

Introductory Comments

Hearing on Proposed Rule Change

To Delete Rule 50

The Department proposes to delete rule 50 of the Conjunctive Management rules. This is in response to a petition filed in 2010. Rule 50 defined the area of common ground water for the Eastern Snake Plain Aquifer, or ESPA, as the area designated in a report of the United States Geological Survey. We invite people to read the Director's final order of August 29, 2014 and the Director's letter to water users of August 9, 2011 for background information. We will now briefly discuss three things: (1) how the Department came to the conclusion to repeal rule 50; (2) when it will become effective; and (3) How this proposed change would affect water users. We will then open the meeting to questions and comments.

1. How did the Department come to decide to propose the repeal of rule 50?

- a. In defining what should constitute an Area of Common Ground Water Supply, the rules set a low bar. Where the use of ground water "affects" the flow of surface water, it satisfies the definition of an area having a common ground water supply (Rule 10 part 01).
- b. It is clear that the area that affects the flow of the Snake River where water calls have been made is much larger than the area described in rule 50. We can argue about the magnitude of the affects and the time it takes for affects to occur, but it there is little if any disagreement among scientists about the fact that the ESPA is affected by an area larger than the current Area of Common Ground Water Supply. The Area of Common Ground Water Supply defined in rule 50 is no longer consistent with the best available scientific information.
- c. The petition requested that the boundary of the Eastern Snake Plain Aquifer Model, or ESPAM, be adopted as the Area of Common Ground Water Supply. However, the model boundary was not established to represent the full extent of ground water impacts. Sometimes artificial boundaries were drawn because of a lack of data or to simplify the modeling. Because of this, the model boundary is a poor surrogate for the Area of Common Ground Water Supply. To use the model boundary would result in treating similarly situated ground water users differently. For example, ground water depletion within the Big Wood River Basin and in the Big Lost River basin below Mackay dam both reduce tributary underflow and recharge to the ESPA but if the ESPAM model boundary were adopted, only the Big Lost River basin would be subject to administration. The Director concluded such disparate treatment is not acceptable.
- d. Furthermore, the arguments against expanding the Area of Common Ground Water Supply seemed to focus on impacts to a specific call. It is important to remember that a

given area may have a minimal impact on a one call but may have a substantial impact on a call from another location. However, in defining the ESPA Area of Common Ground Water Supply, the Department can't predict where a call may come from. The areas affected by each call will depend on the specific facts.

- e. Consequently, the Department believes actual administrative practices make it unnecessary to have a formally defined Area of Common Ground Water Supply for the ESPA.
- f. Rather than attempt to draw one boundary to cover all imaginable (and perhaps unimaginable) future possibilities within and around the ESPA, it is better to resolve the question of who is subject to regulation within the proceedings for an individual water call.
- g. Coincidental to proposing to repeal rule 50, the Department is undertaking two separate actions to strengthen administration:
 - i. Department hydrologists have been asked to review conditions and develop recommendations to administer ground water use outside the model boundary. This is in response to numerous comments received during the negotiated rulemaking process that ground water use with similar impacts to calling parties would be treated differently solely because some are inside, and some are outside the ESPAM model boundary. We don't expect instant results from this effort, which involves complex issues. At an appropriate time, the matter will be discussed with the Eastern Snake Hydrologic Modeling Committee.
 - ii. Department water rights administrators have been asked to review administration of surface water rights outside water district 01. Water District 01 administers the use of natural flow and storage releases diverted above Milner Dam. The purpose of the review will be to determine whether surface water sources connected to the Snake River are being administered in a manner that adversely impacts natural flows available to water users within Water District 01. If the review reveals that diversions are taking place in tributary areas that adversely impact senior rights within Water District 01, actions will be taken to cure the problem.

2. When will a rule change become effective?

- a. In Idaho, the legislature must review administrative rules and changes thereto. There are three possibilities:
 - i. The legislature may approve the rule change by passing a concurrent resolution, in which case the rule becomes effective upon adoption of the concurrent resolution or such other date specified in the concurrent resolution.
 - ii. The legislature may not act to approve the rule change but may simply allow it to become effective. In this case the rule change would apply at the end of the coming legislative session—around April 1, 2015.
 - iii. The legislature could act to disapprove the rule change, in which case the existing rule would remain in effect.

3. How will this rule change affect water users?

- a. For the sake of discussion, we will assume a rule change will become effective on April 1, 2015.
- b. For a new delivery call, the Director would need to determine the Area of Common Ground Water Supply as part of the delivery call proceeding, in accordance with Rule 30.
 - i. Remember, we are only deleting Rule 50, which specifies a fixed boundary for the ESPA.
- c. There are two major existing calls involving the ESPA and the application of a rule change applies differently to them.
- d. The Rangen call is for fish propagation near Hagerman.
 - i. It has been administratively determined that ground water use east of the Great Rift Fault Zone is not significant enough to warrant administration. That will not change.
 - ii. In the southern parts of the aquifer west of the Great Rift, regulation of ground water use was limited to the area identified in rule 50. If the rule change is adopted, that reason to exclude areas outside the existing boundary would no longer apply. We assume that Rangen would petition the Director to expand the area subject to regulation as well as the mitigation owed to Rangen. This would result in an administrative hearing to consider the request. The administrative process would need to be complete before any change could be implemented.
- e. The Surface Water Coalition diverts water from the Minidoka and Milner pools.
 - i. Some areas on the northern, eastern, and southern edges of the ESPA have been precluded from being regulated for the Surface Water Coalition call because they are outside the Area of Common Ground Water Supply.
 - ii. If the rule change is finally adopted, that reason to exclude those areas will no longer exist.
 - iii. Recently, District Judge Eric Wildman issued a decision modifying the application of this practice. He said that the full shortage incurred by the Surface Water Coalition must be provided from the lands subject to regulation and may not be reduced because some lands within the model boundary are outside the Area of Common Ground Water Supply. The decision is still before Judge Wildman on petitions for reconsideration. If Judge Wildman's opinion remains unchanged, the Director will need to modify how the Area of Common Ground Water Supply affects the Surface Water Coalition delivery call. This will result in the full mitigation requirement being provided from those water users deemed in Director's orders to be subject to regulation.
 - iv. We assume the Surface Water Coalition or another party may petition the Director to expand the area subject to regulation. This would result in an administrative hearing to consider the request. The administrative process would need to be complete before any change could be implemented.