

May 2, 2018

Ms. Kelly Robinson
Arkansas Department of Environmental Quality
5301 Northshore Dr.
North Little Rock, AR 72118

Re: ADEQ Comments to Northwest Arkansas Nutrient Trading Research and Advisory Group
(NANTRAG) Proposed Regulation 37

Ms. Robinson,

The Office of Water Quality and Office of Law and Policy greatly appreciate the opportunity to provide comments on behalf of ADEQ regarding the Draft Nutrient Water Quality Trading Regulation 37. ADEQ supports trading programs for their ability to drive effective environmental outcomes beyond traditional regulations and commends NANTRAG's efforts to date to develop a meaningful framework for nutrient trading. ADEQ offers the attached comments regarding the draft regulation.

Sincerely,



Caleb J. Osborne
Associate Director
Office of Water Quality

ADEQ Comments on NANTRAG Draft Nutrient Water Quality Trading Regulation 37

Section 1

ADEQ recommends consideration of the inclusion of key definitions such as “Nutrient Credit Generating Project (NCGP).”

To provide clarity, ADEQ suggests revision of “when determining compliance with permit limits” to “NPDES permit holders must demonstrate compliance with all regulatory and non-regulatory requirements.” Eligible nutrient credits would be authorized in a NPDES permit, permit modification, or at the Director’s discretion. If the trade is with a non-NPDES permit holder, e.g. a non-point source, the nutrient credits may not be the only criterion that may be used to determine compliance with applicable permit conditions.

Section 2(A)

(1) ADEQ recommends considering a revision from watershed scale to receiving stream to more closely align with permit conditions. See also Section 2 (G)(1). It is intuitive that the location of the NCGP be specific. The term “watershed” here and in Section 2 (G)(1) is too vague to ascertain the effectiveness, trading ratio, pollutant(s) being traded, water quality impacts/benefits, and permitting conditions that will be applicable to the approval of the NCGP and the permit.

(4) “The time period in which the credit generating project may be used as an offset” will vary with in-stream conditions, new or expanding discharge activities, and the term of the permit to which the credit generating project will expire or be administratively extended until the permit renewal is issued. At the time of renewal of the permit, the credit generating project will also have to be renewed. See Section 2(E) and (G)(2).

(5) The limitation that the use of the “...credit as an offset will not result in an unacceptable localized adverse effect on water quality” fails to recognize antidegradation provisions in 40 CFR§131.12 and Regulation 2.2.

(8) This should be changed to read “...implementation, performance, and operation and maintenance...” Also see Section 2(F)(2).

Section 2(B)

The approval of a NCGP which will offset a NPDES permit condition is at the discretion of the Director of the Department of Environmental Quality, and, where applicable under law, the United States Environmental Protection Agency (USEPA). ADEQ shall provide Arkansas

Natural Resources Commission (ANRC) an opportunity to review and comment on the NCGP application, but ANRC should not be required to make recommendations.

Section 2(E)

As the NPDES permitting authority, the Director's decision on any approval of a nutrient credit generating project that will be used to offset NPDES permit conditions or requirements must be made in accordance with the applicable USEPA regulations, regardless of the "procedures in this section." The section identifies the minimum time frame the NCGP will be applicable and whether plans may be renewed. However, the section does not discuss how many times a NCGP may be renewed. Many BMPs do not reach maximum nutrient offset efficacy until ten (10) to twenty (20) years post-installation. ADEQ recommends inclusion of language that incorporates review of BMP efficacy at time of renewal, which would allow for increasing or decreasing credit ratios.

Section 2(F)(1)

ADEQ is encouraged by the inclusion of credit quantity and credit ratios resulting from a credit-generating project. In addition, it is unclear what "uncertainty factors" are referenced here. It is more probable that any such factors would be applied to the credit trading ratio.

Section 2(G)

See previous comments related to the specifications (1) through (3).

Section 2(H)

It would be untimely for the Director to cause to be published a public notice on a final action of a request for approval of a nutrient credit of a generating project as an action separate and apart from the manner, specifically the permit or authorization, for which the credit will be used. ADEQ recommends that any NCGP be public noticed at the same time as the permit in accordance with Regulation 8.603 or authorization by the Director as allowed by state law.

Section 2(I)

ADEQ recommends that baseline water quality conditions be defined in each NCGP and should include applicable regulatory requirements including, but not limited, to permit conditions, TMDL wasteload or load allocations, non-point source requirements, and local water quality conditions. If the revision is made, Section I subsections 1-3 can be removed.

Section 3

(A) Because the NCGP relates to an NPDES permit, the permittee is ultimately responsible for enforcing the terms and conditions of the credits. The permittee will be responsible for

operation, maintenance, record keeping, and reporting requirements necessary to evaluate credit efficacy and to prevent localized nutrient hotspots. This paragraph acknowledges that the permittee cannot rely on the credits if the NCGP fails. In such a case, the permittee would be considered in violation of its permit or authorization.

Therefore, any such failure is, in effect, a failure to meet the terms and conditions of the permit. Secondly, ADEQ is bound by a Memorandum of Agreement with the USEPA to take timely and appropriate enforcement actions on any violation of the Clean Water Act, without preconditions. Lastly, inspections to determine compliance with NPDES permits are the sole purview of the ADEQ. ADEQ may request technical assistance from the ANRC, as appropriate.

(B) The reference to “enforcement discretion” is inappropriate in a regulation and should be removed. ADEQ recommends revising the existing language to the following text:

If the NCGP fails, for whatever reason, the permittee shall:

- (1) Promptly notify the Department verbally or by electronic means within 24 hours and file a written report within 5 days clearly identifying the facts leading to the failure, and
- (2) Submit a permit modification to remove the NCGP credits and a compliance plan and schedule clearly demonstrating steps that will be taken to meet the applicable water quality standards at the soonest practicable time.

(C) ADEQ recommends the inclusion of language to clarify that nothing in this regulation in any way impinges ADEQ’s authority to conduct compliance or complaint inspections as authorized by its statutory and regulatory authority. For a NCGP involving non-point sources, ADEQ will request assistance from ANRC in conducting periodic inspections, responding to complaints, reviewing reports, and other actions necessary to monitor compliance with the applicable permit. ADEQ and ANRC may establish an interagency agreement for these purposes.

(D) ADEQ recommends the inclusion of language affirming the agency’s authority to collect fees consistent with Arkansas Code Title 8-4-232(E). In addition, in order to fully administer this regulation, ADEQ shall establish a schedule of user fees in accordance with Arkansas Code Title 8-4-232(E).