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Arizona Department of Water Resources
Attn: Sharon Scantlebury, Docket Supervisor
1110 West Washington St., Suite 310
Phoenix, AZ 85007

Re: Comments to April 8, 2024 Draft Rules on an Alternative Path to Designation of Assured Water Supply (the "Draft Rules")

Dear Sir or Madam:

We represent the following owners and developers of master planned communities in the Buckeye area: Buckeye Tartesso, LLC and Buckeye Tartesso II, LLC, developers of Tartesso; Belmont Infraco LLC, owner of Belmont; DMB White Tank, LLC, the developer of Verrado; Festival Ranch North, LLC, owner of North Star Ranch; and KEMF WP 2.2, LLC, owner of WestPark. These are all substantial, active projects within the City of Buckeye and/or Maricopa County in the Phoenix AMA and holders of Analyses of Assured Water Supply. Each of these developers has made very large capital investments in their projects and has been working diligently on developing solutions to the groundwater challenges in Buckeye and throughout the Phoenix AMA that will allow new residential development to continue in a responsible manner. These developers' collective investments in support of affordable housing in the Buckeye area are far in excess of $1 billion.

We appreciate the efforts of the Department in developing an alternative designation of assured water supply ("ADAWS"). Unfortunately, as currently embodied in the Draft Rules, the ADAWS concept is unworkable without significant modifications, including increasing the amount of groundwater that an ADAWS holder can rely upon. We have the following general comments on the process, followed by specific comments on the Draft Rules. As this is an informal rulemaking process, we have kept our comments on the Draft Rules high-level and reserve the right to provide detailed comments during any future formal rulemaking process.

General Comments

Need for a Transition Period. Because the process of implementing ADAWS is likely to take a significant amount of time (years) before any of the municipal providers targeted for ADAWS status can qualify for that status, the Department should resume issuing certificates of

assured water supply ("CAWS") as an interim measure. All of the major groundwater management tools, including the Groundwater Management Act itself in 1980 and the implementation of replenishment obligations and the assured water supply ("AWS") program rules in the mid-1990s, have included a transition process to implement new requirements over time. Yet here, with the release of the Phoenix AMA groundwater model and simultaneous announcement of a moratorium on new certificates of assured water supply, the entire program has been turned on a dime. As we note below, we do not believe that there is actually a 4% deficit in demand under the groundwater model if reasonable well locations are used, but even if there is, a 4% shortfall – less than half of which is in sectors actually protected under the assured water supply program – does not provide a basis for upending the entire existing system.

Need for Legislation. There are a number of pending legislative proposals that, if adopted, will have an impact on the assured water supply program. *See* SB 1172, SB 1081, SB 1181 and HB 2026. We have no objections to continued discussions about the Draft Rules, but we think that it would be more efficient to hold off on the next iteration of the Draft Rules or any formal rulemaking until the legislature adjourns and any resulting statutory changes can be incorporated.

Commingling and the Updated Model. The Department has taken the position that in service areas where there is unmet demand, new certificates of assured water supply cannot be issued even if the developer brings a sufficient supply of non-groundwater (or imported groundwater) to meet the needs of the proposed development, since the new development could potentially experience shortages that hit the service area as a whole. This position is contrary to statute (A.R.S. § 45-576(M)(1), defining assured water supply as sufficient water for the proposed use) and is not supported by the Department's rules. Nevertheless, the Department is introducing a significant new concept in the Draft Rules (R12-15-704(N)) to compel new development to offset existing demand with additional supplies. This is premised on the Department's current conclusion that there is a 100-year groundwater deficit in the Phoenix AMA of approximately 4%. As we have said repeatedly and as was aired in the Governor's Water Policy Council, this provision is not constitutional; the Department cannot require a developer to bring more water to the table than is necessary to support the proposed project.

Moreover, the Department's conclusion of a groundwater deficit is based on the Phoenix AMA Groundwater Model released last summer. As the Department is aware, there have been continuing discussions with the Department about the Groundwater Model and its underlying assumptions. Matrix New World has prepared an update to the Department's Phoenix AMA Groundwater Model (the "Updated Model") and recently submitted that update to the Department for review. The Updated Model demonstrates that, through well movement alone, unmet demand in the Phoenix AMA is resolved. As a result, there is no purpose for the 30% requirement and it should be eliminated.

