HBACA

Home Builders Association of Central Arizona

May 3, 2024

Sent via Email

Director Tom Buschatzke
Arizona Department of Water Resources
1110 W. Washington, Suite 310
Phoenix, Arizona 85007

RE: Home Builders Association of Central Arizona comments on Alternative Designation of Assured Water Supply Rule Package Dated April 8, 2024

Dear Director Buschatzke:

On behalf of the Home Builders Association of Central Arizona ("HBACA" or "Association") please accept the following comments on the Department's proposed rules related to the Alternative Designation of Assured Water Supply ("A-DAWS") process. The HBACA is a trade association representing the residential construction and development industry. The Association acts as a source of timely and reliable information concerning the state of the local building industry and works to eliminate overly restrictive and costly building laws and regulations which drive up the cost of housing. Since 1951, the HBACA has served as the voice of the home building industry.

The HBACA fully supports the concept of an alternative designation process for Queen Creek, Buckeye, and private utilities to become designated water providers. However, as the industry most impacted by these rules, we believe it is vital that the Department's rules create a workable process for those providers. Moreover, our industry must be allowed to continue to build and grow to create a revenue base for those providers. Finally, we want to ensure that our members' projects that are currently on hold can immediately resume and begin to generate a return on the billions of dollars of stranded investment in those areas.

It is with these goals in mind that we provide these comments.

Very truly yours,

Jackson Moll
Chief Executive Officer
Home Builders Association of Central Arizona

(All References to "Rule" herein refer to the Assured Water Supply Rules, A.A.C. R12-15-701 *et seq*).

Preamble: The preamble is intended to quantify the physically available groundwater in a new DAWS based on the "metric" of issued but unbuilt CAWS. The preamble states that these CAWS are not assigned to or pledged to the DAWS, and will remain (stagnant) until, if ever, the DAWS expires.

In applying for a DAWS, the applicant must quantify the current, committed, and projected demand within the service area. ADWR says that they will rely on the DAWS provider to estimate the committed demand of issued but unbuilt CAWS that represent platted but unbuilt lots (committed demand). This is supposed to allow the provider to estimate the committed demand below the face value of the issued CAWSs, thereby freeing up physically available groundwater.

Question: What standard will ADWR require in estimating this committed demand? If the demand calculator is used, the result will be very little difference. What other standard is appropriate?

Definitions: Rule 701(53) defines new alternative supply as a volume of non-AMA groundwater that was not ***served*** by the provider in 2021.

Question: Is water controlled by the provider and ***stored*** in 2021 (but not served) considered a "new" supply?

Comment: Use of the year 2021 has differential effect on different providers. A different benchmark should be considered that would allow providers to select a year in a range (e.g. 2021 through 2023).

Rule 701(68) defines Unreplenished Groundwater as a volume withdrawn by the provider after subtracting groundwater used that was consistent with the goal.

Comment: This would seem to reduce Unreplenished Groundwater that was offset by use of groundwater allowance, extinguishment credits, or replenished by CAGRD. Use of groundwater allowance or extinguishment credits is a diminishing asset, such that groundwater consistent with the goal in 2021 (or whatever year is chosen) may represent groundwater that will eventually be unreplenished. Yet, this eventual groundwater does not count.

Certificate of Assured Water Supply (Co-mingling Rule): Rule 704 lists the criteria for obtaining a CAWS. Subsection (B)(3) requires an estimate of the 100´year demand for the subdivision. Subsection (B)(5) requires a list of "all proposed sources" of water that will be used by the subdivision. In a commingled system, ADWR maintains that notwithstanding the subdivision bringing 100% physically available water to the development, the subdivision may receive some quantity of (blended) water and therefore must prove that all water within the system is physically available. This is so despite the fact that at the time of the CAWS application, all water within the system is in compliance with the assured water supply laws. Adding a new supply would not affect the remaining system.

ADWR proposes to change the rule to allow a determination of physical availability in the CAWS if certain conditions expressed in Subsection (N) are met. These include the requirement that the application includes a new volume of non-AMA groundwater; that the new supply was not served within the service area in 2022; the proposed new source otherwise meets the assured water supply criteria; that the new supply includes an additional volume equal to 30% of the estimated demand of the proposed subdivision; and that the subdivision be enrolled in the CAGRD.

Comment: The proposed rule requires a water supply that exceeds the estimated demand for the subdivision, going beyond the requirements of A.R.S. § 45-576(M).

Comment: The requirement of the municipal provider acquiring 30% additional water resource beyond the need for the new subdivision use does not have any rational basis but is rather an arbitrary number that does not reflect the individual use of groundwater within any particular provider. Furthermore, the ADWR Phoenix AMA Groundwater Model, released June 1, 2023, shows approximately a 4% deficit (2% for Municipal/Assured Water Supply demand) across the entire model domain. At most, a groundwater offset should be limited to the shortfall in the physically available Municipal/Assured Water Supply sector, or 2%.

