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2 89th General Assembly
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4

As Engrossed: S2/26/13

A Bill

HOUSE BILL 1197

5 By: Representative Davis
6 By: Senator *Burnett*
7

For An Act To Be Entitled

9 AN ACT TO AMEND THE LAWS CONCERNING NONMUNICIPAL
10 DOMESTIC SEWAGE TREATMENT WORKS; TO CLARIFY THE LAWS
11 REGARDING THE TRANSFER OF WATER POLLUTION PERMITS; TO
12 CLARIFY THE FINANCIAL ASSURANCE REQUIREMENTS FOR
13 NONMUNICIPAL DOMESTIC SEWAGE TREATMENT WORKS; TO
14 ESTABLISH ADDITIONAL FINANCIAL ASSURANCE REQUIREMENTS
15 FOR NONMUNICIPAL DOMESTIC SEWAGE TREATMENT WORKS; TO
16 CREATE THE WATER PERFORMANCE BOND FUND; AND FOR OTHER
17 PURPOSES.

Subtitle

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21 TO CLARIFY THE LAWS REGARDING THE
22 TRANSFER OF WATER POLLUTION PERMITS; TO
23 CLARIFY THE FINANCIAL ASSURANCE
24 REQUIREMENTS FOR NONMUNICIPAL DOMESTIC
25 SEWAGE TREATMENT WORKS; AND TO CREATE THE
26 WATER PERFORMANCE BOND FUND.
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29 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
30

31 SECTION 1. Arkansas Code § 8-4-203(b), concerning water pollution
32 permits, is amended to read as follows:

33 (b)(1)(A)(i) The department shall not issue, modify, ~~or~~ renew, or
34 transfer a National Pollutant Discharge Elimination System permit or state
35 permit for a nonmunicipal domestic sewage treatment works without the permit
36 applicant first demonstrating to the department its financial ability to



1 cover the estimated costs of operating and maintaining the nonmunicipal
2 domestic sewage treatment works for a minimum period of five (5) years.

3 (ii) ~~For purposes of~~ As used in this section,
4 “nonmunicipal domestic sewage treatment works” means a device or system
5 operated by an entity other than a city, town, ~~borough,~~ county, or sewer
6 improvement district that treats, in whole or in part, waste or wastewater
7 from humans or household operations and must continuously operate to protect
8 human health and the environment despite a permittee’s failure to maintain or
9 operate the ~~treatment works~~ device or system.

10 (iii) State or federal facilities, schools,
11 universities, and colleges are specifically exempted from the requirements of
12 this section.

13 (iv) Each permit application for a nonmunicipal
14 domestic sewage treatment works submitted under this section shall be
15 accompanied by a cost estimate for a third party to operate and maintain the
16 nonmunicipal domestic sewage treatment works each year for a period of five
17 (5) years.

18 (v) A commercial nonmunicipal domestic sewage
19 treatment works that does not include residential services is not required to
20 post financial assurance under this section.

21 (B)(i) The department shall not issue ~~or~~, modify, renew,
22 or transfer a National Pollutant Discharge Elimination System permit or a
23 state permit for a nonmunicipal domestic sewage treatment works that proposes
24 to use a new technology that, in the discretion of the department, cannot be
25 verified to meet permit requirements without the applicant first
26 demonstrating its financial ability to replace the new technology with a
27 nonmunicipal domestic sewage treatment works that uses technology acceptable
28 to the department.

29 (ii) Each permit application for a nonmunicipal
30 domestic sewage treatment works that proposes to use a new technology that in
31 the discretion of the department cannot be verified to meet permit
32 requirements shall be accompanied by a cost estimate to replace the proposed
33 system with a nonmunicipal domestic sewage treatment works that uses
34 technology acceptable to the department.

35 (2) The applicant’s financial ability to operate and maintain
36 the nonmunicipal domestic sewage treatment works for a period of five (5)

1 years shall be demonstrated to the department by:

- 2 (A) Obtaining insurance that specifically covers operation
3 and maintenance costs;
4 (B) Obtaining a letter of credit;
5 (C) Obtaining a surety bond;
6 (D) Obtaining a trust fund or an escrow account; or
7 (E) Using a combination of insurance, letter of credit,
8 surety bond, trust fund, or escrow account.

9 (3) The financial assurance required under subdivision (b)(2) of
10 this section shall:

- 11 (A) Be posted to the benefit of the department;
12 (B) Provide that the financial instrument underlying the
13 financial assurance cannot be cancelled without ninety (90) days prior
14 written notice addressed to the department's legal division chief as
15 evidenced by a signed notice sent by certified mail with a return receipt
16 requested; and
17 (C) Be reviewed by the department upon receipt of the
18 cancellation notice to determine whether to initiate procedures to:
19 (i) Revoke or suspend the permit for the
20 nonmunicipal domestic sewage treatment works; and
21 (ii) Take possession of the funds guaranteed by the
22 financial instrument underlying the financial assurance.

