

1 State of Arkansas  
2 89th General Assembly  
3 Regular Session, 2013  
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:  
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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:~~

