

**BEFORE THE OKLAHOMA WATER RESOURCES BOARD
STATE OF OKLAHOMA**

IN THE MATTER of Determining the Maximum)
Annual Yield for the Arbuckle-Simpson)
Groundwater Basin underlying parts of Murray,)
Pontotoc, Johnston, Garvin, Coal and Carter)
Counties)

**PROTESTANT’S BRIEF IN OPPOSITION TO A FIVE-YEAR
(OR MORE) TIMEFRAME FOR THE ISSUANCE OF REGULAR
PERMITS TO REPLACE PREVIOUS ISSUED TEMPORARY PERMITS**

INTRODUCTION

Protestants Arbuckle-Simpson Aquifer Protection Federation of Oklahoma, Inc., Charles Roos, Paul Warren, Bill Clark, John Sparks and Floyd Bergen (Protestants) submit this post-hearing brief. Protestants would submit that the Oklahoma Water Resources Board (OWRB or Board) wrongfully included the issue of Phased Implementation in the Tentative Determination of Maximum Annual Yield of Groundwater from the Arbuckle-Simpson Groundwater Basin. After acknowledging that “the statutes or the OWRB rules do not provide any express authority for the OWRB to issue a regular permit that would authorize the pumping of more than the determined equal proportionate share of the Maximum Annual Yield.”, the tentative order proceeds to do exactly that by calling it something else. In addition, and contrary to law, the Board has commingled an Administrative Procedures Act (APA) individual proceeding with an APA rulemaking. The proposed phase-in guarantees that the proposed maximum annual yield will be substantially exceeded.

PROPOSITION ONE

The Tentative Order Improperly included Rule Making regarding Phase-In as part of the maximum annual yield Hearing.

Tentative Conclusion No. 8 of the Board’s Tentative Order determining the Arbuckle-Simpson maximum annual yield (MAY) improperly injects agency rule making into the MAY process. The Board’s conclusion “that input should be solicited from interested persons during the public hearing on this Tentative Determination on criteria or standards that could be considered good cause for an extension of five-year period established for the phased implementation” undoubtedly constitutes rulemaking.

Title 82 Oklahoma Statutes § 1020.6 provides the statutory guidance for hearings on maximum annual yield and specifically states that such “hearings shall be conducted pursuant to Article II of the Administrative Procedures Act (APA). Article II of the APA sets forth in some detail the mode of procedure for individual proceedings. Notably, procedures for agency rule making are delineated in Article I of the APA and are wholly separate and distinct from those mandated for maximum annual yield Determinations. The OWRB’s rules recognize these differing procedures. OWRB Rule OAC 785:4-3-3 reads in pertinent part as follows:

“The Board may conduct general or individual hearings: (1) . . . hearings on maximum annual groundwater basin yields shall be evidentiary type hearings conducted pursuant to Article II of the APA. Hearings on Board rules, regulations and standards shall be conducted according to the requirements of the APA and other applicable laws.”

Similarly, OAC 785:30-9-4 states in part that:

“(b) Determination of maximum annual yields are not rules, rule making procedures of the APA are not followed;. . .”

Thus it is clear that the Board’s tentative order injecting rule making into the MAY hearing process has run afoul of both the APA and the OWRB’s own rules.

PROPOSITION TWO

OWRB lacks statutory authority to “Phase-In”, either by that name or by calling it something else, the issuance of regular permits to temporary permit holders.

Tentative Conclusion 8 e is legally correct in stating that "..., the statutes or the OWRB rules do not provide any express authority for the OWRB to issue a regular permit that would authorize the pumping of more than the determined equal proportionate share of the maximum annual yield." The order then, however, proceeds to do just that by authorizing a limited number of entities to continue pumping more than their equal proportionate share. By playing word games the order provides the very phase-in the tentative order says the Board has no legal authority to grant. This fact was acknowledged under oath by OWRB Executive Director J.D. Strong when he testified at the hearing that the Board had no legal authority to provide a phase-in. Nevertheless, the tentative order disregards that fact by claiming the OWRB has the authority to delay conversion of existing temporary permits for at least five years, and likely for much longer. The Order attempts to justify this "sleight of hand" by claiming that the phrase "as soon as practical" in OAC 785:30-9-6 refers to permittees, not to the Board itself.

The Board accomplished this switch by simply replacing the phrase "as soon as possible" with "a reasonably practical timeframe." These phrases do not carry the same connotation and the Board's effort to claim they mean the same thing constitutes a blatant attempt to circumvent the Board's own rule. Read in context, and particularly in light of past precedent, this reading turns the clear intent of the rule upside down.

In none of the 23 groundwater basins where the Board has determined the maximum annual yield and the equal proportionate share has there been a phase in period. This despite the fact that in 14 instances the equal proportionate share was reduced to 1.0 acre feet or less. A noteworthy example of past Board practice and interpretation of this rule is the MAY determination for the Enid Isolated Terrace, at the time of the order a primary drinking water

supply source for the City of Enid. When the MAY for this basin was reduced to .5 acre feet, there was no phase-in period.

“As soon as practical” clearly means as soon as it is practical for the Board to issue a regular permit and has nothing to do with “a reasonably practical timeframe” for permittees. As Julie Cunningham stated in her testimony, and as confirmed by Dr. Blaine Reely, the OWRB has never before interpreted this rule as authorizing a phase-in period.

In any event, determining the length of a phase-in period based upon “a reasonably practical timeframe” for a permittee essentially means that there is no timeframe. If the current wording of the order were to stand, it takes no stretch of the imagination to think that issuance of a regular permit to the City of Ada will be no more practical in five years than it is now. Such an interpretation of the Board’s rule wholly subverts the Ground Water Act’s stated purpose of allocating and facilitating the use of groundwater.

PROPOSITION THREE

Any Phase-In (*i.e.* reasonably practical timeframe) for issuance of regular permits will cause an exceedance of the proposed maximum annual yield.

Dr. Blaine Reely testified at the hearing that any phase-in, even if only for one day, much less one for five years or more, would result in an over allocation of the 78,404 acre-feet per year maximum annual yield proposed for the Arbuckle-Simpson. As set forth in the OWRB documents referenced by Dr. Reely, the 48 currently existing temporary permits total 74,524 acre feet. When that amount is added to the existing prior rights of 5696 acre feet, the total allocation will be 80,220.3 acre feet, which number guarantees that for at least five years the proposed MAY will be exceeded by 1816 acre feet. OWRB records also reflect that there are 13 pending permits dedicating 57,128.4 acres. Approval of these permits at the proposed equal proportionate share of .2 acre feet would result in additional allocation of 11,425.68 acre-feet.

Finally, it can be anticipated that many, if not most, of the Arbuckle-Simpson landowners who have not yet applied for a groundwater permit, will do so as soon as the equal proportionate share determination is finalized. Approval of these applications will make the possibility of the 78,404 maximum annual yield figure ever being achieved even more remote.

As the above and foregoing makes abundantly clear, the Tentative Order's proposed phase-in of the issuance of regular permits is not only legally suspect but also utterly fails to achieve the order's stated objective of limiting withdrawals to the 78,404 maximum annual yield figure.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. Barnett', is written over a horizontal line.

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