

EXHIBIT H

**BEAVER WATER DISTRICT'S AUGUST 8, 2019
REDLINE MARK-UP OF
NANTRAG'S MAY 10, 2019 VERSION
OF PROPOSED RULE**

DRAFT
ARKANSAS NUTRIENT WATER QUALITY
TRADING REGULATION RULE NO. 37

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SECTION ~~CHAPTER~~ 1: GENERAL PROVISIONS.

Rule 37.101 Adoption

(A) ~~This regulation rule~~ shall be known and shall be cited as “The Arkansas Nutrient Water Quality Trading ~~RegulationRule~~”.

~~(B) Definitions:~~

~~(1) “Department” or “ADEQ” means the Arkansas Department of Environmental Quality or its successor, unless otherwise specified.~~

~~(2) “Director” means the Director of the Arkansas Department of Environmental Quality or the Director’s designee, unless otherwise specified.~~

~~(B)~~ This ~~regulation rule~~ is adopted under the authority of Act 335 of 2015, codified at Ark. Code Ann. §§ 8-4-232 and 8-4-233.

Rule 37.102 Purpose

(A) The purpose of this rule is to:

(1) implement a nutrient water quality trading program in Arkansas;

(2) establish minimum requirements for entities that participate in the program; and

(3) secure long-term improvement in water quality.

~~(B)~~ Participation in any Nutrient Credit Generating Project under this ~~Regulationrule~~ shall be purely voluntary.

~~(C)~~ Nothing in this rule shall be construed to limit or impinge upon any requirement of any other State or federal environmental law, statute, rule, or regulation.

Rule 37.103 Definitions

“Baseline” means the pollutant concentration and load requirements, site conditions, and Best Management Practice requirements that must be met prior to credit generation.

1 “Best Management Practice (BMP)” mean enhancement or restoration actions that reduce
2 pollutant loading. BMPs include, but are not limited to, structural and nonstructural controls and
3 operation and maintenance practices.

4 “Credit” means a measured or modeled unit of pollutant reduction per unit of time at a specified
5 location, as adjusted by applicable attenuation/delivery factors, trading ratios, reserve
6 requirements, and baseline requirements.

7 “Commission” means the Arkansas Pollution Control and Ecology Commission, unless
8 otherwise specified.

9 “Director” means the Director of the Division of Environmental Quality or the Director’s
10 designee, unless otherwise specified.

11 “Division” means the Division of Environmental Quality or its successor, unless otherwise
12 specified.

13 “Nutrient” means Total Nitrogen (TN) or Total Phosphorus (TP).

14 “Total Maximum Daily Load (TMDL)” means the calculation of the maximum amount of a
15 pollutant that a waterbody can receive and still meet applicable water quality standards,
16 accounting for seasonal variations and a margin of safety, including an allocation of pollutant
17 loadings to point sources (waste load allocations) and nonpoint sources (load allocations).

18 “Trading Area” means a geographic area within which nutrient credits can be generated and
19 used.

20 “Water Quality-Based Effluent Limitation (WQBEL)” means an effluent limitation in a
21 National Pollutant Discharge Elimination System (NPDES) permit determined by selecting the
22 most stringent of the effluent limits calculated using all applicable water quality standards and
23 criteria (e.g., numeric and narrative criteria for aquatic life, human health, and domestic water

supply) for a specific point source to a specific receiving water for a given pollutant or based on the facility's waste load allocation from a TMDL. Effluent limitations based on the table in Commission Rule 2.509(B), Water Quality Standards for Surface Waters of the State of Arkansas (i.e., a TP effluent limit of 1.0 milligram per liter (mg/l) for facilities with a design flow of 3 to less than 15 million gallons per day (mgd), a TP effluent limit of 2.0 mg/l for facilities with a design flow of 1 to less than 3 mgd, and a TP effluent limit of 5.0 mg/l for facilities with a design flow of 0.5 to less than 1 mgd) are *not* WQBELs.

