

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

**RIVER VALLEY REGIONAL WATER DISTRICT'S
RESPONSIVENESS SUMMARY**

I. Introduction

On January 13, 2006, River Valley Regional Water District filed a Petition for Third Party Rulemaking with the Commission. The petition sought to amend PC&EC Regulation No. 2 to establish a procedure by which public water authorities could seek permission to use an Extraordinary Resource Water as a source of drinking water supply. On January 27, 2006 the Commission voted to initiate the Third Party Rulemaking process; established a period for submitting public comments that lasted more than 90 days; and directed that public hearings be held in four separate locations: Van Buren, Mountain Home, Springdale, and Little Rock. Thereafter the Commission extended the period for submitting public comments an additional 30 days, to June 2, 2006. The Commission directed River Valley and ADEQ each to prepare and file a Statement of Basis and Purpose and a Responsiveness Summary in conformity with the provisions of PC&EC Regulation No. 8. *See* Minute Order No. 06-11, at paragraph 7. Pursuant to the Commission's direction, River Valley respectfully submits this Responsiveness Summary.

II. Summary Overview of Comments:

A total of 932 written comments and 91 oral comments were received.¹ Of those comments, 392 (39%) were in favor of River Valley's proposal, 629 (61%) were opposed, and 2 were mixed or indeterminate in view.

A majority of the comments from those with Crawford County addresses were in favor of the River Valley proposal. A majority from those with addresses outside of Crawford County were opposed. The geographic breakdown of the comments is as follows:

<u>Address of Commenter</u>	<u>For</u>	<u>Against</u>	<u>Indeterminate</u>
Crawford County	329	13	0
Rest of Arkansas	52	431	2
Out of State	5	41	0
Address Not Given	<u>6</u>	<u>144</u>	<u>0</u>
Total	392	629	2

Twenty-eight public officials signed comments. Congressmen Marion Berry and John Boozman signed comments in favor of River Valley's proposal. Congressman Vic Snyder signed a comment in opposition. Five federal entities (EPA Region 6, U.S. Fish & Wildlife Service, Ozark-St Francis National Forest, Ouachita National Forest, and National Park Service) filed comments in opposition. The Arkansas Natural Resources Commission adopted and filed a resolution in favor of the River Valley proposal; and two state agencies –ADEQ and Natural Heritage Commission— filed comments in opposition. Two State Representatives from Little Rock, Sam Ledbetter and David Johnson, signed comments in opposition. Nineteen County Judges and former Commissioner Bill Bush signed comments in support. The state of Oklahoma filed a comment in opposition.

¹ It is difficult to give an unqualified tabulation of the comments. For example, some comments were signed by more than one person. (River Valley counted each comment with multiple signators as a single comment.) One petition was signed by 39 individuals in support of the proposal. (River Valley counted the petition as a single comment.) Some individuals submitted oral and written comments. (River Valley counted the oral comment and the written comment as separate comments.) Some individuals gave oral comments at more than one hearing. (River Valley counted each oral comment at a separate hearing as a separate comment.)

III. Summary and Response to Issues Raised in Public Comments

1. The Proposal Is Prohibited by EPA's Antidegradation Policy.

ADEQ and a group of environmental organizations commented that River Valley's proposal is prohibited by EPA's Antidegradation Policy. This comment is mistaken.

To understand the claims regarding EPA's Antidegradation policy some background is important. The federal Clean Water Act and EPA's implementing regulations carefully distinguish between two closely related legal terms: "existing uses" and "designated uses." In Arkansas, an "existing use" is any one of five enumerated "uses" (public water supply, propagation of fish and wildlife, recreational use, agricultural and industrial water supply, and navigation) which actually existed in the relevant water body on or after November 28, 1975.² A "designated use" is any one of ten enumerated uses which the state has chosen to designate for a particular water body, regardless of whether the use is, or ever has been, actually in existence in the water body in question. The ten uses enumerated in Regulation No. 2 that can be a "designated use" are as follows:³

- Extraordinary Resource Water
- Ecologically Sensitive Water Body
- Natural and Scenic Waterway
- Primary Contact Recreation
- Secondary Contact Recreation
- Fisheries
 - Trout fisheries
 - Lake & Reservoir fisheries
 - Stream fisheries
- Domestic Water Supply
- Industrial Water Supply
- Agricultural Water Supply
- Other Uses Not Dependent on Water Quality (e.g., hydroelectricity)

² APC&EC Regulation No. 2, § 2.106.

³ APC&EC Regulation No. 2, § 2.302.

A state can assign a “designated use” to a water body even though that use is not an “existing use” in the water body in question. Thus, for example, a state can designate a stream for use as a public water supply, even though the stream has never actually been used for that purpose, and even though the stream currently might not have sufficient water quality to be fit for such use.

EPA’s Antidegradation policy contains two requirements relied upon by ADEQ and the environmental groups. First, EPA’s Antidegradation policy requires states to protect and maintain “existing uses.”⁴ Second, EPA’s Antidegradation policy requires states to protect and maintain the water quality in water bodies that qualify as “outstanding national resource waters” (commonly referred to as “ONRWs”).⁵ ADEQ and the environmental groups make three distinct arguments based on these two requirements.

First, ADEQ and the environmental groups argue that once an ERW is designated in Arkansas the ERW status constitutes an “existing use;” and, as an “existing use,” they claim that EPA’s Antidegradation policy requires the state to protect and maintain the ERW status in perpetuity. The flaw in this argument is that ERW status cannot be an “existing use” because it is not one of the five possible existing uses enumerated in the definition of “existing use.” Regulation No. 2 defines “existing uses” 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.

The omission of ERW status from the list of uses that can qualify as an “existing use” was not an accident. It was a deliberate choice intended to avoid having an ERW designation become a

⁴ 40 C.F.R. § 131.12(a)(1).

⁵ 40 C.F.R. § 131.12(a)(3).

permanent status that could never be changed. This point is clearly evidenced by an exchange between EPA and the Department regarding the 1991 Triennial Review of Regulation No. 2. In that exchange, EPA urged the state to revise Regulation No. 2 to clearly state that ONRW status constitutes an “existing use” that cannot be removed. The Department rejected EPA’s request because, among other things, ONRW status is not one of the five enumerated uses that could qualify as an “existing use” under the definition in Regulation No. 2:

“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 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.)

Against this background it is clear that ERW status is not an “existing use” protected under the EPA Antidegradation policy.

The second argument raised by ADEQ and the environmental groups is that ERWs are “outstanding” in quality and therefore constitute ONRWs that must be protected under the EPA Antidegradation policy. This argument is in error. Although Regulation No. 2 uses the word “outstanding” to describe the ERW “designated use”, the word “outstanding” obviously is used in its ordinary grammatical sense. APC&EC Regulation No. 2, § 2.203. The use of the word “outstanding” in Regulation No. 2 does not mean that designation of an ERW constitutes

designation of an ONRW. Here again the 1991 exchange between EPA and ADEQ is informative:

“Another important point to consider in this argument is the relevancy of the ONRW designation to the state of Arkansas. Nowhere in the Water Quality Standards does the state specifically designate any streams as ONRW streams. In Section 3(C) (Anti-Degradation Policy) [now §2.203] a special level of protection is provided for “outstanding state or national resource waters such as extraordinary resource waters....”. From this language it is not clear whether our extraordinary, scenic, and ecologically sensitive streams are outstanding state or national resource. To clarify this point the Department has recently promulgated within Regulation 6 language protecting our outstanding state resource waters, and thus we feel this issue has been settled. There are not any designated ONRW streams within the state of Arkansas.” ADEQ RESPONSIVENESS SUMMARY ON PROPOSED AMENDMENTS TO ARKANSAS WATER QUALITY STANDARDS IN JULY 1991, at p. 8. (Emphasis in original text.)

