

ARKANSAS DEPARTMENT OF ENERGY AND ENVIRONMENT, DIVISION OF ENVIRONMENTAL QUALITY

SUBJECT: APC&EC Rule No. 6: Rules for State Administration of the National Pollutant Discharge Elimination System (NPDES)

DESCRIPTION: Revisions are being proposed to the Arkansas Pollution Control and Ecology Commission's Rule No. 6: Rules for State Administration of the National Pollutant Discharge Elimination System (NPDES) to adopt federal revisions to the NPDES program, incorporate statutory revisions made by the Arkansas General Assembly, clarify several provisions, implement the Governor's directive to make the current moratorium on confined animal operations in the Buffalo National River Watershed permanent, and make stylistic and formatting corrections throughout the rule. Rule No. 6 establishes the parameters for the State water pollution control permitting program in lieu of the federal NPDES program and pursuant to the federal Clean Water Act, 33 U.S.C. § 1251 et seq. The state legislative acts prompting the regulatory amendments are Acts 94 and 575 of 2015 and Acts 315 and 910 of 2019. The federal regulatory changes prompting the amendments are 40 C.F.R. §§ 122.21(e)(3), 122.44(i)(1)(iv), 136.1(c), 125(I) and (J), 423, 122, 123, 127, and 401.17. The Arkansas Pollution Control and Ecology Commission's authority for amending Rule No. 6 is found in Ark. Code Ann. §§ 8-6-207(b)(1), 8-4-202(a), and 8-1-203(b)(1)(A).

Proposed changes to Rule No. 6 include:

- *Incorporation of Updates to Federal Regulations.* Amendments to Rule 6.104 to incorporate changes made to federal regulations;
- *Incorporation of Updates to Arkansas Law.* Acts 94 and 575 of 2015 were enacted by the Arkansas General Assembly and require revisions to Rule 6.205 concerning Trust Fund permitting requirements; Acts 315 and 910 of 2019 were enacted by the Arkansas General Assembly and require revisions to Rule No. 6 concerning the name of ADEQ and the use of "rule" in lieu of "regulation";
- *Amendments to Provide Clarification and Minor Corrections.* Clarification of sections of the rule that were otherwise unclear, and minor corrections to make the rule more illustrative of the legislative and regulatory intent;
- *Amendments to Chapter 4.* To add 6.403 and 6.404 to insert permitting language from Reg. 2;
- *Amendments to Rule 6.602.* To amend the current Rule 6.602 to make permanent the moratorium on confined animal operations of a certain size in the Buffalo National River Watershed;
- *Regulatory Amendments for Consistency with Statutory Changes.* To amend other chapters of the rule for consistency with the statutory changes made by the General Assembly and federal regulations, primarily concerning terminology and program name changes; and
- *Stylistic and Formatting Corrections.* To make minor, non-substantive stylistic and formatting corrections throughout the rule.

PUBLIC COMMENT: A public hearing was held on August 23, 2019. The public comment period expired on September 3, 2019. The APC&EC voted to reopen the public comment period, and that comment period expired on January 23, 2020. The Division provided a summary of the public comments received and its responses thereto, which due to its length, is attached separately.

Rebecca Miller-Rice, an attorney with the Bureau of Legislative Research, asked the following questions:

(1) Section 6.205 – The materials submitted with the proposed changes indicate that Act 94 of 2015 required revisions to the rule; however, it appears from Act 575 of 2015 that the provisions added by Act 94 were limited by the language “[u]ntil January 1, 2016.” Indeed, it appears that the changes made to statute by Act 94 were never incorporated into the rule, and the language that was to be changed by Act 94 is being stricken. Can you please specify then what revisions to the rule are being made as a result of Act 94? **RESPONSE:** The limiting language is from Act 575, but the language that is limited is from Act 94. Both Acts became effective on July 22, 2015. Since both acts became effective at the same time, DEQ treated them as a single change to the law.

