

AGENDA REQUEST FORM

FOR: Council Meeting of August 6, 2019

FROM: City Council Member Teresa Turk


ORDINANCE OR RESOLUTION TITLE AND SUBJECT:

A RESOLUTION TO REQUEST THAT THE NORTHWEST ARKANSAS NUTRIENT TRADING RESEARCH AND ADVISORY GROUP (NANTRAG) CONSIDER AMENDING THE PROPOSED REGULATION FOR NUTIENT TRADING TO MORE CLOSELY CONFORM TO THE ATTACHED PROPOSED REVISION

APPROVED FOR AGENDA:


City Council Member Teresa Turk

8/2/19
Date


City Attorney Kit Williams
Approved as to form

August 2, 2019
Date

RESOLUTION NO. _____

A RESOLUTION TO REQUEST THAT THE NORTHWEST ARKANSAS NUTRIENT TRADING RESEARCH AND ADVISORY GROUP (NANTRAG) CONSIDER AMENDING THE PROPOSED REGULATION FOR NUTRIENT TRADING TO MORE CLOSELY CONFORM TO THE ATTACHED PROPOSED REVISION

WHEREAS, protecting drinking water in Arkansas should be the highest priority for our citizens; and

WHEREAS, tourism in Arkansas associated with outdoor activity including fishing, swimming, kayaking and canoeing is the second highest employer in the Arkansas and is increasing at 4-6% per year; and

WHEREAS, nutrient trading is a brand new statewide program that must improve and not degrade water quality and is untested in Arkansas; and

WHEREAS, the City of Fayetteville is one of the four Arkansas cities that is a member of NANTRAG and has paid for legal services to develop the proposed nutrient trading regulation; and

WHEREAS, the City Council agrees with the Arkansas Legislature that nutrient water quality trading can potentially achieve water quality goals with greater efficiency and cost savings; and

WHEREAS, experience in other states demonstrate that nutrient water quality trading programs, including the use of credits, off sets, and compliance associations, can result in quicker and more efficient achievement of water quality improvement goals; and

WHEREAS, nutrient water quality trading should be encouraged and facilitated by the development of stringent regulations and verifiable permit terms; and

WHEREAS, the Fayetteville City Council supports the nutrient trading concept, has reviewed the currently proposed nutrient trading regulation and has determined that some changes would be advisable to better protect our reservoirs, environment, endangered species and waterways.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF FAYETTEVILLE, ARKANSAS:

Section 1: That the City Council of the City of Fayetteville, Arkansas hereby requests that NANTRAG consider amending portions of the proposed regulation for Nutrient Water Quality Trading as shown on the attached proposed revisions by Council Member Teresa Turk and approved by the Water, Sewer and Solid Waste Committee.

PASSED and **APPROVED** this 6th day of August, 2019.

APPROVED:

ATTEST:

By: _____
LIONELD JORDAN, Mayor

By: _____
SONDRA E. SMITH, City Clerk/Treasurer

DRAFT

ARKANSAS NUTRIENT WATER QUALITY TRADING REGULATION

SECTION 1. GENERAL PROVISIONS.

(A) This regulation shall be known and shall be cited as “The Arkansas Nutrient Water Quality Trading Regulation”.

Scope and Purpose: This regulation is intended to improve and protect water quality through the reduction of phosphorous and nitrogen, or to meet a TMDL requirement throughout the State of Arkansas. Demonstration and documentation of the improvement in water quality is a key goal and metric of this regulation. Nutrient trading is to be restricted to only trades being conducted from a non-point generator to NPDES permit holders. An NPDES permit is required for the trading entity to participate under this regulation.

Definitions:

(1) “Department” or “ADEQ” means the Arkansas Department of Environmental Quality or its successor, unless otherwise specified.

(2) “Director” means the Director of the Arkansas Department of Environmental Quality or the Director’s designee, unless otherwise specified.

(3) “Watershed” means an area of land that drains into a water body area no larger than an 10 8 digit USGS Hydrological Unit Code (HUC).

(4) “Baseline” means the most stringent of existing conditions or the water quality standards for the credit generating stream. The minimum baseline requirements shall be not less than six in-stream measurements in the nutrient trade generating stream

Council Member Teresa Turk Proposed Revisions to NANTRAG Draft
July 30, 2019

section within the past calendar year of water quality parameters including but not limited to: phosphorous, nitrate, dissolved oxygen, pH, temperature, and turbidity, prior to approval of the project.

