses of hydrologically connected surface water and groundwater in the river basin, subbasin, or reach cause or will in the reasonably foreseeable future cause (a) the surface water supply to be insufficient to sustain over the long term the beneficial or useful purposes for which existing natural flow or storage appropriations were granted and the beneficial or useful purposes for which, at the time of approval, any existing instream appropriation was granted, (b) the streamflow to be insufficient to sustain over the long term the beneficial uses from wells constructed in aquifers dependent on recharge from the river or stream involved, or (c) reduction in the flow of a river or stream sufficient to cause noncompliance by Nebraska with an interstate compact or decree, other formal state contract or agreement, or applicable state or federal laws.

001.01A For purposes of *Neb. Rev. Stat. § 46-713(1)(b)*, the Department shall reach a preliminary conclusion that a river basin, subbasin, or reach is fully appropriated if based on the Department's annual evaluation, it is determined that the cumulative near-term Total Demand and/or the cumulative long-term Total Demand of hydrologically connected groundwater and surface water exceeds the cumulative basin water supplies (BWS) that occur in either of the two sub-periods within the year when summed over the representative period of record used in the annual evaluation. The two sub-periods within the year are June 1 through August 31, inclusive and September 1 through May 31, inclusive. The length of the representative period of record will be determined through statistical analyses of the annual BWS as the set of years, extending back in time from the most recently available data, which captures long-term wet and dry cycles that may exist.

001.01B For purposes of 001.01A, the BWS is the streamflow water supply estimated to be available without the initiation of groundwater pumping from high capacity wells and surface water uses of natural flow and storage. The BWS is calculated by combining the following for each sub-period: gaged streamflows truncated at the 5% exceedence flow probability value plus streamflow depletions due to high capacity (greater than 50 gallons per minute) well groundwater pumping plus consumptive surface water uses minus the BWS originating upstream of the basin, subbasin, or reach.

FINAL DRAFT RULES

August 14, 2013

Clean Version for September 17, 2013, hearing

001.01C For purposes of 001.01A, the cumulative near-term Total Demand of groundwater and surface water is calculated by summing the water demands associated with the following activities for each sub-period within a basin, subbasin, or reach that have not previously been represented as a non-tributary downstream demand: (1) streamflow depletions due to high capacity (greater than 50 gallons per minute) well groundwater pumping; (2) consumptive water demands for surface water uses, inclusive of consumptive uses associated with storage appropriations and the use of such stored water; (3) any additional water (accounting for return flows) determined to be necessary to deliver streamflows to meet consumptive surface water demands; (4) streamflow available to meet instream flow appropriations (accounting for all development in place at such time the appropriation was granted); (5) any additional streamflow demands for hydropower operations not accounted for in the instream flow water demands; and (6) the BWS necessary to meet the proportionate amount of non-tributary demands downstream of a basin, subbasin, or reach. The non-tributary downstream demands of a basin, subbasin, or reach will be proportioned in accordance with that basin, subbasin, or reaches BWS relative to the total basin BWS. In calculating the cumulative near-term Total Demand no water uses developed subsequent to a fully appropriated designation or overappropriated designation shall be assigned to those fully appropriated or overappropriated basins as non-tributary downstream demands.

001.01D For purposes of 001.01A, the cumulative long-term Total Demand of groundwater and surface water is calculated by summing the water demands associated with the following activities for each sub-period within a basin, subbasin, or reach that have not previously been represented as a non-tributary downstream demand: (1) consumptive water demands for hydrologically connected high capacity (greater than 50 gallons per minute) groundwater well pumping; (2) consumptive water demands for surface water uses, inclusive of consumptive uses associated with storage appropriations and the use of such stored water; (3) any additional water (accounting for return flows) determined to be necessary to deliver streamflows to meet consumptive surface water demands; (4) streamflow available to meet instream flow appropriations (accounting for all development in place at such time the appropriation was granted); (5) any additional streamflow demands for hydropower operations not accounted for in the instream flow water demands; and (6) the BWS necessary to meet the proportionate amount of non-tributary demands downstream of a basin, subbasin, or reach. The non-tributary downstream demands of a basin, subbasin, or reach will be proportioned in accordance with that basin, subbasin, or reaches BWS relative to the total basin BWS. In calculating the cumulative long-term Total Demand no water uses developed subsequent to a fully appropriated designation or overappropriated designation shall be assigned to those fully appropriated or overappropriated basins as non-tributary downstream demands.

001.01E In the event that water demands are for a beneficial use other than irrigation, municipal, industrial, instream flow, or hydropower, (for example aquifers dependent on recharge from streamflow, induced recharge, flood control, aquaculture, etc.) the Department will evaluate such use and if necessary determine a methodology to incorporate such demand into any relevant analysis.

FINAL DRAFT RULES

August 14, 2013

Clean Version for September 17, 2013, hearing

001.01F Use of the method described in this rule is not intended to express or imply any mandate or requirement that the method used herein must be included in the goals and objectives of any integrated management plan. Further, nothing in this section is intended to express or imply a priority of use between surface water uses and groundwater uses.

001.01G Pursuant to *Neb. Rev. Stat.* §46-713(1)(d) the Department shall rely on the best scientific data, information, and methodologies readily available to ensure that the conclusions and results contained in the annual evaluation are reliable. Prior to the release of the annual evaluation the Department shall provide sufficient documentation of the data, information, and methodologies used to reach its conclusions such that those conclusions could be independently replicated and assessed. The documentation will specify the specific data, information, and methodologies utilized in the annual evaluation to represent the BWS, near-term Total Demand, and long-term Total Demand.

001.02A For purposes of *Neb. Rev. Stat.* § 46-713(3), the Department shall deem a basin, subbasin, or reach as fully appropriated if such preliminary determination is reached pursuant to 001.01A-G and if information provided at a subsequent hearing pursuant to subsection (4) of *Neb. Rev. Stat.* § 46-714 does not indicate that the criteria set forth in 001.02B or 001.02C apply or unless the Director finds based on written or oral testimony and evidence concerning the appropriation status for the river basin, subbasin, or reach, that a final designation of fully appropriated is not warranted at that time.

001.02B For any basin, subbasin, or reach preliminarily determined to be fully appropriated pursuant to 001.01A-G in which integrated management plan(s) have been initiated by all Natural Resources Districts within the hydrologically connected area, the Natural Resources Districts within that same hydrologically connected area have designated a management area for which a purpose is the integrated management of hydrologically connected groundwater and surface water, and the Natural Resources Districts and Department have not taken more than three years to complete such integrated management plan(s) the Department may reach a final determination that such basin, subbasin, or reach is not fully appropriated at that time.

001.02C For any basin, subbasin, or reach preliminarily determined to be fully appropriated pursuant to 001.01A-G in which integrated management plan(s) have been completed by all Natural Resources Districts within the hydrologically connected area, the Department will review the contents of such integrated management plan(s) to ensure that appropriate limitations on new water uses are included in such integrated management plan (s), inclusive of controls on such new uses pursuant to *Neb. Rev. Stat.* § 46-739(6)(b), and such integrated management plan(s) includes a plan to monitor water uses in a manner consistent with 001.01A-G. Upon the Department completing this review the Department may reach a final determination that such basin, subbasin, or reach is not fully appropriated at that time.

FINAL DRAFT RULES
Clean Version for September 17, 2013, hearing

August 14, 2013

001.03 The geographic area within which the Department preliminarily considers surface water and groundwater to be hydrologically connected for the purpose prescribed in *Neb. Rev. Stat. § 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 ten (10) percent of the amount pumped in that time.

002 INFORMATION CONSIDERED. For making preliminary determinations required by *Neb. Rev. Stat. § 46-713* the Department will use the best scientific data and information readily available to the Department at the time of the determination. Information to be considered will include:

1. Department records on the regulation of surface water appropriations;
2. Department databases and maps of surface water appropriations;
3. Department Hydrographic Reports;
4. Department and United States Geologic Survey stream gage records;
5. Department's registered well data base;
6. Technical hydrogeological reports and publications subject to Department peer review;
7. Department reviewed groundwater models and resulting model outputs;
8. Certified irrigated acres provided by the natural resources districts;
9. Water use information provided by other state agencies, natural resources districts, irrigation districts, reclamation districts, public power and irrigation districts, mutual irrigation companies, canal companies, municipalities, and other water users; and
10. Any other information deemed appropriate by the Department for the purpose of conducting the determination

EFFECTIVE DATE: DATE, 2013

NEBRASKA ADMINISTRATIVE CODE

Title 457 - DEPARTMENT OF NATURAL RESOURCES
RULES FOR SURFACE WATER

Chapter 24 - DETERMINATION OF FULLY APPROPRIATED BASINS, SUB-BASINS OR
REACHES

~~001 FULLY APPROPRIATED. Pursuant to Neb. Rev. Stat. § 46-713(3) (Reissue 2004, as amended), a river basin, subbasin, or reach shall be deemed fully appropriated if the Department of Natural Resources determines that then-current uses of hydrologically connected surface water and ground water in the river basin, subbasin, or reach cause or will in the reasonably foreseeable future cause (a) the surface water supply to be insufficient to sustain over the long term the beneficial or useful purposes for which existing natural flow or storage appropriations were granted and the beneficial or useful purposes for which, at the time of approval, any existing instream appropriation was granted, (b) the streamflow to be insufficient to sustain over the long term the beneficial uses from wells constructed in aquifers dependent on recharge from the river or stream involved, or (c) reduction in the flow of a river or stream sufficient to cause noncompliance by Nebraska with an interstate compact or decree, other formal state contract or agreement, or applicable state or federal laws.~~

~~001.01A Except as provided in 001.01C below, for purposes of Section 46-713(3)(a), the surface water supply for a river basin, subbasin, or reach shall be deemed insufficient, if after considering the impact of the lag effect from existing groundwater pumping in the hydrologically connected area that will deplete the water supply within the next 25 years, it is projected that during the period of May 1 through September 30, inclusive, the most junior 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.~~

~~For purposes of this rule, the "annual crop irrigation requirement" will be determined by the annual irrigation requirement for corn. This requirement is based on the average evapotranspiration of corn that is fully watered to achieve the maximum yield and the average amount of precipitation that is effective in meeting the crop water requirements for the area.~~

~~The inability to divert will be based on stream flow data and diversion records, if such records are available for the most junior surface water appropriator. If these records are not available, the inability to divert will be based on the average number of days within each time period (May 1 to September 30 and July 1 to August 31) that the most junior surface water appropriation for irrigation would have been closed by the Department and therefore could not have diverted during the previous 20 year period. In making this~~

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Chapter 24 - DETERMINATION OF FULLY APPROPRIATED BASINS, SUB-BASINS OR
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~~calculation, if sufficient stream flow data and diversion data are not available, it will be assumed that if the appropriator was not closed, the appropriator could have diverted at the full permitted diversion rate. In addition the historical record will be adjusted to include the impacts of all currently existing surface water appropriations and the projected future impacts from currently existing ground water wells. The projected future impacts from ground water wells to be included shall be the impacts from ground water wells located in the hydrologically connected area that will impact the water supply over the next 25 year period.~~

~~001.01B In the event that the junior water rights are not irrigation rights, the Department will utilize a standard of interference appropriate for the use, taking into account the purpose for which the appropriation was granted.~~

~~001.01C If, at the time of the priority date of the most junior appropriation, the surface water appropriation could not have diverted surface water a sufficient number of days on average for the previous 20 years to satisfy the requirements of 001.01A, the surface water supply for a river basin, subbasin, or reach in which that surface water appropriation is located shall be deemed insufficient only if the average number of days surface water could have been diverted over the previous 20 years is less than the average number of days surface water could have been diverted for the 20 years previous to the time of the priority date of the appropriation.~~

~~When making this comparison, the calculations will follow the same procedures as described in 001.01A. When calculating the number of days an appropriator could have diverted at the time of the priority date of the appropriation, the impacts of all appropriations existing on the priority date of the appropriation and the impacts of wells existing on the priority date of the appropriation shall be applied in the same manner as in 001.01A. As in 001.01A above, in making this calculation, if sufficient stream flow data and diversion data are not available, it will be assumed that if the appropriator was not closed, the appropriator could have diverted at the full permitted diversion rate.~~

FINAL DRAFT RULES
Redline showing changes to the current rules

August 14, 2013

Title 457 - DEPARTMENT OF NATURAL RESOURCES
RULES FOR SURFACE WATER

Chapter 24 - DETERMINATION OF FULLY APPROPRIATED BASINS, SUB-BASINS OR
REACHES

~~Use of the method described in this rule is not intended to express or imply any mandate or requirement that the method used herein must be included in the goals and objectives of any integrated management plan adopted for a river basin, subbasin or reach determined to be fully appropriated under this rule. Further, nothing in this section is intended to express or imply a priority of use between surface water uses and ground water uses.~~

~~001.02 The geographic area within which the Department preliminarily considers surface water and ground water to be hydrologically connected for the purpose prescribed 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 percent of the amount pumped in that time.~~

~~002 INFORMATION CONSIDERED. For making preliminary determinations required by Neb. Rev. Stat. Section 46-713 (Reissue 2004, as amended) the Department will use the best scientific data and information readily available to the Department at the time of the determination. Information to be considered will include:~~

~~Surface water administrative records
Department Hydrographic Report
Department and United States Geologic Survey stream gage records
Department's registered well data base
Water level records and maps from Natural Resources Districts, the Department, the University of Nebraska, the United States Geological Survey or other publications subject to peer review
Technical hydrogeological reports from the University of Nebraska, the United States Geological Survey or other publications subject to peer review
Ground water models
Current rules and regulations of the Natural Resources Districts~~

FINAL DRAFT RULES
Redline showing changes to the current rules

August 14, 2013

Title 457 - DEPARTMENT OF NATURAL RESOURCES
RULES FOR SURFACE WATER

Chapter 24 - DETERMINATION OF FULLY APPROPRIATED BASINS, SUB-BASINS OR
REACHES

~~The Department shall review this list periodically, and will propose amendments to this rule as necessary to incorporate scientific data and information that qualifies for inclusion in this rule, but was not available at the time this rule was adopted.~~

~~EFFECTIVE DATE: December 4, 2006~~

DRAFT

NEBRASKA ADMINISTRATIVE CODE

Title 457 - DEPARTMENT OF NATURAL RESOURCES
RULES FOR SURFACE WATER

Chapter 24 - DETERMINATION OF FULLY APPROPRIATED BASINS, SUBBASINS OR
REACHES

001 FULLY APPROPRIATED. Pursuant to *Neb. Rev. Stat. § 46-713(3)* a river basin, subbasin, or reach shall be deemed fully appropriated if the Department of Natural Resources (Department) determines based upon its annual evaluation and information presented at hearings subsequent to a preliminary determination of fully appropriated that then-current uses of hydrologically connected surface water and groundwater in the river basin, subbasin, or reach cause or will in the reasonably foreseeable future cause (a) the surface water supply to be insufficient to sustain over the long term the beneficial or useful purposes for which existing natural flow or storage appropriations were granted and the beneficial or useful purposes for which, at the time of approval, any existing instream appropriation was granted, (b) the streamflow to be insufficient to sustain over the long term the beneficial uses from wells constructed in aquifers dependent on recharge from the river or stream involved, or (c) reduction in the flow of a river or stream sufficient to cause noncompliance by Nebraska with an interstate compact or decree, other formal state contract or agreement, or applicable state or federal laws.

001.01A For purposes of *Neb. Rev. Stat. § 46-713(1)(b)*, the Department shall reach a preliminary conclusion that a river basin, subbasin, or reach is fully appropriated if based on the Department's annual evaluation, it is determined that the cumulative near-term Total Demand and/or the cumulative long-term Total Demand of hydrologically connected groundwater and surface water exceeds the cumulative basin water supplies (BWS) that occur in either of the two sub-periods within the year when summed over the representative period of record used in the annual evaluation. The two sub-periods within the year are June 1 through August 31, inclusive and September 1 through May 31, inclusive. The length of the representative period of record will be determined through statistical analyses of the annual BWS as the set of years, extending back in time from the most recently available data, which captures long-term wet and dry cycles that may exist.

001.01B For purposes of 001.01A, the BWS is the streamflow water supply estimated to be available without the initiation of groundwater pumping from high capacity wells and surface water uses of natural flow and storage. The BWS is calculated by combining the following for each sub-period: gaged streamflows truncated at the 5% exceedence flow probability value plus streamflow depletions due to high capacity (greater than 50 gallons per minute) well groundwater pumping plus consumptive surface water uses minus the BWS originating upstream of the basin, subbasin, or reach.

001.01C For purposes of 001.01A, the cumulative near-term Total Demand of groundwater and surface water is calculated by summing the water demands associated with the following activities for each sub-period within a basin, subbasin, or reach that have not previously been represented as a non-tributary downstream demand: (1) streamflow depletions due to high capacity (greater than 50 gallons per minute) well groundwater pumping; (2) consumptive water demands for surface water uses, inclusive of consumptive uses associated with storage appropriations and the use of such stored water; (3) any additional water (accounting for return flows) determined to be necessary to deliver streamflows to meet consumptive surface water demands; (4) streamflow available to meet instream flow appropriations (accounting for all development in place at such time the appropriation was granted); (5) any additional streamflow demands for hydropower operations not accounted for in the instream flow water demands; and (6) the BWS necessary to meet the proportionate amount of non-tributary demands downstream of a basin, subbasin, or reach. The non-tributary downstream demands of a basin, subbasin, or reach will be proportioned in accordance with that basin, subbasin, or reaches BWS relative to the total basin BWS. In calculating the cumulative near-term Total Demand no water uses developed subsequent to a fully appropriated designation or overappropriated designation shall be assigned to those fully appropriated or overappropriated basins as non-tributary downstream demands.

001.01D For purposes of 001.01A, the cumulative long-term Total Demand of groundwater and surface water is calculated by summing the water demands associated with the following activities for each sub-period within a basin, subbasin, or reach that have not previously been represented as a non-tributary downstream demand: (1) consumptive water demands for hydrologically connected high capacity (greater than 50 gallons per minute) groundwater well pumping; (2) consumptive water demands for surface water uses, inclusive of consumptive uses associated with storage appropriations and the use of such stored water; (3) any additional water (accounting for return flows) determined to be necessary to deliver streamflows to meet consumptive surface water demands; (4) streamflow available to meet instream flow appropriations (accounting for all development in place at such time the appropriation was granted); (5) any additional streamflow demands for hydropower operations not accounted for in the instream flow water demands; and (6) the BWS necessary to meet the proportionate amount of non-tributary demands downstream of a basin, subbasin, or reach. The non-tributary downstream demands of a basin, subbasin, or reach will be proportioned in accordance with that basin, subbasin, or reaches BWS relative to the total basin BWS. In calculating the cumulative long-term Total Demand no water uses developed subsequent to a fully appropriated designation or overappropriated designation shall be assigned to those fully appropriated or overappropriated basins as non-tributary downstream demands.

001.01E In the event that water demands are for a beneficial use other than irrigation, municipal, industrial, instream flow, or hydropower, (for example aquifers dependent on recharge from streamflow, induced recharge, flood control, aquaculture, etc.) the Department will evaluate such use and if necessary determine a methodology to incorporate such demand into any relevant analysis.

001.01F Use of the method described in this rule is not intended to express or imply any mandate or requirement that the method used herein must be included in the goals and objectives of any integrated management plan. Further, nothing in this section is intended to express or imply a priority of use between surface water uses and groundwater uses.

001.01G Pursuant to *Neb. Rev. Stat. §46-713(1)(d)* the Department shall rely on the best scientific data, information, and methodologies readily available to ensure that the conclusions and results contained in the annual evaluation are reliable. Prior to the release of the annual evaluation the Department shall provide sufficient documentation of the data, information, and methodologies used to reach its conclusions such that those conclusions could be independently replicated and assessed. The documentation will specify the specific data, information, and methodologies utilized in the annual evaluation to represent the BWS, near-term Total Demand, and long-term Total Demand.

001.02A For purposes of *Neb. Rev. Stat. § 46-713(3)*, the Department shall deem a basin, subbasin, or reach as fully appropriated if such preliminary determination is reached pursuant to 001.01A-G and if information provided at a subsequent hearing pursuant to subsection (4) of *Neb. Rev. Stat. § 46-714* does not indicate that the criteria set forth in 001.02B or 001.02C apply or unless the Director finds based on written or oral testimony and evidence concerning the appropriation status for the river basin, subbasin, or reach, that a final designation of fully appropriated is not warranted at that time.

001.02B For any basin, subbasin, or reach preliminarily determined to be fully appropriated pursuant to 001.01A-G in which integrated management plan(s) have been initiated by all Natural Resources Districts within the hydrologically connected area, the Natural Resources Districts within that same hydrologically connected area have designated a management area for which a purpose is the integrated management of hydrologically connected groundwater and surface water, and the Natural Resources Districts and Department have not taken more than three years to complete such integrated management plan(s) the Department may reach a final determination that such basin, subbasin, or reach is not fully appropriated at that time.

001.02C For any basin, subbasin, or reach preliminarily determined to be fully appropriated pursuant to 001.01A-G in which integrated management plan(s) have been completed by all Natural Resources Districts within the hydrologically connected area, the Department will review the contents of such integrated management plan(s) to ensure that appropriate limitations on new water uses are included in such integrated management plan (s), inclusive of controls on such new uses pursuant to *Neb. Rev. Stat. § 46-739(6)(b)*, and such integrated management plan(s) includes a plan to monitor water uses in a manner consistent with 001.01A-G. Upon the Department completing this review the Department may reach a final determination that such basin, subbasin, or reach is not fully appropriated at that time.

