

MEMORANDUM



To: Governor's Regulatory Review Council
From: Nicole Klobas, Chief Counsel, ADWR
Date: 10/31/2024
Re: **ADWR Notice of Final Rulemaking regarding an Alternative Path to Obtain a Designation of Assured Water Supply (ADAWS)**

During the discussion of the Arizona Department of Water Resources' (ADWR) Notice of Final Rulemaking regarding an alternative path to obtaining a designation of assured water supply (ADAWS rules), the chair and members of the Governor's Regulatory Review Council (Council) raised questions regarding the ADAWS rules and asked that ADWR provide supplemental information in response. This memorandum addresses whether the ADAWS rules create a new license or licensing requirement without the requisite authority, pursuant to A.R.S. § 41-1030(B), which provides:

An agency shall not base a licensing decision in whole or in part on a licensing requirement or condition that is not specifically authorized by statute, rule or state tribal gaming compact. A general grant of authority in statute does not constitute a basis for imposing a licensing requirement or condition unless a rule is made pursuant to that general grant of authority that specifically authorizes the requirement or condition.

The ADAWS rules do not exceed ADWR's authority and are consistent with A.R.S. § 41-1030(B). The ADAWS rules do not create a new license. Instead, the ADAWS rules create a new, optional condition for a license that applicants may pursue as an alternative to an existing license condition, both of which are authorized by A.R.S. § 45-576.

Background:

In order to develop a subdivision within an active management area (AMA), including both the Phoenix AMA and the Pinal AMA, state statute requires an assurance that the new development will have a 100-year supply of water for the new growth, without unfairly or adversely affecting the water supply for current residents and consistent with achieving the management goal of the AMA. Specifically, A.R.S. § 45-576 provides, in relevant part:¹

¹ Section 45-576, A.R.S., is also provided in its entirety as Attachment A to this memorandum.

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A. Except as provided in subsections G and J of this section, a person who proposes to offer subdivided lands, as defined in section 32-2101, for sale or lease in an active management area shall apply for and obtain a certificate of assured water supply from the director before presenting the plat for approval to the city, town or county in which the land is located, where such is required, and before filing with the state real estate commissioner a notice of intention to offer such lands for sale or lease, pursuant to section 32-2181, *unless the subdivider has obtained a written commitment of water service for the subdivision from a city, town or private water company designated as having an assured water supply pursuant to this section.*

...

D. The director shall designate private water companies in active management areas that have an assured water supply....

...

E. The director shall designate cities and towns in active management areas where an assured water supply exists....

...

H. The director shall adopt rules to carry out the purposes of this section....

...

M. For the purposes of this section, "assured water supply" means all of the following:

1. Sufficient groundwater, surface water or effluent of adequate quality will be continuously available to satisfy the water needs of the proposed use for at least one hundred years....²
2. The projected groundwater use is consistent with the management plan and achievement of the management goal for the active management area.
3. The financial capability has been demonstrated to construct the water facilities necessary to make the supply of water available for the proposed use, including a delivery system and any storage

² The remainder of subparagraph (M)(1) of A.R.S. § 45-576 includes a definition that pertains only to a member of a "groundwater replenishment district," established pursuant to title 48, chapter 27, which has never been established. *See* A.R.S. § 45-402(14). The entity referred to in the assured water supply rules as the Central Arizona Groundwater Replenishment District, or CAGRD, is a multi-county water conservation district acting in its capacity pursuant to A.R.S. Title 48, Chapter 22. *See* A.R.S. § 45-401(5); A.A.C. R12-701(17).

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facilities or treatment works. The director may accept evidence of the construction assurances required by section 9-463.01, 11-823 or 32-2181 to satisfy this requirement.

Emphasis added. The current rules adopted pursuant to A.R.S. § 45-576(H) require that a new applicant for a designation of assured water supply demonstrate physical availability of its water supplies. A.A.C. R12-15-710(E). The rule for demonstrating physical availability of a groundwater supply requires that “the applicant shall submit a hydrologic study, using a method of analysis approved by the Director” to demonstrate that groundwater will be withdrawn from depths that do not exceed 1,000 feet below land surface in the Phoenix AMA or 1,100 feet below land surface in the Pinal AMA, taking into account the groundwater pumping in the area associated with existing uses and other assured water supply determinations. A.A.C. R12-15-716(B)(2)-(3).

