

**BEFORE THE ARKANSAS POLLUTION CONTROL
AND ECOLOGY COMMISSION**

**IN RE: REQUEST BY THE NORTHWEST)
ARKANSAS NUTRIENT TRADING)
RESEARCH AND ADVISORY GROUP)
TO INITIATE RULEMAKING TO)
ADOPT PROPOSED REGULATION)
NO. 37)**

DOCKET NO. _____

**PETITION TO INITIATE THIRD-PARTY RULEMAKING TO ADOPT
PROPOSED REGULATION NO. 37**

The Northwest Arkansas Nutrient Trading Research and Advisory Group (“NANTRAG”) respectfully requests that the Commission initiate rulemaking to adopt a new regulation, Proposed Regulation No. 37, to govern nutrient water quality trading. In support of its Petition NANTRAG states the following:

1. In 2015, the Arkansas General Assembly enacted legislation authorizing the Commission “to adopt regulations . . . governing the establishment and implementation of nutrient water quality trading programs.” Act No. 335 of 2015, *codified at* Ark. Code Ann. §§ 8-4-232 and -233.
2. The 2015 legislation also established a Nutrient Water Quality Trading Advisory Panel. The legislation called for the Advisory Panel to review any proposed nutrient trading regulation before it is considered by the Commission and make a recommendation whether the Commission should initiate rulemaking to adopt the proposal. Ark. Code Ann. § 8-4-233(g)–(h).
3. The 2015 legislation authorized the Department to issue permit terms and conditions utilizing nutrient water quality trading credits and offsets pursuant to the regulations. Ark. Code Ann. § 8-4-232(c). The Department may also adopt “fees to be collected . . . from

persons or entities utilizing nutrient water quality trades or offsets to comply with permit limits.”

Ark. Code Ann. § 8-4-232(b)(2)(E)(i).

4. In 2016 four Northwest Arkansas cities – Fayetteville, Springdale, Bentonville, and Rogers – formed NANTRAG as a cooperative group for the following purposes:

- Joint development of nutrient water quality trading regulations for proposal to the Arkansas Department of Environmental Quality, the Arkansas Pollution Control and Ecology Commission, the Arkansas Natural Resources Commission, and/or other applicable state and/or federal agencies;
- Exploration of potential nutrient water quality trading projects, including one or more possible pilot projects; and
- Contracting with professionals necessary to accomplish the Group’s objectives.

5. In 2016, NANTRAG developed a “Discussion Draft” of a proposed nutrient trading regulation. NANTRAG distributed the Discussion Draft informally to the Advisory Panel and a variety of stakeholders, including representatives of ADEQ, the Arkansas Natural Resources Commission, the Environmental Protection Agency, Beaver Water District, Illinois River Watershed Partnership, Arkansas Public Policy Panel, Arkansas Farm Bureau Federation, and the University of Arkansas Water Resources Center. Based on comments and feedback from the Advisory Panel and stakeholders, NANTRAG revised its original Discussion Draft nutrient trading regulation.

6. On October 12, 2017, NANTRAG submitted its revised draft nutrient trading regulation to the Advisory Panel for review. NANTRAG gave a formal presentation on the revised draft regulation at a meeting of the Advisory Panel on October 23, 2017. At that meeting the Advisory Panel agreed to meet in December by telephone conference call and formally vote on its recommendation regarding NANTRAG’s draft regulation.

7. Following the October 23, 2017 Advisory Panel meeting, NANTRAG solicited additional comments from members of the Advisory Panel and from stakeholders, including Beaver Water District and Farm Bureau. In response to the comments it received, NANTRAG made further revisions to its draft nutrient trading regulation.

8. On December 8, 2017, NANTRAG submitted its revised draft nutrient trading regulation to the Advisory Panel and formally asked the Advisory Panel, “to recommend that the Arkansas Pollution Control & Ecology Commission initiate rulemaking to adopt NANTRAG’s draft trading regulation, as revised.”