001.03 The geographic area within which the Department preliminarily considers surface water and groundwater to be hydrologically connected for the purpose prescribed in *Neb. Rev. Stat. §*

FINAL DRAFT RULES

August 14, 2013

Redline showing changes to the current rules

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 ten (10) percent of the amount pumped in that time.

002 INFORMATION CONSIDERED. For making preliminary determinations required by *Neb. Rev. Stat. § 46-713* the Department will use the best scientific data and information readily available to the Department at the time of the determination. Information to be considered will include:

1. Department records on the regulation of surface water appropriations;
2. Department databases and maps of surface water appropriations;
3. Department Hydrographic Reports;
4. Department and United States Geologic Survey stream gage records;
5. Department's registered well data base;
6. Technical hydrogeological reports and publications subject to Department peer review;
7. Department reviewed groundwater models and resulting model outputs;
8. Certified irrigated acres provided by the natural resources districts;
9. Water use information provided by other state agencies, natural resources districts, irrigation districts, reclamation districts, public power and irrigation districts, mutual irrigation companies, canal companies, municipalities, and other water users; and
10. Any other information deemed appropriate by the Department for the purpose of conducting the determination

EFFECTIVE DATE: DATE, 2013

Concise Explanatory Statement

This rule describes the scientific data and other information that will be considered by the Department and guides the detailed technical analyses conducted by the Department to assess the water supplies and water uses in a given basin, subbasin, or reach of stream. The Department is required, pursuant to § 46-713(1)(d), to promulgate rules that support making this preliminary determination. Section 46-713(1)(b) requires that the Department conduct an annual evaluation and arrive at a preliminary determination as to whether a basin is or is not currently fully appropriated. The proposed change will make the rule more consistent with integrated management plans' goals and objectives and better align the technical analyses with the planning process.

State of Nebraska
Department of Natural Resources
August 13, 2013

Gower, Laurie

From: Gower, Laurie
Sent: Thursday, August 15, 2013 9:42 AM
To: Wightman, John
Cc: Sievers, LeRoy; Bradley, Jesse; Paeglis, Laura
Subject: Submission of Changes to Title 457 Chapter 24 Rules
Attachments: 1_20130917 Notice of Rulemaking Hearing.pdf; 2_DRAFT_RULES_CHANGE20130812.pdf; 3_DRAFT_RULES_CHANGESredlinedfromcurrent.pdf; 4_20130722_PRO_PreReviewChecklist.pdf; 5_20130709_DNR_PreReviewChecklist.pdf; 20130814_Title457Ch24_DNRtoLegCouncil.pdf

Good morning,

I am submitting the attached documents for the Department of Natural Resources. If you have any questions, please feel free to contact Laura Paeglis at 471-2366. Thank you.

Laurie Gower

Administrative Assistant
NE Department of Natural Resources
301 Centennial Mall South
P.O. Box 94676
Lincoln, NE 68509-4676
(402) 471-2363 – Main
(402) 471-3944 – Direct
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STATE OF NEBRASKA
DEPARTMENT OF NATURAL RESOURCES
NOTICE OF RULEMAKING HEARING

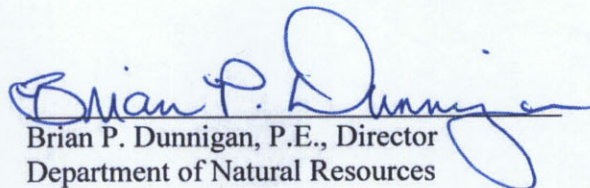
NOTICE IS HEREBY GIVEN THAT THE Nebraska Department of Natural Resources (Department) will hold a public rulemaking hearing pursuant to *Neb. Rev. Stat. § 84-907*. The hearing will be held at 1:00 p.m. (CDT) on Tuesday, September 17, 2013, at the Fairfield Inn & Suites, 510 Talmadge Rd., Kearney, Nebraska.

The purpose of the hearing is to take public comments about the proposed changes to Department rules *Nebraska Administrative Code* Title 457, Chapter 24, entitled "Determination of Fully Appropriated Basins, Subbasins or Reaches." The proposed change will make the rule more consistent with integrated management plans' goals and objectives and better align the technical analyses with the planning process.

The proposed rule is available at the offices of the Secretary of State, Regulations Division, Room 1305, State Capitol, Lincoln, Nebraska 68509-4696, or at the Department's website at www.dnr.ne.gov/rules/Proposed_dnrrules.html. The description of the fiscal and other impacts may be inspected and obtained at the Department of Natural Resources, Nebraska State Office Building, 301 Centennial Mall South, 4th floor, PO Box 94676, Lincoln, Nebraska 68509-4676.

All interested persons are invited to attend and make oral or written comments at the hearing. Interested persons may also submit written comments to the Department of Natural Resources address above prior to the hearing which will be made part of the hearing record at the time of hearing. Comments must be received by the Department of Natural Resources on or before 5:00 p.m. (CDT) September 16, 2013. If auxiliary aids or reasonable accommodations are needed to participate in the hearing, please call the Department at 402-471-2363 by August 30, 2013.

Date: August 12, 2013


Brian P. Dunnigan, P.E., Director
Department of Natural Resources

FINAL DRAFT RULES
Clean Version for September 17, 2013, hearing

August 14, 2013

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Title 457 - DEPARTMENT OF NATURAL RESOURCES
RULES FOR SURFACE WATER

Chapter 24 - DETERMINATION OF FULLY APPROPRIATED BASINS,
SUBBASINS OR REACHES

001 FULLY APPROPRIATED. Pursuant to *Neb. Rev. Stat.* § 46-713(3) a river basin, subbasin, or reach shall be deemed fully appropriated if the Department of Natural Resources (Department) determines based upon its annual evaluation and information presented at hearings subsequent to a preliminary determination of fully appropriated that then-current uses of hydrologically connected surface water and groundwater in the river basin, subbasin, or reach cause or will in the reasonably foreseeable future cause (a) the surface water supply to be insufficient to sustain over the long term the beneficial or useful purposes for which existing natural flow or storage appropriations were granted and the beneficial or useful purposes for which, at the time of approval, any existing instream appropriation was granted, (b) the streamflow to be insufficient to sustain over the long term the beneficial uses from wells constructed in aquifers dependent on recharge from the river or stream involved, or (c) reduction in the flow of a river or stream sufficient to cause noncompliance by Nebraska with an interstate compact or decree, other formal state contract or agreement, or applicable state or federal laws.

001.01A For purposes of *Neb. Rev. Stat.* § 46-713(1)(b), the Department shall reach a preliminary conclusion that a river basin, subbasin, or reach is fully appropriated if based on the Department's annual evaluation, it is determined that the cumulative near-term Total Demand and/or the cumulative long-term Total Demand of hydrologically connected groundwater and surface water exceeds the cumulative basin water supplies (BWS) that occur in either of the two sub-periods within the year when summed over the representative period of record used in the annual evaluation. The two sub-periods within the year are June 1 through August 31, inclusive and September 1 through May 31, inclusive. The length of the representative period of record will be determined through statistical analyses of the annual BWS as the set of years, extending back in time from the most recently available data, which captures long-term wet and dry cycles that may exist.

001.01B For purposes of 001.01A, the BWS is the streamflow water supply estimated to be available without the initiation of groundwater pumping from high capacity wells and surface water uses of natural flow and storage. The BWS is calculated by combining the following for each sub-period: gaged streamflows truncated at the 5% exceedence flow probability value plus streamflow depletions due to high capacity (greater than 50 gallons per minute) well groundwater pumping plus consumptive surface water uses minus the BWS originating upstream of the basin, subbasin, or reach.

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Clean Version for September 17, 2013, hearing

001.01C For purposes of 001.01A, the cumulative near-term Total Demand of groundwater and surface water is calculated by summing the water demands associated with the following activities for each sub-period within a basin, subbasin, or reach that have not previously been represented as a non-tributary downstream demand: (1) streamflow depletions due to high capacity (greater than 50 gallons per minute) well groundwater pumping; (2) consumptive water demands for surface water uses, inclusive of consumptive uses associated with storage appropriations and the use of such stored water; (3) any additional water (accounting for return flows) determined to be necessary to deliver streamflows to meet consumptive surface water demands; (4) streamflow available to meet instream flow appropriations (accounting for all development in place at such time the appropriation was granted); (5) any additional streamflow demands for hydropower operations not accounted for in the instream flow water demands; and (6) the BWS necessary to meet the proportionate amount of non-tributary demands downstream of a basin, subbasin, or reach. The non-tributary downstream demands of a basin, subbasin, or reach will be proportioned in accordance with that basin, subbasin, or reaches BWS relative to the total basin BWS. In calculating the cumulative near-term Total Demand no water uses developed subsequent to a fully appropriated designation or overappropriated designation shall be assigned to those fully appropriated or overappropriated basins as non-tributary downstream demands.

001.01D For purposes of 001.01A, the cumulative long-term Total Demand of groundwater and surface water is calculated by summing the water demands associated with the following activities for each sub-period within a basin, subbasin, or reach that have not previously been represented as a non-tributary downstream demand: (1) consumptive water demands for hydrologically connected high capacity (greater than 50 gallons per minute) groundwater well pumping; (2) consumptive water demands for surface water uses, inclusive of consumptive uses associated with storage appropriations and the use of such stored water; (3) any additional water (accounting for return flows) determined to be necessary to deliver streamflows to meet consumptive surface water demands; (4) streamflow available to meet instream flow appropriations (accounting for all development in place at such time the appropriation was granted); (5) any additional streamflow demands for hydropower operations not accounted for in the instream flow water demands; and (6) the BWS necessary to meet the proportionate amount of non-tributary demands downstream of a basin, subbasin, or reach. The non-tributary downstream demands of a basin, subbasin, or reach will be proportioned in accordance with that basin, subbasin, or reaches BWS relative to the total basin BWS. In calculating the cumulative long-term Total Demand no water uses developed subsequent to a fully appropriated designation or overappropriated designation shall be assigned to those fully appropriated or overappropriated basins as non-tributary downstream demands.

001.01E In the event that water demands are for a beneficial use other than irrigation, municipal, industrial, instream flow, or hydropower, (for example aquifers dependent on recharge from streamflow, induced recharge, flood control, aquaculture, etc.) the Department will evaluate such use and if necessary determine a methodology to incorporate such demand into any relevant analysis.

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Clean Version for September 17, 2013, hearing

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001.01F Use of the method described in this rule is not intended to express or imply any mandate or requirement that the method used herein must be included in the goals and objectives of any integrated management plan. Further, nothing in this section is intended to express or imply a priority of use between surface water uses and groundwater uses.

001.01G Pursuant to *Neb. Rev. Stat.* §46-713(1)(d) the Department shall rely on the best scientific data, information, and methodologies readily available to ensure that the conclusions and results contained in the annual evaluation are reliable. Prior to the release of the annual evaluation the Department shall provide sufficient documentation of the data, information, and methodologies used to reach its conclusions such that those conclusions could be independently replicated and assessed. The documentation will specify the specific data, information, and methodologies utilized in the annual evaluation to represent the BWS, near-term Total Demand, and long-term Total Demand.

001.02A For purposes of *Neb. Rev. Stat.* § 46-713(3), the Department shall deem a basin, subbasin, or reach as fully appropriated if such preliminary determination is reached pursuant to 001.01A-G and if information provided at a subsequent hearing pursuant to subsection (4) of *Neb. Rev. Stat.* § 46-714 does not indicate that the criteria set forth in 001.02B or 001.02C apply or unless the Director finds based on written or oral testimony and evidence concerning the appropriation status for the river basin, subbasin, or reach, that a final designation of fully appropriated is not warranted at that time.

001.02B For any basin, subbasin, or reach preliminarily determined to be fully appropriated pursuant to 001.01A-G in which integrated management plan(s) have been initiated by all Natural Resources Districts within the hydrologically connected area, the Natural Resources Districts within that same hydrologically connected area have designated a management area for which a purpose is the integrated management of hydrologically connected groundwater and surface water, and the Natural Resources Districts and Department have not taken more than three years to complete such integrated management plan(s) the Department may reach a final determination that such basin, subbasin, or reach is not fully appropriated at that time.

001.02C For any basin, subbasin, or reach preliminarily determined to be fully appropriated pursuant to 001.01A-G in which integrated management plan(s) have been completed by all Natural Resources Districts within the hydrologically connected area, the Department will review the contents of such integrated management plan(s) to ensure that appropriate limitations on new water uses are included in such integrated management plan (s), inclusive of controls on such new uses pursuant to *Neb. Rev. Stat.* § 46-739(6)(b), and such integrated management plan(s) includes a plan to monitor water uses in a manner consistent with 001.01A-G. Upon the Department completing this review the Department may reach a final determination that such basin, subbasin, or reach is not fully appropriated at that time.

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001.03 The geographic area within which the Department preliminarily considers surface water and groundwater to be hydrologically connected for the purpose prescribed in *Neb. Rev. Stat. § 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 ten (10) percent of the amount pumped in that time.

002 INFORMATION CONSIDERED. For making preliminary determinations required by *Neb. Rev. Stat. § 46-713* the Department will use the best scientific data and information readily available to the Department at the time of the determination. Information to be considered will include:

1. Department records on the regulation of surface water appropriations;
2. Department databases and maps of surface water appropriations;
3. Department Hydrographic Reports;
4. Department and United States Geologic Survey stream gage records;
5. Department's registered well data base;
6. Technical hydrogeological reports and publications subject to Department peer review;
7. Department reviewed groundwater models and resulting model outputs;
8. Certified irrigated acres provided by the natural resources districts;
9. Water use information provided by other state agencies, natural resources districts, irrigation districts, reclamation districts, public power and irrigation districts, mutual irrigation companies, canal companies, municipalities, and other water users; and
10. Any other information deemed appropriate by the Department for the purpose of conducting the determination

EFFECTIVE DATE: DATE, 2013

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RULES FOR SURFACE WATER

Chapter 24 - DETERMINATION OF FULLY APPROPRIATED BASINS, SUB-BASINS OR
REACHES

~~001 FULLY APPROPRIATED. Pursuant to Neb. Rev. Stat. § 46-713(3) (Reissue 2004, as amended), a river basin, subbasin, or reach shall be deemed fully appropriated if the Department of Natural Resources determines that then-current uses of hydrologically connected surface water and ground water in the river basin, subbasin, or reach cause or will in the reasonably foreseeable future cause (a) the surface water supply to be insufficient to sustain over the long term the beneficial or useful purposes for which existing natural flow or storage appropriations were granted and the beneficial or useful purposes for which, at the time of approval, any existing instream appropriation was granted, (b) the streamflow to be insufficient to sustain over the long term the beneficial uses from wells constructed in aquifers dependent on recharge from the river or stream involved, or (c) reduction in the flow of a river or stream sufficient to cause noncompliance by Nebraska with an interstate compact or decree, other formal state contract or agreement, or applicable state or federal laws.~~

~~001.01A Except as provided in 001.01C below, for purposes of Section 46-713(3)(a), the surface water supply for a river basin, subbasin, or reach shall be deemed insufficient, if after considering the impact of the lag effect from existing groundwater pumping in the hydrologically connected area that will deplete the water supply within the next 25 years, it is projected that during the period of May 1 through September 30, inclusive, the most junior 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.~~

~~For purposes of this rule, the "annual crop irrigation requirement" will be determined by the annual irrigation requirement for corn. This requirement is based on the average evapotranspiration of corn that is fully watered to achieve the maximum yield and the average amount of precipitation that is effective in meeting the crop water requirements for the area.~~

~~The inability to divert will be based on stream flow data and diversion records, if such records are available for the most junior surface water appropriator. If these records are not available, the inability to divert will be based on the average number of days within each time period (May 1 to September 30 and July 1 to August 31) that the most junior surface water appropriation for irrigation would have been closed by the Department and therefore could not have diverted during the previous 20 year period. In making this~~

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REACHES

~~calculation, if sufficient stream flow data and diversion data are not available, it will be assumed that if the appropriator was not closed, the appropriator could have diverted at the full permitted diversion rate. In addition the historical record will be adjusted to include the impacts of all currently existing surface water appropriations and the projected future impacts from currently existing ground water wells. The projected future impacts from ground water wells to be included shall be the impacts from ground water wells located in the hydrologically connected area that will impact the water supply over the next 25 year period.~~

~~001.01B In the event that the junior water rights are not irrigation rights, the Department will utilize a standard of interference appropriate for the use, taking into account the purpose for which the appropriation was granted.~~

~~001.01C If, at the time of the priority date of the most junior appropriation, the surface water appropriation could not have diverted surface water a sufficient number of days on average for the previous 20 years to satisfy the requirements of 001.01A, the surface water supply for a river basin, subbasin, or reach in which that surface water appropriation is located shall be deemed insufficient only if the average number of days surface water could have been diverted over the previous 20 years is less than the average number of days surface water could have been diverted for the 20 years previous to the time of the priority date of the appropriation.~~

~~When making this comparison, the calculations will follow the same procedures as described in 001.01A. When calculating the number of days an appropriator could have diverted at the time of the priority date of the appropriation, the impacts of all appropriations existing on the priority date of the appropriation and the impacts of wells existing on the priority date of the appropriation shall be applied in the same manner as in 001.01A. As in 001.01A above, in making this calculation, if sufficient stream flow data and diversion data are not available, it will be assumed that if the appropriator was not closed, the appropriator could have diverted at the full permitted diversion rate.~~

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~~Use of the method described in this rule is not intended to express or imply any mandate or requirement that the method used herein must be included in the goals and objectives of any integrated management plan adopted for a river basin, subbasin or reach determined to be fully appropriated under this rule. Further, nothing in this section is intended to express or imply a priority of use between surface water uses and ground water uses.~~

~~001.02 The geographic area within which the Department preliminarily considers surface water and ground water to be hydrologically connected for the purpose prescribed 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 percent of the amount pumped in that time.~~

~~002 INFORMATION CONSIDERED. For making preliminary determinations required by Neb. Rev. Stat. Section 46-713 (Reissue 2004, as amended) the Department will use the best scientific data and information readily available to the Department at the time of the determination. Information to be considered will include:~~

- ~~Surface water administrative records~~
- ~~Department Hydrographic Report~~
- ~~Department and United States Geologic Survey stream gage records~~
- ~~Department's registered well data base~~
- ~~Water level records and maps from Natural Resources Districts, the Department, the University of Nebraska, the United States Geological Survey or other publications subject to peer review~~
- ~~Technical hydrogeological reports from the University of Nebraska, the United States Geological Survey or other publications subject to peer review~~
- ~~Ground water models~~
- ~~Current rules and regulations of the Natural Resources Districts~~

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~~The Department shall review this list periodically, and will propose amendments to this rule as necessary to incorporate scientific data and information that qualifies for inclusion in this rule, but was not available at the time this rule was adopted.~~

~~EFFECTIVE DATE: December 4, 2006~~

DRAFT

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Title 457 - DEPARTMENT OF NATURAL RESOURCES
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Chapter 24 - DETERMINATION OF FULLY APPROPRIATED BASINS, SUBBASINS OR
REACHES

001 FULLY APPROPRIATED. Pursuant to *Neb. Rev. Stat.* § 46-713(3) a river basin, subbasin, or reach shall be deemed fully appropriated if the Department of Natural Resources (Department) determines based upon its annual evaluation and information presented at hearings subsequent to a preliminary determination of fully appropriated that then-current uses of hydrologically connected surface water and groundwater in the river basin, subbasin, or reach cause or will in the reasonably foreseeable future cause (a) the surface water supply to be insufficient to sustain over the long term the beneficial or useful purposes for which existing natural flow or storage appropriations were granted and the beneficial or useful purposes for which, at the time of approval, any existing instream appropriation was granted, (b) the streamflow to be insufficient to sustain over the long term the beneficial uses from wells constructed in aquifers dependent on recharge from the river or stream involved, or (c) reduction in the flow of a river or stream sufficient to cause noncompliance by Nebraska with an interstate compact or decree, other formal state contract or agreement, or applicable state or federal laws.

001.01A For purposes of *Neb. Rev. Stat.* § 46-713(1)(b), the Department shall reach a preliminary conclusion that a river basin, subbasin, or reach is fully appropriated if based on the Department's annual evaluation, it is determined that the cumulative near-term Total Demand and/or the cumulative long-term Total Demand of hydrologically connected groundwater and surface water exceeds the cumulative basin water supplies (BWS) that occur in either of the two sub-periods within the year when summed over the representative period of record used in the annual evaluation. The two sub-periods within the year are June 1 through August 31, inclusive and September 1 through May 31, inclusive. The length of the representative period of record will be determined through statistical analyses of the annual BWS as the set of years, extending back in time from the most recently available data, which captures long-term wet and dry cycles that may exist.

001.01B For purposes of 001.01A, the BWS is the streamflow water supply estimated to be available without the initiation of groundwater pumping from high capacity wells and surface water uses of natural flow and storage. The BWS is calculated by combining the following for each sub-period: gaged streamflows truncated at the 5% exceedence flow probability value plus streamflow depletions due to high capacity (greater than 50 gallons per minute) well groundwater pumping plus consumptive surface water uses minus the BWS originating upstream of the basin, subbasin, or reach.