Stated simply, the designation of a water body as an ERW in Arkansas does not make that water body an ONRW within the meaning of EPA’s Antidegradation policy.

The third argument advanced by ADEQ and the environmental groups under EPA’s Antidegradation policy is that the list of designated uses in Regulation 2 subdivides the Fishery use into three categories: Trout Fisheries, Lake and Reservoir Fisheries, and Stream Fisheries. Given this subdivision of the Fisheries designated use, ADEQ and the environmental groups argue that EPA’s Antidegradation policy prohibits the conversion of any Stream Fishery into a Lake and Reservoir Fishery. The flaw in this argument is that the subdivisions of the Fishery use appear only in the list of designated uses, and not in the list of existing uses. The definition of existing uses does not subdivide the Fishery use. This point is decisive because EPA’s Antidegradation policy does not protect designated uses; it only protects existing uses. The error in ADEQ’s argument is apparent when one considers the consequences such a theory would have. If every subdivision of fishery had to be preserved, no new impoundments of any sort would ever be allowed on any stream or rivulet in Arkansas because it would convert a

designated Stream Fishery to a designated Lake and Reservoir fishery. Indeed, the reverse would also be true; namely, no dam or impoundment could ever be removed because it would convert a Lake and Reservoir Fishery to a Stream Fishery.

The error of the arguments based on EPA's Antidegradation policy is confirmed by the fact that the Department has repeatedly taken the position that ERW status is not permanent or irrevocable. The Department clearly stated that ERW status is not permanent when the very first ERWs were considered for designation. The Department has reiterated this position repeatedly, with the most recent instance last Friday when Director Devine described to the Commission the current Triennial Review meetings and the alternative process that the Department is developing for addressing questions regarding the use of ERWs.:

“We have also moved forward with the Triennial Review Regulation No.2 work group. We met with them specifically and have had, I believe, a very interesting group of meetings so far. The work group is comprised of a very diverse group of individuals. This is not a group of “amen corner” type choir members. These are people who have strong opinions from both sides, from the property rights side and also the environmental protection side. I think this type of group is the right kind of group to have a discussion about what the regulation will be. This really includes the broad spectrum, so it includes everyone. I think that that bodes well for the process. Everyone will have had a chance to speak their minds even if it doesn't turn out that everyone gets exactly what they want, because it is impossible to give everyone exactly what they want. But everyone will have a chance at least to speak, and those varying opinions will craft a potential solution to Regulation 2 issues that will be good for all of us. Part of that, of course, includes the potential of the addition or the deletion of Extraordinary Resource Waters. **I think that that process is what we should have in place. A process so people can know exactly how to add or delete ERWs to your listing of ERWs. Also a process to utilize the potential for drinking water from those--an impoundment from those streams if the need can be evidenced. So that is the kind of process that we are looking at and we're making progress on that.**” STATEMENT OF DIRECTOR MARCUS DEVINE BEFORE THE ARKANSAS POLLUTION CONTROL & ECOLOGY COMMISSION ON JUNE 23, 2006. (Emphasis supplied.)

None of the Department's assurances regarding the ability to change or delete ERW status could possibly have been true if ADEQ's current arguments regarding EPA's Antidegradation policy had any merit.

2. *The Proposal Would Violate Section 2.203 of the State Antidegradation Policy.*

ADEQ and the group of environmental organizations commented that River Valley's proposal would violate section 2.203 of the state Antidegradation policy. This comment is mistaken.

Section 2.203 of the state Antidegradation policy provides that:

“Where high quality waters constitute an outstanding state or national resource, such as those waters designated as extraordinary resource waters, ecologically sensitive or natural and scenic waterways, those uses and water quality for which the outstanding waterbody was designated shall be protected by (1) water quality controls, (2) maintenance of the natural flow regime, (3) protection of instream habitat, and (4) encouragement of land management practices protective of the watershed. 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. The Arkansas Soil and Water Conservation Commission has responsibility for the regulation of the withdrawal of water from streams and reservoirs, and such withdrawals are not within the jurisdiction of this regulation.”

ADEQ and the environmental groups argue that this language, and particularly the provisions regarding maintenance of natural flow regime and protection of instream habitat, conflict with River Valley's proposal and therefore it is prohibited. River Valley disagrees.

River Valley's proposal would establish a procedure within Regulation No. 2 by which the Commission could consider on a case-by-case basis specific proposals for drinking water projects that involve alteration of an ERW's habitat. Approval of a project under River Valley's proposed procedure would not remove the ERW designated use, but it would effectively amend the ERW designation insofar as the proposed project is concerned. It is River Valley's view that

the Commission's approval of a specific project under the proposed rule would clearly control in such instances, and the more general requirements of Section 2.203 would apply to the ERW as approved, including the habitat alterations approved by the Commission for the specific project.

3. *The Proposal Would Violate Section 2.201 of the State Antidegradation Policy.*

ADEQ and the group of environmental organizations commented that River Valley's proposal would violate Section 2.201 of the state Antidegradation policy. This comment is mistaken.

Section 2.201 of the state Antidegradation policy provides that:

“Existing instream uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.”

ADEQ and the environmental groups argue that ERW status is an “existing use” and therefore Section 2.201 requires that all ERWs be maintained and protected without change. River Valley disagrees. As noted above, ERW status is a “designated use,” but it is not an “existing use.” The omission of ERW status from the list of possible existing uses in Regulation No. 2 was intentional. Section 2.201 of the state Antidegradation policy applies only to existing uses, and therefore it does not apply to ERW status. Moreover, under River Valley's proposal, approval of a project would not remove the ERW designated use, it would only allow alterations to the habitat of an ERW for a specifically approved project. Under these circumstances, section 2.201 would not apply even if ERW status was an existing use, because the ERW use would not be removed.

4. *Some Commenters, including ADEQ and EPA, Raised Questions Regarding the EIS Requirement in River Valley's Proposal.*

ADEQ, EPA, and other commenters questioned how closely the Environmental Impact Statement requirement in River Valley's proposal would follow federal EIS practices under

NEPA. River Valley believes that these questions do not give any reason for objecting to its proposal. The federal EIS process has been the subject of extensive rulemaking, guidelines, litigation, and technical commentary for more than 35 years. River Valley believes that it is unnecessary and unwise to import every aspect of federal EIS practice into state law. Instead, River Valley's proposal incorporates by reference the basic core requirements regarding the scope and quality of a full-blown federal EIS (40 C.F.R. Part 1502), including in particular the requirement that all alternatives be carefully analyzed. River Valley believes this will be adequate to assure that a water district using the proposed procedure would conduct a study of environmental impacts and alternatives that is substantially equivalent in quality and scope to a full-blown Environmental Impact Statement under the federal system. River Valley is confident that if a water district attempted to proceed based on a study that fell short in any material regard, the Commission would simply reject the project or send it back for further study. River Valley believes the Commission will be able to exercise sound and reasoned discretion in determining whether a study is adequate. River Valley is also confident that if a study does fall short in some regard, the participants in the public review and comment process will identify the deficiencies quite clearly.

