

**STATEMENT OF BASIS, SPECIFIC STATUTORY AUTHORITY, AND PURPOSE
FOR THE AMENDMENT OF RULE 5.6 OF THE
RULES AND REGULATIONS FOR THE MANAGEMENT AND CONTROL OF
DESIGNATED GROUND WATER
2 C.C.R. 410-1**

February 15, 2019

I. STATEMENT OF BASIS AND PURPOSE

This matter concerns the Rules and Regulations for the Management and Control of Designated Ground Water (“Designated Basin Rules” or “Rules”) of the Colorado Ground Water Commission (“Commission”). Rule 5.6 gives the Commission’s standards for approval of replacement plans.

The purpose of amending Rule 5.6 is to provide for more detail and clarity on the Commission’s requirements and standards for approval of replacement plans.

The bases for each amendment to the rule are as follows.

5.6

- The description and purpose of replacement plans that is currently in Rule 5.6.1 is re-located to Rule 5.6.
- As reference to sources of water proposed to be used as replacement water occur repeatedly in the rule, the term Replacement Source Water is introduced for subsequent use.

5.6.1

- Rule 5.6.1 contains the requirements for approval of a replacement plan.
- The requirement that the applicant has the burden of proving the adequacy of the plan in all respects continues the requirement in current Rule 5.6.2.
- A provision that that the Commission shall approve a plan that meets its burden of proof is included, following that concept from Section 37-90-107.5, C.R.S.

5.6.1.A

- The requirement that the plan must not cause any material injury to water rights continues the requirement of current Rules 5.6.1 and 5.6.1.C

5.6.1.B

- The requirement that the plan not cause unreasonable impairment of water quality continues the requirement of current Rule 5.6.1.D.

5.6.1.B.1

- Allowing rebuttable presumptions of no unreasonable impairment of water quality may, where no evidence of unreasonable impairment is presented, reduce the burden of demonstrating the requirement is met for those applicants whose source of water meets a presumptive standard.

- The presumptive standards rely on the Colorado Department of Public Health and Environment, Water Quality Control Commission's (WQCC) regulations on water quality, as the WQCC is the state agency responsible for establishing water quality standards, and has the Water Quality Control Division (WQCD) as staff with expertise in water quality. Staff of the Commission has consulted with the WQCD, and has incorporated recommendations from the WQCD into these presumptive standards.
- 5.6.1.B.1.a If the source is operating in compliance with a WQCD ground water discharge permit, the Commission presumes the quality of the water being discharged under the permit meets the water quality standards of the aquifer that the WQCC has established.
- 5.6.1.B.1.b On-site wastewater treatment systems are permitted by local health agencies, the regulations of which must be adopted pursuant to and be as stringent as WQCC regulations (see WQCC Regulation 43.4.A). The discharges from these systems may therefore be presumed to meet any water quality standards that the WQCC believes need to be met for such systems.
- 5.6.1.B.1.c If the source meets the standards established by the relevant WQCC Regulation No. 41 or, if there are site specific standards, Regulation 42, the Commission presumes the quality of the water is adequate, regardless of whether the source water is otherwise exempt from these WQCD regulations.

5.6.1.B.2

- As it is possible that use of proposed sources of replacement water that do not meet one of the rebuttable presumptions would not unreasonably impair water quality, the rule allows for other methods of demonstrating no unreasonable impairment of water quality.

5.6.1.B.3

- The rule describes, for clarity, the existing legal standard in a hearing of burden shifting when determining whether or not there is unreasonable impairment of water quality under Rule 5.6.1.B.

5.6.1.C

- A statement is included stating the plan must not be speculative to clarify that the anti-speculation doctrine applies to both replacement plans as well as the use of designated ground water being withdrawn under a replacement plan.

5.6.1.D

- Requiring the plan to be operable and administrable on an ongoing basis continues the requirement of current Rule 5.6.1.E.
- 5.6.1.D.1 Requiring sources of replacement water that are designated ground water to be diverted and delivered into the aquifer ensures that those sources are physically available and are an actual supply of replacement water to the aquifer.
- 5.6.1.D.2 The statutory requirements that a replacement plan may not be used as a vehicle for avoiding limitation on existing wells and that guidelines or rules governing replacement plans be complied with, as stated in § 37-90-107.5, are stated for informational purposes.