Rule 37.104 Fees

~~(E)~~ Pursuant to Ark. Code Ann. § 8-4-232(E):

~~(1A)~~ the ~~Department~~Division has the responsibility to develop a schedule of user fees by calculating the reasonable costs to the ~~Department~~Division of evaluating, implementing and enforcing the nutrient water quality trading, credit, and offset program, including the costs of water quality monitoring for the program; and

~~(2B)~~ the Commission may establish a schedule of user fees to be collected by the ~~Department~~Division from persons or entities applying for approval of Nutrient Credit Generating Projects, generating credits, or utilizing credits and offsets from the Nutrient Credit Generating Projects in order to comply with the National Pollutant Discharge Elimination System NPDES permit limits WQBELs for nutrients.

~~(F)~~ Nothing in this regulation shall be construed to limit or impinge any requirement of any other State or Federal environmental law or regulation.

Rule 37.105 Eligibility

(A) Nutrient trading may be allowed between:

- (1) a nonpoint source that generates the credit and a point source that is owned by a governmental entity and that has WQBELs for TP and/or TN in its NPDES permit; and
- (2) two point sources that are owned by governmental entities and that each have an NPDES permit with WQBELs for TP and/or TN.

(B) Trading Areas must be:

- (1) consistent with any applicable TMDL;
- (2) defined ecologically to link pollutant reduction by the credit generator to water quality improvement within a watershed that can be no larger than the relevant watershed with a United States Geological Survey (USGS) eight (8) digit hydrologic unit code (HUC);
- (3) defined to be no larger than the relevant watershed with a USGS ten (10) digit HUC, if trading is to be allowed where the credit is generated downstream of the credit use; and
- (4) established to avoid localized or downstream water quality impairments or localized or downstream impacts.

Rule 37.106 Administrative Procedures

- (A) Commission Rule No. 8, Administrative Procedures, applies to this rule.
- (B) All applications under this rule are to be treated as permit applications under Commission Rule No. 8.
- (C) All draft and final decisions under this rule are to be treated as permitting decisions under Commission Rule No. 8.
- (D) At a minimum and in addition to any administrative procedures specified in this rule, all public notice and public participation rights and procedures afforded by Commission Rule No. 8 and all public notice and public participation rights and procedures mandated by the

1 requirements of the U.S. Environmental Protection Agency's delegation of the NPDES program
2 to the Division apply to this rule.

3 **SECTION 2. AUTHORITY TO APPROVE NUTRIENT CREDIT GENERATING**
4 **PROJECTS FOR USE AS OFFSETS.**

5 The Director of the Arkansas Department of Environmental Quality shall have authority to
6 approve Nutrient Credit Generating Projects as sources of nutrient credits that may be used by
7 National Pollutant Discharge Elimination System, permit holders to offset their nutrient
8 discharges when determining compliance with water quality-based permit limits.

9 **SECTION CHAPTER 3-2: APPLICATIONS FOR APPROVAL OF NUTRIENT CREDIT**
10 **GENERATING PROJECTS.**

11 **Rule 37.201 Director's Authority**

12 The Director shall have authority to approve or deny Nutrient Credit Generating Projects as
13 sources of nutrient credits that may be used by NPDES permit holders to offset their nutrient
14 discharges when determining compliance with nutrient WQBELs.

