

BEFORE THE ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION

IN THE MATTER OF AMENDMENTS TO )  
REGULATION NO. 2, REGULATION )  
ESTABLISHING WATER QUALITY ) DOCKET NO. 06-010-R  
STANDARDS FOR SURFACE WATERS )  
OF THE STATE OF ARKANSAS )

SECOND AMENDED PETITION TO INITIATE RULEMAKING FOR REGULATION NO. 2,  
REGULATION ESTABLISHING WATER QUALITY STANDARDS FOR  
SURFACE WATERS OF THE STATE OF ARKANSAS

The Arkansas Department of Environmental Quality (hereinafter “Department”), for its Second Amended Petition to Initiate Rulemaking to Amend Regulation No. 2, states:

1. The Department submits this amended petition to initiate rulemaking to include changes that were made to the proposed rule after the deadline for submission of the original petition. These changes are intended to simplify and clarify the proposed rule for removing a Extraordinary Resource Water (“ERW”), Ecologically Sensitive Waterbody (“ESW”), or Natural and Scenic Waterway (“NSW”) designated use for the purpose of a constructing a reservoir for a domestic water supply. *Proposed Reg. 2.310*. The proposed regulation, reflecting these changes, is attached as Exhibit “K” and is hereby incorporated by reference.

2. The changes to the proposed rule included in this Second Amended Petition are as follows:

A. The proposed Reg. 2.310(A)(3) has been removed. The petitioner must no longer demonstrate that the designated use is not an existing use to remove an ERW, ESW, or NSW designation for the purpose of constructing a reservoir to provide a domestic water supply. The reference to Appendix E has also been removed from proposed Reg. 2.310(A).

- B. Proposed Reg. 2.310 has also been amended to replace the word “solely” with “primarily” in 2.310(A)(1) and insert the word “feasible” before “alternative” in 2.310(A)(2). Following these changes, the petitioner must demonstrate that: (1) the reservoir on the free flowing stream will be used primarily for a domestic water supply; and (2) there is no feasible alternative water supply available.
- C. In proposed Reg. 2.310(B)(3), the word “solely” has been replaced with “primarily.”
- D. Proposed Reg. 2.310(B)(5) has been amended to delete the phrase, “for determining whether the designated use is an existing use.”
- E. Proposed Reg. 2.310(B)(6) has been amended to replace the phrase, “is an existing use,” with “should be maintained.” A provision was added to allow the petitioner to proceed under that regulation if the Director has not provided a recommendation within 180 days of requesting the recommendation.
- F. Proposed Reg. 2.310(C) has been deleted.
- G. Proposed Reg. 2.310(D) becomes 2.310(C) and the word “feasible” is inserted to modify “alternative water supply” throughout the paragraph.
- H. Proposed Reg. 2.310(E) becomes 2.310(D) and the word “solely” is replaced with “primarily” throughout the paragraph.
- I. The title of proposed Appendix E has been changed to “Criteria to be Considered in Determining Whether the Designated Use of Extraordinary Resource Water, Ecologically Sensitive Waterbody, or Natural and Scenic Waterway Should be Maintained.”

- J. In the opening paragraph, the first sentence is amended to replace the phrase, “is an existing use,” with the phrase, “should be maintained.”
3. On September 19, 2006, the Department filed an Amended Petition to Initiate Rulemaking that set forth the following changes:
- A. The proposed Reg. 2.303 is amended to no longer require a Use Attainability Analysis in order to remove the designated use of Extraordinary Resource Water (“ERW”), Ecologically Sensitive Waterbody (“ESW”), or Natural and Scenic Waterway (“NSW”). The test for allowing a designated use to be removed to construct a drinking water reservoir has been moved to new Reg. 2.310(A), the section that sets forth the procedure for removing the designated use.
  - B. In the original petition to initiate rulemaking and proposed draft regulation, the definition of “Existing Use,” found in Reg. 2.106, was changed to directly correspond to the definition of “existing use” found in 40 C.F.R. §131.3(e). This change has been removed and the definition of “Existing Use” will remain as currently found in Regulation No. 2.
4. The Clean Water Act requires that States review their water quality standards every three years. The Department began the first phase of the current Triennial Review in March 2006. As part of the Triennial Review, the Commission directed the Department to address issues related to Extraordinary Resource Waters that have been raised at different times during the last twenty years.
5. The first phase of the Triennial Review began with seven public meetings held across the state. Participants from the public meetings, along with representatives of other

interested groups, were invited to participate in workgroup meetings with the Department's technical staff. These meetings were held in Little Rock during May – August 2006 and averaged about 50 participants. A technical subcommittee of water quality experts was formed by workgroup members to discuss specific scientific issues.