- 5.6.1.D.3 Requiring flow or other measurement devices continues the requirement of current Rules 5.6.1.E.1 and 5.6.1.E.2.
- 5.6.1.D.4 Requiring water quality sampling and monitoring applies the requirement of current Rule 5.6.1.E.3, with additional details for clarity.
- 5.6.1.D.5 Requiring recording, maintenance and submission of records applies the requirements of current Rules 5.6.1.E.4 and 5.6.1.E.5.
- 5.6.1.D.6 Requiring appropriate terms and conditions in a plan to allow for future updating and/or recalibration of models and future water quality and water level sampling and monitoring, with resulting adjustments as also specified in any terms and conditions included in the plan, provides for adjustments to be made under the plan where elements of the plan, or assumptions used in the plan, are uncertain.

5.6.1.E

- Requiring the plan to be recorded with the county continues the requirement of current Rule 5.6.1.E.6.

5.6.1.F

- Limiting diversions to the extent legal sources of replacement water are available at the time diversions occur prevents injury.
- A statement that the plan may account for replacement water that is lost to vegetative consumption and evaporation is explicitly included because parties involved in the rulemaking hearing were concerned that failing to include such a provision might be construed as meaning evapotranspiration or evaporation cannot be considered when evaluating the amount of replacement water available under a replacement plan.

5.6.1.G

- Allowing a source of replacement water to be identified and included in a plan even if it is not currently legally available for replacement use, with a requirement that it become legally useable prior to use and parties be notified when it becomes legal, provides flexibility for water uses while still preventing injury to water rights.

5.6.1.G.1

- Determining the legality of use of tributary water consistent with the provisions of the 1969 Act recognizes the authority of the water courts over such rights.

5.6.1.G.2

- This Rule is a statement of existing law that the Commission does not have authority to alter a tributary water right in any way.

5.6.1.G.3

- Limiting sources of replacement water that are not legally available for use at the time the plan is approved to those to which an applicant has demonstrated a legal right to use, and has demonstrated a reasonable probability of obtaining approvals necessary to make the water legally available for use in the plan, prevents speculation.

- Requiring an applicant to prove the adequacy of such rights as a source of replacement water under the replacement plan by providing the listed information reduces the burden on the Commission and other parties when evaluating the use of such rights in the plan.

5.6.1.G.4

- Requiring written notification from the applicant that a source of water has become legally available for use prior to its being used puts parties on notice that the applicant is going to start using the source of water.
- 5.6.1.G.4.a The rule informs the applicant what information is to be submitted in the notification.
- 5.6.1.G.4.b Allowing parties to provide comment on the notification, and requiring the Commission to provide written confirmation the source may be used in the plan before it is so used, helps to ensure the source has become legally available for use before it is used.
- 5.6.1.G.4.c Limiting the period of time in which an applicant may provide notification that an approved source of water has become legally available assists with preventing speculation.

5.6.1.H

- Requiring a new application to be filed to add a new source of replacement water ensures public notification of the source in newspapers, and results in the Commission applying appropriate terms and conditions needed for the addition of that source. This rule clarifies that, unlike augmentation plans in water court, a replacement plan cannot include procedures to allow additional or alternative sources of replacement water to be used in the plan after the plan has been approved by the Commission.

5.6.1.I

- The rule is included to provide clarity that replacement water recharged into the aquifer is designated ground water (meaning it becomes designated ground water if it was not previously designated ground water) available for other appropriators in the basin.

5.6.1.J

- Recognition that the Ground Water Management Districts may have rules governing replacement plans is included for informational purposes.

5.6.2

- A separate rule 5.6.2 addressing the requirements of applications for replacement plans is provided to address numerous stakeholders' desires for direction on what has to be included with an application for a replacement plan. The rule is also meant to clarify that if the application is not complete it can be rejected by Commission Staff.

5.6.2.A

- Basic information concerning the applicant is needed for communication with the applicant.

