

BEFORE THE ARKANSAS POLLUTION CONTROL & ECOLOGY COMMISSION

**IN THE MATTER OF AMENDMENTS TO)
REGULATION NO. 2, REGULATION)
ESTABLISHING WATER QUALITY)
STANDARDS FOR SURFACE WATERS)
OF THE STATE OF ARKANSAS)**

DOCKET NO. 06-010-R

**RIVER VALLEY REGIONAL WATER DISTRICT'S
MOTION TO DENY
ADEQ'S PETITION TO INITIATE RULEMAKING**

INTRODUCTION

River Valley Regional Water District hereby moves the Commission to deny ADEQ's Petition to Initiate Rulemaking in the above-styled proceeding. As described more fully below, the Department's proposal would radically alter the longstanding policy of the State regarding Extraordinary Resource Waters. If adopted, the Department's proposal would strip the State of its authority to make any alterations to the status of an ERW. Although the proposal purports to establish a procedure for removing an ERW designation, that procedure could never be used because an applicant would never be able to meet the threshold requirement of showing that the ERW is not an "existing use." Moreover, by altering the definition of "Existing Uses" in Regulation No. 2, the Department's proposal would make all ERW designations permanent and irreversible, unless there is some future change in federal law.

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DISCUSSION

1. The Department's Proposal Would Radically Alter the Status of ERWs. The Department's petition to initiate rulemaking proposes a radical reversal of the historical understanding of the status of Extraordinary Resource Waters in Arkansas. When ERWs were first designated in Arkansas, Commissioners and members of the public asked whether the designations could ever be changed in the future. The Department answered that question unequivocally. The ERW designations could be reversed or modified if future circumstances warranted a change:

"Comment: The State Department of Health, the Soil and Water Conservation Commission and other commenters have objected to language in Section 3(c) [now Section 2.304] that would protect extraordinary resource, ecologically sensitive and scenic rivers by providing for the maintenance of the natural flow regime. The commenters feel that the highest level of use for these streams is as a public water supply and that no effort should be made to prohibit their damming or diversion for such use.

"Response: * * * * **In no circumstance is the designation of the streams as extraordinary, ecologically sensitive, or scenic considered permanent. If circumstances arise that would require removal of such a designated use, appropriate mechanisms exist in the legislature and before our Commission to legally remove such a use.**" ADEQ Response to Comments on 1987 Revisions to Regulation No. 2., at p. 5. (Emphasis supplied.)

The Department's current petition now says that the reverse is true:

"In Arkansas, Extraordinary Resource Waters ("ERWs") . . . are intended to be permanent designations. The intent of these designations is to maintain these examples of exceptional water quality in their current condition and to protect them from degradation so they will be preserved for future generations." ADEQ Petition to Initiate Rulemaking, at Paragraph 5, page 2. (Emphasis supplied.)

The stark contrast between the Department's current petition and the Department's explanation to the Commission at the time ERWs were being designated clearly demonstrates the radical reversal of position proposed by the Department.

2. ADEQ's Proposed Revisions Regarding the Concept of "Existing Uses" Would Make ERW Designations Permanent and Irreversible. The Commission had good reason to ask in 1987 whether an ERW designation could ever be changed. Federal law does not require a state to designate any streams as ERWs. If a state does designate a stream as an ERW, however, federal law requires the state to protect and maintain the stream's ERW status against any change if the ERW status constitutes an "existing use" within the meaning of the state's anti-degradation rules.

In Arkansas, the Department and the Commission carefully avoided making ERW designations permanent by limiting what could qualify as an "existing use" under Regulation No. 2. This limitation was accomplished by defining the term "Existing Uses" in Regulation No. 2. The definition provides that there are only five candidate uses that can qualify as "existing uses," and ERW status is not one of those uses. The definition of "Existing Uses" reads as follows:

"Existing Uses: Those uses listed in Section 303(c)(2) of the Act (**i.e., public water supplies, propagation of fish and wildlife, recreational uses, agricultural and industrial water supplies and navigation**) which were actually attained in the waterbody on or after November 28, 1975, whether or not they are included in the water quality standards."
APC&EC Regulation No. 2, § 2.106. (Emphasis supplied.)

