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From: [ellen carpenter](#)

Sent: Friday, October 2, 2020 8:53:50 AM

To: CPP-antideg-comments; Harper, Jake

Cc: [Blanz, Bob](#); [Martin, Joe](#); nelson.russell@epa.gov

Subject: CPP and AIM Comments

Importance: Normal

Attachments:

[CPP - AIM Comments 10022020.pdf](#); [CPP - AIM Comment Attachments 1 -4.pdf](#);

Dear Mr. Harper,

Attached please find my comments on DEQ's 2020 Draft CPP and 2020 Draft AIM. I have attached a separate document consisting of Attachments 1 - 4, which go with the comments.

Please confirm receipt.

Thank you.

Ellen Carpenter

Via email:

CPP-antideg-comments@adeq.state.ar.us
harper@adeq.state.ar.us

October 2, 2020

Thank you for the opportunity to submit comments on the State of Arkansas' draft 2020 Continuing Planning Process ("CPP"), a guidance document for drafting NPDES permit conditions and for water quality management and the draft 2020 Antidegradation Implementation Methods ("AIM"), a guidance document outlining how to conduct antidegradation reviews when issuing NPDES permits.

Summary of Public Participation Process

The public's involvement in drafting the CPP has a long history that warrants memorializing for future review. The process for drafting the CPP *began* in March 2016 with seven stakeholders representing only one viewpoint. Behind closed doors, these stakeholders, NPDES permittees and their allies, met with DEQ to craft the agency's guide to drafting NPDES permit conditions, a highly technical 117-page document. Four years later, DEQ convened a broader stakeholder group. This broader stakeholder group was given only two months (June and July of 2020) to digest the 117-page guidance document for drafting NPDES permit conditions.

During June and July 2020, when the broader stakeholder group was reviewing the CPP, the stakeholders also were tasked with reviewing the revised draft AIM. In 2018, a focus group had been convened for the purpose of reviewing a draft AIM. However, the 2018 focus group's effort appears to have been pointless given the subsequent revisions to the document revealed in June 2020. The 2020 AIM document bears little resemblance to the draft reviewed by the focus group in 2018, it does not appear to reflect comments made by focus group members on the 2018 draft, and no clear explanation has been offered for the significant changes made to the document between 2018 and 2020.

One week after the third stakeholder meeting held on July 21, 2020, DEQ published the draft CPP and draft AIM for public comment without making any revisions based on the broader stakeholder group's input. Although DEQ has been working on these documents for at least four years, the agency gave the general public a mere 30-days to comment. Stakeholders requested additional time. In the end, the public was granted a 68-day time period to provide comments on these two important agency documents (July 26 through October 2, 2020). This is an unlikely time-frame for providing meaningful comments - especially given that the CPP and AIM comment period overlapped with the comment period for the Triennial Review of Regulation No. 2 (July 4 through September 8). Likely those who commented on the Triennial Review would be interested in commenting on the draft CPP and draft AIM, if they had been given adequate time to review all these documents.

Accordingly, I ask DEQ to consider stakeholders' comments and the public's comments and to revise the draft CPP and draft AIM as appropriate after giving the public's input due consideration. Also, I ask DEQ to send the revised documents back out to public notice with a 90-day period in which to submit comments on the revised drafts before forwarding to EPA for review. This additional comment period would give the public a more meaningful opportunity to consider these important, technical documents, which will guide how water quality is protected in Arkansas for years to come.

Public Participation Process-Details

Beginning in March 2016, DEQ invited seven stakeholders to help author the draft Continuing Planning Policy (“CPP”) - a document used to guide DEQ in drafting NPDES permit conditions. The seven stakeholders chosen to work on the guidance document for drafting NPDES permits, consisted of two NPDES permit holders (Entergy and Little Rock ‘s POTW), four consultants to NPDES permit holders, and the Director of the Arkansas Environmental Federation - a non-profit organization dedicated to representing the regulated community. (The two NPDES permit holders and the four consultants invited to work with DEQ on drafting the CPP all work for businesses that are members of AEF. If I recall correctly, I believe AEF is an organization with which both Secretary Keogh and Dr. Blanz were formerly affiliated prior to assuming their current positions of public service.)

In August 2016, after I learned of the CPP meetings, I sent a lengthy email to Director Keogh objecting to the limited stakeholder input representing only one point of view into this important agency document. (See Attachment 1, which includes my email, DEQ’s response, including, “We convened a small group because, as you know larger groups can be an inefficient use of everyone’s time...,” and my renewed request to include more than just AEF members in the stakeholder process).

DEQ’s meetings with the permittees and their allies were not open to the public, were not reported anywhere, and the extent to which the interested stakeholders contributed to the document’s final version is entirely undocumented. It would be difficult for the average citizen to look at a highly technical document like the CPP and discern whether it is evenhanded in its application and protection of the waters of the state even within a more transparent public participation process. But where the permittees and their allies draft the playbook for permitting with the regulators behind closed doors, this difficulty is greatly exacerbated.

I found DEQ’s CPP public participation process suspect because at the very same time that DEQ was meeting with its exclusive group of seven CPP stakeholders behind closed doors, DEQ simultaneously was engaging in an inclusive, highly transparent, and open public participation process for the 2018 Assessment Methodology (“AM”). The starkly different AM public participation process included among other things, a 27+ member stakeholder group, the meetings for whom were announced through public notices and news releases and on DEQ’s webpage and listed in DEQ’s public events calendar. Further, the public was invited to attend the workgroup meetings and to provide comments through their respective representatives on the workgroup, as well as being given a public comment period for the draft AM. Obviously, DEQ knows how to conduct an open and transparent public participation process when it wants to do so....