001.01C For purposes of 001.01A, the cumulative near-term Total Demand of groundwater and surface water is calculated by summing the water demands associated with the following activities for each sub-period within a basin, subbasin, or reach that have not previously been represented as a non-tributary downstream demand: (1) streamflow depletions due to high capacity (greater than 50 gallons per minute) well groundwater pumping; (2) consumptive water demands for surface water uses, inclusive of consumptive uses associated with storage appropriations and the use of such stored water; (3) any additional water (accounting for return flows) determined to be necessary to deliver streamflows to meet consumptive surface water demands; (4) streamflow available to meet instream flow appropriations (accounting for all development in place at such time the appropriation was granted); (5) any additional streamflow demands for hydropower operations not accounted for in the instream flow water demands; and (6) the BWS necessary to meet the proportionate amount of non-tributary demands downstream of a basin, subbasin, or reach. The non-tributary downstream demands of a basin, subbasin, or reach will be proportioned in accordance with that basin, subbasin, or reaches BWS relative to the total basin BWS. In calculating the cumulative near-term Total Demand no water uses developed subsequent to a fully appropriated designation or overappropriated designation shall be assigned to those fully appropriated or overappropriated basins as non-tributary downstream demands.

001.01D For purposes of 001.01A, the cumulative long-term Total Demand of groundwater and surface water is calculated by summing the water demands associated with the following activities for each sub-period within a basin, subbasin, or reach that have not previously been represented as a non-tributary downstream demand: (1) consumptive water demands for hydrologically connected high capacity (greater than 50 gallons per minute) groundwater well pumping; (2) consumptive water demands for surface water uses, inclusive of consumptive uses associated with storage appropriations and the use of such stored water; (3) any additional water (accounting for return flows) determined to be necessary to deliver streamflows to meet consumptive surface water demands; (4) streamflow available to meet instream flow appropriations (accounting for all development in place at such time the appropriation was granted); (5) any additional streamflow demands for hydropower operations not accounted for in the instream flow water demands; and (6) the BWS necessary to meet the proportionate amount of non-tributary demands downstream of a basin, subbasin, or reach. The non-tributary downstream demands of a basin, subbasin, or reach will be proportioned in accordance with that basin, subbasin, or reaches BWS relative to the total basin BWS. In calculating the cumulative long-term Total Demand no water uses developed subsequent to a fully appropriated designation or overappropriated designation shall be assigned to those fully appropriated or overappropriated basins as non-tributary downstream demands.

001.01E In the event that water demands are for a beneficial use other than irrigation, municipal, industrial, instream flow, or hydropower, (for example aquifers dependent on recharge from streamflow, induced recharge, flood control, aquaculture, etc.) the Department will evaluate such use and if necessary determine a methodology to incorporate such demand into any relevant analysis.

FINAL DRAFT RULES

August 14, 2013

Redline showing changes to the current rules

001.01F Use of the method described in this rule is not intended to express or imply any mandate or requirement that the method used herein must be included in the goals and objectives of any integrated management plan. Further, nothing in this section is intended to express or imply a priority of use between surface water uses and groundwater uses.

001.01G Pursuant to *Neb. Rev. Stat. §46-713(1)(d)* the Department shall rely on the best scientific data, information, and methodologies readily available to ensure that the conclusions and results contained in the annual evaluation are reliable. Prior to the release of the annual evaluation the Department shall provide sufficient documentation of the data, information, and methodologies used to reach its conclusions such that those conclusions could be independently replicated and assessed. The documentation will specify the specific data, information, and methodologies utilized in the annual evaluation to represent the BWS, near-term Total Demand, and long-term Total Demand.

001.02A For purposes of *Neb. Rev. Stat. § 46-713(3)*, the Department shall deem a basin, subbasin, or reach as fully appropriated if such preliminary determination is reached pursuant to 001.01A-G and if information provided at a subsequent hearing pursuant to subsection (4) of *Neb. Rev. Stat. § 46-714* does not indicate that the criteria set forth in 001.02B or 001.02C apply or unless the Director finds based on written or oral testimony and evidence concerning the appropriation status for the river basin, subbasin, or reach, that a final designation of fully appropriated is not warranted at that time.

001.02B For any basin, subbasin, or reach preliminarily determined to be fully appropriated pursuant to 001.01A-G in which integrated management plan(s) have been initiated by all Natural Resources Districts within the hydrologically connected area, the Natural Resources Districts within that same hydrologically connected area have designated a management area for which a purpose is the integrated management of hydrologically connected groundwater and surface water, and the Natural Resources Districts and Department have not taken more than three years to complete such integrated management plan(s) the Department may reach a final determination that such basin, subbasin, or reach is not fully appropriated at that time.

001.02C For any basin, subbasin, or reach preliminarily determined to be fully appropriated pursuant to 001.01A-G in which integrated management plan(s) have been completed by all Natural Resources Districts within the hydrologically connected area, the Department will review the contents of such integrated management plan(s) to ensure that appropriate limitations on new water uses are included in such integrated management plan (s), inclusive of controls on such new uses pursuant to *Neb. Rev. Stat. § 46-739(6)(b)*, and such integrated management plan(s) includes a plan to monitor water uses in a manner consistent with 001.01A-G. Upon the Department completing this review the Department may reach a final determination that such basin, subbasin, or reach is not fully appropriated at that time.

001.03 The geographic area within which the Department preliminarily considers surface water and groundwater to be hydrologically connected for the purpose prescribed in *Neb. Rev. Stat. §*

FINAL DRAFT RULES

August 14, 2013

Redline showing changes to the current rules

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 ten (10) percent of the amount pumped in that time.

002 INFORMATION CONSIDERED. For making preliminary determinations required by *Neb. Rev. Stat. § 46-713* the Department will use the best scientific data and information readily available to the Department at the time of the determination. Information to be considered will include:

1. Department records on the regulation of surface water appropriations;
2. Department databases and maps of surface water appropriations;
3. Department Hydrographic Reports;
4. Department and United States Geologic Survey stream gage records;
5. Department's registered well data base;
6. Technical hydrogeological reports and publications subject to Department peer review;
7. Department reviewed groundwater models and resulting model outputs;
8. Certified irrigated acres provided by the natural resources districts;
9. Water use information provided by other state agencies, natural resources districts, irrigation districts, reclamation districts, public power and irrigation districts, mutual irrigation companies, canal companies, municipalities, and other water users; and
10. Any other information deemed appropriate by the Department for the purpose of conducting the determination

EFFECTIVE DATE: DATE, 2013

**SUBMIT TO GOVERNOR BEFORE SUBMITTING TO EXECUTIVE BOARD AND
BEFORE PUBLIC HEARING DATE IS SET**

**PROPOSED REGULATION
GPRO COVERPAGE
(ATTACH TO PRE-REVIEW CHECKLIST)**

RECEIVED
JUL 09 2013
Gov's Policy Research

Agency: Nebraska Department of Natural Resources
Title, Chapter of Rules submitted: Title 457 Chapter 24
Subject: Determination of Fully Appropriated Basins, Subbasins, or Reaches
Prepared by: Jesse Bradley
Telephone: (402) 471-0586
Date submitted to Governor: July 9, 2013

Projected dates for public hearings: The week of August 26th.

Projected deadline for final approval: October 31, 2013.

N/A A copy of the section of laws or federal regulations that triggered these changes is attached.

FOR GOVERNOR OFFICE RECORDS

Advisor Assigned: MARK L. MATULLA
Date approved to proceed: 07/22/2013
Options for proceeding: SEE BELOW

- a) No further contact with GPRO is necessary until final rules have been approved by the Attorney General.
- b) Contact Governor through GPRO concerning issues raised in Negotiated Rulemaking procedures.
- c) Submit Rules and Regulations Policy Review Checklist to Governor if rules are changed hereafter and a new public hearing is scheduled.
- d) Keep the Governor informed through GPRO as issues arise in negotiations, drafting sessions, advisory board meetings, and public hearings.
- e) Specific policy comments per Governor's instructions is attached.

PROPOSED REGULATION POLICY PRE-REVIEW CHECKLIST

Agency: Nebraska Department of Natural Resources
Title, Chapter of Rules submitted: Title 457 Chapter 24
Subject: Determination of Fully Appropriated Basins, Subbasins, or Reaches
Prepared by: Jesse Bradley
Telephone: (402) 471-0586

A. Policy Changes and Impacts

1. What does the regulation do and whom does it impact? Provide a brief description of the proposed rule or regulation and its impacts on state agencies, political subdivisions, and regulated persons or entities.

This rule describes the scientific data and other information that will be considered by the Department and guides the detailed technical analyses conducted by the Department to assess the water supplies and water uses in a given basin, subbasin, or reach of stream. The Department is required, pursuant to *Neb. Rev. Stat. § 46-713(1)(d)*, to promulgate rules that support making this preliminary determination. *Neb. Rev. Stat. § 46-713(1)(b)* requires that the Department conduct an annual evaluation and arrive at a preliminary determination as to whether a basin is or is not currently fully appropriated.

One of the key purposes of conducting this analysis and reaching a preliminary designation of fully appropriated is to protect water uses in existence prior to the designation. Thus, persons with existing water uses should see limited impact. Persons seeking new water uses may be impacted depending on the limits placed on the availability of water supplies to support these new uses. However, any such limitations on the future availability of water supplies for existing or new uses would be determined in the subsequent integrated management planning process that is required by statute. The effect on other state agencies should be negligible.

2. Describe changes being proposed to current policy and briefly provide rationale.

The rationales for the changes are two-fold. The first rationale is that a technical analysis of the difference between overappropriated and fully appropriated, which is required in the overappropriated portion of the Platte River Basin, must be performed in a manner consistent with the Department's regulations. The current regulations do not accommodate such an analysis in a manner that is consistent with the integrated management plans' goals and objectives in that portion of the basin.

That is why the Department first initiated review of these regulations in conjunction with those NRDs in 2009. The second rationale is that the current regulations used for conducting this evaluation are very limited in their ability to meet the needs of subsequent integrated management planning processes. The change being proposed will much better align the technical analyses necessary to understand water supplies and water uses with the planning process that seeks to balance water supplies and water uses over the long term.

- B. Why is the rule necessary? Explain and provide an identification of authorizing statute(s) or legislative bill(s).

The Department is required by *Neb. Rev. Stat. § 46-713* to annually evaluate those areas of the state not currently designated as fully or overappropriated or for which a status change (i.e., reversal of previous designation) has occurred in the past four years. *Neb. Rev. Stat. § 46-713(1)(b)* requires that the Department conduct this annual evaluation and arrive at a preliminary determination as to whether a basin is or is not currently fully appropriated. Additionally, rules are required to be promulgated by the Department pursuant to *Neb. Rev. Stat. § 46-713(1)(d)*. The Department does currently have promulgated rules; however A.2. above describes the Department's rationale for seeking this rule change.

1. Update of regulation (repeal of obsolete statutes, reflect current policy, editing or technical language changes, etc.).

The updated regulation is an improved means for conducting the annual evaluation and provides for more consistent application of methods in line with the current integrated management planning processes and in support of conducting analyses required pursuant to *Neb. Rev. Stat. § 46-715(5)(c)*.

2. Annual changes – cost of living, hunting season schedules, etc.

N/A

3. Law was changed – federal ____ or state ____ [Cite authorizing statute(s) or legislative bill(s)].

N/A

4. Extension of established policy or program, new initiatives or changes in policy (within statutory authority).

N/A

5. Constituent initiated.

N/A

6. Financial needs – increases/decreases in fees.

N/A

7. Litigation requires changes in rules.

The Nebraska Supreme Court set aside the Department's preliminary determination of fully appropriated in the Niobrara River Basin, as a result of the 2008 Annual Evaluation. The revised rule is consistent with the integrated planning process and should be more easily understood.

8. Addresses legal or constitutional concerns of Attorney General's office.

N/A

9. Implements federal or court mandate.

N/A

10. Other (explain).

N/A

C. What happens if these rules are not adopted?

If the suggested regulations are not adopted the current process will continue. The continuance of this process may result in continued confusion related to how a designation of fully appropriated translates through to the integrated management planning process. Additionally, the Department and NRDs in the overappropriated basin would be left with limited means to conduct the technical analyses required to assess the difference between current and fully appropriated levels of development.

D. Policy Checklist

1. Is this an update or editorial change reflecting essentially no change in policy?

No

2. Does the policy in the proposed regulation reflect legislative intent?

Yes

3. Is the policy proposed in the regulation a state mandate on local government?

No

Is it funded? N/A

4. Is the policy proposed in the regulation a federal mandate on local government?

No

Is it funded? N/A

E. Fiscal Impact. In addition to completing the required Fiscal Impact Statement (a copy must be attached to this document), the agency must address the following:

1. Will the proposed regulation reduce, increase, or have no change in resources – funds, personnel or FTE?

The proposed regulations will have no additional fiscal impact.

2. Have initial contacts been made with citizens or organizations that may be impacted by the proposed regulation?

Yes. The Department has made extensive efforts to reach out to organizations and citizens that may be affected by this regulation (please see the additional documents provided).

3. Does the proposed regulation impact another agency? Explain the impact.

The proposed regulation does not impact another state agency. *Neb. Rev. Stat. § 46-713(1)(b)* requires that the Department conduct this annual evaluation and arrive at a preliminary determination as to whether a basin is or is not currently fully appropriated. Additionally, the Department is required to have rules promulgated pursuant to *Neb. Rev. Stat. § 46-713(1)(d)*.

4. Will the proposed regulation reduce, increase, or have no change on reporting requirements of businesses?

The proposed regulation should not increase the reporting requirements for businesses. The statutes already provide for the Department to request information to support the evaluation, and thus, this regulation would not add any additional reporting requirements for businesses. Furthermore, the Department is not looking to expand any of the current reporting requirements in support of this evaluation.

5. What is the agency's best estimate of the additional or reduced spending? If there is none, please note. If receipt of federal funds is contingent upon approval of the proposed regulation, then indicate the amount and nature of the federal funds affected, and enclose laws or correspondence from federal officials substantiating the information.

The proposed regulations are not anticipated to require additional spending or reduce current spending.

6. Include a description of the impact that the proposed regulation will have on the number of state employees and how the agency intends to address proposed increases or decreases in FTE.

The proposed regulation will not have an impact on the number of state employees or FTEs.

- F. Unique problems or issues and recommendations.

None

- G. Who is expected to be affected, or to oppose or support the proposed regulation? Explain what initial informal contacts have been made with organizations or citizens who may be affected by the regulation prior to the public hearing.

Several efforts have been made to contact organizations and citizens that may be affected by this regulation. These efforts have included working with outside agencies (natural resources districts, irrigation districts, and other water management entities) to evaluate new methods to be implemented in the regulation. Additionally, several stakeholder meetings, presentations and public comment forums have been held throughout the four-year period in which these new regulations have been developed (see attachments to Question E.2.). Furthermore, the Department has adapted the original draft rule (April 8, 2013) to include modifications in line with addressing various public comments which were largely aimed at greater clarity of key points.

Based on comments received, opposition is likely strongest from those water use groups with current surface water appropriations and environmental interest. This opposition is seemingly aimed less at this specific rule and more at the general statutory structure for regulating surface water and groundwater. Much of this opposition appears to be aimed at having the Department implement more stringent criteria in the rules with the desired outcome of immediate basin designations (for those areas not already fully appropriated) or for raising the bar higher with regard to reducing the impacts of groundwater use in future increments of integrated management planning efforts in the overappropriated basin.

- H. Are these proposed rules a likely candidate for negotiated rulemaking?

No

Explain.

As referenced above (Question E.2.) the Department has worked with a broad-based group of stakeholders in the development and refinement of these rules for a period of almost four years. Given this work with stakeholders and the input provided by various stakeholders, the Department does not believe that the rule is a candidate for the negotiated rulemaking process.

Has the process been completed?

No

If so, explain how the issues were addressed.

N/A

Director's Verification of Review

I have reviewed these proposals and verify that, at this stage of the regulation's development, these questions have been accurately addressed.

Director's Signature

Brian P. Dunnington

Date

7-9-13

1446327
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September 12, 2013

VIA EMAIL

Nebraska Department of Natural Resources
P.O. Box 94676
Lincoln, NE 68509-4676
Email: dnr.newfabrules@nebraska.gov

**RE: COMMENTS REGARDING LEGAL DEFICIENCIES WITH NDNR
FINAL DRAFT RULES, TITLE 457, CHAPTER 24, DETERMINATION OF
FULLY APPROPRIATED BASINS, SUBBASINS OR REACHES**

Ladies and Gentlemen:

These comments are submitted by the undersigned as legal counsel for the NORTH PLATTE NATURAL RESOURCES DISTRICT, NORTH PLATTE VALLEY WATER ASSOCIATION and the NORTH PLATTE VALLEY IRRIGATORS PROTECTIVE ASSOCIATION. We request these comments be included in the record of the September 17, 2013 hearing.

I attended the public meeting/presentation of the April 8, 2013, first proposed draft rule held in Scottsbluff, Nebraska on May 14, 2013, and I have reviewed the transcript of the May 23, 2013, meeting with NDNR, which was held in Lincoln, Nebraska. I have also reviewed the "Final Draft Rules" dated August 14, 2013, and participated in a lengthy discussion of the same on September 6, 2013 with representatives of the North Platte Natural Resources District and Jesse Bradley of NDNR, the official most knowledgeable, and we believe, primarily responsible for authoring the rule.

Although we see substantial changes to some of the language of the proposed rule, several legal deficiencies render the latest draft susceptible to constitutional challenges, both on its face and in the future in its application.

The NDNR is limited in its exercise of its rule and regulation authority by our constitutional and statutory provisions and decisions of the Nebraska Supreme Court. There are several long established and accepted rules of law applicable to the "Final Draft Rules." These legal principles include:

- a. Language of a regulation must convey sufficiently definite warnings as to proscribed conduct when measured by common understanding and practices, or will be held unconstitutionally vague or overbroad. *Richardson v. City of Omaha*, 214 Neb. 97 (1983).



- b. An agency regulation which purports to set a standard to determine fully appropriated status must not be opaque. *Middle Niobrara Natural Resources Dist. v. Department of Nat. Resources*, 281 Neb. 634, 799 N.W.2d 305 (2011).
- c. NDNR is limited in its rule making authority to powers granted to the agency by the statutes, which it is to administer. A rule and regulation must be consistent with the statute under which it is promulgated. *Wagoner v. Central Platte Natural Resources Dist.*, 247 Neb. 233 (1995).
- d. NDNR may not employ its rule making power to modify, alter or enlarge portions of its enabling statute, or to adopt regulations contrary to the statutes or Nebraska Constitution that it is empowered to enforce. *Project Extra Mile v. Nebraska Liquor Control Com'n*, 283 Neb. 379 (2012); *Upper Big Blue Natural Resources Dist. v. State Dept. of Natural Resources*, 276 Neb. 612 (2008).
- e. Regulations cannot be arbitrary. An agency is limited in its rule making authority to powers delegated to it by the statute, which it is to administer. *State ex rel. Spire v. Stodola*, 228 Neb. 107 (1988).
- f. Regulations adopted by an administrative agency must have a basis in the statute in connection in which they have been adopted and be within the authority granted the administrative agency. *Review Committee, Venue VII, Commodity Stabilization Service, U.S. Dept. of Agriculture vs. Willey*, 275 F.2d 264, certiorari denied, 363 U.S. 827 (1960).
- g. Finally, with respect to the rule's total dependence upon "averages", the United States Supreme Court in *Nebraska v. Wyoming* recognized that water planning decisions and allocations based on stream flows must be based "on the dependable flow." The Court pointed out that the average of all years was far from being a proper measure of the available supply. 'An intending irrigator, acquiring a water right based on such a measure, would be almost certainly confronted with drought when his need for water was greatest. Crops cannot be grown on expectations of average flows which do not come, nor on recollections of unusual flows which have passed down the stream in prior years.' (Emphasis added.)

Due to unrealistic time constraints for comments imposed by NDNR, the following examples of legal deficiencies in the Final Draft are not represented to be exhaustive:

I.

Section 001.01A creates two "sub-periods" within the year to calculate demands, which is used in the methodology to determine basin water supplies. The first sub-period runs from June 1st through August 31st, and the second from September 1st through May 31st. These periods, which apparently are intended to coincide with the irrigation and non-irrigation seasons respectively, lack a relationship to the actual irrigation and non-irrigation seasons in this State, especially in our western arid portions. The United States Supreme Court Decree in *Nebraska v. Wyoming*, and the United States Bureau of Reclamation in its storage water contracts with North Platte Project, Warren Act and Glendo contractors, establish and recognize the irrigation season as running from May 1st through September 30th of each year for those appropriators governed by the Decree and supplemental storage contracts.

However, with respect to natural flow irrigators in the Panhandle, the irrigation season often starts in April of each year and may run into the fall until freezing temperatures restrict

deliveries and application for beneficial use. No natural flow appropriative permit for North Platte Valley irrigators, to my knowledge, has any permit restrictions regarding the times for diversion and application of irrigation water – only the restriction that the water must be applied to a beneficial use. There are likewise no seasonal restrictions for ground water. There is nothing in our statutes which sets or even suggests an irrigation season – availability and beneficial use are the measures of an appropriative right. Certainly there is no statutory authority permitting NDNR to establish an irrigation season, however it is designated (e.g. sub-period).

Depending upon the year, and typically in dry years as we have frequently experienced in the last couple of decades, irrigation seasons will begin early and run late as long as water is available. Although eastern and central parts of the State normally experience significantly more precipitation, the average (1981-2010) precipitation at the Scotts Bluff County Airport station from April 1st through October 30th has only been 10.29 inches. Obviously, considering all major crop water requirements, irrigation water in this area is more than a luxury, it's an absolute necessity, and significant diversions and applications both prior to June 1st and after August 31st are often absolutely necessary to raise viable crops.