5.6.2.B

- Basic information on the location of the plan is needed to understand and begin evaluation of the plan.

5.6.2.C

- Information on other rights diverted from the structures involved in the plan assists with understanding how the plan will interact with those other rights.

5.6.2.D

- Maps showing the location of the structures involved in the plan assists with understanding and evaluating the plan.

5.6.2.E

- The detailed information requested in Rules 5.6.2.E.1 through 10 is needed to properly understand and evaluate the plan, including whether injury will occur to water rights, whether unreasonable impairment will occur to water quality, whether the plan is speculative, how the plan will be operated and administered, and whether the plan can be approved in accordance with the rules.

5.6.2.F

- Requiring the applicant to provide evidence that the plan will not injure other water rights assists with evaluating the plan and such information is necessary for applicant to meet the standard of Rule 5.6.1 that the applicant has the burden of proving the adequacy of the plan in all respects.

5.6.2.G

- Requiring the applicant to provide evidence that the plan will not cause unreasonable impairment of water quality assists with evaluating the plan and such information is necessary for applicant to meet the standard of Rule 5.6.1 that the applicant has the burden of proving the adequacy of the plan in all respects.

5.6.2.H

- Requiring the applicant to provide proposed terms and conditions assists with ensuring the applicant understands the requirements for plan approval and operation, and assists with fulfilling the standard of Rule 5.6.1 that the applicant has the burden of proving the adequacy of the plan in all respects.

5.6.2.I

- Some plans will be more simple and others very complex. Complex plans may require a ground water model to demonstrate that no material injury will occur. The rule allows Commission Staff to require a model if needed.

5.6.2.J

- Requiring a description of the use of the new appropriation assists with evaluating whether the plan is speculative as well as evaluation of anticipated withdrawals and depletions under the plan.

5.6.2.K

- Requiring notification of the owners of the land upon which structures will be located ensures that those landowners know of the plan so that they may object to the plan if they so choose.

5.6.2.L

- Requiring the applicant to identify applications or actions being taken to make proposed sources of replacement water that are not legally available for such use legally available assists with evaluating whether the plan is speculative.

5.6.2.M

- Requiring the applicant to provide information on its right to use the sources of replacement water, and that the sources will not be used by others, assists with evaluating whether the plan is speculative.

5.6.2.N

- The statutory requirement that an applicant submit a summary of the application for publication, as stated in § 37-90-107.5, is included for informational purposes.

5.6.3

- The rule is for the purposes of providing information that a well permit is needed from the State Engineer for construction of wells that are solely for artificial recharge, and that the applicant is responsible for other approvals as may be required by other agencies.

5.6.4

- The statutory requirement that the application be determined to be complete under the rules in order to be published, as stated in § 37-90-107.5, is included for informational purposes.
- The requirement that Management Districts be provided copies of the application for comments and recommendations continues the provision in current Rule 5.6.2, the provision in § 37-90-107(8) that applies for applications submitted under § 37-90-107, and the provision in § 37-90-111(3) that applies for applications submitted under § 37-90-111.
- The provision that Staff host a meeting, upon request, to discuss modeling has been added at the request of parties to the rulemaking hearing with the goal of encouraging opposers to work with applicant early in the case to determine what type of modeling they believe is required for the plan.
- The provision that Staff be able to propose additional terms and conditions, adopts the same provision in current Rule 5.6.2.

5.6.5

- A rule informing users where to access various reports and other rules referenced in the rule is included to conform with § 24-4-103(12.5), C.R.S.

Other

- The provisions of existing Rule 5.6.1.F, that provide for the Commission's retained jurisdiction to modify or revoke approval of a plan, are removed due to lack of statutory authority granting the Commission authority over such retained jurisdiction.

II. SPECIFIC STATUTORY AUTHORITY

A. Basis and Relevant Provisions of Statute and Rule

The Colorado Ground Water Commission ("Commission") is empowered under Section 37-90-107.5, C.R.S., to approve replacement plans. Pursuant to Section 37-90-107.5 replacement plans shall be approved if the Commission determines the plan meets the requirements of the article and the rules adopted by the Commission.

