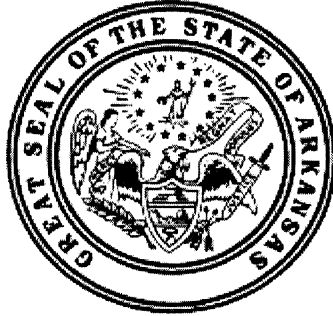


EXHIBIT A

REDLINE OF THE REVISED VERSION OF PROPOSED APC&EC REGULATION NO. 37

ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION



REGULATION NO. 37

ARKANSAS NUTRIENT WATER QUALITY TRADING REGULATIONS

REVISED INITIAL DRAFT

Submitted to the Arkansas Pollution Control and Ecology Commission on September 14, 2018

DRAFT

ARKANSAS NUTRIENT WATER QUALITY

TRADING REGULATION

SECTION 1. GENERAL PROVISIONS.

(A) This regulation shall be known and shall be cited as “The Arkansas Nutrient Water Quality Trading Regulation.

(B) Definitions:

(1) “Department” or “ADEQ” means the Arkansas Department of Environmental Quality or its successor, unless otherwise specified.

(2) “Director” means the Director of the Arkansas Department of Environmental Quality or the Director’s designee, unless otherwise specified.

(C) This regulation is adopted under the authority of Act 335 of 2015, codified at Ark. Code Ann. §§ 8-4-232 and 8-4-233.

(D) Pursuant to Ark. Code Ann. § 8-4-232(E):

(1) the Department has the responsibility to develop a schedule of user fees by calculating the reasonable costs to the Department of implementing and enforcing the nutrient water quality trading, credit, and offset program; and

(2) the Commission may establish a schedule of user fees to be collected by the Department from persons or entities utilizing credits and offsets from the Nutrient Credit Generating Projects in order to comply with the National Pollutant Discharge Elimination System permit limits.

(E) Nothing in this regulation shall be construed to limit or impinge any requirement of any other State or Federal environmental law or regulation.

SECTION 2. AUTHORITY TO APPROVE NUTRIENT CREDIT GENERATING PROJECTS FOR USE AS OFFSETS.

The Director of the Arkansas Department of Environmental Quality shall have authority to approve Nutrient Credit Generating Projects as sources of nutrient credits that may be used by National Pollutant Discharge Elimination System, permit holders to offset their nutrient discharges when determining compliance with water quality-based permit limits.

SECTION 32. APPLICATIONS FOR APPROVAL OF NUTRIENT CREDIT GENERATING PROJECTS.

(A) Any person seeking approval of Nutrient Credit Generating Project shall submit an application for approval to the Director. The application shall include:

- (1) A description of the location, including the watershed, where the credit-generating project will be implemented;
- (2) A description of the watershed, including but not limited to a geographic boundary, in which the credits are proposed for use as offsets. ~~If the watershed includes a reservoir that is the water supply source for an existing public water system as designated by the Arkansas Department of Health, the credit-generating project must be located in the watershed of the reservoir;~~
- (3) A list of the NPDES permitted point sources that may use the credits as offsets;
- (4) The time period in which the credit-generating project may be used as an offset;
- ~~(5)(1) Evidence that use of the nutrient credits as an offset will not result in an unacceptable localized adverse effect on water quality;~~

~~(6)(1) Evidence that use of the nutrient credits will not result in a net increase in pollutant loading in the relevant watershed;~~

(5) Evidence that the credit-generating project will result in a reduction of nutrient discharges below the existing baseline requirements;

~~(7)(6) Evidence and calculations used to derive the credit quantity and credit ratios resulting from the crediting-generating project, including an explanation of the methods used to address uncertainty factors;~~

~~(8)(7) A description of the methods by which the implementation, and performance, and operation and maintenance of the credit-generating project will be verified and documented, and the identity of the person or entity responsible for documenting the verification; and~~

~~(9)(1) Evidence that use of the nutrient credits as an offset will not have a significant adverse impact upon a reservoir that is a drinking water supply source for an existing public water supply system as designated by the Arkansas Department of Health;~~

~~(10)(8) A certification, signed by the applicant, attesting that the application is true and accurate to the best of the applicant's knowledge and belief.~~

(B) If an application involves nonpoint source nutrient credit-generating projects or activities, the proposed Nutrient Credit Generating Project shall be submitted to the Arkansas Natural Resources Commission for review prior to submitting the application to the Director of the Arkansas Department of Environmental Quality. In such cases, the application to the Director shall include a written statement from the Arkansas Natural Resources Commission confirming their review of the project and reporting any comments or recommendations resulting from that review.