Anyway, my efforts at asking DEQ to include more stakeholders in the process of drafting the CPP seemed futile. So, eventually, I provided a public comment about DEQ’s one-sided public involvement scheme for drafting the CPP at the Commission meetings held in December 2016 and January 2017. (See Attachment 2 and Commission meeting minutes at:

https://www.adeg.state.ar.us/downloads/commission/minutes/Minutes_1994-2019/2016-12-02_Commission_Meeting_Minutes.pdf and
https://www.adeg.state.ar.us/downloads/commission/minutes/Minutes_1994-2019/2017-01-27_Commission_Meeting_Minutes.pdf.)

On February 15, 2017, Director Keogh sent me a letter (Attachment 3). She notes in that letter that “we have engaged in the development of a Discussion Draft that allowed input from a targeted group of

stakeholders to be considered alongside the work of ADEQ staff. The Discussion Draft is intended to provide an up-to-date starting point for the larger stakeholder process we plan to begin in the near future.” Director Keogh also advised that DEQ had decided to segregate the Antidegradation Implementation Plan from the CPP and would have “a small focus group” provide input on that chapter, and the Discussion Draft of the CPP would go to a “broader stakeholder group for *in-depth review*” (emphasis added).

Ten months later, in December 2017, I received another letter from Director Keogh in which she advised that the Antidegradation Implementation Chapter’s focus group would be convened in February 2018 (Attachment 4).

The focus group, convened in April, consisted of approximately six stakeholders representing consultants to NPDES permit holders (2), a water district (1), the Farm Bureau (1), an NGO (1) and an interested citizen (1). Guests who were interested in the discussion were allowed to attend the four meetings held once a month between April and July, 2018. Written comments from the focus group participants were solicited by DEQ and were to be submitted in August on the draft Antidegradation Implementation Plan prepared by DEQ. Written comments were submitted by stakeholders.

Two years after the focus group was convened, the broader stakeholder group mentioned in Director Keogh’s February 2017 letter met for the “in-depth review” of the CPP and AIM. The broader stakeholder group, consisted of approximately 21 stakeholders and the “in-depth review” consisted of three meetings held on June 22, July 7, and July 21, 2020. The draft CPP is a 117-page document covering the state’s Water Quality Management Program, technology based effluent limitations, water quality based effluent limitations, monitoring and sampling requirements for permits, and whole effluent toxicity testing requirements. During this “in-depth review,” the stakeholder group also was tasked with reviewing a revised draft AIM. The 2020 draft AIM was significantly different from the draft reviewed by the focus group in 2018 and not because the revised draft incorporated changes based on input from the focus group members. I am not aware of DEQ providing any detailed explanation for the significant revisions made to the draft AIM between 2018 and 2020.

Anyway, one week after the third meeting held on July 21, 2010, DEQ published notice of a 30-day public comment period for both the newly published 117-page draft CPP and the wildly revised 2020 version of the draft AIM. In August, the stakeholders requested an extension of the comment period, which was granted until October 2, 2020, giving the public approximately 68 days to prepare comments on these two documents. It bears mentioning again that during this same time frame, the public also was commenting on the Triennial Review for Regulation No. 2 (the comment period being July 4 through September 8). Overall, it seems the public is getting the bum’s rush in these public participation processes.

Against this discouraging backdrop, I offer the following comments hoping they will not be ignored.

WOTUS Comments

The 2020 draft AIM is very different from the 2018 draft that the focus group considered. I say this because DEQ proposes to re-define “pollution,” “water quality standards,” and “waters of the State” and to limit antidegradation protections in Arkansas to only “*waters of the United States*” or “WOTUS.” There is no basis in state law for this unseemly maneuver, which, if pursued, is tantamount to betraying the public trust.

“Waters of the State” is defined in state law as “all streams, lakes, marshes, ponds, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private, which are contained within, flow through, or border upon this state or any portion of the state.”¹ State law also charges the Arkansas Pollution Control and Ecology Commission (“APC&EC”) with the power and duty to promulgate rules and regulations, including water quality standards.² The Commission has adopted water quality standards for “*all surface waters, interstate and intrastate of the State of Arkansas* (emphasis added).”³ The State’s water quality standards are “designed to enhance the quality, value, and beneficial uses of the water resources of the State of Arkansas, to aid in the prevention, control and abatement of water pollution, to provide for the protection and propagation of fish and wildlife and to provide for recreation in and on the water.”⁴ The State’s water quality standards include the designated uses for waters of the State, the water quality criteria to protect those designated uses, and an antidegradation policy.⁵ The antidegradation policy included in the state’s water quality standards⁶ initially provides that “[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.”⁷ For high quality waters, the antidegradation policy provides:

Where the quality of *the waters* exceeds levels necessary to support propagation of fish, shellfish and wildlife and recreation *in and on the water*, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State of Arkansas’ Continuing Planning Process, that allowing lower water quality is *necessary* to accommodate important economic or social development in the area in which *the waters* are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that (1) there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and (2) that the provisions of the Arkansas Water Quality Management Plan be implemented with regard to nonpoint sources. (Emphasis added.)⁸

The antidegradation policy also encompasses the protection of high quality waters constituting an “outstanding state or national resource” known as Outstanding Resource Waters, and including “waters designated as Extraordinary Resource *Waters*, Ecologically Sensitive *Waterbodies*, or Natural and Scenic *Waterways*.”⁹

The antidegradation policy in no way limits the waters to be protected. Nonetheless, in its 2020 draft AIM, DEQ proposes to limit antidegradation reviews to only new or expanded NPDES permits

¹ Ark. Code Ann. § 8-4-102(10) (Act 472 of 1949). See also APC&EC Reg. 2.106 which defines “waterbodies, waterways, waters” as surface waters of the State as described in Act 472.

