

BEFORE THE ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION

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

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ARKANSAS POLLUTION CONTROL
AND ECOLOGY COMMISSION
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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 Petition to Initiate Rulemaking to Amend Regulation No. 2, states:

1. 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.
2. 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.
3. 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.

4. 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.

5. In Arkansas, Extraordinary Resource Waters (“ERWs”) are considered to be the state equivalent of the federal designation of Outstanding National Resource Waters and are intended to be permanent designations. The intent of these 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.

6. Likewise, 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 attached as Exhibit “G” and is hereby incorporated by reference.

7. However, it is also recognized by the Department that providing drinking water for sustaining life is of great importance to the citizens of Arkansas. 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.

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

8. 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.

9. 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 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.

10. 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.

11. 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.

12. 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.

13. 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 attached as Exhibit "H" and are hereby incorporated by reference.

14. 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

15. The definition of “Existing Uses” under Reg. 2.106 has been changed to correspond directly with the Environmental Protection Agency’s definition found at 40 C.F.R. § 131.3(e).¹

16. 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.

17. Reg. 2.310 has been added to establish 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.

18. 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 is an existing use in accordance with the procedure found in Appendix E. Appendix E has been added to Regulation No. 2 to outline the criteria for determining whether the designated use is an existing use. The petitioner must submit information and supporting documentation addressing each of the criteria in Appendix E.

¹ “Existing uses are those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards.” 40 C.F.R. §131.3(e).

19. 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 solely for a domestic water supply; (4) a Use Attainability Analysis approved by the Department as required by Reg. 2.303; (5) a recommendation to the Commission from the Director on whether or not the designated use is an existing use; (6) a description of the proposed mechanisms for protecting the domestic water supply; and (7) any other submittals required by Regulation No. 8 for a petition to initiate rulemaking.

20. Reg. 2.303, Use Attainability Analysis, has been amended to require a Use Attainability Analysis to justify removing an ERW, ESW, or NSW designated use, which is not an existing use, from a waterbody.

21. Reg. 2.303(C) 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 solely for the purpose of providing a domestic water supply; (2) no alternative water supply is available to meet the domestic water needs of the citizens of the State of Arkansas; and (3) the designated use is not an existing use.

22. Reg. 2.303 has also been amended to require that the scope and methods of the Use Attainability Analysis performed in conjunction with removing an ERW, ESW, or NSW designated use from a waterbody be submitted to the Department for review and approval prior to undertaking the Use Attainability Analysis.

23. Under Reg. 2.310, the Use Attainability Analysis must include: (1) the evaluation of all alternatives to the proposed project and (2) information and supporting documentation which address the criteria set forth in Appendix E for determining whether the designated use is an existing use.

24. The evaluation of all alternatives in the Use Attainability Analysis 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.

25. As part of its rulemaking under Reg. 2.310, the Commission shall determine:

- A. Whether or not the designated use of ERW, ESW, or NSW of a given waterbody is an existing use;
- B. Whether or not an alternative water supply is available to meet the domestic water needs of the citizens of the State of Arkansas; and
- C. 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. The Commission's decision regarding the rulemaking may be appealed in accordance with the procedures provided in Regulation No. 8.

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

26. 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.

27. 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.

28. 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.

29. 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 "A" and is hereby incorporated by reference. A copy of the Legislative Questionnaire is attached as Exhibit "B", and a copy of a Financial Impact Statement for the proposed revision is attached as Exhibit "C", both of which are hereby incorporated by reference. A proposed minute order is attached as Exhibit "D" and is hereby incorporated by reference.

30. A statement regarding compliance with Executive Order 05-04, Economic Impact on Small Businesses, is attached as Exhibit "E" and is hereby incorporated by reference. An

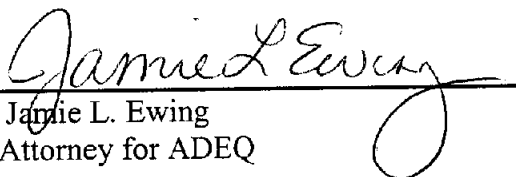
Economic Impact/Environmental Benefit Analysis, as required by Regulation No. 8, is attached as Exhibit "F" and is hereby incorporated by reference.

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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