Accordingly, the sub-periods in the Final Draft Rule would be considered arbitrary, inconsistent with and unauthorized by our statutes governing water rights and permits.

II.

The lack of definitions of terms and phrases not readily understood by laymen or even recognized as terms of art by water experts also results in a rule that is unconstitutionally vague. Several examples of these undefined words and phrases are included in the comments of the North Platte Natural Resources District and include “non-tributary downstream demand” used throughout the Final Draft Rule.

The words “developed” and “development” as used in 001.01C and 001.01D also need to be defined. For example, is a use actually developed as of the permit filing date or assigned priority date? Or is a use developed when water is actually diverted and applied to a beneficial use under the permit, or at some other time? Does the partial use of an appropriation qualify as “development” of the full permitted use?

The phrase “any additional water (accounting for return flows)” in 001.01D(3) is also vague. Return flows will fluctuate significantly every year due to precipitation, storage supplies called for and several other factors. Will return flows be a debit or credit to additional water for the purpose of determining total supply and demand? Will return flows be averaged or determined annually?

The word “rights” was stricken and “demands” was substituted in section 001.01E. What is the significance of that change? Does demand(s) equal the authorized limit of the appropriation, the historical use, or some other quantification?

These are just some examples of ambiguity and uncertainty in the terminology of the draft rule. Several others identified by the North Platte Natural Resources District and other commentators also render the proposed rule vague and lacking in direction.

It may well be that the drafters of the proposed rule have in their minds what the rule means to them today, but there is certainly no consensus or understanding of the meaning of several terms among water planners and users, how the rule may be interpreted by future NDNR personnel, and the regulation as a whole “when measured by common understanding and practices” is unconstitutionally vague.

III.

During the public meeting/presentation on the initial draft, several concerns were raised concerning the failure of the proposed rule to address how Nebraska's constitutional and statutory priority and preference rules would be addressed. In response thereto, the Final Draft Rules now provide "nothing in this section is intended to express or imply a priority of use between surface water uses and ground water uses." Unfortunately, this language does nothing to address those concerns and actually creates more uncertainty. First of all, it is unclear what "this section" refers to. Secondly, whether it applies to the entire proposed draft or not, it does nothing to clarify the situation with the constitutional and statutory priority system for surface water and the preference system applied to both surface water and ground water. In determining the BWS, there is nothing in the Final Draft Rule which requires adherence to or consideration of, the constitutional and statutory preference and priority systems. For example, a junior downstream hydro-demand would apparently be given equal consideration with upstream senior irrigation rights and ground water irrigation uses in applying the rule. This fails to recognize several controlling constitutional and statutory provisions in this State, including Article XV, Section 4; Article XV, Section 6; Article XV, Section 7; Neb. Rev. Stat. §§46-201, 46-204 and 46-613.

Nebraska has intentionally placed domestic use and irrigation use as the favored uses, the necessity of which is declared to be a "natural want." For one example, power generation, while a beneficial use, simply does not have this status. This was made clear by the Nebraska Supreme Court in *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District*, 97 Neb. 139, 149 N.W. 363 (1914). Additionally, the municipal uses, except the portion which may qualify as domestic use, lack a preference over irrigation. Accordingly, adopting a rule and regulation which fails to address and recognize priority and preference requirements in this State is inconsistent with and contrary to the Department's enabling authority.

IV.

Finally, Mr. Bradley was kind enough to make himself available and attempt to answer many questions in his teleconference with the North Platte Natural Resources District on September 6, 2013. The rule, it seems, intentionally avoids directly addressing or providing guidance on critical supply and demand issues, and fails to help water planners and water users understand or predict how the rule could affect water users. Several times Mr. Bradley candidly commented, with respect to questions on the meaning or application of the rule, that it was "something we have to work on", "lots of questions remain", "very complicated and very technical", and finally admitted that the rule was actually no more than a "precursor to the planning process". The rule is at least one or two shades more cloudy than "opaque", which the Nebraska Supreme Court has condemned.

In addition, Mr. Bradley acknowledged that the enabling statutes, including Neb. Rev. Stat. §§46-713, 46-175 simply did not provide the "flexibility" that the rule provides. NDNR is governed by the language of the statutes, and NDNR, as cited above, has no power to modify, alter or enlarge portions of the statutes. Consistency with the enabling statute is the requirement.

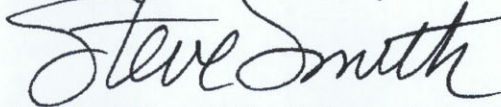
V.

NDNR must recognize the findings of the United States Supreme Court and the North Platte Decree governing the upper portions of the North Platte River, which judicially endorse the old common-sense saying known to all irrigators that "crops cannot be grown on expectations of average flows." The entire draft rule is premised on averages which in effect is meaningless or even misleading when it comes to realistic planning and applications.

CONCLUSION

For the foregoing reasons, the NDNR should take the time necessary to revise the rule to comply with statutory and constitutional provisions which will allow water planners and water users to understand and predict what is required. The pervading vagueness contained in this Final Draft Rule will inevitably result in many conflicting interpretations, providing even less certainty for all those directly affected by the final draft rule, and ultimately resulting in numerous and prolonged disputes and legal challenges.

Respectfully submitted,



North Platte Natural Resources District, North Platte Valley Irrigators Protective Association and
the North Platte Valley Water Association by:

Counsel, Steven C. Smith, NSBA # 13912

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September 13, 2013

Brian Dunnigan, P.E., Director
Nebraska Department of Natural Resources
301 Centennial Mall South
Lincoln, NE 68509-4676

State of Nebraska
Department of
Natural Resources
Filed in the Department of
Natural Resources at 3:50
O'clock P M. this 13th
day of SEPTEMBER 20 13
S. Bowen

Subject: Opposition and Comments on DNR Draft Rule for the
Determination of Fully Appropriated Basins, Subbasins, or Reaches
Nebraska Administrative Code Title 457, Chapter 24

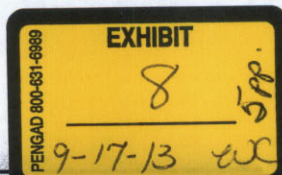
Mr. Dunnigan:

The Central Nebraska Public Power and Irrigation District (Central) opposes the proposed changes to the Department of Natural Resources (Department) rules *Nebraska Administrative Code Title 457, Chapter 24, "Determination of Fully Appropriated Basins, Subbasins, or Reaches"* and provides the following comments. The proposed rule is hydrologically flawed and fails to comply with the state statutes, as further discussed below. The proposed rule is inferior to the current rule, and should not be approved.

The Proposed Rule is Fundamentally Hydrologically Flawed

The proposed rule is fundamentally hydrologically flawed in that it improperly assumes that certain unusable excess water supply is available to meet water demands when in reality it is not. With water supply and demand, timing is of critical importance. Streamflow running past an irrigation diversion or municipal wellfield in the spring is not available to later satisfy the demands of crops and people during a hot summer. Floodwaters in a wet year are usually not available to provide drought relief in a dry year. Even where reservoirs provide some opportunity for retiming from times of plenty to times of need, there are real limitations on their ability to do so, and in no case can a reservoir retime a later excess to satisfy an earlier need. Contrary to this hydrologic reality, the proposed rule improperly cumulates water and demands throughout a season, and over multiple years, inflating the perception of usable water supply and pretending there is a balance in supply and demand where one does not actually exist.

From a seasonal aspect, the proposed rule divides the year into two seasons, one that runs June through August, and the other running September through May. Within each of these seasons the



proposed rule would cumulate water supply against water demand, irrespective of the timing of the supply and demand within that season. Thus excess streamflow early in the June through August season, from late spring runoff for example, is permitted to count against late summer demands even though the river may then be diminished. Irrigators in central and western Nebraska, for example, are quite accustomed to seeing years with enough natural flow to satisfy most or all canal requirements in June, even to the point of having excess flows pass downstream, with only the most senior of appropriations able to receive water in late July and August. There are similar problems with the September through May period, where needs for instream flows, power generation, or reservoir storage might not match the actual timing of the supplies. Such mismatches are masked because the proposed rule ignores these variations in timing and just cumulates water over the whole season.

Consider, for example, the specific recent case of the lower Platte River in the summer of 2012, where extremely low flows in the late summer created water supply problems for Lincoln and Omaha municipal wellfields. Notwithstanding that flows dropped below 500 cfs at Ashland for thirty-three consecutive days in July and August, flows in June were much higher than that, ranging between 7,540 cfs and 1,860 cfs. The proposed rule, in cumulating supplies over that entire season, would show an average flow of around 1,600 cfs, and perhaps reach a conclusion that there was no shortage of water for the municipal wellfields. The people of Lincoln that had to endure water restrictions that year know that there was not enough water in the river that summer, and they wouldn't need to have advanced scientific degrees or years of experience in water resources management to recognize that any rule that would conclude otherwise must be wrong.

From a multi-year aspect, the proposed rule cumulates streamflows over a "representative period" of several years, determined through "statistical analyses" to capture "long-term wet and dry cycles". These words give an impression of a technical effort to avoid problems that might arise from some bias that might be caused by hydrologic variability. Unfortunately, the rule proposed rule, in cumulating supplies across multiple years, doesn't prevent problems, it creates them. By cumulating flows in both wet and dry years, it allows for excess flows in wet years to be applied against demands that occur in other dry years, even though there may be little or no way that the excess supply could have actually been used to satisfy the demand.

Consider, for example, the recent case of Platte River flooding in 2011. In 2011, the North Platte River experienced significant volumes of floodwaters coming out of the Rocky Mountains and into Nebraska; so much so that nearly a million acre-feet of water passed through the system in excess of what was needed, could be beneficially diverted, or could be stored. By cumulating supplies over multiple years, those unusable flows would be used to satisfy demands in other drier

years, even dry years that would have occurred before 2011, such as the drought of 2002 through 2009, as if that water were in the river and available for use at that time.

The proposed rule includes a tacit acknowledgement of the problem of cumulating excess flows, as gaged streamflow is truncated at the five-percent exceedance value when the calculation is performed. However, this limitation is inadequate for addressing the problem created, as excess flows typically occur with a much greater frequency than once every twenty years and excess flows will be counted as available supply even though the flows can not be used to satisfy unmet demands.

The Proposed Rule Fails to Comply with State Law

The proposed rule fails to comply with state law, in that it does not perform the type of analyses required by *Nebraska Revised Statutes* § 46-713(3)(a). This statute makes reference to determining whether current water uses are now, or can reasonably be expected, impact on the water needed "to sustain the beneficial or useful purposes for which existing natural flow or storage appropriations were granted". The language is simple and straightforward; the statute contemplates an evaluation of impacts to appropriations. In contradiction to this statutory requirement, the proposed rule instead evaluates cumulative "demand". This proposed method of evaluation appears to be based on an assumption that, if the calculated demand is met, then appropriations must not have been harmed. Such an assumption, however, would be incorrect.

One way in which the cumulating of demand as described in the proposed rule fails to adequately evaluate potential impacts to appropriations is simply because of the problems described earlier in the discussion about cumulating over seasons and across years. Because the proposed rule, through cumulating, has the opportunity to mistakenly identify a water balance where in reality water shortages might occur, some of these shortages could negatively impact specific appropriations.

Another way in which the proposed rule can fail to identify real impacts to appropriations is in the different treatment of demands based on whether or not they are "consumptive". Implicit in this treatment is a mistaken assumption that water needed for a non-consumptive use must also be available to satisfy other uses in the same basin, subbasin, or reach. While this may sometimes be the case, it is not always so. Many non-consumptive uses (and even some consumptive uses for that matter) are removed from the stream and "bypass" certain other uses before the water ceases to be used and is returned to the stream. For example, both the Sutherland system along the North Platte River and Central's own Supply Canal along the Platte River bypass significant stretches of

river and numerous irrigation diversion locations as part of a non-consumptive hydropower use. Under the totaling of demands by reach under the proposed rule, the same water needed for hydropower would be assumed to be available for use by the bypassed irrigation canals, whereas in reality a greater amount of water is needed in order to satisfy all diversions. In this example, the proposed rule would underestimate the actual demand for water, and increase the chances that a shortage of water supply needed for an appropriation would not be identified by the calculation.

Yet another way in which the proposed rule runs contrary to the statute is in its treatment of storage appropriations. The proposed rule says that it considers as part of the total demand "consumptive water demands for surface water uses, inclusive of consumptive uses associated with storage appropriations and the use of such stored water" This language deviates from the requirements of the statute in two ways. First, by only looking at the consumption, it ignores significantly or entirely that water needed by an appropriation simply for storage in a reservoir. Second, by only considering whether or not an end use is satisfied, irrespective of whether such use is satisfied by natural flow or storage water, the proposed plan implicitly concludes as acceptable any harmful diminishment of a natural flow appropriation, so long as it can be made up by an increased use of storage water. However, the statute language is specific, and requires an evaluation of impacts to "natural flow or storage appropriations". There is nothing in the statute that permits the Department to ignore impacts to appropriations for storing water in reservoirs in performing its evaluation; and there is nothing in the statute that permits the Department to ignore impacts to natural flow appropriations just because the end use can be satisfied by an increased dependence on storage water.

Conclusion

Pusuant to *Nebraska Revised Statutes* § 46-713, the Department is to make a determination of whether or not a basin, subbasin, or reach is fully appropriated, and to do so based simply upon whether or not existing uses are causing (or will cause) impacts to appropriations, needed recharge, or interstate obligations. In the proposed rule, however, the Department appears to skip this step of evaluating for specific impacts, and instead is more broadly estimating what total supplies and demands are available for management. Indeed, the Department's public notice dated August 12, 2013, states that "[t]he proposed change will make the rule more consistent with integrated management plans' goals and objectives and better align the technical analyses with the planning process". However, this outcome, if achievable, may come at the expense of meeting the statutory requirements to determine whether impacts are occurring, including impacts to natural flow and storage appropriations.

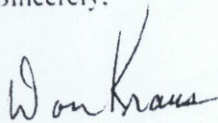
Brian Dunnigan, Director
Nebraska Department of Natural Resources
Comments on DNR Proposed Rule for Fully Appropriated Determination
September 13, 2013
Page 5 of 5

Unfortunately, the flaws in the proposed rule keep it from satisfying the intent and letter of the statute. These fundamental flaws are the cumulating of supplies and demands over time periods that suggest a water balance where a shortage would otherwise exist, and failure to evaluate for impacts to appropriations as required by the statute. The current rule, notwithstanding other flaws it may have that need correcting, does not contain either of these fundamental flaws.

The proposed rule is inferior to the current rule, is fundamentally flawed in ways that cannot be fixed, and should not be approved. If the Department believes that flaws in the current rule need corrected, it should initiate negotiated rulemaking with interested parties and start anew.

Central appreciates the opportunity to provide these comments.

Sincerely,



Don Kraus, P.E.
General Manager

SEP 16 2013

DEPARTMENT OF
NATURAL RESOURCES**METROPOLITAN**UTILITIES DISTRICT
SERVING THE COMMUNITY • 1913-2013

September 12, 2013

Mr. Brian Dunnigan
Director, NDNR
301 Centennial Mall South, 4th Floor
PO Box 94676
Lincoln, NE 68509-4676

Mr. Dunnigan,

On behalf of the Metropolitan Utilities District of Omaha I am submitting the following comments on the Final Draft Rules Title 457, Chapter 24 for the Department of Natural Resources along with the Draft Methodologies per your letter to Interested Parties dated April 8, 2013.

Background

The Metropolitan Utilities District of Omaha (District) provides safe potable water to more than 200,000 customer-owners in the greater Omaha metro area including Omaha, Bellevue, La Vista, Ralston, Bennington, Waterloo, and surrounding unincorporated areas. The District relies on the Platte River to provide about one-half of its water system capacity through recharge from the river into the wellfield's alluvial aquifers. The District has an induced groundwater recharge permit for both of its wellfields located along the Platte River.

In addition to the District's wellfields, the Platte River provides this crucial recharge to numerous other wellfields along the lower portion of the Platte River for the cities of Fremont, Lincoln, Louisville, and Papillion. Like the District, these municipal water systems provide domestic water for critical basic sanitation and consumption needs.



It is imperative that this appropriated flow is protected to provide for the health and well-being of hundreds of thousands of people living in these cities.

Comments

1. The final draft version of 457 NAC 24.001.01A, along with § 4.1.1.1 of the Draft Methodologies, split the annual evaluation into two time periods, June 1 through August 31 and September 1 through May 31, the District questions the basis for this time period selection and believes the logic behind the selection should be made available for discussion. The District notes that there may exist a need to use different time periods for different uses.

457 NAC 24.001.01A and Section 4.1.1.1 also reference perhaps the most important variable used in the determination process- the "*representative period of record*". DNR's intention for this important variable should be available for review and comment by interested parties.

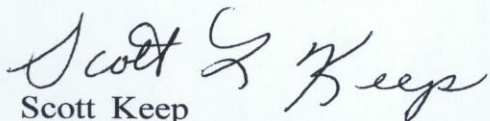
2. A determination of full appropriation in any stream segment should be not be delayed by the anticipation of future actions or changes. The District has always participated in and supported the system of water rights and appropriations. The District firmly believes that to maintain the integrity of this system it requires a program which will do all it can to ensure the maintenance of water flow in the lower Platte River. Nebr. Rev. Stat. § 46-713 seeks to protect existing users from encroachment of these rights and appropriations from future uses. Both the final draft version of 457 NAC 24.001.02B-C along with § 4.1.1.2 of the Draft Methodologies, appear to give too much priority to future uses by delaying the determination of fully appropriated status. § 46-713 allows for reevaluation of a determination based on belief by the Department that implementation of IMP controls may lead to a different determination. It appears to the District that 457 NAC 24.001.02B-C along with § 4.1.1.2 of the Draft Methodologies appear to simply assume that the IMP's controls enacted by numerous NRD's will be coordinated and effective and appears to allow for the Department to change the determination without a full reevaluation.

In the case where full appropriation is needed to protect existing uses; 457 NAC 24.001.02 B-C will cause inordinate delays and inaction. The result could easily be critical shortages and an eventual determination of over-appropriation.

3. The District believes the Final Draft language in 001.01B may not adequately exclude periods of "excessive" stream flow that is in actuality not available for surface water use or capable of satisfying groundwater depletions. The "excessive" stream flow skews upwards the total Basin Water Supply and has the effect of eroding the protection that § 46-713 should provide current users.
4. The District notes that § 4.3.1.4- Final Basin Water Supplies, references the natural dry or wet hydrologic cycles and the District certainly concedes that these cycles exist, but the District questions whether it is entirely appropriate to try to eliminate any bias in the data. Data that is slightly biased toward dry years would seem to provide the protection from the erosion of water rights when municipal and irrigation users need the protection most.

The District appreciates the opportunity to comment on this important ~~final~~ draft rule proposal. If you have any comments, please contact me at 402-504-7106.

Sincerely,



Scott Keep
Senior Vice President, Operations

cc: Rick Kubat- Metropolitan Utilities District
Joel Christensen- Metropolitan Utilities District
Kevin Tobin - Metropolitan Utilities District



nebraska Farm Bureau Federation®

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SEP 16 2013

DEPARTMENT OF
NATURAL RESOURCES

4:00 pm

September 16, 2013

Mr. Brian Dunnigan
Director, Dept. of Natural Resources
301 Centennial Mall South
Lincoln, NE 68509

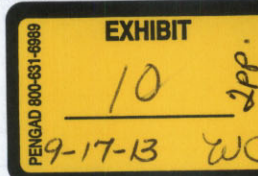
Dear Brian,

Nebraska Farm Bureau Federation (NFBF) would like to take this opportunity to offer the following comments to the Department of Natural Resources (DNR) on the *Title 457, Chapter 24- Determination of Fully Appropriated Basins, Sub-Basins or Reaches* Final Draft Rules released August 14, 2013. NFBF certainly appreciates the opportunity to provide comments and input on these regulations.

Overall, NFBF is supportive of the revisions in the final rules and believes the new rules could provide more simplicity and clarity to water users as to how DNR will conduct evaluations to determine the appropriated status of basins. NFBF also appreciates the flexibility in the proposed regulations in regards to the development of voluntary integrated management plans and a basin's fully appropriated determination. The flexibility will foster greater cooperation and collaboration in integrated management between the DNR, Natural Resources Districts and local water users.

NFBF offers the following specific comments on the proposed regulations:

- (1) NFBF continues to have concerns with the lack of specificity in the rules in regards to the methodologies to be used to arrive at some of the discretionary determinations to be made by DNR. Providing more specificity and identifying the methodologies would provide greater transparency and allow interested water users the opportunity to more easily evaluate whether the appropriate methodologies are being used. The new language inserted in the proposed regulations in 001.01G stating "the Department shall provide sufficient documentation of the data, information, and methodologies used to reach its conclusions such that those conclusions can be independently replicated and assessed" partially mitigates these concerns. However, NFBF continues to strongly encourage the DNR to be completely open and transparent on the methodologies employed and how they are used as it implements the new regulations.
- (2) The draft methodologies underlying the regulations propose a number of technical models to be used in performing fully appropriated evaluations. NFBF encourages the DNR to seek an independent, third-party review of any of the methodologies and their application as proposed in the regulations. A peer review would verify the robustness of the methodologies and the appropriateness of their use and would further give water users the comfort of knowing that DNR's annual evaluation is based on the best science, data, and methodologies readily available.
- (3) The proposed rules state the DNR will sum the annual basin uses and supplies across time to make a preliminary determination whether a basin is fully appropriated. In theory, this would mean a cumulative deficit of one acre-foot could mean a basin is preliminarily determined to be fully appropriated. Given the uncertainties and assumptions made in calculating both uses and supplies, NFBF would encourage the DNR to consider utilizing a range for triggering a preliminary determination rather than an absolute standard. For example, if the amount by which uses exceeded supplies was

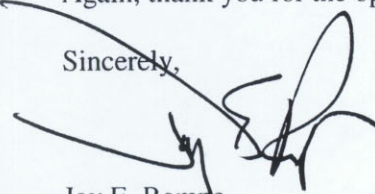


greater than a specific percentage of the basin's average annual supplies, then the basin would be declared preliminarily fully appropriated.