1 (C) Applications submitted to the Director of the Arkansas Department of Environmental
2 Quality shall comply with the public notice procedures and requirements ~~for an individual~~
3 ~~permit~~ under Regulation No. 8, ~~Reg. 8.205.~~ Applications shall also be publicly noticed
4 ~~through electronic notice and publication on the Arkansas Department of Environmental~~
5 ~~Quality's website.~~

6 (D) After review of the application the Director may approve the Nutrient Credit Generating
7 Project as a source of nutrient credits that may be used as offsets as requested, disapprove
8 the Nutrient Credit Generating Project as a source of nutrient credits, or approve the Nutrient
9 Credit Generating Project as a source of nutrient credits subject to specific conditions or
10 limitations.

11 (E) Unless expressly granted for a shorter or longer term, the approval of the Nutrient Credit
12 Generating Project as a source of nutrient credits shall be limited to a term of five years from
13 the date of the Director's decision, but may be renewed or extended upon application in
14 accordance with procedures in this section.

15 (F) In deciding whether to approve an application for approval of a Nutrient Credit Generating
16 Project, the Director shall consider, among all other relevant factors:

17 (1) The evidence provided in the application to support the factors identified in Section
18 3(A);

19 ~~(4)~~(2) The calculation used to derive the credit quantity and credit ratios resulting from
20 the credit-generating project, including an explanation of methods used to address
21 uncertainty factors;

22 ~~(2)~~(3) The methods for verifying the reliability of the implementation, ~~and~~ performance,
23 ~~and operation and maintenance~~ of the credit-generating project ; and

1 ~~(3)(4)~~ The experience and capacity of the persons who will be responsible for
2 implementing and verifying the credit-generating project.

3 (G) The Director's decision approving a Nutrient Credit Generating Project shall ~~include written~~
4 ~~findings regarding the factors identified in Section 3(A) and~~ specify the conditions and
5 limitations that will apply to any use of the nutrient credits generated. At a minimum, the
6 conditions applicable to an Nutrient Credit Generating Project shall specify:

7 (1) The watershed in which the credits generated by the Nutrient Credit Generating
8 Project may be used as an offset;

9 (2) The time period in which the credits generated by the Nutrient Credit Generating
10 Project may be used as an offset; ~~and~~

11 ~~(3)~~ The method by which implementation, ~~and~~ performance, ~~and operation and~~
12 ~~maintenance~~ of the credit-generating project will be verified, and the identity of the
13 person or entity responsible for documenting the verification; ~~and~~

14 ~~(3)(4)~~ For projects generating credits by non-point source activity, a minimum credit
15 ratio of 1.5:1 (projected nutrient reductions or savings to nutrient credits for the
16 project) shall be applied when calculating the credit quantity.

17 (H) Prior to taking final action on a request for approval of a Nutrient Credit Generating Project,
18 the Director shall cause public notice to be published ~~in a newspaper of general circulation~~
19 ~~within~~ the watershed where the credit will be generated ~~in a newspaper of general circulation~~
20 ~~and on the Arkansas Department of Environmental Quality's website~~. The public shall be
21 allowed a period of not less than thirty (30) calendar days in which to submit written
22 comments. The decision to grant or deny approval of a Nutrient Credit Generating Project
23 shall include a written response to all issues raised in comments submitted during the public

comment period. A copy of the final decision granting or denying certification of a Nutrient Credit Generating Project shall be sent to the applicant and each person who submitted written comments within the public comment period. The Director's decision to grant or deny approval of a Nutrient Credit Generating Project shall be subject to the same review and appeal provisions as a final permitting decision under Regulation No. 8, Reg. 8.603.

