

# **ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION**



## **REGULATION NO. 2**

### **REGULATION ESTABLISHING WATER QUALITY STANDARDS FOR SURFACE WATERS OF THE STATE OF ARKANSAS**

Proposed Changes – Triennial Review 2006, Phase 1

Submitted to APC&E Commission – September 2006



Arkansas Pollution Control and Ecology Commission  
Regulation No. 2, As Amended

**Regulation Establishing  
Water Quality Standards for Surface Waters  
of the State of Arkansas**

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**Reg. 2.304      Physical Alteration of Habitat**

(A) Significant physical alterations of the habitat within extraordinary resource waters, ecologically sensitive waterbodies or natural and scenic waterways are not allowed. For the purposes of this subsection, the Director may determine that a proposed physical alteration of the habitat is not significant if it is demonstrated that:

(1) the proposed physical alteration of habitat (a) will not impair water quality; (b) will not impair the natural flow regime; and (c) will not impair the habitat of fish, shellfish or other forms of aquatic life; and.

(2) there is no feasible alternative to the proposed project.

A request under this subsection for a determination that a proposed physical alteration of habitat is not significant shall be submitted to the Director in accordance with the procedures set forth in Appendix D.

(B) In other waters, where significant physical alterations of the habitat are proposed, the Department must be assured that no significant degradation of any existing use or water quality necessary to protect that use will occur. In order to make such determinations, the Department may require an evaluation of all practicable alternatives to the project including: an environmental assessment of the impacts of each alternative, an engineering and economic analysis, and a socio-economic evaluation of the project in the local area.

**Reg. 2.305      Short Term Activity Authorization**

The Director may authorize, with whatever conditions deemed necessary and without public notice, short term activities which might cause a violation of the Arkansas Water Quality Standards. This authorization is subject to the provisions that such activity is essential to the protection or promotion of the public interest and that no permanent or long-term impairment of beneficial uses is likely to result from such activity. Nothing herein shall be intended to supersede existing state and federal permitting processes or requirements.

Activities eligible for authorization include, but are not limited to:

(A) wastewater treatment facility maintenance;

(B) fish eradication projects;

- (C) mosquito abatement projects;
- (D) algae and weed control projects;
- (E) dredge and fill projects;
- (F) construction activities;
- (G) tracers used in hydrological studies; or
- (H) activities which result in overall enhancement or maintenance of beneficial uses.

The Director shall specify the degree of variance from the standards, the time limit of activity and restoration procedures where applicable.

Such authorization shall not be granted for activities which result in the adverse impact on any federally threatened or endangered species or on critical habitat of such species.

**Reg. 2.306      Procedures for Removal of Any Designated Use Except  
Fishable/Swimmable, Extraordinary Resource Water, Ecologically Sensitive  
Waterbody, or Natural and Scenic Waterway, and Modification of Water  
Quality Criteria not Related to ~~Fishable/Swimmable~~ These Uses**

This procedure is applicable in those cases where the Commission chooses to establish less stringent water quality criteria without affecting a fishable/swimmable use or the designated use of Extraordinary Resource Water or Ecologically Sensitive Waterbody or Natural and Scenic Waterway, or when the Commission chooses to remove a use which is not an existing use other than fishable/swimmable, Extraordinary Resource Water, Ecologically Sensitive Waterbody, or Natural and Scenic Waterway ~~which is not an existing use~~.

The Commission may allow a modification of the water quality criteria or the removal of a use which is not a fishable/swimmable use or designated use of Extraordinary Resource Water or Ecologically Sensitive Waterbody or Natural and Scenic Waterway to accommodate important economic or social development in a local area, if existing uses are maintained and protected fully and the requirements for public participation in the Continuing Planning Process are met. As a minimum, the following information shall be submitted to the ~~Department~~ Director before initiation of the public participation process:

- (A) Technological or economic limits of treatability.

- (B) Economic analysis of the impact on the local area.
- (C) Documentation that the use being removed is not an existing use and that all other designated uses will be protected.