B. Specific Statutory Authority Concerning Rule Making

The Commission's Rules, including Designated Basin Rule 5.6 and any amendments thereto, are promulgated pursuant to Section 37-90-111(1)(h), C.R.S. to carry out the authority and responsibilities of the Commission to supervise and control the exercise and administration of rights acquired to the use of designated groundwater. The proceedings were conducted pursuant to the Commission's Rules for Procedure for All Hearings Before the Colorado Ground Water Commission, 2 CCR 402-3.

The Commission announced its contemplated rule-making under section 24-4-103(2), C.R.S., and invited public comment and participation during the stakeholder process. The Commission provided notice of the proposed rule-making under section 24-4-103(3), and the proposed rule and a proposed statement of basis, specific statutory authority, and purpose were made available at least five days prior to the public hearing as required by section 24-4-103(4)(a), C.R.S.

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**STATEMENT OF BASIS, SPECIFIC STATUTORY AUTHORITY, AND PURPOSE
FOR THE AMENDMENT OF RULE 5.8 OF THE
RULES AND REGULATIONS FOR THE MANAGEMENT AND CONTROL OF
DESIGNATED GROUND WATER
2 C.C.R. 410-1**

February 15, 2019

I. STATEMENT OF BASIS AND PURPOSE

This matter concerns the Rules and Regulations for the Management and Control of Designated Ground Water (“Designated Basin Rules” or “Rules”) of the Colorado Ground Water Commission (“Commission”). Rule 5.8 gives the Commission’s standards for approval of an aquifer storage and recovery plan (“ASR Plan”).

The purpose of amending Rule 5.8 is to provide for more detail and clarity on the Commission’s requirements and standards for approval of aquifer storage and recovery plans.

The bases for each amendment to the rule are as follows.

5.8

- The title of the rule is expanded from “Artificial Recharge” to “Aquifer Storage and Recovery Plans” to more clearly describe the type of plans that are the subject of the rule.
- The new title also follows the title of Section 37-90-107.6 C.R.S. (the subject of House Bill 18-1199) that recognizes the Commission may approve these types of plans.
- As reference to sources of water that are recharged, stored, and recovered occurs repeatedly in the rule, the term ASR Source Water is introduced for subsequent use.

5.8.1

- Rule 5.8.1 contains the requirements for approval of an ASR Plan.
- The requirement that the applicant has the burden of proving the adequacy of the plan in all respects adopts the same standard that applies to replacement plans in current Rule 5.6.2 (and amended Rule 5.6.1).
- A provision that the Commission shall approve a plan that meets its burden of proof is included, following that concept from § 37-90-107.6.

5.8.1.A

- The requirement that the plan must not cause any material injury to water rights continues the requirement in current Rule 5.8 that other water rights may not be impaired.
- The requirement also adopts the same standard that applies to replacement plans in current Rules 5.6.1 and 5.6.1.C (and amended Rule 5.6.1.A).

5.8.1.B

- The requirement that the plan not cause unreasonable impairment of water quality adopts the same standard that applies to replacement plans in current Rule 5.6.1.D (and amended Rule 5.6.1.B).

5.8.1.B.1

- Allowing rebuttable presumptions of no unreasonable impairment of water quality may, where no evidence of unreasonable impairment is presented, reduce the burden of demonstrating the requirement is met for those applicants whose source of water meets a presumptive standard.
- The presumptive standards rely on the Colorado Department of Public Health and Environment, Water Quality Control Commission's (WQCC) regulations on water quality, as the WQCC is the state agency responsible for establishing water quality standards, and has the Water Quality Control Division (WQCD) as staff with expertise in water quality. Staff of the Commission has consulted with the WQCD, and has incorporated recommendations from the WQCD into these presumptive standards.
- 5.8.1.B.1.a If the source is operating in compliance with a WQCD ground water discharge permit, the Commission presumes the quality of the water being discharged under the permit meets the water quality standards of the aquifer that the WQCC has established.
- 5.6.1.B.1.b If the source meets the standards established by the relevant WQCC Regulation No. 41 or, if there are site specific standards, Regulation 42, the Commission presumes the quality of the water is adequate, regardless of whether the source water is otherwise exempt from these WQCD regulations.

