

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

**IN RE: NORTHWEST ARKANSAS NUTRIENT  
TRADING RESEARCH AND ADVISORY  
GROUP THIRD-PARTY RULEMAKING  
TO ADOPT PROPOSED NUTRIENT  
WATER QUALITY TRADING  
REGULATION NO. 37**

**DOCKET NO. 18-001-R**

**OBJECTION TO REQUEST OF SPRINGDALE WATER UTILITIES  
TO SUBSTITUTE PARTIES AND, IN THE ALTERNATIVE,  
REQUEST TO SUBSTITUTE ARKANSAS RURAL WATER ASSOCIATION,  
BEAVER WATER DISTRICT, AND CENTRAL ARKANSAS WATER AS PARTIES**

Arkansas Rural Water Association, Beaver Water District, and Central Arkansas Water (hereinafter collectively, the “Water Association and Utilities”) hereby request that the Arkansas Pollution Control and Ecology Commission (hereinafter, “APCEC”) deny the request by Springdale Water Utilities (hereinafter, “Springdale”) to be substituted in the place of the Northwest Arkansas Nutrient Trading Research and Advisory Group (hereinafter, “NANTRAG”) as the third-party petitioner in this rulemaking. In the alternative, the Water Association and Utilities request that they be substituted in this rulemaking in the place of NANTRAG. In support of this request the Water Association and Utilities state the following:

1. Arkansas Rural Water Association (hereinafter, “ARWA”) is a non-profit organization whose purpose is to assist rural water systems. ARWA is the largest water and wastewater utility membership association in the state with over six hundred (600) utility members.
2. Beaver Water District (hereinafter, “BWD”) is a public Regional Water Distribution District established and operating pursuant to A.C.A. §§ 14-116-101 to 14-116-801. BWD is the second largest water utility in the state. It provides treated drinking

water to the Cities of Bentonville, Fayetteville, Rogers, and Springdale. Those cities then distribute the drinking water to approximately three hundred eighty thousand (380,000) people and businesses.

3. Central Arkansas Water (hereinafter, “CAW”) is a public Consolidated Waterworks System established and operating pursuant to A.C.A. §§ 25-20-301 to 25-20-324. CAW is the largest water utility in the state. It provides treated drinking water to approximately four hundred fifty thousand (450,000) people and businesses.
4. During the initial public comment period on the rulemaking in this matter, ARWA submitted comments in support of NANTRAG’s proposed rule. (See Exhibit A hereto). After further consideration of the proposed rule, the public comments that have been submitted on the proposed rule, and the current status of the rulemaking, ARWA withdraws its support in favor of a rule that would protect drinking water sources.
5. During the initial and supplemental public comment periods on the rulemaking in this matter, BWD submitted comments seeking changes to NANTRAG’s proposed rule. (See Exhibits B, C, D, and E hereto).
6. During the initial public comment period on the rulemaking in this matter, CAW submitted comments requesting changes to NANTRAG’s proposed rule. (See Exhibit F hereto).
7. On May 10, 2019, NANTRAG voted to approve a revised version of its proposed rule. (See Exhibit G hereto). The Agreement that established NANTRAG provides, however, that the text of any rule that NANTRAG

proposes to present to APCEC for final adoption is subject to review by the respective member's city councils. As stated in Springdale's Request to Substitute Parties, the Fayetteville City Council voted to oppose the May 10, 2019, version of the proposed rule. (See Springdale's January 10, 2020, Request at numbered paragraph 5).

8. During the summer of 2019, NANTRAG invited BWD and the City of Fayetteville (hereinafter, "Fayetteville") to submit comments on the May 10, 2019, version of the proposed rule by August 8, 2019. Fayetteville and BWD submitted redline mark-ups of the May 10, 2019, version of the rule on August 7 and 8, 2019, respectively. (BWD's submission is attached as Exhibit H hereto).
9. NANTRAG held meetings on August 16, 2019, September 5, 2019, and November 8, 2019, to consider revising the proposed rule. At the August 16, 2019, meeting, NANTRAG voted to make changes to the proposed rule to adopt the applicable Table of Contents, headings, section numberings, and changes in terminology related to the 2019 Arkansas state government transformation that BWD had included in its redline mark-up of the May 10, 2019, version of the proposed rule. It also voted to adopt a definition for "watershed."
10. At the September 5, 2019, meeting, NANTRAG considered two motions by Springdale and eleven motions by Fayetteville offering changes to the proposed rule. NANTRAG approved language proposed by Springdale that provides for an initial five-year pilot period during which nutrient trades are limited to those involving, on the point-source side, a governmentally-owned entity or

governmentally-owned entities that have National Pollutant Discharge Elimination System (NPDES) permits with water quality-based permit limits for nutrients. Springdale's other motion failed, and each of Fayetteville's eleven motions failed to receive a second.

