

2013 Triennial Review Public Comment

Arkansas does not maintain a legislative history; but the history of Act 954, which, among other things, **strips the domestic water supply use from many of Arkansas' water bodies**, should be documented.

The Life of a Bill

Prior to enactment, Act 954 was filed as HB 1929 in the 89th General Assembly, Regular Session of 2013. The bill was filed on March 11, the last day to file bills. HB 1929 was assigned to the House **Public Health** Committee, which voted “do pass” on March 19. The bill was voted out of the House and sent to the Senate **Public Health** Committee. On March 27, the bill was taken up in the Committee. Members of the public went to the meeting prepared to address their concerns with the Committee. But, after listening to the sponsor’s comments, ADEQ and ADH’s objections to the bill and only three or so members of the public, Senator Ronald Caldwell made a motion for immediate consideration, which stopped all further discussion of the bill. The vote was taken (do pass) and off it went to the full Senate. The public was not given the courtesy to voice their concerns to their elected officials. And HB 1929 became Act 954 on April 8, 2013 without the Governor’s signature.

According to the legislative website, the bill’s 53 sponsors included Representatives Davis (R), Alexander (R), Altes (R), C. Armstrong (D), E. Armstrong (D), Baine (D), Ballinger (R), Baltz (D), Barnett (R), Bragg (R), Brasncum (R), Burris (R), Clemmer (R), Cozart (R), Dotson (R), C. Douglas (R), Eubanks (R), Farrer (R), Ferguson (D), Gillam (R), Harris (R), Hickerson (R), Hobbs (R), House (R), Hutchinson (R), Jett (D), Lea (R), Lowery (R), McElroy (D), D. Meeks (R), S. Meeks (R), Miller (R), Neal (R), Payton (R), Ratliff (D), Rice (R), Steel (D), Wardlaw (D), Westerman (R), B. Wilkins (D), Wren (D) and Senators Sanders (R), Burnett (D), Caldwell (R), Cheatham (D), Dismang (R), English (R), Files (R), Ingram (D), Irvin (R), King (R), Sample (R) and Wyatt (D). Note that their political affiliation is not on the actual bill. I added that based on the information provided by the legislative website. Also, please note that the legislative website reports that two sponsors (Hutchison and S. Meeks) did not vote on the bill in the House, while three sponsors (Irvin, Sample and Wyatt) voted against their own bill in the Senate.

If any part of this legislative history is inaccurate, please correct to ensure that an accurate record is preserved.

Act 954 mandates changes to the state’s water quality standards. Consequently, comments on the 2013 Triennial Review seem an appropriate place to record this regrettable moment in the history of Arkansas’ water quality.

Domestic Water Supply Use History

The federal Clean Water Act, enacted in 1972, required states to develop water quality standards to protect surface waters. Arkansas’ water quality standards are contained in Regulation No. 2. According to ADEQ’s analysis of HB 1929, “[t]he domestic drinking water use (or classification as a raw water source for public water supplies) has been applied to all of the state’s surface waters since at least 1973. In limited situations, and based on site-specific scientific studies, the domestic water supply designated use has been removed but only *after a demonstration* that the designated use is not an existing use and that the removal of the use *will allow all other designated uses to be protected.*” These studies follow the procedures in Regulation No. 2 and the Continuing Planning Policy (CPP). The broad application of the domestic water supply use to Arkansas’ surface waters adopted in Regulation 2 seems intended to protect existing and future domestic water supplies for the citizens of Arkansas. Act 954 strips the domestic water supply use protections from a large number of water bodies throughout Arkansas without any demonstration like that required by Regulation 2 or the CPP.

Removing the domestic water supply use from Arkansas' waters must be accomplished through a change to the Water Quality Standards. But any such change should be required to follow the procedures for making these types of changes that are set out in Regulation 2 (Reg. 2.306 and 2.308) and the CPP. Further, any removal of the domestic water supply use protections must ensure that the other designated uses, such as aquatic life, are protected. Where domestic water supply use protections are removed, then, until some other mineral standard is adopted and approved by EPA, please use the Ecoregion values as the mineral standards for protecting aquatic life.

I understand that the Ecoregion values are very stringent. However, stringent standards are better than no standards, which is what we are left with when Act 954 removes the domestic water use from numerous water bodies around the state.

So, What are the Current Domestic Water Supplies?

