

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

**IN RE: REQUEST BY THE NORTHWEST)
 ARKANSAS NUTRIENT TRADING)
 RESEARCH AND ADVISORY GROUP) DOCKET NO. 18-001-R
 TO INITIATE RULEMAKING TO)
 ADOPT PROPOSED REGULATION)
 NO. 37)**

**SPRINGDALE WATER UTILITIES' RESPONSE TO THE OBJECTION
OF ARKANSAS RURAL WATER ASSOCIATION,
BEAVER WATER DISTRICT, AND CENTRAL ARKANSAS WATER TO
SPRINGDALE WATER UTILITIES' REQUEST TO SUBSTITUTE PARTIES**

Springdale Water Utilities responds to the Objection to its Request to Substitute Parties filed by Arkansas Rural Water Association, Beaver Water District, and Central Arkansas Water (the "Objectors") as follows:

1. The Objectors argue there is nothing in Rule 8 or any other relevant law that expressly authorizes the Commission to substitute a new party in the place of the party who initiated a rulemaking. That is true. There also is nothing in Rule 8 or any other relevant law that prohibits the Commission from substituting a new party in the place of the party who initiated a rulemaking. Stated simply, there is no express law either way.
2. In the absence of any express legal direction either way, the controlling legal authority for this Request to Substitute Parties is found in the statutes that give the Commission the power to promulgate rules. Ark. Code Ann. §§ 8-1-203(b)(1)-(3), 8-4-202(b)(1)-(3) & 8-4-223 to -229. Those statutes require specific procedures involving cost benefit analysis when a proposed rule would be more stringent than federal requirements. Ark. Code Ann. §§ 8-1-203(b)(1)(B)-(E) & 8-4-202(b)(1). They also require notice, public hearing, an opportunity for public comment, preparation of a statement of basis, and the compilation of a

public record addressing the public comments. Ark. Code Ann. §§ 8-4-202(d)(e). But the statutes do not prescribe specific answers for other procedural questions that may arise during a rulemaking. Nor do the statutes restrict the Commission to only those procedures expressly authorized by statute or prescribed in a regulation. Instead, the statutes leave the management of a rulemaking proceeding to the sound discretion of the Commission, subject of course to review for any action by the Commission that is arbitrary, capricious, or an abuse of discretion. The extent of the Commission's discretion regarding procedural questions in rulemaking proceedings is expressly confirmed by APCEC Rule 8.820:

“The rulemaking procedures set out in this chapter are merely minimum procedures that must be followed before the Commission adopts a proposed regulation. Nothing in this Chapter shall be construed as restricting the authority of the Commission in its rulemaking capacity to direct the proponents or opponents of a proposed rule to submit additional factual data or legal briefs as the Commission deems necessary, or to make individual proponents or opponents of a proposed regulation available for questioning by the Commission. **The Commission may enter any order as may be necessary to efficiently conduct and conclude any rulemaking proceeding.**” (Emphasis supplied.)

3. Springdale Water Utilities respectfully submits that the Commission's basic, organic authority to conduct rulemaking proceedings necessarily gives the Commission discretion to manage and decide unforeseen procedural issues that may arise during the course of a rulemaking. In this particular rulemaking the Commission has no choice but to decide what to do because the original petitioner is hopelessly deadlocked and clearly unable to proceed. A number of procedural options suggest themselves. Dismissal for failure to proceed, substitution of an appropriate party, indefinite suspension of proceedings, and postponement for a specified period of time are all procedural answers that may be appropriate; and there undoubtedly are others. Whatever the Commission chooses to do in the face of an incapacitated or deadlocked petitioner, however, none of the alternatives is expressly

authorized or prohibited. In the words of Rule 8.820, the answer lies in the inherent authority of the Commission to “enter any order as may be necessary to efficiently conduct and conclude [this] rulemaking proceeding.”

4. The Objectors claim this rulemaking is unprecedented and they argue that all prior third-party rulemakings before the Commission involved limited changes related to a specific regulated facility. That is not correct. Many of the third-party rulemakings before the Commission admittedly have involved requests to establish site specific minerals criteria affecting an individual facility, but this third-party rulemaking is not unprecedented. Other third-party rulemakings have proposed general or statewide changes. *See* APCEC Docket Nos. 02-008-R; 05-013-R; 08-003-R; 08-005-R; 08-006-R; 08-014-R; 14-002-R; 14-003-R. More importantly, there is nothing inappropriate about a third-party rulemaking that seeks to establish a rule of general or statewide application. Arkansas law expressly authorizes third-party rulemaking proceedings before this Commission:

“Any person shall have the right to petition the Commission for the issuance, amendment, or repeal of any rule or regulation.” Ark. Code Ann. 8-4-202(c)(1).

Indeed, the right to initiate third-party rulemaking proceedings is a common feature in essentially all state and federal administrative law. And there is no law suggesting that third-party rulemakings before the Commission should be limited to narrow, facility-specific questions. In fact, as quoted above, the statutory authorization for third-party rulemaking applies broadly to “any” rule or regulation. That is clear.

5. It is pertinent to note that none of the Objectors raised any questions about the propriety of this third-party rulemaking when the rulemaking was initiated or in the public comments they filed during the public comment periods. To the contrary, the Objectors all claimed to support the adoption of some form of nutrient trading regulations in this rulemaking. To the

degree they differed with NANTRAG's proposals at all, they simply asked that new or different requirements be included in the rule.

