

October 07, 2013

Via email: reg-comment@adeq.state.ar.us

Doug Szenher
Public Outreach and Assistance Division
Arkansas Department of Environmental Quality
5301 Northshore Drive
North Little Rock, AR 72118

Re: Proposed Changes to APCEC Regulation No. 6

Dear Mr. Szenher:

The following comments are in regard to the proposed changes to the Arkansas Regulations for State Administration of the National Pollutant Discharge Elimination System (NPDES) contained in Arkansas Pollution Control and Ecology Commission (APCEC) Regulation No. 6 (hereinafter, "Reg. 6"). The comments are submitted on behalf of Beaver Water District (BWD), the largest of the four public drinking water utilities whose source of raw water is Beaver Lake and the second largest drinking water utility in Arkansas. BWD produces the drinking water for over 300,000 people and numerous businesses and industries in Northwest Arkansas.

BWD's comments focus on the proposed changes to Reg. 6 that are based upon and largely quote from Arkansas Act 954 of 2013 (hereinafter, "Act 954"). Act 954 relates to the water quality standards (WQS) for minerals. While BWD has repeatedly stated that it recognizes that wastewater dischargers in Arkansas face problems related to the minerals WQS and that their legitimate complaints need to be addressed, we do not believe that Act 954, and now the proposed changes to Reg. 6, offer a legal or scientifically valid approach to addressing the problems. BWD remains concerned not only about the uncertainty and disruption created by Act 954 and the resultant proposed changes to Reg. 6, but also about the potential adverse impact on the State's current and future drinking water supplies.

BWD's comments begin with two general, introductory comments, followed by comments that refer to specific proposed changes. Those comments are listed in the order in which the proposed changes appear in Reg. 6 and not necessarily in order of importance. These written comments supplement the verbal comments made on behalf of BWD at the public hearing at the Arkansas Department of Environmental Quality (ADEQ) on September 23, 2013.

Comment 1: *BWD objects generally to the proposed changes to Reg. 6 based on Act 954 because they are contrary to the NPDES requirements of the federal Clean Water Act (CWA), the Arkansas Water and Air Pollution Control Act (AWAPCA), and the State and federal regulations that implement the NPDES program. The United States Environmental Protection Agency, Region 6 (hereinafter, "EPA-6") has stated that minerals requirements and conditions established in accordance with Act 954 "are inconsistent with the minimum requirements for NPDES permits established under the CWA and its implementing regulations." See Attachment 1 hereto (fourteen letters dated September 23, 2013, from EPA-6 to ADEQ re general objections to review-draft*

permits). *See also* Attachment 2 hereto (August 28, 2013, letter from EPA-6 to ADEQ re termination of EPA-6's waiver of permit review). *See further* the requirements of the NPDES program at 40 C.F.R. Parts 122 and 123 and Reg. 6.104, Incorporation of Federal Regulations.

ADEQ's own analysis of HB1929, which became Act 954, was that the provisions that ADEQ now proposes to insert in Reg. 6 are contrary to State and federal NPDES laws and regulations. *See* Attachment 3 hereto (ADEQ Bill Analysis Form for HB1929).

Of particular concern to BWD are the proposed changes to Reg. 6 based on Act 954 that are inconsistent with the State and federal NPDES *public participation requirements*. *See, e.g.*, Comment 21 below. Of additional concern is that, pursuant to the proposed changes to Reg. 6, NPDES permits that currently have effluent limitations for minerals would likely be issued without any limits for minerals or with higher limits. This would violate the *anti-backsliding* provisions of CWA Sections 303(d)(4) and 402(c), 33 U.S.C. §§ 1313(d)(4) and 1342(c), and 40 C.F.R. § 122.44(l).

See Comments 9, 12, 13, 20, 21, and 22 below, which are incorporated by reference herein.

