

EXHIBIT C

LEGISLATIVE QUESTIONNAIRE

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

DEPARTMENT/AGENCY: Arkansas Department of Environmental Quality
DIVISION: Water Division
DIVISION DIRECTOR: Caleb Osborne
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**NAME OR PRESENTER AT
COMMITTEE MEETING:** Allan Gates
PRESENTER EMAIL: agates@mvlaw.com

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 the rule?

Arkansas Pollution Control and Ecology Commission, Regulation No. 37, Arkansas Nutrient Water Quality Trading Regulation

2. What is the subject of the proposed rule?

The proposed rule establishes the requirements, standards, and procedures for the establishment and implementation of a voluntary nutrient water quality trading program.

3. Is this rule required to comply with a federal statute, rule, or regulation?

Yes ___ No X

If yes, please provide the federal rule, regulation, and/or statute citation. N/A

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? N/A

When does the emergency rule expire? N/A

Will this emergency rule be promulgated under the permanent provisions of the Administrative Procedure Act? N/A

5. Is this a new rule?

Yes No

If yes, please provide a brief summary explaining the regulation.

The proposed rule authorizes the Director of the Arkansas Department of Environmental Quality to review and approve Nutrient Credit Generating Projects as sources of nutrient credits.

Where authorized by the Director, nutrient credits may be used by National Pollutant Discharge Elimination System ("NPDES") permit holders to offset their nutrient discharges when determining compliance with permit limits and conditions.

Does this repeal an existing rule?

Yes No

If yes, a copy of the repealed rule is to be included with your completed questionnaire.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.

Is this an amendment to an existing rule?

Yes No

If yes, please attach a mark-up showing the changes in the existing rule and a summary of the substantive changes. **Note: This summary should explain what the amendment does, and the mark-up copy should be clearly labeled "mark-up."**

See Attachments A (blackline of proposed APCEC Regulation No. 37) and B (executive summary).

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

Act No. 335 of 2015, codified at Ark. Code Ann. §§ 8-4-232 and -233

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

The purpose of the proposed rule is to facilitate the development and implementation of a voluntary, market-based nutrient trading program that utilizes credits and offsets for a quicker and more efficient achievement of water quality standards for nutrients.

The proposed rule is necessary in order to allow municipal point source dischargers to meet permit terms and conditions by using pollutant reductions created by another

source that has lower pollution control cost, thereby protecting ratepayers from the higher costs of system upgrades.

8. Please provide the address where this rule is publicly accessible in electronic form via the Internet as required by Arkansas Code § 25-19-108(b).

https://www.adeq.state.ar.us/regs/draft_regs.aspx

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

Date: March 20, 2018

Time: 6:00 PM (CST)

Place: Fayetteville Public Library, Fayetteville, AR

Date: March 22, 2018

Time: 2:00 PM (CST)

Place: ADEQ Headquarters, North Little Rock, AR

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

April 6, 2018

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

The regulation becomes effective 20 days after filing of the final regulation as adopted by the Commission with the Secretary of State.

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

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

For or Neutral:

Arkansas Department of Environmental Quality

Arkansas Natural Resources Commission

Environmental Protection Agency

Arkansas Association of Conservation Districts

Arkansas Municipal League

Illinois River Watershed Partnership

Beaver Water District

Arkansas Farm Bureau Federation

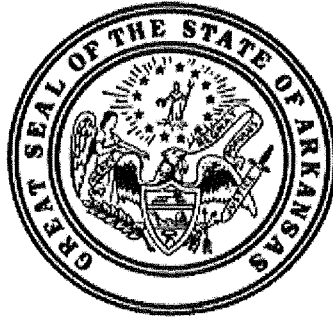
Against:

Unknown

ATTACHMENT A TO

LEGISLATIVE QUESTIONNAIRE

ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION



REGULATION NO. 37

ARKANSAS NUTRIENT WATER QUALITY TRADING REGULATIONS

INITIAL DRAFT

Submitted to the Arkansas Pollution Control and Ecology Commission on January 26, 2018

1 DRAFT

2 ARKANSAS NUTRIENT WATER QUALITY

3 TRADING REGULATION

4
5 SECTION 1. AUTHORITY TO APPROVE NUTRIENT CREDIT GENERATING
6 PROJECTS FOR USE AS OFFSETS.