6. The Objectors argue that DEQ would be a better party to serve as the petitioner in this rulemaking. Springdale Water Utilities does not disagree. Springdale Water Utilities would be entirely comfortable with DEQ stepping in as petitioner in the place of NANTRAG to complete this rulemaking if DEQ is willing to do so. DEQ clearly has the experience and ability to carry this rulemaking to completion. DEQ has participated actively throughout this rulemaking. It would take little additional work for DEQ to finish the rulemaking process and bring a proposed rule to the Commission for final action. If DEQ chose to step in as the petitioner to complete this rulemaking, Springdale Water Utilities would happily withdraw its Request to Substitute Parties. Springdale Water Utilities has no desire to monopolize or control the course of this rulemaking. It simply wants to see the rulemaking completed and a nutrient trading rule presented to the Commission for final action.
7. The Objectors suggest that it is of no great consequence whether this rulemaking is ever completed. This ignores the difficulties anyone would encounter attempting to initiate a new rulemaking. Any proposed nutrient trading rule must first be submitted to the Nutrient Water Quality Trading Advisory Panel for review and recommendation. Ark. Code Ann. § 8-4-233(h). At the present time the terms of all of the members of the Advisory Panel have expired. It is unclear whether the Advisory Panel will be reconstituted any time in the near future. Assuming for purposes of argument one could satisfy the requirement of Advisory Panel review, a new rulemaking would still require new notice, new hearings, a new public comment period, a new statement of basis, new response to comments, and an entirely new public record. If the experience of this rulemaking is any indication, at least two to three

years of effort will be required to get a new rulemaking back to where this rulemaking docket stands today.

8. The Objectors claim that Springdale Water Utilities' Request to Substitute Parties is somehow adverse to NANTRAG. That is not correct. A majority of NANTRAG members are in favor of the Request. The proposed rule Springdale Water Utilities plans to carry forward is the rule that the members of NANTRAG approved by unanimous vote. The only reason Springdale Water Utilities is asking to take NANTRAG's place is that Fayetteville rescinded its original vote, leaving NANTRAG deadlocked for lack of unanimity, with three in favor and one opposed. It is the majority will of NANTRAG members that Springdale seeks to advance.

9. The Objectors state that if they are substituted in NANTRAG's place, they would conduct:

“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.” Objection at p. 9.

The unspoken implication is that NANTRAG's conduct of this rulemaking was not open or transparent and that NANTRAG somehow failed to consult with DEQ or fully support public participation per APCEC Rule 8. Any such suggestion is factually inaccurate and grossly unfair to the members of NANTRAG. It is doubtful there has ever been a Commission rulemaking that has been more open and transparent than this one. All of the Advisory Panel meetings were open to the public. All of the Commission meetings regarding this rulemaking were open to the public. There were two separate public hearings and two separate public comment periods. NANTRAG conducted all of its business in open public meetings in accordance with Freedom of Information Act procedures. NANTRAG meetings routinely included time for statements from the public. Members of the public regularly

attended NANTRAG meetings, although representatives of the Objectors attended only occasionally, if at all. In addition to public meetings, representatives of NANTRAG made two public presentations to the Beaver Watershed Alliance and met informally with representatives of a variety of stakeholder groups, including Beaver Water District, Buffalo River Alliance, Ozark Society, Sierra Club, Farm Bureau, the Arkansas Association of Conservation Districts, and the Environmental Protection Agency. NANTRAG also consulted extensively with DEQ throughout the course of this rulemaking.

10. The Objectors ask the Commission to deny Springdale Water Utilities' Request to Substitute Parties or, in the alternative, to substitute the Objectors in NANTRAG's place. Neither alternative is appropriate. Denying the Request to Substitute would simply perpetuate the current situation of deadlock. That is not a solution. Substituting the Objectors in NANTRAG's place would be inappropriate for several reasons. First and most importantly, the Objectors do not describe the terms of the proposed rule they would bring forward. In fact, it appears they do not currently know what the terms of their proposed rule would be. Second, at least one of the Objectors has suggested that development of nutrient trading rules should not be undertaken at all until after the State adopts statewide numeric nutrient criteria. This position would push any action on nutrient trading rulemaking many years into the future, at a minimum. Third, one of the Objectors has publicly questioned DEQ's technical capacity to manage a trading program, taken the position that trading should be limited to Northwest Arkansas if it is allowed at all, and argued that trading should be limited to municipal utilities because it believed private businesses would use any trading program to cheat the system. Against this background, the Objectors have not established that they would be better candidates to carry this rulemaking forward.

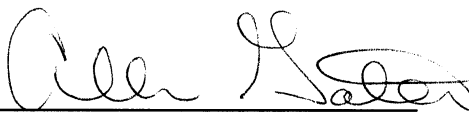
For the reasons stated above:

- A. Springdale Water Utilities asks the Commission to grant its Request to Substitute Parties or, in the alternative, allow DEQ to be substituted in NANTRAG's place if DEQ is willing to undertake the role of petitioner; and
- B. Springdale Water Utilities asks the Commission to deny the Objectors' request that they be substituted in NANTRAG's place.

DATED: January 23, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January 2020, I served a true and correct copy of the foregoing Springdale Water Utilities' Response to the Objection of Arkansas Rural Water Association, Beaver Water District, and Central Arkansas Water to Springdale Water Utilities' Request to Substitute Parties on the following by electronic service:

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A handwritten signature in black ink that reads "Allan Gates". The signature is written in a cursive style with a horizontal line underneath the text.

Allan Gates