Comment 2: *BWD objects generally to the proposed changes to Reg. 6 based on Act 954 because they are contrary to the water quality standards requirements of the CWA, the AWAPCA, and the federal and State water quality standards regulations. The proposed changes to Reg. 6 based upon Act 954 conflict with the current State WQS in APCEC Regulation No. 2 (hereinafter, "Reg. 2"), upon which NPDES permit terms and conditions are based. If implemented, the proposed changes also would in some situations be prohibited by the antidegradation provisions of Section 303(d)(4)(B) of the Clean Water Act, 33 U.S.C. § 1313(d)(4)(B), 40 C.F.R. § 131.12(a)(1), and Reg. 2.201 through 2.203. Additionally, the proposed changes to Reg. 6 based upon Act 954 conflict with the changes proposed to Reg. 2 as part of the Triennial Review process that already has gone through public notice and comment, including four public hearings. Further, the proposed changes to Reg. 6 based upon Act 954 are contrary to the WQS provisions of Section 303 the CWA, 33 U.S.C. § 1313, and the WQS regulations at 40 C.F.R. Part 131. See Comments 9, 12, and 13 below, which are incorporated by reference herein.*

Comment 3, Proposed Reg. 6.103, Definition of Average Flow: The current Reg. 6 does not have a definition for Average Flow. ADEQ has proposed to include the following definition: " 'Average Flow' means an average flow value that represents both the high and the low of streamflow oscillations and is established by no less than twenty (20) consecutive years of daily streamflow data (7300 data points) from a gaging station [sic] must be used to calculate the average flow." BWD assumes that ADEQ believes it is necessary to include a definition for Average Flow because it is a key term in Act 954.

According to Act 954's legislative findings at Section 1(b), the intent of the Act is, among other things, to direct state agencies to implement WQS for minerals according to the provisions of the Act. The provisions of Act 954, which are codified at A.C.A. § 8-4-202(b)(3), require the use of "the greater of the average flow in the stream or stream segment or four cubic feet per second (4

ft³/s)” for the development and implementation of WQS and water quality criteria (WQC) for minerals. One of the primary ways that ADEQ must implement WQS and WQC for minerals is in the NPDES permit context of deriving appropriate water quality-based effluent limitations (WQBELs). It follows then that in order to implement Act 954, ADEQ would seek to determine the average flow in the applicable stream.

Nonetheless, *BWD objects to including a definition for Average Flow in Reg. 6. Our objection is directed primarily at how the term is to be used, rather than at the definition itself.* Proposed Reg. 6.403(A) and Reg. 6.403(B) are the provisions that incorporate the above-quoted language from Act 954 and that provide how and when the term “Average Flow” is to be used. These provisions have numerous problems, including that they are inconsistent with the CWA, its implementing regulations, and the State WQS in Reg. 2. *See Comments 14 through 19 below, which are incorporated by reference herein.*

Comment 4, Proposed Reg. 6.103, Definition of Average Flow: If a definition of Average Flow were needed in Reg. 6 for purposes other than to implement Act 954, *BWD believes that the proposed definition is too restrictive in specifying the exact number of consecutive data points that are required.* We assume, however, that ADEQ has proposed such a specific and restrictive definition because that mimics the approach that the legislature took in Section 2 of Act 954 in terms of specifying the number and timing of the samples that are required to make a determination on whether a waterbody is either impaired or meets the WQS for minerals for purposes of Section 303(d) of the CWA, 33 U.S.C. § 1313(d). For both 303(d) purposes and average flow calculations, *BWD believes that, within limitations, somewhat greater flexibility in the number and timing of the required measured samples is scientifically more appropriate and reasonable.*

Comment 5, Proposed Reg. 6.103, Definition of Average Flow: In the event that ADEQ decides to include a definition of Average Flow in Reg. 6, please note that *some words appear to be missing from the proposed definition.* The sentence is complete and makes sense only up to the word “station.”

