



City of Phoenix Comments on 5MP Recharge Proposals

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Fri, Nov 12, 2021 at 4:51 PM

Dear Sir or Madam:

The City of Phoenix (Phoenix) submits the following comments regarding the draft 5MP language regarding underground storage and recovery in areas of shallow groundwater depth ("Shallow Groundwater Draft Language") as set forth in "5MP Recharge and Recovery Proposal Summary - Version 2." These comments are similar to those previously submitted by Phoenix and others summarized on the Department document "July 14, 2021 Recharge Subgroup Meeting Questionnaire Responses." The Department provided no response to those previously submitted comments, and Phoenix requests that the Department address Phoenix's and other stakeholders' concerns and comments before moving ahead with the adoption of the 5MP.

As stated in Phoenix's earlier comments, Phoenix is fully supportive of the Department's efforts to administer the Underground Water Storage, Savings and Recovery Act ("UWS Act") while ensuring that water storage and recovery under the UWS Act does not exacerbate water issues facing the Phoenix AMA. Nonetheless, the Shallow Groundwater Draft Language is concerning because (a) the problem the Department is attempting to address by the Draft Language is unspecified, (b) the Draft Language may significantly limit water management flexibility provided by the UWS Act, inhibiting one of the principal purposes of the UWS Act, and (c) there has been no thorough public analysis of the Draft Language that would provide assurance that there will be no unintended consequences resulting from its adoption.

Since Phoenix's earlier comments, the Department's proposal has been clarified by defining shallow depth to water as any area where the water surface is 50 feet or less below land surface. This arbitrary and "one size fits all" approach has only increased the likelihood of negative unintended consequences and raised greater concerns about the potential impact on water management in the Phoenix AMA.

Proposal 1: *Enforce language allowing recovery of stored water outside the area of impact only if the "areas in which water is stored are not experiencing problems associated with shallow depth to water."*

The narrative supporting Proposal 1 describes the problem as one in which "dewatering is required as a direct result of water storage or savings."

Any such problem, however, would seemingly already have been addressed in permitting the underground storage facility ("USF"). In issuing the USF permit, the Director is required to determine that "storage of the maximum amount of water that could be in storage at any one time at the facility is hydrologically feasible" and that "[s]torage at the facility will not cause unreasonable harm to land or other water users within the maximum area of impact of the maximum amount of water that could be in storage at any one time." A.R.S. § 45-811.01(C)(2) & (3). If Director has already determined that the maximum storage is feasible in the aquifer and there is no harm to surrounding land and water users, it is unclear what problem Proposal 1 is meant to address.

Further, the regulatory approach under A.R.S. § 45-811.01(C)(2) & (3) allows the Department to examine each area and storage facility under the unique circumstance presented by that facility to determine potential harm to surrounding land and water users. The "50 feet or less below land surface" will universally eliminate the ability to recover water stored in particular facilities away from the area of impact.

One of the two express policies and purposes of the UWS Act is to "allow for the efficient and cost-effective management of water supplies by allowing the use of storage facilities for filtration and distribution of surface water instead of constructing surface water treatment plants and pipeline distribution systems." A.R.S. § 45-801.01. Recovery of stored water away from the area of impact of storage is one of the UWS Act provisions that allows for cost-effective management of water in furtherance of this policy. Proposal 1 would be a significant impediment of this UWS Act purpose by requiring recovery only in the area of impact. The policy could require a storer to find storage facilities elsewhere, if that is possible, build a costly pipeline, or forego storage completely, at the expense of its future water security. The impact of Proposal 1 on cost-effective water management is particularly concerning, given that it will now arbitrarily and universally apply to all facilities where depth to water is less than 50 feet. If there are facilities where storage within 50 feet of land surface is not problematic, the Department's policy may practically prohibit a water storer from using that facility while achieving no water management objective.

If the proposed Shallow Groundwater Policy resolved an identified and significant problem, or addressed problems that may be unique to a particular facility, it might be justified; however, as reviewed above, it is unclear what benefit would be achieved by the proposed policy.

It is evident that the State is entering an era of continued growth while its water resources are threatened by drought. During this time, water providers need as much flexibility as possible to manage their supplies as cost-efficiently as possible. Therefore, the tools provided by the UWS Act should not be eliminated without a clear and pressing reason to do so. Phoenix continues to assert that Proposal 1 should be eliminated from the 5MP, or, in the alternative, the Department should clearly define the problem to be addressed and then narrowly tailor a regulation to address that problem.

Proposal 2: *Incentivize recovery in areas of shallow groundwater (areas 50 feet or less from land surface)*

Phoenix re-asserts that Proposal 2 is extremely complex and that moving forward without a full analysis of potential consequences is ill-advised.

The “50 feet depth to water” standard that has been proposed incentivizes recovery along natural streambeds where depth-to-water is naturally shallow. The standard will encourage recovery near natural, developed, or restored wetlands and riparian habitats which are critical for environmental and ecological diversity. Phoenix is particularly concerned with the potential risk and harm to Tres Rios and Rio Salado. Phoenix asks that the Department provide any analysis or study it has undertaken of the potential consequences of Proposal 2 to these environmentally and ecologically important areas along streambeds in the Phoenix AMA.

The Department must also consider the impact of Proposal 2 on subflow in the Phoenix AMA. Under Arizona law, underground water that is closely associated with a stream is considered “subflow” of the stream; that is, it is considered to be a part of the stream and is governed by surface water law, not the Groundwater Code. *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 198 Ariz. 330, 334–35, 9 P.3d 1069, 1073–74 (2000). These principles have been the law in Arizona for at least 90 years. *Id.*

The Department must consider its proposal to incentivize the placement of recovery wells so that the wells are in all likelihood pumping subflow. The Department's position of simply relying on the presumption that water pumped from a well is groundwater until the adjudication court delineates a subflow zone is unsatisfactory. As the Special Master in the Gila River General Stream Adjudication recently ruled regarding the subflow presumption, “[a] presumption is simply an evidentiary rule that operates by requiring an initial determination that a particular fact is true once a specific underlying fact has been established. . . . **A rule of evidence does not invalidate, change or create an exception to a law**; instead, it is a rule applicable to the proof of a fact to which the law is applied.” See *In re the General Stream Adjudication of All Rights to Use Water in the Gila River System and Source*, W-1, W-2, W-3, W-4, Contested Case No. W1-11-0245, Report of the Special Master, September 23, 2021, p. 17 (emphasis added).

If the Department adopts Proposal 2, the Department is encouraging investment in the construction of recovery wells in an area that someday will likely be found to be part of the subflow zone. It is likely that recovery of water from the subflow zone that has not been stored in the area will then become legally prohibited. The persons who invested in the recovery wells encouraged by Proposal 2 will look for compensation or may assert the right to continue to pump subflow at the expense of valid surface water right holders. The Department must adequately address the potential problems Proposal 2 will cause in the future.

The potential consequences of incentivizing recovery in areas of shallow depth to groundwater are too complex and important to adopt a rule that is not fully considered and vetted. Given the time and resource constraints the Department faces in meeting its goal of adopting the 5MP for the Phoenix AMA in 2022, Phoenix requests that Proposal 2 be delayed until the post-2025 management programs to allow sufficient time to consider fully all the potential consequences.

Phoenix also again requests that the Department address the comments and concerns raised by Phoenix and other stakeholders before moving ahead with Proposals 1 and 2. A process that solicits but ignores comments and questions of the impacted stakeholders is inadequate. A process that thoroughly examines and evaluates significant policy changes must include consideration and responses to submitted comments.

Thank you again for the opportunity to submit comments on this important proposal.

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