

**February 25, 2013 Advisory Letter -- Opinion Request - State Engineer's Curry  
County and Portales Basin Guidelines**

The Honorable Stuart Ingle  
New Mexico State Senator  
2106 W. University Drive  
Portales, NM 88130

The Honorable Gay G. Kernan  
New Mexico State Senator  
928 W. Mesa Verde  
Hobbs, NM 88240

The Honorable Anna M. Crook  
New Mexico State Representative  
1041 Fairway Terrace  
Clovis, NM 88101

**Re:** Opinion Request - State Engineer's Curry County and Portales Basin  
Guidelines

Dear Senators Ingle and Kernan and Representative Crook:

You requested our advice on the following questions:

1. Were the Curry County and Portales Basin Guidelines ("Guidelines") for Review of Water Right Applications issued on June 1, 2010 properly adopted?
2. If so, are the provisions of the Guidelines properly founded on orders, regulations, and statutes governing the administration of groundwater in New Mexico?

We conclude first, that the Guidelines are properly characterized and implemented as internal rules for the guidance of Office of State Engineer ("OSE") employees when they process applications made under regulations that provide the definition of the Curry County and Portales underground basins and the procedures for applying to obtain or change water rights in those basins. The Guidelines accurately describe their purpose as being internal to OSE.

Secondly, the Guidelines are reasonably based on existing legislative delegations of authority to the State Engineer in the water code. That is, substantively, the Guidelines and the rules they relate to are within the broad authority of the OSE. We address your questions separately, below.

**Procedural Adequacy**

The State Rules Act imposes specific notice and filing requirements on state agencies broadly defined as "any agency, board, commission, department, institution or officer of the state government except the judicial and legislative branches of the state government." See NMSA 1978, § 14-4-2(A). The Act defines "rule" as: "any rule, regulation, order, standard, statement of policy . . . promulgated by any agency and purporting to affect one or more agencies besides the agency issuing such rule *or to affect persons not members or employees of such issuing agency.*" Section 14-4-2(C) (emphasis added). Under these provisions, policies and guidelines adopted by a state agency are subject to the State Rules Act's requirements if the policies and guidelines affect other agencies or people who are not employed by or members of the state agency. See N.M. Att'y Gen. Op. No. 93-01 (1993). The Act does not apply to internal policies or guidelines that affect only a state agency's employees or members.

The Guidelines expressly apply only to OSE employees. The Guidelines are instructions to OSE staff rather than directives or regulations affecting public rights. In substance, they implement OSE regulations declaring the basins and establishing the public rights to obtain or change ground water rights in the basins. See the OSE's declarations of the Curry County Basin (declared August 31, 1989, boundaries extended Oct. 13, 1989, and Sept. 23, 2005, State Engineer Orders 142, 142-A and 166), formally enacted under the State Rules Act as 19.27.29.1 through 19.27.29.8 NMAC; the Portales Basin (declared May 1, 1950, boundaries extended July 18, 1955, State Engineer Orders 28 and 51, and a portion excluded by State Engineer Order 52, Nov. 3, 1955)(together referred to as the CPUWBs), formally adopted under the State Rules Act as 19.27.47.1 through 19.27.47.8 NMAC; and the Order closing the High Plains Aquifer, the primary water source in the CPUWBs, on Nov. 13, 2009. The declarations of basins trigger the State Engineer's broad jurisdiction to limit water right applications for the basins. Once the basins are declared within the regulatory jurisdiction of the OSE, another regulation provides the generally applicable substantive regulations describing the public rights to apply for new water permits or change existing water right uses in the basins. 19.27.1.1 through 19.27.1.39 NMAC.1

The Guidelines do not effectively create any new rights, obligations, or restrictions for the public beyond what is in the applicable regulations. The definition of the basin is found in the formally adopted declarations of basin. The other substantive and generally applicable rules governing groundwater uses flesh out the consequences for the public seeking to acquire or change groundwater rights in declared basins. See 19.27.1.1 through .39 NMAC. For example, the number of copies of forms to be filed, the specifics of required timing of public notice, comment, and objections, hearings on objections, etc. are set forth in 19.27.1.1 through .15 NMAC. Applications not requiring public notice are also provided for in 19.27.1.22 NMAC. Should water right owners, permittees, or licensees seek to change their well location or purpose of use, the rules provide the applicable procedures that will govern their application. See 19.27.1.24 NMAC.

Unlike the formal regulations that govern the public's rights under state granted permits, licenses, or other authorities in 19.27.1.1 through .39 NMAC, the Guidelines in issue are internal operating instructions for OSE employees to guide their work process when

acting on applications involving water rights in the Curry County and Portales declared basins. The regulations, not the corresponding Guidelines, are the declarations of the boundaries of the underground water basins and the generally applicable substantive groundwater rules.

Although not required to do so by statute or regulation, the State Engineer did conduct stakeholder meetings to gather public input prior to adopting the Guidelines. Public records in the Office of the State Engineer indicate that in cooperation with the Eastern New Mexico Water Authority, the State Engineer held stakeholder meetings in Portales and Santa Fe. Although the State Engineer was not strictly required to conduct the public process that he did, his actions reflect an administrative process respectful of the public right to participate in government. We find no procedural irregularity in the adoption process.

