

**BEFORE THE ARKANSAS POLLUTION CONTROL
AND ECOLOGY COMMISSION**

In the Matter of Amendments to)	
Regulation No. 2, Regulations)	
Establishing Water Quality)	DOCKET No. 13-003-R
Standards for Surface Waters)	
of the State of Arkansas)	

**COMMENTS OF THE ENERGY AND ENVIRONMENTAL ALLIANCE OF
ARKANSAS AND ITS MEMBERS CONCERNING THE PROPOSED
AMENDMENTS TO REGULATION 2**

I. Introduction

The Energy and Environmental Alliance of Arkansas (“EEAA”) and its individual members¹ are pleased to submit these comments on the revisions to Arkansas Pollution Control and Ecology Commission (“Commission”) Regulation 2 that were proposed by the Arkansas Department of Environmental Quality (“ADEQ”) as part of a rulemaking initiated by the Commission on February 22, 2013.²

The EEAA is an ad-hoc collaboration of Arkansas’ investor-owned, co-operative, municipal, and independent electric utilities and other energy companies formed to advocate, communicate and encourage energy and environmental policies that promote sound and predictable regulation of Arkansas’ utility industry and support an economically viable and environmentally secure future for all Arkansans, including access to reliable and affordable energy resources. The EEAA members are all regulated under Regulation 2, and all own or operate facilities whose operations are directly affected by the regulations for water quality standards for surface waters of the State of Arkansas. While EEAA supports many aspects of the proposed revisions to Regulation 2, some of the proposed revisions will cause confusion and uncertainty among the regulated community and will be unnecessarily burdensome on business and communities, as explained below. As such, EEAA appreciates the Commission’s careful consideration of the impacts of the proposed revisions to Regulation 2.

¹ The members of EEAA are: AEP/Southwestern Electric Power Company, Arkansas Electric Cooperative Corporation, Arkansas Municipal Power Association, Conway Corporation, Empire District Electric Company, Entergy Arkansas, Inc., Jonesboro City Water & Light, North Little Rock Electric, Oklahoma Gas & Electric Company, Plum Point Services Company, LLC, and West Memphis Utility Commission.

² See Minute Order 13-12, Docket No. 13-003-R.

II. General Comments on Proposed Revisions

A. Regulation 2 Should Conform with Act 954 of 2013.

The proposed revisions to Regulation 2 should be amended to be consistent with Act 954 of 2013. Act 954 of 2013 amends the Arkansas Water and Air Pollution Control Act (“AWAPCA”) to provide that the development and implementation of standards and criteria for minerals, including total dissolved solids, chlorides and sulfates, and the assessment of a stream’s or a stream segment’s conformity with attainment of a standard or criteria for minerals must be based on the greater of the average flow in the stream or stream segment or four cubic feet per second (“4 ft³/s”). Many of the proposed revisions to Regulation 2, including the proposed revisions to the definition of Critical flows for mineral criteria in Regulation 2.106, conflict with both the spirit and substance of Act 954, and should not be adopted. The Commission’s authority to promulgate regulations prescribing water quality standards and criteria for minerals is limited to that authority granted by the legislature under AWAPCA, and any attempt to adopt regulations outside the scope of the Commission’s authority is *ultra vires*, and is arbitrary and capricious. Further, adoption of regulations in excess of the Commission’s statutory authority only to have such regulations be unenforceable is an inefficient use of public resources and causes unnecessary confusion among the regulated community. As such, the Commission should refrain from adopting any revisions to Regulation 2 that are in conflict with Act 954 or any other provisions of AWAPCA. The proposed revisions to Regulation 2 that conflict with Act 954, including but not limited to the proposed revisions to the definition of Critical flows under Regulation 2.106, should be rejected. Additionally, the Commission should provide the public and regulated community an opportunity to review and comment on the draft of Regulation 2 after it is amended to conform with Act 954.

B. Regulation 2 Should Not Incorporate Requirements Not Subject to Public Notice and Comment.

The proposed revisions to Regulation 2 should not incorporate by reference ADEQ policies as enforceable regulations without subjecting those policies to the public participation process required for a regulatory rulemaking. For example, many of the proposed revisions to Regulation 2 appear to incorporate the State of Arkansas Continuing Planning Process (“CPP”) as a *de facto* regulation binding on the regulated community. The CPP is a document developed by ADEQ outside a formal public notice and comment process which sets forth the general procedures and requirements of ADEQ’s water quality management programs. Although development of a CPP is required under the federal Clean Water Act (“CWA”) and AWAPCA³, neither the

³ See 33 U.S.C. 1313(e) and Ark. Code Ann. § 8-4-208(a).