Comment 6, Proposed Reg. 6.207(A), Individual Permit Application Review for Minerals: This proposed new provision also is based on Act 954. *See A.C.A. §§ 8-4-202(b)(3)(B)(vi).* Proposed Reg. 6.207(A) requires ADEQ to certify to a permit applicant within thirty (30) days of the receipt of an application for an individual NPDES permit whether “the stream segment or reservoir that will receive the proposed discharge is: (1) an existing domestic water supply; or (2) listed in the Arkansas Water Plan as a planned or potential domestic water supply.” There are numerous problems inherent in this proposed provision (*see Comments 7 through 10 below*), but one readily apparent problem is that *the current Arkansas Water Plan does not contain a list of planned or potential domestic water supplies.*

Comment 7, Proposed Reg. 6.207(A), Individual Permit Application Review for Minerals: Even though the Arkansas Department of Health (ADH) is responsible for the administration of the federal Safe Drinking Water Act (SDWA) in Arkansas, this new provision appears to leave it to ADEQ to determine what is an existing domestic water supply and to leave it to the Arkansas

Natural Resources Commission (ANRC) to determine what is a planned or potential domestic water supply. BWD suggests that *this is inconsistent with the delegation of the SDWA program to ADH.*

Comment 8, Proposed Reg. 6.207(A), Individual Permit Application Review for Minerals: *The term “existing domestic water supply” is not defined in Reg. 6. Under the CWA, an existing use is one that has actually occurred since November 28, 1975, or water quality that is suitable to allow the use to be attained. See 40 C.F.R. § 131.3(e) and Attachment 4 hereto (EPA Water Quality Standards Handbook, Second Edition, Chapter 4, Section 4.4 (1994)). If ADEQ decides to retain proposed Reg. 6.207(A) requiring ADEQ to certify to permit applicants whether a “stream segment or reservoir” [NOTE: these are the waterbody terms used in the applicable provision of Act 954] is or is not an existing domestic water supply, then BWD believes that a definition for Existing Domestic Water Supply should be included in Reg. 6. In order to be consistent with the CWA, that definition should be: “An Existing Domestic Water Supply is a stream segment, reservoir, or other water body that has been used as a private or public domestic water supply source at any time since November 28, 1975, or that has water quality that is suitable to allow its use as a private or public domestic water supply source.”*

Comment 9, Proposed Reg. 6.207(A), Individual Permit Application Review for Minerals: *The clear purpose of this new provision in conjunction with proposed Reg. 6.207(B) (see Comments 11 through 13 below) is to eliminate the application of the current Reg. 2 Domestic Water Supply WQC for minerals for many waterbodies throughout the State. The Reg. 2.511(C) WQC of 250 milligrams per liter (mg/L) for sulfates, 250 mg/L for chlorides, and 500 mg/L for total dissolved solids (TDS) apply to all waterbodies with a designated Domestic Water Supply use. Since at least 1973, all Arkansas surface waters have been designated as Domestic Water Supplies unless the designation has been removed via a site-specific study and an amendment to Reg. 2 that has undergone public notice and comment, as well as approval by APCEC and EPA.*

If, however, ADEQ follows the proposed changes to Reg. 6.207(A) and certifies that a stream segment or reservoir does *not* have an existing use as a domestic water supply and is *not* listed in the Arkansas Water Plan as a planned or potential domestic water supply, then according to Act 954, as codified at A.C.A. §§ 8-4-202(b)(3)(B)(iv)(a), the Reg. 2.511(C) Domestic Water Supply WQC for minerals cannot be “implemented” for NPDES permitting or other purposes *unless* the water body is within the watershed of a lake or reservoir used as a public water supply. *This would be in violation of State and federal laws and regulations, including CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. §§ 122.4(a) and 122.44(d); Reg. 6.104(A)(3); and Reg. 2.511. See Comments 12 and 13 below, which are incorporated by reference herein.*