5.8.1.B.2

- As it is possible that use of proposed ASR Source Waters that do not meet one of the rebuttable presumptions would not unreasonably impair water quality, the rule allows for other methods of demonstrating no unreasonable impairment of water quality.

5.8.1.B.3

- The rule describes, for clarity, the existing legal standard in a hearing of burden shifting when determining whether or not there is unreasonable impairment of water quality under Rule 5.8.1.B.

5.8.1.C

- A statement is included stating the plan must not be speculative to clarify that the anti-speculation doctrine applies to both ASR Plans plans as well as the use of ASR Source Water being recovered under an ASR Plan.

5.8.1.D

- Requiring the plan to be operable and administrable on an ongoing basis adopts the same standard that applies to replacement plans in current Rule 5.6.1.E (and amended Rule 5.6.1.D).

5.8.1.D.1

- Requiring ASR Source Water to be diverted and delivered into the aquifer ensures that those sources are physically available and are an actual supply of ASR Source Water to the aquifer, and adopts the same standard that applies to replacement plans in amended Rule 5.6.1.D.1.

5.8.1.D.2

- Requiring flow or other measurement devices adopts the same standard that applies to replacement plans in current Rules 5.6.1.E.1 and 5.6.1.E.2 (and amended Rule 5.6.1.D.3).

5.8.1.D.3

- Requiring water quality sampling and monitoring adopts the same standard that applies to replacement plans in current Rules 5.6.1.E.3 (and amended Rule 5.6.1.D.4).

5.6.1.D.4

- Requiring recording, maintenance and submission of records adopts the same standard that applies to replacement plans in current Rules 5.6.1.D.4 and 5.6.1.D.5 (and amended Rule 5.6.1.D.5)

5.8.1.D.5

- Requiring appropriate terms and conditions in a plan to allow for future updating and/or recalibration of models and future water quality and water level sampling and monitoring, with resulting adjustments as also specified in any terms and conditions included in the plan, provides for adjustments to be made under the plan where elements of the plan, or assumptions used in the plan, are uncertain.

5.8.1.E

- Requiring the plan to be recorded with the county adopts the same standard that applies to replacement plans in current Rule 5.6.1.E.6 (and amended Rule 5.6.1.E).

5.8.1.F

- It is appropriate to require the aquifer to be capable of accommodating the water, as water that appears on ground surface would no longer be stored in the aquifer, and water that contributes to evaporation or consumption by plants would not be available for recovery.

5.8.1.G

- As the purpose of an ASR Plan is for an applicant to recharge, store, recover and use its own water, it is appropriate to require the applicant to demonstrate dominion and control over, and ability to recover, the water it is recharging and storing. The rule provides clarity on how dominion and control is determined to be maintained and lost.
- The rule continues the requirement of current Rule 5.8 which states that water that moves away from applicant's ability to capture becomes designated ground water available to other appropriators, clarifying that ASR Source Water over which the applicant does not maintain dominion and control is lost to the applicant, and

- becomes designated ground water available to other appropriators within the aquifer.
- The rule provides clarification, consistent with *Board of County Com'rs of County of Park v. Park County Sportsmen's Ranch, LLP*, 45 P.3d 693 (2002), that the applicant is not required to own or have a legal right to use the land overlying the portions of the aquifer in which water will be stored.

5.8.1.G.1

- This rule recognizes that methods or man-made structures that confine or restrict the water from moving within the aquifer and/or commingling with the water previously existing in the aquifer, may be appropriate means for demonstrating dominion and control over the water.

5.8.1.G.2

- This rule recognizes that there may be other wells diverting water from the area in the aquifer where the recharged water is in storage, and that those wells may divert the stored water (for example, in situations where the water level rises which increases such wells' ability to divert more water than they would have absent the existence of the stored water), in which case dominion and control over the water pumped by the other wells has been lost.

5.8.1.G.3

- By utilizing the described ASR Boundary concept, this rule provides further detail on whether dominion and control is maintained by requiring the establishment of an area within which the water must be recharged, stored and recovered, with dominion and control lost for any recharged and stored water flowing across that boundary.

