

ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION

REGULAR COMMISSION MEETING

8:30 a.m., Friday, April 23, 2004

**Arkansas State Police Headquarters
No. 1 State Police Plaza
Little Rock, Arkansas**

Commissioners Attending: W. Thompson, G. Black, S. Henderson, C. McGrew, R. Mathis, R. Quillin, T. Schueck, J. Shannon, L. Sickel E. Valdez, M. Woodward and R. Young.

Commissioners Absent: B. Ackerman.

Visitors: Kevin Pride, E.C.H.O.; Ken Smith, Audubon; Harry Short, City of Van Buren; John Hall, River Valley Regional Water; Barry H. Haas, Little Rock; Connie Burks, Harrison; Mary Rivera, Gepp; Jarmis Harper, ALCOA; John Henley, Chairman ILLIT, Searcy County; Bill Shepherd, Audubon Society of Central Arkansas; Leonard Uecker, Save Greers Ferry Lake Inc.; Carl Garner, Save Greers Ferry Lake Inc.; Michael Farar, Ozark Society; William Saunders, Arkansas Canoe Club; Debbie Dan, Arkansas Canoe Club; George Crook, NTBA Inc.; Charles Oberste, Sierra Club; Barb Meyer, Little Rock; Vince Blubaugh, GBMC & Associates; Dotson Collins, Governor's Office; Arnold Jochums, Attorney General's Office; Randy Thurman, Arkansas Environmental Federation; Austin Gelder, Arkansas Democrat-Gazette; Carol Griffiee, Little Rock.

Chair Thompson called the meeting to order at approximately 8:30 a.m. He acknowledged special guests Senator John Hall and Representative Larry Prather.

Quorum

The Commission Secretary called the roll and declared a quorum.

Approval of Minutes

Chair Thompson asked for a motion to approve the minutes of the March 26, 2004 meeting. Commissioner Mathis made a motion to approve the minutes with one correction to his statement about who attended a meeting at the Capitol. He meant Steve Martin, not Martin Maner. Commissioner Shannon seconded the motion. The minutes were approved with the correction.

Director's Report

Director Devine reported on a meeting held between farmers and the Soil and Water Conservation Commission Advisory Committee in Russellville regarding the nutrient-watershed phosphorus issue.

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Devine reported on a meeting with Senator Blanche Lincoln's office about an old issue regarding Koppers in North Little Rock. Commissioner Charles McGrew and Director Devine met with a group of people concerned about this issue and reassured them of the Health Department's and Arkansas Department of Environmental Quality's ("ADEQ") concern regarding public health and safety and assured them that the situation was being monitored.

Devine updated the Commission on the Monte Ne Cove issue in the Northwest Arkansas Beaver Water District regarding sediment problems. He stressed that ADEQ is monitoring it closely and trying to determine the reason why this is occurring.

He discussed a letter received from Environmental Protection Agency ("EPA") Administrator Mike Leavitt to Governor Huckabee regarding the ozone designation issue in Crittenden County.

Devine gave the Commission an update on the Pine Bluff Arsenal trial burns and requested Mr. Mike Bates to give a more detailed report on the trial burn testing in the incinerator. Bates reported on the activity of ADEQ staff and the staff at Pine Bluff Arsenal regarding the Chemical Stockpile Demilitarization Project and reported on the surrogate trial burns and stated that the next phase is the agent trial burn.

The Director reported on the Environmental Council of States meeting that ADEQ hosted in Hot Springs. He stated that Commissioner Mathis attended and thanked staff members Becky Allison, Mary Leath, and Becky Keogh for helping him host the conference.

Devine discussed the Ash Grove Cement tour that was held on April 14th. A wildlife presentation was also made at the Foreman Elementary School.

Commissioners asked questions regarding ozone designation of Crittenden and Shelby Counties. Discussion followed.

Commissioner Mathis thanked Director Devine for his report on Crittenden County and agreed that Memphis contributed to the air quality in Crittenden County.

Commissioner Young thanked Director Devine and his staff's support of the Soil and Water Conservation Commission in their rulemaking process on the nutrient management program.

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Commissioner Young asked questions regarding the Monte Ne Cove issues. An update was given by Mr. Martin Maner. Discussion followed.

Public Comments

All public comments were delayed until the discussion on adopting Regulation No. 2 was before the Commission.

