



SIERRA CLUB

ARKANSAS CHAPTER

1308 West 2nd Street--Little Rock, AR 72201—501.301.8280

May 1st, 2018

Arkansas Pollution Control & Ecology Commission

101 East Capitol Avenue, Suite 205

Little Rock, AR 72201

SUBMITTED ELECTRONICALLY TO: Robinson@adeq.state.ar.us

RE: Proposed Changes to Regulation 37: APC&E Docket # 18-001-R

Dear Commission Members:

The Arkansas Sierra Club writes to comment on proposed Regulation 37 that would allow nutrient trading in Northwest Arkansas.

It is widely agreed that nutrient trading has economic and environmental potential in theory. However, it is apparent that in practice it has proven to be problematic from the standpoint of the environment.

One of the oldest and largest programs has been that surrounding the Chesapeake Bay Area. A multi-state program, the program has been extensively studied. Nutrient Trading, Preliminary Investigation: Findings and Recommendations, Senior Scientist and Policy Makers, For the Bay Nutrient Trading Subcommittee (BNTS), https://www.epa.gov/sites/production/files/2015-07/documents/nutrient_trading_final_report.pdf

Extensive economic analyses have been performed to evaluate the potential performance of Nutrient trading in the Chesapeake. Nutrient Credit Trading for the Chesapeake Bay, an Economic Study, <http://www.chesbay.us/Publications/nutrient-trading-2012.pdf>

Yet despite thirty years of experience and the extensive study and review, it would seem that the main effect of the program has been to facilitate continued discharges of unnecessary and unacceptable levels of pollutants as reflected in an Environmental Integrity Project, Sewage and Wastewater Plants in the Chesapeake Bay Watershed,

<https://www.environmentalintegrity.org/wp-content/uploads/2017/02/Bay-Wastewater.pdf>

and

Water Quality Trading: Polluting Public Waterways for Private Gain,

<https://www.foodandwaterwatch.org/insight/water-quality-trading-polluting-public-waterways-private-gain>

All this has come with little generalized economic benefit. GAO-18-84 Some States Have Trading Programs to Help Address Nutrient Pollution, but Use Has Been Limited, Oct 2017,

<https://www.gao.gov/products/GAO-18-84>

The primary goal of any nutrient trading program should be preserving or improving the environment. Economic benefit should be a secondary concern. The key risks of and elements required to develop an honest and functional program were outlined in the BNTS report above as follows:

- 1) Nutrient trading is a relatively new and untested technique for pollutant reductions in waterbodies that makes assumptions regarding short and long-term effects.
- 2) All efforts should be made to improve and then preserve local water quality.
- 3) Independent, rigorous, and transparent verification is essential.
- 4) A policy of net improvement credit is needed to account for uncertainties in non-point sources reductions and runoff variability.
- 5) Nutrient trading should not be used to maintain discharges at technology levels below industry standards.
- 6) Nutrient trading may create environmental justice issues by moving problems to disadvantaged areas.
- 7) Trading could benefit large organizations and corporations without protecting the interests of local waterways and grassroots entities.
- 8) The total impacts of nutrient trades need to be measured and adequate compensation provided.
- 9) Credited practices and the models used to calculate the amounts of credits awarded need to be standardized.

10) Growth allocations should be based on demonstrated pollution reductions in other sectors, not on speculative, proposed reductions in those sectors.

The Arkansas Sierra Club's specific concerns about this proposed regulation include:

- 1) Arkansas has not established appropriate water quality goals (total maximum daily loads, water quality based effluent limitations, numeric nutrient criteria, among others) to create a market for trades.
- 2) The regulation as drafted lacks sufficient substance to ensure the trading is protective of water quality and will result in actual net improvements to water quality.
- 3) It does not include an enforceability provision to ensure that the actual in stream nutrient concentrations and loads be reduced or maintained at current levels.
- 4) The regulation lacks sufficient implementation procedures.
- 5) The regulation lacks a defined process to evaluate non-point source nutrient credits and generators of those credits.
- 6) The standards for the decision of the ADEQ Director to approve or disapprove a Nutrient Credit Generating Project do not adequately protect our water resources.
- 7) There is no required minimum trade ratio and insufficient detail regarding how credits will be incorporated as offsets into NPDES permit.
- 8) The regulation is introducing an entirely new regulatory program and provides no consideration to the impact on ADEQ resources and staff and how those costs will be recovered.
- 9) The regulation limits ADEQ's enforcement authority and only allows inspections by the Arkansas Natural Resources Commission. This is contrary to the delegation of the NPDES program to ADEQ by the U. S. EPA.

The comments of others have articulated in some detail the many shortcomings of the proposed rule as drafted. Principally these relate to the lack of any reliable way to measure what is being traded, to monitor the validity of what presumably is being traded, the lack of an enforcement or penalty system to motivate honest trading, to dissuade using trading to avoid using available technology or BMP's and the risks of focusing pollutants in locations where purchased credits are being used as offsets. We believe this regulation should:

1. Require mandatory and enforceable nutrient management plans;
2. Allow public comment opportunity for land application;
3. Require application based on agronomic rates;
4. Ensure transparent monitoring and reporting requirements (for example, reporting of all waste generated, stored, exported, and land applied); and,

5. CAFOs should not be permitted to participate since if I regulation five or regulation six permit is required, then nutrient runoff should already be appropriately managed.

The Arkansas Sierra Club is concerned that the current regulation violates the Clean Water Act. The primary goal of the clean water act is to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters.” Nutrient trading circumvents the Clean Water Act’s technology-forcing principles. NPDES permits have five-year terms so affluent limitations can be revised to maintain best available technology to reduce discharges.

The Regulation, as proposed, appears to have been drafted with the interests of sources of pollution in mind without giving adequate attention to addressing the known problems inherent in nutrient trading. We offer these suggestions. ADEQ should create a stakeholder workgroup with the Nutrient Water Quality Trading Advisory Panel to further develop NANTRAG’s framework. This will create a transparent process and encompassing more diverse array of stakeholders. With a new regulation and one that would apply statewide, more voices need to be at the table besides those from Northwest Arkansas. ADEQ should host a webpage with relevant materials.

Respectfully, the regulation should not be approved as drafted.

Thank you for considering our comments.

Sincerely,

/s/

Glen Hooks, Director

Arkansas Sierra Club