### **Substantive Conformity with the State Engineer's Legislatively Delegated Authority**

The OSE is a unique state agency whose functions essentially predate statehood. The office is the successor to the Territorial Engineer. It has remained a powerful entity with broad and extensive delegated powers to implement and regulate state water policy as set by the legislature. See *State ex rel. Reynolds v. Aamodt*, 111 N.M. 4, 5, 800 P.2d 1061, 1062 (1990). The water code itself contains broad delegations of regulatory authority to the OSE, and also includes procedural requirements applicable specifically to the OSE. NMSA 1978, Section 72-2-8(A) (1967) provides:

The state engineer may adopt regulations and codes to implement and enforce any provision of any law administered by him and may issue orders necessary to implement his decisions and to aid him in the accomplishment of his duties. In order to accomplish its purpose, this provision is to be liberally construed.

The State Engineer's actions are entitled to a presumption of correctness. *State ex rel. Reynolds*, 800 P.2d at 1063.

Even the OSE's power, of course, flows exclusively from the legislature. Thus, the OSE cannot enlarge its statutory authority under the guise of making rules and regulations. *Public Serv. Co. v. New Mexico Env'tl. Improvement Bd.*, 89 N.M. 223, 226, 549 P.2d 638, 641 (Ct. App. 1976); *Chalamidas v. Env'tl. Improvement Div.*, 102 N.M. 63, 66, 691 P.2d 64, 67 (Ct. App. 1984). An administrative agency may not enact a rule that is not in harmony with its statutory authority. *New Mexico Bd. of Pharmacy v. New Mexico Bd. of Osteopathic Med. Examiners*, 95 N.M. 780, 782, 626 P.2d 854, 856 (Ct. App. 1981). As you correctly identified the issue, the Curry County and Portales Basin Guidelines, like the rules they relate to, must fit within the OSE's broad grant of authority to be permissible. We conclude that they do.

The Guidelines relate to water rights applications in declared basins. The OSE's authority to declare basins is long settled law in New Mexico. See *New Mexico v.*

*Myers*, 64 N.M. 186, 326 P.2d 1075 (1958) (the State Engineer's groundwater jurisdiction covers the entire state and includes broad authority to administer in the public interest the finite resource of groundwater in declared groundwater basins); *Mathers v. Texaco*, 77 N.M. 239, 421 P.2d 771 (1966) (State Engineer's administrative determination to manage a mined aquifer for a forty year economic life upheld). Because the State Engineer has broad authority to declare and manage groundwater basins and make determinations on water rights applications, hydrologic connectivity and impairment, it follows that he has the inherent administrative authority to instruct his staff on how to carry out those functions. See also *Kennecott Copper Corp. v. Employment Security Comm'n*, 78 N.M. 398, 402, 432 P.2d 109 (1967) ("when a power is conferred by statute everything necessary to carry out the power and make it effective and complete will be implied").

The New Mexico Supreme Court has upheld other similar OSE Guidelines for acting on water rights applications in fully appropriated areas. The purpose of the Guidelines is clear: "to provide guidelines to the Office of the State Engineer (OSE) on the procedures for processing water rights applications filed within the Curry-Portales Underground Water Basins (CPUWBs)." Guidelines, p. 1. Agency employees apply the Guidelines "on a case-by-case basis" as has been held to be appropriate for the factually and scientifically complex and diverse matter of decision-making on individual water rights matters. *Stokes v. Morgan*, 101 N.M. 195, 202, 680 P.2d 335, 342 (1984) (the determination of whether there is impairment must be made on a case-by-case basis).

In *Albuquerque v. Reynolds*, 71 N.M. 428, 439, 379 P.2d 73, 81 (1962), the New Mexico Supreme Court upheld the application of the OSE's administrative guidelines for processing, including placing conditions on applications for water rights from the Rio Grande and connected aquifers. It reasoned that because the OSE clearly had the authority to deny the application, the authority to take the lesser action, i.e., condition an application to assure no impairment, must follow. "Having the statutory power and duty to prohibit the taking, by denying the applications in toto . . . , the state engineer has reasonably exercised his power by imposing suitable conditions so as to permit such taking as will not result in impairment." In *Montgomery v. Lomos Altos*, 2007-NMSC-002, ¶ 18, 141 N.M. 21, 150 P.3d 971, 977, the New Mexico Supreme Court upheld the applicability and validity of the State Engineer's Middle Rio Grande Administrative Area Guidelines.

These decisions are fully in accord with other case law holding the OSE has broad authority in water rights matters. "The general purpose of the water code's grant of broad powers to the State Engineer, especially regarding water rights applications, is to employ his or her expertise in hydrology and to manage those applications through an exclusive and comprehensive administrative process that maximizes resources through its efficiency, while seeking to protect the rights and interests of water rights applicants. See *State ex rel. Reynolds v. Aamodt*, 111 N.M. at 5, 800 P.2d at 1062 (1990) ("the legislature granted the State Engineer broad powers to implement and enforce the water laws administered by him").

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

SARAH A. BOND  
Assistant Attorney General

[1] No question has been raised regarding the procedural adequacy of these previously adopted regulations governing public rights and opportunities for new and changed uses within declared basins.