Comment 10, Proposed Reg. 6.207(A), Individual Permit Application Review for Minerals: *In the event that ADEQ decides to include in Reg. 6 this provision regarding certification of receiving streams as existing, planned, or potential domestic water supplies, language should be added that such certification is required only for discharges that involve or potentially involve minerals and that such certification applies only to the development of permit limits for minerals. As the authors and sponsors of Act 954 repeatedly have said and as the introductory sentence at A.C.A. § 8-4-202(b)(3) specifies, the requirements of Act 954 apply to WQS (including*

designated uses) and the resultant stream assessments and permit limits *only for minerals purposes*. They do not apply to WQS, stream assessments, or permit limits for other pollutants that are intended to protect drinking water supply sources, such as nitrate-nitrogen. *For pollutants other than minerals, the Domestic Water Supply designated use stands unless it has been removed via a site-specific study and rulemaking amendment of Reg. 2.*

Comment 11, Proposed Reg. 6.207(B), Individual Permit Application Review for Minerals: This proposed new provision states that, “Any mineral permit effluent limits included in an individual permit shall be based upon the requirements of Act 954 of 2013.” BWD objects to this provision for several reasons (*see* Comments 12 and 13 below), but *an initial problem with this provision is that it is too vague. The exact requirements of Act 954 upon which mineral permit effluent limits are to be based need to be listed.* The public can’t comment fully on this proposed provision until its terms are clear. Reference to Act 954 also does not clarify this matter as several of its provisions are imprecise and open to interpretation.

Comment 12, Proposed Reg. 6.207(B), Individual Permit Application Review for Minerals: As noted in Comment 11 above, the exact requirements of Act 954 and their meaning are debatable, but the following provisions are included:

- (1) WQS for minerals, WQC for minerals, stream assessments for minerals for CWA section 303(d) purposes, waste load allocations (WLA) for minerals, and permit limits for minerals “shall be based on the greater of the average flow in the stream or stream segment or four cubic feet per second (4 ft³/s).” See A.C.A § 8-4-202(b)(3)(B)(i) and (ii);
- (2) Stream assessments for minerals for CWA section 303(d) purposes must be based on the *average* concentration of minerals. See A.C.A § 8-4-202(b)(3)(B)(iii). The current EPA-approved 303(d) assessment methodology provides that “if greater than 10% of the total samples for the period of record [five years] exceed the applicable criteria, the waterbody will be included on the 303(d) list as being impaired for the mineral assessed.” See ADEQ’s 2008 Integrated Water Quality Monitoring and Assessment Report, p. 55. As noted in ADEQ’s analysis of HB1929, this provision creates further confusion because “[s]tandards based on flow and standards based on average concentration would yield two completely different numbers and would not be workable as an assessment methodology.” See Attachment 3, page 6;
- (3) The current “Ecoregion Reference Stream Minerals Values” at Reg. 2.511(B) can’t be used to “evaluate or assess the attainment of water quality standards” and, presumably, can’t be used to set permit limits for minerals. See A.C.A § 8-4-202(b)(3)(B)(vii); and
- (4) The current “Domestic Water Supply Criteria” for minerals at Reg. 2.511(C) can only be used for water quality standards assessment and permit effluent limitation purposes for waterbodies that have an “existing use as a domestic water supply,” are listed in the Arkansas Water Plan as a planned or potential domestic water supply, or are “within the watershed of a lake or reservoir used as a public water supply unless the designated use is

or has been removed under the regulations of the commission [APCEC].” See A.C.A § 8-4-202(b)(3)(B)(iv)(a) and (b).

All of these requirements of Act 954, which are incorporated by reference in proposed Reg. 6.207(B), are in direct conflict with the current and effective Reg. 2 WQS and assessment methodology. The Reg. 2 WQS do not prohibit the use of the Reg. 2.511(B) Ecoregion Values. The Reg. 2.511(C) Domestic Water Supply Criteria apply to all waterbodies with a Domestic Water Supply designated use. The development, implementation, and assessment of the Reg. 2.511 WQS for minerals are not based on the greater of the average flow in the stream or 4 cubic feet per second (cfs).

