

DRAFT REGULATION OF JANUARY 2006
ON HOUSEHOLD OR OTHER DOMESTIC USE OF WATER

ABSTRACT

<u>Item</u>	<u>Impact of New Regulation 19.27.5</u>
Household or other Domestic Use	OSE may reject, condition, meter and tag new wells.
Trees, lawn, or garden irrigation (non-commercial)	OSE may reject, condition, meter and tag new wells.
Domestic Well Management Area (DWMA)	A DWMA is in the proposed regulation to prevent impairment to rights in surface water. A DWMA has additional restrictions, transfer requirements, a limit of 0.25 AF or less to 0.0 AF if the OSE requires transfer of the total household use.
Amount of water	Maximum 1.0 AF for single households or incidental commercial use, instead of the 3.0 AF required for one acre of irrigation. DWMA households limited to 0.25 AF or less, and may be 0.0 AF. Multiple households on one well retain 3.0 AF, unless in a DWMA.

Purpose of use	Proposed regulation applies to single household, multiple households, and incidental commercial uses statewide. Incidental commercial uses are to be rejected where an alternative supply is available.
Metering	OSE “ <i>may require</i> ” a meter for a single household statewide, and “ <i>shall require</i> ” meters for single households in a DWMA, instead of only at multiple households and incidental commercial uses.
Fee Schedule	\$125 for domestic wells and \$75 to \$200 for other administrative actions.
Replacement, supplement, repair, deepen, change use	Will require new applications outside the domestic well permit.
Expedited transfer	Proposed method to raise rights to 3 AF, but no process, other than standard application procedures, is presented. Transfer requirement would delay for years or deny domestic permits, which are now available the same day of application.
Cancellation	For failure to comply with OSE conditions.

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COMMENTARY

The proposed new 72-12-1.1 domestic use regulation provides for OSE rejection of domestic well and household uses and treats them as other commercial water permit applications that require transfer of existing rights. The proposal eliminates the current administrative practice regarding 72-12-1.1 *“upon filing of each application describing the use of applied for, the state engineer shall issue a permit to the applicant to use the underground waters applied for;...”*. Domestic wells have been exempt from impairment analysis in accordance with 72-12-1 *“By reason of the...relatively small amounts of water consumed in the watering of livestock; in irrigation of not to exceed one acre of non commercial trees, lawn or garden; in household or other domestic use;...”*. Accordingly, the practice has been to issue permits for domestic well uses without administrative review. The purpose of use was accepted as a practical limit due to the *“relatively small amounts of water consumed”*. Any associated impacts on the water resource or other rights were accepted as authorized by the legislature. The amount of 3 AF per annum for 72-12-1 well permits is derived from existing OSE rules (1-15.2), rather than from legislation.

The New Mexico legislature has declined to authorize any change to the existing domestic well law despite recurring submittal of bills since year 2000 to curtail or limit domestic well uses for households in New Mexico. The regulation should implement the statute, instead it revises the statute. The proposed regulation is an administrative bypass of the legislature. The OSE has stated *“Through the rule-making process, we can do a lot of this stuff administratively,”* and *“There is a very real question of whether the domestic well statute is unconstitutional.”* However, such questions ordinarily are answered by the legislature and courts, rather than by the administrative agency.

The proposed regulation requires findings of fact that justify the regulation. The January 3 findings of fact list five objectives, but display no facts on the quantitative impact of domestic wells that would justify rejecting domestic applications or declaring DWMA to meet the objectives. Instead, published hydrologic analysis demonstrates there is no actual benefit for

existing rights to surface water from curtailing domestic wells¹. The same number of households obtain water from the same aquifers whether self-supplied or public-supplied.

The premise of the proposed regulation in finding of fact (3) is that concentrations of domestic wells “*impair existing rights to surface water.*” Domestic wells provide highly-valued water service to about 20 percent of households in the state, but that good service comes from less than one half of one percent of the total water used in the state. There is no hydrologic basis in the published or the administrative record that indicates a need to reduce families’ access to domestic wells. No actual harm can be shown to existing rights or Compact obligations. The legislature exempted domestic wells from administrative review in 1953 and reconfirmed that exemption in 2000 – 2005.

The alternative actions that are needed to avoid almost all problems from domestic wells are a set back requirement of 200 to 300 feet between wells in separate ownership (instead of the 50 feet in the draft regulation), a well-construction standard for adequate 60-foot operating pump-submergence depth, and a program of field inspection to verify that the 72-12-1 purpose of use is as permitted without waste. With those three conditions, there would be no hydraulic interference with supply among adjacent wells, and no over-consumption of the authorized “*relatively small amounts*” to impact streams or Compacts. Compacts are affected most by the hundreds of thousands of AF of riparian stream valley unmanaged losses of water.

The OSE public hearing on the proposed regulation where “*any person who is or may be affected by the proposed regulation or code may appear and testify*” is scheduled for April 2006.

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¹ Natural Resources Journal, “Hydrology and Administration of Domestic Wells in New Mexico,” Volume 45, #4 (Fall 2005) by Balleau and Silver, viewable at http://www.balleau.com/materials/Dom_Wells.pdf.