6. The workgroup meetings were intended to provide a forum for participants to offer suggestions and comments to the Department on the development of any new regulations that would come from the Triennial Review process, but were not intended to create consensus among the participants.

7. This rulemaking is intended to balance the strong state interests in protecting the water quality of Extraordinary Resource Waters (“ERWs”), Ecologically Sensitive Waterbodies (“ESWs”) and Natural and Scenic Waterways (“NSWs”) and providing drinking water to the citizens of the State of Arkansas. ERWs, ESWs, and NSWs are a key part of “The Natural State” and provide recreational, aesthetic, and economic benefits to the State. As the State's population grows, the Department also recognizes that new sources of drinking water may need to be developed.

8. The intent of the ERW, ESW, or NSW designations is to maintain these examples of exceptional water quality in their current condition and to protect them from degradation so they will be preserved for future generations. However, it is also recognized by the Department that providing drinking water for sustaining life is of great importance to the citizens of Arkansas.

9. This rulemaking is intended to balance these interests and will provide complete procedures for:

- A. Using ERWs, ESWs, or NSWs without impairing the water quality, natural flow regime or habitat of fish, shellfish or other forms of aquatic life;
- B. Removing the designated use of ERWs, ESWs, and NSWs for the purpose of creating a reservoir to provide a domestic drinking water supply; and
- C. Adding the designated use of ERW, ESW, or NSW to a waterbody or segment of a waterbody.

10. The State Parks, Recreation, and Travel Commission has issued a resolution supportive of maintaining protection of ERWs and addressing a proposal that could potentially threaten those protections. This resolution is Exhibit “G” in the original petition to initiate rulemaking filed with the Commission.

**A. Using ERWs, ESWs, or NSWs Without Impairing the Water Quality, Natural Flow Regime, or Habitat of Fish, Shellfish or Other Forms of Aquatic Life**

11. This rulemaking will amend Reg. 2.304, Physical Alteration of Habitat. Under Reg. 2.304, “significant physical alterations of the habitat within extraordinary resource waters, ecologically sensitive waterbodies or natural and scenic waterways are not allowed.” This rulemaking will establish a process for determining that a proposed physical alteration is not significant.

12. Specifically, this amendment to Regulation No. 2 will allow an Extraordinary Resource Water, Ecologically Sensitive Waterbody, or Natural and Scenic Waterway to be used as a domestic water supply without removing the designated use. In situations where a party would like to build a low-head weir, other structure, or other means to facilitate the use of the waterbody as a drinking water supply, the proposed rulemaking

provides a process where the party can request a determination that such structure is not a significant physical alteration of the habitat of the ERW, ESW, or NSW.

13. In addition, this rulemaking will not only make a process available for developing drinking water supplies, but is applicable to all proposed projects on ERWs, ESWs, or NSWs which will not impair these designations.

14. The amended language of this rulemaking states that the Director may determine that a proposed physical alteration is not significant if: (1) the proposed physical alteration will not impair water quality, natural flow regime, or habitat of fish, shellfish or other forms of aquatic life, and (2) there is no feasible alternative to the proposed project.

15. A request for a determination that the proposed physical alteration of habitat is not significant must be submitted to the Director in accordance with the procedures set forth in Appendix D. Appendix D is a new appendix added to Regulation No. 2.

16. Appendix D sets forth the required contents for the request and outlines the Department's procedures in reviewing the request which includes: (1) an analysis of alternatives to the proposed project; and (2) a technical report containing supporting documentation to demonstrate that the proposed project will not impair water quality, the natural flow regime, or habitat of fish, shellfish and other forms of aquatic life. The Department has begun the process of developing guidelines for preparing the technical report with input from a technical subcommittee of water quality experts. The guidelines will not be part of the regulations but should be utilized by parties requesting a determination under this subsection as an aid in drafting the technical report. A draft copy of the guidelines is contained in Exhibit "H" in the original petition to initiate rulemaking filed with the Commission.

17. The Director will issue a decision in the same manner as required for permit decisions in Regulation No. 8. Thus, the Director's decision may be appealed to the Commission in the same manner as provided for permit decision appeals in Regulation No. 8. If the Director determines that the proposed project does not constitute a significant physical alteration of habitat, the petitioner may submit a request for a short-term activity authorization in accordance with Reg. 2.305, which allows the Director to authorize certain activities, including construction projects, which might cause a temporary violation of the water quality standards.