Modifications made pursuant to this section may be required to be rejustified for continued support. As community water needs change, or technological advancement, including long-term environmental improvement projects, make treatment options more practicable, the Commission may reevaluate the need for the reestablishment of the more stringent water quality criteria or the removed use.

Any waterbody on which such alterations are approved will be so listed in Appendix A with the applicable changes noted.

#### **Reg. 2.307 Use Subcategories**

The Commission may adopt sub-categories of a use and set the appropriate criteria to reflect varying needs of such sub-categories of uses, for instance, to differentiate between cold and warm water fisheries or agricultural and domestic water supply.

#### **Reg. 2.308 Site Specific Criteria**

In establishing criteria:

- (A) Establish numerical criteria values based on:
  - (1) 304(a) Guidance; or
  - (2) 304(a) Guidance modified to reflect site conditions [WER] or
  - (3) other scientifically defensible methods;
- (B) Establish narrative criteria or criteria based upon biomonitoring methods where numerical criteria cannot be established or to supplement numerical criteria.

#### **Reg. 2.309 Temporary Variance**

A temporary variance to the water quality standards may be allowed for an existing permitted discharge facility. The variance will be for specified constituents and shall be no longer than a

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three year period. A variance must be approved by the Arkansas Pollution Control and Ecology Commission and the U.S. Environmental Protection Agency. A variance will be considered when it is determined that a standard, including designated use, can ultimately be attained or when preliminary evidence indicates that a site specific amendment of the standards may be appropriate. A variance may be granted only to the applicant and will not apply to other discharges into the specified waterbody.

**Reg. 2.310. Procedure for the Removal of the Designated Use of Extraordinary Resource Water or Ecologically Sensitive Waterbody, or Natural and Scenic Waterway for the Purpose of Constructing a Reservoir on a Free Flowing Waterbody to Provide A Domestic Water Supply.**

(A) An extraordinary resource water, ecologically sensitive waterbody, or natural and scenic waterway designated use may be removed from a free flowing waterbody for the purpose of constructing a reservoir to provide a domestic water supply, if it can be demonstrated that:

- (1) the sole purpose for the funding and construction of the reservoir is to provide a domestic water supply; and
- (2) there is no feasible alternative to constructing a reservoir in order to meet the domestic water needs of the citizens of the State of Arkansas.

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The limitation in Subsection A(1) of this section does not prohibit incidental uses of the reservoir that are consistent with the use of domestic water supply.

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(B) A petition to initiate rulemaking to remove an Extraordinary Resource Water, Ecologically Sensitive Waterbody, or Natural and Scenic Waterway designated use from a free flowing waterbody in order to construct a reservoir to provide a domestic water supply may be submitted to the Commission by a regional water distribution district, public facilities board, public water authority, or other public entity engaged in providing water to the public. Such petition, at a minimum, shall include:

- (1) A map depicting the location of the proposed project and the area to be impounded;
- (2) A description of the proposed project, including detailed design plans;
- (3) A certification that the proposed structure to impound the free flowing stream shall be funded and constructed solely for the purpose of providing a domestic water supply;
- (4) An evaluation of all alternatives to the proposed project, including:
  - (i) an environmental assessment of the impacts of each alternative on the

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instream 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;

(ii) the costs associated with, and an economic analysis for, each alternative;

(iii) an engineering analysis for each alternative; and

(iv) a socio-economic evaluation of the project to the local area and to the State as a whole; and

(5) information and supporting documentation which address the criteria set forth in Appendix E;

(6) A recommendation to the Commission from the Director on whether or not the designated use should be maintained based upon a review of the information and supporting documentation required to be considered in Appendix E. The Director shall provide the petitioner with the Director's recommendation within 180 days of the Department's receipt of the petitioner's Appendix E submittal. If the Director does not deliver a recommendation to the petitioner within the 180 day time period, the petitioner may file its petition under this section without including a recommendation from the Director. The Director may submit a recommendation to the Commission at any time not less than 30 days prior to the Commission's final decision on the petition.

(7) A description of any proposed mechanisms for protecting the domestic water supply, including but not limited to prohibitions to be placed on commercial and residential development along the proposed shoreline of the impoundment, the controls to be placed on public access to the water supply, and the legal authority for establishing and maintaining these domestic water supply protections; and

(8) Any other submittals required by Regulation No. 8 for a petition to initiate rulemaking.