(2) Section 6.205 – Is the language being stricken in subsections “P” and “Q” due to the limiting language of Act 575 that allowed the reduction or waiver “[u]ntil January 1, 2016”? **RESPONSE:** Yes.

(3) Section 6.205 – It appears that the language being stricken in subsection “R” is still present in Ark. Code Ann. § 8-4-203(8). Can you reconcile for me why it is being removed from the rule? **RESPONSE:** Ark. Code Ann. § 8-4-203(8) states, “The division shall not directly operate or be responsible for the operation of a nonmunicipal domestic sewage treatment works.” DEQ believes that Ark. Code Ann. § 8-4-203(8) does not require clarification through regulations.

Section 6.205 concerns “Trust Fund Permitting Requirements” for non-municipal domestic sewage treatment works. The proposed language for this section is, “The Division shall not issue, modify, renew, or transfer a NPDES permit for a non-municipal domestic sewage treatment works without the permit applicant first complying with Ark. Code Ann. § 8-4-203(b).”

Based on the proposed changes for Section 6.205, retaining subsection “R” would be redundant because it is in the statute and including “R” in Rule 6 was unnecessary in the first instance.

(4) Section 6.701 – What is the rationale for the addition of a repealer? I only ask because it would seem any repeal of a rule would still be required to go through the legislative review and approval process of Ark. Code Ann. § 10-3-309 before it could become effective. **RESPONSE:** The “repealer” language was intended to make it clear that when a new rule was enacted, that it would supersede existing rules that were in conflict. DEQ’s intention is to run any repeal of a rule concurrently with the superseding rule and

to make it clear in the petition that the new rule would replace the old rule. However, since each rule would move through the process separately, DEQ was concerned that a hiccup in the process could result in conflicting rules being “effective” at the same time.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The agency states that the amended rule has no financial impact.

With respect to the total estimated cost by fiscal year to any private individual, entity and business subject to the amended rule, the agency provided the following response:

Implementing the revised federal rules and clarification/correction of various sections of this regulation is not expected to cause an increase in costs to private entities because permittees were expected to comply with these requirements prior to incorporation. Implementing the revised state rule should result in reduced costs to nonmunicipal domestic sewage treatment works permittees. Changes to the general permit process are expected to reduce costs to facilities.

The agency further states that there is no additional cost to state, county, and municipal government to implement the changes to this rule.

LEGAL AUTHORIZATION: The Arkansas Pollution Control and Ecology Commission (“Commission”) is given and charged with the power and duty to promulgate rules, 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 Division of Environmental Quality (“Division”) for administration. *See* Ark. Code Ann. § 8-4-201(b)(1)(A). *See also* Ark. Code Ann. § 8-1-203(b)(1)(A) (setting forth generally the powers and responsibilities of the Commission, including the promulgation of rules implementing the substantive statutes charged to the Division for administration) and Ark. Code Ann. § 8-6-207(b)(1)(A) (bestowing said power and duty under the Arkansas Solid Waste Management Act, codified at Ark. Code Ann. §§ 8-6-201 through 8-6-223). The Commission is likewise given and charged with the power and duty to adopt, modify, or repeal, after notice and public hearings, rules implementing or effectuating the powers and duties of the Division and the Commission under the Arkansas Water and Air Pollution Control Act (“Act”), codified at Ark. Code Ann. §§ 8-4-101 through 8-4-318. *See* Ark. Code Ann. § 8-4-202(a). Under this Act, the Division is given and charged with the power and duty to issue, continue in effect, revoke, modify, or deny permits under such conditions as it may prescribe “[t]o prevent, control, or abate pollution” and “[f]or the discharge of sewage, industrial waste, or other wastes into the waters of the state, including the disposal of pollutants into wells.” Ark. Code Ann. § 8-4-203(a)(1), (2).

Per the agency, the amended rules are required to comply with federal law, specifically, 40 C.F.R. §§ 122.21(e)(3), 122.44(i)(1)(iv), 125 Subparts I and J, 127, and 136.1(c), and Regulation 6.602.