23 (4)(A) The owner or operator of a nonmunicipal domestic sewage
24 treatment works shall establish and maintain financial assurance that
25 demonstrates to the department's satisfaction the applicant's financial
26 ability to ensure adequate operation and maintenance costs as required under
27 subdivision (b)(2) of this section.

28 (B) Financial assurance shall provide that the department
29 is the obligee or payee of the financial instrument underlying the financial
30 assurance and shall otherwise comply with the regulations promulgated under
31 this subchapter.

32 (C) The amount of financial assurance required under this
33 subsection shall be equal to or greater than the detailed cost estimate for a
34 third party to maintain and operate the permitted nonmunicipal domestic
35 sewage treatment works in accordance with the permit and applicable
36 regulations.

1 (D) The owner or operator shall provide continuous
2 financial assurance for the operation and maintenance costs of a nonmunicipal
3 domestic sewage treatment works until the department:

4 (i) Releases the owner or operator from the
5 financial assurance requirements under this subchapter and the permit;

6 (ii) Approves the closure of the nonmunicipal
7 domestic sewage treatment works; or

8 (iii) Approves the transfer of a permit and the
9 replacement financial assurance under subdivision (b)(9) of this section.

10 (5)(A) Operation and maintenance costs shall be updated with
11 each permit renewal to account for inflation and the condition of the
12 nonmunicipal domestic sewage treatment works.

13 (B) The updated operation and maintenance costs based on
14 the condition of the nonmunicipal domestic sewage treatment works required
15 under subdivision (b)(5)(A) of this section shall be provided in a report
16 certified by a professional engineer registered in the State of Arkansas and
17 submitted to the department with each permit renewal.

18 (6)(A) If an owner or operator establishes a trust as financial
19 assurance, the owner or operator shall either fully fund the trust or make
20 payments into a trust fund.

21 (B)(i) If the owner or operator elects to make payments
22 into a trust fund, the payments shall be made in equal monthly installments
23 by the owner or operator.

24 (ii) The trust fund shall be fully funded within
25 five (5) years of the issuance of the permit unless otherwise approved by the
26 Director of the Arkansas Department of Environmental Quality.

27 (7)(A) The director may order that any financial assurance filed
28 pursuant to this section be forfeited to the department if the director
29 determines that the owner or operator has not adequately operated,
30 maintained, or completed closure of the nonmunicipal domestic sewage
31 treatment works.

32 (B) Following the determination of the director under
33 subdivision (b)(7)(A) of this section, the department shall commence
34 proceedings to collect on the financial assurance on which the department is
35 the obligee or payee.

36 (C) For each permit, the financial instrument underlying

1 the financial assurance shall be renewed or an alternate financial instrument
2 shall be issued to maintain continuous financial assurance.

3 (D) If documentation of the renewed financial assurance or
4 alternate financial assurance is not received by the department at least
5 sixty (60) days before the expiration date of the existing financial
6 instrument underlying the financial assurance, the department shall:

7 (i) Take possession of the funds guaranteed by the
8 financial instrument underlying the financial assurance; and

9 (ii)(a) Initiate procedures to suspend or revoke the
10 permit under which the nonmunicipal domestic sewage treatment works is
11 operated.

12 (b) A permit shall remain suspended until
13 financial assurance is provided to the department in accordance with this
14 subsection.

15 (E) The permittee is responsible for ensuring that
16 documentation of the financial assurance and all renewals of financial
17 instruments underlying the financial assurance are received by the department
18 by the due date.

19 (8) The department shall deposit all forfeited funds into the
20 Water Performance Bond Fund.

21 (9)(A)(i) Existing responsibilities and financial instruments
22 underlying the financial assurance remain in full force and effect, and a
23 permit shall not be transferred until the proposed new owner or operator has
24 filed and the department has approved the required replacement financial
25 assurance in accordance with the requirements of this section and applicable
26 regulations.

27 (ii) The department shall approve or deny the
28 replacement financial assurance offered under subdivision (b)(9)(A)(i) of
29 this section within thirty (30) days of receipt of the completed permit
30 transfer request.

31 (B) The department shall release to the former owner,
32 operator, or issuing institution, if appropriate, the financial assurance
33 that the former owner or operator filed if the department does not:

34 (i) Object to the replacement financial assurance
35 within thirty (30) days of receipt of the completed permit transfer request;
36 and

1 (ii) Deny the permit transfer.

2 (C) A completed permit transfer request shall be submitted
3 on the forms required by the department and shall include the following:

4 (i) A disclosure statement, unless the nonmunicipal
5 domestic sewage treatment works is exempt under § 8-1-106 or an Arkansas
6 Pollution Control and Ecology Commission rule; and

7 (ii) Acceptable replacement financial assurance.

8 (D) The new owner or operator is responsible for ensuring
9 that the financial assurance meets all applicable requirements.