11. The changes approved at the August 16, 2019, and September 5, 2019, meetings were incorporated by NANTRAG into a revised version of the proposed rule dated September 5, 2019. (See Exhibit I hereto). At the November 8, 2019, meeting, Fayetteville opposed the September 5, 2019, version of the proposed rule. The meeting was adjourned without NANTRAG reaching a consensus on a final proposed rule to submit to APCEC, but with NANTRAG agreeing to allow its counsel to withdraw from their representation of NANTRAG in this matter.

12. NANTRAG's January 11, 2018, Third-Party Petition to Initiate Rulemaking in this matter was procedurally unprecedented. Prior to the initiation of this rulemaking, all third-party rulemakings involved limited changes to existing APCEC rules that, generally, were related to a specific regulated facility. This rulemaking, however, seeks to establish the rules for an entirely new regulatory program that would be implemented by the Department of Energy and Environment, Division of Environmental Quality (hereinafter, "DEQ"). Instead of DEQ drafting and proposing the rules for the new DEQ program, as has previously been the case, in this matter a cooperative association of the Cities of Bentonville, Fayetteville, Rogers, and Springdale – NANTRAG – is pursuing the rulemaking. Each of the four cities has one or more wastewater treatment facilities that are

regulated by DEQ and that potentially could be subject to the nutrient water quality trading rule they are proposing.

13. Springdale's January 10, 2020, Request to Substitute Parties is likewise unprecedented. Nothing in APCEC, Regulation No. 8, Administrative Procedures (hereinafter, "Reg. 8") allows the substitution of parties in a rulemaking. (See Reg. 8, Chapter Eight). Although inapplicable to a rulemaking, the Reg. 8 provisions related to adjudicatory proceedings also do not provide for the substitution of parties. (See Reg. 8, Chapter Six). Reg. 8, Chapter Six, Reg. 8.611 does state for adjudicatory proceedings that, "Procedural matters not addressed in this Chapter shall be governed by the provisions of the Arkansas Rules of Civil Procedure." Even though Reg. 8 does not apply the Arkansas Rules of Civil Procedure to rulemaking proceedings, the Arkansas Rules of Civil Procedure nonetheless would not permit the substitution of Springdale for NANTRAG in this rulemaking. (See Ark. R. Civ. P. 25).

14. NANTRAG has not withdrawn or petitioned to withdraw from this rulemaking. Fayetteville has notified APCEC regarding Springdale's Request that, among other things, "Such proposed involuntary removal of NANTRAG is certainly adverse to NANTRAG's interests as NANTRAG will be pushed aside and prevented from participating further in precisely what it was formed to do." (See Exhibit J hereto, January 16, 2020, letter from Fayetteville to APCEC).

15. A decision by APCEC to grant Springdale's Request to be substituted for NANTRAG in this rulemaking would be outside the scope of APCEC's legal

authority and would be arbitrary, capricious, and otherwise not in accordance with law. In addition, such a decision by APCEC would set a precedent likely to have negative and unanticipated consequences. Springdale's Request should be denied. (See Exhibit K hereto, the Water Association and Utilities' proposed Minute Order dated January 21, 2020, denying the Request of Springdale).

16. In the event APCEC decides to replace NANTRAG in this rulemaking, the Water Association and Utilities request that they be substituted as parties. The Water Association and Utilities make this request reluctantly because they maintain that it would be without legal authority for APCEC to substitute any party for NANTRAG at this juncture. Nonetheless, substitution of the Water Association and Utilities for NANTRAG would be more appropriate than replacing NANTRAG with Springdale Water Utilities in consideration of the statewide application of the proposed rule, the broad and diverse populace that the Water Association and Utilities serve, and BWD's role as the supplier of drinking water to all of the members of NANTRAG.
17. Springdale's Request to Substitute Parties describes its qualifications to replace NANTRAG as the petitioner in this rulemaking. (See Springdale's January 10, 2020, Request at numbered paragraph 9). The Water Association and Utilities have similar experience and have been actively involved in this rulemaking. The Water Association and Utilities, however, would bring to the role of petitioner in this rulemaking an important qualification that Springdale does not possess: a willingness to continue working with interested stakeholders and members of the

public to ultimately produce for APCEC's consideration a proposed nutrient water quality trading rule that contains clear procedures, that protects Arkansas streams and drinking water sources, that can be successfully utilized by wastewater dischargers, and that accomplishes nutrient reduction and water quality improvement over the long term.