15 **Rule 37.202 Application Requirements**

16 (A) Any person seeking approval of a Nutrient Credit Generating Project shall submit an
17 application for approval to the Director. The application shall include: contain a detailed
18 description of the credit-generating project and all supporting information, documentation, and
19 data, including but not limited to:

20 (1) Documentation that the proposed Trading Area meets the eligibility requirements of
21 Commission Rule 37.105(B);

22 (2) A complete list of the baseline requirements and documentation, including effluent and
23 other water quality analyses, demonstrating that the baseline requirements have been met;

(3) For a nonpoint source credit-generating project, certification that the credit-generating activities or project have not been previously installed or implemented;

(14) A visual representation and narrative description of the location, including but not limited to the USGS twelve (12) digit HUC watershed, where the credit-generating project will be implemented;

(25) A visual representation and narrative description of the watershedTrading Area, including but not limited to the geographic boundary and USGS watershed HUC, in which the credits will be generated and are proposed for use as offsets;

(36) A list of the NPDES permitted point sources in the Trading Area that may apply to use the credits as offsets;

(47) The scientific basis for the proposed time period in which the credit-generating project may be used as an offset;

(58) Evidence and calculations demonstrating that the credit-generating project will result in a reduction of nutrient discharges below the existing baseline requirements;

(69) Evidence and calculations used to derive the proposed credit quantity and proposed credit ratios resulting from the crediting-generating project, including an explanation of and the scientific basis for the methods used to address risk and uncertainty factors;

(710) A description of the water quality monitoring plan and the other methods by which the implementation, performance, and operation and maintenance of the credit-generating project will be verified and documented, and the identity and qualifications of the person or entity responsible for documenting the verification; and

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

(B) If an application involves nonpoint source nutrient credit-generating projects or activities, the proposed Nutrient Credit Generating Project shall be submitted to the Arkansas Natural Resources Commission for review prior to submitting the application to the Director of the Arkansas Department of Environmental Quality. In such cases, the application to the Director shall include a written statement from the Arkansas Natural Resources Commission confirming their review of the project and reporting any comments or recommendations resulting from that review.

(C) Applications submitted to the Director of the Arkansas Department of Environmental Quality shall comply with the public notice procedures and requirements for an individual permit under Regulation No. 8. Applications shall also be publicly noticed through electronic notice and publication on the Arkansas Department of Environmental Quality-Division website.

Rule 37.203 Director's Decision

(DA) After review of the application, the Director will issue a draft decision that may approve the Nutrient Credit Generating Project as a source of nutrient credits that may be used as offsets as requested, disapprove the Nutrient Credit Generating Project as a source of nutrient credits, or approve the Nutrient Credit Generating Project as a source of nutrient credits subject to specific conditions or limitations.

(EB) Unless expressly granted for a shorter or longer term, the approval of the Nutrient Credit Generating Project as a source of nutrient credits shall be limited to a term of no more than five years from the date of the Director's final decision, but may be renewed or extended upon application in accordance with procedures in this sectionchapter.

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

(1) The evidence provided in the application to support ~~the factors identified in Section 3(A)~~ each item in Rule 37.202(A);

(2) The evidence and calculations used to derive the credit quantity and credit ratios resulting from the credit-generating project, including an explanation of methods used to address risk and uncertainty factors;

(3) The methods for verifying the reliability of the implementation, performance, and operation and maintenance of the credit-generating project; and

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

(GD) The Director's draft decision approving or denying a Nutrient Credit Generating Project shall include written findings regarding ~~the factors identified in Section 3(A)~~ each item in Rule 37.202(A) and shall specify the conditions and limitations that will apply to the credit-generating project and to any use of the nutrient credits generated. At a minimum, the conditions applicable to a Nutrient Credit Generating Project shall specify:

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

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

(3) The water quality monitoring plan and the method by which implementation, performance, and operation and maintenance of the credit-generating project will be verified, and the identity of the person or entity responsible for documenting the verification; and

(4) For projects generating credits by ~~non~~-point source activity, a minimum credit ratio of 1.5:1 (projected nutrient reductions or savings to nutrient credits for the project) shall be applied when calculating the credit quantity;

(5) For projects generating credit by nonpoint source activity, a minimum credit ratio of 2:1 shall be applied when calculating the credit quantity; and

(6) Monitoring and reporting requirements, including the submission no less than annually of a report that describes the implementation and performance of the credit-generating project and that includes the monitoring data. All reports shall be readily available to the public and shall be posted on the Division's website.