Section 301(b)(1)(C) of the CWA, 33 U.S.C. § 1311(b)(1)(C), requires that all NPDES permits include limitations as necessary to comply with the state WQS. Under proposed Reg. 6.207(B), however, any permit limits for minerals must be based upon the requirements of Act 954, which, as set forth above, are contrary to the Reg. 2 WQS. Therefore, *proposed Reg. 6.207(B) violates the requirement of Section 301(b)(1)(C) of the CWA, 33 U.S.C. § 1311(b)(1)(C), that all NPDES permits include limitations as necessary to comply with the state WQS.*

Comment 13, Proposed Reg. 6.207(B), Individual Permit Application Review for Minerals: Forty C.F.R. § 122.4(a) prohibits the issuance of an NPDES permit “[w]hen the conditions of the permit do not provide for compliance with the applicable requirements of CWA, or regulations promulgated under CWA.” Forty C.F.R. § 122.44(d) provides that each NPDES permit shall include conditions necessary to achieve state water quality standards. Forty C.F.R. § 122.44(d)(1)(i) requires that limitations must control all pollutants or pollutant parameters that are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any state water quality standard. Finally, 40 C.F.R. § 122.44(d)(1)(iii) specifically states:

When the permitting authority determines . . . that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a State numeric criteria within a State water quality standard for an individual pollutant, the permit **must** contain effluent limits for that pollutant. (Emphasis added).

ADEQ has adopted the regulations at 40 C.F.R. §§ 122.4(a) and 122.44(d), verbatim, pursuant to APCEC Regulation No. 6, Reg. 6.104(A)(3).

Under proposed Reg. 6.207(B), however, any permit limits for minerals must be based upon the requirements of Act 954 rather than upon the current and effective Reg. 2 WQS. *This violates 40 C.F.R. §§ 122.4(a) and 122.44(d) and Reg. 6.104(A)(3).*

Comment 14, Proposed Reg. 6.403(A), Development and Implementation of Water Quality Standards and Criteria for Minerals: This proposed new provision states that, “In accordance with Act 954 of 2013, the development and implementation of standards and criteria for minerals, including without limitation total dissolved solids, chlorides and sulfates, shall be

based on the greater of the average flow in the stream or stream segment or four (4) cubic feet per second (cfs).” BWD objects to this provision for several reasons (see Comments 15 and 16 below), but *an initial problem with this provision is that it is unclear*. It quotes the language of A.C.A § 8-4-202(b)(3)(B)(i). Exactly how is the requirement to base the development and implementation of standards and criteria for minerals on the greater of the average flow in the stream or 4 cfs to be applied?

Typically, flow values are not used in the context of establishing WQS or WQC or in determining if a stream meets the applicable WQS or WQC. In ADEQ’s analysis of HB1929, which became Act 954, ADEQ stated that it “has never used flow to establish standards or to assess streams against the standards established.” See Attachment 3, page 6. Flow values are utilized by ADEQ in developing permit limits, though. See Attachment 3, pages 6 through 8. What, then, does it mean to use the greater of the average flow in the stream or 4cfs to develop and implement WQS and WQC for minerals?

Does it mean that a water quality criterion for minerals is not a set number, but that it varies depending on the streamflow? Does it mean that samples taken for water quality assessment purposes when the flow in the stream is less than the greater of the average flow in the stream or 4 cfs must be thrown out and not utilized? Does it mean that the minerals concentrations for samples taken when the flow in the stream is less than the greater of the average flow in the stream or 4 cfs are to be mathematically “diluted” using the greater of the average flow in the stream or 4cfs? Does the requirement to base the development and implementation of standards and criteria for minerals on the greater of the average flow in the stream or 4 cfs apply only to the flow factors to be used when performing theoretical calculations, such as for setting permit limits for minerals or determining if a discharge has the potential to cause or contribute to an in-stream excursion of the minerals WQS or WQC? Or does it mean a combination of these things or something else entirely?

