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2 90th General Assembly
3 Regular Session, 2015
4

As Engrossed: H3/6/15

A Bill

HOUSE BILL 1314

5 By: Representative Davis
6 By: Senator Rapert
7

For An Act To Be Entitled

9 AN ACT TO AMEND THE LAWS CONCERNING NONMUNICIPAL
10 DOMESTIC SEWAGE TREATMENT WORKS; TO REPEAL THE
11 FINANCIAL ASSURANCE REQUIREMENTS FOR NONMUNICIPAL
12 *DOMESTIC SEWAGE TREATMENT WORKS; TO CREATE THE*
13 *NONMUNICIPAL DOMESTIC SEWAGE TREATMENT TRUST FUND;*
14 *AND FOR OTHER PURPOSES.*

Subtitle

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18 TO AMEND THE LAWS CONCERNING NONMUNICIPAL
19 DOMESTIC SEWAGE TREATMENT WORKS; AND TO
20 REPEAL THE FINANCIAL ASSURANCE
21 REQUIREMENTS FOR NONMUNICIPAL DOMESTIC
22 SEWAGE TREATMENT WORKS.
23
24

25 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
26

27 *SECTION 1. DO NOT CODIFY. Legislative findings.*

28 *The General Assembly finds that:*

29 *(1) The existing financial assurance requirements for nonmunicipal*
30 *domestic sewage treatment works that are in place to ensure that funding is*
31 *available to properly operate these sewage treatment systems for the*
32 *permitted term can create hardships for those facilities that cannot secure*
33 *readily available and affordable financial assurance mechanisms;*

34 *(2) In lieu of each permit applicant and each owner or operator of a*
35 *nonmunicipal domestic sewage treatment works providing individual financial*
36 *assurance to the Arkansas Department of Environmental Quality, the need for*



1 financial assurance for nonmunicipal domestic sewage treatment facilities may
 2 be met through the creation of a trust fund to be funded jointly by the
 3 nonmunicipal domestic wastewater treatment facilities permitted to operate in
 4 Arkansas; and

5 (3) The total funding for the trust fund is anticipated to be
 6 approximately ten percent (10%) of the total amount currently required to be
 7 assured by individual permittees.

8
 9 SECTION 2. Arkansas Code § 8-4-203(b), as amended by Section 1 of Act
 10 94 of 2015 and concerning water pollution permits, is amended to read as
 11 follows:

12 ~~(b)(1)(A)(i)~~ The department shall not issue, modify, renew, or
 13 transfer a National Pollutant Discharge Elimination System permit or state
 14 permit for a nonmunicipal domestic sewage treatment works without the permit
 15 applicant first ~~demonstrating to the department its financial ability to~~
 16 ~~cover the estimated costs of operating and maintaining the nonmunicipal~~
 17 ~~domestic sewage treatment works for a minimum period of five (5) years~~ paying
 18 the trust fund contribution fee required under subdivision (b)(2) of this
 19 section.

20 ~~(ii)~~ (B) As used in this section, “nonmunicipal
 21 domestic sewage treatment works” means a device or system operated by an
 22 entity other than a city, town, county, or sewer improvement district that
 23 treats, in whole or in part, waste or wastewater from humans or household
 24 operations and must continuously operate to protect human health and the
 25 environment despite a permittee’s failure to maintain or operate the device
 26 or system.

27 ~~(iii)~~ (C) ~~State or federal facilities, schools,~~
 28 ~~universities, and colleges~~ The following are specifically exempted from the
 29 requirements of this section:

30 (i) State or federal facilities;
 31 (ii) Schools;
 32 (iii) Universities and colleges; and
 33 (iv) Entities that continuously operate due to a
 34 connection with a city, town, county, or sewer improvement district.

