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Comments on Regulation 6 Revisions

Submitted via electronic delivery to reg-comment@adeq.state.ar.us
October 17, 2016

The following are comments from the Buffalo River Watershed Alliance on proposed revisions to APC&EC Regulation 6 (Regulations for State Administration of the National Pollutant Discharge Elimination System (NPDES)), Markup Draft August, 2016.

1) Section 6.202(F) states, *"For general National Pollutant Discharge Elimination System Permits, a state construction permit is not required if the construction is authorized under the general permit."*

Comment: The Alliance believes the construction permitting process serves an important purpose in allowing the ADEQ to review and approve an engineer's construction plans, provide notice to the public, and ensure that disposal systems are constructed in accordance with the plans submitted and approved. This change weakens the permitting process is against the public interest and is one that the Alliance strongly opposes. A separate construction permit, and public notice of application for such a permit, should be required.

The Alliance and others have long contended that the permit for C&H Hog Farms, ARG590001, was improperly issued because it lacked the required construction permit. ADEQ has responded that a separate construction permit was not required. However, the proposed revised language in Section 6.202(F), stating that "…*a state construction permit is not required*…", reflects a change in the requirements. Such a change would not be necessary if there were in fact no current requirements for a construction permit. This proposed change suggests that a separate permit for construction was required at the time of the C&H application and that the permit was therefore improperly issued.

2) Section 6.301(D)(4) states, "*The fecal coliform content of discharges shall not exceed a monthly geometric mean ~~average~~ of 200 colonies per 100 milliliters and a weekly geometric mean ~~average~~ of 400 colonies per 100 milliliters. However, at no time shall the fecal coliform content exceed a geometric mean of 200 colonies per 100 milliliters in any water defined as an Extraordinary Resource Water or Natural and Scenic Waterway; "*

Comment: Regulation 2.507 states, *"For assessment of ambient waters as impaired by bacteria, [see] the below listed applicable values for **E. coli** …"* (emphasis added)

E. coli is considered by EPA to be a better indicator of bacterial impairment with regard to human health than fecal coliform. See https://www.nps.gov/buff/learn/nature/upload/Usrey-2013-Assessment-of-E-coli-on-Surface-Waters.pdf "**Assessment of Escherichia coli Concentrations in the Surface Waters of Buffalo National River 2009 to 2012 Buffalo National River Report NPS/B-0100/2013 "** which states on page 2, "*In recent years, guidance from the EPA has suggested that the utilization of E. coli was more effective in monitoring surface waters from a human health perspective than was fecal coliform. So, in 2009 the park began to make the transition from fecal coliform to that of E. coli for monitoring purpose, and as of now, the park collects both fecal coliform and E. coli."* In order to be consistent with existing state regulations and conform with federal guidelines, E. coli should be the primary analyte for monitoring bacterial contamination, not fecal coliform, and section 6.310(D)(4) should be changed accordingly.

The final sentence of this section regarding ERW/NSWs does not specify a period during which the geometric mean is to be calculated. The phrase, "*at no time*" implies that no single sample should exceed 200 colonies per 100 ml, therefore the language regarding geometric mean is incorrect because a mean cannot be calculated based on a single sample. This sentence should either specify a minimum number of samples to be taken in order to calculate a geometric mean, or the reference to geometric mean should be removed.

Whether by averages or geometric means, the application of any mathematical formula should not be used to hide dangerous peak

readings when public health is of concern. Parents allow their children to swim in ERWs on the assumption that this designation means the water is safe for human contact

3) Section 6.207 states, "***Public Notice Requirements of Notice of Intent for Concentrated Animal Feeding Operation (CAFO) General Permit*** *Public notification requirements for any notice of intent filed with the Department for a general permit for a proposed Concentrated Animal Feeding Operation (CAFO) in Arkansas (ARG59000) are as follows: ...*"

Comment: This section refers to the General Permits for Swine CAFOs, ARG590000. This section contradicts the public announcement by ADEQ on April 28, 2016, and a public notice issued by the Director on May 4, 2016, stating that ARG590000 would not be renewed after it expires on October 31, 2016. (see Attachment 1) However, this apparently was only an administrative decision by the Director and has no regulatory authority. The decision to issue no further Regulation 6 General permits for swine CAFOs is only in effect as long as Director Keogh remains director of ADEQ, or as long as she chooses to enforce it. As this amounts to nothing more than a temporary moratorium, we request that rule-making be initiated to make this elimination of Regulation 6 General permits for swine CAFOs, ARG590000, permanent as it was implied by the Director in May. We ask that Director Keogh take the steps necessary to ensure the credibility of her original statement on this matter. Meanwhile, Draft Section 6.207 should be deleted or modified to be consistent with the commitment made by the Director.

Further, on November 13, 2013, Arkansas Attorney General Dustin McDaniel rendered a legal opinion to State Representative David Branscum regarding the authority of the ADEQ director to impose a moratorium or suspend permitting of CAFO permit (see Attachment 2 and http://ag.arkansas.gov/opinions/docs/2013-102.html). The AG concludes in part, "*…it is my opinion that the Director of ADEQ lacks authority to impose a moratorium on, or suspend the processing of, a permit for a concentrated animal feeding operation.* " This opinion further adds to the confusion regarding the Director's Notice. It is understandable that in light of these various conflicting statements, the public is confused about the status of the

General Permit for CAFOs, ARG590000.