² Ark. Code Ann. § 8-4-201(b)(1)(A); APC&EC Regulation No. 2.

³ APC&EC Reg. 2.101.

⁴ APC&EC Reg. 2.102.

⁵ APC&EC Regulation No. 2; Section 1.2 of the Draft 2020 CPP at pages 4 - 5.

⁶ Chapter 2 of APC&EC Regulation No. 2.

⁷ APC&EC Reg. 2.201.

⁸ APC&EC Reg. 2.202.

⁹ APC&EC Reg. 2.203. See also APC&EC Reg. 2.106 which defines “waterbodies, waterways, waters” as surface waters of the State as described in Act 472 of 1949 (Ark. Code Ann. § 8-4-102(10)).

discharging to waters of the United States or WOTUS. WOTUS is a subset of all the waters located within the State of Arkansas. But *nowhere* in state law, state regulation or, more specifically, in the State's water quality standards' antidegradation policy is WOTUS ever mentioned. State law, state regulation, and the State's antidegradation policy only speak in terms of waters of the State.¹⁰ "Waters of the State" is defined more broadly than WOTUS. Proposing to limit antidegradation protections to only WOTUS would exclude waters of the state that are considered critical to maintaining biological integrity and preserving water quality from protection in conflict with 40 CFR § 131.12 and the provisions of the State's water quality standards. Further, "waters of the State" has a stable and easy to understand definition that has remained unchanged for generations, maybe since 1949. The definition of WOTUS, on the other hand, is highly litigated, subject to change with each new administration, and has successfully flummoxed even the U.S. Supreme Court.¹¹ Recognizing these problems with WOTUS, DEQ's proposal appears to very cleverly avoid offering a meaningful definition for WOTUS.

Why narrow the application of antidegradation protections in Arkansas to a subset of the waters of the State by referencing a federal term whose definition is ever-changing, contentious, highly litigated, and has no meaningful application in the State of Arkansas? States can choose to protect more waters within its boundaries than just WOTUS, and Arkansas has chosen to do so in every instance! Until now. There is no reason for DEQ to propose redefining waters of the State—a term that has been clearly defined by the State legislature and by the Arkansas Pollution Control and Ecology Commission, and which has served as the regulatory basis for every other DEQ administration in the history of the Arkansas Water and Air Pollution Control Act. DEQ's proposal to limit antidegradation review to only WOTUS, when WOTUS, a federal term, has never been used before by the State of Arkansas in the administration of its NPDES programs, is without legal support, is an abuse of discretion, and is simply very wrong. Therefore, every reference to "WOTUS" in the draft 2020 AIM should be deleted and replaced by "waters of the State."

Other Comments on the 2020 Draft AIM

1) The CPP and the AIM were originally intended to be one document. I believe the two should be merged and, for purposes of enforceability, be subject to rulemaking.

2) The first step in the antidegradation review process should be the identification of the tier protection level for the receiving stream. This step should be clearly documented as part of the review process.

3) According to the draft Implementation Plan, if a *significant* lowering of water quality is proposed by an activity, then an applicant will be subject to a Tier 2 antidegradation review. A significant lowering of water quality is established when $\geq 10\%$ of the total assimilative capacity of a waterbody for a given parameter is proposed to be consumed as a result of the permitted activity. The assimilative capacity is derived through the following calculation:

¹⁰ Chapter 2 of APC&EC Regulation No. 2 repeatedly refers to waters, waterbodies, or waterways, all of which are defined in the regulation as surface waters of the State as described in Act 472 [of 1949 (Ark. Code Ann. § 8-4-102(1))] at Reg. 2.106.

¹¹ *Rapanos v. U.S.*, 547 U.S. 715 (2006). This case, in considering what constitutes "waters of the United States," resulted in a plurality decision (by Justice Scalia with Chief Justice Roberts, Justice Thomas, and Justice Alito joining), two concurring opinions (one by Chief Justice Roberts and the other by Justice Kennedy) and two dissenting opinions (one by Justice Stevens with Justice Souter, Justice Ginsburg, and Justice Breyer joining); the other by Justice Breyer separately.

Baseline water quality – water quality criteria = total assimilative capacity.

Water quality criteria, both numeric and narrative, are intended to protect beneficial uses of surface water. But for purposes of calculating total assimilative capacity only numeric criteria are utilized. Numeric criteria establish minimally acceptable levels of pollutants. EPA describes the criteria to protect aquatic life as, “how much of a chemical can be present in surface water before it is *likely* to harm plant and animal life.” And for human health criteria, EPA notes, “EPA scientists research how much of a specific chemical can be present in surface water before *it is likely* to harm human health.”¹² Although criteria development uses conservative assumptions, EPA’s qualified description of these criteria hardly instills absolute confidence in the values derived. The development of numeric criteria is supposed to be based on the best scientific information currently available. But it would be misleading to suggest that there is no scientific uncertainty in the numeric water quality criteria which have been derived to date to protect human health and the environment.