Some commenters questioned who would perform the EIS. One commenter suggested that it should be performed by a federal agency. Another commenter suggested that it should not be performed by a government agency, but instead by an independent expert. Another commenter suggested that the EIS should not be performed by any consultant or other entity employed or compensated by the water district sponsoring the proposed project. River Valley believes that there is no single answer to this question that will fit all circumstances. In some instances a federal agency may be willing or even required to perform the EIS. In other

instances an independent private contractor may be appropriate. River Valley is satisfied that the Commission will be able to determine whether the identity or interest of the author of the EIS has material impact on the adequacy or substantive content of the study.

Some commenters questioned whether specific procedural regulations applicable to federal Environmental Impact Statements would be applicable to an EIS under River Valley's proposal. River Valley believes that its proposal requires substantial equivalence in quality, scope, and content of the study, but not literal adherence to every federal NEPA regulation and guideline. River Valley also believes that it would be difficult, if not impossible, to conduct an EIS of the type required by its proposal without engaging in an open procedure that provides ample opportunities for participation and input by members of the public and interested governmental agencies. River Valley does not believe, however, that detailed one-size-fits-all prescriptions for procedure are necessary or prudent in a rule of this sort.

Some commenters questioned whether an EIS performed under River Valley's proposed rule would be subject to judicial review in the same manner as a federal EIS. Some commenters questioned whether the EIS requirement would be enforceable if it were not subject to the same type of judicial challenges as a federal EIS. River Valley doubts that it would be prudent or feasible for the Commission to try to import into Regulation No. 2 all of the federal case law that has developed with respect to the federal EIS requirement. Much of this law is based on specific requirements in NEPA that are not present in state law. Nevertheless, River Valley believes that the EIS contemplated by its proposed rule would be a critical piece of the administrative record. If the Commission approved a project where there were serious procedural or substantive flaws in the supporting EIS, existing Arkansas law provides ample opportunity for seeking judicial review and securing appropriate redress.

ADEQ and some other commenters stated that the EIS requirement in River Valley's proposal is meaningless, too lenient, or inadequate. River Valley disagrees. River Valley's proposal requires a study of environmental impacts and alternatives that is equivalent in scope and quality to a full-blown federal EIS. Studies of this sort typically cost millions of dollars and usually take multiple years to complete. There is no requirement in Arkansas law that currently comes anywhere close to the demands of the full-blown EIS contemplated by River Valley's proposal.

One commenter objected to the EIS requirement in River Valley's proposal on the ground that it is too costly, too time consuming, and would set a bad precedent in state law. The commenter expressed concern that the EIS requirement might spread into other requirements of state law, and asked that it be removed. This commenter stated that environmental issues raised in connection with proposals for alteration of ERWs can be adequately addressed without such a demanding study requirement. River Valley agrees that the EIS contemplated by its proposal would be costly and time consuming, but River Valley believes that such a demanding requirement is justified in the unique circumstances involved in dealing with an ERW.

One commenter stated that the EIS requirement in River Valley's proposal might open proposed projects to litigation under state law comparable to the litigation that has occurred under federal EIS requirements. River Valley recognizes that the EIS requirement may tempt opponents of projects to engage in litigation of the sort that has occurred in connection with the federal EIS requirements. River Valley believes that existing state law of judicial review is more than adequate to deal with such claims in a manner that is appropriate and fair to all concerned. River Valley believes that one of the best answers to the threat of such claims is a study of such

procedural fairness and high substantive quality that no reasonable person would believe there are serious grounds for finding fault with the study.

One commenter stated that under River Valley's proposal, the Commission could approve a proposed project even if the EIS is totally deficient. River Valley believes it is unrealistic to think that the Commission would approve any project under its proposal if the EIS supporting the project is genuinely inadequate.

5. *The Proposal Should be Developed in the Triennial Review.*

ADEQ and some other commenters stated that River Valley's proposal should be developed in the context of the Triennial Review of Regulation No. 2 rather than a third party rulemaking. These commenters suggest that the Triennial Review would provide a fairer process, and would ensure more extensive public participation. River Valley disagrees. The public participation in River Valley's third party rulemaking has been extensive. In this regard it is significant to note that far more people attended the four public hearings on River Valley's proposal than attended all seven of ADEQ's public meetings on the Triennial Review. In fact, one of the Triennial Review meetings had no members of the public attending, and another had only two members of the public attending. As for written comments, River Valley doubts that any Triennial Review in the history of the Department has attracted as many comments as have been submitted in response to River Valley's third party rulemaking proposal.

Some commenters stated that the Triennial Review would be a better procedural forum for considering the issues presented by River Valley because the Triennial Review is consensus-based process that leads to a proposal which assures that all views are incorporated and accommodated. River Valley believes these comments are based on a mistaken premise. The Triennial Review is not a consensus-based process. In the Triennial Review, the Department

does attempt to seek out a wide range of views, but the Department does not claim that it then develops a consensus-based proposal. Instead, the Department develops what it thinks is the best proposal, without necessarily attempting to develop consensus. This is a point the Department has stressed at each of the Triennial Review Work Group meetings that have been held this year regarding ERWs.

Finally, whatever one may think about the Triennial Review process, historically the Triennial Review has failed to adequately address this subject even though it has been raised repeatedly. River Valley believes that this failure is due in large part to the fact that the Department is the only participant in the Triennial Review who gets to bring a specific rulemaking proposal to the Commission for a vote.

6. *The River Valley Proposal Does Not Make the Drinking Water Purpose the Sole Permissible Purpose of a Project:*

ADEQ and other commenters note that River Valley's proposal requires that a project be for drinking water purposes, but the proposal does not require that drinking water supply be the sole purpose of the project. As a consequence, these commenters argue that River Valley's proposal will allow the damming of ERWs for purely recreational purposes, for real estate speculation, or for any other purpose, so long as some sort of minimal drinking water purpose is added. River Valley disagrees with this comment.

River Valley acknowledges that its proposal would allow a project to come before the Commission that includes one or more purposes in addition to the drinking water purpose. It is frankly unrealistic to think that any significant water project would have one purpose, and one purpose only. For example, the construction of a drinking water reservoir necessarily raises questions regarding the design and operation of downstream releases; and these questions in turn inevitably implicate purposes other than the drinking water supply, such as maintenance of

minimum flows and other conditions to protect or even enhance downstream recreation and aquatic life.

River Valley's proposal requires that any project be legitimately motivated by a bona fide drinking water purpose. Any project that comes before the Commission will be subject to intense scrutiny. Each such project will have already gone before the Natural Resources Commission for certification of compliance with the State Water Plan. Each project will have already had an extensive study of the environmental impacts and alternatives. Each project will have to undergo a period of public review and comment, which undoubtedly will probe the legitimacy of the drinking water purpose and the severity of the need. Under these circumstances, River Valley is confident that the procedure it has proposed will provide the Commission with a record that is more than adequate to determine whether the drinking water purpose is bona fide and warrants the impacts that would be involved.