ADEQ does not maintain a list of current domestic water supplies. The Arkansas Department of Health (ADH) maintains this list because ADH is the agency recognized by US EPA as having primacy for the federal Safe Drinking Water Act. In response to a Freedom of Information Act (FOIA) request, ADH provided the following list of lakes, reservoirs and streams with public water supply intakes:

BEAVER LAKE	JAMES FORK RESERVIOR		MIDDLE FORK SALINE RIVER
BALD KNOB LAKE	LAKE ALMA	LAKE MILLWOOD - SWWD CANAL	MILLWOOD LAKE
BLACK RIVER	LAKE BOONEVILLE	LAKE NICHOLS	MULBERRY RIVER
CADDO RIVER	LAKE BREWER	LAKE NIMROD	NORFORK LAKE

CADRON CREEK	LAKE BULL SHOALS	LAKE OLA DALE	OUACHITA RIVER
CAMP OZARK CREEK	LAKE CHARLESTON	LAKE OUACHITA	PARIS CITY LAKE
CEDAR - PINEY LAKE	LAKE COLUMBIA	LAKE PRAIRIE GROVE	PETIT JEAN RIVER
CEDAR CREEK IMPONDMENT	LAKE DARBY	LAKE RICKS	PINE CREST RESERVOIR
CEDAR CREEK RESERVOIR	LAKE DARDANELLE	LAKE SOUTH OF HWY 154	PINEY BAY
COSSATOT RIVER	LAKE DEGRAY	LAKE WALDRON	QUACHITA RIVER
DIERKS LAKE	LAKE DEQUEEN		S.W. WATER DIST CANAL
FLINT CREEK	LAKE FORT SMITH-SHEPARD SPRINGS	LAKESIDE, SANDERSON, & DILLON	SALINE RIVER
FOURCHE LAFAYE RIVER	LAKE GEORGE	LEE CREEK RESERVOIR	SPADRA CREEK (LUDWIG LAKE UPSTREAM)
GALLA CREEK LAKE	LAKE GILLHAM	LINCOLN LAKE	SQUARE ROCK LAKE
GREERS FERRY LAKE	LAKE GREENWOOD		SUBIACO RESERVIOR
HUCKLEBERRY RESERVOIR	LAKE GREESON	LITTLE MISSOURI RIVER	T.J. HOUSE RESERVOIR
ILLINOIS BAYOU	LAKE HAMILTON	LITTLE RED RIVER	UPPER LAKE
ILLINOIS RIVER	LAKE HUDSPETH	LITTLE RIVER	WHITE RIVER
IRON FORKS RESERVOIR	LAKE LACO	LOWER LAKE	
	LAKE LUCY	MIDDLE FORK ILLINOIS BAYOU	

This list does not appear to be complete because it doesn't include Lake Maumelle, which I assume does have a public water supply intake. This omission may have something to do with information related to the security of public water systems which is information exempt from disclosure under Arkansas' FOIA. This list identifies lakes, reservoirs and streams with public water supply intakes, but it does not identify the “**stream segments**” (an undefined term) in which the water supply intakes are located. Under Act 954, only the **stream segments** where the intakes are located will be protected as a drinking water supply, not the entire length of the stream. Under Act 954 only that portion of the stream tapped for a public water supply will retain the domestic water supply use protections, while inexplicably all "bodies of water", great and small, river and ditch alike, located within the **watershed** of a lake or reservoir used as a public water supply shall retain the domestic water supply use. What justification can possibly exist for providing greater protection to the streams that feed a water supply lake then to a stream

that serves as the actual drinking water supply? In one instance, the lake and every stream located within its watershed will be protected. In the other, only a portion of the stream will be protected. Hopefully, it will be the part upstream of the water intake, but there is no guarantee of that under Act 954!

Under Regulation 2, “domestic water supply” includes both public and private water supplies. The Safe Drinking Water Act covers public drinking water supplies only. ADH has an accurate list of public drinking water supplies, but I do not know if they maintain lists of sources used as private drinking water supplies or if there are any private drinking water supplies in the state that use surface water. Therefore, would the Commission please provide notice to the public about the changes required by Act 954 and ask the public to provide the Commission or ADEQ with information about any private water intakes located on lakes or streams in Arkansas before the domestic water supply use protections are removed from the state’s surface waters as required by Act 954.

What Planned or Potential Drinking Water Supplies are Listed in Current State Water Plan?

Act 954 allows the domestic water supply use protections to remain on lakes, reservoirs or **stream segments** listed in the State Water Plan as planned or potential domestic water supplies. The State Water Plan is developed by the Arkansas Natural Resources Commission, not ADEQ. Currently, as the Plan now exists, it appears to consist of some vintage Basin Reports that identify major tributaries and reservoirs and impoundments in each Basin. The Reports consider surface water quality, uses, and stream flow at designated gauging stations, as well as other information. Reservoirs serving population centers might be noted in some Basin Report, but based on my quick review of a few of them, **no list of planned or potential domestic water supplies seems to exist in the State Water Plan.** So, it does not look like many water bodies will retain the domestic water supply use protections based on its listing in the existing State Water Plan.