(I) No Nutrient Credit Generating Project shall be approved by the Director unless the project, activity, or discharge reduction involved in the project will reduce the nutrient load below the applicable baseline requirements.

(1) For projects generating credits by point source pollution reduction, the baseline requirements shall be the National Pollutant Discharge Elimination System permit limits for the point source in question or the wasteload allocation in any applicable Total Maximum Daily Load, whichever is more stringent.

(2) For projects generating credits by non-point source activity, the baseline requirements shall be the regulatory requirements applicable to the location where the project will generate the credits.

(3) If the baseline requirements applicable to a Nutrient Credit Generating Project change after the date the Project is approved, the amount of offset allowed from credits generated by the Nutrient Credit Generating Project shall be reduced to conform to the baseline requirements applicable at the time the nutrient credit is used.

(J) The fact that a non-point source project or a point source pollution reduction may be supported in part or entirely by government grants or other third-party financial funding shall not prevent the project, activity, or pollution reduction from being eligible for approval as a

Nutrient Credit Generating Project, where such use is allowed by the granting agency or third-party entity.

SECTION 43. RESPONSIBILITY FOR PERMIT COMPLIANCE.

(A) Credits generated by an approved Nutrient Credit Generating Project may be used as offsets only when expressly authorized by the National Pollutant Discharge Elimination System permit in question, or a modification of the that-permit. In addition to all other permit application or permit modification requirements, the application must include:

(1) Evidence that the nutrient credits used under the permit modification are approved for use in the watershed into which the National Pollutant Discharge Elimination System permittee discharges;

(2) Evidence that use of the nutrient credits as an offset will not result in an unacceptable localized adverse effect on water quality;

(32) Evidence that use of the nutrient credits will not result in a net increase in pollutant loading in the relevant watershed; and

(43) Evidence that use of the nutrient credits as an offset will not have a significant adverse impact upon a reservoir that is a drinking water supply source for an existing public water supply system as designated by the Arkansas Department of Health.

(B) A National Pollutant Discharge Elimination System permittee that discharges into a watershed identified on Appendix A as an existing drinking water reservoir watershed designated in the Arkansas Department of Health GIS Database shall not be allowed to use

1 credits that have been generated outside of the watershed of the reservoir as offsets against its
2 permit limits for nutrients.

3 ~~(A)(C)~~ A permittee relying on nutrient credits to demonstrate compliance with its National
4 Pollutant Discharge Elimination System, permit limits retains full responsibility for
5 achieving and maintaining permit compliance. If a Nutrient Credit Generating Project fails
6 to meet the terms and conditions of its approval as a source of nutrient credits, National
7 Pollutant Discharge Elimination System permit holders may not rely on credits generated by
8 the project regardless of the fact that failure of the project may have been attributable to
9 circumstances beyond the reasonable control of the permit holder.

10 ~~The Arkansas Department of Environmental Quality may exercise enforcement discretion to~~
11 ~~forego formal enforcement or reduce formal enforcement sanctions with respect to permit~~
12 ~~violations that arise from the complete or partial failure to implement a Nutrient Credit~~
13 ~~Generating Project in accordance with the terms and conditions of its approval if:~~

14 ~~The permittee followed the monitoring requirements approved as part of the Nutrient Credit~~
15 ~~Generating Project;~~

16 ~~The permittee promptly notified the Arkansas Department of Environmental Quality of any~~
17 ~~information suggesting that the Nutrient Credit Generating Project was not implemented in~~
18 ~~accordance with the certification;~~

19 ~~The failure to implement the Nutrient Credit Generating Project in accordance with its~~
20 ~~approval was not attributable to negligence or willful misconduct on the part of the permittee;~~
21 ~~and~~

22 ~~The permittee took prompt action to regain permit compliance after learning of the failure to~~
23 ~~implement the Nutrient Credit Generating Project in accordance with its certification.~~

~~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.~~
SECTION 5: EFFECTIVE DATE.

This regulation is effective ten (10) days after filing with the Secretary of State, the State Library and the Bureau of Legislative Research.