Again, this proposed provision is too vague. *If ADEQ decides to retain this proposed provision, then it needs to be clarified and an additional public notice and comment period needs to be held on the revised language.*

Comment 15, Proposed Reg. 6.403(A), Development and Implementation of Water Quality Standards and Criteria for Minerals: Given that the heading for proposed Reg. 6.403(A) is the “Development and Implementation of Water Quality Standards and Criteria for Minerals” *shouldn’t this provision be in the Reg. 2 surface water quality standards instead of the Reg. 6 NPDES regulations?*

Comment 16, Proposed Reg. 6.403(A), Development and Implementation of Water Quality Standards and Criteria for Minerals: *While it remains unclear how stream flows are to be utilized for the purposes of the minerals WQS and WQC, they should not be based on arbitrary, scientifically indefensible numbers such as the greater of 4 cfs or the average flow in the stream. Stream flows utilized for the purposes of the minerals WQS and WQC should be based on actual, critical flows as more appropriately represented by the harmonic mean flow (for the purposes of the Reg. 2.511(B) Ecoregion Reference Stream Minerals Values) or the Q7-10 value*

(for the purposes of the Reg. 2.511(C) Domestic Water Supply Criteria). ADEQ has recently taken this same position. *See* Attachment 3 hereto, pages 6 through 8; Attachment 5 hereto (ADEQ's January 30, 2013, proposed rulemaking changes to Reg. 2.106 Definitions for Critical Flows for minerals criteria); and Attachment 6 hereto (August 5, 2013, ADEQ Response to GBMc Third Party Rulemaking for Tyson Foods, Inc. – Waldron). EPA-6 also has objected to the use of 4 cfs instead of critical low flow values. *See* Attachment 7 hereto (August 1, 2013, EPA-6 comment letter to ADEQ regarding Tyson – Waldron proposed site-specific change to Reg. 2 minerals WQC).

Forty C.F.R. § 131.11 requires that state WQC must be based on sound scientific rationale and must support the most sensitive use. *See* EPA Water Quality Standards Handbook, Second Edition, Chapter 3 (1994). The use of a stream flow of 4 cfs as, essentially, a dilution factor for minerals, even where actual stream flow measurements show a lower number to be representative of the real stream conditions, is scientifically indefensible. A flow of 4 cfs equals 1,800 gallons per minute. This is a lot of water for streams that are often dry or reduced to a trickle during the critical season. The use of the *average* flow in a stream (if that is higher than 4 cfs) will over-represent storm flows and will not be reflective of actual stream conditions most of the time. Average stream flows often are tens to hundreds of times higher than the harmonic mean stream flow, which, among other things, accounts for flood events, evens out their impact, and is a much better representation of the normal conditions in a stream.

BWD reviewed twenty consecutive years of data from United States Geological Survey (USGS) gaging stations on the White River near Fayetteville, the Kings River near Berryville, and the Buffalo River near St. Joe and fourteen consecutive years of data from a USGS gaging station on War Eagle Creek near Hindsville. The data show that the actual flow in the streams was at or above the calculated *average* flow only one-fourth or less of the time, but the actual flow in the streams was at or above the calculated *harmonic mean* flow approximately two thirds or more of the time. *See* Attachment 8 (Graph of average number of days per year when stream flow is at or above the calculated harmonic mean, median, and average values).

Comment 17, Proposed Reg. 6.403(B), Development and Implementation of Water Quality Standards and Criteria for Minerals: This proposed new provision *regarding domestic water supplies* states that, “Also in accordance with Act 954 of 2013, the development and implementation of standards or criteria for minerals, including without limitation total dissolved solids, chlorides and sulfates, in order to protect the use of a domestic water supply, shall be based on the greater of the average flow in the stream or stream segment or four (4) cubic feet per second (cfs).” *Proposed Reg. 6.403(B) conflicts with Reg. 2.511(C)*. The Reg. 2.511(C) Domestic Water Supply Criteria states, “*In no case shall discharges cause concentrations in any waterbody to exceed 250, 250, and 500 mg/L for chlorides, sulfates, and total dissolved solids, respectively, or cause concentrations to exceed the applicable limits in the streams to which they are tributary . . .*” (Emphasis added). *Allowing the arbitrary and scientifically indefensible use of a stream flow dilution factor of the greater of the average flow or 4 cfs will not protect domestic water supply uses during critical low flow periods.* Additionally, BWD objects to this provision for the reasons set forth in Comment 16 above, which is incorporated by reference herein.