5.8.1.G.4

- The rule recognizes that there may be various other aquifer characteristics that result in the inability to recover water that is recharged and stored and thus loss of dominion and control (for example, specific retention and geohydraulic barriers) that must be considered when evaluating an ASR Plan.

5.8.1.H

- Allowing a source of water to be identified and included in a plan even if it is not currently legally available for storage, recovery, and subsequent use under the plan, with a requirement that it become legally useable prior to use and parties be notified when it becomes legal, provides flexibility for water users while still preventing injury to water rights.
- While the water to be stored in an ASR plan does not have to be explicitly decreed or permitted for "recharge, storage, recovery and use" in those words, it does have to be legally available for storage, recovery, and subsequent use pursuant to the plan, meaning the right has to be legally available to be stored in the proposed designated ground water aquifer, and upon subsequent recovery, legally useable in the manner proposed by the applicant, all as proposed to be operated under the plan.

5.8.1.H.1

- Determining the legality of use of tributary water consistent with the provisions of the 1969 Act recognizes the authority of the water courts over such rights.

5.8.1.H.2

- This Rule is a statement of existing law that the Commission does not have authority to alter a tributary water right in any way.

5.8.1.H.3

- Limiting sources of ASR Source Water that are not legally available for use at the time the plan is approved to those to which an applicant has demonstrated a legal right to use, and has demonstrated a reasonable probability of obtaining approvals necessary to make the water legally available for use in the plan, prevents speculation.
- Requiring an applicant to prove the adequacy of such rights as a source of ASR Source Water under the plan by providing the listed information reduces the burden on the Commission and other parties when evaluating the use of such rights in the plan.

5.8.1.H.4

- Requiring written notification from the applicant that a source of water has become legally available for use prior to its being used puts parties on notice that the applicant is going to start using the source of water.
- 5.6.1.H.4.a The rule informs the applicant what information is to be submitted in the notification.
- 5.6.1.H.4.b Allowing parties to provide comment on the notification, and requiring the Commission to provide written confirmation the source may be used in the plan before it is so used, helps to ensure the source has become legally available for use before it is used.
- 5.6.1.H.4.c Limiting the period of time in which an applicant may provide notification that an approved source of water has become legally available assists with preventing speculation.

5.8.1.I

- Requiring a new application to be filed to add a new source of ASR Source Water ensures public notification of the source in newspapers, and results in the Commission applying appropriate terms and conditions needed for the addition of that source. This rule clarifies that, unlike augmentation plans in water court, an ASR Plan cannot include procedures to allow additional or alternative sources of ASR Source Water after the plan has been approved by the Commission.

5.8.1.J

- This rule clarifies that while methods or man-made structures that confine or restrict the water from moving within the aquifer and/or commingling with the water previously existing in the aquifer may be utilized in an ASR Plan, such are not required for approval of a plan.

5.8.1.K

- This rule clarifies that the ASR Source Water that is recovered from an aquifer does not have to consist of the same molecules of water that were recharged into the aquifer.

5.8.1.L

- This rule clarifies that ASR Source Water that is the subject of a plan retains the legal classification it had prior to being recharged and stored, and does not become designated ground water by virtue of a designated basin aquifer being used as a storage vessel for the water.

5.8.1.M

- This rule clarifies that the type, manner and place of use of the ASR Source Water after it is recovered from storage continues to be subject to the provisions of those uses in the decrees and/or permits under which the water originated before being stored (the ASR Plan being a means to facilitate storage of the water before being beneficially used pursuant to the provisions of those decrees and/or permits). The rule recognizes that rates of diversion of the water when recovered from storage under the plan are not subject to the provisions of those decrees and/or permits addressing diversion rates (as the provisions of those decrees and/or permits addressing diversion rates are only applicable to the original diversion of the water).

5.8.1.N

- Requiring wells to be completed in a single aquifer ensures all water is delivered into and recovered from the aquifer in which the plan is intended to operate.

5.8.1.O

- Requiring a plan to contain terms and conditions to prevent injury to water rights and unreasonable impairment of water quality ensures that the requirements of approval of the plan as stated in Rules 5.8.1.A and 5.8.1.B are met.