9. The Advisory Panel met by telephone conference call on December 14, 2017, to consider NANTRAG’s request for a recommendation to the Commission. In the meeting, members of the Advisory Panel proposed four amendments to NANTRAG’s draft trading regulation:

- (i) a proposal regarding inspections;
- (ii) a proposal regarding evaluation of adverse effects on drinking water reservoirs;
- (iii) a proposal regarding the siting of projects located in the watershed of a drinking water reservoir; and
- (iv) a proposal to add a minimum numeric discounting ratio.

NANTRAG stated that it was neutral regarding the first two amendments and the Advisory Panel adopted those changes unanimously. NANTRAG expressed opposition to the other two amendments. The Advisory Panel adopted the third amendment by a divided vote and rejected the fourth by a divided vote. With the three amendments that were approved, the Advisory Panel voted unanimously to recommend that the Commission initiate rulemaking to adopt NANTRAG’s draft nutrient trading regulation.

10. The draft nutrient trading regulation establishes the requirements, standards and procedures for the Director to review and approve applications for nutrient credit generating projects as sources of nutrient credits. Where authorized, the nutrient credits may then be used as offsets to nutrient discharges when determining compliance with permit terms, limits and conditions.

11. In conformity with the Advisory Panel's recommendation, NANTRAG asks the Commission to initiate rulemaking to adopt the NANTRAG nutrient trading regulation. The nutrient trading regulation is proposed as a new stand-alone regulation, APCEC Regulation No. 37. A blackline version of proposed APCEC Regulation No. 37 is attached as Exhibit A and incorporated by reference.

12. The Department has indicated its intent to separately adopt fees for the proposed Regulation No. 37 as part of APCEC Regulation No. 9 – *Fee Regulation*.

13. A copy of the Governor's approval letter, consistent with Executive Order 15-02, is attached as Exhibit B and incorporated by reference.

14. A copy of the Legislative Questionnaire is attached as Exhibit C and incorporated by reference.

15. A copy of the Financial Impact Statement is attached as Exhibit D and incorporated by reference.


16. A copy of the Economic Impact/Environmental Benefit Analysis required by APCEC Regulation No. 8, § 8.812 is attached as Exhibit E and incorporated by reference.

17. A copy of the proposed Minute Order to initiate rulemaking is attached as Exhibit F and incorporated by reference.

WHEREFORE, the Northwest Arkansas Nutrient Trading Research and Advisory Group requests that the Commission initiate rulemaking to adopt proposed APCEC Regulation No. 37.

Respectfully submitted,

MITCHELL, WILLIAMS, SELIG,
GATES & WOODYARD, PLLC
425 W. Capitol Avenue, Suite 1800
Little Rock, Arkansas 72201-3525
Phone: (501) 688-8800
Facsimile: (501) 688-8807
agates@mwlaw.com
jwimpy@mwlaw.com

By: 
Allan Gates, AR Bar No. 72040
Jordan Wimpy, AR Bar No. 2012273

**Counsel for the Northwest Arkansas Nutrient
Trading Research and Advisory Group**

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of January, 2018, I served a true and correct copy of the foregoing Petition to Initiate Third-Party Rulemaking to Adopt Proposed Regulation No. 37 on the following by United States Postal Service, postage prepaid and by electronic service:

Michael McAlister, Esq.
Managing Attorney, Legal Division
Arkansas Department of Environmental Quality
5301 Northshore Drive
North Little Rock, AR 72118
mcalister@adeq.state.ar.us

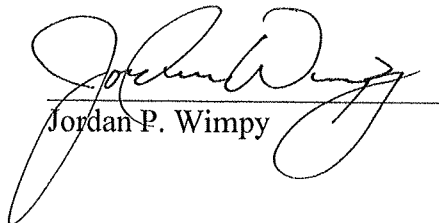

Jordan P. Wimpy

EXHIBIT A

**BLACKLINE VERSION OF
PROPOSED APCEC REGULATION NO. 37**

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.

