

Comment on APC&EC Regulation 37 submitted by the Arkansas Natural Resources Commission

The Arkansas Natural Resources Commission is supportive of the concept of nutrient credit trading and believes nutrient credit trading is an important tool that is needed for the State of Arkansas. ANRC provides the following comments on the “as amended” draft Regulation 37.

General Comments

ANRC Comment 1 – History of the Arkansas Nonpoint Source Program

In January of 1990, in a letter to the U.S. Environmental Protection Agency (EPA), Gov. Bill Clinton designated the Arkansas Soil and Water Conservation Commission (ASWCC) as the lead agency for agriculture nonpoint source pollution management in the state. This designation was for a period of three years. Prior to the governor’s designation, the Arkansas Department of Pollution Control and Ecology (ADPC&E) was beginning to develop a Nonpoint Source (NPS) Management Program. Due to constraints in the capability of auditing local in-kind funds and generating the matching funds required to secure Clean Water Act 319 funding, the ADPC&E asked ASWCC (what is now the Arkansas Natural Resources Commission) to be designated the lead agency for agricultural NPS management. Subsequently, after the governor’s designation, ASWCC and EPA developed a work plan for grant funding under Section 319 of the Clean Water Act. This grant allowed ASWCC to prepare and implement an agricultural NPS Management Program. In 1993, the state re-evaluated the NPS Management Program. Gov. Jim Guy Tucker extended ASWCC’s responsibility for agriculture NPS Management another three years. In 1996, Tucker ultimately designated Arkansas Natural Resources Commission, ASWCC’s successor, as the lead agency for agriculture NPS Management in the state after evaluation and determining substantial progress in implementing the NPS Management Program had been made. In September 1996, the Arkansas Natural Resources Commission (ANRC) submitted a holistic draft of a NPS Management Program to EPA. Upon concurrence with the EPA, Gov. Mike Huckabee gave ANRC the responsibility of coordinating the NPS Management Program for all categories of NPS pollution. ANRC developed a holistic NPS Management Program, using the same management process as used with agriculture: a non-regulatory voluntary approach.

As the lead agency for Nonpoint Source Management in the State of Arkansas, ANRC has developed the Arkansas 2018-2023 Nonpoint Source Management Plan. The plan’s purpose is to provide an overarching guide to develop, coordinate and implement Watershed Management Plans, programs and projects, to reduce, manage, control or abate NPS pollution. This NPS Plan provides a focal point for public agencies, nonprofit organizations, interest groups and citizens to discuss and address NPS pollution together. The plan provides the basis (a decision support matrix) that allows stakeholders to periodically evaluate, add to and rank risk factors influencing the potential outcome of alternative NPS management and investment strategies.

ANRC Comment 2 – State of Arkansas Nutrient Reduction Strategy

The Arkansas Natural Resources Commission is the State Agency tasked with serving on the National Hypoxia Task Force and with developing the Nutrient Reduction Strategy for the State of Arkansas. The Arkansas Nutrient Reduction Strategy (ANRS) is a strategic framework that outlines opportunities, both regulatory and voluntary, which are available to improve overall aquatic health and viability in Arkansas waters for recreational, economic, environmental, and human health benefits specifically related to nutrients.

ANRC Comment 3 – Nutrient Trading Enacting Legislation – Act 335 of 2015

Act 335 of 2015 specifically recognized ANRC's role in Nutrient Trading Programs. Act 335 of 2015 authorizes the Nutrient Water Quality Trading Advisory Panel to "Advise the department and the **Arkansas Natural Resources Commission** regarding the desirability, design, and operation of nutrient water quality trading programs; and advise the Arkansas Pollution Control and Ecology Commission and **the Arkansas Natural Resources Commission** regarding the promulgation of regulations involving nutrient water quality trading programs." (A.C.A. 8-4-233 (g)).