~~(HE) Prior to taking final action on a request for approval of a Nutrient Credit Generating Project, the~~ The Director shall cause public notice of the draft decision to be published, within the ~~watershed~~Trading Area where the credit will be generated and utilized, in a newspaper of general circulation ~~and, posted on the Arkansas Department of Environmental Quality's~~ Division's website, and distributed by email to a nutrient-water-quality-trading listserve. The public shall be allowed a period of not less than thirty (30) calendar days in which to submit written comments.

~~(F) The~~ Director's final decision to grant or deny approval of a Nutrient Credit Generating Project shall include a written response to all issues raised in comments submitted during the public comment period. A copy of the final decision granting or denying ~~certification~~approval of a Nutrient Credit Generating Project shall be sent to the applicant and each person who submitted written comments within the public comment period. The Director's decision to grant or deny approval of a Nutrient Credit Generating Project shall be subject to the same review and appeal provisions as a final permitting decision under ~~Commission Regulation~~Rule No. 8.

Rule 37.204 Baseline Requirements

(1A) No Nutrient Credit Generating Project shall be approved by the Director unless the project, activity, or discharge reduction involved in the project will reduce the nutrient load below the applicable baseline requirements.

(1) For projects generating credits by point source pollution reduction, the baseline requirements shall be the ~~National Pollutant Discharge Elimination System-NPDES~~ water quality-based permit limits for the point source in question or the wasteload allocation in any applicable ~~Total Maximum Daily Load TMDL~~, whichever is more stringent.

(2) For projects generating credits by non-point source activity, the baseline requirements shall be the regulatory requirements applicable to the location where the project will generate the credits and to the activity that will generate the credits. At a minimum, the baseline requirements shall not be less than the existing conditions or activities. The baseline requirements shall apply to all agricultural or other operations and activities within the Trading Area that are owned or managed by the person or entity applying for approval of the Nutrient Credit Generating Project.

(3) If the baseline requirements applicable to a Nutrient Credit Generating Project change after the date the ~~Project credit-generating project~~ is approved, the amount of offset allowed from credits generated by the Nutrient Credit Generating Project shall be reduced to conform to the baseline requirements applicable at the time the nutrient credit is used. The procedure for adjusting the amount or duration of credits allowed from an approved Nutrient Credit Generating Project shall be the same as that used

1 for reopening and modifying National Pollutant Discharge Elimination System
2 NPDES permits.

3 Rule 37.205 Use of Public or Third-Party Funds

4 ~~(J)~~ The fact that a non-point source project or a point source pollution reduction may be
5 supported in part or entirely by government grants or other third-party financial funding shall not
6 prevent the project, activity, or pollution reduction from being eligible for approval as a Nutrient
7 Credit Generating Project, where such use is specifically allowed by the granting agency or
8 third-party entity.

9 Rule 37.206 Inspections

10 ~~(K)~~ All inspections necessary to determine compliance with non-point source Nutrient Credit
11 Generating Projects that cannot otherwise be verified through the procedures outlined in the
12 approved Nutrient Credit Generating Project application ~~will~~may be performed by the Division
13 or by the Arkansas Natural Resources Commission under the direct supervision of the Division.
14 Nothing in this ~~section~~chapter shall limit or interfere with the Department's authority and
15 responsibility to conduct compliance and complaint inspections as authorized by statute or
16 regulation.

17 ~~SECTION~~CHAPTER 43. USE OF CREDITS AND RESPONSIBILITY FOR PERMIT
18 COMPLIANCE.