The Alliance requests, and the public is entitled to, a clarification of the apparent contradictions between the Director's Notice, the AG's opinion, and the language contained in Draft Regulation 6.

Thank you for the opportunity to submit these comments.

Gordon Watkins, President,

Buffalo River Watershed Alliance

PO Box 101, Jasper, AR 72641

ATTACHMENT 1

Notification of Decision to Not Renew
NPDES General Permit Number ARG590000 Operators of Concentrated Animal Feeding Operations (CAFOs) within the State of Arkansas

This is to give notice in accordance with A.C.A § 8-4-203 that the Permits Branch of the Office of Water Quality of the Arkansas Department of Environmental Quality (ADEQ), 5301 Northshore Drive, North Little Rock, Arkansas 72118-5317 at telephone number (501) 682-0648, has made a decision to not renew the above General Permit, which is set to expire on October 31, 2016, under the National Pollutant Discharge Elimination System and the Arkansas Water and Air Pollution Control Act. The Department made the decision not to renew this General Permit after an extensive review of all comments received during the public comment period. Only one facility had received coverage during the five-year term of the General Permit. ADEQ determined such limited use was inconsistent with the intent of a general permit and, thus, did not warrant renewal.

Becky W. Keogh, Director Date: May 4, 2016

ATTACHMENT 2

November 13, 2013

The Honorable David L. Branscum
State Representative
Post Office Box 370
Marshall, Arkansas 72650-0370

Dear Representative Branscum:

You have requested my opinion on the following question concerning permitting for a concentrated animal feeding operation:

Under Arkansas law, may the director of the Arkansas Department of Environmental Quality impose a moratorium or suspension of the processing of a permit for a concentrated animal feeding operation? If the answer is yes, under that circumstances may the director do so?

RESPONSE

The answer to this question is "no," in my opinion. Your second question is consequently moot.

Some explanation of the permitting process at issue will be helpful before further explaining this response.

The Federal Water Pollution Control Act,*[1]* commonly referred to as the Clean Water Act ("CWA"), created a federal permitting program – the National Pollutant Discharge Elimination System ("NPDES") – that requires a permit of any person discharging pollutants into a surface water body.*[2]* Concentrated, confined animal operations which are covered by Environmental Protection Agency ("EPA") regulations defining "concentrated animal feeding operation" ("CAFO")*[3]* are subject to the NPDES program.*[4]* The EPA requires all CAFOs to apply for an

individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit.[5] An NPDES permit may be issued by the EPA, but states also are authorized to administer their own NPDES programs.[6] If a state chooses to operate its own permit program, it must first obtain EPA permission and then ensure that it issues discharge permits in accord with the same federal rules that govern permits issued by the EPA.[7]

EPA and the Arkansas General Assembly have delegated to the Arkansas Department of Environmental Quality ("ADEQ") the power to issue NPDES permits authorizing pollutant discharges. Pursuant to A.C.A. § 8-4-208(a), "the [ADEQ] is authorized … to administer on behalf of the state its own permit program for discharges into navigable waters within its jurisdiction in lieu of that of the [EPA.]" ADEQ was further granted authority under A.C.A. § 8-4-208(b) to "accept a delegation of authority from the [EPA] under the [CWA] and to exercise and enforce the authority delegated."

ADEQ is therefore the NPDES permitting authority in Arkansas.[8] The Arkansas Pollution Control and Ecology Commission ("Commission") adopted Regulation No. 6[9] to govern NPDES permitting.[10] Regulation No. 6 incorporates federal regulations governing, inter alia, permit requirements for CAFOs.[11] The federal regulations for CAFOs provide as follows regarding NPDES permit authorization:

A CAFO must not discharge unless the discharge is authorized by an NPDES permit. In order to obtain authorization under an NPDES permit, the CAFO owner or operator must either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit.[12]
A general permit is issued to categories or classes of dischargers that are susceptible to regulation under common terms and conditions. As explained by one court:

A general permit is a tool by which EPA regulates a large number of similar dischargers. Under the traditional general permitting model, each general permit identifies the output limitations and technology-based requirements necessary to adequately protect water quality from a class of dischargers. Those dischargers may then acquire permission to discharge under the Clean Water Act by filing [Notices of Intent], which embody each discharger's agreement to abide by the terms of the general permit.*[13]* Pursuant to Regulation No. 6 and its permitting authority, ADEQ developed a general permit covering CAFOs.*[14]*

With this background in mind, I will turn to your particular question concerning a moratorium or suspension. Because you have referred to a "permit for a [CAFO]," I assume you are asking about the general permit noted above, and possibly individual NPDES permits that may be issued to CAFO owners or operators.