ANRC Comment 4 – ANRC's Existing Nonpoint Source Program

The Arkansas Natural Resources Commission (ANRC) is the lead agency responsible for the Arkansas Nonpoint Source Pollution Management Program. The Arkansas Natural Resources Commission (ANRC) receives funding through an Assistance Agreement from the Environmental Protection Agency (EPA) for the purpose of enacting and maintaining the Nonpoint Source Pollution Management Program (NPS Program). Funds are received from EPA yearly, and the EPA allocation varies but is generally between \$2 to \$3 million. The NPS Program and associated staff are funded through the Assistance Agreement with the exception of one staff position. ANRC maintains a highly trained staff of environmental professionals whose expertise is in review and inspection of non-point source practices. In addition based on ANRC's long history working on non-point source projects in the State, we maintain an excellent working relationship with all entities doing non-point source work including but not limited to the agricultural community.

ANRC Comment 5 –ANRC Non-point Source Projects Funded and Completed

Since 2003, ANRC staff has overseen over 300 non-point source projects within the State with a total cost of over \$56 Million.

Specific Comments

ANRC Comment 6 – Draft Regulation 37 – Section 3(B)

ANRC supports this section and the requirement that potential projects be sent to ANRC for review. As noted in ANRC Comments 1-5 above, we have the established program and personnel to accomplish this review with existing staff that are experts in the planning, execution, review and inspection of nonpoint pollution management practices. ANRC believes that this review can be initially done without the need

for additional funding or staffing but may need to reevaluate funding and staffing based on the volume of applications submitted.

ANRC Comment 7 – Draft Regulation 37 – Section 3(J)

ANRC has concerns that governmental grants or other third party funding may be utilized to generate nutrient credits. This practice may be in violation of State and Federal law, policy or guidelines. ANRC supports the language in the section but requests that the following language be added. “Any person who proposes a Nutrient Credit Generating Project that will be fully or partially completed using State or Federal funding must notify the governmental funding entity of their intent to utilize those funds on a Nutrient Credit Generating Project and must provide proof of that notification in the application.”

ANRC Comment 8 – Draft Regulation 37

The first Draft Regulation 37, which was sent out for comment, included the following condition: “All inspections necessary to determine compliance with a non-point source nutrient credit-generating project that cannot be verified through the approved Nutrient Credit Generating Project application will be performed by the Arkansas Natural Resources Commission.” The Northwest Arkansas Nutrient Trading Research and Advisory Group (NANTRAG) has removed this condition in the current draft. This condition was added by the legislative advisory panel established by Act 335 of 2015 and no reason has been given for why the recommendation of the Nutrient Water Quality Trading Advisory Panel should be ignored. Per comments 1-5, ANRC has the expertise, staffing and willingness to provide this inspection. ANRC is the designated agency within the State of Arkansas for non-point source pollution. ANRC currently performs this function for non-point source projects across the State. ANRC administers the Federal Non-point Source management program within the State of Arkansas for the United States Environmental Protection Agency. ANRC is supportive of reinsertion of this deleted section in the final adopted rulemaking.

ANRC Comment 9 – Draft Regulation 37

Prior to submission of the original Draft Regulation 37 to the Arkansas Pollution Control and Ecology Commission for initiation of rulemaking, Act 335 of 2017 required NANTRAG to submit the draft rule to the Nutrient Water Quality Trading Advisory Panel for review and potential approval. NANTRAG submitted the rule for review and the Nutrient Water Quality Trading Advisory Panel recommended approval of the draft Regulation subject to some revisions which NANTRAG agreed to make. NANTRAG has now modified the draft regulation in the middle of the rulemaking process and specifically removed provisions added by majority vote of the Panel. The Panel was selected specifically for their input and expertise and has not been given the opportunity to formally review and comment on the current draft version of the rulemaking. The Arkansas Pollution Control and Ecology Commission has the authority by Act 335 of 2017 to alter the proposed regulation, but ANRC requests that the altered draft regulation be submitted to the Panel for review and comment consistent with the intent of Act 335 of 2017.

