

**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)**

Secretary
Arkansas Pollution Control and Ecology
101 East Capitol, Suite 205
Little Rock, AR, 72201
Filed 1/10/2016

REQUEST TO SUBSTITUTE PARTIES

Springdale Water Utilities hereby requests that the Commission substitute Springdale Water Utilities in the place of NANTRAG as the third party petitioner in this rulemaking. In support of this request Springdale Water Utilities states the following.

1. On January 11, 2018, NANTRAG filed a petition to initiate a third party rulemaking. The rule proposed by NANTRAG would establish administrative procedures and requirements for evaluating and approving nutrient water quality credit generating projects.
2. On January 26, 2018, the Commission approved initiation of the rulemaking requested by NANTRAG and entered a Minute Order that specified the procedures to be followed in the rulemaking. Minute Order 18-4. Since that date, there have been two public hearings and two separate rounds of public comment.
3. On May 10, 2019, after the close of the second round of public comments, representatives of NANTRAG met and voted unanimously to approve the final text of the draft rule and a related set of responses to public comments.

4. NANTRAG is a cooperative association of four cities, Springdale, Rogers, Bentonville, and Fayetteville. The NANTRAG group agreement provides that a unanimous vote is required regarding the text of any rule the group proposes to present to the Commission for final adoption. The group agreement also provides that the vote of a member city's representative regarding the final text of any rule may be subject to review by the member city's city council.
5. After the May 10, 2019 NANTRAG vote unanimously approving a draft rule, the Fayetteville City Council voted to oppose the rule unless more than a dozen amendments were approved, many of which would significantly alter the nature of the rule.
6. After extensive debate that stretched over three separate meetings, NANTRAG reached deadlock. Initially the group representatives approved three proposed amendments, but eleven amendments proposed by Fayetteville failed for lack of a second. On November 8, 2019, the group representatives agreed they were deadlocked due to lack of unanimity, and they voted to adjourn indefinitely.
7. The Minute Orders issued by the Commission in this rulemaking call for NANTRAG to prepare and file a response to public comments, participate with ADEQ in seeking legislative review, and present the final text of the proposed regulation to the Commission for a vote on adoption. Minute Order 18-4, at p. 2, ¶¶ 6-8; Minute Order 18-21, at p. 2, ¶ 5. Because of Fayetteville's decision to oppose the version of Rule 37 previously approved by all four cities' representatives, NANTRAG is unable to fulfill the steps contemplated by the Minute Orders necessary to move the rulemaking forward. By the same token, the three other cities in NANTRAG do not want to withdraw the rulemaking and see all of the group's hard work go for naught.

8. In light of the foregoing circumstances, Springdale Water Utilities asks the Commission to substitute Springdale Water Utilities in the place of NANTRAG as the third party petitioner in this rulemaking.
9. Springdale Water Utilities is well qualified to assume the role of third party petitioner in this rulemaking because:
 - a. Springdale Water Utilities and its Executive Director, Heath Ward, were actively involved in the drafting and adoption of legislation authorizing the Commission to issue nutrient trading rules. Act 335 of 2015, *codified as* Ark. Code Ann. §§ 8-4-232.
 - b. Springdale Water Utilities led the organizational effort that resulted in the formation of NANTRAG.
 - c. Springdale Water Utilities Executive Director, Heath Ward, served as Chair of the Nutrient Water Quality Trading Advisory Board, under appointment by Governor Hutchinson.
 - d. Springdale Water Utilities Operations Manager, Brad Stewart, was elected as NANTRAG's Chair by unanimous vote of all four member cities. He has served in that capacity from the initial formation of NANTRAG to the present day.
10. If this request to substitute parties is granted, there would be no need for any new public hearing or new, third public comment period. Springdale Water Utilities plans to pursue adoption of the version of Rule 37 that was approved on May 10, 2019 by unanimous vote of all four cities' representatives. That version of Rule 37 is very similar to the proposed rule that was presented to the Commission when it approved initiation of this rulemaking Docket. The only changes to the Rule 37 proposed by Springdale Water

Utilities are changes that are logical outgrowths of the comments submitted during the original and supplemental public comment periods.

11. Springdale Water Utilities has discussed this Request to Substitute Parties with counsel for the Division of Environmental Quality and has been authorized to state that DEQ favors going forward with rulemaking to support the use of nutrient trading as an additional tool to maximize nutrient reduction efforts and improve water quality.
12. Springdale Water Utilities has discussed this Request to Substitute Parties with the NANTRAG representatives of Rogers and Bentonville and has been authorized to state that Rogers and Bentonville are in favor of the request and Springdale Water Utilities' proposal to go forward with the rulemaking.
13. Springdale Water Utilities believes it is unlikely that NANTRAG's 3-1 deadlock will change. As a consequence, there is little chance this rulemaking will proceed to a final decision by the Commission unless a new party is substituted as the petitioner.
14. If this rulemaking does not proceed to a final decision before the Commission, there will be a significant waste of public and private resources.
 - a. Proposed Rule 37 originated almost three years ago in discussions before the statutorily created Nutrient Water Quality Trading Advisory Panel. The nutrient trading rule recommended by the Advisory Panel is the rule that NANTRAG presented to the Commission when this rulemaking was initiated.
 - b. DEQ and the staff of other governmental agencies have devoted a significant amount of time to a review of the proposed rule and the development of a robust public record in this rulemaking.

- c. There have been two separate public hearings in this rulemaking. Scores of individuals attended the public hearings and even more filed public comments.
- d. Extensive work has been expended by DEQ and the members of NANTRAG in considering and drafting responses to comments from the public and interested government entities.

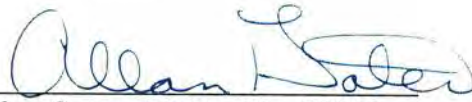
If this rulemaking does not proceed to a final decision before the Commission, all of that work and the entire public record will go for naught. If DEQ or anyone else decides to start a new rulemaking petition on nutrient trading, the public record supporting that rulemaking will have to be created from scratch, presumably starting with a return to the statutory Advisory Panel. And that is true even if there is no change whatsoever to the terms of proposed Rule 37.

- 15. The prospect of returning to the statutory Advisory Panel to start a new rulemaking is particularly problematic because the two year terms of all the Advisory Panel members have expired and no replacements have been appointed.
- 16. If the Commission grants this Request to Substitute Parties, Springdale Water Utilities commits that it will fulfill the remaining obligations set forth in Minute Orders 18-4 and 18-21. More specifically, Springdale Water Utilities will finalize a Response to Public Comments, participate with ADEQ in seeking legislative review of proposed Rule 37, and present the text of the proposed rule to the Commission for final consideration.
- 17. If the Request to Substitute Parties is not granted, the rulemaking petition is likely to linger on the Commission's docket in a state of unresolved limbo for an indefinite period of time.

WHEREFORE, Springdale Water Utilities requests that the Commission grant this Request and enter an order substituting Springdale Water Utilities as the petitioner in this rulemaking.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10 day of January, 2020, I served the foregoing Request 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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