(5) "Nutrient credit" means a nutrient reduction that is expressed in pounds of phosphorous or nitrogen.

This regulation is adopted under the authority of Act 335 of 2015, codified at Ark. Code Ann. §§ 8-4-232 and 8-4-233.

Participation in any Nutrient Credit Generating Project under this Regulation shall be purely voluntary.

Pursuant to Ark. Code Ann. § 8-4-232(E):

(1) the Department has the responsibility to develop a schedule of user fees by calculating the reasonable costs to the Department of evaluating, implementing and enforcing the nutrient water quality trading, credit, and offset program; and

(2) the Commission may establish a schedule of user fees to be collected by the Department from persons or entities applying for approval of, generating, or utilizing credits and offsets from the Nutrient Credit Generating Projects in order to comply with the National Pollutant Discharge Elimination System permit limits.

Nothing in this regulation shall be construed to limit or impinge any requirement of any other State or Federal environmental law or regulation.

SECTION 2. AUTHORITY TO APPROVE NUTRIENT CREDIT GENERATING PROJECTS FOR USE AS OFFSETS.

The Director of the Arkansas Department of Environmental Quality shall have authority to approve Nutrient Credit Generating Projects as sources of nutrient credits that may be used by National

Pollutant Discharge Elimination System, permit holders to offset their nutrient discharges when determining compliance with water quality-based permit limits.

SECTION 3. APPLICATIONS FOR APPROVAL OF NUTRIENT CREDIT GENERATING PROJECTS.

(A) Any person seeking approval of Nutrient Credit Generating Project shall submit an application for approval to the Director. The application shall include:

(1) A description of the location, including the watershed and the 12-digit USGC HUC, where the credit-generating project will be implemented;

(2) A description of the watershed, including but not limited to a geographic boundary and the 12-digit USGS HUC, in which the credits are proposed for use as offsets;

(3) A list of the NPDES permitted point sources that may use the credits as offsets along with a copy of each NPDES permit;

(4) The time period in which the credit-generating project may be used as an offset;

(5) Scientific and numeric Evidence that the credit-generating project will result in a reduction of nutrient discharges below the existing baseline requirements;

Applicant shall provide all information and documentation such as previous and planned manure application, previous use and anticipated use, and any other information on the stream section and adjacent application fields to be used to generate credits.

Evidence and calculations used to derive the credit quantity and credit ratios resulting from the crediting-generating project, including an explanation of the methods used to address uncertainty factors;

**Council Member Teresa Turk Proposed Revisions to NANTRAG Draft
July 30, 2019**

1 ~~7.4.2.2~~ A description of the methods by which the implementation, performance, and
2 operation and maintenance of the credit-generating project will be verified and
3 documented, and the identity of the person or entity responsible for documenting the
4 verification; and

5 ~~7.4.2.3~~ A certification, signed by the applicant, attesting that the application is true and
6 accurate to the best of the applicant's knowledge and belief.

7 (B) ~~If an application involves nonpoint source nutrient credit-generating projects or activities, the~~
8 Proposed Nutrient Credit Generating Project shall be submitted to the Arkansas Natural
9 Resources Commission for review prior to submitting at the same time that the application is
10 submitted to the Director of the Arkansas Department of Environmental Quality. In such
11 cases, the application to the Director shall include a written agreement from the Arkansas
12 Natural Resources Commission will send a copy of confirming their review of the project and
13 reporting any comments or recommendations resulting from that review to the Director of the
14 Arkansas Department of Environmental Quality.

15 (C) Applications submitted to the Director of the Arkansas Department of Environmental Quality
16 shall comply with the public notice procedures and requirements for an individual permit
17 under Regulation No. 8. Applications shall also be publicly noticed through electronic notice
18 and publication on the Arkansas Department of Environmental Quality website. All
19 information shall be stored post in the ADEQ database and available for public review on
20 the ADEQ website within three (3) days of ADEQ receiving any information.