Comment 18, Proposed Reg. 6.403(B), Development and Implementation of Water Quality Standards and Criteria for Minerals: Reg. 6.403(B) mirrors Reg. 6.403(A), except that it applies specifically to domestic water supply designated uses. *It is similarly unclear. See Comment 14 above, which is incorporated by reference herein.*

Comment 19, Proposed Reg. 6.403(B), Development and Implementation of Water Quality Standards and Criteria for Minerals: As with proposed Reg. 6.403(A), *shouldn't proposed Reg. 6.403(B) be in the Reg. 2 surface water quality standards instead of the Reg. 6 NPDES regulations?*

Comment 20, Proposed Reg. 6.703(A), Minerals Stay: This proposed new provision quotes from A.C.A. §§ 8-4-202(b)(3)(C) and states that, "A term or provision in a National Pollutant Discharge Elimination System permit or an order related to a National Pollutant Discharge Elimination System permit that exists as of the effective date of Act 954 of 2013 but that has not yet become effective and does not comply with or was not developed according to subdivisions (b)(3)(B)(i)-(iv) of section 2 of Act 954 of 2013 shall be: (A) Stayed upon application to the commission by a person regulated under the noncompliant National Pollutant Discharge Elimination System permit term or condition or an order related to the noncompliant National Pollutant Discharge Elimination System permit."

These proposed Reg. 6.703(A) stay provisions are inconsistent with the CWA and the NPDES regulations. In response to the first request for a stay pursuant to Act 954, as codified at A.C.A. §§ 8-4-202(b)(3)(C), EPA-6 stated that, "Neither the Clean Water Act (CWA) nor its implementing regulations provide for a stay of final permit limits pending revision of the permit." EPA-6 continued, "The final minerals limits . . . remain the applicable limits . . ." See Attachment 9 hereto (August 28, 2013, letter from EPA-6 to ADEQ re Tyson-Waldron Plant NPDES permit stay).

Comment 21, Proposed Reg. 6.703(A), Minerals Stay: *In addition to conflicting with the CWA and the NPDES regulations, the proposed stay provisions also violate the AWAPCA, Reg. 6, and APCEC Regulation No. 8 (hereinafter, "Reg. 8. "). ADEQ is charged with the power and duty to administer the NPDES program in Arkansas. See A.C.A. §§ 8-4-201(a)(3); 8-4-206(a); and 8-4-208. It also is charged with the power and duty to "issue, continue in effect, revoke, modify, or deny permits . . ." See A.C.A. § 8-4-203(a). See also Reg. 8.202. The APCEC is not authorized to administer the NPDES program in Arkansas nor to issue, continue in effect, revoke, modify, or deny permits. See A.C.A. §§ 8-4-201(b) and Reg. 8.202.*

Should the APCEC enter a stay or waiver of NPDES permit effluent limitations or associated terms and conditions for chlorides, sulfates, and TDS pursuant to proposed Reg. 6.703(A), it would constitute a major modification by the APCEC of an NPDES permit that was properly issued by ADEQ following publication of notice and an opportunity for public participation as required by A.C.A. §§ 8-4-203(d) and (e); Reg. 8.202 – 8.211; Reg. 6.104(A); 40 C.F.R. § 123.25; 40 C.F.R. §§ 124.10(a)(1)(ii), (a)(1)(iii) and (a)(1)(v); 40 C.F.R. §§ 124.10 (b), (c), (d)

and (e); 40 C.F.R. § 124.11; 40 C.F.R. §§ 124.12(a), (b), (c) and (d); and 40 C.F.R. § 124.57 (a).

