

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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AR. POLLUTION CONTROL
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ARKANSAS DEPARTMENT OF ENVIRONMENTAL QUALITY'S
STATEMENT OF BASIS AND PURPOSE

I. Introduction

The Clean Water Act requires that States review their water quality standards every three years, commonly referred to as a "Triennial Review." The Arkansas Department of Environmental Quality ("Department" or "ADEQ") began the first phase of the current Triennial Review in March 2006. As part of the Triennial Review, the Arkansas Pollution Control and Ecology Commission ("Commission") directed the Department to address issues related to Extraordinary Resource Waters ("ERWs"), Ecologically Sensitive Waterbodies ("ESWs"), and Natural and Scenic Waterways ("NSWs") that have been raised at different times during the last twenty years.

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 a series of 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.

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. Based on the input received from the workgroup, ADEQ submitted a Petition to Initiate Rulemaking on September 8, 2006. Based on further reviews, ADEQ revised the proposed rulemaking twice, submitting an Amended Petition to Initiate on September 19, 2006 and a Second Amended Petition to Initiate on September 21, 2006. On September 22, 2006, the Commission granted the Second Amended Petition to Initiate and began the public participation process.

A total of ten (10) public hearings were held in Mountain Home, Fayetteville, Van Buren, El Dorado, Harrison, Hot Springs, Mt. Ida, Russellville, Arkadelphia, and Little Rock. A total of over 45 persons submitted oral comments at the public hearings. Written comments were received through February 5, 2007. A total of 564 persons submitted written comments by letter, email, or petition.

II. Purpose of the Proposed Rule

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.

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. The proposed rulemaking provides two procedures for using ERWs, ESWs, and NSWs as drinking water supplies. The first would use the designated waterbody without causing a significant physical alteration of the habitat of the waterbody. The second would allow for the removal of a designated use from a waterbody in order to construct a reservoir on a free flowing stream to provide a domestic water supply.

In addition, the proposed rulemaking establishes a procedure for adding the designated uses of ERW, ESW, and NSW to a waterbody or segment of a waterbody.

III. Summary of Proposed Rule

This rulemaking is intended to balance vital interests of the citizens of Arkansas for protecting existing ERWs, ESWs, and NSWs and providing potential drinking water supplies. The rulemaking 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.

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

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.

Specifically, this amendment to Regulation No. 2 will allow an ERW, ESW, or NSW 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.

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.

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.

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.

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 was included with the petitions to initiate rulemaking filed with the Commission.

The Director will issue a decision in the same manner as required for permit decisions in Regulation No. 8, Administrative Procedures. 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, Short Term Activity Authorization, which allows the Director to authorize certain activities, including construction projects, which might cause a temporary violation of the water quality standards.

V. Removing the Designated Use of ERW, ESW, or NSW for the Purpose of Constructing a Reservoir on a Free Flowing Waterbody to Provide a Domestic Water Supply

Reg. 2.306, Procedures for Removal of Any Designated Use Except Fishable/Swimmable, and Modification of Water Quality Criteria not Related to Fishable/Swimmable Uses, 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, Procedure for 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.

Reg. 2.310 has been added to allow the removal of an ERW, ESW, or NSW designated use, 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.

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.

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.

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.

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.

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 primarily for the purposes of providing a domestic water supply.

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

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

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.

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.

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.

VII. Possible Revisions to the Proposed Rulemaking

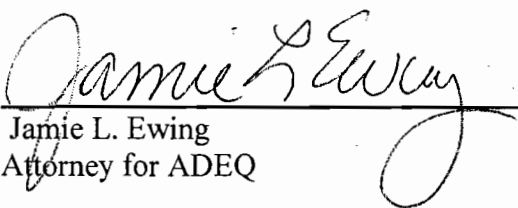
The subject of the proposed changes has engendered a great deal of public interest and an extraordinary amount of public input. The majority of the comments were critical of some portion of the proposed rulemaking. Based on the comments received, ADEQ will submit proposed revisions to the rulemaking. On June 4, 2007, ADEQ reconvened the citizen workgroup to discuss possible revisions based on the public comments. At this time, ADEQ is considering the specific revisions that will be submitted to the Commission for

final adoption but has not made a final determination regarding the extent of the proposed revisions.

Respectfully submitted,

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