21 (D) Prior to approval, the Director will send a copy of the application, her written findings, and
22 decision to EPA for review. After review of the application the Director may approve the
23 Nutrient Credit Generating Project as a source of nutrient credits that may be used as offsets

(D) Prior to approval, the Director will send a copy of the application, her written findings, and decision to EPA for review. After review of the application the Director may approve the Nutrient Credit Generating Project as a source of nutrient credits that may be used as offsets as requested, disapprove the Nutrient Credit Generating Project as a source of nutrient credits, or approve the Nutrient Credit Generating Project as a source of nutrient credits subject to specific conditions or limitations.

(E) Unless expressly granted for a shorter or longer term, the approval of the Nutrient Credit Generating Project as a source of nutrient credits shall be limited to a term of five years from the date of the Director's decision, but may be renewed or extended upon application in accordance with procedures in this section.

(F) Nutrient trades shall be prohibited if the watershed contains any of the following:

(1) A listed Endangered or Threatened Species;

(2) Designated Critical Habitat;

(3) The stream and/or tributary is designated as an Extraordinary Water Resource (ERW), Ecologically Sensitive Waterbody (ESW), or Natural and Scenic Waterways;

(4) The stream or tributary lie inside a designated nutrient surplus area; or

~~(2)~~(5) In karst geological areas due to the potential for cross basin (between watersheds) and rapid transport of nutrients to sensitive environments.

~~(3)~~(6) Is absent of a numeric nutrient water quality criterion for phosphorous and nitrogen.

~~(E)~~(G) In deciding whether to approve an application for approval of a Nutrient Credit Generating Project, the Director shall consider, among all other relevant factors:

(1) The scientific and numeric evidence provided in the application to support the factors identified in Section 3(A);

Council Member Teresa Turk Proposed Revisions to NANTRAG Draft
July 30, 2019

1 as requested, disapprove the Nutrient Credit Generating Project as a source of nutrient credits,
2 or approve the Nutrient Credit Generating Project as a source of nutrient credits subject to
3 specific conditions or limitations.

4 (E) Unless expressly granted for a shorter or longer term, the approval of the Nutrient Credit
5 Generating Project as a source of nutrient credits shall be limited to a term of five years from
6 the date of the Director's decision, but may be renewed or extended upon application in
7 accordance with procedures in this section.

8 (F) Nutrient trades shall be prohibited if the watershed contains any of the following:

OR THREATENED

9 (1) A listed Endangered Species;

10 (2) The stream and/or tributary is designated as an Extraordinary Water Resource (ERW),

11 Ecologically Sensitive Waterbody (ESW), or Natural and Scenic Waterways;

12 (3) The stream or tributary lie inside a designated nutrient surplus area; or

13 In karst geological areas due to the potential for cross basin (watershed) and rapid
14 transport of nutrients to sensitive environments.

(5) CRITICAL HABITAT

15 In deciding whether to approve an application for approval of a Nutrient Credit Generating
16 Project, the Director shall consider, among all other relevant factors:

17 (1) The scientific and numeric evidence provided in the application to support the factors
18 identified in Section 3(A);

19 (2) The calculation used to derive the credit quantity and credit ratios resulting from the
20 credit-generating project, including an explanation of methods and supporting
21 scientific literature used to address uncertainty factors;

- 1 (3) The methods for verifying and providing access to data and information when
2 requested by ADEQ or any citizen of Arkansas the reliability of the implementation,
3 performance, and operation and maintenance of the credit-generating project; and
4 (4) The experience and capacity of the persons who will be responsible for implementing
5 and verifying the credit-generating project .

6 The Director's decision approving or denying a Nutrient Credit Generating Project shall
7 include written findings regarding the factors identified in Section 3(A) and specify the
8 conditions and limitations that will apply to any use of the nutrient credits generated. At a
9 minimum, the conditions applicable to an Nutrient Credit Generating Project shall specify:

- 10 (1) The watershed in which the credits generated by the Nutrient Credit Generating
11 Project may be used as an offset;
12 (2) The time period in which the credits generated by the Nutrient Credit Generating
13 Project may be used as an offset;
14 (3) The method by which implementation, performance, and operation and maintenance
15 of the credit-generating project will be verified, and the identity of the person or entity
16 responsible for documenting the verification; and
17 (4) For projects generating credits by non-point source activity, a minimum credit ratio of
18 1.54:1 (projected nutrient reductions or savings to nutrient credits for the project) shall
19 be applied when calculating the credit quantity.

