

BEFORE THE ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION

IN THE MATTER OF AMENDMENTS TO)
REGULATION NO. 9: FEE REGULATION)

DOCKET NO. 16-006-R

RESPONSIVE SUMMARY INTRODUCTION

The public comment record for Docket No. 16-006-R contains six (6) comments pertaining to changes to Arkansas Pollution Control and Ecology Commission Regulation 9, entitled Fee Regulations (Reg.9).

The Notice of Proposed Regulation Changes, Public Hearing, and Comment Period was published on September 28 and 29, 2016. The public comment period ended on November 4, 2016 at 4:30 P.M. C.T. The Arkansas Pollution Control and Ecology Commission (APCEC) conducted one (1) public hearing on the proposed Reg. 9 in N. Little Rock on October 18, 2016.

RESPONSES TO WRITTEN COMMENTS

The following people or organizations sent comments during the public comment period and public hearing.

- Rebecca Miller-Rice, Legislative Attorney of Administrative Rules Review Section of Bureau of Legislative Research

Comment 1 Reg.9.403(B)(1) – I just wanted to make sure that I understood this amendment correctly. It is not a change to the fee charged, but merely a rewriting/simplification of the formula?

Response: Yes, that is correct.

Comment 2 Reg.9.403(C)(1)(a) – Can you please provide me with the precise statutory authority on which the Department/Commission relies to reduce the maximum fee?

Response: Ark. Code Ann. § 8-1-103 provides the specific legal authority for ADEQ and APC&EC to determine permit fees. This change is warranted because facilities classified as minor domestic facilities will not have a value for the term “Q” in the formula greater than one million gallons per day (1 mgd). However, based on your comment and the agency’s further review, it has been determined that the word “Domestic” should be added to the title of Reg. 9.403(C) and read as “Minor Municipal and Minor Non-Municipal Domestic Facilities” with a maximum fee of \$5,800. Additionally, for more clarification, a new Reg.9.403(D) has been added for “Minor Non-Municipal Facility” with a maximum fee of \$10,000. The remaining subsections of Reg.9.403 will be reindexed to account for the changes from adding the new subsection.

Proposed revision of Reg.9.403(C) based on Comment 4:

(C) Minor Municipal and Minor Non-Municipal Domestic Facilities

Proposed addition of Reg.9.403(D) based on Comment 4:

(D) Non-Municipal Minor Facilities

Non-Municipal Minor Facilities with MRAT less than 80 are subject to fees as follows:

(a) Initial and annual fees shall be calculated as follows:

Fee = \$200 + 5600 X Q
with Maximum Fee = \$10,000

(b) Modification Fee

(i) Major\$2,000

(ii) Minor\$1,000

Comment 3 Reg.9.403(C)(3) – Can you please provide me with the precise statutory authority on which the Department/Commission relies in implementing this fee?

Response: Ark. Code Ann. § 8-1-103 provides the specific legal authority for ADEQ and APC&EC to determine permit fees.

Comment 4 Reg.9.407 – The amendment seems to merely set forth that the fee is authorized by statute; it does not state if the fee is required, will be collected, and/or how it will be calculated, despite Ark. Code Ann. § 8-4-203(b)(4) appearing to set forth some parameters. Is there a reason that this fee has not been expounded upon further as the other fees contained in the Regulation have been?

Response: Ark. Code Ann. § 8-4-203(b) requires that a Non-municipal Domestic Sewage Treatment Works pays the trust fund contribution fee and sets some parameters for those fees. The proposed revision below references Ark. Code Ann. § 8-4-203(b), and states that the assessment of trust fund contribution fees are limited by it. Ark. Code Ann. § 8-4-203(b) was amended in the 2017 legislative session following the close of public comments on APC&EC Regulation No. 9. For that reason, further changes are not within the scope of this rulemaking or the public notice for this rulemaking.

Proposed revision or Reg.9.407 based on Comment 4:

9.407. Nonmunicipal Domestic Sewage Treatment Works Trust Fund Contribution Fee.

(A) A Nonmunicipal Domestic Sewage Treatment Work is required to pay a trust fund contribution fee for the Nonmunicipal Domestic Sewage Treatment Works Trust Fund.

(B) The trust fund contribution fee shall be assessed in accordance with Ark. Code Ann. § 8-4-203(b).

- Commissioner Wesley Stites of Arkansas Pollution Control and Ecology Commission

Comment 5 Reg.9.301 (D) concerns failure to pay. One part reads “[c]ontinued refusal to pay the required fees after a reasonable notice shall constitute grounds for legal action by the Department...” Is there a particular reason for the use of the word ‘refusal’? I, of course, am not a lawyer, but in my mind the use of that word evokes the question of intent or willfulness in the act. Might it not be better to use the word that is in the title line, ‘failure’, in place of ‘refusal’? Failure is devoid of intent. You either pay or don’t and whether you are refusing to pay, or forgot to pay, or couldn’t pay, or thought somebody else paid is immaterial.

Response: The use of “refusal” in Reg.9.301(D) is based on Ark. Code Ann. § 8-1-103(3) which states in part that the Department shall deny a permit, “if and when any facility subject to control by the department fails or refuses to pay the fees after reasonable notice...” In order to be consistent with Ark. Code Ann. § 8-1-103(3), the word “failure” has been added to that sentence in Reg.9.301(D) to read: “Continued failure or refusal to pay the required fees after a reasonable notice...”

Proposed revision of Reg.9.301(D) based on Comment 5:

(D) Failure to Pay Annual Fees

A permitted facility failing or refusing to pay the annual fee in a timely manner shall be subject to a late payment charge as established in these regulations. Continued failure or refusal to pay the required fees after a reasonable notice shall constitute grounds for legal action by the Department, ~~which that~~ may result in revocation of the permit. When payment of fees is made by check ~~which that~~ is subsequently returned due to insufficient funds, all review work on the particular application ~~will~~ shall immediately cease until the fee is paid in cash or by money order.

Comment 6 Reg. [sic] 9.403 & Chapter 2 – The definition of Q is moved to Chapter 2. That makes sense. However, the new definition in Chapter 2 says “‘Q’ or ‘Quantity’ means the flow expressed in million gallons per day (mgd)”. In the old reg, Q is the DESIGN flow. This is no longer specified in the proposed changes. If I am applying for a permit and my average daily flow is 80% of design, using my average daily flow to calculate my fee might save me money. I suggest that ‘design’ or, if that is what you intend, ‘average daily’ be inserted ahead of ‘flow’ in the new definition of Q in Chapter 2.

Response: The Department acknowledges the comment. For more clarification the word “permitted” has been added to the definition of “Q” or “Quantity.” The term “Q” or “Quantity” is used in formulas for all permit categories, including those permits that do not use “design flow” for the permitted flow.

Proposed definition of “Q” or “Quantity” based on Comment 6:

“Q” or “Quantity” means the permitted flow expressed in million gallons per day (mgd), as used in formulas for calculating Water Permit Fees under Chapter 4.