7. *River Valley's Proposal Would Require a Consultation Under the Endangered Species Act.*

Some of the federal entities commented that adoption of River Valley's proposal might trigger a consultation under the Endangered Species Act. River Valley disagrees. River Valley's proposal would not alter the condition or status of any water body in Arkansas. It would simply establish a procedure for seeking approval from the Commission. River Valley recognizes that a proposed project that is brought before the Commission in the future under the River Valley procedure may well raise significant questions about impacts on protected species. River Valley expects that the requirements of the Endangered Species Act might then require a consultation about the specifics of such a project. But River Valley is not aware of any provision in the Endangered Species Act that would make a change in Commission procedure the subject of a federal consultation under the Endangered Species Act.

8. The Commission Does Not Have Authority to Adopt the River Valley Proposal

ADEQ and some other commenters stated that the Commission does not have legal authority to adopt the River Valley proposal. These commenters state that the Commission's authority is limited to two types of action, rulemaking and adjudication. The commenters argue that River Valley's proposal would put the Commission in the position of approving a specific project, and that falls outside the permissible reach of rulemaking and adjudication. The Department argues that the Director, and not the Commission, should be given the authority to approve or disapprove any request presented under River Valley's proposal. River Valley disagrees.

Administrative law in Arkansas divides all actions of an administrative agency or body into three basic categories: (i) rulemaking, (ii) adjudication, and (iii) agency actions that are excluded from judicial review. Agency actions that are excluded from judicial review are typically limited to informal actions that do not materially affect any member of the public, such as where the Director hangs the pictures in his office or what color of paper the Commission chooses for its stationery. In some instances, particularly at the federal level, significant agency actions may be placed beyond judicial review by specific statutory exemptions or exclusions, such as those for military combat decision making and the gathering of foreign intelligence.

Against this background, River Valley believes that it is not meaningful to argue that the Commission's powers are limited to rulemaking and adjudication. The same can be said of the Director. The Director's statutory authority is also limited to actions that are characterized for administrative law purposes as either rulemaking or adjudication.

The underlying point of the comments seems to be that the Director and the Commission simply stand at different locations in the chronology of most adjudications and rulemaking

proceedings. The Director typically is more active at the stage where a rulemaking or adjudication is commenced, and the Commission is typically more active at the stage where the rulemaking or adjudication is concluded. The differences between the role of the Director and the role of the Commission arise in large part from the practical reality that the Director has a large staff and the Commission has a small staff. There are very few bright lines that immutably separate the functions of the Director and the Commission as a matter of law. Thus, for example, almost all enforcement investigations originate in the Department, but the Commission clearly has authority to initiate investigations, and it has done so on rare occasions in the past. Similarly, the Department makes almost all decisions in the first instance on whether a particular party needs a permit to engage in a particular activity, but the Commission can wind up making the initial (and final) decision on such a subject if a party seeks to have the Commission issue a declaratory order. In short, the Director and the Commission sit more in the relationship of CEO and Board of Directors than in the relationship of separate agencies with differing jurisdiction.

On the specific question of River Valley's proposal, the Commission's authority clearly derives from its statutory to adopt rules, specifically including water quality standards. It was the Commission, and not the Director, that adopted Regulation No. 2. It was the Commission, and not the Director, that assigned ERW status to the various streams and reservoirs which carry that designated use. It is the Commission, and not the Director, that has the authority to remove ERW designations since the Commission assigned the designations in the first place. If the Commission can remove an ERW designation altogether, it is difficult to understand why the Commission cannot adopt rules that would allow it to authorize less drastic changes to an ERW's status. It is a fundamental tenet of agency law that a greater power customarily includes the lesser power. *People v. FCC*, 267 F.3d 91, 107 (2d Cir. 2001).

Having stated that the Commission has authority to adopt the rule as proposed, River Valley wishes to make it clear that it also believes the Commission has the authority to adopt a different rule that follows the same format but places the Director in the position of making the initial decision on any proposed ERW drinking water project. River Valley believes that the Commission is better situated to make such a decision, but the choice of who decides is a policy question the Commission can decide for itself.

9. Do Not Change Regulation No. 2.

A large number of commenters submitted comments that simply stated that they did not believe Regulation No. 2 should be changed. These comments did not offer any elaboration or explanation for this position. River Valley disagrees with these commenters. To the extent these comments oppose literally any future change to Regulation No. 2, River Valley believes the comments are unrealistic. The Commission makes changes to Regulation No. 2 all the time. Indeed, periodic review and revision to Regulation No. 2 is required as a matter of federal law. To the extent these comments only oppose the change proposed in this Third Party Rulemaking, River Valley believes, for the reasons summarized in River Valley's Statement of Basis and Purpose, that there is a need to resolve the continuing debate on the issue of drinking water use in the context of Extraordinary Resource Waters.

10. Do not Change Regulation No. 2 With Respect to Extraordinary Resource Waters.

A large number of commenters submitted comments that simply stated they did not believe Regulation No. 2 should be changed. These comments did not offer any elaboration or explanation for this position. River Valley disagrees with these commenters.

As explained in River Valley's Statement of Basis and Purpose, River Valley believes there is a need to resolve the continuing debate on the issue of drinking water use in the context of extraordinary resource waters.

11. Do Not Dam Lee Creek.

A large number of commenters submitted comments which stated that they believed a dam should not be constructed on Lee Creek. River Valley believes that the merits of the proposed Pine Mountain Dam are not relevant to this Third Party Rulemaking because River Valley's proposal would simply establish a procedure. It would do nothing to approve or disapprove the Pine Mountain Project.

River Valley recognizes, of course, that there are very strong feelings both for and against the proposed Pine Mountain project. River Valley believes that the strength of these feeling provide an object lesson in why the procedure proposed by River Valley is needed. In the absence of such a procedure, a proposal to alter an ERW could come before the Commission without any prior study or public review. A party could simply seek to remove an ERW designation without further elaboration. Under the procedure proposed by River Valley, such a proposal would come before the Commission only after extensive review, certification by the Natural Resources Commission, and the preparation and public comment on an exhaustive study of the environmental impacts and alternatives. Indeed, the procedural steps required by River Valley's proposal, particularly the study of environmental impacts and alternatives, could develop information that might well kill the Pine Mountain project.

12. Do Not Allow Dams on ERWs.

A number of commenters submitted comments which stated without qualification that dams should not be allowed on Extraordinary Resource Waters. River Valley disagrees with this

position. River Valley believes that under some circumstances human needs, and particularly the need for safe drinking water, will outweigh the value of preserving wilderness streams without change. River Valley also recognizes, however, that Extraordinary Resource Waters have esthetic, scientific, recreational, and social values which weigh heavily in favor of protecting them against significant alteration when competing human needs can be satisfied by reasonable alternative means. River Valley believes that the procedure it has proposed will help assure that any difficult choices made in the future regarding the preservation or alteration of an ERW will be made only after an orderly process of public review and the development of a comprehensive body of information regarding the environmental impacts and alternatives.