- (4) NFBF policy supports the use of 28%/40-year standard to define the hydrologically connected area. The proposed rules continue the 10%/50-year standard presently in place. While not consistent with NFBF policy, NFBF can accept the continuation of the existing standard, but would oppose any effort to widen the area beyond the 10%/50-year standard. Widening the area beyond the 10%/50-year line is problematic for several reasons. First, it could limit groundwater development with little assurance that stream flows or existing surface water appropriators would benefit. Second, it would test the credibility and acceptance with irrigators and other users of fully appropriated designations and integrated management plans. Third, sound science and the best data and methodologies are not without a margin of error. The relationship of hydrologically connected groundwater and surface water is extremely complex and site dependent. Geology, geography, land use changes, precipitation, and many other variables play a role in defining the relationship. Because of the uncertainties, caution should dictate limiting the geographic area. Fourth, widening the area beyond the 10%/50-year line will result in more landowners being subject to multiple-basin fully appropriated designations and integrated management plans. Such complications will increase user confusion, uncertainty and frustration. It would be difficult to convince groundwater users in one basin, several miles from a stream in another basin, that they must be part of an integrated management plan to protect stream flows for a stream several miles away. For these reasons, DNR should, at a minimum, maintain the 10%/50-year boundary and not extend it any further.

Again, thank you for the opportunity to submit these comments.

Sincerely,


Jay E. Rempe,
Vice President/Governmental Relations

NORTH PLATTE

Natural Resources District

Chimney Rock
on the Oregon Trail

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September 13, 2013

Brian Dunnigan, Director
Nebraska Department of Natural Resources
P.O. Box 94676
Lincoln, NE 68509-4676

RE: North Platte NRD Testimony on the Final Draft Rules, Title 457, Chapter 24, Determination of Fully Appropriated Basins, Subbasins or Reaches

Dear Mr. Dunnigan:

The North Platte Natural Resources District (District or NPNRD) would like to provide the following comments for consideration as part of the record for the September 17, 2013, hearing related to the proposed changes to the Nebraska Department of Natural Resources (Department or DNR) final draft rules, Title 457, Chapter 24, Determination of Fully Appropriated Basins, Subbasins or Reaches.

These comments are predicated on our understanding that the methodology described therein will be used in the determination of the difference between fully appropriated (FA) and overappropriated (OA) in the OA portion of the Platte River Basin.

1. The purpose of the proposed rules is to further describe, in a specific and comprehensible manner, the requirements found in Neb. Rev. Stat. §46-713, related to the determination as to whether those basins, subbasins or reaches, not currently fully or overappropriated, are fully appropriated. Unfortunately, the proposed rules, as drafted, do not accomplish this purpose and only serve to generate confusion, even among Nebraska water professionals, regarding their requirements.

2. A fundamental element of rules, although absent in the proposed rules, is a comprehensive and detailed definitions section. Because of this omission, terms are left undefined leading to a multitude of interpretations, which can potentially result in an atrocious situation of disagreements/conflicts between competing interests, significant changes in implementation methods by future administrations, differing opinions among policymakers and potential unintended consequences. The following are examples of significant terms lacking definitions:

A. Demand – The meaning of “demand” in sections 001.01C, 001.01D and 001.01E and how it applies to each type of “activity” is indeterminate. For example:

1. The demand related to “high capacity well groundwater pumping” could be construed as the capacity of the well, the calculated consumptive use amount associated with that well, or the actual pumping volume.

Your Local Voice For Natural Resources Management



Department of Natural Resources

September 13, 2013

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2. The demand related to “consumptive water demands for surface water uses” could be construed, for irrigation purposes, as the potential consumptive use if all acres under the appropriation were irrigated or the consumptive use of the actual number of acres that are irrigated.

3. The demand related to “consumptive uses associated with storage appropriations and the use of such stored water” presumably, for the storage appropriation, the only consumptive use is evaporation. As to the “use of such stored water,” mean the consumptive use or the total amount of water applied.

4. Without a further explanation or definition of the demand related to “any additional water (accounting for return flows) determined to be necessary to deliver streamflows to meet consumptive surface water demands,” it is difficult to discern what this demand represents.

5. The demand related to “streamflow demands for hydropower operations” could be construed as the amount granted in the appropriation or the historic amount of use.

6. The term non-tributary downstream demand is not a term of art used by water professionals in Nebraska. Therefore, without a definition, one can only speculate as to its meaning.

7. The demand related to other uses “for example aquifers dependent on recharge from streamflow” found in section 001.01E, refers to the entire aquifer, whereas the statute refers to “wells constructed in aquifers dependent on recharge from streamflow.” Demands assigned to a portion(s) of the river based on the entire aquifer versus the wells in the aquifer are very different in magnitude.

B. Developed – It is difficult to determine what “water uses developed subsequent to a fully appropriated designation or overappropriated designation” means. The word “developed” in this context could be construed as appropriations granted or wells drilled post-FA or OA or the new or expanded use post-FA or OA of an appropriation granted pre-FA or OA.

3. It would be nearly impossible for water technical experts to conduct the analysis described in the proposed rules without definitions of the types of demands listed in comment 2. These experts would be forced to interpret what those demands consist of and the values associated with them leading to differences of opinions between multiple experts.

4. Ground water depletions should only be accounted for as a demand where the depletions occur within the river system and which, at that point, may be considered as a supply for downstream users. These ground water demands should not be placed as a demand on upstream users. Since an NRD only has the authority to manage ground water within its borders, the premise of shifting downstream ground water depletions upstream would appear to give an upstream NRD standing in a downstream NRD’s management of ground water, due to the potential of the upstream NRD and its water users having to provide mitigation for downstream ground water demands. This would place an undue burden on the upstream NRD and its constituents due to items such as increased costs for review and analysis of downstream management activities.

Department of Natural Resources

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5. It is unclear how, if at all, the surface water priority and surface water and ground water preference system is accounted for in the draft rules. If equal consideration be given to determining downstream demands for appropriations of differing priority and/or preference, like downstream ground water management, the NPNRD will have to review and analyze downstream surface water activities for potential impacts to our District.

6. The assignment of downstream ground water and surface water demands upstream has major policy, economic and legal implications for upstream users. If, in the unlikely event, upstream users are charged with mitigation of the assessed downstream demands, the economic and social impacts to the NPNRD would be significant.

7. We are concerned how this rule will be applied to the determination of the difference between FA and OA in the OA Platte Basin. The OA Platte Basin is a complex system and, as such, we question whether the simplified methodology in the proposed rules will be sufficient to provide the results necessary for the FA-OA determination. It is our expectation that the Department will work with the five OA Platte Basin NRDs to amend, as necessary, the proposed rules prior to their use in the determination of the FA-OA difference.

8. The incorrect terminology is used in sections 001.01C and 001.01D regarding the fully appropriated determination. The term "fully appropriated *designation*" is used in the proposed rules; however, the term "fully appropriated *determination*" is used in statute. There is a distinct difference between these terms as the overappropriated designation happened as function of statute, whereas the fully appropriated determination is made following the procedures, which include the analysis described in the proposed rules, found in Neb. Rev. Stat. §§46-713 and 46-714.

9. The rules the Department is proposing to implement the requirements of statutes originating from LB962 (2004), would seem to be in conflict with the intent of LB962 (2004) to bring parity to all water users within the state regardless of location. The proposed rules have the possibility to create discord between upstream users and downstream users through the assessment and assignment of downstream demands.

Thank you for consideration of our comments on the draft rules. Based on the issues we have raised, we ask that you not adopt the rules until such time as these and other issues brought forth at the hearing are addressed. We are very interested in working with you during that process.

We would also like to extend our appreciation to Jesse Bradley for taking the time to discuss the draft rules with us via a conference call on Friday, September 6, 2013.

Sincerely,



Ronald D. Cacek
Manager



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September 17, 2013

Brian Dunnigan, Director
Nebraska Department of Natural Resources
301 Centennial Mall South
Lincoln, NE 68509-4676

Re: City of Lincoln Comments on Final Draft Rules for Determining
Fully Appropriated Basins

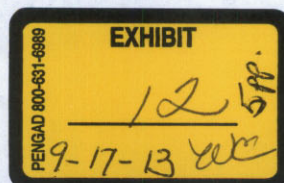
Dear Mr. Dunnigan:

The City of Lincoln provides the following comments relative to the Department's proposed rules for determining fully appropriated basins.

**THE MAJORITY OF THE DECISION MAKING IS CONTAINED IN THE
METHODOLOGY NOT THE RULE**

This was a comment that we made in the preliminary review to the rules and methodology. The methodology is not part of the official rule yet it contains much of the decision making criteria. It seems inappropriate to put details of decision making in documents that are not part of process that can be appealed or officially challenged. While the desire for flexibility is understandable, if the significant parts of the decision making are only included in the methodology which is not subject to the rule making processes, this format is flawed. I believe this violates the requirement in NRS § 46-713(1)(d) "The Department shall specify by rule and regulation the types of scientific data and other information that will be considered".

There are times when the methodology, in our opinion, does not mesh with the statute requirements and the rule language. For example, Neb. Rev. Stat. § 46-713(3) generally states that a basin is fully appropriated if: current uses of hydrologically connected surface water and groundwater in a basin cause, or will cause in the reasonably foreseeable future, (a) the surface water to be insufficient to sustain over the long term the beneficial purposes for which the existing surface water appropriations were granted, (b) the streamflow to be insufficient to sustain over the long term the beneficial uses from wells constructed in aquifers dependent on recharge from the basin's river or stream, . . . The rules say the exact same thing in Title 457 Chap. 24 001. The methodology states in 4.1.1.1:



As a final step in the Department's preliminary determination, the Department is also required, pursuant to Neb. Rev. Stat. § 46-713(1)(b) to assess how its preliminary conclusions, based on current development, might change by predicting future development. The predictions of future development account for existing development trends and project development that may be added in the next twenty-five years. Because the Department does not use this portion of the evaluation in the determination of basin status, no further specifics are defined in Department Rules and Regulations.

The methodology appears to directly state that even though the statute requires the consideration of the reasonably foreseeable future impacts, the Department will not use this information. The City would argue that "current uses" language of NRS § 46-713(a) includes the future component of a granted appropriation.

Any non recognition of the full amount of the City's appropriation causes the City of Lincoln concern because the permitted amount of stream flow in our induced recharge permit is partially based on a future demand component. We are left wondering what good is our permit if it is not considered in its entirety.

1. In light of the methodology language, it is uncertain if the Rule addresses or considers the entirety of the City of Lincoln's (or any other public water supplier) water rights. The consideration is limited to the near-term and long-term Total Demand as of the time of the decision. The term "Use" in the previous draft rule was replaced with "Demand". While "Demand" may have a different emphasis, the difference is unknown from reviewing the language. These two calculations appear to have only a historical component, no forward-looking component. If there is agreement with our view of how to interpret "current uses" and a distinction drawn between speculative future development and non speculative future development based on a granted appropriation and completed infrastructure, then our comments in this point are unnecessary. Further discussion with the Department staff on this topic would be helpful. If there is not agreement, our concerns with the apparent approach include the following:
 - a. It is uncertain where a City's induced ground water recharge permit fits in the scheme of these rules and methodologies. Is it in Surface Water or Ground Water? The City has an order from DNR indicating a streamflow right of 704 cfs for certain times of the year. The City has dozens of wells on the river bank and islands in the Platte river. The City also has ground water transfer permits in the amounts of 110 million gallons per day. It is unknown where in the rule these demands are taken into account.

- b. The consumptive uses of a public water supplier are different from the uses of irrigation. It is inappropriate and imprudent for a public water supplier to be focused on the current needs of the citizenry that it provides for. The public water supplier always need to plan, budget and build for a growth component in its efforts. It always builds more capacity than it needs for Day 1, more treatment than it needs for Day 1, and more transmission capability than it needs for Day 1. Likewise, it acquires permits for more consumption than it uses on Day 1. It is for that reason that the statutes require a forward looking consideration in this area. In it's induced groundwater recharge application, Lincoln was required to identify and articulate the amounts needed for the future development and growth of the City. The order granting a specific stream flow amount was based, in part, on the future component. The concept of "then-current uses" in Draft Final Rule 457 NAC 24.001 and the statute NRS § 46-713(3) needs to consider the uses that have been permitted, and for which infrastructure has already been built. Draft Methodology 4.4 states: "The results of this analysis alone (the consideration of the impact of reasonable future development within a basin) cannot cause a basin, subbasin, or reach to be declared fully appropriated." We would say where that current use or future development component is reflected in the acquisition of a permit, the construction of millions of dollars of facilities, and the demonstrated historical trend of population growth, why not? The statute appears to require just that.
- c. Lincoln has been specifically told by previous staff at the DNR that all of the permitted amounts were specifically accounted for in its determination of the uses that were evaluated in the determinations of whether there was a fully appropriated Lower Platte in the past. This proposed Rule and methodologies now seem to have abandoned that consideration.
 - i. Draft methodology 4.3.2.1 and 4.3.2.2 consider two approaches to calculate consumptive use. First, water pumped minus water returned. Second, current population times per capita amount. Neither approach considers any future component.
- d. In light of the statutory requirements (NRS § 46-235) required prior to the granting of an induced recharge right, the lack of recognition of the full amounts of stream flow seems bad policy at best. Before granting an induced recharge right, the Director is required to find:
 - i. The appropriation is required to maintain the wells for the uses requested.
 - ii. The rate and timing is necessary to maintain the wells for the uses requested. (Which include a future component)

- iii. The application is in the public interest.
- iv. The wells were located and constructed to take reasonable advantage of the aquifer conditions
- e. If the State, in conducting a determination of a fully appropriated basin, were to fail to recognize a public water supplier's full water right amount under an induced ground water recharge permit, it seems confused and inconsistent policy.

THE SUB-PERIODS ARE NOT APPROPRIATE FOR THE CITY'S NEEDS

There does not appear to be an explanation of how the Department came to the conclusion of the two sub-periods that are indicated in the draft final rules. How were these time periods chosen? What analysis was used? Do they work for all areas of the state on all rivers? The sub-period of June 1 through August 31 is of most concern. This period includes the month of June in which we have rarely had precipitation issues with the two months that we have had the most precipitation issues (July and August). There appears little relationship to what happens in June with what happens in the latter two months. There is little correlation between stream flow amounts in the Platte in June versus August. While precipitation in large amounts in June may correlate with large stream flows and be helpful to land based irrigators storing subsoil moisture, it is of no benefit to surface water irrigators or municipal wellfields along the Platte in August. There is concern that by including the wettest month in this sub-period, you will have the effect of delaying the decision to declare a basin fully appropriated by statistical manipulation of the average stream flows for the period.

There is also no explanation of how the representative period will be determined. No criteria is identified for decision making relative to the "period" except the absolute discretion of Department. It appears the period of record can change depending on factors only known to Department.

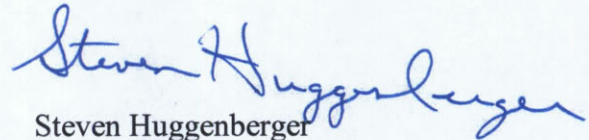
I think the Department should take a different approach when considering public water supplier uses or demands. Virtually all of the rights granted to public water suppliers, whether ground water sourced or surface water sourced, include a future use component as indicated in these comments previously. Significant public expenditures have been made in reliance on those rights. The Department, as we have been lead to believe in the past, should consider the entirety of the water rights held by public water suppliers when making this analysis of fully appropriated. Such a future component inclusion position is supported by NRS § 46-713 and the statutes providing for the granting of water rights to public water suppliers. If a public water supplier holds a right that is not reasonable in amount for some reason, the statutes provide mechanisms for determinations of nonuse and cancellation. Public water suppliers, which generally provide water for the highest preference in our state, domestic use, are required to

Brian Dunnigan, Director
Nebraska Department of Natural Resources
September 17, 2013
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document in great detail, the uses for which they request water rights. All of the State's statutory framework allows for prudent future demands to be made a part of those requests. To then fail to take such future amounts into account when making a fully appropriated determination is poor policy.

I appreciate the opportunity to provide these comments on behalf of the City of Lincoln and welcome further clarification discussions.

Sincerely,



Steven Huggenberger
Assistant City Attorney

SH/ce



Nebraska Public Power District

"Always there when you need us"

September 17, 2013

Brian Dunnigan
Nebraska Department of Natural Resources
301 Centennial Mall South
PO Box 94676
Lincoln, NE 68509

Dear Mr. Dunnigan:

RE: Nebraska Public Power District Comments on the Proposed Rules for Nebraska Administrative Title 457, Chapter 24

Nebraska Public Power District (NPPD) opposes the proposed changes to the Department of Natural Resources (Department) rules *Nebraska Administrative Code* Title 457, Chapter 24, "Determination of Fully Appropriated Basins, Subbasins, or Reaches". This is because the proposed rules are unclear and appear to be flawed and hydrologically inaccurate. We provide the following comments.

Nebraska Public Power District holds over one hundred surface water appropriations for irrigation, power production, water storage, and storage use across the State of Nebraska. Implementation of the proposed rules may allow harm to occur to water supplies for those rights in basins not declared fully or over appropriated. Additionally, many of NPPD's appropriations are held in the portion of the Platte River basin which has been declared overappropriated. If the Department uses this rule to determine the overall difference between fully appropriated and overappropriated, as the DNR has verbally stated multiple times, I believe NPPD's water supplies and uses will be harmed.

The proposed rules are fatally flawed based on the facts that the rules are: 1) vague, unclear and appear to be severely deficient; 2) do not accomplish the requirements of 46-713(3); 3) are hydrologically inaccurate and 4) exceed the statutory authority of the Department.

The Proposed Rules are Vague, Unclear and Appear to be Severely Deficient

There is a lack of definitions for many terms found in the rules which makes it impossible to understand how the rules will be applied. The proposed rules utilize a variety of terms that can be interpreted in different ways or may be implemented or calculated in a variety of ways. For example, the proposed rules indicates a summation of consumptive uses, it is not known what is included in this category, how it will be determined, and if the

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Department's actions will be complete. It is not known what the Department intends without definitions of terms utilized included in the rule. Another example is the rules refer to a flow at a gage. It is not known what flows and what gage the rules refer to. The rules refer to representative period of record but it is not stated what that is, or how it is determined, so it can be determined it is adequate for its intended use.

Additionally, the methodology for completing the analyses needs to be codified in the rules. The rules themselves lack detail necessary to understand how they will be applied or how the lack of necessary data will be mitigated.

The Proposed Rules Do Not Accomplish the Requirements of Nebraska Revised Statute Section 46-713

The proposed rules do not accomplish the purpose of Nebraska Revised Statute 46-713(3), which provides for the evaluation of whether existing uses would cause individual uses or aquifers to be unsustainable or Nebraska to be in noncompliance. The statute provides:

(3) A river basin, subbasin, or reach shall be deemed fully appropriated if the department determines based upon its evaluation conducted pursuant to subsection (1) of this section and information presented at the hearing pursuant to subsection (4) of section 46-714 that then-current uses of hydrologically connected surface water and ground water in the river basin, subbasin, or reach cause or will in the reasonably foreseeable future cause (a) the surface water supply to be insufficient to sustain over the long term the beneficial or useful purposes for which existing natural-flow or storage appropriations were granted and the beneficial or useful purposes for which, at the time of approval, any existing instream appropriation was granted, (b) the streamflow to be insufficient to sustain over the long term the beneficial uses from wells constructed in aquifers dependent on recharge from the river or stream involved, or (c) reduction in the flow of a river or stream sufficient to cause noncompliance by Nebraska with an interstate compact or decree, other formal state contract or agreement, or applicable state or federal laws.

By parsing out the language in the statute, one can easily discern the purpose.

"A river basin ... shall be deemed fully appropriated if ... then-current uses of hydrologically connected surface water and ground water in the river basin ... cause ...

1) "the surface water supply to be insufficient to sustain over the long term the beneficial or useful purposes for which existing natural-flow or storage appropriations were granted ..."

2) "the streamflow to be insufficient to sustain over the long term the beneficial uses from wells constructed in aquifers dependent on recharge from the river ... involved ..."

And 3) "reduction in the flow of a river or stream sufficient to cause noncompliance by Nebraska ..."

Nowhere in the statute does it provide that whole basin's (hereafter when basin is used it implies the use of basins, subbasins or reaches as provided for in the statute) demands can

be compared to whole basin's supplies to determine if a basin is fully appropriated. The statute is clear, impacts to supplies must be evaluated and then the supply impact must be applied to existing appropriations. It appears that the Department is exceeding its statutory authority by altering the purpose of 46-713.