5.8.1.P

- Recognition that the Ground Water Management Districts may have rules governing replacement plans is included for informational purposes.

5.8.2

- As aquifers subject to Rules 5.3 and 5.4 (where water availability is based on overlying land ownership and a 100 year aquifer life) are administered differently than other aquifers, distinct rules dealing with aquifer storage and recovery plans in such aquifers is appropriate.
- The Division of Water Resource's Rules and Regulations for the Permitting and Use of Waters Artificially Recharged into the Denver Basin Aquifers and Nontributary Groundwater Aquifers (2 CCR 402-11, May 14, 2018, also referred to as the Artificial Recharge Extraction Rules) address aquifer storage and recovery in the Denver Basin bedrock aquifers and other nontributary aquifers outside of the Designated Basins. As administration of aquifers subject to Rules 5.3 and 5.4 is similar administration of Denver Basin aquifers and other nontributary aquifers

outside of the Designated Basins, a number of the Artificial Recharge Extraction Rules are adapted for use in these rules.

5.8.2.A

- The definition of “Contiguous Extraction Area” is adapted from the definition of “Contiguous Extraction Area”, Rule 4.3.5 of the Artificial Recharge Extraction Rules.
- The definition of “Remote Recovery Well” is adapted from the definition of “Remote Extraction”, Rule 4.3.14 of the Artificial Recharge Extraction Rules.

5.8.2.B

- Restricting recovery wells from being no closer than 1 mile to any point of contact with a stream or alluvium and the outcrop/subcrop of the aquifer is adapted from Rule 6.7.3 of the Artificial Recharge Extraction Rules.

5.8.2.C

- Restrictions on location and use of Remote Recovery Wells recovering water from a confined aquifer are adapted from Rule 7.1 of the Artificial Recharge Extraction Rules.

5.8.2.D

- Restrictions on location and use of Remote Recovery Wells recovering water from an unconfined aquifer are adapted from Rule 7.2 of the Artificial Recharge Extraction Rules.

5.8.2.E

- Limitations on the amounts of water that may be recovered annually, and in total, are adapted from Rule 7.3 of the Artificial Recharge Extraction Rules.

5.8.2.F

- The ability to bank the stored water indefinitely is adapted from Rule 7.4 of the Artificial Recharge Extraction Rules.

5.8.3

- A separate rule 5.8.3 addressing the requirements of applications for aquifer storage and recovery plans is provided to address numerous stakeholders’ desires for direction on what has to be included with an application for an aquifer storage and recovery plan.

5.8.3.A

- Rule 5.8.3.A gives requirements for all applications for all aquifer storage and recovery plans.

5.8.3.A.1

- Basic information concerning the applicant is needed for communication with the applicant.

5.8.3.A.2

- Basic information on the location of the plan is needed to understand and begin evaluation of the plan.

5.8.3.A.3

- Requiring the applicant to provide evidence that the plan will not injure other water rights assists with evaluating the plan and such information is necessary for applicant to meet the standard of Rule 5.8.1 that the applicant has the burden of proving the adequacy of the plan in all respects.

5.8.3.A.4

- The detailed information requested in Rules 5.8.3.A.4.a through n is needed to properly understand and evaluate the plan, including whether injury will occur to water rights, whether unreasonable impairment will occur to water quality, whether the plan is speculative, how the plan will be operated and administered, whether dominion and control is maintained over the water, and whether the plan can be approved in accordance with the rules.

5.8.3.A.5

- Some plans will be more simple and others very complex. Complex plans may require a ground water model to demonstrate that no material injury will occur, that dominion and control will be maintained, or estimate amounts of ASR Source Water available to other than recovery wells. The rule allows Commission Staff to require a model if needed.

5.8.3.A.6

- Maps showing the location of the structures involved in the plan assists with understanding and evaluating the plan.

5.8.3.A.7

- Requiring the applicant to provide information on the storage space in the aquifers assists with evaluating the plan, including whether the standard of Rule 5.8.1.F will be met.