CWA nor AWAPCA exempt the CPP from the public participation process required for promulgation of an agency regulation. The CPP bears all the hallmarks of a regulation, as opposed to a policy, under prevailing judicial interpretations of the term. In particular, the CPP has a binding effect on permittees, in that it establishes standards with which ADEQ requires compliance in order to secure a permit, and it does not allow ADEQ staff to exercise discretion to deviate from its prescriptions, but rather, is treated as controlling by the agency.

Further, despite the impression conveyed by a plain reading of the proposed revisions to Regulation 2, the CPP is not a centralized document easily referenced by the public or regulated community. The CPP was originally developed in 1983, and revisions and modifications have been made to the CPP in 1991, 1993, 1995, 1999 and 2009. Where EPA has not approved a provision of a modification to the CPP, ADEQ treats the provisions of an earlier version of the CPP as binding regulation. This ad-hoc implementation and enforcement of the CPP results in a hodge-podge of *de facto* regulations that are applied inconsistently by ADEQ and fail to give the public and regulated community adequate notice of what is being regulated, ultimately causing confusion and uncertainty for businesses and communities. These problems are confounded by adoption by reference of the CPP as part of the proposed revisions to Regulation 2. Accordingly, the Commission should avoid incorporating the requirements of the CPP by reference into Regulation 2. Alternatively, if the Commission incorporates the requirements of the CPP into Regulation 2, the CPP should simultaneously undergo the public participation process for promulgation of a rule as required by AWAPCA.

III. Comments on Specific Proposed Revisions

A. Proposed Revisions to Regulation 2.106

1. Bioaccumulation

The proposed addition to Regulation 2.106 to define the term Bioaccumulation should be rejected. Defining the term Bioaccumulation is not required by a standard or regulation promulgated by the United States Environmental Protection Agency (“EPA”), nor is the proposed definition of Bioaccumulation consistent with the use of that term in generally accepted scientific literature. Specifically, ADEQ proposes to define Bioaccumulation as a “process by which a compound is taken up by an aquatic organism, both from water and through food.” However, bioaccumulation itself is not a *process*, but is a result of subsequent increases in concentration of a constituent through the food chain which may occur in particular organs or tissue, depending on the constituent in question. As such, inclusion of the defined term Bioaccumulation in the proposed amendments to Regulation 2 is unnecessary, and should not be adopted. Alternatively, if the Commission

intends to adopt a regulatory definition for Bioaccumulation, it should provide a written explanation of the necessity of the regulation and a demonstration that the regulatory definition is based on generally accepted scientific knowledge, with appropriate references to scientific literature or written studies, as required by Ark. Code Ann. § 8-4-202.

2. Critical Flows

ADEQ proposes to amend the definition of Critical flows for mineral criteria to eliminate the use of 4 ft³/s as the default value to be used in calculating concentrations of pollutants from permitted discharges unless that specific flow value was used for a site specific criterion development under Reg. 2.511(A)(2). Other than this exception, the proposed amendments to the definition of Critical flows directly conflict with the requirements for development and implementation of standards and criteria for minerals under Act 954 of 2013, and should not be adopted (*see* Comment II.A., above). The proposed revisions to the Critical flows definition of are not required by a standard or regulation promulgated by EPA, and ADEQ has not provided an explanation of the necessity of the regulation and a demonstration that the proposed revisions are based on generally accepted scientific knowledge and engineering practices. Elimination of 4 ft³/s as a default value for calculating permitted discharge limits will be particularly burdensome for sources that discharge into small streams or ditches that at times of year have little or no flow and to which the ecoregion based criteria will apply, and ultimately require those sources to implement costly pollutant-reduction measures with no corresponding environmental benefit. For all these reasons, the proposed revisions to the definition of Critical flows should not be adopted. Alternatively, if the Commission adopts the proposed revisions to the Critical flows definition, it should provide justification for doing so with appropriate references to the scientific and engineering literature or written studies on which the proposed revisions are based as required by Ark. Code Ann. § 8-4-202.

3. State of Arkansas Continuing Planning Process

The proposed revisions to the definition of CPP in Regulation 2.106 are unnecessary and will create confusion and uncertainty for the public and the regulated community. ADEQ proposes to delete the language of the definition clarifying that the CPP is not a regulation, and in doing so appears to be attempting to elevate the status of the CPP to a binding regulation. However, the CPP has not been adopted as a regulation and subjected to the public participation process required by Arkansas statute (*see* Comment II.B., above). Under Arkansas law, the authority to promulgate rules and regulations for water quality standards is vested with the Commission.⁴ The proposed revisions would impermissibly delegate the authority to adopt and enforce the

⁴ Ark. Code Ann. §§ 8-4-201 and 202.

CPP as a binding regulation to ADEQ in excess of ADEQ's and the Commission's statutory authority. Accordingly, the proposed revisions to the definition of CPP should not be adopted.