The ADAWS rules seek to modify the requirements of A.A.C. R12-15-710(E) to allow an additional and alternative method to demonstrate physical availability. Rather than submitting a hydrologic study pursuant to 716(B), the applicant may choose to satisfy the provisions of a new subsection (H), which provides:

For a new application for a designation of assured water supply in the Phoenix and Pinal Active Management Areas, a volume of groundwater and stored water recovered outside the area of impact, as calculated in subsection (H)(1), (2) and (3) of this Section, shall be deemed physically available if the Director determines that a New Alternative Water Supply included in the application meets the requirements in R12-15-716 through R12-15-720. The volume of groundwater and stored water recovered outside the area of impact shall be calculated as follows:

1. Add the total volume of groundwater withdrawn and stored water recovered outside the area of impact within the service area of applicant during the calendar year 2023 to the estimated groundwater and stored water recovered outside the area of impact demand for unbuilt portions of issued certificates of assured water supply as of 2023 that are or will be within the service area of the applicant, and multiply the sum by 100;
2. Multiply 25 percent of each New Alternative Water Supply included in the designation by 100; and
3. Subtract the total volume calculated in subsection (H)(2) of this Section from the total volume calculated in subsection (H)(1).

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4. The Director shall use the annual report submitted by the municipal provider for calendar year 2023, as verified by the Director, for purposes of this calculation.

Notice of Final Rulemaking at pp. 20-21.

Analysis:

Subsections (D), (E), and (H) of A.R.S. § 45-576 clearly and explicitly authorize ADWR to adopt rules providing for a license in the form of a designation of assured water supply for cities, towns and private water companies. Additionally, the definition of “assured water supply” in A.R.S. § 45-576(M) undoubtedly authorizes ADWR to require evidence that groundwater included in the application will be physically available for 100 years, as required by the existing provisions of A.A.C. R12-15-710(E) and R12-15-716(B).

This new subsection (H) in the ADAWS rules allows the applicant to include a volume of groundwater that is “deemed” to be physically available, based on existing uses and issued certificates. However, if the applicant elects to use this path to demonstrate physical availability, the applicant must still satisfy other requirements. One of those requirements is that the existing and approved uses of groundwater will, over time, be reduced in part as they are replaced by “new alternative water supplies,” as defined in the ADAWS rules.

Notably, the ADAWS rules *do not reduce* the volume of new alternative supplies that are available to the applicant water provider. Instead, the ADAWS rules *reduce the volume of groundwater that is deemed to be physically available without a hydrologic study*, as alternative supplies are added to the designation. Therefore, if an applicant seeks to utilize the proposed ADAWS rules to “bypass” the existing requirement set forth in A.A.C. R12-15-716(B) for demonstrating that groundwater is physically available using a hydrologic study, the applicant may only include a prescribed volume of groundwater. That limited volume of groundwater will also be reduced as the water provider adds new supplies to the designation. Therefore, in the long term, the water provider will be using less groundwater than the water provider would have used if the water provider had not opted to become designated.

The ADAWS rules provide a second, optional method to demonstrate physical availability of groundwater. It logically follows that the same statute that authorizes ADWR to adopt a rule requiring an applicant for a designation to demonstrate physical availability of groundwater allows ADWR to adopt a rule providing two methods from which to choose for making that demonstration.

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A plain reading of the ADAWS rules makes clear that a water provider seeking a designation of assured water supply is never required to satisfy the requirements of the new subsection (H) of A.A.C. R12-15-710. In fact, A.A.C. R12-15-710(E) will still allow a designation applicant to demonstrate physical availability of groundwater through a hydrologic study, pursuant to the existing requirements in A.A.C. R12-15-716(B). Additionally, a designation applicant may seek to obtain a designation without including any volume of groundwater. Moreover, no water provider is ever required to obtain a designation of assured water supply, as it is completely optional.

One or more of the public comments during the study session and in the written comments submitted to the Council suggest that the ADAWS rules impose a requirement on *developers* to provide more water than is required for their individual subdivision to demonstrate an assured water supply. This is a simple misunderstanding of the ADAWS rules. The ADAWS rules do not apply to developers. Developers are not eligible for a designation of assured water supply (which, pursuant to A.R.S. § 45-576(D)-(E), is only available to a city, town, or private water company). Instead, a *developer* would apply for a *certificate* of assured water supply, as provided in A.R.S. § 45-576(A) and A.A.C. R12-15-704. Therefore, the ADAWS rules impose no requirements on any developer for any project.