It is my understanding that the effluent limits included in existing permits are designed to meet water quality criteria, which as noted above, establish minimally acceptable levels of pollutants. Those effluent limits were not usually designed to protect high quality waters which exceeded the criteria. Existing permitted discharges to high quality waters may have already consumed the total assimilative capacity and degraded high quality waters. And the extent to which high quality waters may have been degraded is unknown. In 2016, over ½ of all the state’s larger streams and rivers were either not assessed or did not support a use.¹³

Given the number of permitted discharges already existing and the existing data gaps in assessing water quality impacts from point sources, there is a clear need for measures to be adopted that offset the risks posed by the lack of knowledge regarding the existing permit program’s impacts on water quality, especially for discharges to high-quality waters. As such, for Tier 2 waters, I recommend that the AIM require representative water quality data (whether actual or modeled) for a five -year period *at critical flow conditions* when establishing the BWQ.

Further, I recommend that the AIM include a margin of safety to conserve a small portion of the total assimilative capacity. This margin of safety would place a certain percentage (such as 20%) of the total assimilative capacity in reserve to take into account any uncertainty between the permit limits designed to meet water quality criteria and the actual impacts on the receiving waterbody. This approach would provide better protection of high quality waters in the permitting process and greatly improve public confidence in the agency’s decisions to lower water quality.

Also, I ask DEQ to consider conducting a one-time anti-degradation review for all NPDES permits. However, if that proves too onerous a task for DEQ, then please at least conduct a one-time anti-degradation review for existing major industrial and major municipal permitted facilities that discharge into high quality waters. Both the public and these facilities would clearly benefit from the completion of an alternatives analysis, which has never been considered for these types of dischargers. Currently, I

¹² <https://www.epa.gov/wqc/basic-information-water-quality-criteria> .

¹³ According to DEQ’s 2016 305(b) Report, there were 16,682 miles of 2nd - 5th order rivers and streams in Arkansas (page II-3) but only 11,430.6 river miles were assessed (page III-71). Of the 16,682 total river miles, 5251.4 river miles were not assessed and 4610.6 river miles did not support a use (mostly aquatic life). Although a total of 6820 river miles were determined to support all uses (page III-71), well over ½ of all the state’s larger streams and rivers were either not assessed or did not support a use (9,862 river miles).

believe there are fewer than 500 individually permitted industrial and municipal facilities, not all of which are majors. To facilitate this one-time review for major facilities, the permit reviews could be phased in over a ten-year period. If, however, this approach, too, should prove too much for DEQ, then, in the alternative, I ask DEQ to please consider enlarging the category of appropriate permits for antidegradation review to include chronically noncompliant facilities. Such facilities likely have a much greater impact on water quality than facilities that regularly meet their permit requirements, and they would clearly benefit from conducting an alternatives analysis to determine whether viable less-degrading treatment options exist, including such things as product or raw material substitution, improved operation and maintenance, or seasonal or controlled discharges to avoid critical water quality periods.

4) DEQ has replaced the term “necessary,” used with reference to High Quality Water antidegradation review included in the 2018 draft AIM, with the word “justifiable.” APC&EC Reg. 2.202 states, “[w]here the quality of the waters exceeds levels necessary to support propagation of fish, shellfish and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State of Arkansas’ Continuing Planning Process, that allowing lower water quality is *necessary* to accommodate important economic or social development in the area in which the waters are located (emphasis added).” The State’s Antidegradation Policy clearly allows lowering the water quality of high quality waters where it is *necessary* to do so. Not simply “justifiable.” Anything can be justified. For example, I can justify not brushing my teeth before I go to bed because I’m too tired. Although justifiable, the decision is still a really poor one as far as oral hygiene goes. Because anything can be justified, the words “justified” and “justifiable” included in the draft 2020 AIM should all be deleted and replaced with the word “necessary.” Also, changing “justified” to “necessary” is consistent with the wording set out in APC&EC Regulation 2.202.

5) The time frame during which the temporary lowering of a Tier 3 waterbody is allowed should be specified in the AIM and that time frame should be limited to a very narrow period of time, such as two weeks, for example. But not a time frame that extends into months.

6) I also suggest other specific language changes to the draft 2020 AIM as follows:

Page 2, Line 55 should be revised to add the following sentence at the end of the definition, “Existing use protection maintains and protects existing instream water uses and the level of water quality necessary to protect existing uses.”

Page 2, Line 59 should be revised to add the following two sentences at the end of the definition, “High quality protection protects and maintains water quality parameters that exceed levels necessary to support the protection and propagation of fish, shellfish, and wildlife and recreation in and on the waters of the State. Any significant lowering of water quality for these parameters requires the completion of a Tier 2 review prior to permit issuance.”

Page 5, Line 143 should be revised as follows, “CFR § 131.12(a)(2)). In lowering water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that the highest statutory and regulatory requirements for all new and existing point sources shall be achieved. Lowering of water quality in a high quality water is allowed only after a systematic decision-”

Page 5, Lines 165 -166 should be revised to delete the last sentence of the paragraph. ~~EUP applies to those waters meeting the definition of WOTUS as defined for purposes of the federal Clean Water Act.~~

Page 7, Line 215: “~~justified~~” should be replaced by “necessary.”

Page 7, Line 219: “~~justifiable~~” should be replaced by “necessary.”