Comment: Requiring a 30% volume from the municipal provider to serve a subdivision that otherwise has procured 100% of the demand volume for that subdivision is an exaction that is in excess of the need for this particular subdivision. As such, it is a taking under the rule adopted by the United States Supreme Court *Sheetz v. El Dorado County, California*, No. 22-1074 (April 12, 2024).

Comment: Rule 704(N) limits the applicability of the new rule to applications filed before June 30, 2027. First, it is not clear that an application filed, but not resolved, before this date still qualifies. Second, there is no clear justification stated for the sunset deadline. If the intent is to allow time for an A-DAWS to be issued, that may never happen. If it does not, a rule on commingled supplies is still necessary.

Designation of Assured Water Supply (Alternative Designation or A-DAWS). Rule 710 has been modified to provide a means of obtaining a designation of assured water supply for a municipal provider if that new designation is based in part on groundwater and in part on at least one New Alternative Water Supply. The Rule also includes certain provisions for modification of a designation to incorporate new supplies. The elements of the Rule are addressed below:

Comment: The proposed changes to Rule 710(G) appear to limit the ability of a designated provider that holds a designation based in part on groundwater deemed physically available under Sections (H) and (I). Section (G) is intended to preserve the physical availability of groundwater in a designation if that designation is modified. There appears to be no reason to preclude application of this principle to providers that do rely on the groundwater deemed physically available under Sections (H) and (I) other than the requirement, imposed by Rule 710(I) that would exact a 25% decrease in the available groundwater based on acquisition of New Alternative Water Supplies. This is drawing a distinction between currently designated providers and A-DAWS providers.

Comment: Rule 710(H) limits the application of the A-DAWS to the Phoenix AMA. There appears to be no basis for excluding the Pinal AMA.

Comment: Rule 710(H) provides that a volume of groundwater shall be deemed physically available if the application for an A-DAWS includes a New Alternative Water Supply that meets the requirements of Rules 716 through 720. These rules are the basic requirements for an assured supply. If the New Alternative Water Supply must meet these requirements at the time the A-DAWS application is filed, it is unclear what forms of New Alternative Water Supply may qualify. It is likely that some alternative supplies, while presently being pursued by municipal providers seeking to take advantage of this rule, will not qualify as an assured water supply for several years. It is therefore unclear that this new rule will provide any immediate effect. This is contrary to the proposed intent of the rule, which is to provide a means to re-start economic development in areas where the municipal provider does not hold a current designation of assured water supply.

Comment: The volume of groundwater deemed to be physically available under Rule 710(H) is based on the volume of groundwater (and stored water recovered outside the area of impact) within the service area of the applicant in calendar year 2021. It is now calendar year 2024. Most if not all providers that would apply for the A-DAWS have increased their service demand over the last three years. Basing the groundwater allocation on 2021 use means that these providers will start the A-DAWS in a groundwater deficit. This deficit may be as large as 15% for some providers. Commencing a program that immediately starts with a significant deficit is unreasonable and without rational basis.

Comment: The traditional rule of a designation is that the provider must show adequate water supplies to cover current, committed, and at least two years of projected demand or be subject to revocation of the designation. Rule 711(F). Under the A-DAWS rules as stated, it is unclear that any provider can show the quantity of water to meet this standard. Comments from municipal providers on these proposed rules to date have consistently focused on the provider's proposed water budget for the A-DAWS and the ability of the provider to meet a standard that would show sufficient water to meet the projected demand within the term of the designation. Rule 711(D) proposes that the term of the designation shall be for an initial term of not greater than 15 years. It is doubtful that a municipal provider can today show any water portfolio that meets the requirements of these rules that would approach a 15 year term. Furthermore, it is unclear that even if an A-DAWS is granted, the same would not be subject to revocation almost immediately based on the declining portfolio of water.

Comment: Rule 710(H)(1) – (3) provide a formula for calculating the 100 year volume of groundwater available to the provider in the A-DAWS. This formula, apart from being unreasonably based on 2021 water use as noted above, also reduces the volume of groundwater available to the provider by 25% of each New Alternative Water Supply included in the application. This 25% factor is again a quasi-legislative exaction that exceeds the need to prove physically available groundwater. If the modeling results show a 2% shortfall in the municipal/assured water supply groundwater (a determination that may still be subject to challenge), the arbitrary exaction of a 25% reduction in groundwater available to the A-DAWS provider is without rational basis and contrary to the ruling in *Sheetz v. El Dorado County, California* noted above.

Comment: Rule 710(I) provides that if an A-DAWS is modified, the volume of groundwater in the existing designation will be preserved, subject to groundwater withdrawn by the provider since the original A-DAWS was issued (consistent with Rule 710(G) discussed above) but further requires a reduction in that amount based on 25% of each New Alternative Water Supply included within the modification. This requirement is subject to the same objections as the 25% requirement noted above for Rule 710(H).