10 ~~(3)~~ (10) The department may reduce or waive the amount of the
11 required financial assurance if the permit applicant can demonstrate to the
12 department's satisfaction that:

13 (A) For a renewal permit, during the five (5) years
14 preceding the application for a renewal permit, the nonmunicipal domestic
15 sewage treatment works ~~facility~~ has:

16 ~~(i) Remained~~ Maintained the nonmunicipal domestic
17 sewage treatment works in continuous operation;

18 ~~(ii) Received no more than three (3) permit~~
19 ~~violations within a six-month period as set out in the permit issued by the~~
20 ~~department~~ Maintained the nonmunicipal domestic sewage treatment works in
21 substantial compliance with the existing discharge permit issued by the
22 department, which shall be demonstrated by submitting the following:

23 (a) All discharge monitoring reports;

24 (b) Evidence that the nonmunicipal domestic
25 sewage treatment works has not exceeded the same permit effluent criteria in
26 any two (2) consecutive monitoring periods during the previous three (3)
27 years;

28 (c) Evidence that no more than ten percent
29 (10%) of the nonmunicipal domestic sewage treatment works's submitted
30 discharge monitoring reports show effluent violations; and

31 (d) Evidence that there have not been any
32 administrative or judicial orders entered against the owner or operator for
33 violations of state or federal environmental laws, rules, or regulations or
34 permits issued by the department;

35 (iii) Maintained the services of a certified
36 wastewater treatment operator, where applicable;

1 (iv)(a) Remained financially solvent, which shall be
2 demonstrated by an independent certified public accountant's report on the
3 examination of the owner's or operator's independently audited financial
4 statements.

5 (b) The examination of financial statements
6 under subdivision (b)(10)(A)(iv)(a) of this section shall be conducted in
7 accordance with the American Institute of Certified Public Accountants'
8 Professional Standards, as they existed on January 1, 2013; and

9 (v) Operated the ~~facility's~~ nonmunicipal domestic
10 sewage treatment works to prevent the discharge of waterborne pollutants in
11 unacceptable concentrations to the surface waters or groundwater of the state
12 as defined in the permit or as defined in the state's water quality
13 standards; or

14 (B)(i) For a new permit, that the reduction or waiver is
15 necessary to accommodate important economic or social development in the area
16 of the proposed nonmunicipal domestic sewage treatment works ~~facility~~; and
17 ~~that the~~

18 (ii) The applicant has shown a history of financial
19 responsibility and compliance with regulatory requirements ~~in other relevant~~
20 ventures.

21 ~~(4) (11)~~ The department ~~has discretion to~~ may withdraw a
22 reduction or waiver granted under this subsection at any time in order to
23 protect human health or the environment.

24 ~~(5) A financial instrument required by this section shall be~~
25 ~~posted to the benefit of the department and shall remain in effect for the~~
26 ~~life of the permit.~~

27 ~~(6) It is explicitly understood that the~~ (12) The department
28 shall not directly operate ~~and shall not~~ nor be responsible for the operation
29 of ~~any~~ a nonmunicipal domestic sewage treatment works.

30
31 SECTION 2. Arkansas Code § 8-4-203(h), concerning water pollution
32 permits, is amended to read as follows:

33 (h)(1) Permits for the discharge of pollutants into the waters of the
34 state or for the prevention of pollution of the waters of the state shall
35 remain freely transferable, ~~provided if~~ provided if the applicant for the transfer
36 ~~notifies:~~

1 (A) Notifies the Director of the Arkansas Department of
2 Environmental Quality director at least thirty (30) days in advance of the
3 proposed transfer date ~~and submits;~~

4 (B) Submits a disclosure statement as required by under §
5 8-1-106; and

6 (C) Provides any replacement financial assurance required
7 under this section.

8 (2) Only ~~those~~ the reasons set out stated in § 8-1-103(4), § 8-
9 1-106(b)(1) and (c), and subdivision (b)(9) of this section constitute
10 grounds for denial of a transfer.

11 (3) The permit is automatically transferred to the new permittee
12 unless the director denies the request within thirty (30) days of the receipt
13 of the disclosure statement.

14
15 SECTION 3. Arkansas Code Title 19, Chapter 5, *Subchapter 11*, is
16 amended to add an additional section to read as follows:

17 19-5-1140. Water Performance Bond Fund.

18 (a) There is created on the books of the Treasurer of State, the
19 Auditor of State, and the Chief Fiscal Officer of the State a trust fund to
20 be known as the "Water Performance Bond Fund".

21 (b) The fund shall consist of the following:

22 (1) Funds appropriated by the General Assembly;

23 (2) All forfeitures collected under § 8-4-201 et seq.;

24 (3) Grants made by a person or the federal government;

25 (4) Gifts and donations; and

26 (5) Interest earned on the moneys deposited into the fund.

27 (c) The fund shall be used by the Arkansas Department of Environmental
28 Quality to hire a third-party contractor to:

29 (1) Take remedial action, including without limitation
30 corrective action, the closure of a nonmunicipal domestic sewage treatment
31 works, and any other action the Director of the Arkansas Department of
32 Environmental Quality determines to be necessary; or

33 (2) Maintain and operate a nonmunicipal sewage treatment works.

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35 /s/Davis

36 APPROVED: 03/14/2013