35 ~~(iv)~~ ~~Each permit application for a nonmunicipal~~
 36 ~~domestic sewage treatment works submitted under this section shall be~~

1 accompanied by a cost estimate for a third party to operate and maintain the
2 nonmunicipal domestic sewage treatment works each year for a period of five
3 ~~(5) years.~~

4 ~~(v) A commercial nonmunicipal domestic sewage~~
5 ~~treatment works that does not include residential services is not required to~~
6 ~~post financial assurance under this section.~~

7 ~~(B)(i) The department shall not issue, modify, renew, or~~
8 ~~transfer a National Pollutant Discharge Elimination System permit or a state~~
9 ~~permit for a nonmunicipal domestic sewage treatment works that proposes to~~
10 ~~use a new technology that, in the discretion of the department, cannot be~~
11 ~~verified to meet permit requirements without the applicant first~~
12 ~~demonstrating its financial ability to replace the new technology with a~~
13 ~~nonmunicipal domestic sewage treatment works that uses technology acceptable~~
14 ~~to the department.~~

15 ~~(ii) Each permit application for a nonmunicipal~~
16 ~~domestic sewage treatment works that proposes to use a new technology that in~~
17 ~~the discretion of the department cannot be verified to meet permit~~
18 ~~requirements shall be accompanied by a cost estimate to replace the proposed~~
19 ~~system with a nonmunicipal domestic sewage treatment works that uses~~
20 ~~technology acceptable to the department.~~

21 ~~(2) The applicant's financial ability to operate and maintain~~
22 ~~the nonmunicipal domestic sewage treatment works for a period of five (5)~~
23 ~~years shall be demonstrated to the department by:~~

24 ~~(A) Obtaining insurance that specifically covers operation~~
25 ~~and maintenance costs;~~

26 ~~(B) Obtaining a letter of credit;~~

27 ~~(C) Obtaining a surety bond;~~

28 ~~(D) Obtaining a trust fund or an escrow account; or~~

29 ~~(E) Using a combination of insurance, letter of credit,~~
30 ~~surety bond, trust fund, or escrow account.~~

31 ~~(3) The financial assurance required under subdivision (b)(2) of~~
32 ~~this section shall:~~

33 ~~(A) Be posted to the benefit of the department;~~

34 ~~(B) Provide that the financial instrument underlying the~~
35 ~~financial assurance cannot be cancelled without ninety (90) days prior~~
36 ~~written notice addressed to the department's legal division chief as~~

1 ~~evidenced by a signed notice sent by certified mail with a return receipt~~
2 ~~requested; and~~

3 ~~(C) Be reviewed by the department upon receipt of the~~
4 ~~cancellation notice to determine whether to initiate procedures to:~~

5 ~~(i) Revoke or suspend the permit for the~~
6 ~~nonmunicipal domestic sewage treatment works; and~~

7 ~~(ii) Take possession of the funds guaranteed by the~~
8 ~~financial instrument underlying the financial assurance.~~

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

14 ~~(B) Financial assurance shall provide that the department~~
15 ~~is the obligee or payee of the financial instrument underlying the financial~~
16 ~~assurance and shall otherwise comply with the regulations promulgated under~~
17 ~~this subchapter.~~

18 ~~(C) The amount of financial assurance required under this~~
19 ~~subsection shall be equal to or greater than the detailed cost estimate for a~~
20 ~~third party to maintain and operate the permitted nonmunicipal domestic~~
21 ~~sewage treatment works in accordance with the permit and applicable~~
22 ~~regulations.~~

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

26 ~~(i) Releases the owner or operator from the~~
27 ~~financial assurance requirements under this subchapter and the permit;~~

28 ~~(ii) Approves the closure of the nonmunicipal~~
29 ~~domestic sewage treatment works; or~~

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

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

35 ~~(B) The updated operation and maintenance costs based on~~
36 ~~the condition of the nonmunicipal domestic sewage treatment works required~~

1 under subdivision (b)(5)(A) of this section shall be provided in a report
2 certified by a professional engineer registered in the State of Arkansas and
3 submitted to the department with each permit renewal.

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

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

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

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

18 (B) Following the determination of the director under
19 subdivision (b)(7)(A) of this section, the department shall commence
20 proceedings to collect on the financial assurance on which the department is
21 the obligee or payee.

22 (C) For each permit, the financial instrument underlying
23 the financial assurance shall be renewed or an alternate financial instrument
24 shall be issued to maintain continuous financial assurance.

25 (D) If documentation of the renewed financial assurance or
26 alternate financial assurance is not received by the department at least
27 sixty (60) days before the expiration date of the existing financial
28 instrument underlying the financial assurance, the department shall:

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

31 (ii)(a) Initiate procedures to suspend or revoke the
32 permit under which the nonmunicipal domestic sewage treatment works is
33 operated.

34 (b) A permit shall remain suspended until
35 financial assurance is provided to the department in accordance with this
36 subsection.

