

EXHIBIT E

**PUBLIC COMMENT
OF BEAVER WATER DISTRICT
DATED NOVEMBER 5, 2018**



November 5, 2018

Via Email: reg-comment@adeq.state.ar.us

Raeanne Gardner
Arkansas Department of Environmental Quality
5301 Northshore Drive
North Little Rock, AR 72118

Re: APCEC Docket No. 18-001-R, NANTRAG's Revised Proposed APCEC Regulation No. 37

Dear Ms. Gardner:

The following comments are submitted on behalf of Beaver Water District (BWD). They are in addition to, and not in place of, the comments in this docket that were submitted by BWD via email on January 25, 2018, March 30, 2018, and May 2, 2018, and that were made on behalf of BWD at the public hearing in Fayetteville on March 29, 2018. The previous written comments are attached hereto and incorporated by reference herein. Responses to each of BWD's comments are requested. The background information in BWD's previous public comments remains applicable to the revised version of the Northwest Arkansas Nutrient Trading Research and Advisory Group (NANTRAG) proposed Arkansas Pollution Control and Ecology Commission (APCEC) Regulation No. 37 (hereinafter, "Reg. 37"). The substantive concerns in BWD's previous public comments also continue to be relevant to NANTRAG's revised version of proposed Reg. 37. Again, this comment letter supplements, but does not replace, BWD's previous comments, and it does so by focusing on certain sections of the revised proposed regulation in the order in which they appear.

1. Section 1(B)

Proposed Reg. 37 would institute an entirely new regulatory program. It contains, however, definitions for only two terms: "Department" or "ADEQ" and "Director." More complicated and novel terms are left undefined. Definitions are needed for at least the following:

- (a) Nutrient;
- (b) Nutrient Credit Generating Project (*see, e.g.,* Section 1(D)(2));
- (c) Credit (*see, e.g.,* Section 1(D)(2));
- (d) Offset (*see, e.g.,* Section 1(D)(2));
- (e) Nutrient credits (*see, e.g.,* Section 2);
- (f) Nutrient discharges (*see, e.g.,* Section 2);
- (g) Water quality-based permit limits (*see, e.g.,* Section 2);
- (h) Watershed (*see, e.g.,* Section 3(A)(1));
- (i) Baseline requirements (*see, e.g.,* Section 3(A)(5));
- (j) Credit ratios (*see, e.g.,* Section 3(A)(6));
- (k) Uncertainty factors (*see, e.g.,* Section 3(A)(6));
- (l) Unacceptable localized adverse effect (*see, e.g.,* Section 4(A)(2)); and
- (m) Significant adverse impact (*see, e.g.,* Section 4(A)(4)).

See also numbered comment 2, below regarding the definition of "nutrient."

2. Section 2

This section provides that the Arkansas Department of Environmental Quality (ADEQ) Director has the authority "to approve Nutrient Credit Generating Projects as sources of nutrient credits that may be used by National Pollutant Discharge Elimination System, [sic] permit holders to offset their nutrient discharges when determining compliance with *water-quality based* permit limits." [Emphasis added]. The italicized language is new to the revised version of proposed Reg. 37 and is an improvement. Problems remain, however, due to the lack of definitions for the terms "nutrient," "nutrient credits," "nutrient discharges," and "water quality-based permit limits" and due to the fact that there are no true numeric water quality criteria for nutrients in APCEC Regulation No. 2, the Arkansas Water Quality Standards for Surface Waters, upon which to base National Pollutant Discharge Elimination System Pollutant Discharge Elimination System (NPDES) permit limits.

First, the term "nutrient" for the purpose of this regulation should be limited to total phosphorus (TP), total nitrogen (TN), and possibly nitrate plus nitrite-nitrogen ($\text{NO}_2 + \text{NO}_3\text{-N}$). It would add unnecessary complication and complexity to the initiation of a wholly new water quality trading program to extend the definition of nutrient at the outset to cover other nutrient-related parameters, such as dissolved oxygen (DO) or ammonia nitrogen ($\text{NH}_3\text{-N}$). In Arkansas, the primary nutrient parameter of interest to NPDES permittees is TP. Significantly, there are no actual numeric water quality criteria for TP in Reg. 2. The TP numbers in Reg. 2.509(B) are not water quality criteria; they are NPDES permit discharge limits derived from some sort of Best Professional Judgment/technology-related analysis. Consequently, there are very few Arkansas NPDES permits that contain TP limits that are water quality-based and most, if not all, of those are triggered by the numeric phosphorus water quality criteria of downstream states. Section 2 of proposed Reg. 37 and a definition for "water quality-based permit limits" should specify that the discharge limits for TP in Reg. 2.509(B) are not water quality criteria and do not constitute water quality-based NPDES permit limits.