13. *ERWs are Already Designated for Drinking Water Use.*

ADEQ and some other commenters stated that Extraordinary Resource Waters may already be used for drinking water purposes, and therefore they contend that River Valley's proposal is unnecessary. ADEQ's comment goes on to describe two instances (Benton and Hot Springs Village) in which low head weirs have been constructed in streams that are ERWs and the water used for public water supply. River Valley recognizes that Regulation No. 2 does not directly prohibit use of the water in an ERW for drinking water purposes. In fact, it is River Valley's understanding that there are a few additional instances in which a stream designated as an ERW also serves as a source of supply, at least on a limited or standby basis, for public drinking water distribution. Nevertheless, the absolute prohibition in Regulation No. 2 against any significant alteration of an ERW represents an inflexible and unreasonable barrier to the use of ERWs where drinking water needs may justify such use. In fact, the two low head weirs repeatedly identified by ADEQ were not built on streams that were designated as ERWs. Instead they were built on streams that were designated as ERWs only after the weirs had already been

constructed and placed in operation. River Valley frankly questions whether those weirs or any other similar project would have been possible after the streams were designated as ERWs. More importantly, the prohibition against any significant alteration inflexibly prohibits any significant use of an ERW stream, presumably including the removal of any significant quantity of water into off-stream storage.

River Valley's proposal would provide public water authorities with a much more rational process for determining whether any proposed project involving an ERW, including a proposal for a low head weir, could be developed, presented, and rationally considered.

14. River Valley's Proposal will Negatively Impact the Environment.

Some commenters stated that River Valley's proposal would negatively impact the environment, stream habitat, or related flora and fauna. River Valley disagrees. River Valley's proposal would simply establish a procedure for considering a proposed project. All environmental impacts, positive and negative, would have to be analyzed, documented, and carefully considered. The question of whether any project would go forward would then be considered on a case-by-case basis.

River Valley suspects that these commenters are laboring under the mistaken impression that ERW status cannot be removed. River Valley believes that the procedure it has proposed provides increased protection for ERWs because it allows for an orderly process of seeking limited change to an ERW based on exhaustive study of the environmental impacts and alternatives. Without such a procedure, ERWs are exposed to a greater risk that the designation can simply be removed by a majority vote in the legislature or the Commission without any formal study of environmental impacts or alternatives.

15. *The Proposal Will Negatively Impact Tourism and the Economic Benefits Derived From Tourism.*

Some commenters stated that River Valley's proposal will negatively impact tourism that is attracted by the presence of pristine ERWs. These commenters also pointed to the economic benefits derived from such tourism. River Valley recognizes that ERWs attract a certain amount of tourism and that there are economic benefits that arise from such tourism. River Valley does not agree that its proposal would adversely affect such tourism. River Valley's proposal would simply establish a procedure by which a project could be considered on a case-by-case basis. The negative impacts on tourism and related economics would be included among the consequences to be studied before any proposed change under River Valley's proposal could be considered by the Commission.

River Valley acknowledges that Extraordinary Resource Waters attract tourism. River Valley questions whether the monetary total of the economic benefits from tourism attributable to an ERW are likely to be greater than the monetary value of raw economic benefits that might be derived from more intensive development of the stream and its watershed. Nevertheless, River Valley recognizes that there are esthetic, scientific, and intangible social values that also weigh heavily in favor of protecting an ERW and its watershed against significant alteration.

16. *River Valley's Proposal will Affect all ERWs.*

Several commenters stated that River Valley's proposal will affect all Extraordinary Resource Waters, not just Lee Creek. Some commenters also noted that the proposal would also apply to streams with a designated use as ecologically sensitive or natural and scenic. River Valley agrees that its proposal would establish a procedure applicable to all Extraordinary Resource Waters. River Valley also agrees that its proposal would also apply to streams with a designated use as ecologically sensitive or natural and scenic. Some have suggested that River

Valley should simply seek to remove the ERW designation from Lee Creek rather than proposing a procedure that might “open up” all ERWs, ecologically sensitive, and natural and scenic waters to potential change. River Valley disagrees with this suggestion. River Valley believes that any significant alteration to an ERW or similar water body should be considered on a case-by-case basis under an orderly process that assures a comprehensive factual analysis of all relevant environmental impacts and alternatives. That is what River Valley’s proposal would establish. River Valley does not believe that Regulation No. 2 should place any water body in Arkansas permanently off limits no matter what the consequences or needs may be.

17. River Valley has Ample Water Supply.

ADEQ and other commenters stated that River Valley’s proposal should be rejected because River Valley has ample alternative sources of water supply. Some of these commenters, including the Department, pointed to the Arkansas River, construction of low head weir, groundwater wells in the Arkansas River Alluvium, water conservation, and recycling treated sewage back into the drinking water supply as alternatives. These commenters stated that River Valley should explore all of these alternatives and any others that might be identified before considering the alteration of any ERW. River Valley agrees that all alternatives should be studied before an ERW is significantly altered. That is precisely what the procedure proposed by River Valley would assure. River Valley’s proposal would guarantee that an exhaustive study of all environmental impacts and alternatives would be performed before any proposal to alter an ERW could be approved by the Commission.

River Valley notes that many of the commenters seemed to assume that without any study specific alternatives were adequate. River Valley disagrees with such an assumption. Indeed all of the alternatives that have been suggested by commenters have been studied by

River Valley's consultants. As a result of the consultants' work thus far, River Valley believes that the commenters' confidence about the adequacy of the alternatives they have cited is seriously misplaced.

18. River Valley's Proposal is Motivated by Competition Between Van Buren and Fort Smith.

Some commenters suggested that River Valley's proposal is motivated by competition between Van Buren and Fort Smith. These commenters suggested that River Valley should seek to achieve regional cooperation in water supply. River Valley does not agree that its proposal is based on any petty or parochial interests. River Valley is a regional water distribution district that is built upon cooperation of a number of separate water utilities, and not on the ambitions of a single community.

19. River Valley's Proposal is Motivated by Developers and Greed.

Several commenters stated that River Valley's proposal is a subterfuge. These commenters stated that the real purpose of the proposal is to enable real estate developers to secure individual profits from the development of a recreational lake. River Valley is confident that these comments are erroneous emotional responses; and River Valley notes that there is absolutely no factual basis for such suggestions.

20. River Valley's Proposal is too Vague.

Some commenters stated that River Valley's proposal is too vague. These commenters suggested that additional details were needed. Many of these comments raised questions regarding the EIS requirement. The comments relating to the EIS requirement are addressed in the portion of this Responsiveness Summary that addresses the EIS issues specifically. Other commenters who suggested that River Valley's procedure was too vague offered no specific area in which more detail was desired. These comments seemed to intimate that more detailed

procedures should be prescribed. River Valley disagrees. River Valley believes that its procedure is adequately detailed.

21. *There Should be a State Water Plan That Protects ERWs.*

Some commenters stated that there should be a state water plan that protects Extraordinary Resource Waters. River Valley believes that the Natural Resource Commission's State Water Plan and Regulation No. 2 taken together achieve this purpose. These commenters offered no specific examples or rationale on why the State Water Plan and Regulation No. 2 are inadequate or how they might be amended.