7 The Director of the Arkansas Department of Environmental Quality shall have authority to
8 approve Nutrient Credit Generating Projects as sources of nutrient credits that may be used by
9 NPDES permit holders to offset their nutrient discharges when determining compliance with
10 permit limits.

11 SECTION 2. APPLICATIONS FOR APPROVAL OF NUTRIENT CREDIT
12 GENERATING PROJECTS.

13 (A) Any person seeking approval of Nutrient Credit Generating Project shall submit an
14 application for approval to the Director. The application shall include:

15 (1) A description of the location, including the watershed, where the credit-generating
16 project will be implemented;

17 (2) A description of the watershed in which the credits are proposed for use as offsets. If
18 the watershed includes a reservoir that is the water supply source for an existing

1 public water system as designated by the Arkansas Department of Health, the credit-
2 generating project must be located in the watershed of the reservoir;

3 (3) A list of the NPDES permitted point sources that may use the credits as offsets;

4 (4) The time period in which the credit-generating project may be used as an offset;

5 (5) Evidence that use of the nutrient credits as an offset will not result in an unacceptable
6 localized adverse effect on water quality;

7 (6) Evidence that use of the nutrient credits will not result in a net increase in pollutant
8 loading in the relevant watershed;

9 (7) Evidence that the credit-generating project will result in a reduction of nutrient
10 discharges below the existing baseline requirements;

11 (8) A description of the methods by which the implementation and performance of the
12 credit-generating project will be verified and documented;

13 (9) Evidence that use of the nutrient credits as an offset will not have a significant
14 adverse impact upon a reservoir that is a drinking water supply source for an existing
15 public water supply system as designated by the Arkansas Department of Health;

16 (10) A certification, signed by the applicant, attesting that the application is true and
17 accurate to the best of the applicant's knowledge and belief.

18 (B) If an application involves nonpoint source nutrient credit-generating projects or activities,
19 the proposed Nutrient Credit Generating Project shall be submitted to the Arkansas Natural
20 Resources Commission for review prior to submitting the application to the Director of the

1 Arkansas Department of Environmental Quality. In such cases, the application to the
2 Director shall include a written statement from the Arkansas Natural Resources Commission
3 confirming their review of the project and reporting any comments or recommendations
4 resulting from that review.

5 (C) Applications submitted to the Director of the Arkansas Department of Environmental
6 Quality shall comply with the public notice procedures and requirements under Regulation
7 No. 8, Reg. 8.205.

8 (D) After review of the application the Director may approve the Nutrient Credit Generating
9 Project as a source of nutrient credits that may be used as offsets as requested, disapprove
10 the Nutrient Credit Generating Project as a source of nutrient credits, or approve the Nutrient
11 Credit Generating Project as a source of nutrient credits subject to specific conditions or
12 limitations.

13 (E) Unless expressly granted for a shorter or longer term, the approval of the Nutrient Credit
14 Generating Project as a source of nutrient credits shall be limited to a term of five years from
15 the date of the Director's decision, but may be renewed or extended upon application in
16 accordance with procedures in this section.

17 (F) In deciding whether to approve an application for approval of a Nutrient Credit Generating
18 Project, the Director shall consider, among all other relevant factors:

19 (1) The calculation used to derive the credit quantity and credit ratios resulting from the
20 credit-generating project, including an explanation of methods used to address
21 uncertainty factors;

1 (2) The methods for verifying the reliability of the implementation and performance of
2 the credit-generating project ; and

3 (3) The experience and capacity of the persons who will be responsible for
4 implementing and verifying the credit-generating project .

5 (G) The Director's decision approving a Nutrient Credit Generating Project shall specify the
6 conditions and limitations that will apply to any use of the nutrient credits generated. At a
7 minimum, the conditions applicable to an Nutrient Credit Generating Project shall specify:

8 (1) The watershed in which the credits generated by the Nutrient Credit Generating
9 Project may be used as an offset;

10 (2) The time period in which the credits generated by the Nutrient Credit Generating
11 Project may be used as an offset; and

12 (3) The method by which implementation and performance of the credit-generating
13 project will be verified, and the identity of the person or entity responsible for
14 documenting the verification.