In 1991 EPA urged the Department to change Regulation No. 2 to make ERW status permanent. ADEQ refused EPA's request. In doing so, the Department explained that the definition of the term "Existing Uses" in Regulation No. 2 was deliberately crafted to avoid making ERW designations permanent and irreversible:

"The Department has since 1987 repeatedly stated to EPA, the Commission, and the public our position in this matter. The question of what is an existing use has never been answered by Congress or EPA. The Department began its search for the definition of existing uses during the 1987 triennial revision process by researching Act and ensuing regulations and guidelines, but was unable to discover any such definition. We concluded that it was at the states' discretion to define this term and we promptly did so by adding a definition of "existing use" to the glossary. In our definition we quoted directly from 303(c)(2)(B) of the [federal Clean Water] Act to describe those uses which would be considered to be eligible to be "existing uses" (ie; public water supplies, propagation of fish and wildlife, recreational uses, agricultural and industrial water supplies, and navigation). **We purposely did not list extraordinary, scenic, or ecologically sensitive streams as an existing use.**" ADEQ RESPONSIVENESS SUMMARY ON PROPOSED AMENDMENTS TO ARKANSAS WATER QUALITY STANDARDS IN JULY 1991, at p. 8. (Emphasis supplied.)

The Department's rulemaking proposal would delete the limiting language from the definition of the term "Existing Uses" in Regulation No. 2. If adopted, this change would mean that all ERWs in Arkansas would qualify as "existing uses" under the state anti-degradation policy. This, in turn, would mean that federal law would prohibit any changes to the ERWs in Arkansas from that point forward.

3. The Procedure Proposed by the Department for Removing an ERW Designation Can Never Be Used. The Department's proposal contains a procedure which appears to allow a party to seek removal of an ERW designation. See proposed Regulation 2.310. The proposed provision, however, contains a requirement that would make it impossible for anyone to use the procedure. The procedure requires an applicant to demonstrate, as a threshold requirement, that the ERW status of the stream in question is not an "existing use." See proposed Regulations 2.303, 2.310(A)(4)-(5), and 2.310(B). As noted above, ADEQ's proposal would eliminate the language in the definition of "Existing Uses" which currently prevents an ERW designation from

becoming an “existing use.” Once that definition is amended as proposed by ADEQ, no one would ever be able to demonstrate that a stream’s ERW status is not an “existing use.” ERW status is not a physical fact, like the presence of aquatic species (a fishery use) or the existence of a public drinking water intake (domestic water supply use), that can be determined on an objective basis by inspecting the stream. Instead, ERW status is a legal designation applied to a stream or lake by rulemaking. Once a rule is adopted designating a stream as an ERW, the designation exists as a matter of law. There is nothing about a stream’s physical attributes that would disprove the existence of the ERW legal designation.

It is possible that the Department intends its proposed “existing use” requirement to call for an *ex post facto* review of the physical characteristics of the stream in question in order to determine whether the ERW designation was actually justified. Even if this is what the Department intends by its proposal, no one would ever be able to satisfy such a requirement. First, a use is defined to be an “existing use” if it existed at any point in time from November 28, 1975 to the present. No one would ever be able to prove what the conditions in a stream were at every point in time over the last 20 years. As a consequence, no one would ever be able to satisfy the threshold requirement of showing that the stream had no special qualities at any point in time since 1975. Second, no one involved in the debates over ERWs is suggesting that the streams in question lack the physical attributes that would support an ERW designation. Indeed, most people would probably agree that each stream and lake designated as an ERW possessed sufficient physical qualities at some point in time to support the legal designation. The real issue is whether, despite a stream’s special physical attributes, some future circumstances might warrant removal or alteration of the stream’s designation in order to serve more important social needs. ADEQ’s proposal would permanently block any alteration or removal of an ERW designation regardless of the nature of future social needs.