The Proposed Rules are Hydrologically Inaccurate

The concept of the proposed rules supply and demand calculations are incomplete and flawed when compared to the water budget supply and demand equations found in any basic hydrology textbook. What the Department will find is that:

- Surface water flowing in and out of the basin is misapplied in the proposed methodology.
- Basin precipitation, groundwater flowing in, groundwater flowing out, consumption from non-irrigated lands, and changes in groundwater storage and surface water storage are missing.

In addition there other issues with the equations:

- Groundwater consumptive demand and surface water consumptive demand are duplicated in part or in whole on both sides of the equation.
- Downstream basin demand is duplicated in part.
- The non-consumptive demands identified in the demand calculation must be measured at the point location where they are needed, not at another point in the basin. The non-consumptive surface water demands include surface water non-consumptive delivery demands, surface water instream flow demands, and surface water hydro demands.

The rules as drafted appear to create an estimate of the supply originating in the basin, not the supply which will be available to meet demands in the basin. The physical reality is that the demands in the basin will be met by both the supply flowing into the basin and the supply originating in the basin. The proposed methodology may make sense for accounting where basin water is allocated between multiple users based on percentages of supply originating in that basin, as may be the case in the Republican River Basin, but the proposed rules process is not applicable for determining the impacts of existing uses on streamflow and that impact on surface water appropriations, aquifers, and state agreements as 46-713 requires.

The proposed rules do not make sense based on the location of the demands and supplies. The rules state that a basin is fully appropriated if the basin water demands equal or exceed the basin water supplies. The water supply calculation includes water flowing past a gage in the basin and the water demand includes well uses upstream of that gaging station. It should appear obvious to anyone that the water in the river at the end of the basin – which is added into the basin supply – can in no possible situation meet the demands of an upstream well. NPPD understands surface water and groundwater is interconnected, and that groundwater use can affect downstream river flows, but the rules as written finds the reverse, downstream river flows can supply upstream groundwater use, when it is a physical impossibility. In the same way, the water demand calculation includes surface

water consumptive uses above the stream gage. Water flowing downstream of a consumptive use cannot be used to satisfy that use, it is a physical impossibility.

The proposed rules are hydrologically flawed because they require the summing of multiple years to determine the supply. The quantity of water flowing in a river in the first year or years of the analysis period can meet the demands of the last year of the analysis period only when there is unlimited water storage available in the basin. See Exhibit A which shows the last 20 years flows in the Platte River at Grand Island. It is a fact that water flowing at the end of the analysis period cannot meet the demands which occur during earlier years in the analysis period. The proposed rules as written finds that water flowing out of the basin at any time during the period can meet the demands which occur at any time during the period that is a physical impossibility.

The same flaw occurs when supplies are cumulated within a sub-period. The irrigation season sub-period is defined in the proposed rules as June 1st through August 31st. Exhibit B shows the 2013 Platte River flows at Grand Island. Over half, in fact 58%, of the total flow between June 1st and August 31st occurred in June and was gone and useless to meet the irrigation demands in July and August.

The proposed rule lacks sufficient detail to understand how the truncation provided for will be applied. But, based on a reasonable assumption of how it could be applied, the truncation value for stream flows appears to be much too low and will result in too high of a water supply estimation. A 5% exceedance flow probability is an event which would occur on average once every 20 years. The flow values related to those types of events are much too high to be effectively used or stored. See Exhibit C which shows Platte River flows at Grand Island between 1993 and 2012 with flows truncated to the 95% percentile annually. In one year a small amount of flow would be truncated. The proposed truncation process is flawed and inappropriate to address the proposed cumulating process.

Exceed Statutory Authority

There are three additional areas where the proposed rules appear to allow the Department to exceed its statutory authority.

Rules 01.002B and 01.002C would allow the Department to find a basin, sub-basin, or reach not fully appropriated when the rest of the rules would dictate that it must be fully appropriated. There is nothing in the Groundwater Management and Protection Act which would allow the Department to do so.

One purpose of LB 962 and the existing statutes was to create a system to identify water supply problems before they became problems and initiate planning to prevent conflicts. By not including a look into the future as required by Statute 46-713(3), which includes additional future uses, it appears that the Department is not meeting its statutory requirement. The existing rule was implemented by persons in the Department that participated in the discussions and development LB 962. The existing rules look at conditions in the future based on recent trends to evaluate whether conditions of fully appropriated are eminent. The proposed rules do not meet the intent of looking into the future as existing rules do, and as intended by the statutes.

Proposed rule section 001.01E seems to give DNR the ability to create methodology on the fly for any other use and the ability to change that methodology at any time. This also exceeds the statutory authority of the Department. All criteria and methodology the Department intends to implement must be included in the rules.

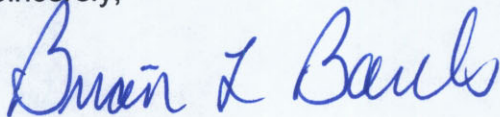
Additional Comments

- Exceedance is misspelled in 001.01B.
- The sub-periods defined by the rules may not protect existing uses in that they are too limiting. NPPD irrigation canals typically begin operating late April and can continue delivering irrigation water until the middle of September. The June 1st through August 31st time period may be insufficient.
- The rules as drafted are conceptually deficient in the same number of years will be used for both the long term and short term analyses. Conceptually it does not make sense. The rules fail to include analysis of drought periods which can represent the short term. Droughts are also when impacts of existing uses are most apparent.
- The proposed rules are flawed in that they do not describe how storage appropriations are incorporated or how the proposed rules will use natural flow and storage use appropriations.
- 10/50 is not an adequate measure of de minimis groundwater impacts on streamflow.
- Ignoring the impacts of wells with capacities less than 50 gpm may not appropriate when considering the basin demands. There is a difference between separating that class of well for regulatory purposes and for planning purposes such as this. A well that pumps 30 gpm may have a greater impact on a water supply than a well that pumps 52 gpm depending on location and geology.

Based on the above, I urge you to reject the proposed rules as written. I also urge you and your staff to continue to meet with both groundwater and surface water interests to develop new proposed rules that reflects the purposes of the statutes and reflects the water supplies and uses of the basin.

Thank you for the opportunity to provide comments on the proposed rule.

Sincerely,



Brian L. Barels
Water Resources Manager

Exhibits Attached

Exhibit A – Graph showing truncated annual flows for the Platte River at Grand Island

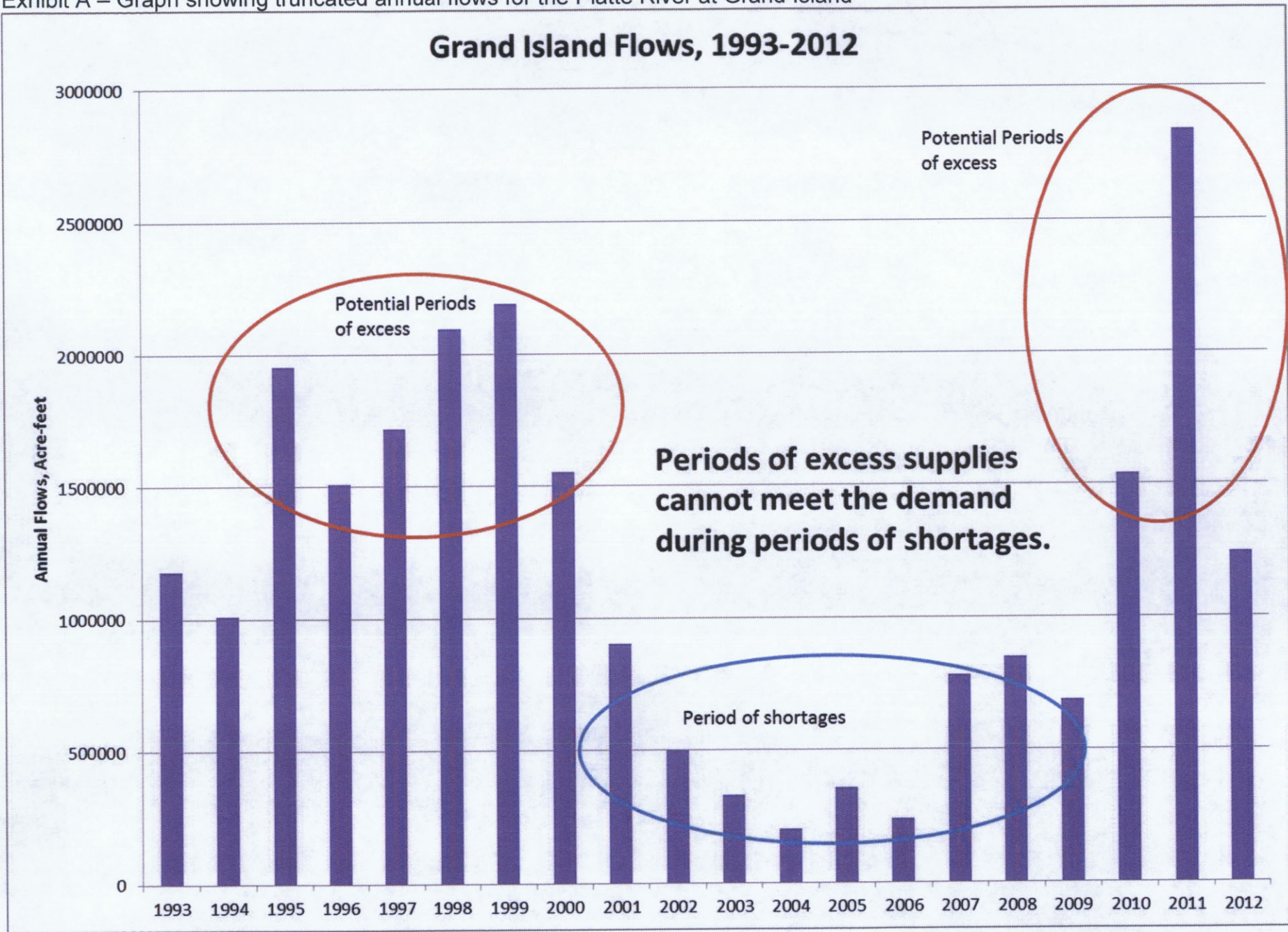
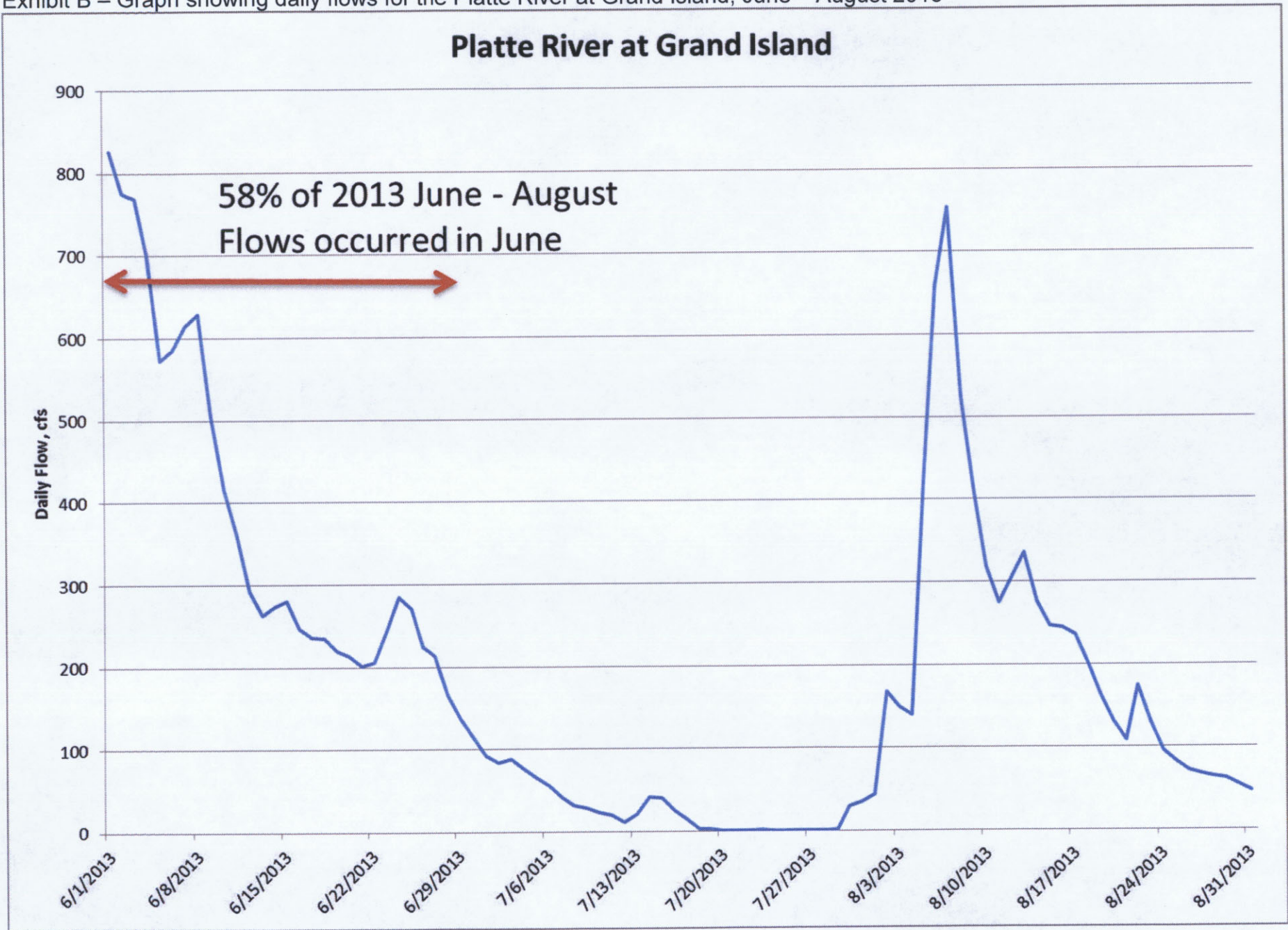
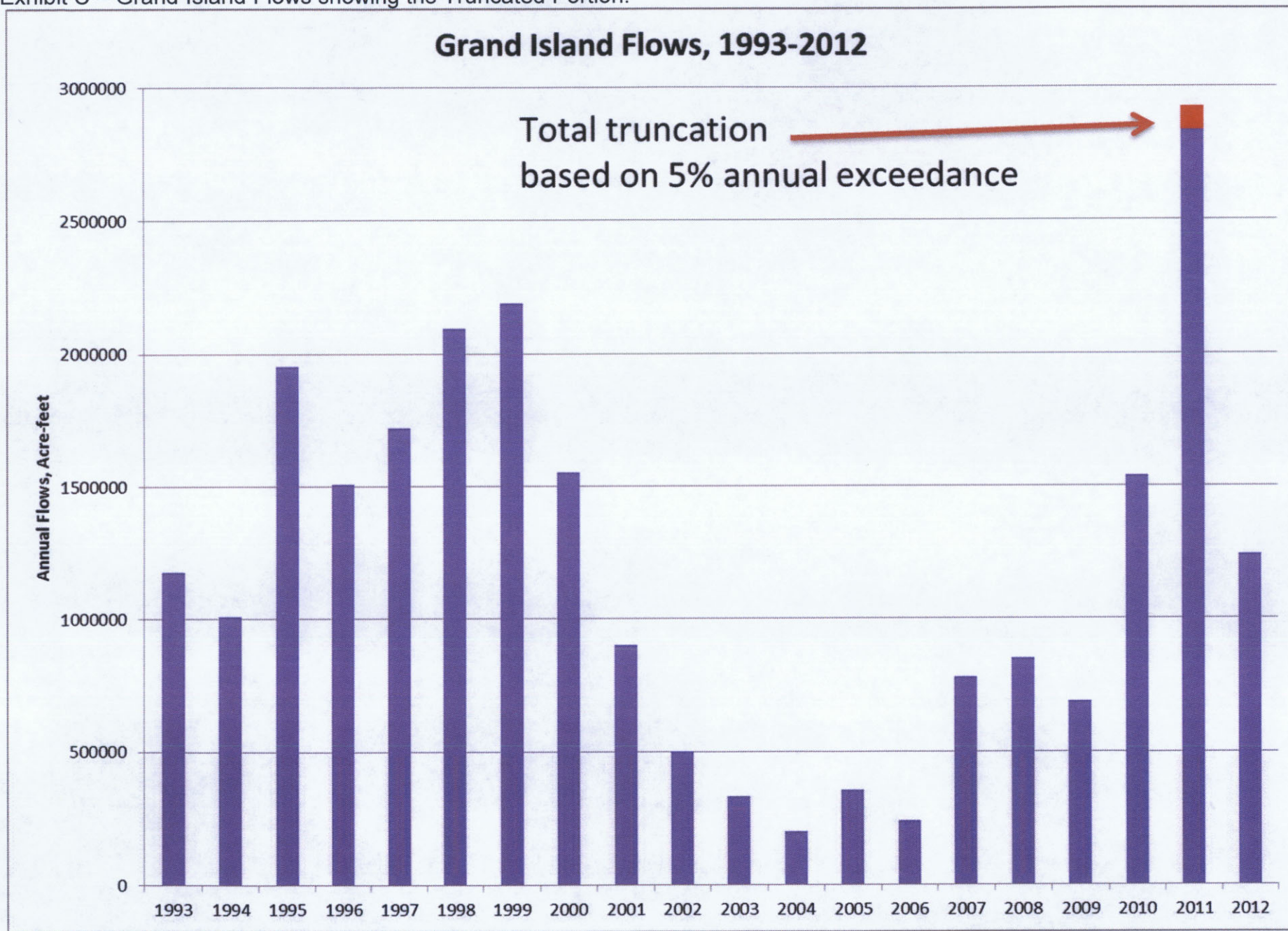


Exhibit B – Graph showing daily flows for the Platte River at Grand Island, June – August 2013



4

Exhibit C – Grand Island Flows showing the Truncated Portion.





June 6, 2013

Brian Dunnigan, Director
Nebraska Department of Natural Resources
301 Centennial Mall South
Lincoln, NE 68509-4676

RE: Comments on DNR Draft Rules & Methodology for Determining Fully Appropriated Watersheds.

Dear Brian,

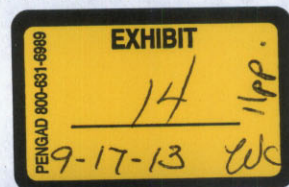
We are writing to provide the comments of the Nebraska Wildlife Federation, Nebraska Sportsmen's Foundation, Nebraska League of Conservation Voters, Audubon Nebraska, Friends of the Niobrara, Western Nebraska Resources Council and Nebraska Chapter of the Sierra Club on the Department of Natural Resources draft rules and draft methodology for determining fully appropriated watersheds.

We believe that the rules fall far short of achieving the key purposes of the law they are intended to implement.

We further believe the draft rules fail in that they do not identify the objective criteria that will be used to determine whether a watershed is 'fully appropriated'. The draft rules lack basic information and appropriate detail to give interested parties and the public a clear expectation and understanding of how the Department will make its determinations. The failure to include this information in the rule would also allow important criteria to be changed at the whim of the Department without an opportunity for input or challenge from the public.

If implemented as proposed, we believe the draft rules and draft methodology, taken together:

1. Would fail to protect stream flows and water supplies for existing water users;
2. Would fail to declare watersheds 'fully appropriated' until well after development levels had reached the point of conflict between various water uses;
3. Could allow Integrated Management Plans for over-appropriated basins to fall short of achieving their statutory goals;
4. Would fall short of protecting the stream flows and water resources that the State of Nebraska



has a Public Trust obligation to protect; and
5. Fails to use the best available science to consider projected future changes in water supply and demand.

We urge the Department to either develop a more modest proposal to correct the minor deficiencies in the current rule to enable it to pass muster by the Nebraska Supreme Court, or fundamentally rewrite the draft rule and draft methodology to correct these problems as summarized below.

I. The Draft Rules Lack Critical Information and Criteria

The draft rule is just two and a half pages, despite the importance of the determinations involved and the complexity of the issues. The draft rules leave important criteria for the draft 'Methodology' document, which would apparently not be a Department rule or regulation and thus not subject to public notice, comment, or challenge. In fact, the Methodology document is not even mentioned or cited in the draft rules, including Section 002 which purports to list the information to be considered by the Department in making preliminary determinations. It appears that the Methodology could thus be changed -- or completely ignored -- at the whim of the Department.

The criteria and important parts of the method for determining what is 'fully appropriated' should be clearly spelled out in the rule, and subject to public comment and the regular rulemaking process. A few examples of the questions *not* answered and criteria *not* included in the draft rules may help highlight the problem:

* What criteria or method will the Department use to determine what a "representative period of record" is for a particular basin, subbasin or reach (Sec. 001.01A)?;

* In calculating the basin water supplies, will "streamflow depletions due to high capacity well groundwater pumping" include only current level of depletions, or include past or future depletion from existing wells (and if so how far out in time), and what method or methods will be used to estimate stream depletions? Will that estimate include depletions from all high capacity wells, or only those wells in the 50-year/10% area? Does "consumptive surface water uses" include the loss of surface water to the basin through groundwater recharge, such as the Platte River water lost to the Republican basin at Elwood Reservoir (Sec. 001.01B)?

* In calculating the total use of water, is the "consumptive water demands" for wells based on actual historic pumping (and if so over what period, and how will the DNR deal with insufficient records), or total pumping allowed under each well's permit, or total pumping allowed based on annual NRD restrictions where in place, or total crop demand for water? Is

“consumptive water demands for surface water uses” based on a presumed consumptive share of water diverted, and if so what method will be used to calculate that share? Will it be based on a share of the total amount of water that could be diverted under a water right, the actual amounts diverted (and if so over what period of record), or some other basis? How will it deal with permits for groundwater recharge, or municipal or industrial permits for withdrawals that exceed current use but are expected to be used in the future (Sec. 001.01C)?

