

**BEFORE THE ARKANSAS COMMISSION ON POLLUTING CONTROL &  
ECOLOGY**

IN RE:

REQUEST BY RIVER VALLEY  
REGIONAL WATER DISTRICT  
TO INIATE RULEMAKING TO  
AMEND REGULATION NO. 2,  
SECTION 2.304

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AR. POLLUTION CONTROL  
& ECOLOGY COMMISSION  
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**ARKANSAS DEPARTMENT OF ENVIRONMENTAL QUALITY**  
**STATEMENT OF BASIS AND PURPOSE**

On January 13, 2006, River Valley Regional Water District ("RVRWD") filed a Petition to Initiate Third Party Rulemaking to Amend Regulation No. 2, Regulation Establishing Water Quality Standards for Surface Waters of the State of Arkansas. The Arkansas Pollution Control and Ecology Commission ("Commission") granted the petition in Minute Order No. 06-11. Pursuant to the Minute Order, the Arkansas Department of Environmental Quality ("ADEQ") files this Statement of Basis and Purpose following the requirements of Regulation No. 8, Part 3, Section 3.6.2(1), (2), and (3).

RVRWD's proposed amendment to Regulation No. 2, Section 2.304 is as follows:

Significant physical alterations of the habitat within extraordinary resource waters, ecologically sensitive waterbodies or natural and scenic waterways are not allowed; provided, however, that such alterations may be allowed for the purpose of providing for drinking water needs if: (i) the alteration is requested by a regional water distribution district, public facilities board, public water authority, or other public entity; (ii) the alteration is part of a proposal that has been certified by the Natural Resources Commission to be in compliance with the State Water Plan; (iii) an environmental impact statement is prepared and submitted to the Commission which meets the standards for environmental impact statements in 40 C.F.R. Part 1502 as

of December 9, 2005; (iv) public notice of the proposed alteration is published and members of the public and the Arkansas Department of Environmental Quality are afforded at least 45 days in which to submit comments; and (v) the Commission approves the proposed alteration as providing benefits that justify the anticipated adverse effects. In other waters, where significant physical alterations of the habitat are proposed, the Department must be assured that no significant degradation of any existing use or water quality necessary to protect that use will occur. In order to make such determinations, the Department may require an evaluation of all practicable alternatives to the project including: an environmental assessment of the impacts of each alternative, an engineering and economic analysis, and a socio-economic evaluation of the project in the local area.

#### I. The Necessity of the Regulation

ADEQ has, in presentations before the Commission, at public hearings and in written statements, stated that there is no necessity for the proposed amendment to Regulation No. 2, Section 2.304. The ADEQ incorporates, by reference, all of its previous comments and written statements regarding the proposed amendment into this Statement of Basis and Purpose.

Briefly, there are several reasons why this proposed amendment is not only not necessary, but also unlawful. First, RVRWD's proposal violates Arkansas state law. The proposal would give the Commission the authority to act in excess of its statutory authority.

Second, RVRWD's proposal violates state and federal environmental laws. The proposal would apply to all waterbodies listed as extraordinary resource waters ("ERWs"), ecologically sensitive waterbodies, and natural and scenic waterways. Collectively, those waters are identified by the State as "outstanding resource waters" ("ORWs") and, pursuant to the Clean Water Act, the water quality of these streams must be maintained and protected.

When a free flowing stream is dammed, the water quality is adversely impacted.<sup>1</sup> RVRWD's proposal, if adopted, would allow projects to be built that would adversely impact the water quality necessary to maintain and protect ORWs in violation of the state and federal antidegradation policies.

Furthermore, by design, dams alter the natural flow regime and instream habitat of a river. When a free flowing ORW stream is dammed and its waters impounded to form a lake, the natural flow regime of the stream is no longer maintained and the instream habitat is not protected. Without maintaining the natural flow regime and protecting the instream habitat, the existing uses and water quality of the state's ORWs cannot be protected, which violates the requirements of both the state and federal antidegradation policies.

Third, the proposed amendment abolishes more than twenty years of protection that has been afforded to high-quality streams and rivers in Arkansas. As early as 1967, the Arkansas legislature appointed a State Stream Committee to identify and protect high-quality streams in the State. The work of this committee, and others throughout the years, led to the designation and protection of outstanding resource waters under Regulation No. 2. The ORW designations were based on strong science and public comment and should not be reversed through the third-party rulemaking process.

The proposed amendment has broad application because it would affect all designated extraordinary resource waters, ecologically sensitive waterbodies, and natural and scenic waterways. An amendment to Regulation No. 2 with such far-reaching effects is best brought forward during the Department's triennial review of water quality standards.

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<sup>1</sup> "The Impact of Impoundment On a Mountain Stream" by Joe Nix, March 23, 2006, submitted at the public hearing held in Arkadelphia on March 30, 2006., attached and incorporated into ADEQ's Additional Comments.

The triennial review is required under the Clean Water Act. In Spring 2006, the Department began a series of public meetings and workgroup sessions to collect public input on the most important issues regarding water quality standards. The use of ERWs as drinking water supplies is one of the primary issues currently being discussed by workgroup participants. It is more appropriate to discuss, and implement if needed, any changes to Regulation No. 2 in this process where comments and suggestions are taken from a broad spectrum of individuals and groups, instead of a change crafted by one single entity without the benefit of public input.

Fourth, RVRWD claims that the proposed amendment is needed to provide for the use of ERWs as drinking water supplies. RVRWD states that the only way an ERW “can be used as a source of drinking water is to completely remove the ERW designation.”<sup>2</sup> This is incorrect. An ERW can be used as a drinking water supply if such use does not result in “significant physical alteration” of the habitat. Specific examples of ERWs being used as drinking water supplies, including the use of the Saline River by Benton and the Middle Fork of the Saline River by Hot Springs Village, were noted in numerous written comments and at public hearings.

Lastly, the number of comments submitted by the citizens of Arkansas show that they favor protecting the State’s high-quality, free-flowing streams. The comments received emphasized the many benefits of ERWs. These streams and rivers provide habitat for endangered species and many opportunities for recreation. Recreation and tourism along these streams benefit the State’s economy. The majority of commenters recognized that, while this proposal is clearly linked to a proposed dam on Lee Creek, the amendment

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<sup>2</sup> Exhibit B of Petition to Initiate Rulemaking Response to Question 7.

would open to damming all extraordinary resource waters, ecologically sensitive waterbodies, and natural and scenic waterways in the State.

In conclusion, the reasons listed above and the many more mentioned in the public comments, demonstrate that there is no necessity for the proposed amendment.

## II. Responsive Summary

The Department incorporates, by reference, the Responsive Summary that it prepared and filed concurrently with the Statement of Basis and Purpose.

Prepared by:

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