3. Section 3(A)

This section lists the things that must be included in an application for approval of a Nutrient Credit Generating Project. Deleted from the list of what must be included in the application in the previous version of proposed Reg. 37 (at previous Section 2(A)) are the following requirements and limitations:

- (a) "If the watershed includes a reservoir that is the water supply source for an existing public water system as designated by the Arkansas Department of Health, the credit-generating project must be located in the watershed of the reservoir;"
- (b) "Evidence that use of the nutrient credits as an offset will not result in an unacceptable localized adverse effect on water quality;"
- (c) "Evidence that use of the nutrient credits will not result in a net increase in pollutant loading in the relevant watershed;" and

(d) "Evidence that the use of the nutrients credits as an offset will not have a significant adverse impact upon a reservoir that is a drinking water supply source for an existing public water supply system as designated by the Arkansas Department of Health[.]"

These items or replacement language for them are now found in new Section 4 of the revised proposed Reg. 37, which lists what must be included in an NPDES permit application for use of credits generated by an approved Nutrient Credit Generating Project as offsets. This makes some sense because these items are, at least in part, dependent upon the exact location of the NPDES discharge for which the credits are sought to be used as offsets. The same could be said, however, about the following items that remain in or have been added to Section 3(A) of the revised proposed Reg. 37:

- (a) "Evidence that the credit-generating project will result in a reduction of nutrient discharges below the existing baseline requirements;" and
- (b) "Evidence and calculations used to derive the credit quantity and credit ratios resulting from the credit-generating project, including an explanation of the methods used to address uncertainty factors[.]"

It is important to carefully consider what is and what is not included in Section 3(A) of the revised proposed Reg. 37. This is because the "evidence provided in the application to support the factors identified in Section 3(A)" is among the relevant factors that Section 3(F) of the revised proposed Reg. 37 requires the ADEQ Director to consider in deciding whether to approve an application for approval of a Nutrient Credit Generating Project. Additionally, pursuant to Section 3(G) of the revised proposed Reg. 37, the ADEQ Director's decision approving an application for a Nutrient Credit Generating Project must include written findings only on "the factors identified in Section 3(A)."

Section 3(A) should be revised to address, among other things, how the location of any NPDES discharge that seeks to use the credits as offsets is to be taken into consideration in providing the "evidence" required. Additionally, issues related to the concept of "baseline requirements" remain a significant concern to BWD. Please *see* numbered comment 3 in BWD's May 2, 2018, public comment, including BWD's requested revisions. These comments related to baseline requirements also apply to Section 3(I) of the revised proposed Reg. 37.

4. Section 3(E)

Section 3(E) of the revised proposed Reg. 37 regarding the term of a Nutrient Credit Generating Project as a source of nutrient credits has not changed from what was 2(E) in the previous version. Please *see* numbered comment 4 in BWD's May 2, 2018, public comment.

5. Section 3(G)(4)

This new section provides for a minimum credit ratio of 1.5:1. It applies, however, only to projects generating credits by *non-point* source activity. Any minimum credit ratio should also apply to projects generating credits by *point* source activity. Uncertainty factors and the need to

include a margin of safety apply to both point source and non-point source activities. Please *see also* numbered comment 5 in BWD's May 2, 2018, public comment.

6. Section 3(H)

This section requires public notice of the ADEQ Director's draft decision on an application for approval of a Nutrient Credit Generating Project. Notice must be published "within the watershed where the credit will be generated in a newspaper of general circulation and on the Arkansas Department of Environmental Quality's website." Notice should also be provided within the watershed where the credit could be used (*see* sections 3(A)(2) and 3(A)(3) of the revised proposed Reg. 37).

7. Section 3(I)

This section concerns baseline requirements. Please *see* numbered comment 3 in BWD's May 2, 2018, public comment, including BWD's requested revisions, and numbered comment 3 above.

8. Section 4

This section is captioned "Responsibility for Permit Compliance." It contains provisions that were located under the requirements for applications for approval of Nutrient Credit Generating Projects at Section 2 in the previous version of proposed Reg. 37. These items are instead now required to be included in an NPDES permit application for use of credits as offsets. Among the things that are to be included in the permit application are:

- (a) "Evidence that use of the nutrient credits as an offset will not result in an unacceptable localized adverse effect on water quality;"
- (b) "Evidence that use of the nutrient credits will not result in a net increase in pollutant loading in the relevant watershed;" and
- (c) "Evidence that the use of the nutrients credits as an offset will not have a significant adverse impact upon a reservoir that is a drinking water supply source for an existing public water supply system as designated by the Arkansas Department of Health[.]"

