

**QUESTIONNAIRE
FOR FILING PROPOSED RULES AND REGULATIONS
WITH THE ARKANSAS LEGISLATIVE COUNCIL
AND JOINT INTERIM COMMITTEE**

DEPARTMENT/AGENCY

DIVISION

DIVISION DIRECTOR

CONTACT PERSON

ADDRESS

PHONE NO.:

FAX NO.:

TO: Donna K. Davis
Subcommittee on Administrative Rules and Regulations
Arkansas Legislative Council
Bureau of Legislative Research
Room 315, State Capitol
Little Rock, AR 72201

1. What is the short title of this rule?
*Arkansas Pollution Control and Ecology Commission, Regulation No. 2,
Regulation Establishing Water Quality Standards for Surface Waters of the State
of Arkansas*

2. What is the subject of the proposed rule?
*Amendment of Section 2.304 of Regulation No. 2 to establish a procedure by
which regional water distribution districts and other public water authorities
would be able to request approval from the Arkansas Pollution Control &
Ecology Commission to use waterbodies designated as extraordinary resource
waters as a source of drinking water supply.*

3. Is this rule required to comply with federal statute or regulations?
Yes _____ No X

4. Was this rule filed under the emergency provisions of the Administrative Procedure
Act?
Yes _____ No X

If yes, what is the effective date of the emergency rule? _____

When does the emergency rule expire? _____

Will this emergency rule be promulgated under the permanent provisions of the
Administrative Procedure Act? Yes _____ No _____

Is this a new Rule? Yes _____ No X



If yes, please provide a brief summary explaining the regulation

Does this repeal an existing rule: Yes _____ No X If yes, a copy of the repealed rule is to be included with your completed questionnaire. If it is being replaced with a new rule, please provide a summary of the rule giving an explanation of what the rule does.

5. Is this an amendment to an existing rule? Yes X No _____ If yes, please attach a mark-up showing the changes in the existing rule and a summary of the substance changes.

See Attachments A and B.

6. Cite the state law that grants the authority for this proposed rule. If codified, please give the Arkansas Code citation.

Act 472 of the Acts of Arkansas 1949, [Part 1], § 3 as amended ARK. CODE ANN. § 8-4-201

7. What is the purpose of the rule? What is it necessary?

Section 2.304 of Regulation No. 2 currently prohibits any significant alteration of any water body designated as an extraordinary resource water. As a consequence, the only way that a water body designated as an extraordinary resource water can be used as a source of drinking water supply is to completely remove the ERW designation, thereby eliminating all attendant protections for the water body in question. The proposed amendment would add to Section 2.304 a procedure by which regional water distribution districts and other public water authorities would be able to request approval from the Arkansas Pollution Control & Ecology Commission to use an extraordinary resource water body as a source of drinking water supply without removing the extraordinary resource water designation from the water body in question.

The complete prohibition in Section 2.304 against any significant alteration of extraordinary resource waters has been the source of recurring complaints because of its inflexible, "all or nothing" nature. Either an ERW must be completely protected against any change, or it must be completely stripped of all protections that arise from ERW status. The amendment is needed to provide a more flexible procedure for reaching an appropriate balance between the protection of the environmental interests in preserving extraordinary resource waters on the one hand, and the protection of the public health and welfare interests at issue in assuring safe and dependable drinking water supplies on the other.

8. Will a public hearing be held on this proposed rule? Yes X No _____ If yes, please complete the following:

Date: week of March 28, 2006, April 3, 2006, April 10, 2006 and April 17, 2006

Time: to be determined by ADEQ

Place: Van Buren, Arkansas, Little Rock, Arkansas, Fayetteville/Springdale, Arkansas and Mountain Home, Arkansas at a location to be determined by ADEQ

9. When does the public comment period expire for permanent promulgation? (Must provide a date.)

The period for receiving all written comments by the public shall conclude ten (10) business days after the date of the public hearing pursuant to Arkansas Pollution Control and Ecology Commission Regulation No. 8, Part 3, Section 2.2.3, unless an extension of time is granted. Thus, the public comment period will expire on or before April 28, 2006.

10. What is the proposed effective date of this proposed rule? (Must provide a date.)

The regulation becomes effective twenty days after filing of the final regulation as adopted by the Commission with the Secretary of State.

11. Do you expect the rule to be controversial? Yes No If yes, please explain.

Most proposals related to extraordinary resource waters have generated strong public interest. Some members of the public strongly object to any proposal that could be viewed as reducing the protection for extraordinary resource waters. Other members of the public strongly object to the inflexible prohibitions against any alteration that attach to a water body once it is designated as an extraordinary resource water. The proposed amendment would not change the current status of any designated extraordinary resource water, it would only establish a procedure for requesting Commission approval. Nevertheless, it is likely that strong advocates and opponents of extraordinary resource waters will view this proposed rulemaking as an occasion to voice their concerns about the merits of the current system for protecting extraordinary resource waters, or the lack thereof.