EXHIBIT B

EO15-02 – GOVERNOR REVIEW OF RULES AND REGULATIONS

Jordan Wimpy

From: Justin Tate <Justin.Tate@governor.arkansas.gov>
Sent: Monday, January 08, 2018 3:40 PM
To: Jordan Wimpy
Cc: Allan Gates; Leann Kret; Caleb Stanton
Subject: RE: EO 15-02 Nutrient Trading Regulation and Proposed Rulemaking

Jordan,

Pursuant to EO 15-02, the Governor has approved moving forward with the proposed Nutrient Water Quality Trading Regulation. If you have any additional questions, please let me know.

Best,

Justin Tate
Director Rules and Regulatory Affairs
Office of Governor Asa Hutchinson
(501) 682-8040

From: Jordan Wimpy [<mailto:jwimpy@mwlaw.com>]
Sent: Thursday, December 21, 2017 4:00 PM
To: Justin Tate
Cc: Allan Gates; Leann Kret
Subject: RE: EO 15-02 Nutrient Trading Regulation and Proposed Rulemaking

Dear Mr. Tate:

Thank you for visiting with me yesterday regarding the Northwest Arkansas Nutrient Trading Research and Advisory Group (NANTRAG) and its effort to develop a nutrient water quality trading program. As discussed, the Arkansas Nutrient Water Quality Trading Advisory Panel voted unanimously on December 14th to recommend that the Arkansas Pollution Control & Ecology Commission initiate rulemaking to adopt NANTRAG's draft nutrient trading regulation, as amended.

In conformity with the Advisory Panel's recommendation, NANTRAG has prepared a Petition for Third-Party Rulemaking and is preparing to file the same with the Commission prior to the January 26, 2018 Commission meeting. Accordingly, I am attaching the Petition, the Proposed Regulation and other relevant materials to you for the Governor's review pursuant to EO 15-02.

We appreciate your attention to and consideration of these materials, and we remain available to discuss any questions regarding the proposed rule.

Regards,
Jordan

Jordan P. Wimpy

T 501.688.8872 | F 501.918.7872

jwimpy@mwlaw.com | MitchellWilliamsLaw.com

425 W. Capitol Ave. | Ste. 1800 | Little Rock, AR 72201

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.

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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
CONTACT PERSON: Caleb Osborne
ADDRESS: 5301 Northshore Drive, Little Rock, AR 72118
PHONE NO: 501/ 682-0665
FAX NO.: 501/ 682-0880
EMAIL: osbornec@adeq.state.ar.us
NAME OR PRESENTER AT COMMITTEE MEETING: Allan Gates
PRESENTER EMAIL: agates@mwlaw.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 X 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 X

If yes, a copy of the repealed rule is to be included with your completed questionnaire. If it is being replaced with a new rule, please provide a summary of the rule giving an explanation of what the rule does.

Is this an amendment to an existing rule?

Yes No X

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

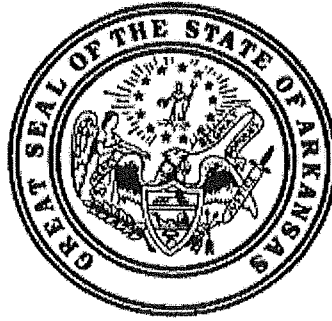
Against:

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**

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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;

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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;

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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.

EXHIBIT D

FINANCIAL IMPACT STATEMENT

FINANCIAL IMPACT STATEMENT

PLEASE ANSWER ALL QUESTIONS COMPLETELY

DEPARTMENT Arkansas Department of Environmental Quality

DIVISION Water Division

PERSON COMPLETING THIS STATEMENT

Allan Gates, representing third-party petitioner,
Northwest Arkansas Nutrient Trading Research
and Advisory Group

TELEPHONE NO. 501/688-8816 **FAX NO.** 501/682-0880 **EMAIL:** agates@mwlaw.com

To comply with Ark. Code Ann. § 25-15-204(e), please complete the following Financial Impact Statement and file two copies with the questionnaire and proposed rules.