Page 7, Line 224: “~~considered~~” should be replaced by “implemented.”

Page 7, Line 234 should be revised as follows, “capacity is to be maintained in order to protect existing uses, including recreational or ecological significance.”

Page 8, Line 261 should be revised to add the following, “is defined as increased concentration or mass of pollutants.”

Page 10, Line 341 should be revised as follows, “degradation is ~~justified~~ necessary in WOTUS waters of the State from regulated discharges/activities. The”

Page 11, Lines 364 – 366 should be revised as follows: ~~Tier 1 protection is to maintain existing uses and water quality standards, which assumes no assimilative capacity. For parameters within a waterbody that has been assigned Tier 1 protection, no assimilative capacity is available and existing uses and water quality standards will be maintained and protected.~~

Page 11, Line 367: “~~uses~~” should be replaced with “water quality.”

Page 12, Line 410: add the following two sentences at the end of the paragraph, “This analysis must be done on a cumulative basis and must incorporate all degradation from all activities that have occurred in this waterbody since the determination of the BWQ. In the cases where there is potential for bioaccumulation or impacts to aquatic biota may be present, an antidegradation review may be required.”

Page 12, Line 415: add the following sentence at the end of the paragraph, “Once 10% of the assimilative capacity determined at the time that the BWQ was established has been utilized, all subsequent activities that result in a new or increased discharge must undergo a Tier 2 review.”

Page 13, Line 450 should be revised to add the following, “pollution control targets within a specified time,...”

Page 13, beginning at Line 456, add the following sentence at the end of the paragraph, “Where practicable alternatives are identified, the lowering of water quality in a high quality water will only be authorized if one of those practicable alternatives is selected for implementation.”

Page 13, Line 475 should be revised to add the following, “present worth or direct cost comparison, as appropriate.”

Page 13, Line 478 should be revised to add the following, “annual operating and maintenance cost, return on investment,...”

Comments on the CPP

1) Section 1.2 on Page 4 fails to adequately characterize the antidegradation policy set out in Chapter 2 of the State's water quality standards (APC&EC Regulation No. 2). The CPP quotes only Reg. 2.201 and is silent on Reg. 2.202 (High Quality Waters) and Reg. 2.203 (Outstanding Resource Waters). Both High Quality Waters and Outstanding Resource Waters are integral components of the State's antidegradation policy and, as such, should not be ignored.

2) At this point, I only have time left to address one other comment on the CPP. Section 1.11 mentions temporary variances from water quality standards. Temporary variances from water quality standards involve rulemaking and, as such, are decisions which benefit from the statutory and regulatory requirements for public participation on rulemaking.

The CPP fails to mention the variance process set out in 40 CFR § 124.62, which is incorporated by reference at APC&EC Reg. 6.104 (A) (5). APC&EC Regulation No. 6 is part of the regulatory basis for Arkansas' approved NPDES permit program delegation from U.S. EPA. Regulation No. 6 includes provisions for making decisions on certain NPDES variance requests.¹⁴ And I believe decisions granting a variance request require public notice of the draft permitting decision.

If DEQ is going to reference variances, it is appropriate to reference the variances which can be authorized under 40 CFR § 124.62 as incorporated by reference in APC&EC Reg. 6.104(A)(5), and it is important to note that DEQ has no legal authority under Arkansas' approved NPDES permit program delegation from U.S. EPA to issue temporary variances under Ark. Code Ann. § 8-4-230. U.S. EPA approved Arkansas' NPDES permit program delegation package in 1986, which pre-dates by almost a decade the enactment of Ark. Code Ann. § 8-4-230.¹⁵ Further, the temporary variance provisions of Ark. Code Ann. § 8-4-230 are not as stringent as federal NPDES regulations.¹⁶ For these reasons, I do not believe the temporary variance provisions of Ark. Code Ann. § 8-4-230 are part of Arkansas' NPDES federally delegated permit program and this law should not be used to modify NPDES permits.

I believe it is important to note the absence of the legal authority for using temporary variances to modify NPDES permits under Ark. Code Ann. § 8-4-230 because DEQ has used this authority in the past and not necessarily well. For example, on July 27, 2017, Director Keogh granted two 90-day temporary variances¹⁷ modifying Great Lakes Chemical Company's NPDES permit;¹⁸ a permit that expired on January 31, 2008 and which has been administratively continued (not renewed) ever since.¹⁹ The two temporary variances were granted under the authority of Ark. Code Ann. § 8-4-230 after a 10-day public

¹⁴ 40 CFR § 124.62, as incorporated by reference in APC&EC Reg. 6.104(A)(5).

¹⁵ Ark. Code Ann. § 8-4-230 was enacted in 1995, which is after Arkansas' NPDES program delegation was approved by EPA on 11/01/1986. Also, the NPDES permit program requires states to include the permit variance process set out in 40 CFR § 124.62 in its NPDES program. This process has been incorporated into Regulation No. 6, at Reg. 6.104(A)(5). Additionally, the temporary variance process under Ark. Code Ann. § 8-4-230 is not as stringent a variance process as that included in Regulation No. 6. Under 40 CFR § 123.25(a), NPDES program requirements can be modified when the requirements are more stringent than federal requirements.

¹⁶ 40 CFR § 123.25.