12. Please give the names of persons, groups, or organizations that you expect to comment of these rules? Please provide the position (for or against) if known.

For or Neutral:

Arkansas Natural Resources Conservation Commission

Mr. John Riggs, Mayor of Van Buren, Arkansas

Mr. Jerry Williams, Crawford County Judge

Against:

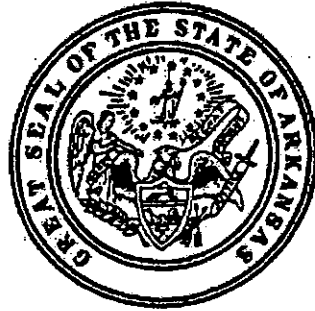
Ozark Society

Sierra Club

Position Unknown

Arkansas Department of Environmental Quality

ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION



REGULATION NO. 2

REGULATION ESTABLISHING WATER QUALITY STANDARDS FOR SURFACE WATERS OF THE STATE OF ARKANSAS

DRAFT

Attachment A

Arkansas Pollution Control and Ecology Commission
Regulation No. 2, As Amended

**Regulation Establishing Water Quality Standards for Surface Waters
of the State of Arkansas**

TABLE OF CONTENTS

Reg. 2.101	Authority.....	1-1
Reg. 2.102	Purpose	1-1
Reg. 2.103	Commission Review.....	1-2
Reg. 2.104	Policy for Compliance	1-2
Reg. 2.105	Environmental Improvement Projects	1-2
Reg. 2.106	Definitions	1-2
Reg. 2.201	Existing Uses	2-1
Reg. 2.202	High Quality Waters.....	2-1
Reg. 2.203	Outstanding Resource Waters	2-1
Reg. 2.204	Thermal Discharges.....	2-1
Reg. 2.301	Introduction	3-1
Reg. 2.302	Designated Uses	3-1
Reg. 2.303	Use Attainability Analysis.....	3-6
Reg. 2.304	Physical Alteration of Habitat	3-7
Reg. 2.305	Short Term Activity Authorization.....	3-7
Reg. 2.306	Procedures for Removal of Any Designated Uses Except Fishable/Swimmable, and Modification of Water Quality Criteria Not Related to Fishable/Swimmable Uses	3-8
Reg. 2.307	Use Subcategories.....	3-8 <u>9</u>
Reg. 2.308	Site Specific Criteria.....	3-9
Reg. 2.309	Temporary Variance	3-9
Reg. 2.401	Applicability	4-1
Reg. 2.402	Nuisance Species	4-1
Reg. 2.403	Methods	4-1
Reg. 2.404	Mixing Zones.....	4-1
Reg. 2.405	Biological Integrity	4-2
Reg. 2.406	Color	4-2
Reg. 2.407	Taste and Odor.....	4-2
Reg. 2.408	Solids, Floating Material and Deposits.....	4-2
Reg. 2.409	Toxic Substances	4-2
Reg. 2.410	Oil and Grease	4-3
Reg. 2.501	Applicability	5-1
Reg. 2.502	Temperature.....	5-1
Reg. 2.503	Turbidity	5-2
Reg. 2.504	pH	5-2
Reg. 2.505	Dissolved Oxygen.....	5-2
Reg. 2.506	Radioactivity.....	5-4
Reg. 2.507	Bacteria.....	5-4

Reg. 2.508	Toxic Substances	5-5
Reg. 2.509	Nutrients	5-7
Reg. 2.510	Oil and Grease	5-8
Reg. 2.511	Mineral Quality.....	5-8
Reg. 2.512	Ammonia	5-12
	DESIGNATED USES: OZARK HIGHLANDS ECOREGION.....	A-6
	SPECIFIC STANDARDS: OZARK HIGHLANDS ECOREGION.....	A-7
	DESIGNATED USES: BOSTON MOUNTAINS ECOREGION.....	A-14
	SPECIFIC STANDARDS: BOSTON MOUNTAINS ECOREGION.....	A-15
	DESIGNATED USES: ARKANSAS RIVER VALLEY ECOREGION.....	A-20
	SPECIFIC STANDARDS: ARKANSAS RIVER VALLEY ECOREGION.....	A-21
	DESIGNATED USES: OUACHITA MOUNTAIN ECOREGION.....	A-26
	SPECIFIC STANDARDS: OUACHITA MOUNTAIN ECOREGION.....	A-27
	DESIGNATED USES: GULF COASTAL ECOREGION.....	A-32
	SPECIFIC STANDARDS: GULF COASTAL ECOREGION.....	A-33
	DESIGNATED USES: DELTA ECOREGION.....	A-40
	SPECIFIC STANDARDS: DELTA ECOREGION.....	A-41

may be found in the November 1983 EPA publication entitled *Technical Support Manual: Waterbody Surveys and Assessments for Conducting Use Attainability Analysis*. Other scientific methods, including the use of existing technical data, may be used for justifying the removal of a designated use; provided the methods are agreed upon prior to the study. Such other methods may include the use of information previously gathered through technical studies and/or use attainability analysis. Use attainability analysis procedures may be found in the State of Arkansas Continuing Planning Process document (CPP). Any waterbody on which a use attainability analysis is approved shall be so listed in Appendix A with appropriate criteria.

