

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 INTITATE RULEMAKING
TO AMEND APCEC REGULATION NO. 2
SECTION 2.304**

NO. 06-003-R

**RIVER VALLEY REGIONAL WATER DISTRICT'S
STATEMENT OF BASIS AND PURPOSE**

River Valley Regional Water District respectfully submits the following Statement of Basis and Purpose:

I. Procedural Background

1. The Arkansas Pollution Control & Ecology Commission is given the power and duty to promulgate rules and regulations implementing and effectuating the powers and duties of ADEQ and the Commission under the Arkansas Air and Water Pollution Control Act. Ark. Code Ann. § 8-4-202(a)-(b).
2. The Arkansas Air and Water Pollution Control Act and PC&EC Regulation No. 8 give any person the right to petition the Commission for the issuance, amendment, or repeal of any rule or regulation. Ark. Code Ann. § 8-4-202(c); APC&EC Regulation No. 8, § 3.4.
3. 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.

4. 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.

5. 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 Statement of Basis and Purpose and a related Responsiveness Summary filed contemporaneously herewith.

II. Basis and Purpose

6. PC&EC Regulation No. 2 expressly prohibits any significant physical alteration to the habitat of an ERW:

“Significant physical alterations of the habitat within extraordinary resource waters, ecologically sensitive waterbodies or natural and scenic waterways are not allowed.” PC&EC Reg. No. 2, Section 2.304

This Third Party Rulemaking presents an issue that has recurred repeatedly for almost twenty years, namely whether an ERW can ever be used for drinking water supply if that use involves a physical alteration to the ERW that might be considered “significant” as that term is used in Section 2.304.

7. In 1987, when the ERW designation was first adopted by the Commission, concerns were expressed that the ERW designation would make it more difficult to utilize a

water body for public water supply. In fact, the Department of Health and the Soil and Water Conservation Commission objected to the proposed language for ERWs because they felt that the highest use for these streams was as a public water supply. ADEQ, then known as ADPC&E, responded by stating that these concerns were not justified because the ERW protections could be altered and the ERW designation could be removed altogether if necessary.

“In no case is the designation of the streams as extraordinary, ecologically sensitive, or scenic considered permanent. If circumstances arise that would require the removal of such a designated use, appropriate mechanisms exist in the legislature and before the Commission to legally remove such a use.” ADPC&E RESPONSIVENESS SUMMARY FOR 1987 AMENDMENTS TO REGULATION NO. 2, at p. 5.

8. Unfortunately, there has never been a procedure established in Regulation No. 2 that would allow a party to ask the Commission for approval of a proposed alteration to an ERW, regardless of how strong the public need might be for the proposed alteration. The only way an alteration to an ERW can be allowed under the current provisions of Regulation No. 2 is for the Commission to remove the ERW designation from the stream altogether, and thereby eliminate all of the attendant protections for the stream in question. Stated simply, Section 2.304 creates an “all or nothing” legal dilemma: an ERW must be protected against any alteration regardless of how justified the alteration may be, or the ERW must be stripped of all protection by completely removing the ERW designation

9. River Valley believes that the “all or nothing” structure of Section 2.304 is inappropriate and counterproductive. The inflexible “all or nothing” protection for ERW streams unnecessarily increases the level of public controversy that attends any proposal to designate a new ERW and any proposal for a use that might affect an existing ERW. Designation of new ERWs will be more difficult if it is perceived that the result would be to lock the stream away

forever. Proposed alterations to an ERW are made more difficult, because there is no procedure for approving limited but significant changes, without completely removing the ERW designation.

10. The lack of any procedure that would allow more limited alteration of an ERW has been a recurring source of concern which has never been resolved. The most recent recurrence of these concerns prior to this rulemaking took place at the Commission's April 23, 2004 meeting. At that meeting, former State Representative John Hall made the following statement in commenting on ADEQ's proposed Triennial Revision of Regulation No. 2:

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

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

"At present, Regulation 2 does NOT provide a process by which a city, county or water district can follow to create an additional water supply as current sources become insufficient. Absent action by the Commission, the opportunity for greater discord will increase, which would only serve to stifle Arkansas' growth and tax base.

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

11. The amendment to Regulation No. 2 proposed by River Valley would establish a procedure for seeking permission to utilize an ERW for drinking water supply even though the project may result in alterations that would be considered "significant" as that term is used in Section 2.304. The procedure would be subject to several limitations:

- The procedure could be used only by public water authorities.
- The procedure could be used only for public drinking water projects.


- The procedure could not be used unless the proposed project has been certified by the Natural Resources Commission as consistent with the State Water Plan.
- The procedure could not be used until a comprehensive study of environmental impacts and alternatives has been completed that is equivalent in quality to a federal environmental impact statement.
- The procedure could not be used without going through formal public review and comment.
- The procedure would require affirmative approval of the Commission.

12. River Valley believes that the procedure it has proposed will establish a much-needed alternative to the all-or-nothing legal dilemma that now exists with respect to use of ERWs. The establishment of new drinking water supplies requires extremely long range planning. It typically takes 15 years or more to plan and construct all of the physical facilities and infrastructure necessary to put a new drinking water source on line. The procedure proposed by River Valley will give public officials charged with the duty of securing safe and adequate public water supplies a very important tool for making their plans. The procedure will also assure that no proposal for such use will come before the Commission without first having a very comprehensive and sound study of all environmental impacts and alternatives.

Respectfully submitted,

MITCHELL, WILLIAMS, SELIG,
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By


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

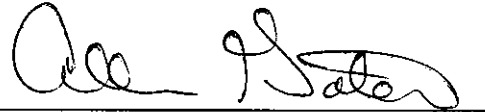
ATTORNEYS FOR RIVER VALLEY REGIONAL
WATER DISTRICT

CERTIFICATE OF SERVICE

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

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A handwritten signature in black ink, appearing to read "Allan Gates", is written over a horizontal line.

Allan Gates

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