Conclusion: The provision in the ADAWS rules adding an alternative option for demonstrating physical availability of groundwater in an application for a designation of assured water supply is consistent with ADWR's authority pursuant to A.R.S. § 45-576 and is therefore consistent with A.R.S. § 41-1030(B).

ATTACHMENT A

45-576. Certificate of assured water supply; designated cities, towns and private water companies; exemptions; definition

A. Except as provided in subsections G and J of this section, a person who proposes to offer subdivided lands, as defined in section 32-2101, for sale or lease in an active management area shall apply for and obtain a certificate of assured water supply from the director before presenting the plat for approval to the city, town or county in which the land is located, where such is required, and before filing with the state real estate commissioner a notice of intention to offer such lands for sale or lease, pursuant to section 32-2181, unless the subdivider has obtained a written commitment of water service for the subdivision from a city, town or private water company designated as having an assured water supply pursuant to this section.

B. Except as provided in subsections G and J of this section, a city, town or county may approve a subdivision plat only if the subdivider has obtained a certificate of assured water supply from the director or the subdivider has obtained a written commitment of water service for the subdivision from a city, town or private water company designated as having an assured water supply pursuant to this section. The city, town or county shall note on the face of the approved plat that a certificate of assured water supply has been submitted with the plat or that the subdivider has obtained a written commitment of water service for the proposed subdivision from a city, town or private water company designated as having an assured water supply pursuant to this section.

C. Except as provided in subsections G and J of this section, the state real estate commissioner may issue a public report authorizing the sale or lease of subdivided lands only on compliance with either of the following:

1. The subdivider, owner or agent has paid any activation fee required under section 48-3772, subsection A, paragraph 7 and any replenishment reserve fee required under section 48-3774.01, subsection A, paragraph 2 and has obtained a certificate of assured water supply from the director.

2. The subdivider has obtained a written commitment of water service for the lands from a city, town or private water company designated as having an assured water supply pursuant to this section and the subdivider, owner or agent has paid any activation fee required under section 48-3772, subsection A, paragraph 7.

D. The director shall designate private water companies in active management areas that have an assured water supply. If a city or town acquires a private water company that has contracted for central Arizona project water, the city or town shall assume the private water company's contract for central Arizona project water.

E. The director shall designate cities and towns in active management areas where an assured water supply exists. If a city or town has entered into a contract for central Arizona project water, the city or town is deemed to continue to have an assured water supply until December 31, 1997. Commencing on January 1, 1998, the determination that the city or town has an assured water supply is subject to review by the director and the director may determine that a city or town does not have an assured water supply.

F. The director shall notify the mayors of all cities and towns in active management areas and the chairmen of the boards of supervisors of counties in which active management areas are located of the cities, towns and private water companies designated as having an assured water supply and any modification of that designation within thirty days of the designation or modification. If the service area of the city, town or private water company has qualified as a member service area pursuant to title 48, chapter 22, article 4, the director shall also notify the conservation district of the designation or modification and shall report the projected average annual replenishment obligation for the member service area based on the projected and committed average annual demand for water within the service area during the effective term of the designation or modification subject to any limitation in an agreement between the conservation district and the city, town or private water company. For each city, town or private water company that qualified as a member service area under title 48, chapter 22 and was designated as having an assured water supply before January 1, 2004, the director shall report to the conservation district on or before January 1, 2005 the projected average annual replenishment obligation based on the projected and committed average annual demand for water within the service area during the effective term of the designation subject to any limitation in an agreement between the conservation district and the city,

town or private water company. Persons proposing to offer subdivided lands served by those designated cities, towns and private water companies for sale or lease are exempt from applying for and obtaining a certificate of assured water supply.

G. This section does not apply in the case of the sale of lands for developments that are subject to a mineral extraction and processing permit or an industrial use permit pursuant to sections 45-514 and 45-515.

H. The director shall adopt rules to carry out the purposes of this section. On or before January 1, 2008, the rules shall provide for a reduction in water demand for an application for a designation of assured water supply or a certificate of assured water supply if a gray water reuse system will be installed that meets the requirements of the rules adopted by the department of environmental quality for gray water systems and if the application is for a certificate of assured water supply, the land for which the certificate is sought must qualify as a member land in a conservation district pursuant to title 48, chapter 22, article 4. For the purposes of this subsection, "gray water" has the same meaning prescribed in section 49-201.