18. Springdale states that if its Request to Substitute Parties is granted, "there would be no need for any new public hearing or new, third public comment period." It proposes instead to pursue adoption of NANTRAG's May 10, 2019, version of the rule. Springdale goes on to state that the May 10, 2019, version of the proposed rule "is very similar to the proposed rule that was presented to the Commission when it approved initiation of this rulemaking Docket." (See Springdale's January 10, 2020, Request to Substitute Parties at numbered paragraph 10).
19. Springdale's position that it would ask APCEC to adopt a proposed rule that is "very similar" to its initial proposed rule is telling. Approximately one hundred fifteen (115) separate written submissions were added to the docket in this matter during the opportunities for public comments. (See Exhibit L hereto, APCEC Docket #18-001-R as of January 20, 2020). To the best of the Water Association and Utilities' knowledge, more public comments were submitted in this matter than have been submitted on any APCEC matter that did not involve C&H Hog Farms, Inc. Most of the public submissions in this third-party rulemaking expressed objections to provisions in the proposed rule and concern about what was missing from the proposed rule. Springdale,

nonetheless, remains unwilling to make meaningful changes in the proposed rule to address the objections and concerns. It is not even willing to move forward with a proposed rule that includes the changes approved by NANTRAG in August and September 2019.

20. Springdale's Request to Substitute Parties is replete with dire warnings about what will happen if it is not allowed to replace NANTRAG in this matter. According to Springdale, NANTRAG's hard work "will go for naught," "there will be a significant waste of public and private resources," and the rulemaking will linger "in a state of unresolved limbo." (See Springdale's January 10, 2020, Request at numbered paragraphs 7, 14, and 17).
21. As anyone who has observed laws being made knows, the process is often unpredictable and time-consuming. Sometimes the initial attempts to create legislation, regulations, or rules fail. Those attempts, however, can lay the foundation for the passage of better laws that are clear and readily implementable rather than vague and confusing. Just because NANTRAG's proposed rulemaking has encountered obstacles does not mean that the time and resources involved thus far have not been worthwhile. The Water Association and Utilities, NANTRAG, DEQ, and other interested stakeholders have learned much in the two years since this rulemaking began about nutrient water quality trading and how a trading program could best be implemented in Arkansas.
22. The Water Association and Utilities cannot promise, of course, that they can



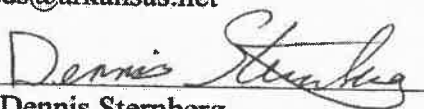
deliver to APCEC a proposed rule to which no one objects, if they are substituted as the third-party petitioner in this matter. The Water Association and Utilities can commit, though, to an open and transparent process that will be conducted as expeditiously as possible and in consultation with DEQ, giving due regard to the public participation rights under Reg. 8. (See Exhibit M hereto, the Water Association and Utilities' proposed Minute Order dated January 21, 2020, granting their request for substitution and providing a schedule).

WHEREFORE, the Arkansas Rural Water Association, Beaver Water District, and Central Arkansas Water respectfully ask that APCEC issue an order that denies the Request of Springdale Water Utilities to be substituted in the place of NANTRAG in this rulemaking. In the event APCEC decides to replace NANTRAG in this rulemaking, however, Arkansas Rural Water Association, Beaver Water District, and Central Arkansas Water respectfully request that APCEC issue an order that substitutes them as the petitioner in this rulemaking and that provides a schedule for further steps in this rulemaking as they have requested or may request.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 21st day of January, 2020, I served the foregoing Objection to the Request of Springdale Water Utilities to Substitute Parties and, in the Alternative, the Request of Arkansas Rural Water Association, Beaver Water District, and Central Arkansas Water to Substitute Parties, by electronic delivery and by placing a true and correct copy in the United States Mail, First Class postage prepaid addressed to each of the following:

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