1 ~~(E) The permittee is responsible for ensuring that~~
2 ~~documentation of the financial assurance and all renewals of financial~~
3 ~~instruments underlying the financial assurance are received by the department~~
4 ~~by the due date.~~

5 ~~(8) The department shall deposit all forfeited funds into the~~
6 ~~Water Performance Bond Fund.~~

7 ~~(9)(A)(i) Existing responsibilities and financial instruments~~
8 ~~underlying the financial assurance remain in full force and effect, and a~~
9 ~~permit shall not be transferred until the proposed new owner or operator has~~
10 ~~filed and the department has approved the required replacement financial~~
11 ~~assurance in accordance with the requirements of this section and applicable~~
12 ~~regulations.~~

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

17 ~~(B) The department shall release to the former owner,~~
18 ~~operator, or issuing institution, if appropriate, the financial assurance~~
19 ~~that the former owner or operator filed if the department does not.~~

20 ~~(i) Object to the replacement financial assurance~~
21 ~~within thirty (30) days of receipt of the completed permit transfer request;~~
22 ~~and~~

23 ~~(ii) Deny the permit transfer.~~

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

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

29 ~~(ii) Acceptable replacement financial assurance.~~

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

32 ~~(10) The (2) Until January 1, 2016, the department may reduce~~
33 ~~or waive the amount of the required financial assurance if the permit~~
34 ~~applicant can demonstrate to the department's satisfaction that:~~

35 ~~(A) For a renewal permit, during the five (5) years~~
36 ~~preceding the application for a renewal permit, the nonmunicipal domestic~~

1 sewage treatment works has:

2 (i) Maintained the nonmunicipal domestic sewage
3 treatment works in continuous operation;

4 (ii) Maintained the nonmunicipal domestic sewage
5 treatment works in substantial compliance with the existing discharge permit
6 issued by the department, which shall be demonstrated by submitting the
7 following:

8 (a) All discharge monitoring reports;

9 (b) Evidence that the nonmunicipal domestic
10 sewage treatment works has not exceeded the same permit effluent criteria in
11 any two (2) consecutive monitoring periods during the previous three (3)
12 years;

13 (c) Evidence that no more than ten percent
14 (10%) of the nonmunicipal domestic sewage treatment works' submitted
15 discharge monitoring reports show effluent violations; and

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

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

22 (iv)(a) Remained financially solvent, which shall be
23 demonstrated by either:

24 (1) The nonmunicipal domestic sewage
25 treatment works' federal tax returns for the five (5) years preceding the
26 application for a renewal permit and a sworn affidavit from a corporate
27 official or other responsible official representing the nonmunicipal domestic
28 sewage treatment works that lists all assets and liabilities for the
29 nonmunicipal domestic sewage treatment works; or

30 (2) An independent certified public
31 accountant's report on the owner's or operator's independently reviewed
32 financial statements.

33 (b) The review of financial statements under
34 subdivision ~~(b)(10)(A)(iv)(a)(2)~~ (b)(2)(A)(iv)(a)(2) of this section shall be
35 conducted in accordance with the American Institute of Certified Public
36 Accountants' Professional Standards, as they existed on January 1, 2013; and

1 (v) Operated the nonmunicipal domestic sewage
2 treatment works to prevent the discharge of waterborne pollutants in
3 unacceptable concentrations to the surface waters or groundwater of the state
4 as defined in the permit or as defined in the state's water quality
5 standards; or

6 (B) For a new permit:

7 (i) The reduction or waiver is necessary to
8 accommodate important economic or social development in the area of the
9 proposed nonmunicipal domestic sewage treatment works; and

10 (ii) The applicant has shown a history of financial
11 responsibility and compliance with regulatory requirements.

12 ~~(11)~~ (3) The department may withdraw a reduction or waiver
13 granted under this subsection at any time ~~in order to protect human health or~~
14 ~~the environment~~ if the permittee has a permit violation in three (3) or more
15 consecutive discharge monitoring periods.

16 ~~(12)~~ ~~The department shall not directly operate nor be~~
17 ~~responsible for the operation of a nonmunicipal domestic sewage treatment~~

18 4)(A) A permittee shall pay the trust fund contribution fee determined
19 by the department under this subdivision (b)(4) to the department.

