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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2012-014309 04/16/2013

HONORABLE ARTHUR T. ANDERSON

CLERK OF THE COURT
L. Nelson
Deputy

S W V P-G T I S, M R, L L C, et al.

LARRY J CROWN

v.

ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY, et al.

JOHN T HESTAND

SHANE HAM
CHRISTOPHER D THOMAS
D CHRISTOPHER WARD

RULING

The Court has had under advisement Defendant/Intervenor Curis Resources (Arizona), Inc.'s ("Curis") Motion to Dismiss. Having read and considered the briefing and having heard oral argument, the Court issues the following ruling.

In ruling on a Rule 12(b)(6) motion to dismiss, the Court will "assume the truth of the well-pled factual allegations and indulge all reasonable inferences therefrom." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 (2008); *see Strategic Dev. & Constr., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 63-64 (App. 2010) (extraneous matters that are central to the complaint and public records regarding matters referenced in the complaint are not "outside the pleadings" under Rule 12(b)(6)). The Court will grant the motion only if Plaintiffs are not entitled to relief "under any facts susceptible of proof in the statement of the claim." *ELM Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, 289 (App. 2010), *quoting Mohave Disposal, Inc. v. City of Kingman*, 186 Ariz. 343, 346 (1996). The Court will not "accept as true allegations consisting of conclusions of law, inferences or deductions that are not necessarily implied by well-pleaded facts, unreasonable inferences or unsupported conclusions from such facts, or legal conclusions alleged as facts." *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 389 (App. 2005).

The crux of the issue is whether the Arizona Department of Environmental Quality ("ADEQ") exceeded its legal authority in promulgating the temporary individual aquifer protection permit ("APP") rule, Ariz. Admin. Code § R18-9-A210 ("A210").[1] Plaintiffs allege that A210 violates "the Enabling Act," A.R.S. § 49-203(A)(4),[2] which they contend defines the universe in terms of ADEQ's authority to issue an individual APP (temporary or otherwise). Curis disputes that § 49-203(A)(4) constitutes enabling legislation, instead contending that ADEQ's authority to promulgate A210 (and thus issue a temporary individual APP) derives from A.R.S. §§ 49-104(A)(1),[3] 49-203(A)(5),[4] and 49-242(A).[5]

"When authorized to do so by the legislature, administrative bodies may make supplementary rules for the complete operation and enforcement of legislation." *Boyce v. City of Scottsdale*, 157 Ariz. 265, 268 (App. 1988). Although the Court gives weight to an agency's interpretation of statute, such interpretation is invalid if it is not consistent with the enabling legislation. *Sharpe v. Ariz. Health Care Cost Containment Sys.*, 220 Ariz. 488, 494 (App. 2009). In determining whether a regulation exceeds a statutory grant of authority, the focus is on the language of the statute. *Id.* at 495. The scope of an agency's power to promulgate regulations "is measured by the statute and may not be expanded by agency fiat." *Id.* (quotation and citation omitted).

Initially, the Court agrees with Curis that A.R.S. § 49-203(A)(4) cannot be read in isolation as constituting an "Enabling Act" for the entire statutory scheme that authorized the APP program. Granted, "shall" generally indicates a mandatory directive, but only insofar as such an interpretation is indicated by context and purpose. *See Walter v. Wilkinson*, 198 Ariz. 431, 432-33 (App. 2000); *Ariz. Libertarian Party v. Schmerl*, 200 Ariz. 486, 490 (App. 2001).

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[1] A210 sets forth special conditions and requirements for certain applications, specifically those seeking to discharge for less than six months or to start a pilot project to gather additional data for a full-scale APP. Pursuant to A210, ADEQ issued a temporary individual APP for the Curis project on September 28, 2012. The merits of the Curis APP are not at issue here.

[2] A.R.S. § 49-203(A)(4) provides: "The director shall: Adopt, by rule, an aquifer protection permit program to control discharges of any pollutant or combination of pollutants that are reaching or may with a reasonable probability reach an aquifer. The permit program shall be as prescribed by article 3 of this chapter (A.R.S. §§ 49-241 to 49-252, "Article 3")."

[3] A.R.S. § 49-104(A)(1) provides: "The department shall: Formulate policies, plans and programs to implement this title to protect the environment."

[4] A.R.S. § 49-203(A)(5) provides: "The director shall: Adopt, by rule, the permit program for underground injection control described in the safe drinking water act (42 U.S.C.A. §§ 201, 300f to 300j-9)."

[5] A.R.S. § 49-242(A) provides: "The director shall prescribe by rule requirements for issuing, denying, suspending or modifying individual permits, including requirements for submitting notices, permit applications and any additional information necessary to determine whether an individual permit should be issued, and shall prescribe conditions and requirements for individual permits."

Plaintiffs acknowledge that compliance with all of Article 3 for issuing an individual APP is impossible as Article 3 encompasses statutes that have no bearing on individual APPs.

To the extent that the statutory scheme is less than clear, the Court agrees with Curis that ADEQ's interpretation of its authority to establish rules for issuing individual APPs is entitled to deference. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); *Ariz. Water Co. v. Ariz. Dep't of Water Res.*, 208 Ariz. 147, 154-55 (2004); *see also* A.R.S. § 49-102. ADEQ addressed this very issue and listed the authority relied on during A201 rulemaking, in particular A.R.S. § 49-242(A). The legislature has amended § 49-242 three times since then without disturbing A201, leading to the presumption that ADEQ's interpretation is correct. *See State, ex rel., Ariz. Dep't of Revenue v. Short*, 192 Ariz. 322, 324-25 (App. 1998); *Yavapai-Apache Nation v. Fabritz-Whitney*, 227 Ariz. 499, 505-06 (App. 2011). The Court does not find that ADEQ's interpretation is absurd or contrary to the plain meaning of the statutory scheme it seeks to effectuate. *Cf. Sharpe, supra.*

Based on the foregoing, the Court finds that A210 constitutes a valid exercise of ADEQ's rulemaking authority. Assuming the truth of the factual allegations alleged in the Amended Complaint, Plaintiffs do not state a claim upon which relief can be granted. Accordingly,

IT IS ORDERED granting Curis' Motion to Dismiss.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.