SHORT TITLE OF THIS RULE Arkansas Pollution Control and Ecology Commission,
Regulation No. 37, Arkansas Nutrient Water Quality
Trading Regulation

1. Does this proposed, amended, or repealed rule have a financial impact? Yes ☐ No ☒
2. Is the rule based on the best reasonably obtainable scientific, technical, economic, or other evidence and information available concerning the need for, consequences of, and alternatives to the rule? Yes ☒ No ☐
3. In consideration of the alternatives to this rule, was this rule determined by the agency to be the least costly rule considered? Yes ☐ No ☐

If an agency is proposing a more costly rule, please state the following:

- (a) How the additional benefits of the more costly rule justify its additional cost;

- (b) The reason for adoption of the more costly rule;

- (c) Whether the more costly rule is based on the interests of public health, safety, or welfare, and if so, please explain; and;

- (d) Whether the reason is within the scope of the agency's statutory authority; and if so, please explain.

4. If the purpose of this rule is to implement a federal rule or regulation, please state the following:

- (a) What is the cost to implement the federal rule or regulation?

Current Fiscal Year

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total \$ 0

Next Fiscal Year

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total \$ 0

- (b) What is the additional cost of the state rule?

Current Fiscal Year

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total \$ 0

Next Fiscal Year

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total \$ 0

5. What is the total estimated cost by fiscal year to any private individual, entity and business subject to the proposed, amended, or repealed rule? Identify the entity(ies) subject to the proposed rule and explain how they are affected.

Current Fiscal Year

\$ 0

Next Fiscal Year

\$ 0

6. What is the total estimated cost by fiscal year to state, county, and municipal government to implement this rule? Is this the cost of the program or grant? Please explain how the government is affected.

Current Fiscal Year

\$ 0

Next Fiscal Year

\$ 0

7. With respect to the agency's answers to Questions #5 and #6 above, is there a new or increased cost or obligation of at least one hundred thousand dollars (\$100,000) per year to a private individual, private entity, private business, state government, county government, municipal government, or to two (2) or more of those entities combined?

Yes ☐ No ☒

If YES, the agency is required by Ark. Code Ann. § 25-15-204(e)(4) to file written findings at the time of filing the financial impact statement. The written findings shall be filed simultaneously with the financial impact statement and shall include, without limitation, the following:

- (1) a statement of the rule's basis and purpose;
- (2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute;
- (3) a description of the factual evidence that:
 - (a) justifies the agency's need for the proposed rule; and
 - (b) describes how the benefits of the rule meet the relevant statutory objectives and justify the rule's costs;
- (4) a list of less costly alternatives to the proposed rule and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
- (5) a list of alternatives to the proposed rule that were suggested as a result of public comment and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
- (6) a statement of whether existing rules have created or contributed to the problem the agency seeks to address with the proposed rule and, if existing rules have created or contributed to the problem, an explanation of why amendment or repeal of the rule creating or contributing to the problem is not a sufficient response; and
- (7) an agency plan for review of the rule no less than every ten (10) years to determine whether, based upon the evidence, there remains a need for the rule including, without limitation, whether:
 - (a) the rule is achieving the statutory objectives;
 - (b) the benefits of the rule continue to justify its costs; and
 - (c) the rule can be amended or repealed to reduce costs while continuing to achieve the statutory objectives.

EXHIBIT E

**ECONOMIC IMPACT/
ENVIRONMENTAL BENEFIT
ANALYSIS**

**ARKANSAS POLLUTION CONTROL & ECOLOGY COMMISSION
ECONOMIC IMPACT/ENVIRONMENTAL BENEFIT ANALYSIS**

Rule Number & Title: APCEC Regulation No. 37; Arkansas Nutrient Water Trading Regulation

Petitioners: Northwest Arkansas Nutrient Trading Research and Advisory Group ("NANTRAG")

Contact/Phone/Electronic mail: Allan Gates, (501) 688-8816, agates@mwlaw.com

Analysis Prepared by: Allan Gates and Jordan Wimpy, counsel for NANTRAG

Date Analysis Prepared: December __, 2017

2A. ECONOMIC IMPACT

1. Who will be affected economically by this proposed rule? State: a) the specific public and/or private entities affected by this rulemaking, indicating for each category if it is a positive or negative economic effect; and b) provide the estimated number of entities affected by this proposed rule.