In the event “water rights for a beneficial use other than irrigation, municipal, industrial, instream flow or hydropower (for example flood control, aquaculture, etc.)” are an issue, what criteria will the Department use to “incorporate such right into any relevant analysis” -- for example, will the Department’s intent be to reflect the full extent of permits in place, or just the current or historical extent of the use (Section 001.01D)? Isn’t this approach one of the things the Nebraska Supreme Court objected to when the Department attempted to incorporate a standard for hydropower use in its analysis that was not spelled out in its rules?

There are other examples, but these are some of the key questions that are critical to how the determinations are made, and they are not answered in the draft rules. Some of these are explained in the Methodology document, but it appears some are not. While the Department should have flexibility to adopt the latest information, analysis and models in considering these determinations, the basic approach, criteria and objectives for addressing these issues – including answers to the above questions -- should be very clearly stated in the rules, open for public comment, and changed only through an open, public rulemaking process.

II. The Draft Rule Counts Un-usable Water as Available

One of the critical flaws in the draft rule is the notion that the Department can calculate the total amount of water that flows in or drops on a river basin (the Basin Water Supply), and the amount of water demanded or used (and as noted above, it is not clear from the draft rules which the Department intends to calculate in its Total Use), and if on average the “Basin Water Supply” exceeds the “Total Use” then new uses of water in the watershed must not be impacting existing surface or groundwater uses (and hence the basin should not be deemed “fully appropriated”). There are at least several flaws in this reasoning.

First, the approach assumes that every drop of water that enters the watershed through rain, snow, or streamflow, is either used for a permitted or appropriated use or could be stored for future use. In the Department’s approach, ‘excess’ river flows in one year would be counted as being available to meet uses in past or future years. The only way the State could come even close to accomplishing this would be to have a main-stem dam at the outflow point of each river

basin large enough to capture even the highest flood flows imaginable¹.

That would be a ludicrous idea financially, biologically, and in terms of water management. For the Department to assume that every drop that enters a watershed is or can be used for permitted or appropriated uses is just as ludicrous.

That is not to say that the water that flows out of a watershed does not provide substantial benefits; clearly for the fish and wildlife that use the stream, and for downstream water users (whether they have permits or water rights or not), this flowing water provides clear benefits.

A second major flaw in this approach is that, by using an average over multiple years, the Department's approach assumes that the water in a flood in, for example, 2011, could have been used to cover shortages in the years that preceded it. For purposes of determining whether there is enough water in a basin to meet existing uses, the Department should not be counting as available 'supply' water that is already in the Gulf of Mexico.

A third major flaw in this approach is that it ignores the fact that averages over time do not reflect actual impacts on water users. The intent of LB 962 was both to begin to address the areas of the state where existing water uses (and users) were already in clear conflict with other existing water uses (and users) – the over-appropriated basins – *and* to prevent such future conflicts by requiring joint state-local planning in watersheds *before* they reached the point where new uses were negatively impacting existing users. Those conflicts occur when, in a location and time period, new uses are beginning to erode the ability of an existing user to exercise their water right or permit.

The Department's approach would allow the Natural Resource Districts and Department of Natural Resources to continue to grant new permits and water rights well after the point where specific water users were experiencing those impacts, by not declaring such basins 'fully appropriated' until such time when existing uses had exceeded even the ability of a "perfect" system of water management to capture and use every drop of water in the basin.

III. The Methodology Ignores Future Increases in Municipal and Industrial Water Use that is Already Under Permit, as Well as Existing Municipal Needs

The Department's "Methodology" document includes several ways to calculate municipal water use, but all of them provide estimates for *current* water use (using either

¹ We note that in calculating a basin's water supply, the draft rules and methodology appear to ignore both inflows and outflows of groundwater. Since some of the water leaving a basin through groundwater movements enters through surface water or precipitation, the Department would need to assume groundwater dams or high-capacity wells were in place to effectively use this water before it leaves a basin.

diversion and return to the river data, or per capita use and current population statistics). Industrial use is proposed to be estimated based on typical industrial water use information. Municipalities and industries must plan for the future, so they obtain permits for water use to cover increases in the reasonably foreseeable future. While the use may not yet be occurring today, the water is clearly spoken for under Nebraska law. Since one purpose of the law is to prevent future conflicts, the Department's rules and methodology should recognize that the water is already spoken for and count municipal and industrial demand at the full limit of any permits or rights that are in place. This is a clear policy-level choice that should be stated in the Department's rules.

Similarly, municipal groundwater recharge permits and rights that are already in place need to be counted at their full permitted level in figuring demand. These are in place to deal with demand for beneficial uses in the reasonably foreseeable future, so they should be included in the Department's determination of Total Use (should it decide to use this flawed approach).

The draft rules would only count as "use" the "consumptive water demands" for groundwater wells. Municipal water systems pump more than the expected "consumptive use" because they need to deliver water that eventually returns through their wastewater system. For both groundwater and surface water, municipalities (and industries) need to pump or divert more than the consumptive use, just as surface water irrigation needs to.

Neither the draft rules nor the draft methodology include a recognition that impacts to the total amount needed to be available to be pumped (not just the consumptive use) are critical, and should be counted in total demand. They also appear to ignore situations like the Omaha metropolitan area, where some of the water pumped from the Platte basin well fields and not consumed returns through wastewater treatment plants on Papillion Creek and the Missouri River.

IV, The Draft Rules and Methodology Allow for the Erosion of Instream Flow Rights

The draft rules, as noted above, would allow development in a basin to go on long after new permits and water rights were harming existing beneficial uses. That in itself would allow all surface water rights, including instream flow rights, to be eroded by additional new uses before a basin was declared "fully appropriated" and subject to planning and controls on new uses.

The specific treatment of instream flow rights under the draft Methodology also appears to allow for the significant erosion of instream flow rights. The draft rules indicate that the "Total Use" will include "streamflow available to meet instream flow appropriations at the time

the application was granted (accounting for all development in place at such time the appropriation was granted)" (Section 001.01C). The relevant Nebraska law, Sec. 46-713(3), *actually* says the test is whether the water uses in the basin "cause or will in the reasonably foreseeable future cause (a) the surface water supply to be insufficient to sustain over the longer term ... the beneficial or useful purposes for which, at the time of approval, any existing instream appropriation was granted." The statutory language refers to the "beneficial or useful purposes" at the time of approval.

The intent of the language was to ensure that impacts to the *streamflow conditions at the time the appropriation was granted* (and which were the basis for granting the instream flow application) would be the relevant standard for measuring development impacts, and that the Department would not count water that was not available in the river *at the time the application was granted*.

Instead, the Department's draft methodology goes well beyond that standard. In calculating what flows would be "available" for an instream flow right, the Department methodology (Sec. 4.3.2.4) would start with the actual stream flow (e.g., 1,800 cfs), then add the depletions from groundwater uses "for the representative period", which would presumably include both existing (at time of approval) and subsequent new groundwater uses (e.g., 100 cfs from existing wells, and 100 cfs from subsequent wells, totaling 2,000 cfs).

If that representative period dates back to the date the instream flow application was granted (or earlier), then the value calculated (2,000 cfs, in the example above) should approximately represent the streamflow conditions, absent groundwater development, at the time the water right was granted. At that point, the Department should then subtract the depletion levels for the year in which the appropriation was granted based on the groundwater uses in place at the time (e.g., 50 cfs of then-current depletions, resulting in 1,950 cfs in flows available), which would then represent flows available on which the appropriation and its beneficial uses was based. The Nebraska Supreme Court itself said the Department need not consider future ground water depletion² in granting the application. The Department could then compare that number to the actual appropriation (e.g., 1,000 cfs) to adjust the demand (as measured by the appropriation) to the river conditions at the time the right was granted.

That method would be similar to how the Department proposes to determine the demand from hydropower facilities, except the instream flow demand would be reduced by groundwater depletions to the extent they were impacting the stream at the time the right was granted.

Instead, the Department proposes to calculate the approximate streamflow conditions

² Central Platte NRD v. State of Wyoming, 245 Neb. 439, 513 N.W.2d 847 (1994).

absent groundwater development for the representative period (as noted above), and then *subtract the full consumptive use* of the groundwater wells in place at the time the right was granted, even though the depletion to the river might not occur for decades (or centuries) in the future. That result is compared to the flow right granted, and only the adjusted flow up to the water right is considered a “demand.” By assessing the full lag effects of groundwater development in this way, the Department’s proposed rule goes well beyond what is provided for in the statute. The result does not reflect the full beneficial uses for which (and at the time) the application was granted, and would result in discounting the in-stream flow benefits for which the appropriation was granted in the consideration of when a basin reaches fully appropriated status.

It is one thing to preclude the regulation of groundwater wells in place at the time an instream flow water right was granted to provide water to meet those flows, as LB 962 clearly intended. It quite another to ignore, as the Department’s draft rules propose, the impact of the lag effect of that development alongside the effects of subsequent development in determining whether the protected instream flows will be harmed by new uses and thus the basin should be considered “fully appropriated.”

V. The Rule and Methodology Ignore Likely Future Changes in Water Supplies

The scientific research from the University of Nebraska and elsewhere appears clear: climate change is real, and will likely change the timing and volume of flows in the Platte River and perhaps other Nebraska rivers. The research is also clear that warming temperatures will increase water use through greater evaporation. The Department’s draft rule and draft methodology ignores the implications of this science, by assuming a ‘steady state’ system where water supplies are constant.

Especially as it looks at long term water balance, we believe the Department needs to grapple with the implications of this work. The Department already makes heavy use of models in everything from water use to identifying hydrologically connected surface and groundwater, and they provide helpful insight in understanding Nebraska water resources. The Department should work with the University of Nebraska to identify and quantify scientifically valid models for assessing the climate change implications for future water supply by basin, and incorporate them into its determinations of whether future water supplies will be sufficient to meet existing and new water uses over the long term.

VI. The Allocation of Downstream Responsibility is Unsupported by Statute

The draft methodology (Sec. 4.3.2.6) purports to allocate responsibility for meeting

downstream consumptive and non-consumptive uses by summing the Basin Water Supply for each upstream basin, and then assigning to each upstream basin only a percentage of responsibility for downstream uses based on its percentage of total Basin Water Supply available.

This approach ignores several important points. Many upstream basins in Nebraska are already *over*-appropriated, making it difficult or impossible for those basins to contribute enough actual water to meet their “share” of water assumed by the draft methodology to be needed for downstream uses. In those cases, for downstream basins to meet their existing demand, more water may need to come from upstream basins that are not over-appropriated than would be assigned through a simple division of responsibility based on percentage of basin water supplies.

The differences in when surface water rights were granted and when groundwater permits were approved from basin to basin means that the legal responsibility for meeting downstream consumptive or non-consumptive uses varies considerably from basin to basin; this is especially clear with respect to surface water rights where ‘first in time, first in right’ applies. This may not seem “fair”, but it is in fact the practical reality of Nebraska water law. It will not be remedied unless or until development in every over-appropriated basin is brought back to a point where water supplies and management systems are sufficient to provide for the remaining collective uses in the basin.

If continued development in a basin would impact existing water uses downstream in violation of the statutory standard, then that basin meets the standard of being ‘fully appropriated’. A key purpose of LB 962 was to protect existing uses from the impacts of new uses, not to exempt new uses from their impact on existing uses downstream because of an arbitrary “allocation” of responsibility for downstream water demands. There is no basis in the law for this Section of the rule.

VII. The Rule Does Not Account for State Protected Species Requirements

The Nebraska Game & Parks Commission has issued a biological opinion noting that additional degradation of Platte River flows would jeopardize the continued existence of pallid sturgeons, interior least terns and piping plovers that depend on the river for survival. This implies that further groundwater and surface water development that would impact key flows needed for those species would violate Nebraska law that protects these species.

Neither the draft rule nor the draft methodology appear to include a process for incorporating these kinds of determinations. The section of the methodology that mentions compliance with federal and state law (Section 4.3.4) says that “It was concluded that any

reductions in flow that may occur as a result of not determining a basin, subbasin, or reach to be fully appropriated will not cause noncompliance with either federal or state law at this time in any of the basins evaluated.” This defies common sense. If a state agency has concluded that continued reductions in stream flows will have an impact on state protected species, that is vital information that should be considered in determining whether it is time to put into place integrated watershed planning by declaring a basin fully appropriated.

VII. The Draft Rule Ignores Nebraska’s Public Trust Obligation to Protect Streamflows

The obligation of the State of Nebraska (and other states) to protect Public Trust water resources is well document in case law, and included in common law doctrines that date back to Roman times. Water is a Public Trust resource in Nebraska, and in addition to the specific obligation to protect threatened and endangered species noted above, the State has a general obligation to protect the stream flows and fish and wildlife that depend on them as a Public Trust for future generations.

Neither the draft rule nor the draft methodology document discuss how the rule will honor Nebraska’s Public Trust obligations, nor how it will consider existing water uses (including for fish, wildlife and recreation) that are not protected by a specific instream flow appropriation in determining whether a basin is fully appropriated.

Nebraska law (Sec. 46-713(1)(a) also recognizes that the evaluation should include “a summary of relevant data provided by any interested party concerning the social, economic and environmental impacts of additional hydrologically connected surface water and ground water uses on resources that are dependent on streamflow or ground water levels but are not protected by appropriations or regulations,” but neither the draft rule nor the draft methodology include a process for collecting, verifying or including this information in the Department’s annual report.

VIII. The Rule Could Allow IMPs in Over-Appropriated Basins to Fall Short

The law (Sec. 46-713) says “River basins, subbasins, and reaches designated as overappropriated in accordance with subsection (4) of this section shall not be evaluated by the department” (in performing annual evaluations). The staff explanation at public presentations on the draft rules was that the new draft rules were needed (in part) to help define when over-appropriated basins would reach fully appropriated status. Neither the rules nor the methodology include discussion of this important point or say how this new standard would be used.

At the point where an over-appropriated watershed becomes merely fully appropriated, the obligations of the Integrated Management Plan would appear to change, from active efforts

to restore the balance between water supply and water use in the basin, to maintaining the then re-established balance between water supply and water use. If the Department's intention is to use the draft rule's definition of what constitutes "fully appropriated" – the point at which all existing uses could be met by the hypothetical ability to manage and beneficially use every drop of water that enters a basin through precipitation or stream flows – then the result will be that Integrated Management Plans designed to reduce and ultimately eliminate the current conflicts between water uses could be halted in their efforts well before they achieve that desired result.

In the real world, those conflicts between water uses (and water users) will only be remedied when the actual impacts of real-world uses on other real-world uses of water are eliminated in a basin using our existing capacity to manage water and real-world water supplies.

IX. The 50-Year/10% Line Should be Revised

The draft rule 24-001.03 provides that "the geographic area within which the Department preliminarily considers surface water and groundwater to be hydrologically connected...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 percent of the amount pumped in that time."

The proposed language falls short, in that a 10% reduction in just 50 years is a significant, not a 'de minimus' reduction in streamflow. There is no explanation or justification for using this weak of a standard. At the information meetings, the Department explained that this language is taken from the current rule. However, the current language was part of a current rule that, while flawed in some cases, was clearly more protective of water resources than the proposed rule, and was structured to identify impacts on individual water uses.

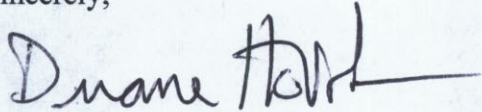
The 50 year/10% standard has two implications. First, impacts on the watershed from water development outside the 50 year/10% line would be ignored in determining the water demand part of the water balance in the watershed. That would understate the actual water use in the basin. Second, water users outside of the 50-year/10% line are not required to be subject to regulatory measures under the Integrated Management Plans, once developed. That would lead to further erosion of the water supply available in the watershed and downstream even after an Integrated Management Plan is put into place.

The Department should rewrite the rule to use the best information available to determine where groundwater and surface water are hydrologically connected using a standard that truly represents a 'de minimus' impact, such as a 100 year/1% standard.

In closing, we urge the Department to either develop a more modest proposal to correct the minor deficiencies in the current rule to enable it to pass muster by the Nebraska Supreme Court, or fundamentally rewrite the draft rule and draft methodology to correct these problems as

summarized above. Feel free to direct any questions to Duane Hovorka at the Nebraska Wildlife Federation, PO Box 81437, Lincoln, NE 68501, (402) 477-1008.

Sincerely,



Duane Hovorka, Nebraska Wildlife Federation
and on behalf of:

Scott Smathers, Nebraska Sportsmen's Foundation

Dale Gubbels, Nebraska League of Conservation Voters

Marian Langan, Audubon Nebraska

Bruce Kennedy, Friends of the Niobrara

Buffalo Bruce, Western Nebraska Resources Council

Ken Winston, Sierra Club Nebraska Chapter

Cc: Governor Dave Heineman
Attorney General Jon Bruning



September 16, 2013

Brian Dunnigan, Director
Nebraska Department of Natural Resources
301 Centennial Mall South
Lincoln, NE 68509-4676

RE: Comments on DNR Proposed Rules & Methodology for Determining Fully Appropriated Watersheds.

Dear Brian,

We are writing to provide the comments of the Nebraska Wildlife Federation on the Department of Natural Resources proposed rules and for determining fully appropriated watersheds.

We appreciate that an effort has been made to correct some of the deficiencies we identified in the draft rules released earlier this year, but believe that the proposed rules continue to fall far short of achieving the key purposes of the law they are intended to implement.

We further believe the draft rules fail in that they do not identify the objective criteria that will be used to determine whether a watershed is 'fully appropriated'. The draft rules lack basic information and appropriate detail to give interested parties and the public a clear expectation and understanding of how the Department will make its determinations. The failure to include this information in the rule would also allow important criteria to be changed at the whim of the Department without an opportunity for input or challenge from the public.

If implemented as proposed, we believe the draft rules and draft methodology, taken together:

1. Would fail to protect stream flows and water supplies for existing water users;
2. Would fail to declare watersheds 'fully appropriated' until well after development levels had reached the point of conflict between various water uses;
3. Could allow Integrated Management Plans for over-appropriated basins to fall short of achieving their statutory goals;
4. Would fall short of protecting the stream flows and water resources that the State of Nebraska has a Public Trust obligation to protect; and



5. Fails to use the best available science to consider projected future changes in water supply and demand.

We urge the Department to either develop a more modest proposal to correct the minor deficiencies in the current rule to enable it to pass muster by the Nebraska Supreme Court, or fundamentally rewrite the draft rule and draft methodology to correct these problems as summarized below.

I. The Draft Rules Lack Critical Information and Criteria

The proposed rule is just a few pages, despite the importance of the determinations involved and the complexity of the issues. The proposed rules leave important criteria for the draft 'Methodology' document, which would apparently not be a Department rule or regulation and thus not subject to public notice, comment, or challenge. In fact, the Methodology document is not specifically cited in the proposed rules Section 002 which purports to list the information to be considered by the Department in making preliminary determinations. It appears that the Methodology could thus be changed -- or completely ignored -- at the whim of the Department.

We appreciate that the proposed rule answers one of the questions we raised, concerning what criteria or method will be used to determine what a "representative period of record" is for a particular basin, subbasin or reach (Sec. 001.01A).

The criteria and important parts of the method for determining what is 'fully appropriated' should be clearly spelled out in the rule, and subject to public comment and the regular rulemaking process. A few examples of the questions not answered and criteria not included in the draft rules may help highlight the problem:

* In calculating the basin water supplies, will "streamflow depletions due to high capacity well groundwater pumping" include only current level of depletions, or include past or future depletion from existing wells (and if so how far out in time), and what method or methods will be used to estimate stream depletions? Will that estimate include depletions from all high capacity wells, or only those wells in the 50-year/10% area? Does "consumptive surface water uses" include the loss of surface water to the basin through groundwater recharge, such as the Platte River water lost to the Republican basin at Elwood Reservoir (Sec. 001.01B)? Which gages will the Department use to determine "gaged streamflows" -- at the top of the watershed, the bottom, or someplace in between?

* In calculating the total use of water, is the "consumptive water demands" for wells based on actual historic pumping (and if so over what period, and how will the DNR deal with

insufficient records), or total pumping allowed under each well's permit, or total pumping allowed based on annual NRD restrictions where in place, or total crop demand for water? Is "consumptive water demands for surface water uses" based on a presumed consumptive share of water diverted, and if so what method will be used to calculate that share? Will it be based on a share of the total amount of water that could be diverted under a water right, the actual amounts diverted (and if so over what period of record), or some other basis? How will it deal with permits for groundwater recharge, or municipal or industrial permits for withdrawals that exceed current use but are expected to be used in the future (Sec. 001.01C)?

In the event "water rights for a beneficial use other than irrigation, municipal, industrial, instream flow or hydropower (for example flood control, aquaculture, etc.)" are an issue, what criteria will the Department use to "incorporate such demand into any relevant analysis" -- for example, will the Department's intent be to reflect the full extent of permits in place, or just the current or historical extent of the use (Section 001.01D)? We appreciate that the Department recognized that the demands discussed in this section are not necessarily tied to a water right. However, this approach of leaving the critical decisions for the unspecified methodology is one of the things the Nebraska Supreme Court objected to when the Department attempted to incorporate a standard for hydropower use in its analysis that was not spelled out in its rules.