5. The Department's Explanation of the Proposed Changes Are Fatally Deficient.

The Department's petition does not explain the dramatic changes that will result from its proposal to delete the limiting language from the definition of the term "Existing Uses." The Department does not say anywhere in its petition that the amendment of the definition of "Existing Uses" will reverse a long-standing policy of preserving the State's ability to alter or remove ERW designations in the future. Instead, the Department's petition contains only one sentence of explanation:

"The definition of "Existing Uses" under Reg. 2.106 has been changed to correspond directly with the Environmental Protection Agency's definition found at 40 C.F.R. § 131.3(e)." ADEQ Petition to Initiate Rulemaking, Paragraph 15, p.5.

This explanation not only fails to identify the true nature of the change and the real reasons for making it, the one sentence explanation creates the misleading impression that the proposed change is a minor housekeeping measure to conform Regulation No. 2 to some new EPA language. The Department's petition also fails to explain that the proposed procedure for removing an ERW designation could never be used.

Even if one supports the dramatic changes proposed by the ADEQ, the failure of the Department's petition to explain the true nature of the changes in question is a fatal procedural defect that would have to be cured before rulemaking can be initiated. In any rulemaking, the proposal must inform the public of the nature of the change proposed, and the reasons for proposing such changes. The Department's petition does not meet these minimum standards for providing the public with adequate notice and a fair basis for preparing public comments.

6. The Department's Proposed Rulemaking May Undermine the Existing Protections for ERWs. If the Commission votes to initiate the rulemaking as proposed by ADEQ, that action may seriously undermine the existing protection for ERWs. At the present time, state law provides stringent protection for ERWs, but it also preserves the State's authority to remove or alter an ERW designation if future circumstances warrant such a change. The Department's proposal would permanently eliminate the State's authority to remove or alter an ERW designation. The prospect of such a dramatic change would undoubtedly prompt some opponents of ERWs to consider legislative or judicial efforts to remove or invalidate the existing ERW designations before any final action on the Department's proposal can make such an action more difficult or impossible.


7. The Department's Proposed Rulemaking Would Nullify Another, Ongoing Rulemaking Proceeding. ADEQ's proposal would nullify an existing rulemaking proceeding. In January the Commission voted to approve a Third Party rulemaking petition filed by River Valley. Four public hearings have been held on the petition. More than a thousand public comments have been filed. River Valley's petition is currently scheduled to come back before the Commission on December 1, 2006. River Valley and others have gone to great effort and expense to comply with all of the procedural requirements established by the Commission. The Department's proposal would effectively nullify River Valley's rulemaking proceeding without allowing a final vote on the River Valley proposal. Such a result would be unfair and inappropriate.

CONCLUSION

For the reasons stated above, River Valley Regional Water District respectfully requests that the Commission grant this motion and enter an order denying ADEQ's petition to initiate rulemaking. A proposed Minute Order is attached to this motion for the convenience of the Commission.

Respectfully submitted,

MITCHELL, WILLIAMS, SELIG,
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By 
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ATTORNEYS FOR RIVER VALLEY
REGIONAL WATER DISTRICT

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September, 2006, I served River Valley Regional Water District's Motion to Deny ADEQ's Petition to Initiate Rulemaking by electronic delivery and by placing a true copy in the United States Mail, first class postage prepaid, addressed to the following:

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**ARKANSAS POLLUTION CONTROL
AND ECOLOGY COMMISSION**

**SUBJECT: Petition to Initiate
Rulemaking Regulation No. 2**

Docket No. 06-010-R

MINUTE ORDER NO. 06-

After review of ADEQ's Petition to Amend Regulation No. 2 and River Valley Regional Water District's Motion to Deny Petition to Initiate Rulemaking, and after consideration of oral comments received at the meeting, the Commission hereby denies the Petition filed by the Arkansas Department of Environmental Quality to Amend Regulation No. 2, Regulation Establishing Water Quality Standards for Surface Waters of the State of Arkansas.

____ B. Ackerman
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____ SUBMITTED BY:
Dana Samples, Chairman

____ DATE