

*“Protecting the public health and natural resources of the
White River watershed through advocacy, education, and research”*

WHITE RIVER
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VIA EMAIL

Raeanne Gardner

Arkansas Department of Environmental Quality

5301 Northshore Drive

North Little Rock, AR 72118

Reg-comment@adeq.state.ar.us

RE: White River Waterkeeper Comments on Arkansas Pollution Control and Ecology Commission, Regulation No. 37, Arkansas Nutrient Water Quality Trading Regulation, Docket #18-001-R – Supplemental Comments

Dear Ms. Gardner:

The following comments are submitted on behalf of White River Waterkeeper regarding the revised draft of Regulation No. 37, dated 14 Septemeber 2018. While it is acknowledged that response to comments for the initial version of the draft regulation are not yet available, it is worth reiterating that WRW’s comments on the initial draft¹ remain unaddressed in the revised draft. As the proposed regulation remains inconsistent with the Clean Water Act, we maintain that the approval of this regulation will not only place an unnecessary burden on Arkansas Department of Environmental Quality (hereinafter, the Department) but also risks jeopardizing the department’s delegated authority to administer the NPDES program from EPA.

To date, the Department continues to ignore the narrative nutrient criteria² when making attainment decisions under Section 303(d) of the Act.³ Lacking numeric nutrient criteria or baseline criteria for determining thresholds of algal density impacting designated water quality uses, the Department is not capable of ensuring the “credit-generating project will result in a reduction of nutrient discharges below the existing baseline requirements,”⁴ despite any well-intentioned efforts. Additionally, without an Antidegradation Implementation Plan, the Department has no way of ensuring high-quality waters are protected and maintained. Approving nutrient credit generating projects for use as offsets without the necessary safeguards, including

¹ 2 May 2018, White River Waterkeeper comments on APC&EC Draft Regulation No. 37, Docket #18-001-R, <https://www.adeq.state.ar.us/regs/drafts/3rdParty/reg37/18-001-R/comments/20180502-white-river-waterkeeper.pdf>

² APC&EC Regulation 2.509

³ 10 September 2018, White River Waterkeeper comments on the 2018 draft 303(d) list of impaired waters, <https://www.adeq.state.ar.us/water/planning/integrated/303d/pdfs/2018/public-comments/Jessie%20Green%20-%20WRW.pdf>

⁴ Revised Draft Reg. 37 Section 3(A)(5)



an Analysis of Alternatives (antidegradation requirements), would be short-sighted, irresponsible, and put the integrity of our state's waters at risk.

The revised draft Regulation No. 37 requires that public notice shall be published “in the watershed where the credit will be generated.”⁵ **Public notice should also be included in a newspaper of general circulation in the county of the permit holder proposing to circumvent appropriate discharge limits through the use of credit-generating projects as offsets.** Without such would be denying the communities affected by increased pollution the chance to engage in meaningful public comments – as the receiving streams of discharges utilizing credits to circumvent water quality-based permit limits are those likely to degrade further.

Although a minimum credit ratio of 1.5:1 has been added to the revised regulation for projects generating credits by non-point source activity, the proposed ratio remains insufficient for ensuring overall nutrient loading is reduced in light of uncertainties surrounding non-point source project success. A credit ratio of at least 3:1 should be required and would be consistent with more protective nutrient trading programs across the country.^{6,7}

As the Department shall maintain the authority to approve credit generating projects for use as offsets, we support the removal of language stating that non-point source projects will be verified by Arkansas Natural Resources Commission (ANRC). Department personnel should certainly seek training and guidance from ANRC and outside sources to properly inspect projects before and after projects are completed; however, to deny Department personnel from carrying out inspections would further convolute the permitting process.

For all other applicable comments to this revised regulation, see WRW's 2 May 2018 comments on draft Regulation No. 37.

Respectfully submitted,



Jessie J. Green
Executive Director & Waterkeeper

⁵ Revised Draft Reg. 37 Section 3(H)

⁶ Vogel, Jennifer and Leon Szeptycki. 2012. A survey of trading ratios used for generation of credits in water quality trading programs. Environmental Law and Conservation Clinic. University of Virginia School of Law.

[http://www.deq.virginia.gov/Portals/0/DEQ/Water/PollutionDischargeElimination/UVA_Trading Ratios_Study.pdf](http://www.deq.virginia.gov/Portals/0/DEQ/Water/PollutionDischargeElimination/UVA_Trading_Ratios_Study.pdf). U.S. EPA. Water Quality Trading Policy, III(G)(4)

⁷ Based on EPA input, Pennsylvania changed its uncertainty ratio involving nonpoint sources to 3:1. Government Accountability Office Report to the Honorable Sheldon Whitehouse, US Senate, Water Pollution: Some States Have Trading Programs to Help Address Nutrient Pollution, but Use Has Been Limited, October 2017, at 30.

