



American Fisheries Society Arkansas Chapter

April 30, 2018

Kelly Robinson
Arkansas Department of Environmental Quality
5301 Northshore Drive
North Little Rock, AR 72118

RE: Comment concerning Draft Regulation No. 37

Ms. Robinson:

The Arkansas Chapter of the American Fisheries Society is the largest organization of professional fisheries and aquatic biologists in the state of Arkansas. With approximately 200 members, the Arkansas Chapter adheres to the goals of our parent society, the American Fisheries Society, which include promotion of scientific research and sustainable management of fisheries resources and their habitats. As a chapter, we are especially interested in the health of all of Arkansas' aquatic resources, not only as a natural resource but also as a national treasure. It is in this spirit that the Chapter has concerns about the implementation of a new water quality nutrient-trading program that is currently being proposed and open for public comment.

The Arkansas Pollution Control and Ecology Commission recently approved a petition to initiate rulemaking for Regulation No. 37: "*Arkansas Nutrient Water Quality Trading Regulations.*" The Chapter is concerned that this rule could and will facilitate degradation of some waterbodies for the benefit of others. While extreme cases of nutrient enrichment to a waterbody can result in massive fish kills, less visible effects such as harm to sensitive species, shifts in community structures, and biodiversity reductions can be equally detrimental to aquatic ecosystems over the long-term. Additionally, excessive nutrients often fuel the massive growth of algae, some of which are considered nuisances. Although it is well documented that excessive algae alters habitats and water quality needed to sustain aquatic communities, it also impacts, and in many cases, devalues the recreational potential of a waterbody for activities like fishing, paddling, and swimming.

For any such nutrient trading program to be successful, the details are essential. For instance, in order for nutrient reductions to be truly achieved under this new regulation, management of how and where credits are bought and sold is critical to ensuring that water quality problems aren't simply shifted from one area to benefit another. At present, details to Regulation No. 37 suggest that vague and loose requirements are needed in order to be compatible with especially innovative projects. Although this sounds reasonable and logical, there needs to be an adequate assessment plan in place such that agencies administering the credits are capable of validating whether or not the reductions have been met. If no monitoring system is in place or is not possible for various reasons (e.g., laws, mandates, jurisdictions, etc.), there will be no quality control for this program. As a result, indicators for judging the success or failure of new projects become subjective and debatable.

Given goals and philosophy of the Arkansas Chapter of the American Fisheries Society, it is to this end that our members request additional clarity on the structure of the proposed Regulation No. 37, including all details for the monitoring and assessment plan. Members request that comments below be addressed and used to make sensible and reasonable revisions to Regulation No. 37 before it is adopted. In the end, we are hopeful that any new regulation adopted will be thoughtfully developed and implemented such that Arkansas' rivers, streams, and lakes all receive adequate protection under this new rule.

Please feel free to contact us if you have questions about this request or need additional information.

Respectfully,

A handwritten signature in cursive script that reads "Michael A. Eggleton".

Michael Eggleton, President
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Draft Regulation No. 37 - Questions, Concern, and Comments

- Section 2 (A)(1): “Watershed” should be defined.
- Section 2 (A)(5): How will “unacceptable” be determined? Arkansas has not adopted statewide numeric nutrient criteria or specific biological criteria in place.
- Section 2 (A) (7): How are existing baseline conditions defined and who is responsible for defining existing baseline conditions?
- Section 2 (A) (10): What about requiring professional certification? This might be too prohibitive on the applicants due to costs but having the applicant burdensome technical expertise on the application could lessen the burden on ADEQ.
- Section 2(A): should include a requirement that the application includes the evidence and calculations used to derive the credit quantity and credit ratios resulting from the credit-generating project, including and explanation of methods used to address uncertainty factors. A minimum ration of 3 credits for 1 offset should apply. This is one of the factors that the Director is supposed to consider under Section 2(F)(1), but there is no provision regarding how and where the Department is supposed to come up with this information, and there is NO requirement that the Director make a decision on a trading ratio, much less that there be a minimum trading ratio.
- Section 2 (B): Would ANRC’s review and recommendations be binding? Does ANRC have the personnel and resources to review and inspect nutrient credit generating projects as necessary? How will the nutrient credit projects be incorporated into NPDES permits at ADEQ?
- Section 2 (C): Should public notice include ADH and any water treatment/water providers whose source water is within the watershed in public notice? Note: The proposed regulation provides for public notice of the *application* under Reg. 8.205, but it does not provide for public notice and comment on the Director’s *draft decision* under Reg. 8.205 – 8.209.
- Section 2(G)(2) – The time period in which the credit may be used as an offset should be further defined in the regulation and not left up to the applicant to decide.
- Section 2(H) –See above comment. The proposed regulation provides for appealing the Director’s final decision under Reg. 8.603, but does not provide for requesting a public hearing (or for having public notice and comment) on the Director’s *draft decision* under Reg. 8.205 – 8.209.
- Section 2 (I) (2): There are no regulatory requirements. Narrative nutrient criteria will not suffice. Suggestion: “baseline requirements” should be based on EPA approved TMDLs or numeric nutrient criteria.
- Section 2 (J): If a BMP is paid for by a Farm Bill program or other government grant, it is hard to have confidence that the trade is resulting in *additional* pollution reduction. Trading programs should incentivize pollution reduction that would not have occurred otherwise.
- Section 3 (C): Compliance cannot be verified through an application. Inspections must be conducted before, during, and after implementation to ensure compliance. However, ANRC is non-regulatory in nature. What ability will ANRC have to enforce compliance? Will a percentage of the fees generated go to ANRC to implement an inspection program?

General Comments and Questions on Reg. 37

- Credit ratio to be used in point-to-point and nonpoint-to-point credit sales should be defined in the regulation. This should not be up to the applicant to decide.
- Requiring credits to be upstream of trade would better protect water quality.
- Does ADEQ have staff with experience to review applications and certifications?
- There should be no trading against technology-based permit limits. In other words, the nutrient limit in the permit (typically Total Phosphorus in Arkansas) must be a water-quality-based limit. This is one of the Mississippi River Collaborative’s “Principles” regarding water quality trading. Another is that the trading program should result in an actual net improvement in water quality. That is not required in the proposed regulation. Note that the “evidence” of various things that the applicant is required to submit in the application under Section 2(A) are not tied to standards that the Director is bound by in her decision-making.

- This regulation is being driven by Northwest Arkansas stakeholders (i.e., Northwest Arkansas Trading Research and Advisory Group). What are the ramifications of this bill statewide? There needs to be public hearing elsewhere in the State, not just Little Rock and Fayetteville.
- There is an implication that costs to monitor this program will be minimal to the State. We are concerned that monitoring costs will be substantial, and that monitoring cost will need to include storm event sampling.