Pursuant to the enabling statute, any decision to participate in the nutrient water quality trading program is voluntary and is entirely the choice of each participant in the nutrient water quality trading program or arrangement. Only those "persons" voluntarily seeking approval for a Nutrient Credit Generating Project and/or seeking to utilize credits from a Nutrient Credit Generating Project will be affected by this proposed rule.

The "persons" involved with and affected by nutrient trading are likely to include: (i) municipal wastewater utilities with NPDES permit limits for nutrients and (ii) non-point source entities seeking compensation for the implementation of best management practices (i.e. – farmers or urban landowners). The economic effect on the persons/applicants is positive.

2. What are the economic effects of the proposed rule? State: The estimated increased or decreased cost for an average facility to implement the proposed rule; and 2) the estimated total cost to implement the rule.

There are no negative economic effects of the proposed rule. Adoption of the proposed rule will foster an alternative, and more cost-effective, compliance mechanism for National Pollutant Discharge Elimination System ("NPDES") permit holders. Specifically, the proposed rule will allow permit holders to utilize nutrient credits generated by Nutrient Credit Generating Projects as offsets to their nutrient discharges when determining compliance with permit limits and conditions.

This alternative compliance mechanism may, in turn, protect municipal waste water utility ratepayers from the higher costs of system upgrades by allowing the utility to meet permit terms and conditions through the nutrient reductions created by another source that can achieve nutrient reductions at a lower cost.

Participation in nutrient trading programs and arrangements is voluntary and any cost to implement the proposed rule will be captured in the application fees attendant to the Arkansas Department of Environmental Quality's ("ADEQ") review of Nutrient Credit Generating Project applications. See Response to Question No. 3.

3. List any fee changes imposed by this proposal and justification for each.

The Arkansas Department of Environmental Quality ("ADEQ") is evaluating the fee structure and fee amounts that will be necessary and sufficient to cover ADEQ's cost to review and evaluate applications for a proposed Nutrient Credit Generating Project. NANTRAG understands that any fees will be separately proposed by ADEQ and will be included in an amended APCEC Regulation No. 9 – Fee Regulation. Such fees must be consistent with the specific statutory authorizations set forth in Ark. Code Ann. § 8-4-232(b)(2)(E).

4. What is the probable cost to ADEQ in manpower and associated resources to implement and enforce this proposed change, and what is the source of revenue supporting this proposed rule.

See Response to Question No(s). 2 and 3.

5. Is there a known beneficial or adverse impact to any other relevant state agency to implement or enforce this proposed rule? Is there any other relevant state agency's rule that could adequately address this issue, or is this proposed rulemaking in conflict with or have any nexus to any other relevant state agency's rule? Identify the state agency and/or rule.

The Arkansas Natural Resource Commission ("ANRC") is the only other relevant state agency involved with the implementation of the proposed rule. ANRC's role is to review and provide recommendations to ADEQ regarding certain types of nutrient trading project applications that ADEQ may receive.

This rulemaking is not in conflict with, nor does it have a nexus to, any other relevant state agency's rule.

6. Are there any less costly, non-regulatory, or less intrusive methods that would achieve the same purpose of this proposed rule?

No

2B. ENVIRONMENTAL BENEFIT

1. What issues affecting the environment are addressed by this proposal?

Currently there are limited technically and economically feasible treatments capable of reducing nutrients to levels that meet increasingly stringent water quality criteria for nutrients. The proposed rule will allow municipal wastewater treatment facilities and other regulated point sources to continue their operations with less costly and more efficient compliance tools, while also preserving the water quality and the designated uses of receiving streams.