Modifications to permits, other than modifications defined as minor modifications (*see* Reg. 6.104(A); Reg. 8.213; and 40 C.F.R. § 122.63) cannot be made without satisfaction of the public notice and participation requirements of A.C.A. §§ 8-4-203(d) and (e); Reg. 8.202 – 8.211; Reg. 6.104(A); 40 C.F.R. § 122.62; 40 C.F.R. § 123.25; 40 C.F.R. §§ 124.10(a)(1)(ii), (a)(1)(iii) and (a)(1)(v); 40 C.F.R. §§ 124.10 (b), (c), (d) and (e); 40 C.F.R. § 124.11; 40 C.F.R. §§ 124.12(a), (b), (c) and (d); and 124.57(a). Therefore, *any change to the force and effect of effluent limitations for chlorides, sulfates, and TDS and associated terms and conditions in an NPDES permit must be made in conformance with the requisite public notice and review requirements.*

Modifications to NPDES permits can only be made for cause. *See* Reg. 6.104(A) and 40 C.F.R. § 122.63. Cause exists when the state standards or regulations on which the permit was based have been changed, *as long as those changes have been approved by the United States Environmental Protection Agency (EPA).* *See* Reg. 6.104(A) and 40 C.F.R. § 122.62(a)(3). EPA has not approved any changes to the applicable Arkansas standards or regulations.

Act 954 and proposed Reg. 6.703(A) and (B) could ultimately lead to EPA's withdrawal of its delegation of the NPDES program to ADEQ. The criteria for EPA to withdraw its delegation of the NPDES program include action by the State legislature limiting State authorities, such as ADEQ's power to issue and modify NPDES permits, and failure to comply with the public participation requirements set forth above. *See* 40 C.F.R. § 123.63.

Comment 22, Proposed Reg. 6.703(B), Minerals Waiver: This proposed new provision states that, "A term or provision in a National Pollutant Discharge Elimination System permit or an order related to a National Pollutant Discharge Elimination System permit that exists as of the effective date of Act 954 of 2013 but that has not yet become effective and does not comply with or was not developed according to subdivisions (b)(3)(B)(i)-(iv) of section 2 of Act 954 of 2013 shall be: (B) Waived upon application to the commission by a person regulated under the noncompliant National Pollutant Discharge Elimination System permit term or condition or an order related to the noncompliant National Pollutant Discharge Elimination System permit until an applicable National Pollutant Discharge Elimination System permit term or condition or an order related to an applicable National Pollutant Discharge Elimination System permit that complies with subdivisions (b)(3)(B)(i)-(iv) of section 2 of Act 954 of 2013 becomes effective." This waiver provision suffers from the same problems as proposed Reg. 6.703(A)'s stay provision. *It is inconsistent with the CWA, the federal NPDES regulations, the Arkansas Water and Air Pollution Control Act, Reg. 6, and Reg. 8.* *See* Comments 20 and 21 above, which are incorporated by reference herein.

Thank you for your consideration of these comments.

Sincerely,



Colene Gaston
Staff Attorney

Attachments:

- Attachment 1:** Fourteen letters dated September 23, 2013, from EPA-6 to ADEQ re general objections to review-draft permits.
- Attachment 2:** August 28, 2013, letter from EPA-6 to ADEQ re termination of EPA-6's waiver of permit review.
- Attachment 3:** ADEQ Bill Analysis Form for HB1929, which became Act 954.
- Attachment 4:** EPA Water Quality Standards Handbook, Second Edition, Chapter 4, Section 4.4 (1994).
- Attachment 5:** ADEQ's January 30, 2013, proposed rulemaking changes to Reg. 2.106 Definitions for Critical Flows for minerals criteria.
- Attachment 6:** ADEQ's August 5, 2013, Response to GBMc Third Party Rulemaking for Tyson Foods, Inc. – Waldron.
- Attachment 7:** August 1, 2013, comment letter from EPA-6 to ADEQ regarding Tyson – Waldron proposed site-specific change to Reg. 2 minerals WQC.
- Attachment 8:** Graph of average number of days per year when stream flow is at or above the calculated harmonic mean, median, and average values.
- Attachment 9:** August 28, 2013, letter from EPA-6 to ADEQ re Tyson-Waldron Plant NPDES permit stay.

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