22. *If River Valley's Proposal is Adopted a Ditch Would Have More Protection Than an ERW.*

Some commenters stated that if River Valley's proposal is adopted a ditch would have more protection than ERWs. These comments specifically point to the second sentence of Section 2.304 of Regulation No. 2 which provides as follows:

"In other waters [i.e., waters other than ERWs ecologically sensitive water bodies are natural and scenic waterways] where significant physical alterations of the habitat or proposed, the Department must be assured hat 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 practical alternatives to the project including: an environmental assessment of the impacts of each alternative, an engineering and economic analysis, an associo-economic analysis of the project in the local area." (Emphasis supplied.)

River Valley disagrees with the commenters. An examination of the language quoted above clearly indicates that the protection referred to only protects "existing uses." As noted above, the term "existing uses" as used in Regulation No. 2 is limited to the five potential uses enumerated in the definition. The protection in question does not apply to designated uses. Moreover, the study contemplated by the language quoted above is purely discretionary with the

Department and far less extensive than the full blown EIS that is mandatory under River Valley's proposal.

23. *Commenters Specifically Endorsed the Comments Offered by ADEQ or the Group of Environmental Organizations.*

Some commenters stated without explanation that they supported ADEQ's position or the position articulated by the group of environmental organizations. River Valley believes that its response to those comments adequately responds to the commenters who endorsed them.

24. *Commenters Specifically Endorsed the Comments Offered by River Valley.*

Some commenters stated without explanation that they supported River Valley's position or the position articulated by the group of environmental organizations. River Valley believes that the other responses in this Responsiveness Summary adequately address these endorsements.

25. *River Valley's Proposal Will Adversely Affect Property Rights, Heritage, Land, Livestock, and Cemeteries.*

Some commenters stated that River Valley's proposal would adversely affect property rights, local heritage, land, livestock, and cemeteries because it would lead to the condemnation and inundation of land for drinking water reservoirs. In particular, two commenters who live on land that would be flooded by the proposed Pine Mountain Project objected to the idea that their land might be condemned and the location of family cemeteries inundated. One commenter who lives in the area that would be inundated commented in favor of the Pine Mountain Project.

River Valley recognizes that the exercise of eminent domain frequently has significant emotional consequences for those directly affected. In many instances, however, the needs of society as a whole outweigh the adverse impacts on the individuals whose land is taken. River Valley believes that the procedure it has proposed will provide an appropriate procedure for assessing and balancing all competing interests, impacts, and alternatives. To the extent that

these comments were addressed to the specific merits of the Pine Mountain Project, River Valley believes the comments are irrelevant to this third party rulemaking. River Valley proposal would simply establish a procedure. It would do nothing to approve or disapprove the Pine Mountain Project.

26. *The River Valley Proposal Contains Sufficient Safeguards to Ensure a Balance Between Drinking Water Needs and Protection for ERWs.*

Some commenters stated that the River Valley proposal contains safeguards that are well-designed to properly balance the competing needs for drinking water and the desire to protect ERWs. These comments supported the River Valley proposal. River Valley agrees with these comments.

27. *River Valley's Proposal is Necessary.*

Some comments stated that the procedure proposed by River Valley is necessary. Some of these comments pointed to the historical recurrence of the debate over whether ERWs can be altered to meet drinking water needs. River Valley agrees with these comments and believes that the procedure it has proposed is necessary. Some of these comments pointed to the very long lead time that is necessary to plan and establish a new drinking water supply.

28. *The Public Needs the Ability to Consider all Viable Water Sources to Meet Demands.*

Some commenters stated that they favor the River Valley proposal because public officials need the ability to consider all viable water sources to meet present and future demands. River Valley agrees that all potential sources of water should be available for consideration to meet the present and future demands for public water supply. River Valley believes that its proposal would provide the Commission with a procedure that would allow a proper balance to be struck between competing alternative supplies based on a well-developed, factual and scientific record.

29. Prohibiting the Use of ERWs For Drinking Water was Never Intended.

Some commenters stated that the creation of ERW designated use was never intended as a prohibition of drinking water use. River Valley agrees. As the comments for the Department noted, Benton and Hot Springs both utilize pre-existing low head weirs on subsequently designated ERWs to supply their drinking water systems. In addition, it is River Valley's understanding that other ERWs may serve as limited or standby sources for a few other drinking water systems.

30. Re-designation of a Water Body in Crawford County is not the Issue That Must be Initially Decided.

Some commenters stated that re-designation of a water body in Crawford County is not the question that must be decided in considering River Valley's proposal. Instead, these commenters argued that the question to be decided is whether a procedure is needed and, if so, what this procedure should provide. River Valley agrees with these comments.

31. The Present Rule Removes the Authority of ADEQ to Consider Whether Changes in Circumstance Alter the Appropriateness of a Given Water Body Being Designated as an ERW.

One commenter stated that Regulation No. 2, as it presently stands, removes the authority of ADEQ to consider the possibility that changes in circumstances might alter the appropriateness of a given water body being designated as an ERW. This comment pointed to the construction of Regulation No. 2 advanced by the Department which precludes any proposal to modify the status of an ERW or to delete its designation. River Valley believes that this comment is based on an erroneous interpretation of Regulation No. 2, albeit an interpretation that the Department espoused at each of the public hearings. As noted above, River Valley believes that the state and federal anti-degradation policies do not prevent the Commission from altering or removing an ERW designation. To the extent this comment is premised on the notion that

utilization of an ERW may require an “all-or-nothing” decision, River Valley agrees that Regulation No. 2 is inflexible and should be amended. River Valley believes that its proposal provides the flexibility that is needed to allow utilization of an ERW for drinking water supplies even if that utilization involves some significant alteration to the habitat of the ERW.

32. *Communities Need to be Able to Plan for the Future.*

Several commenters stated that local communities need to be able to plan for the future. Many of these comments pointed to the very long lead time that is needed to plan for the establishment of a new drinking water supply. These comments supported the adoption of River Valley’s proposal to allow for such planning. River Valley agrees with these comments.

33. *Property and Livestock are Lost When Lee Creek Floods; the Reservoir Would Control Flooding.*

Some commenters stated that Lee Creek has a significant history of flooding, which results in loss of livestock and property damage. These commenters noted that the proposed Pine Mountain Dam could protect against such flooding. River Valley does not believe that the specifics of any Pine Mountain Project are relevant to the procedure that it has proposed in this rulemaking. River Valley believes that the procedure it has proposed will allow for an appropriate balance on a case-by-case basis of the merits and lack of merits of any specific project. River Valley notes that any alteration to the habitat of an ERW proposed under River Valley’s procedure would have to be predicated on a drinking water purpose, not flood control.

34. *The Director of the Natural Resources Commission Would Have a Conflict of Interest under River Valley’s Proposal*

One commenter stated that under the River Valley proposal the Director of the Natural Resources Commission would have a conflict of interest. The commenter stated that the conflict would arise because the Natural Resources Commission is responsible for certifying compliance

with the State Water Plan, and the Director of the Natural Resources Commission also sits as a member of the PC&E Commission that would thereafter consider any proposal under the procedure proposed by River Valley. This commenter stated that adoption of the River Valley proposal could precipitate renewed legislative efforts to take the Director of the Natural Resources Commission and the other state agency heads off the PC&E Commission.