Please *see* numbered comments 2 and 3 in BWD's May 2, 2018, public comment regarding protections for water quality and drinking water supply reservoirs. In addition, BWD requests that Section 4 be revised and that a new section or sections be added, as needed, to require that the ADEQ Director make specific, written findings in the decision on the NPDES permit application. The written findings should address, among other things, localized adverse effects, net increases in pollutant loading, reduction of nutrient discharges, compliance with the State's antidegradation policy, and adverse impacts on existing drinking water supply reservoirs. The regulation should also be revised to require that the Director deny NPDES permit applications for use of credits as offsets:

- (1) when the use of the nutrient credits as an offset is likely to result in unacceptable localized adverse effects on water quality;

- (2) when the use of nutrient credits is likely to result in a net increase in pollutant concentrations or loadings;
- (3) when the use of nutrient credits will not reduce in-stream nutrient concentrations or loadings;
- (4) when the use of nutrient credits would not comply with the State's antidegradation policy in APCEC Regulation No. 2; or
- (5) when an NPDES permittee that discharges into a watershed identified by the Arkansas Department of Health (ADH) as an existing drinking water reservoir watershed seeks to use credits that have been generated outside of the watershed of the reservoir as offsets against its permit limits.

8. Section 4(B)

Section 4(B) is a new provision. It provides that, "A National Pollutant Discharge Elimination System permittee that discharges into a watershed identified on Appendix A as an existing drinking water reservoir watershed designated in the Arkansas Department of Health GIS Database shall not be allowed to use credits that have been generated outside of the watershed of the reservoir as offsets against its permit limits for nutrients." BWD assumes that this language was intended by NANTRAG to replace the language at Section 2(A)(2) of the previous version of proposed Reg. 37. That language provided that, "If the watershed [in which the credits are proposed for use as offsets] includes a reservoir that is the water supply source for an existing public water system as designated by the Arkansas Department of Health, the credit generating project must be located in the watershed of the reservoir[.]"

"Appendix A" was not supplied with the revised version of proposed Reg. 37. BWD, therefore, reserves comment on that aspect of Section 4(B). BWD requests that Section 4 be revised to make it clear that the decision of the ADEQ Director on any application for NPDES permit issuance, renewal, or modification that seeks to use of nutrient credits as offsets is bound by the requirements of new Section 4(B). Section 4 should also be revised to specify that there must be an affirmative finding or condition in the written decision on the permit application that, where the NPDES permittee discharges into a watershed identified as an existing drinking water reservoir watershed designated by ADH, the permittee is not allowed to use credits that have been generated outside of the watershed of the reservoir as offsets against its permit limits for nutrients.

Thank you for your consideration of Beaver Water District's comments.

Sincerely,



Colene Gaston
Staff Attorney

BWD Public Comments

APCEC Docket No. 18-001-R, NANTRAG's Revised Proposed APCEC Regulation No. 37

November 5, 2018

Page 6

Attachments:

January 25, 2018, BWD Public Comment

March 30, 2018, BWD Public Comment

May 2, 2018, BWD Public Comment

Cc via email:

Raeanne Gardner (gardner@adeq.state.ar.us)

APCEC Commissioners (commissioners@adeq.state.ar.us)

Charles Moulton (moulton@adeq.state.ar.us)

Becky Keogh (keogh@adeq.state.ar.us)

Caleb Osborne (osbornec@adeq.state.ar.us)

Michael McAlister (mcalister@adeq.state.ar.us)

Mike Bender (mbender@bentonvillear.com)

Tim Nyander (tnyander@fayetteville-ar.gov)

Earl Rausch (earlrausch@rwu.org)

Jene Huffman-Gilreath (JeneHuffman-Gilreath@rwu.org)

Brad Stewart (bstewart@springdalewater.com)

Heath Ward (hward@springdalewater.com)

Alan Fortenberry (afortenberry@bwdh2o.org)

Lane Crider (lcrider@bwdh2o.org)

Larry Lloyd (llloyd@bwdh2o.org)

Bill HagenBurger (bhagenburger@bwdh2o.org)

James McCarty (jmccarty@bwdh2o.org)