Regulation No. 12 - Storage Tanks, Docket No. 04-001-R

Commissioner Young reported that changes to Regulation No. 12 were due to legislative changes that occurred in 2003 and federal revisions. The rulemaking process was complete and no public comments were received. Commissioner Young moved to adopt the amendments. Commissioner Sickel seconded the motion. The motion passed. (Minute Order No. 04-12)

Regulation No. 2 - Regulation Establishing Water Quality Standards for Surface Waters of the State of Arkansas, Docket No. 03-003-R

Commissioner Young asked Jennifer Tucker to speak regarding changes to Regulation No. 2. Ms. Tucker gave a brief overview of the changes to the regulation. She stated that Section 303C of the Clean Water Act requires each state to perform a triennial review of its water quality standards and our triennial review process began in 2001. There were six (6) public information meetings in the fall of 2001 held throughout the state. A Water Quality Standards Work Group was established with various members of the public and ADEQ staff which met on seven (7) occasions to discuss changes to the standard. This rulemaking does not propose changes or additions to Extraordinary Resource Water ("ERW") designations. However, ADEQ understands that the public has a significant interest in the ERW issue and has proposed several alternatives to the Commission for consideration. Six (6) public hearings were held throughout the state in January 2004. There were several public comments received. Many of these comments were either inapplicable to this rulemaking or would be more appropriately raised in a petition for third party rulemaking. The Department requests the Commission to move forward regarding Regulation No. 2 and to adopt the minute order in the packet.

Mr. Martin Maner discussed changes that were being offered due to public concerns as alternatives for the Commission to approve. He explained all the changes being made to the regulation and the reasons for the changes. The next step is to incorporate the comments that were received into the final regulation. ADEQ reviewed all comments and recommended proposed final language for

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Commission approval on various amendments. However, on Reg.2.302, Maner offered three options, which were:
#1) take no action, #2) delete "and its watershed" from the regulation language and #3) add clarifying language.

Questions were asked about whether an additional public comment period would be required if option #2 or #3 were chosen. Discussion followed. Judge O'Malley stated that it was his opinion that an additional public comment period would be required because the regulation comes from a statute that says "If as a result of comments the Commission changes a proposed regulation to the extent that the rule would have an effect not previously expressed in the notice required in a particular section the Commission shall provide another adequate public notice and public comment period. This subsection shall not require a second public notice and public comment period if the final regulation is a logical outgrowth of the regulation proposed in the prior notice." The prior notice had no changes to the ERW definition. It was his opinion that option 2 or 3 are not a logical outgrowth of what was originally sent to the public. Therefore, if the Commission chose either option, it would have to be sent out for a public comment period. Discussion followed.

Public Comments

Mrs. Connie Burks from Harrison argued for deleting "and its watershed" from the regulation. She also spoke about the following three subjects: 1) validity of the Ecoregions concept 2) validity of ERW designations and 3) economic impact analysis. Discussion followed.

Mr. Elton Roe argued that ERW designations in Regulation No. 2 were more stringent than federal law. ADEQ states that fishable and swimable are the mandatory requirements of the Clean Water Act. Therefore, he disagrees that ERW designations are not more stringent than federal law. He also spoke about the Clean Water Act Tier 1, 2, and 3. He closed with the statement that water quality regulations should not impede or preclude the necessary and favorable social and economic development of private land. Discussion followed.

Mr. Kevin Pride, representing E.C.H.O., an environmental coalition actively focusing on the issues that influence and impact the Middle Fork of the Saline River watershed argued against changes to the regulation and stated that current ERW protection has not been strong enough to protect the Middle Fork. He requested the Commission to expand the limits of ERW protective jurisdiction,

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actively urging state agencies toward a comprehensive Middle Fork restoration effort through interagency consultation and cooperation. Discussion followed.

Mr. Terry Horton, Executive Director of the Arkansas Wildlife Federation, argued against changes and requested that we adopt the minute order and start a new triennial review process. He stated that if changes were made today he believed this would require that Regulation No. 2 be sent out for public hearings again. He argued that any new changes could be made in the new triennial review or through third party rulemaking. Discussion followed.

Mr. Fred Wiseman, a Jonesboro citizen and property owner urged the Commission to vote for option #1. He also spoke about economics and tourism and how ERW designation benefits state revenues due to the increase of tourism dollars. Discussion followed.

Mr. John Hall requested that a process for obtaining a waiver or exemption for building future water supplies be added to Regulation No. 2. At present Regulation No. 2 does not provide a process by which a city, county or water district can follow to create an additional water supply as current sources become insufficient. Discussion followed.

Mr. Ken Smith, representative of the National Audubon Society, argued against changes to Regulation No. 2 especially deleting "and its watershed" from the regulation. He requested that Greers Ferry Lake, Maumelle Lake and Beaver Lake and their watersheds be added to ERW designations. He encouraged the members of the Commission to work together to avoid stove pipe management enforcement and make every effort to use a coordination cooperation effort. Discussion followed.

Mr. Barry Haas argued against changes to Regulation No. 2, to leave "and its watersheds" in the regulation and to improve the level of protection and protect ERW designations. He also requested Lake Maumelle be added to the ERW designations.

Mr. Bill Shepherd representing the Audubon Society of Central Arkansas, argued against changes to Regulation No. 2 and to protect the environment at all costs. He stated that protecting the environment provides the state with great drinking water and supplies the state with tourism dollars. Discussion followed.