19 Rule 37.301 Application for Use of Credits

20 ~~(A)~~ Credits generated by an approved Nutrient Credit Generating Project may be used as offsets
21 only when expressly authorized by the National Pollutant Discharge Elimination SystemNPDES
22 permit in question, or by a modification of the NPDES permit. In addition to all other permit
23 application or permit modification requirements, the application must include:

1 ~~(1A)~~ EvidenceDocumentation that the nutrient credits to be used under the permit modification
2 are approved for use in the watershedTrading Area into which the National Pollutant
3 Discharge Elimination System-NPDES permittee discharges;

4 ~~(2B)~~ Evidence, including water quality monitoring data, which demonstrates that use of the
5 nutrient credits as an offset will not result in any unacceptable localized adverse effect on
6 water quality;

7 ~~(3C)~~ Evidence, including water quality monitoring data, which demonstrates that use of the
8 nutrient credits as an offset will not result in a net increasedecrease in pollutant loading in the
9 relevant watershedTrading Area; and

10 ~~(D)~~ Evidence, including water quality monitoring data, which demonstrates that the use of the
11 nutrient credits as an offset will result in long-term improvement in water quality in the
12 Trading Area;

13 ~~(E)~~ Documentation that the Division's antidegradation implementation procedures have been
14 applied to the use of the nutrient credits as an offset under the NPDES permit and that the use
15 of the nutrient credits as an offset under the permit is consistent with the antidegradation
16 policy in Commission Rule No. 2; and

17 ~~(4F)~~ Evidence that use of the nutrient credits as an offset will not have an significant adverse
18 impact upon a reservoir that is a drinking water supply source for an existing public water
19 supply system as designated by the Arkansas Department of Health.

20 **Rule 37.302 Director's Decision on Use of Credits**

21 (A) The Director shall not issue a draft or final NPDES permitting decision that authorizes the
22 use of nutrient credits as an offset unless the use of the nutrient credits:

23 (1) is approved for use in the Trading Area into which the NPDES permittee discharges;

1 (2) will not result in any localized adverse effect on water quality;

2 (3) will result in a net decrease in pollutant loading in the Trading Area;

3 (4) will result in long-term improvement in water quality in the Trading Area;

4 (5) is consistent with the antidegradation policy in Commission Rule No. 2, as applied using
5 the Division's antidegradation implementation procedures; and

6 (6) will not have an adverse impact upon a reservoir that is a drinking water supply source
7 for an existing public water supply system as designated by the Arkansas Department of
8 Health.

9 (B) An ~~National Pollutant Discharge Elimination System~~ NPDES permittee that discharges into
10 a watershed identified on Appendix A as an existing drinking water reservoir watershed
11 designated in the Arkansas Department of Health GIS Database shall not be allowed to use
12 credits that have been generated outside of the watershed of the reservoir as offsets against its
13 permit limits for nutrients.

14 (C) The Director's draft and final NPDES permitting decisions that authorize the use of nutrient
15 credits as an offset must include written findings regarding each requirement in Rule 37.302(A)
16 and shall specify the conditions and limitations that will apply to the use of nutrient credits.

17 **Rule 37.303 Permit Compliance**

18 (C) A permittee relying on nutrient credits to demonstrate compliance with its ~~National Pollutant~~
19 ~~Discharge Elimination System~~ NPDES permit limits retains full responsibility for achieving and
20 maintaining permit compliance. If a Nutrient Credit Generating Project fails to meet the terms
21 and conditions of its approval as a source of nutrient credits, ~~National Pollutant Discharge~~
22 ~~Elimination System~~ NPDES permit holders may not rely on credits generated by the project

1 regardless of the fact that failure of the project may have been attributable to circumstances
2 beyond the reasonable control of the permit holder.

3 ~~SECTION 5: NO USE OF CREDITS OUTSIDE WATERSHED~~

4 ~~Nutrient credits generated by an approved Nutrient Credit Generating Project may be utilized as~~
5 ~~offsets only in the watershed in which the credits are generated.~~

6 ~~SECTION~~CHAPTER 64: EFFECTIVE DATE.

7 This ~~regulation~~rule is effective ten (10) days after filing with the Secretary of State, the State
8 Library and the Bureau of Legislative Research.