2. How does this proposed rule protect, enhance, or restore the natural environment for the well being of all Arkansas?

The compensation paid for credits generated by voluntary non-point source nutrient reductions will increase the implementation of best management practices in otherwise unregulated activities throughout the state, thereby improving water quality.

The utilization of Nutrient Credit Generating Project credits as permit offsets represents a market-based approach to achieving water quality goals more quickly and more efficiently. Moreover, any permit holder that relies on credits will be fully responsible for verifying, documenting, and reporting the success of the credit, and any default in a credit or offset will trigger traditional permit enforcement options and ensure the integrity of the permit program and protect the water quality concern.

3. What detrimental effect will there be to the environment or to the public health and safety if this proposed rule is not implemented?

None

4. What risks are addressed by the proposal and to what extent are the risks anticipated to be reduced?

The risks addressed by this proposed rule include the economic risk to municipal NPDES permit holders and their ratepayers should more stringent nutrient discharge limits require costly treatment system upgrades. Under this proposal the risks are reduced by authorizing a less costly nutrient reduction and permit compliance option.

EXHIBIT F

PROPOSED MINUTE ORDER

**ARKANSAS POLLUTION CONTROL
AND ECOLOGY COMMISSION**

**SUBJECT – Proposed Regulation No. 37
Nutrient Water Quality Trading
Third-Party Rulemaking
NORTHWEST ARKANSAS NUTRIENT
TRADING RESEARCH AND ADVISORY
GROUP**

DOCKET NO. 18-__-R

MINUTE ORDER NO. 18-__

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On January 11th, 2018, the Northwest Arkansas Nutrient Trading Research and Advisory Group (“NANTRAG”) filed a Petition to Initiate Third-Party Rulemaking to adopt a new regulation, Proposed Regulation No. 37 – *Arkansas Nutrient Water Quality Trading Regulations* (Petition). Pursuant to Ark. Code Ann. § 8-4-202(c) the Arkansas Pollution Control and Ecology Commission (APCEC or the Commission) has sixty (60) days in which to either institute rulemaking proceedings or to give written notice denying the petition for rulemaking.

The Commission met on January 26, 2018, to review NANTRAG’s Petition. Having considered the Petition, the Commission hereby orders the initiation of a rulemaking proceeding to consider the adoption of Proposed Regulation No. 37. The Commission also adopts the following procedural schedule so consideration of this matter may proceed in an efficient and orderly manner.

1. NANTRAG and the Arkansas Department of Environmental Quality (ADEQ) shall file an original and one (1) copy and a computer disk in Word of all materials required under this Minute Order. This requirement does not apply to transcripts.
2. Persons submitting written public comments shall submit their written comments to ADEQ, and ADEQ will deliver the originals of all comments to the Commission Secretary at the conclusion of the proceeding.
3. NANTRAG shall submit to ADEQ’s Public Outreach and Assistance Division (POA) the following:
 - a. A proposed public notice to be used in mailing notice to interested persons and for publishing in appropriate industry, trade, or professional publications as the Commission may select. The proposed public notice may, at ADEQ’s discretion, be approved for use or ADEQ may choose to prepare its own public notice. The public notice shall conform to the requirements of Regulation No. 8.803. The public notice shall be published not later than 45 days prior to the first public hearing. By agreement, NANTRAG shall pay the costs of the newspaper publications and the costs of the appropriate industry, trade or professional publication chosen by the Commission and shall file only the original proof of the

**ARKANSAS POLLUTION CONTROL
AND ECOLOGY COMMISSION**

**SUBJECT – Proposed Regulation No. 37
Nutrient Water Quality Trading
Third-Party Rulemaking
NORTHWEST ARKANSAS NUTRIENT
TRADING RESEARCH AND ADVISORY
GROUP**

DOCKET NO. 18-____-R

MINUTE ORDER NO. 18-____

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publication with the Commission. ADEQ shall be responsible for mailing the public notice to all persons who have requested notice of rulemaking proceedings and the cost of mailing;

- b. Fifty (50) copies of the executive summary of the proposed rulemaking.
- c. Bound copies of the Petition and all supporting documentation, the number of which is to be determined by the POA.