There are other examples, but these are some of the key questions that are critical to how the determinations are made, and they are not answered in the draft rules. Some of these are explained in the Methodology document, but it appears some are not. While the Department should have flexibility to adopt the latest information, analysis and models in considering these determinations, the basic approach, criteria and objectives for addressing these issues -- including answers to the above questions -- should be very clearly stated in the rules, open for public comment, and changed only through an open, public rulemaking process.

II. The Draft Rule Still Counts Un-usable Water as Available

It appears that the proposed rule has reduced the amount of water considered as part of the Basin Water Supply by truncating extreme high flows (the 5% exceedence flow probability value), and by subtracting the Basin Water Supply originating upstream. Those appear to improve the rule, but it still appears that the proposed rule ignores the reality that not all water originating in a basin is (or should be) storable before the water leaves the basin. The rule is based on the premise that there are no impacts on other water users in the basin or downstream (and thus the watershed is not fully appropriated) if there is, on average, water that could be stored before flowing downstream.

That premise means that, in at least some watersheds, water users could see considerable

impact from new surface and groundwater uses well before the watershed is considered 'fully appropriated' under this proposed rule. In the Department's approach, 'excess' water supplies flows in one year would be counted as being available to meet uses in past or future years. The only way the State could come even close to accomplishing this would be to have a main-stem dam at the outflow point of each river basin large enough to capture even the highest flood flows imaginable¹.

That would be a ludicrous idea financially, biologically, and in terms of water management. For the Department to assume that every drop that enters a watershed is or can be used for permitted or appropriated uses is just as ludicrous.

Of course, the water that flows out of a watershed provides substantial benefits; clearly for the fish and wildlife that use the stream, and for downstream water users (whether they have permits or water rights or not), this flowing water provides substantial benefits.

A second major flaw in this approach is that, by using an average over multiple years, the Department's approach assumes that the water in a flood in, for example, 2011, could have been used to cover shortages in the years that preceded it. For purposes of determining whether there is enough water in a basin to meet existing uses, the Department should not be counting as available 'supply' water that is already in the Gulf of Mexico.

The intent of LB 962 was both to begin to address the areas of the state where existing water uses (and users) were already in clear conflict with other existing water uses (and users) – the over-appropriated basins – **and** to prevent such future conflicts by requiring joint state-local planning in watersheds **before** they reached the point where new uses were negatively impacting existing users. Those conflicts occur when, in a location and time period, new uses are beginning to erode the ability of an existing user to exercise their water right or permit.

The Department's approach would allow the Natural Resource Districts and Department of Natural Resources to continue to grant new permits and water rights well after the point where specific water users were experiencing those impacts, by not declaring such basins 'fully appropriated' until such time when existing uses had exceeded even the ability of a "perfect" system of water management to capture and use every drop of water in the basin.

III. The Methodology Ignores Future Increases in Municipal and Industrial Water Use that is Already Under Permit, as Well as Existing Municipal Needs

¹ We note that in calculating a basin's water supply, the draft rules and methodology appear to ignore both inflows and outflows of groundwater. Since some of the water leaving a basin through groundwater movements enters through surface water or precipitation, the Department would need to assume groundwater dams or high-capacity wells were in place to effectively use this water before it leaves a basin.

The Department's "Methodology" document includes several ways to calculate municipal water use, but all of them provide estimates for current water use (using either diversion and return to the river data, or per capita use and current population statistics). Industrial use is proposed to be estimated based on typical industrial water use information. Municipalities and industries must plan for the future, so they obtain permits for water use to cover increases in the reasonably foreseeable future. While the use may not yet be occurring today, the water is clearly spoken for under Nebraska law. Since one purpose of the law is to prevent future conflicts, the Department's rules and methodology should recognize that the water is already spoken for and count municipal and industrial demand at the full limit of any permits or rights that are in place. This is a clear policy-level choice that should be stated in the Department's rules.

Similarly, municipal groundwater recharge permits and rights that are already in place need to be counted at their full permitted level in figuring demand. These are in place to deal with demand for beneficial uses in the reasonably foreseeable future, so they should be included in the Department's determination of Total Use (should it decide to use this flawed approach).

The draft rules would only count as long-term demand the "consumptive water demands" for groundwater wells. Municipal water systems pump more than the expected "consumptive use" because they need to deliver water that eventually returns through their wastewater system. For both groundwater and surface water, municipalities (and industries) need to pump or divert more than the consumptive use, just as surface water irrigation needs to.

Neither the draft rules nor the draft methodology include a recognition that impacts to the total amount needed to be available to be pumped (not just the consumptive use) are critical, and should be counted in total demand. They also appear to ignore situations like the Omaha metropolitan area, where some of the water pumped from the Platte basin well fields and not consumed returns through wastewater treatment plants on Papillion Creek and the Missouri River.

IV, The Draft Rules and Methodology Allow for the Erosion of Instream Flow Rights

The draft rules, as noted above, would appear to allow development in a basin to go on long after new permits and water rights were harming existing beneficial uses. That in itself would allow all surface water rights, including instream flow rights, to be eroded by additional new uses before a basin was declared "fully appropriated" and subject to planning and controls on new uses.

The specific treatment of instream flow rights under the draft Methodology also appears to allow for the significant erosion of instream flow rights. The draft rules indicate that the demand will include "streamflow available to meet instream flow appropriations (accounting for all development in place at such time the appropriation was granted)" (Section 001.01C). The relevant Nebraska law, Sec. 46-713(3), actually says the test is whether the water uses in the basin "cause or will in the reasonably foreseeable future cause (a) the surface water supply to be insufficient to sustain over the longer term ... the beneficial or useful purposes for which, at the time of approval, any existing instream appropriation was granted." The statutory language refers to the "beneficial or useful purposes" at the time of approval.

The intent of the language was to ensure that impacts to the streamflow conditions at the time the appropriation was granted (and which were the basis for granting the instream flow application) would be the relevant standard for measuring development impacts, and that the Department would not count water that was not available in the river at the time the application was granted.

Instead, the Department's draft methodology goes well beyond that standard. In calculating what flows would be "available" for an instream flow right, the Department methodology (Sec. 4.3.2.4) would start with the actual stream flow (e.g., 1,800 cfs), then add the depletions from groundwater uses "for the representative period", which would presumably include both existing (at time of approval) and subsequent new groundwater uses (e.g., 100 cfs from existing wells, and 100 cfs from subsequent wells, totaling 2,000 cfs).

If that representative period dates back to the date the instream flow application was granted (or earlier), then the value calculated (2,000 cfs, in the example above) should approximately represent the streamflow conditions, absent groundwater development, at the time the water right was granted. At that point, the Department should then subtract the depletion levels for the year in which the appropriation was granted based on the groundwater uses in place at the time (e.g., 50 cfs of then-current depletions, resulting in 1,950 cfs in flows available), which would then represent flows available on which the appropriation and its beneficial uses was based. The Nebraska Supreme Court itself said the Department need not consider future ground water depletion² in granting the application. The Department could then compare that number to the actual appropriation (e.g., 1,000 cfs) to adjust the demand (as measured by the appropriation) to the river conditions at the time the right was granted.

That method would be similar to how the Department proposes to determine the demand from hydropower facilities, except the instream flow demand would be reduced by groundwater depletions to the extent they were impacting the stream at the time the right was granted.

² Central Platte NRD v. State of Wyoming, 245 Neb. 439, 513 N.W.2d 847 (1994).

Instead, the Department proposes to calculate the approximate streamflow conditions absent groundwater development for the representative period (as noted above), and then subtract the full consumptive use of the groundwater wells in place at the time the right was granted, even though the depletion to the river might not occur for decades (or centuries) in the future. That result is compared to the flow right granted, and only the adjusted flow up to the water right is considered a “demand.” By assessing the full lag effects of groundwater development in this way, the Department’s proposed rule goes well beyond what is provided for in the statute. The result does not reflect the full beneficial uses for which (and at the time) the application was granted, and would result in discounting the in-stream flow benefits for which the appropriation was granted in the consideration of when a basin reaches fully appropriated status.

It is one thing to preclude the regulation of groundwater wells in place at the time an instream flow water right was granted to provide water to meet those flows, as LB 962 clearly intended. It quite another to ignore, as the Department’s draft rules propose, the impact of the lag effect of that development alongside the effects of subsequent development in determining whether the protected instream flows will be harmed by new uses and thus the basin should be considered “fully appropriated.”

V. The Rule and Methodology Ignore Likely Future Changes in Water Supplies

The scientific research from the University of Nebraska and elsewhere appears clear: climate change is real, and will likely change the timing and volume of flows in the Platte River and perhaps other Nebraska rivers. The research is also clear that warming temperatures will increase water use through greater evaporation. The Department’s draft rule and draft methodology ignores the implications of this science, by assuming a ‘steady state’ system where water supplies are constant.

At best, the use of a representative period of record designed to capture long-term wet and dry cycles that may exist as set out in the rule (Sec. 001.01A) will only capture long-term trends in climate-driven water supply and use decades after they occur, even though current climate science provides tools that can predict those changes.

Especially as it looks at long term water balance, we believe the Department needs to grapple with the implications of this work. The Department already makes heavy use of models in everything from water use to identifying hydrologically connected surface and groundwater, and they provide helpful insight in understanding Nebraska water resources. The Department should work with the University of Nebraska to identify and quantify scientifically valid models

for assessing the climate change implications for future water supply by basin, and incorporate them into its determinations of whether future water supplies will be sufficient to meet existing and new water uses over the long term.

VI. The Allocation of Downstream Responsibility is Unsupported by Statute

The proposed rule changes, but does not eliminate, the allocation of responsibility for downstream demands to upstream watersheds. The draft methodology (Sec. 4.3.2.6) purports to allocate responsibility for meeting downstream consumptive and non-consumptive uses by summing the Basin Water Supply for each upstream basin, and then assigning to each upstream basin only a percentage of responsibility for downstream uses based on its percentage of total Basin Water Supply available.

This approach ignores several important points. Many upstream basins in Nebraska are already over-appropriated, making it difficult or impossible for those basins to contribute enough actual water to meet their “share” of water assumed by the draft methodology to be needed for downstream uses. In those cases, for downstream basins to meet their existing demand, more water may need to come from upstream basins that are not over-appropriated than would be assigned through a simple division of responsibility based on percentage of basin water supplies.

The differences in when surface water rights were granted and when groundwater permits were approved from basin to basin means that the legal responsibility for meeting downstream consumptive or non-consumptive uses varies considerably from basin to basin; this is especially clear with respect to surface water rights where ‘first in time, first in right’ applies. This may not seem “fair”, but it is in fact the practical reality of Nebraska water law. It will not be remedied unless or until development in every over-appropriated basin is brought back to a point where water supplies and management systems are sufficient to provide for the remaining collective uses in the basin.

If continued development in a basin would impact existing water uses downstream in violation of the statutory standard, then that basin meets the statutory standard of being ‘fully appropriated’. A key purpose of LB 962 was to protect existing uses from the impacts of new uses, not to exempt new uses from their impact on existing uses downstream because of an arbitrary “allocation” of responsibility for downstream water demands. There is no basis in the law for this Section of the rule.

VII. The Rule Does Not Account for State Protected Species Requirements

The Nebraska Game & Parks Commission has issued a biological opinion noting that

additional degradation of Platte River flows would jeopardize the continued existence of pallid sturgeons, interior least terns and piping plovers that depend on the river for survival. This implies that further groundwater and surface water development that would impact key flows needed for those species would violate Nebraska law that protects these species.

Neither the draft rule nor the draft methodology appear to include a process for incorporating these kinds of determinations. The section of the methodology that mentions compliance with federal and state law (Section 4.3.4) says that "It was concluded that any reductions in flow that may occur as a result of not determining a basin, subbasin, or reach to be fully appropriated will not cause noncompliance with either federal or state law at this time in any of the basins evaluated." This defies common sense. If a state agency has concluded that continued reductions in stream flows will have an impact on state protected species, then that is vital information that should be considered in determining whether it is time to put into place integrated watershed planning by declaring a basin fully appropriated.

VII. The Draft Rule Ignores Nebraska's Public Trust Obligation to Protect Streamflows

The obligation of the State of Nebraska (and other states) to protect Public Trust water resources is well documented in case law, and included in common law doctrines that date back to Roman times. Water is a Public Trust resource in Nebraska, and in addition to the specific obligation to protect threatened and endangered species noted above, the State has a general obligation to protect the stream flows and fish and wildlife that depend on them as a Public Trust for future generations.

Neither the draft rule nor the draft methodology document discuss how the rule will honor Nebraska's Public Trust obligations, nor how it will consider existing water uses (including for fish, wildlife and recreation) that are not protected by a specific instream flow appropriation in determining whether a basin is fully appropriated.

Nebraska law (Sec. 46-713(1)(a)) also recognizes that the evaluation should include "a summary of relevant data provided by any interested party concerning the social, economic and environmental impacts of additional hydrologically connected surface water and ground water uses on resources that are dependent on streamflow or ground water levels but are not protected by appropriations or regulations," but neither the draft rule nor the draft methodology include a process for collecting, verifying or including this information in the Department's annual report.

VIII. The Rule Could Allow IMPs in Over-Appropriated Basins to Fall Short

The law (Sec. 46-713) says "River basins, subbasins, and reaches designated as

overappropriated in accordance with subsection (4) of this section shall not be evaluated by the department” (in performing annual evaluations). The staff explanation at public presentations on the draft rules was that the new draft rules were needed (in part) to help define when over-appropriated basins would reach fully appropriated status. Yet the proposed rules do not include discussion of this important point or say how this new standard would be used.

At the point where an over-appropriated watershed becomes merely fully appropriated, the obligations of the Integrated Management Plan would appear to change, from active efforts to restore the balance between water supply and water use in the basin, to maintaining the then re-established balance between water supply and water use. If the Department’s intention is to use the draft rule’s definition of what constitutes “fully appropriated” – the point at which all existing uses could be met by the hypothetical ability to manage and beneficially use every drop of water that enters a basin through precipitation or stream flows – then the result will be that Integrated Management Plans designed to reduce and ultimately eliminate the current conflicts between water uses could be halted in their efforts well before they achieve that desired result.

In the real world, those conflicts between water uses (and water users) will only be remedied when the actual impacts of real-world uses on other real-world uses of water are eliminated in a basin using our existing capacity to manage water and real-world water supplies.

IX. The 50-Year/10% Line Should be Revised

The draft rule 24-001.03 provides that “the geographic area within which the Department preliminarily considers surface water and groundwater to be hydrologically connected...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 ten percent of the amount pumped in that time.”

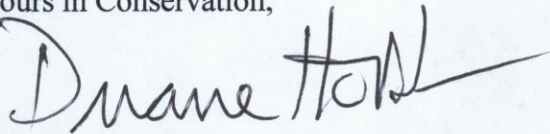
The proposed language falls short, in that a 10% reduction in just 50 years is a significant, not a ‘de minimus’ reduction in streamflow. There is no explanation or justification for using this weak of a standard. At the information meetings, the Department explained that this language is taken from the current rule. However, the current language was part of a current rule that, while flawed in some cases, was clearly more protective of water resources than the proposed rule, and was structured to identify impacts on individual water uses.

The 50 year/10% standard has two implications. First, impacts on the watershed from water development outside the 50 year/10% line would be ignored in determining the water demand part of the water balance in the watershed. That would understate the actual water use in the basin. Second, water users outside of the 50-year/10% line are not required to be subject to regulatory measures under the Integrated Management Plans, once developed. That would lead to further erosion of the water supply available in the watershed and downstream even after an Integrated Management Plan is put into place.

The Department should rewrite the rule to use the best information available to determine where groundwater and surface water are hydrologically connected using a standard that truly represents a 'de minimus' impact, such as at a minimum a 100 year/1% standard.

In closing, we urge the Department to either develop a more modest proposal to correct the minor deficiencies in the current rule to enable it to pass muster by the Nebraska Supreme Court, or fundamentally rewrite the draft rule and draft methodology to correct these problems as summarized above.

Yours in Conservation,

A handwritten signature in cursive script that reads "Duane Hovorka". The signature is written in black ink and is positioned below the typed name.

Duane Hovorka, Nebraska Wildlife Federation



LOWER ELKHORN NATURAL RESOURCES DISTRICT

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September 17, 2013

Brian P. Dunnigan, P.E., Director
Nebraska Department of Natural Resources
301 Centennial Mall South, 4th Floor
Lincoln, NE 68509

Re: Notice of Rulemaking on proposed changes to Department Rules, *Nebraska Administrative Code* Title 457, Chapter 24, entitled "Determination of Fully Appropriated Basins, Subbasins or Reaches"

Dear Director Dunnigan:

Over the past several years, the Department of Natural Resources (Department) has worked with stakeholders across the State of Nebraska, including Natural Resources Districts, to consider changes to the Department's methodology for making fully appropriated determinations. The Lower Elkhorn Natural Resources District (District) appreciates the time and effort you and your staff have dedicated to this. Overall, the District supports the concept of using a water budget to perform the annual evaluation required under Neb. Rev. Stat. § 46-713(3). The District requests, however, that you consider the following comments as you finalize this rulemaking.

1. Adherence to the Framework in Neb. Rev. Stat. § 46-713(3)

Any modification of the Department's rules for making fully appropriated determinations must adhere to the statutory construct and limitations in Section 46-713(3). The approach set forth by the Legislature requires the Director to compare the then-current uses of hydrologically connected water with the supply. The Director is to deem a basin, subbasin or reach fully appropriated if the water supply is "insufficient to sustain over the long term the beneficial [uses]" of surface water and groundwater. Neb. Rev. Stat. § 46-713(3) (emphasis added). In the August 14, 2013 Final Draft Rules released for public comment, the Department introduces a distinction between "near-term" and "long-term" water demand. See *Final Draft Rules*, Title 457, Ch.24, § 001.01A (Aug. 14, 2013). This is a material change over the draft language released on April 8, 2013.

More importantly, the Legislature did not grant the Department authority to deem a basin fully appropriated based on near-term impacts. The Legislature does require that the Department evaluate "the extent to which the then-current uses affect available near-term and long-term water supplies." Neb. Rev. Stat. § 46-713(1)(a)(iii). But the criteria for a fully appropriated determination set forth in Subsection 3 are limited to an evaluation of supply and demand "over the long term." Neb. Rev. Stat. § 76-713(3). There is no reference to consideration of short term, or near-term, impacts on water supply in the fully appropriated analysis. And for good reason.

Once a basin is deemed fully appropriated, it triggers a mandatory and often lengthy process for the development of an integrated management plan. This requires a significant amount of resources from the



Department and the relevant Natural Resources Districts. The Legislature recognized the magnitude of this effort, allowing the Department and the Districts up to five years to complete an integrated management plan. Neb. Rev. Stat. § 46-715. Undertaking this process due to a near-term trigger would waste significant public resources, particularly where the supply is sufficient to meet demand over the long term.

The District requests that the Department reconsider inclusion of the cumulative near-term Total Demand as a trigger for fully appropriated status. Instead, the Department should utilize the cumulative long-term Total Demand as the only test for fully appropriated status. This approach is consistent with the limitations established by the Legislature and the overall framework of the integrated management planning process.

2. The Department Should Use Streamflow Depletions to Calculate Demand of Groundwater Pumping on the Basin Water Supply

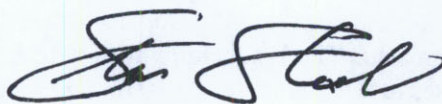
In the Final Draft Rules, the Department sets forth the methodology for calculating the cumulative long-term Total Demand of groundwater and surface water. See *Final Draft Rules* at § 001.01D. The Department proposes to use “consumptive water demands” to calculate the demand for groundwater pumping in the Basin Water Supply calculation. The District is concerned that using consumptive use alone will overestimate this portion of the water budget by overestimating the impacts of wells farther from the stream. The District suggests using “streamflow depletions,” as proposed in Section 001.01C, for this purpose will provide a more reliable and realistic estimate of groundwater demand for the Basin Water Supply.

3. The Department Should Include All Flows in the Basin Water Supply Analysis

In Section 001.01B of the Final Draft Rules, the Department proposes to exclude the highest 5% of flows from the Basin Water Supply calculation. The District requests that the Department reconsider this proposal. All flows, high and low, are relevant to the Basin Water Supply calculation. Removing the highest 5% is no less arbitrary than removing the lowest 5%. To be consistent for all stakeholders, the Department should include these flows in the Basin Water Supply calculation.

The District appreciates the opportunity to provide these comments. If you have any questions, please contact us at (402) 371-7313.

Sincerely,



Stan Staab
General Manager

From: bostwick@gpcom.net [mailto:bostwick@gpcom.net]

Sent: Friday, April 12, 2013 9:26 AM

To: DNR NewFabRules

Subject: New Fab Rule Comments

First Name: Mike

Last Name: Delka


Email: bostwick@gpcom.net

Comments: The determination of "Fully Appropriated" should be based on sound science and demand. In 001.02B it appears the Department may reach a final determination that such basin, subbasin, or reach is not fully appropriated by considering if a NRD took more than three years to complete an IMP. This is neither science or demand and should not over ride or change the facts. Likewise the IMP discussions in 001.02C have to relevant contribution without details of action. So, again there does not appear sufficient justification to ignore science and demand and withdraw or change a fully appropriated determination. Let the fully appropriated determination be determined by science and demand and not IMP arbitrary criteria subject to the influences and timing of a board of local water users. If this is a state determination leave the state in charge.



GENERAL REPORTING SERVICE

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 TO: Department of Natural Resources

ATTN: Leroy Sievers

RECEIVED

SEP 24 2013

DEPARTMENT OF
NATURAL RESOURCES