Specific Comments on Draft Rules

Although there may need to be significant changes to the Draft Rules based on pending legislation (assuming enactment) and the acceptance of the Updated Model by the Department, we submit the following comments to the Draft Rules for the Department's consideration:

A. Preamble

The Draft Rules would allow an ADAWS holder to rely in part on the physical availability of groundwater equal to the water demand of unbuilt subdivisions or lots that have certificates of assured water supply. A number of our clients hold existing unbuilt certificates and need assurances that this practice will not undermine the validity of those certificates. The preamble language states: "In the event a designation expires or is otherwise terminated, any certificate previously issued in the designated provider's service area would remain in effect." This needs to be expressly stated in the rules themselves so there is no uncertainty for certificate holders. The Department is allowing the ADAWS holder to determine the water demand represented by these unbuilt subdivisions or lots and to use that water elsewhere. In addition, this physically available groundwater is subject to the 25% reduction in the provider's portfolio proposed by the Department. If the Department ultimately revokes the provider's ADAWS or refuses to extend it, the certificate could be undermined. The rules need to be unequivocal that the certificates remain valid.

B. 12-15-704(N).

1. We do not agree with the Department's position on commingled water supplies. If a CAWS applicant has a source of non-groundwater supply, the Department should evaluate whether that supply satisfies the physical, legal and continuous availability requirements for that non-groundwater supply under the rules. There is nothing in the AWS statutes or rules authorizing the Department to also require that applicant to account for or somehow "backstop" groundwater supplies where the applicant is not relying on groundwater to prove an assured water supply. Therefore, we object to the inclusion of 12-15-704(N).

2. If the Department retains 12-15-704(N), we object to the requirement that the water provider must increase its portfolio by 30% to "substitute for its existing use of groundwater or stored water recovered outside the area of impact." As noted above, there are constitutional problems with requiring the acquisition of water supplies significantly in excess of those supplies necessary to meet the demands of the applicable project. We realize that the Department has drafted this provision so

that it is the water provider's responsibility to obtain the additional supply. In reality, however, the water provider will simply turn around and require the developer of the project to pay for the acquisition of the extra water.

3. We request clarification on the concept of "new supply that was not served within the service area of the municipal provider as of the calendar year 2022" found in 12-15-704(N)(2). What happens if a municipal provider increases its deliveries of a type of supply? For example, suppose the provider delivers some volume of effluent within its service area in 2022, but is able to increase deliveries of effluent in 2023 by creating additional underground storage and recovery facilities. Is the additional volume considered a new supply?

C. 12-15-710(H) & (I)

1. We object to the omission of Analyses of Assured Water Supply from the calculation of a provider's physically available groundwater supply. In any issued ADAWS, it is critical to Analysis holders that the remaining volume of groundwater reserved under Analyses be included in the calculation of physically available groundwater for that provider's designation portfolio and that it be used to support development on the Analysis lands. Analyses of Assured Water Supply that prove a physically available supply of groundwater were issued by the Department and relied upon by Analysis holders in expending very large capital investments on their projects for such things as planning, designing and permitting. The rules protect that supply from subsequent assured water supply determinations. A.A.C. R12-703(F)(1). We ask that the Department acknowledge those investments and reflect the Analyses' groundwater volumes in the provider's groundwater portfolio. With the Updated Model, Analysis holders have demonstrated that the groundwater is physically available in the Phoenix AMA, which is an additional reason to include those supplies in an provider's portfolio. Also, we note that several of the Analysis holders have already proposed a 15% reduction in the volume of groundwater held under their Analyses (as reflected in the Updated Model), which freed-up volume could be used by the designated provider.

   We should also note that the length of the ADAWS is very important for developers and investors in land development. It is critical that a designation have multiple years of "running room" – 15 years or more – because major infrastructure investment will not occur unless there is confidence that the designation will be in

place when it comes time to plat and sell lots in subdivisions supported by those designations. The communities planned under the Analyses are very large and take years to build out. One of the primary reasons for advocating for rolling the Analyses' reserved groundwater volumes into an ADAWS is that doing so creates the opportunity for ADAWS providers to hold an initial designation of sufficient length.

2. With respect to issued Certificates of Assured Water Supply, the Draft Rules include in the calculation of physically-available groundwater a volume equal to the demand for unbuilt portions of such certificates. R12-15-710(H)(1). However, as noted above, it is not clear if that volume will be protected if a reduction in physically available supplies occurs or an ADAWS lapses or is terminated. We realize the preamble contains language protecting certificates if a designation lapses or is terminated, but we ask that the Department state this in the Draft Rules themselves.