4. A public hearing shall be conducted Tuesday, March 20, 2018 at 6:00 PM in the Walker Community Room of the Fayetteville Public Library, 401 W. Mountain Street, Fayetteville, Arkansas 72701. A second public hearing shall be conducted Thursday, March 22, 2018 at 2:00 PM in the Commission Room of the Arkansas Department of Environmental Quality Headquarters, 5301 Northshore Drive, North Little Rock, Arkansas, 72118.

5. The period for receiving all written comments from NANTRAG, the public and ADEQ conclude ten (10) business days after the date of the second public hearing, unless an extension of time is granted.

6. NANTRAG and ADEQ shall each file, not later than 14 days before the Commission meets to consider adoption of the proposed regulation, a Statement of Basis and Purpose and Responsive Summary as required by APEC Regulation No. 8.815. In addition, NANTRAG shall file a proposed Minute Order deciding this matter.

7. ADEQ shall seek review and approval of the proposed rule from the Joint Interim Committee on Public Health and Welfare and from the Joint Interim Committee on Administrative Rules and Regulations.

8. The Commission may consider this matter at or before their September, 2018 meeting. In the event the appropriate legislative committees do not complete review of the proposed rule by the above date, the Commission will consider the proposed regulation after review by the appropriate legislative committees. Members of the Commission may ask questions of any persons that made oral or written comments.

**ARKANSAS POLLUTION CONTROL
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NORTHWEST ARKANSAS NUTRIENT
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GROUP**

DOCKET NO. 18-__-R

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9. At the Commission meeting, the presentation of oral statements and legal arguments will be regulated as follows:

- a. The Chair of the Commission will permit members of the public to make a statement to the Commission. No more than three (3) minutes will be allowed for each statement. The period for statements will close at the end of one (1) hour, or sooner if all interested person have completed their statements. At the discretion of the Chair, the one (1) hour oral statement period may be extended.
- b. At the discretion of the Chair, an attorney representing one or more individuals, a corporation or other legal entity may be permitted five (5) minutes in which to address the Commission.
- c. Legal Counsel or other designated persons representing NANTRAG and ADEQ shall be permitted ten (10) minutes in which to address the Commission.
- d. At the conclusion of all statements, the Chair will call on each Commissioner for the purpose of asking the attorneys or persons sponsoring statements who are present, any questions they may have. Attorneys will not be permitted to respond or ask follow-up questions of any person questioned by the Commissioner.

After each Commissioner has had the opportunity to ask questions, the Chair will entertain a motion on the matter, allow discussion, and call for a vote of the Commission members.

10. If NANTRAG desires a transcript of the public hearing and Commission meetings, or if required by the Commission, NANTRAG agrees to pay all costs for the preparation of a transcript of the public hearing and Commission meetings which concern this docket and occur after the adoption of this Minute Order. If a transcript is required, NANTRAG shall employ the court reporter and the court reporter shall deliver the original transcript to the Commission Secretary.

**ARKANSAS POLLUTION CONTROL
AND ECOLOGY COMMISSION**

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The Commission initiates the rulemaking proceeding in this docket. The Commission adopts without modification, the procedural schedule set forth above.

COMMISSIONERS:

_____**L. Bengal**
_____**J. Chamberlin**
_____**J. Crow**
_____**J. Fox**
_____**C. Gardner**
_____**B. Holland**

_____**D. Melton**
_____**S. Moss, Jr.**
_____**R. Reynolds**
_____**W. Stites**
_____**G. Wheeler**
_____**B. White**

M. Goggans – Chair

SUBMITTED BY: Allan Gates

DATE PASSED: _____