I. If the director designates a municipal provider as having an assured water supply under this section and the designation lapses or otherwise terminates while the municipal provider's service area is a member service area of a conservation district, the municipal provider or its successor shall continue to comply with the consistency with management goal requirements in the rules adopted by the director under subsection H of this section as if the designation was still in effect with respect to the municipal provider's designation uses. When determining compliance by the municipal provider or its successor with the consistency with management goal requirements in the rules, the director shall consider only water delivered by the municipal provider or its successor to the municipal provider's designation uses. A person is the successor of a municipal provider if the person commences water service to uses that were previously designation uses of the municipal provider. Any groundwater delivered by the municipal provider or its successor to the municipal provider's designation uses in excess of the amount allowed under the consistency with management goal requirements in the rules shall be considered excess groundwater for purposes of title 48, chapter 22. For the purposes of this subsection, "designation uses" means all water uses served by a municipal provider on the date the municipal provider's designation of assured water supply lapses or otherwise terminates and all recorded lots within the municipal provider's service area that were not being served by the municipal provider on that date but that received final plat approval from a city, town or county on or before that date. Designation uses do not include industrial uses served by an irrigation district under section 45-497.

J. Subsections A, B and C of this section do not apply to a person who proposes to offer subdivided land for sale or lease in an active management area if all the following apply:

1. The director issued a certificate of assured water supply for the land to a previous owner of the land and the certificate was classified as a type A certificate under rules adopted by the director pursuant to subsection H of this section.
2. The director has not revoked the certificate of assured water supply described in paragraph 1 of this subsection, and proceedings to revoke the certificate are not pending before the department or a court. The department shall post on its website a list of all certificates of assured water supply that have been revoked or for which proceedings are pending before the department or a court.
3. The plat submitted to the department in the application for the certificate of assured water supply described in paragraph 1 of this subsection has not changed.
4. Water service is currently available to each lot within the subdivided land and the water provider listed on the certificate of assured water supply described in paragraph 1 of this subsection has not changed.
5. The subdivided land qualifies as a member land under title 48, chapter 22 and the subdivider has paid any activation fee required under section 48-3772, subsection A, paragraph 7 and any replenishment reserve fee required under section 48-3774.01, subsection A, paragraph 2.

6. The plat is submitted for approval to a city, town or county that is listed on the department's website as a qualified platting authority.

K. Subsection J of this section does not affect the assignment of a certificate of assured water supply as prescribed by section 45-579.

L. On or before December 31, 2023, the director shall study and submit to the governor, president of the senate and speaker of the house of representatives a report on whether and how a person that seeks a building permit for six or more residences within an active management area, without regard to any proposed lease term for those residences, should apply for and obtain a certificate of assured water supply from the director before presenting the permit application for approval to the county in which the land is located, unless the applicant has obtained a written commitment of water service for the residences from a city, town or private water company designated as having an assured water supply pursuant to this section.

M. For the purposes of this section, "assured water supply" means all of the following:

1. Sufficient groundwater, surface water or effluent of adequate quality will be continuously available to satisfy the water needs of the proposed use for at least one hundred years. Beginning January 1 of the calendar year following the year in which a groundwater replenishment district is required to submit its preliminary plan pursuant to section 45-576.02, subsection A, paragraph 1, with respect to an applicant that is a member of the district, "sufficient groundwater" for the purposes of this paragraph means that the proposed groundwater withdrawals that the applicant will cause over a period of one hundred years will be of adequate quality and will not exceed, in combination with other withdrawals from land in the replenishment district, a depth to water of one thousand feet or the depth of the bottom of the aquifer, whichever is less. In determining depth to water for the purposes of this paragraph, the director shall consider the combination of:

(a) The existing rate of decline.

(b) The proposed withdrawals.

(c) The expected water requirements of all recorded lots that are not yet served water and that are located in the service area of a municipal provider.

2. The projected groundwater use is consistent with the management plan and achievement of the management goal for the active management area.

3. The financial capability has been demonstrated to construct the water facilities necessary to make the supply of water available for the proposed use, including a delivery system and any storage facilities or treatment works. The director may accept evidence of the construction assurances required by section 9-463.01, 11-823 or 32-2181 to satisfy this requirement.