Reg. 2.304 Physical Alteration of Habitat

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 an 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.

Reg. 2.305 Short Term Activity Authorization

The Director may authorize, with whatever conditions deemed necessary and without public notice, short term activities which might cause a violation of the Arkansas Water Quality Standards. This authorization is subject to the provisions that such activity is essential to the protection or promotion of the public interest that no permanent or long-term impairment of beneficial uses is likely to result from such activity. Nothing herein shall be intended to supersede existing state and federal permitting processes or requirements.

Activities eligible for authorization include, but are not limited to:

- (A) wastewater treatment facility maintenance;
- (B) fish eradication projects;
- (C) mosquito abatement projects;
- (D) algae and weed control projects;

- (E) dredge and fill projects;
- (F) construction activities;
- (G) tracers used in hydrological studies; or
- (H) activities which result in overall enhancement or maintenance of beneficial uses.

The Director shall specify the degree of variance from the standards, the time limit of activity and restoration procedures where applicable.

Such authorization shall not be granted for activities which result in the adverse impact on any federally threatened or endangered species or on critical habitat of such species.

Reg. 2.306 Procedures for Removal of any Designated Use Except Fishable/Swimmable, and Modification of Water Quality Criteria not Related to Fishable/Swimmable Uses

This procedure is applicable in those cases where the Commission chooses to establish less stringent water quality criteria without affecting a fishable/swimmable use or when the Commission chooses to remove a use other than fishable/swimmable which is not an existing use.

The Commission may allow a modification of the water quality criteria or the removal of a use which is not a fishable/swimmable use to accommodate important economic or social development in a local area, if existing uses are maintained and protected fully and the requirements for public participation in the Continuing Planning Process are met. As a minimum, the following information shall be submitted to the Department Director before initiation of the public participation process:

- (A) Technological or economic limits of treatability.
- (B) Economic analysis of the impact on the local area.
- (C) Documentation that the use being removed is not an existing use and that all other designated uses will be protected.

Modifications made pursuant to this section may be required to be rejustified for continued support. As community water needs change, or technological advancement, including long-term environmental improvement projects, make treatment options more practicable, the Commission may reevaluate the need for the establishment of the more stringent water quality criteria or the removed use.

Any waterbody on which such alterations are approved will be so listed in Appendix A with the applicable changes noted.

Reg 2.307 Use Subcategories

The Commission may adopt sub-categories of a use and set the appropriate criteria to reflect varying needs of such sub-categories of uses, for instance, to differentiate between cold and warm water fisheries or agricultural and domestic water supply.

Reg. 2.308 Site Specific Criteria

In establishing criteria:

- (A) Establish numerical criteria values based on:
 - (1) 304(a) Guidance; or
 - (2) 304(a) Guidance modified to reflect site conditions [WER] or
 - (3) other scientifically defensible methods;
- (B) Establish narrative criteria or criteria based upon biomonitoring methods where numerical criteria cannot be established or to supplement numerical criteria.

Reg. 2.309 Temporary Variance

A temporary variance to the water quality standards may be allowed for an existing permitted discharge facility. The variance will be for specified constituents and shall be no longer than a three year period. A variance must be approved by the Arkansas Pollution Control and Ecology Commission and the U.S. Environmental Protection Agency. A variance will be considered when it is determined that a standard, including designated use, can ultimately be attained or when preliminary evidence indicates that a site specific amendment of the standards may be appropriate. A variance may be granted only to the applicant and will not apply to other discharges into the specified waterbody.

EXECUTIVE SUMMARY

Arkansas Pollution Control & Ecology Commission Regulation No. 2 designates certain streams and waterbodies as extraordinary resource waters. Section 2.304 of Regulation No. 2 prohibits any activity that would result in any significant alteration of any extraordinary resource waters. River Valley Regional Water District proposes that the Commission amend Section 2.304 to establish a procedure by which regional water districts and other public water authorities would be able to request approval from the Pollution Control & Ecology Commission to use a waterbody designated as extraordinary resource waters as a source of drinking water supply. The procedure proposed by River Valley would have relatively narrow application. As proposed by River Valley:

- 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.

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. to serve water users in the Crawford County area. River Valley is interested in the adoption of the proposed

amendment because it plans to utilize upper Lee Creek, which has been designated as an extraordinary resource water, 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 Pollution Control & Ecology Commission to seek approval for the project. If the proposed amendment to Section 2.304 is adopted, River Valley would follow that procedure. If the proposed amendment is not adopted, the current provisions of Regulation No. 2 would require any public water authority seeking to use extraordinary resource waters as a source of drinking water supply to have the ERW designation removed altogether, thereby eliminating all attendant protections for the waterbody in question.