20 (B)(i) The department shall determine the required initial
21 and annual trust fund contribution fees for each nonmunicipal domestic sewage
22 treatment works based on each nonmunicipal domestic sewage treatment works'
23 actual flow and existing and projected number of residential end users.

24 (ii) However, the trust fund contribution fee
25 required by the department shall not exceed two hundred dollars (\$200) per
26 year for no-discharge permits or one thousand dollars (\$1,000) per year for
27 discharge permits.

28 (C) The trust fund contribution fee required under this
29 subdivision (b)(4):

30 (i) May be collected in conjunction with any other
31 permit fees;

32 (ii) Shall be paid before a permit is issued or
33 renewed; and

34 (iii) Shall be deposited into the Nonmunicipal
35 Domestic Sewage Treatment Works Trust Fund.

36 (D) If the total amount in the fund equals or exceeds two

1 million one hundred thousand dollars (\$2,100,000), additional trust fund
2 contribution fees shall not be collected by the department until the total
3 amount of the fund equals or is less than one million five hundred thousand
4 dollars (\$1,500,000), at which time the collection of required trust fund
5 contribution fees shall resume.

6 (5)(A) A permittee is responsible for ensuring that the required
7 trust fund contribution fee is received by the department by the due date
8 determined by the department.

9 (B) If the department does not timely receive the required
10 trust fund contribution fees for a nonmunicipal domestic sewage treatment
11 works, the department may initiate procedures to suspend or revoke the permit
12 under which the nonmunicipal domestic sewage treatment works is operated.

13 (C) A permit applicant's or permit transfer applicant's
14 failure to pay the required trust fund contribution fee assessed by the
15 department under this section is:

16 (i) Grounds for denying the permit or the permit
17 transfer; and

18 (ii) A violation of this chapter and subjects the
19 applicant to the penalties described in § 8-4-103.

20 (6) Sanctions for violating this subsection may include without
21 limitation civil penalties and suspension or revocation of a permit.

22 (7) The department may seek cost recovery from an owner or
23 operator and reimbursement to the fund of any moneys expended under this
24 section, including without limitation the institution of a civil action
25 against the owner or operator.

26 (8) The department shall not directly operate or be responsible
27 for the operation of a nonmunicipal domestic sewage treatment works.

28
29 SECTION 3. Arkansas Code § 8-4-203(h), concerning water pollution
30 permits, is amended to read as follows:

31 (h)(1) Permits for the discharge of pollutants into the waters of the
32 state or for the prevention of pollution of the waters of the state shall
33 remain freely transferable if the applicant for the transfer:

34 (A) Notifies the director at least thirty (30) days in
35 advance of the proposed transfer date;

36 (B) Submits a disclosure statement as required under § 8-

1 1-106; ~~and~~

2 (C) Provides any replacement financial assurance required
3 under this section; and

4 (D) Ensures that all past and currently due annual permit
5 fees and the trust fund contribution fese for the nonmunicipal domestic
6 sewage treatment works have been paid.

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

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

13
14 SECTION 4. Arkansas Code Title 19, Chapter 5, Subchapter 11, is
15 amended to add an additional section to read as follows:

16 19-5-1142. Nonmunicipal Domestic Sewage Treatment Works Trust Fund.

17 (a) There is created on the books of the Treasurer of State, the
18 Auditor of State, and the Chief Fiscal Officer of the State a trust fund to
19 be known as the "Nonmunicipal Domestic Sewage Treatment Works Trust Fund".

20 (b) The fund shall consist of:

21 (1) Funds appropriated by the General Assembly;

22 (2) Trust fund contribution fees under § 8-4-203(b);

23 (3) Grants made by any person, state agency, or federal
24 government agency;

25 (4) Gifts and donations; and

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

27 (c)(1) The fund shall be used by the Arkansas Department of
28 Environmental Quality to ensure adequate operation, maintenance, and
29 completed closure of a nonmunicipal domestic sewage treatment works if the
30 Director of the Arkansas Department of Environmental Quality determines that
31 an owner or operator has not adequately operated, maintained, or completed
32 closure of the nonmunicipal domestic sewage treatment works.

33 (2) If the director determines that an owner or operator has not
34 adequately operated, maintained, or completed closure of the nonmunicipal
35 domestic sewage treatment works, the department may use moneys in the fund to
36 hire a third-party contractor to:

