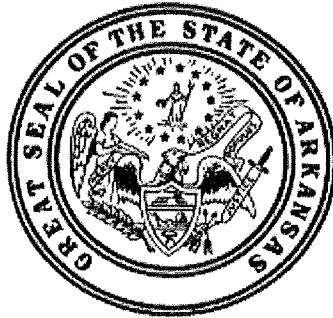


EXHIBIT B

**BLACKLINE 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

1 **DRAFT**

2 **ARKANSAS NUTRIENT WATER QUALITY**

3 **TRADING REGULATION**

4
5 **SECTION 1. GENERAL PROVISIONS.**

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

8 (B) Definitions:

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

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

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

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

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

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

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

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

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

9 **SECTION 3. APPLICATIONS FOR APPROVAL OF NUTRIENT CREDIT**
10 **GENERATING PROJECTS.**

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

- 13 (1) A description of the location, including the watershed, where the credit-generating
14 project will be implemented;
- 15 (2) A description of the watershed, including but not limited to a geographic boundary, in
16 which the credits are proposed for use as offsets;
- 17 (3) A list of the NPDES permitted point sources that may use the credits as offsets;
- 18 (4) The time period in which the credit-generating project may be used as an offset;
- 19 (5) Evidence that the credit-generating project will result in a reduction of nutrient
20 discharges below the existing baseline requirements;
- 21 (6) Evidence and calculations used to derive the credit quantity and credit ratios resulting
22 from the crediting-generating project, including an explanation of the methods used to
23 address uncertainty factors;

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

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

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

14 (C) Applications submitted to the Director of the Arkansas Department of Environmental
15 Quality shall comply with the public notice procedures and requirements for an individual
16 permit under Regulation No. 8. Applications shall also be publicly noticed through
17 electronic notice and publication on the Arkansas Department of Environmental Quality's
18 website.

19 (D) After review of the application the Director may approve the Nutrient Credit Generating
20 Project as a source of nutrient credits that may be used as offsets as requested, disapprove
21 the Nutrient Credit Generating Project as a source of nutrient credits, or approve the Nutrient
22 Credit Generating Project as a source of nutrient credits subject to specific conditions or
23 limitations.

- 1 (E) Unless expressly granted for a shorter or longer term, the approval of the Nutrient Credit
2 Generating Project as a source of nutrient credits shall be limited to a term of five years from
3 the date of the Director's decision, but may be renewed or extended upon application in
4 accordance with procedures in this section.
- 5 (F) In deciding whether to approve an application for approval of a Nutrient Credit Generating
6 Project, the Director shall consider, among all other relevant factors:
- 7 (1) The evidence provided in the application to support the factors identified in Section
8 3(A);
- 9 (2) The calculation used to derive the credit quantity and credit ratios resulting from the
10 credit-generating project, including an explanation of methods used to address
11 uncertainty factors;
- 12 (3) The methods for verifying the reliability of the implementation, performance, and
13 operation and maintenance of the credit-generating project ; and
- 14 (4) The experience and capacity of the persons who will be responsible for
15 implementing and verifying the credit-generating project .
- 16 (G) The Director's decision approving a Nutrient Credit Generating Project shall include written
17 findings regarding the factors identified in Section 3(A) and specify the conditions and
18 limitations that will apply to any use of the nutrient credits generated. At a minimum, the
19 conditions applicable to an Nutrient Credit Generating Project shall specify:
- 20 (1) The watershed in which the credits generated by the Nutrient Credit Generating
21 Project may be used as an offset;
- 22 (2) The time period in which the credits generated by the Nutrient Credit Generating
23 Project may be used as an offset;

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

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

7 (H) Prior to taking final action on a request for approval of a Nutrient Credit Generating Project,
8 the Director shall cause public notice to be published within the watershed where the credit
9 will be generated in a newspaper of general circulation and on the Arkansas Department of
10 Environmental Quality's website. The public shall be allowed a period of not less than thirty
11 (30) calendar days in which to submit written comments. The decision to grant or deny
12 approval of a Nutrient Credit Generating Project shall include a written response to all issues
13 raised in comments submitted during the public comment period. A copy of the final
14 decision granting or denying certification of a Nutrient Credit Generating Project shall be
15 sent to the applicant and each person who submitted written comments within the public
16 comment period. The Director's decision to grant or deny approval of a Nutrient Credit
17 Generating Project shall be subject to the same review and appeal provisions as a final
18 permitting decision under Regulation No. 8.

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

22 (1) For projects generating credits by point source pollution reduction, the baseline
23 requirements shall be the National Pollutant Discharge Elimination System permit

1 limits for the point source in question or the wasteload allocation in any applicable
2 Total Maximum Daily Load, whichever is more stringent.

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

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

10 (J) The fact that a non-point source project or a point source pollution reduction may be
11 supported in part or entirely by government grants or other third-party financial funding shall
12 not prevent the project, activity, or pollution reduction from being eligible for approval as a
13 Nutrient Credit Generating Project, where such use is allowed by the granting agency or
14 third-party entity.

15 **SECTION 4. RESPONSIBILITY FOR PERMIT COMPLIANCE.**

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

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

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

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

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

9 (B) A National Pollutant Discharge Elimination System permittee that discharges into a
10 watershed identified on Appendix A as an existing drinking water reservoir watershed
11 designated in the Arkansas Department of Health GIS Database shall not be allowed to use
12 credits that have been generated outside of the watershed of the reservoir as offsets against its
13 permit limits for nutrients.

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

21 **SECTION 5: EFFECTIVE DATE.**

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