¹⁷ https://www.adeg.state.ar.us/downloads/commission/misc/Closed_MISC_Dockets_2000-2019/19-002-MISC%20Great%20Lakes%20Chemical/2019-03-21_Exhibit_C-July_27_2017_Temporary_Variations.pdf

¹⁸ Great Lakes Chemical Company NPDES Permit No. AR0001171. Great Lakes Chemical Company is a member of AEF.

¹⁹ Modifying an expired NPDES permit is inconsistent with Reg. 6.201 and ADEQ's long-standing interpretation of that regulation.

notice in the wrong newspaper (a local newspaper instead of a newspaper of general circulation²⁰). The permit modifications authorized by these two temporary variances have been in continuous effect since first granted in July 2017 via multiple extensions of the temporary variances and then by incorporation of the temporary variances into CAO LIS No. 19-005.²¹ Through these decisions, DEQ has modified Great Lakes expired NPDES permit without going through any formal permit renewal or NPDES permit modification procedures. To the best of my knowledge, Great Lakes continues to discharge from unpermitted Outfall 005 to this day. Also, wastewater permitted to be discharged to a receiving stream with a critical flow of 750 cfs is diverted into a 0 cfs receiving stream, as needed, without any reasonable potential analysis being done for the 0 cfs receiving stream to determine whether *the diverted discharge* will cause or contribute to exceedances of the water quality standards for the 0 cfs receiving stream. The 0 cfs receiving stream is an unnamed tributary that flows into Bayou de Loutre. Bayou de Loutre is a waterbody on Arkansas' 303 (d) list. Allowing a discharge without first establishing permitted effluent limits for that discharge to protect the receiving stream may be inconsistent with state and federal law.²²

In conclusion, the CPP should clarify that the temporary variance provisions of Ark. Code Ann. § 8-4-230 are not part of Arkansas' NPDES federally delegated permit program and should not be used to modify NPDES permits, including expired NPDES permits.

Conclusion

I ask DEQ to please revise the draft CPP and draft AIM after giving stakeholder input and the public comments due consideration. If the documents are revised based on stakeholder input and public comment, I also ask DEQ to consider sending the revised drafts back out for further public review and comment. Finally, I ask DEQ to please post the final drafts forwarded to EPA on the agency's website.

Again, I thank you for the opportunity to comment on the draft 2020 CPP and draft 2020 AIM.

Sincerely



Ellen Carpenter

cc: Robert Blanz, Ph.D., Associate Director, Office of Water Quality, blanz@adeq.state.ar.us
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Russell Nelson, EPA, nelson.russell@epa.gov

²⁰ https://www.adeq.state.ar.us/downloads/commission/misc/Closed_MISC_Dockets_2000-2019/19-002-MISC%20Great%20Lakes%20Chemical/2019-03-21_Exhibit_G-Public_Notices_for_Temporary_Variiances.pdf; Ark. Code Ann. §8-4-230(e)(1).

²¹ https://www.adeq.state.ar.us/downloads/commission/misc/Closed_MISC_Dockets_2000-2019/19-002-MISC%20Great%20Lakes%20Chemical/2019-03-21_Exhibit_A-CAO_LIS_19-005.pdf.

²² 33 U.S.C. § 1311(b)(1)(C); Ark. Code Ann. § 8-4-207(2); 40 CFR § 122.44(d)(1); Reg. 6.104(A)(3).

CPP - AIM Comment Attachments 1 -4.pdf



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Continuing Planning Process

3 messages

ellen carpenter <ejcarpenter503@gmail.com>

Thu, Aug 18, 2016 at 4:40 PM

To: keogh@adeq.state.ar.us, blanz@adeq.state.ar.us, osbornec@adeq.state.ar.us, shafii@adeq.state.ar.us,

clem@adeq.state.ar.us

Bcc: chapman@adeq.state.ar.us

Dear Ms. Keogh,

Emails obtained from a recent Arkansas Freedom of Information Act request show that meetings have been held since March 2016 with select members of the regulated community and their consultants to draft a revised Continuing Planning Process (CPP). The CPP is a document required for the implementation of the federal NPDES program. This document is required by both federal law (Section 303(e) of the federal Clean Water Act and 40 CFR § 130.5) and the Arkansas Water and Air Pollution Control Act (Ark. Code Ann. § 8-4-208[1]). The CPP establishes processes for protecting water quality and includes plans for establishing NPDES permit effluent limits, monitoring and reporting requirements for permits, public participation programs, and the implementation of the anti-degradation policy, among other things.

The CPP is not a regulation, but EPA approval of the document is required. The most recent CPP is dated 2000. Changes since 2000 in the water quality management program and the NPDES permit program necessitate updating the CPP. If input is being sought by ADEQ on revisions to the CPP from outside the Department, then it would be meaningful to include representatives from the broad community of interested parties. It appears, however, that a select group has been working with ADEQ since March 2016 to develop a draft CPP. Based on ADEQ emails obtained through the Arkansas Freedom of Information Act, the members of this group are:

- Charles Miller- Executive Director of the Arkansas Environmental Federation (AEF)[2];
- a representative from Entergy- an energy company with ADEQ issued NPDES permits and a company represented on AEF's Board of Directors;
- Stanley Suel - Director of Environmental Assessment at Little Rock Wastewater. Little Rock Wastewater's facilities have ADEQ issued NPDES permits. Mr. Suel is an Ex-Officio member of AEF's Board of Directors;
- Vincent Blubaugh-principle of GBMc & Associates, an environmental and engineering firm. Mr. Blubaugh is GBMc's representative on the AEF Board of Directors and is Co-Chair of the AEF Water Committee;
- Shon Simpson-GBMc & Associates; and
- two representatives of FTN –a water resource and environmental consulting firm with a representative on AEF's Board of Directors.