River Valley does not agree that there is any conflict of interest. When the Natural Resources Commission certifies a proposal as being in compliance with the State Water Plan that does not make the Director of the Natural Resources Commission an advocate for seeing the proposal implemented. Nor does it give rise to any vested interest in the Natural Resources Commission with respect to action on issues outside its direct jurisdiction. The various state agency heads sit on the PC&E Commission in part to assure coordination of action and a sharing of expertise. The fact of coordination does not give rise to a conflict of interest. Indeed, if one accepted this commenter's view, then members of the Commission appointed from the public might have conflicts of interest if they had any connection to environmental or professional groups that had business or advocated positions before the commission, or if they owned real property or had personal hobbies or interests that might be affected by Commission decisions.

River Valley recognizes that some have sought to restructure the membership of the Commission in the past. River Valley believes that questions regarding the structure of the Commission are beyond the scope of subjects that directly bear on its proposal.

35. *A Public Opinion Poll Indicates That the Public Strongly Favors Protection of ERWs.*

ADEQ and some commenters pointed to a recent public opinion poll in which an overwhelming majority of the respondents indicated that they strongly favor protection of ERWs. River Valley is not surprised by the results of the poll. River Valley also strongly favors

protection of ERWs when there is no competing interest at stake. From the information described by the commenters, it appears that the poll did not ask questions that would have explored public views about protection of ERWs when balanced against other significant competing social needs. River Valley notes that almost all commenters who address the subject in this rulemaking proceeding, candidly conceded that drinking water needs outweigh preservation of ERWs when there is no alternative. The difficulty, of course, is in balancing the alternatives. It appears that the public opinion poll did not make any serious effort to explore such balances. River Valley would be interested to know, for example, what the poll might have shown regarding the public attitudes on using treated sewage as a source of drinking water supply. It would also be interesting to know how those polled would have reacted to the idea of dramatic increases in their water rates. In the end, River Valley believes that the public opinion poll in question does little to resolve the difficult policy question of how one properly balances protection of ERWs against legitimate competing social and human needs, particularly needs for drinking water.

36. *Only 16% of Arkansas Streams are ERWs; They Should all be Protected or Increased.*

Many commenters noted that only 16% of Arkansas streams have been assigned ERW status. These commenters indicate that such a small percentage should be protected, and others suggested that the percentage of Arkansas stream miles designated as ERWs should be increased. River Valley does not believe that there is any mathematical percentage of stream miles that is appropriate or inappropriate for ERW designation. River Valley believes that the proper balance of human and social needs against protection of ERW status can only be determined on a case-by-base basis. River Valley's proposed rule would establish a procedure that would assure just such a case-by-case analysis.

37. *Arkansas in the Natural State.*

Several commenters noted that Arkansas' motto is "The Natural State." These commenters suggested that the selection of that motto argues in favor of protection of all ERWs without change, and argues against the adoption of River Valley's proposed rule. River Valley does not believe that the state's motto has any direct relevance to the merits of its proposed rule.

38. *The Steps Required in River Valley's Proposal are Already Required by Other Law.*

Some commenters stated that the steps required in River Valley's proposed rule add nothing to existing law. These commenters note that a water district must already seek certification of compliance with the state water plan before they can undertake a drinking water project. River Valley acknowledges that certification of compliance with the state water plan is a requirement that would attach to the establishment of a new drinking water supply. The point of River Valley's proposal is to establish a clear sequence as well as a specific set of requirements. Under River Valley's proposal, no proposal could come before the Commission until after the matter had been presented to the Natural Resources Commission for certification of compliance with the state water plan. River Valley does not agree that all of the steps in its proposal are already required by other law. No other law requires an EIS. No other law requires public notice and comment on alternatives. No other law sets a standard for Commission decision-making beyond the requirement of a majority vote.

39. *Preservation of ERW Status is Meaningless When an ERW is Dammed.*

Many commenters stated that the preservation of ERW status is meaningless if an ERW is dammed. These commenters argue that when an ERW is designated because of its free-flowing stream characteristics, the impoundment of the stream by definition will destroy those characteristics. River Valley acknowledges that impoundment of an ERW will alter the

characteristics of a stream in the immediate vicinity of the impoundment, but that does not mean that the water body ceases to have any of the esthetic and other values that support an ERW designation. River Valley believes that if an ERW is to be altered by the construction of a dam, it is reasonable to consider what steps should be taken to protect esthetic values, intangible social values, and other values that support the ERW designated use.

One commenter questioned whether the impoundment of an ERW would necessarily result in a lake or reservoir that would have the esthetic and other values which are associated with ERW reservoirs. River Valley believes that these questions are best addressed in a case-by-case analysis. River Valley notes, however, that if the resulting reservoir is not compatible with ERW designation, for example because of heavy residential development or other circumstances, River Valley expects the Commission would weigh that fact heavily against approval in making its decision. At some point, River Valley expects that commenters and the Commission would question whether use of the River Valley procedure would be appropriate if the end result of the proposal is a reservoir that would not justify ERW designation. In such circumstances requesting removal of the ERW designation may be a more appropriate procedure, rather than seeking permission to make alterations to the habitat without removing the ERW designation.

Many commenters noted that impoundment of a free flowing stream necessarily changes the characteristic of the area impounded and the character of the stream below the impoundment as well. River Valley recognizes that impoundments necessarily entail changes to a water body. The nature and extent of these changes vary depending upon the design and operation of the impoundment in question. River Valley believes that its proposed rule offers a process which will assure that the impacts of a proposed impoundment will be fully analyzed and measured against all of the relevant alternatives.

40. The Proposed Pine Mountain Project may Adversely Affect Protected Species.

Some commenters stated that the proposed Pine Mountain project may adversely affect habitat of the Ozark big-eared bat, a threatened species. Commenters also identified the long-nose darter and the Ouachita creekshell as species of concern that have been previously been documented in Lee Creek.

River Valley believes that the EIS required under its proposed rule will require analysis of all potential affects on protected species.

41. Commenters Representing the National Forest Stated That They Wished to be Informed of the Progress of any Proposal.

These commenters indicated that they wished to coordinate their mission of sustaining the health, diversity, and productivity of the forest with any proposal to dam Lee Creek. River Valley recognizes that the National Forest Service has legal obligations to address the various uses in the National Forests, including timber production, recreation, etc. River Valley believes that its proposal will assure that the interests and mission of the Forest Service will be taken into consideration in connection with any proposal to utilize an ERW for drinking water purposes.

42. ERWs Should be Protected Because no new Free-Flowing Streams are Being Built.

Many commenters noted that there is a finite number of free-flowing streams. These commenters argued that the limited number of free-flowing streams should be protected against any change in the future. Many commenters stated that protection of free-flowing streams was an obligation that the current generation owes to future generations. River Valley agrees that protection of ERWs and free-flowing streams is important. River Valley does not believe, however, that protection of free-flowing streams is a value that completely overrides all other considerations. River Valley believes that at some point, public needs for a safe drinking water supply may override the esthetic and intangible social values of a free-flowing wilderness

stream. River Valley believes that its proposal would establish a procedure by which all of the competing interests could be properly identified, analyzed, and presented to the Commission for decision.

43. *The State of Oklahoma Submitted Comments in Opposition to River Valley's Proposal.*

Oklahoma expressed concern about the Pine Mountain project and described the history of prior disputes between Oklahoma the City of Fort Smith involving Lee Creek. Oklahoma stated that those disputes led to an agreement between the states on how future questions regarding changes to Lee Creek would be resolved.