B. Proposed Revisions to Regulation 2.404

The proposed revisions to Regulation 2.404 include the addition of language which will allow ADEQ to prohibit or limit the application of mixing zones in an arbitrary manner where ADEQ deems it "appropriate" to do so. The proposed revisions to Regulation 2 do not provide a technical or legal framework for the "careful consideration" that will be required when evaluating the "appropriateness" of a mixing zone according to the proposed revisions to Regulation 2.404, and will cause uncertainty for regulated sources and be an unnecessary burden on businesses and communities. The proposed addition of the language allowing ADEQ to limit the application of mixing zones is not required by a standard or regulation promulgated by EPA, and ADEQ has not provided an explanation of the necessity of the regulation and a demonstration that the proposed revisions are based on generally accepted scientific knowledge and engineering practices.

In addition, ADEQ proposes to revise Regulation 2.404 to explicitly restrict the application of a mixing zone with respect to a "public water supply well." Regulation 2 concerns regulations establishing standards for surface waters, and the proposed revisions to Regulation 2.404 attempt to expand application of those standards to groundwater without any scientific or technical justification. The proposed revisions establishing a connection to groundwater standards could be interpreted as requiring permitted sources to conduct studies to prove their discharges are not affecting groundwater. Such negative-proof studies are prohibitively burdensome, and the Commission should not place such burdens on the regulated community in the absence of a defined environmental need. As such, the proposed revisions to Regulation 2.404 should be rejected and the existing language should be retained. Alternatively, if the Commission adopts the proposed revisions to Regulation 2.404, it should provide a written explanation of the necessity of the regulation and a demonstration that the regulation is based on generally accepted scientific knowledge and engineering practices, with appropriate references to scientific literature or written studies, as required by Ark. Code Ann. § 8-4-202.

C. Proposed Revisions to Regulation 2.405

ADEQ proposes to amend the current language in Regulation 2.405 which prohibits ADEQ from developing or imposing permit limits based on aquatic biological data to specifically allow for such use. However, Regulation 2 does not provide a technical or scientific process for utilizing such biological data to determine that a specific effluent parameter is affecting biological integrity. The proposed revisions could be interpreted as allowing ADEQ to

require permittees to conduct instream monitoring of fish and benthics as enforceable permit conditions. The proposed amendments to Regulation 2.405 are not required by a standard or regulation promulgated by EPA, and ADEQ has not provided an explanation of the necessity of the regulation and a demonstration that the proposed revisions are based on generally accepted scientific knowledge and engineering practices. As such, these proposed amendments to Regulation 2.405 should be rejected, and the existing language should be retained. Alternatively, if the Commission adopts the proposed revisions to Regulation 2.405, it should provide justification for doing so with appropriate references to the scientific and engineering literature or written studies on which the proposed revisions are based as required by Ark. Code Ann. § 8-4-202.

D. Proposed Revisions to Regulation 2.511

The mineral quality criteria in Regulation 2.511 should be consistent with the assessment protocol for determining mineral impairment. ADEQ's proposed revisions to Regulation 2.511 cause an inconsistency between the assessment protocol for determining minerals impairment and the development of permitted discharge limits, and should not be adopted. Under the proposed revisions to Regulation 2, ADEQ assesses for minerals impairment based on the secondary drinking water standards for chlorides, sulfates and total dissolved solids. However, if an impairment is determined, ADEQ reverts to the ecoregion reference stream minerals values in 2.511(B) to develop permit limits calculated using the harmonic mean flow (*see* proposed revisions to Critical flows definition and Comment II.B., above). EPA has criticized this practice and stated that if ADEQ utilizes the ecoregion reference stream values for establishing permit limits, it should assess for impairment based on those standards. However, assessment of a stream or stream segment based on the extremely conservative ecoregion reference stream minerals values in Regulation 2.511 is inappropriate and would be extremely burdensome for regulated businesses and communities. These inconsistencies in the proposed revisions to Regulation 2.511(B) will have unintended consequences for regulated businesses and communities, and should not be adopted as proposed. Alternatively, if the Commission adopts the proposed revisions to Regulation 2.511, it should provide justification for doing so with appropriate references to the scientific and engineering literature or written studies on which the proposed revisions are based as required by Ark. Code Ann. § 8-4-202.

EEAA and its members sincerely appreciate the opportunity to provide comments on the proposed amendments to Regulation 2 and ADEQ's and the Commission's careful consideration of the same.

DATED: May 8, 2013

Respectfully Submitted,

Energy and Environmental Alliance of
Arkansas

Little Rock, Arkansas

A handwritten signature in black ink, appearing to read "Chad L. Wood". The signature is fluid and cursive, with a prominent loop at the end.

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