20 Prior to taking final action on a request for approval of a Nutrient Credit Generating Project,
21 the Director shall cause public notice to be published within the watershed where the credit
22 will be generated and utilized in a newspaper of general circulation and on the Arkansas
23 Department of Environmental Quality's website and current ADEQ water email list. The

**Council Member Teresa Turk Proposed Revisions to NANTRAG Draft
July 30, 2019**

1 public shall be allowed a period of not less than thirty (30) calendar days in which to submit
2 written comments. The decision to grant or deny approval of a Nutrient Credit Generating
3 Project shall include a written response to all issues raised in comments submitted during the
4 public comment period. A copy of the final decision granting or denying certification of a
5 Nutrient Credit Generating Project shall be sent to the applicant and each person who
6 submitted written comments within the public comment period. The Director's decision to
7 grant or deny approval of a Nutrient Credit Generating Project shall be subject to the same
8 review and appeal provisions as a final permitting decision under Regulation No. 8.

9 No Nutrient Credit Generating Project shall be approved by the Director unless the project,
10 activity, or discharge reduction involved in the project will ~~reduce the nutrient load below the~~
11 ~~applicable baseline requirements~~ be protective of Arkansas's waterways, fish, other aquatic
12 species, and improve overall water quality by a numeric reduction in nutrients within the
13 nutrient generating watershed.

14 (1) For projects generating credits by point source pollution reduction, the baseline
15 requirements shall be the National Pollutant Discharge Elimination System ~~water-~~
16 ~~quality based permit limits for the point source average monthly water quality~~
17 ~~parameters for the past twelve (12) months for the point source in question or the~~
18 ~~wasteload allocation in any applicable Total Maximum Daily Load, whichever is more~~
19 ~~stringent.~~

20 (2) For projects generating credits by non-point source activity, the baseline requirements
21 ~~shall be no less than six in-stream measurements of water quality parameters in the~~
22 ~~nutrient trade generating stream section in the last calendar year including but not~~
23 ~~limited to: phosphorous, nitrate, dissolved oxygen, pH, temperature, and turbidity, prior~~

**Council Member Teresa Turk Proposed Revisions to NANTRAG Draft
July 30, 2019**

1 to approval of the project. Water quality measurements will be required to be conducted
2 quarterly at a minimum and the samples analyzed by an approved state of AR certified
3 water quality lab. Water quality samples will be collected by a 3rd party. The non-point
4 source permittee will allow access and will cooperate with all data collection activities
5 and personnel. For projects generating credits by non-point source activity, the baseline
6 requirements shall be the regulatory requirements applicable to the location where the
7 project will generate the credits.

- 8 (3) If the baseline requirements applicable to a Nutrient Credit Generating Project change
9 after the date the Project is approved, the amount of offset allowed from credits
10 generated by the Nutrient Credit Generating Project shall be reduced to conform to the
11 baseline requirements applicable at the time the nutrient credit is used. The procedure
12 for adjusting the amount or duration of credits allowed from an approved Nutrient
13 Credit Generating Project shall be the same as that used for reopening and modifying
14 National Pollutant Discharge Elimination System permits.

15 The fact that a non-point source project or a point source pollution reduction may be
16 supported in part or entirely by government grants or other third-party financial funding shall
17 not prevent the project, activity, or pollution reduction from being eligible for approval as a
18 Nutrient Credit Generating Project, where such use is allowed by the granting agency or third-
19 party entity.

20 All inspections necessary to determine compliance with non-point source Nutrient Credit
21 Generating Projects that cannot otherwise be verified through the procedures outlined in the
22 approved Nutrient Credit Generating Project application will be performed by the Arkansas
23 Natural Resources Commission Arkansas Department of Environmental Quality. Nothing in

1 this section shall interfere with the Department's authority to conduct compliance and
2 complaint inspections as authorized by statute or regulation.