Comment: The 25% reduction in available groundwater imposed by the A-DAWS Rules applies not only to the New Alternative Water Supply that is acquired by the A-DAWS provider but would also apply to any effluent generated from that new supply, as that effluent would also qualify as a New Alternative Water Supply. Thus, the exaction of a 25% reduction in available groundwater applies twice to the New Alternative Water Supply, once upon its initial introduction and then again when effluent generated from that New Alternative Water Supply is sought to be included within the A-DAWS.

Comment: Rule 710(J) provides that no additional groundwater may be included in an application for, or modification of, an A-DAWS beyond the amount deemed physically available under Section (H). This rule limits any ability for the A-DAWS provider to demonstrate that additional groundwater is indeed physically available under the traditional showing of physical availability provided in Rule 716. This is inconsistent with proposed legislation (SB 1172) that would allow additional groundwater to be included in an A-DAWS based on the physical availability exemption contemplated by that legislation. Further, it may be that additional groundwater is determined to be physically available by, for example, the recognition of an Analysis of Assured Supply (AAWS) located within the provider's service area. Physical availability demonstrated by an AAWS should be allowed to inure to the benefit of the municipal provider if that provider becomes designated.

Comment: Rule 710(K) provides that the A-DAWS applicant must be enrolled as a Member Service Area within the CAGRD. The terms and conditions of becoming a Member Service Area depend upon discussions/negotiations with CAGRD as to the minimum offset against the financial replenishment obligations. These terms may need to be developed before a provider can commit to enroll in the CAGRD, as noted in the general comments below.

Expedited Modification. Rule 711 changes the rule on modification to incorporate the A-DAWS concept and also provides for expedited review of an application for modification of any designation.

Comment: Rule 711(G) does not allow for expedited modification if the applicant includes a new source of groundwater. This is inconsistent with the proposed legislative intent of SB 1172 as noted above and is also inconsistent with a determination of physically available groundwater made outside of the modified application process.

Comment: The review of the current, committed, and projected demands of the provider may result in a determination, based on declining groundwater volumes due to use or reductions based on New Alternative Water Supplies that will show a lack of supplies necessary to meet these demands. Thus, the attempt by the provider to increase the portfolio based on bona fide new supplies may be thwarted by the declining groundwater.

Financial Capability. Rule 720 proposes to change the requirements for showing financial capability for future projects to include "financing mechanisms" for any applicant. This is a good change. The definition of "financing mechanisms" is somewhat vague, as in the current rule.

Calculation of Groundwater Allowance. To show consistency with the management goal for groundwater use, Rule 720(A)(4) provides a new calculation for a proposed A-DAWS provider that includes a formula for determining the volume based on (i) total groundwater deliveries; or (ii) total water deliveries. In either case, the subject year is still 2021.

Comment: The providers seeking a potential A-DAWS all have different water delivery characteristics. Choosing one year (2021) as the standard presents the same issues noted above in calculating the physically available groundwater. The general intent appears to be to calculate a groundwater allowance based on so-called "legacy" groundwater use—that is groundwater use in the provider's service area that, for several reasons, may not have been subject to replenishment. The volume of groundwater that might have been used by the provider consistent with the management goal without CAGRD replenishment varies significantly among providers. Choosing one year (2021) may not be equitable for all proposed A-DAWS providers.

Comment: The financial impact of assuming a replenishment obligation for legacy groundwater is a significant hurdle to the A-DAWS concept. The impact depends in part on the terms of a Member Service Area Agreement between the provider and CAGRD as noted above, but the goal of the A-DAWS provider is to provide a ramp-up time for meeting this financial obligation similar to the time frame contemplated by the Member Lands bill pending in the Legislature (SB 1181). At present, the groundwater allowance as calculated by the proposed rule does not provide sufficient relief. Legacy groundwater use is a function of the Assured Water Supply Rules as adopted and administered over the last few decades. More attention needs to be paid to the dilemma of the provider faced with this sudden shift in replenishment obligation and the impact that may have on the CAGRD.

General Comments. In addition to the specific comments noted above, there are other considerations in the A-DAWS proposal that deserve further review.

Comment: Pending legislation, particularly SB 1172, SB 1081, SB 1181 and HB 2026, all have a bearing the practicality of the A-DAWS approach. While these legislative initiatives are not yet law, the impact of these pending bills on the A-DAWS rules has not yet been fully analyzed or incorporated into the proposed A-DAWS rules. Timing of the rule package versus the final fate of these legislative acts should be further considered and discussed.

Comment: The financial impact of replenishment obligations on both the A-DAWS provider and the CAGRD have not been fully analyzed. The terms of a Member Service Area Agreement, while discussed at a high level, have not been resolved and may have a determinative effect on the viability of the A-DAWS for any given provider.

Comment: The rule package as a whole is an aggressive step toward reducing otherwise legitimate groundwater use within the Active Management Areas. While this is a laudable goal, in certain instances the rules impose requirements that are far beyond the definition of what constitutes an assured water supply under A.R.S. § 45-576. The rules therefore may be subject to challenge during the adoption process and after. *See e.g.* A.R.S. § 41-1052(D)(5); A.R.S. § 41-1030.