The CPP includes plans for establishing effluent limitations in NPDES permits, compliance schedules, permit monitoring and reporting requirements, and requirements for whole effluent toxicity testing. As such, permit holders and consultants to permit holders clearly have an interest in how the CPP is revised. However, NPDES permittees and their representatives provide only one viewpoint on this important document. They are not the only stakeholders interested in drafting the CPP. If the drafting process was opened to parties outside ADEQ, then representatives of all stakeholders with an interest in drafting the CPP should have been participating in this process over the last 5 months. Surely, recent examples have shown that governmental transparency is not optional - it is a necessity - as is public involvement in the full decision-making process.

When representatives of all stakeholders participate in open governmental processes, the public's concerns are more likely to be addressed while changes can still be made. If all stakeholders with an interest in drafting the CPP were involved in the discussions that have been ongoing over the last 5 months, then information-sharing and understanding among the various interested parties could have been maximized allowing for more efficient conflict resolution. Soliciting knowledge and information from the wider community in the drafting process would have demonstrated that ADEQ accepts the public as a valued partner in environmental decision-making.

At this point, I ask that you stop revising the CPP until a stakeholder group representative of the wider interested public can be convened and given a meaningful amount of time to review and provide input on the changes developed so far. The public has a lot of catching-up to do. Also, please include the broader public in drafting any further revisions to the CPP. I make this request because, in providing guidance on how the agency will protect water quality and engage in water quality decision-making, the CPP is an important document to many Arkansas stakeholders.

I look forward to your response and thank you for your attention to this request.

Sincerely,
Ellen Carpenter

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- [1] This statute authorizes ADEQ to seek NPDES program delegation from EPA and also provides;
To that end, the department and the Arkansas Pollution Control and Ecology Commission are vested with all necessary authority and power...to engage in an approved continuing planning process under § 303(e) of the Federal Water Pollution Control Act Amendments of 1972....
- [2] AEF is a 501©(3) non-profit education association composed by a majority of businesses and industry. Its mission is stated to include, among other things, "to serve as the voice for industry on environmental affairs."

Blanz, Bob <blanz@adeq.state.ar.us> Thu, Aug 18, 2016 at 5:02 PM
To: ellen carpenter <ejcarpenter503@gmail.com>, "Keogh, Becky" <keogh@adeq.state.ar.us>, "Osborne, Caleb" <osbornec@adeq.state.ar.us>, "Shafii, Mo" <SHAFII@adeq.state.ar.us>, "Clem, Sarah" <CLEM@adeq.state.ar.us>

Ellen: Our plan is to finish our initial review with the small group of internal and external persons that we believed were the most experienced in working with the CPP. We convened a small group because, as you know larger groups can be an inefficient use of everyone's time. It is designed to give us a starting point for the ultimate revisions. We are proceeding through the document very deliberately and plan to be completed by early 2017. At that time we plan to convene a larger, more diverse stakeholder group to thoroughly review the Preliminary Draft document again before it is finalized and send to EPA for review, probably in late 2017 or early 2018.

Representatives from the planning and permitting branch (not included on your list) routinely sit in the discussions and have provided valuable input to this effort.

We feel like this is a much better process than that which was none in the past where that was no stakeholder involvement and it was revised solely with internally staff and was not available to the public until EPA had approved it.

Bob

[Quoted text hidden]

ellen carpenter <ejcarpenter503@gmail.com>

Fri, Aug 19, 2016 at 1:39 PM

To: "Blanz, Bob" <blanz@adeq.state.ar.us>

Cc: "Keogh, Becky" <keogh@adeq.state.ar.us>, "Osborne, Caleb" <osbornec@adeq.state.ar.us>, "Shafii, Mo" <SHAFII@adeq.state.ar.us>, "Clem, Sarah" <CLEM@adeq.state.ar.us>

Bcc: chapman@adeq.state.ar.us

Becky and Bob,

Having a small group of external participants, who are all members of AEF, draft an ADEQ document that governs permitting decisions and water quality management is not a transparent process.

ADEQ could model drafting the CPP after the Triennial Review public process. Through that process a manageable number of people representing a diversity of interests participates in proposing draft language while allowing a maximum number of people to observe and follow the drafting process, thereby promoting governmental transparency and facilitating understanding of all viewpoints.

Please reconsider the manner in which this important document is being drafted.

Thank you for your consideration.

Ellen

[Quoted text hidden]

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December 2, 2016

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Regulation No. 2, City of Harrison and the City of Yellville Third-Party Rulemaking; Docket No. 15-002-R

Commissioner Moss called on Allan Gates for City of Harrison and the City of Yellville to discuss their Request to Proceed. The Cities request the Commission's permission to proceed with their Third Party Rulemaking independent of whatever actions the Commission may choose to take with respect to the two independent questions upon which it sought public comment.

Commissioners asked questions and discussion followed.

Commissioner Stites made a motion to proceed with the rulemaking process for Regulation No 2 and Commissioner Henry seconded the motion. The motion passed. **(Minute Order No. 16-16)**

State of the Air Report

The ADEQ Office of Air Quality prepared a 2016 retrospective report, fact sheet and slide show describing the state of air quality in Arkansas during the past decade.

