

BEFORE THE ARKANSAS POLLUTION CONTROL & ECOLOGY COMMISSION

IN THE MATTER OF:

RIVER VALLEY REGIONAL WATER DISTRICT
2806 BRYAN ROAD, VAN BUREN, AR 72956
REQUEST TO INITIATE RULEMAKING
TO AMEND APCEC REGULATION NO. 2
SECTION 2.304

NO. 06-003-R

**THIRD PARTY PETITION TO INITIATE RULEMAKING
TO AMEND REGULATION NO. 2, SECTION 2.304**

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ARK. POLLUTION CONTROL
& ECOLOGY COMMISSION
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River Valley Regional Water District ("River Valley") hereby petitions the Commission to initiate a rulemaking proceeding to amend APCEC Regulation No. 2, Section 2.304, to establish a procedure by which regional water distribution districts and other public water authorities would be able seek Commission approval to use extraordinary resource waters as a source of drinking water supply. A copy of the proposed amendment to Section 2.304 is attached as Exhibit A. In support of this petition River Valley states the following.

1. River Valley Regional Water District is a public, nonprofit regional water distribution district organized under the authority of Ark. Code Ann. § 14-16-101, et seq. River Valley's mission is to acquire safe and dependable water supplies and to distribute water efficiently to consumers and communities in the Crawford County area.

2. River Valley currently plans to utilize water from upper Lee Creek as a source of drinking water supply. More specifically, River Valley plans to utilize water that would be impounded by the proposed Pine Mountain Dam, a Corps of Engineers project that has been authorized by Congress for many years and for which an environmental impact statement is currently being prepared. If the environmental impact statement indicates that the proposed Pine

Mountain Dam is a meritorious project, with benefits that justify any potential adverse effects, River Valley expects that it will return to the Commission to seek approval for the project.

3. APCEC Regulation No. 2 designates Lee Creek from the Arkansas state line upstream to its headwaters as an extraordinary resource water. See APCEC Regulation No. 2, Appendix A, at p. A-14. The proposed location of the Pine Mountain Dam project is on a portion of Lee Creek that is designated as an ERW.

4. Section 2.304 of Regulation No. 2 expressly prohibits any significant alteration of any ERW. There is currently no procedure in Regulation No. 2 that would allow a party to ask the Commission for approval of any proposed alteration to an ERW regardless of how strong the public need might be for the proposed alteration. The only way an alteration to an ERW can be allowed under the current provisions of Regulation No. 2 is for the Commission to remove the ERW designation from the stream altogether, and thereby eliminate all of the attendant protections for the stream in question. Stated simply, Section 2.304 creates an “all or nothing” legal dilemma: an ERW must be protected against any alteration regardless of how justified the alteration may be, or the ERW must be stripped of all protection by completely removing the ERW designation

5. River Valley believes that the “all or nothing” structure of Section 2.304 is inappropriate and counterproductive. The inflexible “all or nothing” protection for ERW streams unnecessarily increases the level of public controversy that attends any proposal to designate a new ERW and any proposal for a use that might affect an existing ERW.

5. The lack of any procedure that would allow more limited alteration of an ERW has been a recurring source of concern which has never been resolved. Concerns about the lack of a procedure were expressed when the very first ERW designations were presented to the

Commission. These concerns have recurred repeatedly, particularly in the context of seeking sources of drinking water supply. The most recent recurrence of these concerns took place at the Commission's April 23, 2004 meeting. At that meeting, former State Representative John Hall made the following statement in commenting on ADEQ's proposed triennial revision of Regulation No. 2:

“[S]ome parts of our state are rich in water, but others, such as Central, Northwest and West Arkansas, have seen such rapid growth that existing supplies will not sustain current growth trends.

This imminent shortage is precisely why many here today are petitioning to have ERW's wiped off the books. But the primary concern that I foresee is not the actual list of ERW streams, but rather the inflexibility of Regulation 2 with regard to developing future water supplies.