While the Commission is clearly authorized to either declare a moratorium on, or suspend the processing of, a type or category of permit, it appears the Director of ADEQ has not been vested with such authority. The Commission's authority to this effect is set forth in A.C.A. § 8-4-201, and further reflected in A.C.A. § 8-4-202. Section 8-4-201 addresses the Commission's powers and duties generally, and provides in relevant part:

The Arkansas Pollution Control and Ecology Commission is given and charged with the following powers and duties:
Promulgation of rules and regulations, including water quality standards and the classification of the waters of the state and moratoriums or suspensions of the processing of types or categories of permits, implementing the substantive statutes charged to the department for administration.*[15]*
Section 8-4-202 details more specifically the matters that may be addressed by Commission rule or regulation, and includes the

following notice requirement and "emergency" authority:
Before the adoption, amendment, or repeal of any rule or regulation or before suspending the processing of a type or category of permits or the declaration of a moratorium on a type or category of permits, the commission shall give at least thirty (30) days' notice of its intended action.
* * *
If the commission determines that imminent peril to the public health, safety, or welfare requires immediate change in the rules or immediate suspension or moratorium on categories or types of permits, it may, after documenting the facts and reasons, declare an emergency and implement emergency rules, regulations, suspensions, or moratoria.*[16]*

I have found no comparable provision in law or regulation that would authorize the Director of ADEQ to declare a moratorium on, or suspend the processing of, a permit for a CAFO.

I should note that the Director very clearly may revoke or suspend, for cause, a permit under which a CAFO is operating:

The Arkansas Department of Environmental Quality or its successor is given and charged with the power and duty to revoke, modify, or suspend, in whole or in part, for cause any permit issued under this chapter, including, without limitation:
(1) Violation of any condition of the permit;
(2) Obtaining a permit by misrepresentation or failure to disclose fully all relevant facts; or
(3) A change in any applicable regulation or a change in any preexisting condition affecting the nature of the discharge that requires either a temporary or permanent reduction or elimination of the permitted discharge.*[17]*
This authority is plainly distinct, however, from that noted above respecting moratoria or suspensions. Had the General Assembly intended to extend the latter authority to the Director, it could

easily have done so.

In response to your question, therefore, it is my opinion that the Director of ADEQ lacks authority to impose a moratorium on, or suspend the processing of, a permit for a concentrated animal feeding operation.

Deputy Attorney General Elisabeth A. Walker prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN McDANIEL
Attorney General

DM:EAW/cyh

*[1]*33 U.S.C. §§1251 - 1387.
*[2]*Id. at §§ 1251(a)(1), 1311(a), 1342(a)(1).
*[3]*40 C.F.R. § 122.23 (emphasis added).
*[4]*CAFOs are defined and categorized depending on the number of animals that they stable or confine. Id. at (b).
*[5]*Id. at (d)(1).
*[6]*33 U.S.C. § 1342(a)-(b).
*[7]*Id. at (a); 40 C.F.R. §§ 123.25; 122.41.
*[8]*See also A.C.A. §§ 8-1-202(b)(2)(A) (Repl. 2011) (including among the duties of the Director of ADEQ "[t]he administration of permitting … programs deemed necessary to protect the environmental integrity of the state[,]" and designating the Director as "the issuing authority for the state[.]"); 8-4-203(a) (Supp. 2013)(vesting ADEQ with "the power and duty to issue, continue in effect, revoke, modify, or deny permits, under such conditions as it may prescribe….").

*[9]*Reg. No. 6, Regulations for State Administration of the National Pollutant Discharge Elimination System (as amended Feb. 9, 2013).
*[10]*See Reg. 6.101, 6.102. The Commission is charged under A.C.A. §§ 8-1-203(b)(1)(A) and 8-4-201(b)(1)(A) (Repl. 2011) with the power and duty to promulgate rules and regulations "implementing the substantive statutes charged to the [ADEQ] for administration."). See also A.C.A. § 8-4-202 (Supp. 2013) (further addressing the Commission's rulemaking authority).
*[11]*Reg. 6.104(A). As noted above, CAFOs are defined in 40 C.F.R. § 122.23(b).
*[12]*40 C.F.R. § 122.23(d)(1).
*[13]*Environmental Defense Ctr., Inc. v. EPA, 344 F.3d 832, 853 (9th Cir. 2003). See also A.C.A. § 8-4-203(m)(1)(A)(i) (Supp. 2013) (authorizing the issuance of "general permits" by ADEQ, and identifying a "general permit" as "a statewide permit for a category of facilities or sources that … (a) [i]nvolve the same or substantially similar types of operations or activities; (b) [d]ischarge or release the same type of wastes or engage in the same type of disposal practices; (c) [r]equire the same limitations, operating conditions, or standards; (d)[r]equire the same or similar monitoring requirements….).
*[14]*CAFO General Permit ARG590000 (Nov. 1, 2011) (available at http://www.adeq.state.ar.us/water/branch _permits/generalpermits/default.htm) (last visited Oct. 24, 2013).
*[15]*A.C.A. § 8-4-201(b)(1)(A) (Repl. 2011) (emphasis added).
*[16]*A.C.A. § 8-4-202(d)(1)(A) and (e)(1) (Supp. 2013) (emphasis added).

*[17]*A.C.A. § 8-4-204(Repl. 2011) (emphasis added).