5.8.3.A.8

- Requiring the applicant to provide the requested information on the proposed ASR Source Waters, including information on its right to use the sources and actions being taken to make proposed sources that are not legally available for use in the plan legally available, assists with evaluating the plan including whether the source is speculative.

5.8.3.A.9

- Requiring the applicant to provide evidence that the plan will not cause unreasonable impairment of water quality assists with evaluating the plan and such information is necessary for applicant to meet the standard of Rule 5.8.1 that the applicant has the burden of proving the adequacy of the plan in all respects.

5.8.3.A.10

- Requiring notification of the owners of the land upon which structures will be located ensures that those landowners know of the plan so that they may object to the plan if they so choose.

5.8.3.A.11

- Information on other rights diverted from the structures involved in the plan assists with understanding how the plan will interact with those other rights.

5.8.3.A.12

- The statutory requirement that an applicant submit a summary of the application for publication, as stated in § 37-90-107.6, is included for informational purposes.

5.8.3.B

- Rule 5.8.3.B gives requirements for applications for all aquifer storage and recovery plans in aquifers subject to Rules 5.3 and 5.4.

5.8.3.B.1

- The requirements listed in Rules 5.8.3.A are required for Rule 5.8.2 plans.

5.8.3.B.2

- A requirement that a report be submitted is adapted from Rule 6.3.1 of the Denver Basin Artificial Recharge Extraction Rules. The report assists with determining whether Rule 5.8.2.C or 5.8.2.D applies, and whether there is a relevant cylinder of appropriation as referenced in Rule 5.8.2.C.2.

5.8.4

- This rule is for the purpose of providing information that a well permit from the Commission is required for a well used for the recovery of ASR Source Water.

5.8.5

- The rule is for the purposes of providing information that a well permit is needed from the State Engineer for construction of wells that are solely for artificial recharge, and that the applicant is responsible for other approvals as may be required by other agencies.

5.8.6

- The statutory requirement that the application be determined to be complete under the rules in order to be published, as stated in § 37-90-107.6, is included for informational purposes.
- The requirement that Management Districts be provided copies of the application for comments and recommendations adopts the same requirement that is in current Rule 5.6.2 (and amended Rule 5.6.4) that applies for applications submitted for replacement plans, the provision in § 37-90-107(8) that applies for applications submitted under § 37-90-107, and the provision in § 37-90-111(3) that applies for applications submitted under § 37-90-111.

- The provision that Staff host a meeting, upon request, to discuss modeling has been added at the request of parties to the rulemaking hearing with the goal of encouraging opposers to work with applicant early in the case to determine what type of modeling they believe is required for the plan.
- The provision that Staff be able to propose additional terms and conditions, adopts the same provision that applies to replacement plans in current Rule 5.6.2 (and amended Rule 5.6.4).

5.8.7

- A rule informing users where to access various reports and other rules referenced in the rule is included to conform with § 24-4-103(12.5), C.R.S.

II. SPECIFIC STATUTORY AUTHORITY

A. Basis and Relevant Provisions of Statute and Rule

The Colorado Ground Water Commission (“Commission”) is empowered under Section 37-90-107.6, C.R.S., to approve aquifer storage and recovery plans. Pursuant to Section 37-90-107.6 aquifer storage and recovery plans shall be approved if the Commission determines the plan meets the requirements of the article and the rules adopted by the Commission.

B. Specific Statutory Authority Concerning Rule Making

The Commission’s Rules, including Designated Basin Rule 5.8 and any amendments thereto, are promulgated pursuant to Section 37-90-111(1)(h), C.R.S. to carry out the authority and responsibilities of the Commission to supervise and control the exercise and administration of rights acquired to the use of designated groundwater. The proceedings were conducted pursuant to the Commission’s Rules for Procedure for All Hearings Before the Colorado Ground Water Commission, 2 CCR 402-3.

The Commission announced its contemplated rule-making under section 24-4-103(2), C.R.S., and invited public comment and participation during the stakeholder process. The Commission provided notice of the proposed rule-making under section 24-4-103(3), and the proposed rule and a proposed statement of basis, specific statutory authority, and purpose were made available at least five days prior to the public hearing as required by section 24-4-103(4)(a), C.R.S.

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