“At present, Regulation 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. Absent action by the Commission, the opportunity for greater discord will increase, which would only serve to stifle Arkansas' growth and tax base.

“My purpose here today is to ask the commission to consider steps that can be taken to implement a fair and balanced process that communities can follow to develop future water supplies.”

A complete transcript of Rep. Hall's Statement before the Commission is reproduced as Exhibit F of this Petition. The Minutes of the Commission's April 23, 2004 meeting summarizes ADEQ's response to the public comments on the ERW issue by stating that “ADEQ understands that the public has a significant interest in the ERW issue,” and the Department stated that suggestions for change proposed at the meeting “would be more appropriately raised in a petition for third party rulemaking.” See Minutes of Commission's April 23, 2004 Meeting, at p. 3, reproduced as Exhibit G of this Petition.

6. River Valley accepts the Department's invitation to address the procedures in Regulation No.2 by means of a third party petition for rulemaking. River Valley hopes that the

Department will support the initiation of the rulemaking proceeding requested in this petition so there can be the type of dialogue that Department advocated in April of 2004.

7. This petition proposes to amend Section 2.304 to establish a procedure by which regional water distribution districts and other public water authorities could, under limited circumstances, request Commission approval to use extraordinary resource waters as a source of drinking water supply. More specifically, this petition proposes to amend Section 2.304 by inserting the following underscored language:

2.304. 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.

8. The procedure that would be established under the proposed amendment would be available only under very limited circumstances:

- The procedure could be initiated only by a regional water distribution district or other public entity engaged in providing water to the public;
- The procedure could be invoked only for a project certified by the Natural Resources Commission as being in compliance with the State Water Plan;

- The procedure would require preparation of a formal environmental impact statement that meets the information and analytical standards established by the Council on Environmental Quality for federal agency environmental impact statements;
- The procedure would require at least 45 days of public notice and opportunity to comment on the proposal; and
- The procedure would require an affirmative vote of the Commission approving any proposal as having benefits that justify the anticipated adverse effects.

9. The procedure that would be established under the proposed amendment would resolve at least some of the concerns that have given rise to such controversy regarding the inflexibility of the regulations governing ERW streams.

10. It is important to note that this petition does not seek to change the current status of any designated ERW. Instead, the petition simply seeks to establish a procedure under which regional water districts and other public water authorities would be able to ask the Commission in the future for permission to use an ERW as a source for drinking water supply. If the amendment proposed in this petition is ultimately adopted by the Commission, the procedural steps required under the amendment should assure that any request advanced under the amendment for alteration of an ERW would be supported by an extraordinarily strong body of information and analysis, including a formal environmental impact statement.

11. The amendment proposed in this petition will not affect any small business within the meaning of Executive Order 05-04. As set forth more fully in Exhibit D, the amendment would not apply to any small business, and it would not impose any obligation or requirement on any small business. The amendment would simply establish a procedure by which a limited number of public entities would be able to ask the Commission for permission to use extraordinary resource waters as a source of drinking water supply.

12. The amendment proposed in this petition would not constitute a regulation that is more stringent than federal requirements within the meaning of Ark. Code Ann. § 8-1-203(b)(1)(B) or APCEC Regulation No. 8, Section 3.5.3. Therefore no economic impact and environmental benefit analysis is required for the proposed amendment

13. The Legislative Questionnaire and Legislative Financial Impact Statement for this proposal are attached as Exhibits B and C of this Petition.

14. The proposed Minute Order that would initiate the rulemaking requested in this Petition is attached as Exhibit H of the Petition.

WHEREFORE, River Valley Regional Water District respectfully requests that the Commission initiate a third party rulemaking to consider the amendment to Regulation No. 2, Section 2.304 set forth in this petition.

Respectfully submitted,

MITCHELL, WILLIAMS, SELIG,
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By



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ATTORNEYS FOR RIVER VALLEY REGIONAL
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