

BEFORE THE ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION

IN THE MATTER OF PROMULGATION OF)
REGULATION NO. 6, REGULATIONS FOR THE STATE) DOCKET NO. 12-008-R
ADMINISTRATION OF THE NATIONAL POLLUTANT)
DISCHARGE ELIMINATION SYSTEM (NPDES))

RESPONSE TO COMMENTS

On August 24, 2012, the Arkansas Pollution Control and Ecology Commission (“APC&EC”) passed Minute Order 12-37, which initiated rulemaking procedures for amendments to APC&EC Regulation No. 6, Regulations for the State Administration of the National Pollutant Discharge Elimination System (NPDES). A public hearing on the proposed changes was held on October 16, 2012. The public comment period closed on October 30, 2012.

Two oral comments were submitted at the public hearing. One written comment was submitted during the public comment period. The comments are set forth below followed by the responses of the Department.

Comment 1: One commenter expressed his concern about over-regulation. He stated that his initial concerns had been addressed by talking to others before the hearing and he was not opposed to this regulation as it had been explained to him.

Response 1: ADEQ acknowledges this comment.

Comment 2: The Arkansas Forestry Association supports the proposed amendments, specifically the amendments that create a permit-by-rule for pesticide application.

Response 2: ADEQ acknowledges this comment.

Comment 3: The Bureau of Legislative Research (hereinafter “BLR”) noted that “[t]he new definition for ‘pesticide’ goes beyond the definition found in A.C.A. 8-6-203(8), including, among other things, that it means ‘any nitrogen stabilizer’ and asked for an explanation.

Response 3: The BLR cites to a provision of the Arkansas Solid Waste Management Act, Ark.



Code Ann. § 8-6-201 *et seq.* APC&EC Regulation No. 6 is promulgated under the authority of the Arkansas Water and Air Pollution Control Act, Ark. Code Ann. § 8-4-101 *et seq.* This state law corresponds with the federal Water Pollution Control Act (the “Clean Water Act”), 33 U.S.C. § 1251 *et seq.*, which is administered by the Environmental Protection Agency. The definition of pesticides found in Ark. Code Ann. § 8-6-203(8) does not apply to the regulations promulgated in APC&EC Regulation No. 6.

The proposed changes establish permit-by-rule coverage for discharges of pesticides to Waters of the State, as allowed by Arkansas law and the Clean Water Act. On March 1, 2012, the Arkansas Department of Environmental Quality issued a National Pollutant Discharge Elimination System (“NPDES”) general permit for pesticide discharges (Permit No. ARG870000). Issuance of a permit to cover pesticide discharges was required by federal law, based on a decision of the Federal Court of Appeals for the Sixth Circuit in *National Cotton Council of America v. EPA*, 553 F.3d 927 (6th Cir. 2009). The Sixth Circuit’s decision vacated EPA’s regulation which exempted the application of pesticides on or near waterways from NPDES permitting requirements, if those pesticides were applied in accordance with other federal laws. ADEQ’s general permit incorporated narrative effluent limitations based on EPA draft general permit. ADEQ’s general permit does not require any additional conditions beyond those already in place under the authority of the Arkansas State Plant Board.

Comment 4: The BLR also stated:

Currently, industrial users discharging to publicly owned treatment works must obtain a permit except for those qualifying for a “permit-by-rule” (have an approved local pretreatment program or are not subject to pretreatment standards). As written, the new rule would not require a permit or a permit-by-rule for these industrial users.

According to the explanation provided with the rule, it is ADEQ’s position that a permit is not necessary because the industrial users are discharging

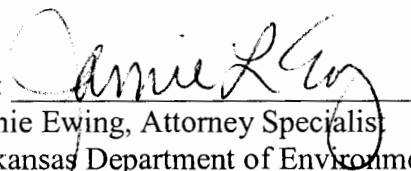
into a treatment system that is already permitted, not into waters of the State, and because in **most** cases the publicly owned treatment works will issue a permit to industrial users for their discharge to the treatment system.

Under 33 U.S.C. 1342(b)(8), the state must insure that the discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards (1317(b)) and a program to assure compliance with the pretreatment standards and adequate notice to the permitting agency of new introduction or substantial change in volume into the publicly owned treatment works of pollutants that are regulated by federal law.

If these industrial users will not be required to obtain a permit or be covered by a permit-by-rule, how will the state be able to insure compliance with 33 U.S.C. 1342, especially since not **all** of the publicly owned treatment works are requiring a permit from these industrial users? Is there an ADEQ rule that requires publicly owned treatment works to obtain a permit from its industrial users?

Response No. 4: ADEQ acknowledges this comment. ADEQ's intent with the proposed change was to address the requirement that industrial users obtain a State construction permit for a facility whose discharge is permitted through a publicly owned treatment works, not ADEQ. However, based upon confusion regarding the intent of the proposed changes, ADEQ will withdraw this proposed change and request that APC&EC Reg. 6.204 remain as currently written (with typographical corrections as throughout the rest of the document).

Respectfully Submitted,

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