3 **SECTION 4. RESPONSIBILITY FOR PERMIT COMPLIANCE.**

4 (A) Credits generated by an approved Nutrient Credit Generating Project may be used as offsets
5 only when expressly authorized by the National Pollutant Discharge Elimination System
6 permit in question, or a modification of the permit. In addition to all other permit application
7 or permit modification requirements, the application must include:

8 (1) Scientific and numeric Eevidence that the nutrient credits used under the permit
9 modification are approved for use in the watershed into which the National
10 Pollutant Discharge Elimination System permittee discharges;

11 (2) Scientific and numeric Eevidence that use of the nutrient credits as an offset will
12 not result in an unacceptable localized adverse effect on water quality will
13 demonstrate water quality improvement in localized areas;

14 (3) Scientific and numeric Eevidence that use of the nutrient credits as an offset will
15 not result in a net increase in pollutant loading in the relevant watershed will
16 demonstrate water quality improvement and a decrease in the net pollutant loading
17 in the relevant watershed; and

18 (4) Scientific and numeric Eevidence that use of the nutrient credits as an offset will
19 not have a significant adverse impact upon will demonstrate significant water
20 quality improvement within a reservoir that is a drinking water supply source for
21 an existing public water supply system as designated by the Arkansas Department
22 of Health.

1 (B) A National Pollutant Discharge Elimination System permittee that discharges into a watershed
2 identified on Appendix A as an existing drinking water reservoir watershed designated in the
3 Arkansas Department of Health GIS Database shall not be allowed to use credits that have
4 been generated outside of the watershed of the reservoir as offsets against its permit limits for
5 nutrients.

6 (C) ~~A permittee-Anyone~~ authorized to conduct nutrient trading in Arkansas relying on nutrient
7 credits to demonstrate compliance with its National Pollutant Discharge Elimination System.
8 permit limits retains full responsibility for achieving and maintaining permit compliance. If a
9 Nutrient Credit Generating Project fails to meet the terms and conditions of its approval as a
10 source of nutrient credits, National Pollutant Discharge Elimination System permit holders
11 may not rely on credits generated by the project regardless of the fact that failure of the project
12 may have been attributable to circumstances beyond the reasonable control of the permit
13 holder.

14 **SECTION 5: NO USE OF CREDITS OUTSIDE WATERSHED**

15 ~~Nutrient credits generated by an approved Nutrient Credit Generating Project may be utilized~~
16 ~~as offsets only in the watershed in which the credits are generated. Nutrient credits generated~~
17 ~~by an approved Nutrient Credit Generating Project may be utilized as offsets only in a~~
18 ~~watershed defined by an 10 8-digit HUC in which the credits are generated.~~

19 **SECTION 6: EFFECTIVE DATE.**

20 This regulation is effective ten (10) days after filing with the Secretary of State, the State
21 Library and the Bureau of Legislative Research.



OFFICE OF THE
CITY ATTORNEY

DEPARTMENTAL CORRESPONDENCE



Kit Williams
City Attorney

Blake Pennington
Assistant City Attorney

Jodi Batker
Paralegal

TO: **Mayor Jordan**
City Council

CC: **Don Marr**, Chief of Staff
Tim Nyander, Utilities Director

FROM: **Kit Williams**, City Attorney

DATE: **August 1, 2019**

RE: **Proposed changes to NANTRAG's proposed Arkansas Nutrient Water Quality Trading Regulation**

I am not a scientist nor expert on nutrient water quality trading issues. However, I ask that you carefully review the proposed changes to the regulation to be submitted by NANTRAG (a group of Northwest Arkansas cities including Fayetteville which has been working on difficulties surrounding nutrient issues for our wastewater treatment plants and possible solutions for many years). Please remember our taxpayers need to keep our wastewater plants operating efficiently at reasonable cost. We also all need to be as protective as reasonably possible of our region's most valuable and vital asset, Beaver Lake.

My understanding is that major sources of undue nutrient (phosphorus and nitrogen) loading of the watershed for Beaver Lake come from overly fertilized urban and rural land. Our wastewater plants do an excellent job of removing these nutrients from our wastewater and even more stringent requirements on our wastewater plants would be extremely expensive. Thus, our money would probably be better spent encouraging land owners to use better water quality protection measures.

All regulations should be designed to accomplish as much as reasonably possible of the desired goal while not becoming so cumbersome or expensive that the proposed program will not be used. That is certainly the case here as the legislature has ensured that nutrient trading shall be "a matter of voluntary choice on the part of each participant in the nutrient water quality trading program or arrangement." A.C.A. §8-4-322(d)