Commissioners asked questions and discussion followed.

Commissioner Moss asked for public comment.

Public Comment

Ellen Carpenter

Ms. Carpenter discussed and thanked the Department for setting up a stakeholder work group that will examine possible revisions to the current 2016 Water Quality Assessment Methodology. Ms. Carpenter also noted that ADEQ is in the process of revising another document called the Continuing Planning Process (CPP) for NPDES permits. She said, based on information obtained from FOIA requests, the Department has invited seven outside entities representing only one perspective to develop an initial draft, and they have been working on developing the draft since March 2016. Ms. Carpenter stated that a more open and balanced stakeholder process was needed in developing the initial draft of the CPP, which is an important document for the administration of the NPDES permit program.

Brian Thompson

Mr. Thompson of the Buffalo River Watershed Alliance requested an extension of the public comment period regarding the drilling study at the C&H Hog Farm by Harbor Environmental and Safety.

Colene Gaston

Commission Meeting Minutes

January 27, 2017

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Chuck Bitting

Mr. Bitting of Marble Falls discussed the Buffalo River as a revenue source and the possible degradation of the Buffalo River. He discussed Best Management Practices and the Watershed Management Plan. He asked the Commission to protect the Buffalo River Watershed.

Carol Bitting

Ms. Bitting of Marble Falls discussed the water quality standards in the Buffalo River and suggested that the Commission maintain the Buffalo River to its highest standards.

Laura Timby

Ms. Timby of Gilbert discussed the possible effects that the hog farm would have on the environment and the possible loss of funds from tourists and how that would affect the watershed.

Bob Allen

Mr. Allen, Conservation Chair of the Arkansas Canoe Club argued that the permit for EC Farms would violate the spirit of the moratorium.

Teri Patrick

Ms. Patrick of Little Rock discussed the nitrate increase in the Buffalo River in the area of the hog farm along with the algae blooms in the river. She stated it was our duty as citizens to protect the Buffalo River Watershed because it is a National treasure.

Robert Walker

Mr. Walker of Little Rock discussed gully washers and how they could affect the Buffalo River. He asked the Commission to not allow the hog farm to destroy the Buffalo River Watershed and to preserve jobs in Arkansas by denying the EC Farms permit.

Ellen Carpenter

Ms. Carpenter of North Little Rock discussed the Continuing Planning Process for NPDES Permit Delegation and the Implementation Plan for the Anti-Degradation Policy. She asked ADEQ to provide a more open and balanced representative stakeholder group to update the Continuing Planning Process.

Commissioners asked questions and discussion followed.

ADEQ

ARKANSAS
Department of Environmental Quality

February 15, 2017

Ellen,

Thank you for your email and your interest in the development of an updated Continuing Planning Project (CPP) document. As you said in your email and before the Commission, the CPP plays a critical role in how we carry out our program. Perhaps more than any other interested party, you know the important role of this document, and we certainly want your input in this process.

As you know, we have been engaged in the development of a Discussion Draft that allowed input from a targeted group of stakeholders to be considered alongside the work of ADEQ staff. The Discussion Draft is intended to provide an up-to-date starting point for the larger stakeholder process we plan to begin in the near future. As discussed previously, we will get input and feedback from the larger group of interested stakeholders before submission to the EPA. Our goal is to create an effective CPP both for the Department's use and for all Arkansans. Representatives of all stakeholders will have the opportunity to help draft the final product.

We have begun an internal discussion around an implementation plan for the Department's antidegradation policy. At this time, the draft implementation plan continues to be developed and reviewed internally. I have decided to develop a small focus group to provide input on the antidegradation chapter of the Discussion Draft of the CPP. This focus group will be separate from the current work group and will focus exclusively on an antidegradation chapter. The Discussion Draft will then go to the broader stakeholder group for in-depth review. We welcome your input and request your involvement in the small focus group. Please indicate your interest in participating in the antidegradation focus group by February 28, 2017.

Your insight is valuable, and we thank you for reaching out. If you have any additional comments, questions, or concerns, then please contact Caleb Osborne at 682-0655 or osbornec@adeq.state.ar.us.

Sincerely,



Becky W. Keogh
Director



December 5, 2017

Dear Ms. Ellen Carpenter:

Thank you for your interest in participating in the focus group for the Antidegradation Implementation Chapter of the Continuing Planning Process (CPP) document. Currently, an internal ADEQ team is preparing a framework and working draft to facilitate more effective stakeholder discussions to present to the focus group. We anticipate convening the focus group for review and discussion of the Antidegradation Implementation Chapter in February 2018.

Participants should be prepared to actively engage in the review process and should possess a broad range of knowledge of water-quality and permit-related issues. Ideally, they will have a strong working knowledge of Arkansas's water-quality standards (Reg. No. 2), impaired-waterbodies list (303(d) list), and permitting processes.

The current 2000 CPP can be found at https://www.adeg.state.ar.us/water/planning/pdfs/2000_cpp.pdf. The current EPA rule (40 C.F.R. § 131) and other related information can be found at <https://www.epa.gov/wqs-tech/final-rulemaking-update-national-water-quality-standards-regulation>.

Please expect a formal invitation regarding the focus group with additional meeting information in the near future. Collaboration with partners like you is a critical component for carrying out our mission. We appreciate your willingness to assist us with this important endeavor.

Sincerely,

A handwritten signature in blue ink that reads "Becky W. Keogh".

Becky W. Keogh
Director

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Attachment 4