15 (H) Prior to taking final action on a request for approval of a Nutrient Credit Generating Project,
16 the Director shall cause public notice to be published in a newspaper of general circulation in
17 the watershed where the credit will be generated. The public shall be allowed a period of not
18 less than thirty (30) calendar days in which to submit written comments. The decision to
19 grant or deny approval of a Nutrient Credit Generating Project shall include a written
20 response to all issues raised in comments submitted during the public comment period. A
21 copy of the final decision granting or denying certification of a Nutrient Credit Generating

1 Project shall be sent to the applicant and each person who submitted written comments
2 within the public comment period. The Director's decision to grant or deny approval of a
3 Nutrient Credit Generating Project shall be subject to review as a permitting decision under
4 Regulation No. 8, Reg. 8.603.

5 (I) No Nutrient Credit Generating Project shall be approved by the Director unless the project,
6 activity, or discharge reduction involved in the project will reduce the nutrient load below
7 the applicable baseline requirements.

8 (1) For projects generating credits by point source pollution reduction, the baseline
9 requirements shall be the NPDES permit limits for the point source in question or the
10 wasteload allocation in any applicable TMDL, whichever is more stringent.

11 (2) For projects generating credits by non-point source activity, the baseline requirements
12 shall be the regulatory requirements applicable to the location where the project will
13 generate the credits.

14 (3) If the baseline requirements applicable to a Nutrient Credit Generating Project change
15 after the date the Project is approved, the amount of offset allowed from credits
16 generated by the Nutrient Credit Generating Project shall be reduced to conform to
17 the baseline requirements applicable at the time the nutrient credit is used.

18 (J) The fact that a non-point source project or a point source pollution reduction may be
19 supported in part or entirely by government grants or other third-party financial funding shall
20 not prevent the project, activity, or pollution reduction from being eligible for approval as a
21 Nutrient Credit Generating Project.

1 **SECTION 3. RESPONSIBILITY FOR PERMIT COMPLIANCE.**

2 (A) A permittee relying on nutrient credits to demonstrate compliance with its NPDES permit
3 limits retains full responsibility for achieving and maintaining permit compliance. If a
4 Nutrient Credit Generating Project fails to meet the terms and conditions of its approval as a
5 source of nutrient credits, NPDES permit holders may not rely on credits generated by the
6 project regardless of the fact that failure of the project may have been attributable to
7 circumstances beyond the reasonable control of the permit holder.

8 (B) The Arkansas Department of Environmental Quality may exercise enforcement discretion to
9 forego formal enforcement or reduce formal enforcement sanctions with respect to permit
10 violations that arise from the complete or partial failure to implement a Nutrient Credit
11 Generating Project in accordance with the terms and conditions of its approval if:

12 (1) The permittee followed the monitoring requirements approved as part of the Nutrient
13 Credit Generating Project;

14 (2) The permittee promptly notified the Arkansas Department of Environmental Quality
15 of any information suggesting that the Nutrient Credit Generating Project was not
16 implemented in accordance with the certification;

17 (3) The failure to implement the Nutrient Credit Generating Project in accordance with
18 its approval was not attributable to negligence or willful misconduct on the part of the
19 permittee; and

1 (4) The permittee took prompt action to regain permit compliance after learning of the
2 failure to implement the Nutrient Credit Generating Project in accordance with its
3 certification.

4 (C) All inspections necessary to determine compliance with a non-point source nutrient credit-
5 generating project that cannot be verified through the approved Nutrient Credit Generating
6 Project application will be performed by the Arkansas Natural Resources Commission.

ATTACHMENT B TO

LEGISLATIVE QUESTIONNAIRE

EXECUTIVE SUMMARY

In 2015, the Arkansas General Assembly enacted Act 335 authorizing the Arkansas Pollution Control and Ecology Commission (APCEC) to promulgate regulations governing the establishment and implementation of a nutrient water quality trading program. The proposed rule, Proposed APCEC Regulation No. 37 – *Arkansas Nutrient Water Quality Trading Regulation*, establishes the requirements and procedures for implementing nutrient water quality trading. Under the proposed rule, participation in the nutrient trading program would be completely voluntary. Application for approval of a nutrient credit generating project would be submitted to the Arkansas Department of Environmental Quality. ADEQ would decide whether the proposed project would be appropriate for generating credits that could be used by permit holders regulated by ADEQ.