3. We object to the reduction in the volume of physically available groundwater equal to 25% of any "New Alternative Water Supply" as stated in R12-15-710(H). As noted above, we expect that the Department will conclude that there is no 100-year groundwater deficit in the Phoenix AMA based on the Updated Model. If that occurs, there will be no need for any automatic reduction in the provider's groundwater portfolio upon acquisition of New Alternative Water Supplies. In addition, we believe the reduction concept is legally problematic, including with respect to questions of constitutionality. Accordingly, the Department should not impose any reduction in the physically available groundwater supplies based on the acquisition of such New Alternative Water Supplies. Although the reduction appears to affect the water provider, in practice, we fully expect water providers will require developers to pay most, if not all, of the costs of acquiring New Alternative Water Supplies to make up for this reduction. In other words, as new projects are approved by a water provider, we expect that the water provider will require the developer to pay for New Alternative Water Supplies to meet the estimated water demands of their new project, <u>plus</u> the volume necessary to offset the 25% reduction in the provider's groundwater portfolio. Otherwise, the water provider will be at risk of not having sufficient water supplies to meet its current, committed and projected demands.

4. Regardless of how the purchase of new water supplies is financed by water providers, acquisition costs will be very expensive. Depending on the water supply,

the provider will also have to plan and pay for distribution, storage, and treatment systems for the new supplies. These costs will create a significant burden on the water provider and its customers, as well as on developers of new projects, and will have an impact on the number of homes built in the AMA, the timing of construction, and the price of the finished lots. The 25% reduction structure in the Draft Rules will exacerbate this problem by leading water providers to purchase the volume of supply to meet the expected water demands of new development, plus an additional volume to make up for the 25% reduction in physically available groundwater, thereby greatly increasing the overall costs of water and the costs of developing lots. We urge the Department to avoid a structure that increases the financial burden of acquiring new water supplies.

5. As written, the Draft Rules contain no limit on the total reduction in the volume of physically available groundwater. Apparently, the volume of physically available groundwater is reduced by 25% of the volume of new alternative water supplies until there is no physically available groundwater left in the provider's portfolio. We think this structure is contrary to Arizona law, which allows groundwater to be used to prove an assured water supply so long as groundwater is physically available and any excess groundwater is replenished. As noted above, we anticipate that the Updated Model will eliminate any 100-year groundwater deficit in the Phoenix AMA Groundwater Model. But even if there is a groundwater deficit in the Phoenix AMA at some point, any reduction in the groundwater portfolio of water providers should be aimed at reversing only that deficit. Thus, if the Draft Rules include some provision for automatic reductions in a water provider's groundwater portfolio, we believe that the Draft Rules should also require a periodic reconsideration of the amount and need for the reduction under R12-15-710(H) to reflect the then-condition of the aquifer. A corresponding change would be needed to R12-15-710(J) to allow additional groundwater supplies to be added to a provider's portfolio if the condition of the aquifer improves and there is no longer a projected deficit.

6. Regarding which year to use in calculating the physically available supply of groundwater, we suggest that the Department allow some flexibility in this provision. The Draft Rules use 2021, but given that the Department's groundwater model was not released and the moratorium imposed until 2023, there is good reason to use calendar year 2023 as an alternative. We suggest that the water provider should be able to select a year so as to maximize its flexibility. For example, the water provider could select the calendar year that it withdrew the

greatest volume of groundwater plus stored water recovered outside the area of impact within its service area, so long as the selected calendar year is within three years of application submittal.

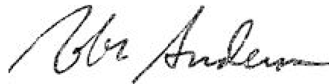
D. 12-15-711(D)

This provision limits the term of the designation based on groundwater to no more than 15 years. Under the current rules, there is no limit on the designation term other than that imposed by limitations of water resources or demand projections. The rules only require that the designation be reviewed at least every 15 years. Specifically limiting the designation to 15 years is inconsistent with this broader practice and treats ADAWS holders unfairly. And, as noted above, the length of an ADAWS is critical to the development of communities that can routinely take years to fully build out.

Thank you for considering these comments.

Sincerely,

FENNEMORE CRAIG, P.C.



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