

May 2, 2018

Arkansas Pollution Control and Ecology Commission
101 East Capitol Avenue, Suite 205
Little Rock, AR 72201

SUBMITTED ELECTRONICALLY TO: reg-comment@adeq.state.ar.us.

RE: APCEC Docket No. 18-001-R, NANTRAG’s Proposed Regulation 37

Dear Commissioners:

The Arkansas Public Policy Panel finds the proposed Regulation 37 as drafted and placed within the current regulatory scheme lacks sufficient details and safeguards to be protective of water quality, ensure real and verifiable nutrient reductions, and provide sufficient accountability for trades to occur and long-term success. Regulation 37 should not be approved as drafted.

Section 2

(A)(2): If the watershed does not include a reservoir that is a water supply source for an existing public water system can the offset be generated anywhere in the state or beyond?

(A)(5):

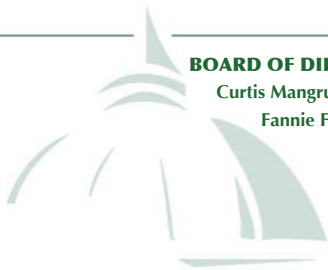
- “Unacceptable localized adverse effect on water quality” is a subjective determination that creates uncertainty in the program. What effects on water quality will be deemed “unacceptable?”
- What type of evidence will demonstrate the use of the nutrient credits, as an offset will not result in unacceptable localized effect on water quality?

(A)(6): How will a net increase in pollutant loading in the watershed be measured?

(A)(7): How is baseline defined? Arkansas should adopt numeric nutrient criteria to set a baseline for nutrient pollution.

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(A)(8): Without any guidance from regulators, how would nonpoint source projects ensure acceptable implementation and verification methods? If the Director and/or ANRC have not developed a standard of review, then rulemaking should be postponed until such standards have been agreed upon. If the Director and/or ANRC have a standard of review it should be part of this regulation or supplemental and readily accessible.

(A)(9): “Significant adverse impact” is subjective and should be defined. What “evidence” would be considered sufficient to meet this requirement?

(A)(10): An “applicant’s knowledge and belief” is a reliable attestation only if the applicant has some specialized knowledge or training relevant to the subject in question, and even then the attestation should be informed by clear rules. Both point and nonpoint source applicants should provide a certification from a professional engineer with relevant training and experience in the subject.

(B): Will the comments or recommendations from the Arkansas Natural Resource Commission be binding? If not what weight will they be given?

(C): The notice, comment, and hearing requirements under Regulation No. 8, Reg. 8.207-09 must be applied here as with any other NPDES permit application. The proposed regulation provides for public notice of the application under Reg. 8.205, but does not provide for public notice and comment on the Director’s draft decision.

(E): Why is there a five-year term for credits? What factors are or should be considered when determining a credit term?

(F): The Director’s decision should be based on the complete application and take into consideration public health, environmental health and designated uses in a clear manner than can be challenged.

- (1) It is not clear where the Director will get the information required for consideration in this section. The application should include the evidence and calculations used to derive the credit quantity and credit ratios resulting from the credit-generating project, including an explanation of methods used to address uncertainty factors. There is no requirement that the Director make a decision on a trading ratio or that there be a minimum-trading ratio. There should be a minimum ratio of 2 credits for 1 offset to provide a margin of safety.

(G): The Director’s decision should set forth the basis for compliance with federal “reasonable potential” analysis and anti-degradation regulations.

(I): As with the lack of specificity in the application process, it is unclear what baseline is applicable and where the measured reduction must occur. Moreover, there is no formula for converting nonpoint source reductions to the NPDES permit limit.

Section 3

(B): All enforcement decisions must be in compliance with the Clean Water Act. Other remedies, such as breach of contract are available to protect the permittee.

(C): ADEQ’s authority to determine compliance with a non-point source nutrient credit-generating project should not be limited in any manner.

The few water quality trading programs that have been successful include systems to maintain transparency around the methods they employ, ensure real and verifiable pollutant reductions, track and review projects and credits throughout their lifecycle, rely on sound science, and establish clear lines of responsibility. For a nutrient trading market to exist and reduce instream nutrient loads Arkansas must first establish and implement water quality standards that are protective of water quality and designated uses such as numeric nutrient criteria. Proposed Regulation 37 provides a framework for an application process but *lacks* the details, consideration and supporting regulations to establish a successful nutrient-trading program that would benefit water resources for Arkansans.

Sincerely,

/s/

Anna Weeks, Environmental Policy Associate