(C) The Commission, as part of its rulemaking decision, shall determine whether or not a feasible alternative ~~to constructing a reservoir~~ is available to meet the domestic water needs of the citizens of the State of Arkansas. The Commission shall set forth the reasons for its determination in writing. The designated use of Extraordinary Resource Water, Ecologically Sensitive Waterbody, or Natural and Scenic Waterway shall not be removed by the Commission if a feasible alternative ~~to constructing a reservoir~~ is available to meet the domestic water needs of the citizens of the State of Arkansas.

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(D) The Commission, as part of its rulemaking, shall determine whether or not the ~~sole purpose for the funding and construction of the reservoir is to provide a domestic water supply~~. The

Deleted: reservoir to be constructed shall be used primarily for the purpose of providing a domestic water supply

Commission shall set forth the reasons for its determination in writing. The designated use of Extraordinary Resource Water, Ecologically Sensitive Waterbody, or Natural and Scenic Waterway shall not be removed by the Commission if the ~~purpose for the funding and construction of the reservoir is other than to provide~~ a domestic water supply. In no circumstance, shall the designated use of Extraordinary Resource Water, Ecologically Sensitive Waterbody, or Natural and Scenic Waterway be removed by the Commission from a free flowing waterbody in order to construct a reservoir ~~for recreational, flood control, or economic purposes other~~ than providing a domestic drinking water supply.

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(E) The Commission, as part of its rulemaking decision, shall determine whether or not the designated use of Extraordinary Resource Water, Ecologically Sensitive Waterbody, or Natural and Scenic Waterway of a given waterbody should be maintained. The Commission shall set forth the reasons for its determination in writing, after considering the Director's recommendation referenced in Subsection (B)(6) of this section and reviewing the information and supporting documentation which address the criteria set forth in Appendix E.

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**Reg. 2.311. Procedure for the Addition of the Designated Use of Extraordinary Resource Water or Ecologically Sensitive Waterbody or Natural and Scenic Waterway to a Waterbody or Segment of a Waterbody.**

(A) Any waters of the State may be nominated for designation as an Extraordinary Resource Water, Ecologically Sensitive Waterbody, or Natural and Scenic Waterway by submitting a petition to initiate rulemaking to the Arkansas Pollution Control and Ecology Commission. Such petition shall include, at a minimum, the following:

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- (1) Name of petitioner;
- (2) Petitioner's mailing address and telephone number;
- (3) Name and location description of the waterbody or segment proposed for designation;
- (4) A map depicting the waterbody or segment proposed for designation;
- (5) Petitioner's interest in the proposed action;
- (6) Statement of potential benefits and impacts of the proposed action;
- (7) Evidence of requests for resolution(s) by appropriate local government(s) regarding the nomination of the waterbody as an Extraordinary Resource Water, Ecologically Sensitive Waterbody, or Natural and Scenic Waterway;
- (8) Supporting documentation for the designation, including information which

addresses the factors listed in Appendix F, I (A) through (P);

(9) Recommended language change necessary to affect this proposed change to any Commission regulation; and

(10) Any other submittals required by Regulation No. 8 for a petition to initiate rulemaking.

(B) The Commission, as part of its rulemaking, shall set forth in writing the reasons for its final decision.

# **ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION**



## **REGULATION NO. 2.**

### **APPENDIX D**

#### **PROCEDURES FOR OBTAINING DIRECTOR'S DETERMINATION ON THE PROPOSED PHYSICAL ALTERATION OF AN EXTRAORDINARY RESOURCE WATERS, ECOLOGICALLY SENSITIVE WATERBODY, OR NATURAL AND SCENIC WATERWAY**

## **I. CONTENTS OF REQUEST FOR DETERMINATION**

Any person may submit a written request to the Department seeking a determination on whether or not a proposed project will constitute a significant physical alteration of the habitat of an extraordinary resource water, ecologically sensitive waterbody, or natural and scenic waterbody. Such request shall include, at a minimum:

(A) A map depicting the location of the proposed project and the area to be altered by the project;

(B) A description of the project, including detailed design plans;

(C) An analysis of alternatives to the proposed project, including: an environmental assessment of the impacts of each alternative, the costs associated with each alternative, an engineering and economic analysis, and a socio-economic evaluation of the project to the local area; and

(D) A technical report containing supporting documentation to demonstrate that the proposed project:

(1) will not impair water quality;

(2) will not impair the natural flow regime; and

(3) will not impair the habitat of fish, shellfish, or other forms of aquatic life

## **II. DEPARTMENT REVIEW OF REQUEST**

(A) Upon receipt of the request and supporting documentation identified above, the Department shall review the alternatives analysis referenced in Appendix D, I (C). The Department may consult with professionals, as necessary, in reviewing the report. The Department shall review the alternatives analysis in order to:

(1) ensure that the alternatives analysis is complete;

(2) evaluate whether the analysis adequately addresses the environmental, social, and economic costs and impacts of each alternative; and

(3) determine whether any feasible alternatives exist for the proposed project.

(B) Following review of the alternatives analysis, the Department will review the technical report referenced in Appendix D, I (D). The Department may consult with professionals, as necessary, in reviewing the report. The Department shall review the technical report to evaluate the impacts of the proposed project on water quality, instream flow, and aquatic habitat. The

Department will develop guidelines for drafting the technical report and identifying issues to be addressed.

### **III. DIRECTOR'S DETERMINATION**

(a) Upon completing its review of the written request and supporting information, the Director shall issue a draft determination. The Director's draft determination shall include a written statement setting out the reasons for the determination and provide a draft decision on the proposed project which shall either:

1) authorize, with conditions as necessary, the alteration of the habitat because the proposed project does not constitute a significant alteration of the habitat and no feasible alternatives exist to the proposed project; or

2) deny the request to alter the habitat because:

(i) the proposed project constitutes a significant alteration of the habitat which is prohibited by Reg. 2.304(a); or

(ii) feasible alternatives to the proposed project exist.

(b) Public notice, notice of a public comment period, and notice of any public hearing on the Director's draft determination shall be provided in the same manner as that provided for a draft permit decision in Regulation No. 8. Thereafter, the Director shall issue a final determination. The final determination shall be issued and notice provided in the same manner as that provided for the issuance and notice of a final permitting decision in Regulation No. 8. The Director's determination may be appealed to the Commission in the same manner as permit appeals are provided for in Regulation No. 8.

### **IV. REQUIREMENT FOR SHORT TERM ACTIVITY AUTHORIZATION**

If the Director authorizes the alteration of the habitat of an extraordinary resource water, ecologically sensitive waterbody, or natural and scenic waterway, then the party requesting the Director's Determination shall submit to the Department a request for a short term activity authorization in accordance with the requirements of Reg. 2.305.

**V. OTHER REQUIRED PERMITS NOT WAIVED**

Nothing contained herein shall be construed to relieve the petitioner of the requirements to obtain any other permit for the proposed project required by state or federal law.





# **ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION**



## **REGULATION NO. 2.**

### **APPENDIX E**

**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**

The determination of whether a designated use of Extraordinary Resource Water, Ecologically Sensitive Waterbody, or Natural and Scenic Waterway should be maintained in a given waterbody must be made on a case by case basis. At least 180 days prior to filing any petition authorized under Section 2.310 to initiate rulemaking with the Commission to remove the designated use of Extraordinary Resource Water, Ecologically Sensitive Waterbody, or Natural and Scenic Waterway from a free flowing waterbody for the purpose of constructing a reservoir to provide a domestic water supply, the petitioner shall submit to the Department information and supporting documentation which address each of the following:

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- (A) Describe generally and specifically the state of the existing water quality;
- (B) Identify the presence of key and indicator species of fish adapted to flowing water systems and state the extent to which these species are present in the waterbody;
- (C) Describe the extent to which water quality and physical habitat, including wetlands, support other plant or animal life and identify the species;
- (D) Identify the presence of, and state the extent to which, other wildlife uses are dependent upon the waterbody;
- (E) State the extent to which water quality and physical habitat support threatened, endangered, or endemic aquatic or semi-aquatic species and identify those species;
- (F) Specify the extent to which the waterbody supports a high diversity of aquatic species and identify the presence and frequency of the species;
- (G) Describe and identify the extent to which physical or chemical characteristics of the waterbody provide an unusual or uncommon aquatic habitat;
- (H) Describe the extent to which physical or chemical characteristics give the waterbody unusual or unique aesthetic attributes;
- (I) Specify the extent of the use of the waterbody for recreation in or on the water, such as fishing, swimming, and boating (including but not limited to canoeing, kayaking, or rafting), or use of the waterbody for commercial activity, including tourism;
- (J) Identify and describe the intangible social values associated with the free flowing characteristics of the waterbody;
- (K) Identify the presence and location of gorges, rapids, waterfalls, or other significant geologic features;
- (L) Identify the presence and location of scenic areas and sites potentially impacted by the reservoir;
- (M) Identify the presence and location of rare and/or irreplaceable natural areas potentially impacted by the reservoir;
- (N) Identify the presence and location of known archeological sites potentially impacted

by the reservoir;

(O) Identify the presence and location of historic resources potentially impacted by the reservoir;

(P) Delineate the extent to which the waterbody is located within the boundaries of, flows through, or is adjacent to state or federal forest land, parks, natural areas, nature preserves, refuges, or wildlife management areas;

(Q) Describe the extent to which the waterbody is used for educational, scientific, or research purposes;

(R) Identify the waterbody's use or potential use as an ecoregion reference stream;

(S) Describe the land uses, and the geographical extent of each, occurring within the watershed;

(T) Identify the presence and location of all permitted point sources discharging to the waterbody;

(U) Identify the presence and location of existing alterations, diversions or man- made impoundments; and

(V) Provide the frequency of occasions when there is no natural flow in the waterbody, and the 7Q10 flow values for the waterbody.



# ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION



## REGULATION NO. 2.

### APPENDIX F

#### Factors Considered In Adding the Designated Use of Extraordinary Resource Water, Ecologically Sensitive Waterbody, or Natural and Scenic Waterway to a Waterbody or Waterbody Segment

The Commission shall consider the following supporting documentation in determining whether a waterbody should be designated as an Extraordinary Resource Water, Ecologically Sensitive Waterbody, or Natural and Scenic Waterway:

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(A) Location – The waterbody is within the boundaries of or flows through or is adjacent to state or federal forest land, parks, natural areas, nature preserves, refuges, or wildlife management areas, or the watershed may include remote, primitive, or relatively undeveloped areas;

(B) Existing water quality – pristine, naturally-occurring, or unique;

(C) Ecological value – The presence of water quality and physical habitat that supports threatened, endangered, or sensitive species, the presence of any threatened, endangered, or sensitive species, and/or water quality that supports an exceptional high diversity of aquatic species (fish or benthic macroinvertebrates) as categorized by an appropriate index of biological integrity (IBI) protocol;

(D) Presence of physical or chemical characteristics that provide an unusual or uncommon aquatic habitat;

(E) Special attributes of the waterbody that make it an outstanding resource, including but not limited to the presence of archeological sites, historical sites, or rare or valuable wildlife habitat;

(F) Aesthetic Value- the presence of scenic areas or sites or scenic beauty resulting from natural features of the basin such as flow, topography, geology, ecology, physiography (i.e., waterfalls, gorges, rapids, or other special features), or the presence of characteristics giving the waterbody unique or unusual attributes;

(G) Recreational Value- Use of the waterbody for:

(1) Fishing, rafting, kayaking, camping, family outings, backpacking, bird watching, etc.,

(2) Presence of hiking trails or scenic road or highway alongside, and

(3) Attracting tourism;

(H) Use of the waterbody for educational, scientific, or research purposes;

(I) Presence of rare and/or irreplaceable natural areas; and

(J) Impacts the designation may have on current uses, upstream users, downstream users, and potential future uses of the waterbody or waterbody segment.

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