Some future update of the State Water Plan may add a list of planned or potential water supplies. Because the revised list in a future Plan update was not the list that existed when Act 954 was enacted, will Act 954 have to be amended in order to add the water supply use to the new listings?

Can’t We Just Add The Domestic Water Use Back on Stream Segments When Needed?

What does 40 CFR § 131.10(j) mean? The federal regulation provides:

- (j) A State must conduct a use attainability as described in § 131.3(g) whenever:
 - (1) The State designates or has designated uses that do not include the uses specified in Section 101(a)(2) of the Act....

I understand that the Section 101(a)(2) uses are the “fishable./swimmable” uses, and those uses

do not include drinking water. Does this federal regulation mean that a city, wanting to add the domestic water use to a stream so it can use surface water for drinking water purposes, has to conduct a use attainability analysis in order to add the domestic water supply use back onto a stream that had the use before it was removed by operation of Act 954? I don't know what this regulation means, but surely EPA does not intend to object or would object to adding a use to a water body when that use existed prior to Act 954.

But, either way, a public drinking water supplier can always use surface water as a source whether or not the source is designated as a domestic water supply in Regulation 2. The only difference in this post Act 954 era is that if a domestic water supply use is not attached to a stream or lake, then any industrial discharger or sewage treatment plant discharging to that water body does not have to worry about controlling minerals in its effluent. It is the water supplier who will have to meet the drinking water standards, and not the polluters. Addressing minerals can be extremely costly, as polluters have noted. So **Act 954 has effectively transferred the financial burden of cleaning up mineral pollution from the polluting discharger to any new drinking water supplier.**

Commission's List is Published

Act 954 requires the Commission to regularly publish the list of stream segments and reservoirs that have an existing use as a domestic water supply or are listed in the Arkansas Water Plan as a planned or potential water supply. ADH provided a list of some reservoirs and streams with water supply intakes, but it did not specify where those intakes are such that the Commission can identify the particular **stream segment** where the domestic water supply use protections apply under Act 954. And the Commission may not obtain this information if it is related to the security of public water systems because that information is exempt from disclosure under Arkansas' Freedom of Information Act. So how does the Commission publish a list of stream segments to be protected if the information related to the location of a public water supply intake is exempt from disclosure under the FOIA? And how can domestic water supply use protections be applied to any stream segment where the location of the public water supply intake is supposed to be a secret?

There is another related problem under Act 954. The Commission's list does not include the publication of water bodies located within the watersheds of lakes or reservoirs used as public water supplies. (See A. C. A. 8-4-202(b)(3)(B)(iv)(c), which only references (b)(3)(B)(iv)(a), but not (b).) Why should the Commission publish one list and not the other?

4 cfs

Please advise where or how it makes sense to use 4cfs for stream flows when data collected from the stream in question shows the stream flow is less than 4 cfs? On this point, please see ADEQ's comments, which are attached.

Data

Regarding the requirement for an average concentration of minerals using "at least 60 actual measured samples taken at regular intervals over at least a five-year period," when assessing water quality for mineral impairments, please see ADEQ's comments on this point, as well as current federal case law. This requirement may play havoc with Arkansas' 303(d) list because

EPA will not be bound by this requirement. Hopefully, EPA will proceed to do what needs to be done, despite Act 954. Indeed, Act 954 may focus EPA's attention on minerals data and the effort to avoid listings based on mineral impairments may backfire.

Permits

Please find attached a list of permits that have been issued with mineral limits since 2010. This list was provided by ADEQ in response to a FOIA request. These permittees may be ones who can obtain a stay or waiver of the mineral limits under Act 954. See ADEQ's comments concerning the merits of changing permit conditions through a stay or waiver as authorized under Act 954 without modifying the permit in conformance with state and federal law and NPDES program delegation.

Conclusion

The domestic water supply use designations should not be removed from any waters, unless the use is removed in accordance with the procedures set forth in Regulation 2 and the Continuing Planning Process and where mineral standards will still exist to protect aquatic life uses.

Act 954 also establishes a data credibility law for determining mineral impairments that EPA should ignore in Arkansas, just as it did in Florida and Iowa.

If any changes are made to Regulation 2 as a result of Act 954, please give the public an opportunity to review and comment on those changes. The public was shut out of the legislative process. Please don't shut us out of the rule making process too.

In order to complete the record of this matter, I have attached the analyses of HB 1929 prepared by ADEQ, ADH, and ANRC.

Thank you for the opportunity to comment on the changes to Regulation 2.

Sincerely,
Harry Elliott
May 7, 2013