River Valley acknowledges that any proposal to impound upper Lee Creek will have to consider the potential impacts on stream conditions below the dam, including potential impacts in Oklahoma. River Valley believes that the procedure it has proposed will assure assessment of all such impacts.

River Valley currently has no position regarding the accuracy of Oklahoma's statement about a purported agreement on how future questions involving Lee Creek must be addressed. Whatever the case may be, however, issues related to Lee Creek are not directly relevant to the proposal presented by River Valley in this Third Party Rulemaking. The procedure proposed by River Valley simply establishes a procedure. If the Commission adopts the procedure and River Valley subsequently seeks permission to undertake alterations to Lee Creek, Oklahoma is free to participate in that proceeding and explain why it believes Arkansas is obligated to undertake a different or additional process of consultation or dispute resolution with Oklahoma.

44. *River Valley's Proposal Will Precipitate Litigation.*

Some commenters intimated or stated that River Valley's proposal would precipitate litigation. These comments specifically referred to the possibility of litigation by Oklahoma or

one or more environmental groups. River Valley recognizes that Oklahoma has had a long history of resorting to litigation in dealing with downstream water quality issues. River Valley hopes that the procedure it has proposed would reduce the likelihood of such litigation, rather than increase it. Similarly, River Valley recognizes that some other individuals and groups also have little reluctance to engage in litigation. River Valley hopes that its proposal will establish a procedure that is calculated to diminish rather than increase the likelihood of litigation.

45. *Clear Objective Criteria and a Fair Process are Needed.*

Some commenters stated that there is a need for clear, objective criteria and a fair procedure for balancing the protection of ERWs against the need for drinking water supplies. Several of these commenters stated that they supported River Valley's proposal because it provided the type of objective criteria and fair procedures they favored.

River Valley agrees with these comments and hopes that the procedures it has proposed will prove workable in achieving fairness and clarity.

46. *Long Lead Time is Needed to Plan for Water Supplies; Cannot Wait Until a Crisis.*

Several commenters noted that a long lead time is required to plan for and establish a new drinking water supply. Some of these commenters stated that it would be a mistake to wait until there is a crisis before new water supplies are identified and appropriate measures undertaken. River Valley agrees that water supplies require very long term planning. River Valley also agrees that it would be inappropriate to wait until there is a crisis before new water supplies are identified and established. River Valley hopes that the procedure it has proposed will facilitate long range planning. River Valley disagrees with comments which suggest that alteration of an ERW for drinking water supply purposes should only be allowed when there is a crisis present.

47. *A Procedure is Needed to Provide an Alternative to the Clash of Extreme Views Between Those who Would Lock Away all the ERWs in Perpetuity and Those who Would Abolish all ERWs.*

Several commenters expressed concern that the discussion of ERWs is dominated by views at opposite extremes: on the one hand those who would abolish all ERWs, and on the other hand those who would lock away all ERWs forever. River Valley agrees that there is a need for a procedure to avoid one extreme consequence or the other.

48. *We do not Have Unlimited Resources.*

Some commenters noted that safe and reliable drinking water supplies are not unlimited. These commenters stated that ERWs cannot be locked away forever because they may be needed in the future as a critical source of drinking water. River Valley agrees that resources are not unlimited and that no resource should be considered off limits in perpetuity. On the other hand, River Valley also recognizes the need for protecting free flowing ERWs as a scarce environmental resource. River Valley believes that the procedure it has proposed provides an appropriate vehicle for balancing the competing needs of society against the legitimate values of preserving ERWs in an unspoiled state.

49. *Drinking Water is a Primary Need.*

Many commenters stated that drinking water needs rank above all other values when considering water resources. Most of these commenters claimed to support River Valley's efforts to find safe and adequate water supplies for its population. Some of these commenters suggested that the primacy of drinking water needs strongly supported the adoption of the rule proposed by River Valley. Others suggested that the primacy of drinking water needs could be adequately served through alternative sources and actions, and those commenters opposed River Valley's proposal.

River Valley believes these comments demonstrate that almost all members of the public agree that drinking water needs rank higher than any other value in deciding how to utilize water resources. River Valley also believes these comments demonstrate that the public differs widely in how one should balance other competing values against drinking water needs. Those who favor River Valley's proposal seem to place a higher priority on drinking water needs and a lower value on other competing concerns. Those who oppose River Valley's proposal seem to place a lower priority on drinking water needs when compared to other competing values. River Valley recognizes that people of good will can have honest differences of opinion regarding how one balances drinking water needs against other competing values. Nevertheless, River Valley believes that its proposal would provide a fair and balanced procedure by which all of these competing values could be weighed and presented to the Commission for decision. River Valley believes that the absence of an orderly procedure such as the one it has proposed will continue to complicate and aggravate the debate regarding ERWs.

50. *Disagreement With a Statement in ADEQ's comments.*

One commenter disagreed with a statement in ADEQ's comments to the effect that there was a strong consensus in support of the original listing of ERWs in 1987. The commenter asked for evidence that the proposed ERWs were listed as required by law. The commenter stated that there was no listing of individual streams, that there was inadequate public notice of the proposed designations, and that local government entities were not given adequate notice or opportunity to approve or disapprove the listings.

River Valley believes it would be inappropriate for it to attempt to explain ADEQ's comments.

51. River Valley's Proposal Will Not Resolve All of the Objections to ERWs.

Some commenters stated that they supported River Valley's proposal as a partial solution to their concerns regarding ERWs, but these commenters said that River Valley's proposal fell short of resolving all of their concerns regarding the propriety and legality of the original ERW designations.

River Valley believes that its proposal is necessary and desirable. It does not otherwise take a position regarding the concerns these commenters express regarding ERWs.

52. Approval of a Proposal Should be Subject to a Vote of the Relevant County Conservation District Board.

One commenter stated that the approval process contemplated by River Valley's proposal should be subject to a vote of the relevant County Conservation District Board. This commenter stated that this change in the procedure would return control of the basic decision making to a local level that more accurately reflects the will of the local affected populace. River Valley believes that its proposal is appropriate to resolve the questions that have arisen out of the flat prohibition in Regulation No. 2 against any significant alteration of ERWs. That is all River Valley's proposal is designed to address. River Valley questions whether the Commission has authority to delegate or subdelegate approval to County Conservation Districts. River Valley expects that the involvement of County Conservation Districts is more properly controlled by existing state statutes and any amendments that may be adopted hereafter.

Respectfully submitted,

MITCHELL, WILLIAMS, SELIG,
GATES & WOODYARD, PLLC

By


Allan Gates, Ark. Bar I.D. # 72040

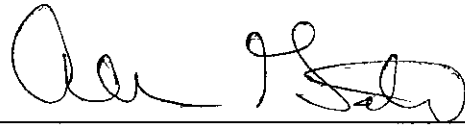
ATTORNEYS FOR RIVER VALLEY
REGIONAL WATER DISTRICT

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of June, 2006 I served the foregoing Responsiveness Summary by depositing a true copy in the United States mail, First Class postage prepaid, addressed to each of the following:

Ellen J. Carpenter, Esq.
Arkansas Department of Environmental Quality
8110 National Drive
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Hank Bates, Esq.
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A handwritten signature in black ink, appearing to read "Allan Gates", written over a horizontal line.

Allan Gates