**B. Removing the Designated Use of ERW, ESW, or NSW for the Purpose of Constructing a Reservoir to Provide a Domestic Water Supply**

18. Reg. 2.306 has been amended to exclude ERWs, ESWs, and NSWs from the designated uses that can be removed under that provision. The procedure for removing the designated uses of ERW, ESW, or NSW for the purpose of constructing a reservoir on a free flowing waterbody to provide a domestic water supply has been added in Reg. 2.310.

19. Reg. 2.310 has been added to allow the removal of an ERW, ESW, or NSW designated use from a free flowing waterbody for the construction of a reservoir to provide a domestic water supply, if it can be demonstrated that (1) the reservoir to be constructed shall be used primarily for the purpose of providing a domestic water supply and (2) no feasible alternative water supply is available to meet the domestic water needs of the citizens of the State of Arkansas.

20. Reg. 2.310 also sets forth a procedure by which a regional water distribution district, public facilities board, public water authority, or other public entity engaged in providing

water to the public can petition the Commission to initiate rulemaking to remove an ERW, ESW, or NSW designated use from a free flowing waterbody for the construction of a reservoir to provide a domestic water supply.

21. Prior to filing a petition under Reg. 2.310, the petitioner must submit to the Department a request for a recommendation from the Director on whether the designated use should be maintained in accordance with the procedure found in Appendix E. Appendix E has been added to Regulation No. 2 to outline the criteria to be considered in determining whether the designated use should be maintained. The petitioner must submit information and supporting documentation addressing each of the criteria in Appendix E. Proposed Reg. 2.310(6) states that if the Director does not issue a recommendation within 180 days of receipt of the request under Appendix E, the petitioner may proceed to file a petition to initiate rulemaking without the recommendation.

22. In accordance with the new Reg. 2.310, to remove the ERW, ESW, or NSW designated use from a free flowing waterbody to construct a reservoir to provide a domestic water supply, the petitioner must submit: (1) a map of the location of the proposed project and the area to be impounded; (2) a description of the project; (3) certification that the project is constructed primarily for a domestic water supply; (4) an evaluation of all feasible alternatives to the proposed project; (5) information and supporting documentation that address the criteria in Appendix E; (6) a recommendation to the Commission from the Director on whether or not the designated use should be maintained; (7) a description of the proposed mechanisms for protecting the domestic water supply; and (8) any other submittals required by Regulation No. 8 for a petition to initiate rulemaking.



23. The evaluation of all alternatives to the project must include: (1) an environmental assessment of the impacts of each alternative on the upstream and downstream water quality, the instream habitat, and the habitat and plant and animal life in the area upstream, downstream, and to be inundated by the proposed project; (2) the costs associated with, and an economic analysis for, each alternative; (3) an engineering analysis for each alternative; and (4) a socio-economic evaluation of the project to the local area and to the State as a whole.

24. As part of its rulemaking under Reg. 2.310, to remove a designated use, the Commission shall determine:

A. Whether or not an alternative water supply is available to meet the domestic water needs of the citizens of the State of Arkansas; and

B. Whether or not the reservoir to be constructed shall be used solely for the purposes of providing a domestic water supply.

The Commission shall set forth its reasons for each determination in writing.

**C. Adding an ERW, ESW, or NSW Designated Use to a Waterbody or Segment of a Waterbody**

25. Reg. 2.311 has been added to create a procedure for adding the designated use of ERW, ESW, or NSW to a waterbody or segment of a waterbody. A petition to initiate rulemaking may be submitted to the Commission to nominate any waters of the State for such designated uses. The petition must include a statement of potential benefits and impacts of the proposed action, and evidence that the petitioner has requested resolutions by appropriate local governments regarding the nomination.

26. Appendix F has been added to list the factors to be considered in determining whether to add the designated use of ERW, ESW, or NSW to a waterbody or segment of a waterbody.

27. The Commission, as part of its rulemaking on the nomination, shall set forth in writing the reasons for its final decision. The Commission's decision regarding the rulemaking shall be appealed in accordance with the procedures provided in Regulation No. 8.

28. Mary Leath, Martin Maner, and Ellen Carpenter will be available to answer questions concerning this proposed rulemaking. A version of the regulation showing the proposed changes is attached as Exhibit "K" and is hereby incorporated by reference.

29. Exhibits C, E, F, G, and H filed with the original petition to initiate rulemaking are hereby incorporated by reference. Those exhibits remain unchanged.

30. An Amended Minute Order is attached as Exhibit "L" and is hereby incorporated by reference.

WHEREFORE, the ADEQ requests that the Commission adopt the proposed Minute Order,  
and initiate the rulemaking on Regulation No. 2.

Respectfully submitted,

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By:

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