Mr. Dennis Norton, a resident and cattle farmer from Harrison, requested the Commission to remove ERW designations from all

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stream segments in Boone County as requested by the Boone County Quorum Court. He also explained how the designations and regulations were making it difficult for cattle farmers to make a living because of all the restrictions they were forced to follow. Discussion followed.

Ms. Mary Rivera, a resident of Gepp argued for removal of ERW designations from Regulation No. 2 as requested by the quorum courts and for removing "and its watershed" from the regulation. Discussion followed.

Mr. John Henley, a resident of St. Joe, wanted to take ERW designations out of Regulation No. 2. He argued for education of landowners, not more regulations.

Mr. Ronnie Tinsley, a resident and cattle farmer from Harrison, argued against ERW designations and explained how it was making it difficult for cattle farmers to make a living because of all the restrictions that were placed on them. Discussion followed.

Mr. Bill Saunders, a resident of Little Rock and a representative of the Arkansas Canoe Club argued against changes to Regulation No. 2. He supported the changes that were already made and not the changes that were being requested by other residents. He requested to keep ERW designations, approve the minute order, and start the new Triennial Review process.

Mr. Leonard Uecker, a resident of Quitman and representative of Greers Ferry Lake, Inc. argued against deleting "and its watersheds" from the regulation. He also requested Greers Ferry Lake be added to the ERW designations. Discussion followed.

Mr. Michael Farar, a resident of Little Rock, requested to keep "and its watershed" in the regulation. He also requested to add Greers Ferry Lake to the ERW designations. Discussion followed.

Commissioner Young presented the following motions. He made a motion to adopt as a logical outgrowth of the comments received, deletion of the sentence beginning: "The determination of mean...", which is set out in Regulation 2.507.

Commissioner Young made a motion to adopt, as a logical outgrowth of the comments received, the words "Expressed as cells per liter," which is in the definition of "Objectionable algal densities" in Regulation 2.106.

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Commissioner Young made a motion to adopt, as a logical outgrowth of the comments received, the third sentence in Regulation 2.509 to read as follows: "Because nutrient water column concentrations do not always correlate directly with stream impairments, impairments will be assessed by a combination of factors such as water clarity, periphyton or phytoplankton production, dissolved oxygen values, community structure and possibly others."

Commissioner Young made a motion to adopt, as a logical outgrowth of the comments received, the addition of the words "nutrient surplus" so that the sentence in Regulation 2.509 reads as follows: "Additionally, waters in nutrient surplus watershed as determined by Act 1061 of 2003 Regular Session of the Arkansas 84th General Assembly and subsequently designated nutrient surplus watersheds may be included under this Regulation if point source discharges are shown to provide a significant phosphorus contribution to waters within the listed nutrient surplus watersheds."

Chair Thompson asked for a second. Commissioner Woodward seconded the motion. Commissioner Schueck and Commissioner Quillin announced their recusal to vote on the minute order. Motion passed.

Commissioner Young made a motion to adopt Option #3 set out in the responsiveness summary in Reg. 2.203 as a logical outgrowth of the regulation proposed in the public notice and that option #3 be added to Regulation 2.203, outstanding resource waters. He proposed that the clarification language be added following the next to last sentence that ends with the word watershed. The proposed language is: "It is not the intent of the ERW designated use definition to imply that ERW status dictates regulatory authority over private land within the watershed other than what exists under local, state or federal law". Commissioner Black seconded the motion.

Commissioner Mathis made a substitute motion to take no action and have the next Triennial Review decide what changes were to be made. He stated that this motion would adopt option #1 leaving "and its watershed" in the regulation. Commissioner Henderson seconded the motion. A roll call vote was taken with Commissioners Black, Sickel, Valdez, Woodward and Young voting "No." Commissioners Henderson, McGrew, Mathis, and Shannon voted "Yes." The motion failed.

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A roll call vote on Commissioner Young's motion was taken with Commissioners Henderson, McGrew, and Mathis voting "NO." Commissioners Black, Shannon, Sickel, Valdez, Woodward, and Young voted "Yes." The motion passed.

Commissioner Young made a motion to approve the minute order with the changes that were authorized. Commissioner Black seconded the motion. The motion passed. (Minute Order No. 04-13)

Chair Thompson recognized Chief Martin Maner, Attorney Jennifer Tucker, and the people in customer service, James Gilson, Tamara Robinson and Doug Szenher for their work on Regulation No. 2.

Adjourn

There being no further business the meeting was adjourned.

THE NEXT COMMISSION MEETING IS SCHEDULED FOR 9:30 a.m., Thursday, May 27, 2004.

APPROVED MINUTE ORDERS
REGULAR COMMISSION MEETING
APRIL 23, 2004

- 04-12 The Commission adopted changes to Regulation No. 12
 (Storage Tanks).
- 04-13 The Commission adopted changes to Regulation No. 2
 (Regulation Establishing Water Quality Standards
 For Surface Waters of the State of Arkansas).