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VIA EMAIL ONLY

October 7, 2013

Doug Szenher
POA Division
Arkansas Department of Environmental Quality
5301 Northshore Dr.
North Little Rock, AR 72118

Re: *Proposed Changes to APCEC Reg. 6*

Dear Mr. Szenher:

I submit these comments in opposition to the 2013 Ark. Acts 954 ("Act 954") inspired changes to Arkansas Pollution Control and Ecology Commission Regulation 6 ("Reg. 6") on behalf of myself and the individuals and organizations listed below. The Arkansas Department of Environmental Quality ("ADEQ") must reject these changes. The legislative findings forced upon Reg. 6 do not protect water quality in Arkansas or comply with the federal Clean Water Act. This comment addresses each of the proposed changes as they appear in the draft Reg. 6.

Proposed Reg. 6.103 Definition of Average Flow

Reg. 6.103 would impose an absurdly high burden on ADEQ for establishing average stream flows for National Pollution Discharge Elimination System ("NPDES") permitting requirements by requiring twenty consecutive years of streamflow data from a gauge. Act 954 states that there is a "rational basis" for "using long-term averages in assessing mineral concentrations in a stream." This finding has no factual or scientific basis. Average flows will over-represent storm flows and will not reflect actual stream conditions most of the year. Reg. 6.103 leaves no room for ADEQ to consider reliable data it has compiled in recent years. ADEQ must consider all relevant data available to it when making permitting and water quality standards decisions. *Sierra Club, Inc. v. Leavitt*, 488 F.3d 904, 913-14 (11th Cir. 2007); *Thomas v. Jackson*, 581 F.3d 658 (8th Cir. 2009).

Proposed Reg. 6.207 Individual Permit Application Review for Minerals

Reg. 6.207 implements two illegal Act 954 mandates. First, Reg. 6.207(A) prevents ADEQ from honoring the drinking water designated use in its NPDES program. Second, Reg. 6.207(B) improperly imposes legislatively determined mineral effluent limits.

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Reg. 6.207(A) seeks to remove the drinking water designated use found in Reg. 2 from consideration when ADEQ issues NPDES permits. Using Reg. 6 to alter Reg. 2 water quality standards is improper, as is removing a designated use outside of the administrative process. Failing to honor designated uses in permitting decisions ignores water quality standards promulgated by ADEQ and approved by the Environmental Protection Agency (“EPA”). Federal regulations require that “prior to adding or removing any use, or establishing sub-categories of a use, the State shall provide notice and an opportunity for a public hearing.” 40 C.F.R. § 131.10(e). Legislative determinations do not equate to the administrative process required by law, and are not effective in removing the drinking water designated use. Reg. 6 must allow for a NPDES program which considers designated uses in the ADEQ’s permitting decisions. It must also be noted that the list of planned domestic water supplies referenced in Reg. 6.207(A)(2) does not exist.

Reg. 6.207(B) adopts Act 954’s arbitrary effluent limitations for minerals. Act 954 prohibits the use of dissolved minerals values found in Reg. 2, § 2.511(B), otherwise known as the “Ecoregion Reference Stream Minerals Values” to assess water quality standards attainment. Reg. 2 contains Arkansas’ water quality standards. The Clean Water Act requires that all permits comply with a state’s water quality standards. 33 U.S.C. § 1311; 40 C.F.R. § 122.4(a); 40 C.F.R. § 122.44(d). Reg. 6.207(B) calls for Arkansas’ NPDES program to ignore its water quality standards for minerals, in violation of federal law. Reg. 6.207(B), in conjunction with the purported removal of the drinking water designated use, prohibits ADEQ from regulating minerals in all but a few of Arkansas’ waters.

Proposed Reg. 6.403 Development and Implementation of Water Quality Standards and Criteria for Minerals

Reg. 6.403 seeks to impose an arbitrary average stream flow of four cubic feet per second for small streams when developing and implementing Arkansas water quality criteria and standards. Reg. 6.403, like Reg. 6.207, attempts to illegally alter Arkansas’ water quality standards through its NPDES program.

Act 954’s determination that four cubic feet per second is the “median flow for small streams” in Arkansas has no factual or scientific basis and fails to acknowledge that small streams, with less than four cubic feet per second of flow, may require protections more stringent than those for larger streams. A discharge of minerals fit for a stream with a four cubic foot per second flow is not appropriate for a stream with a one cubic foot per second flow.

States must adopt water quality criteria that are based on sound scientific rationale to protect designated uses. 40 C.F.R. § 131.11(a). Arbitrary average stream flows are not based in science, and thus violate federal law.

Proposed Reg. 6.703 Minerals

This section allows for a NPDES permittee to seek a stay or waiver of minerals permit limits from the Arkansas Pollution Control and Ecology Commission. NPDES permits are issued after agency review and an opportunity for public comment. Reg. 6.703 ignores this process, and the fact EPA has final approval and enforcement authority over NPDES permits. ADEQ may only modify or change a permit for changed conditions or good cause. 40 C.F.R. § 122.62; 40 C.F.R. § 122.63.

Tyson Foods-Waldron sought a stay of final permit limits before the Arkansas Pollution Control and Ecology Commission in Docket No. 13-008-MISC by citing the provision of Act 954 which Reg. 6.703 implements. The commission granted the stay despite objections from the public. In a letter dated August 28, 2013, EPA rejected the premises of the stay, noting that 40 C.F.R. § 122.62 allows changes to a NPDES permit "only by the authorized NPDES permitting authority." The Arkansas legislature is not such an authority.

Reg. 6.703 is a pathway to liability for Arkansas' regulated community. It ignores the proper process for modifying a permit, and creates a procedure not contemplated by the Clean Water Act or its regulations. It must not be adopted.

General Comments

The Commission must not adopt the Act 954 inspired changes to Reg. 6. Each element of the proposed changes violates antibacksliding requirements by allowing existing permittees to seek, and obtain, permits with less protective minerals limits. 33 U.S.C. § 1342(o). The proposed changes to Reg. 6 also conflict with antidegradation requirements by failing to protect existing uses, high quality waters, and outstanding resource waters. 40 C.F.R. § 131.12. It removes the drinking water designated use from the vast majority of the waters of our state without so much as a cursory administrative review and public participation. Such a wholesale lowering of water quality standards by weakening Arkansas' NPDES program jeopardizes our current and future drinking water supplies.

The proposed changes are in conflict with the Clean Water Act and its implementing regulations. Act 954 makes unsubstantiated, unscientific and incorrect legislative findings which ADEQ must not adopt.

Sincerely,



Ross Noland



The following individuals and entities join this letter:

John Whiteside as Policy Director of the
Arkansas Public Policy Panel

Robert Cross, individually, and as
President of the Ozark Society

Daniel Scheiman, Ph.D, as
Acting State Director of Audubon Arkansas

Debbie Doss, individually, and as
Conservation Chair of the Arkansas Canoe Club

Bob Allen
Professor of Chemistry
Arkansas Tech University

Kate Althoff

Tom McKinney, individually, and as
Chair, Executive Committee, Arkansas Chapter Sierra Club