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## Water Quality Trading In Arkansas Background Resources

- 1) Act 335 of 2015, Arkansas Nutrient Water Quality Trading Act, *codified as* ARK. CODE ANN. §§ 8-4-232 & 8-4-233 (Supp. 2015).
- 2) Arkansas Nutrient Water Quality Trading Advisory Panel
- 3) Straw Man Discussion Draft Nutrient Water Quality Trading Regulation
- 4) Other Resources:
  - a) National Network on Water Quality Trading, BUILDING A WATER QUALITY TRADING PROGRAM (June 2015), *accessible at:* <http://willamettepartnership.org/wp-content/uploads/2015/06/BuildingaWQTProgram-NNWQT.pdf>
  - b) EPA Office of Water, WATER QUALITY TRADING POLICY (Jan. 13, 2003), *accessible at:* [https://www3.epa.gov/npdes/pubs/wqtradingtoolkit\\_app\\_b\\_trading\\_policy.pdf](https://www3.epa.gov/npdes/pubs/wqtradingtoolkit_app_b_trading_policy.pdf)
  - c) EPA Office of Wastewater Management, Water Permits Division, WATER QUALITY TRADING TOOLKIT FOR PERMIT WRITERS (rev. June 2009), *accessible at:* [https://www3.epa.gov/npdes/pubs/wqtradingtoolkit\\_fundamentals.pdf](https://www3.epa.gov/npdes/pubs/wqtradingtoolkit_fundamentals.pdf)

Stricken language would be deleted from and underlined language would be added to present law.  
Act 335 of the Regular Session

1 State of Arkansas  
2 90th General Assembly  
3 Regular Session, 2015

As Engrossed: H2/18/15

# A Bill

HOUSE BILL 1067

4  
5 By: Representatives Collins, Davis, Ballinger, Beck, Bell, Bentley, Cozart, Della Rosa, C. Douglas,  
6 Eubanks, Gonzales, M. Gray, Hillman, G. Hodges, Ladyman, Leding, Neal, Petty  
7 By: Senator U. Lindsey

## For An Act To Be Entitled

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10 AN ACT TO AMEND THE LAWS PERTAINING TO THE  
11 PROMULGATION OF WATER QUALITY REGULATIONS AND THE  
12 ISSUANCE OF WASTEWATER DISCHARGE PERMITS; TO  
13 AUTHORIZE THE IMPLEMENTATION OF NUTRIENT WATER  
14 QUALITY TRADING, CREDITS, OFFSETS, AND COMPLIANCE  
15 ASSOCIATIONS; AND FOR OTHER PURPOSES.

## Subtitle

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19 TO AMEND THE LAWS REGARDING WATER QUALITY  
20 REGULATIONS AND WASTEWATER DISCHARGE  
21 PERMITS; AND TO AUTHORIZE NUTRIENT WATER  
22 QUALITY TRADING, CREDITS, OFFSETS, AND  
23 COMPLIANCE ASSOCIATIONS.

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

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28 SECTION 1. DO NOT CODIFY. Legislative findings and intent.

29 The General Assembly finds that:

30 (1) Water quality trading is a market-based approach to  
31 achieving water quality goals that can provide greater efficiency and cost  
32 savings by allowing one (1) source to meet its regulatory obligations by  
33 using pollutant reductions created by another source that has lower pollution  
34 control costs;

35 (2) Experience in other states has demonstrated that nutrient  
36 water quality trading programs, including the use of credits, offsets, and



1 compliance associations, can result in quicker and more efficient achievement  
2 of water quality protection goals; and

3 (3) Nutrient water quality trading should be encouraged wherever  
4 appropriate and facilitated by the development of applicable regulations and  
5 permit terms.

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7 SECTION 2. Arkansas Code Title 8, Chapter 4, Subchapter 2, is  
8 amended to add an additional sections to read as follows:

9 8-4-232. Nutrient water quality trading programs.

10 (a) As used in this section, "nutrient" means a substance assimilated  
11 by an organism that promotes growth and replacement of cellular constituents,  
12 including without limitation nitrogen, phosphorus, and carbon.

13 (b)(1) The Arkansas Pollution Control and Ecology Commission may adopt  
14 regulations that specify requirements, standards, and procedures governing  
15 the establishment and implementation of nutrient water quality trading  
16 programs, including without limitation program scope, eligibility, and  
17 threshold treatment requirements.

18 (2) The nutrient water quality trading programs may include  
19 without limitation the following:

20 (A) The establishment and regulation of nutrient water  
21 quality trading exchanges;

22 (B) The establishment and regulation of nutrient water  
23 quality compliance associations;

24 (C) The authorization and regulation of nutrient water  
25 quality trading credits;

26 (D) The authorization and regulation of nutrient water  
27 quality offsets; and

28 (E)(i) The establishment of a schedule of user fees to be  
29 collected by the Arkansas Department of Environmental Quality from persons or  
30 entities utilizing nutrient water quality trades or offsets to comply with  
31 permit limits.

32 (ii) The user fees shall be based on a record  
33 calculating the reasonable costs to the department of implementing and  
34 enforcing each nutrient water quality trading, credit, or offset program.

35 (c) Under regulations adopted by the commission under subsection (b)  
36 of this section, the department may:

1           (1) Include terms and conditions in any appropriate permit that  
2 allow the eligible permit holder to use water quality trading arrangements  
3 such as water quality trading credits and water quality offsets as a means  
4 for complying with appropriate nutrient effluent limitations or conditions  
5 contained in the permit; and

6           (2) Issue permits to eligible compliance associations as a means  
7 for multiple eligible permit holders to collectively satisfy their aggregate  
8 permit limits for one (1) or more appropriate nutrient water quality  
9 parameters.

10          (d) A nutrient water quality trading program or arrangement  
11 established under this section shall provide that a decision to participate  
12 in the nutrient water quality trading program or arrangement shall be a  
13 matter of voluntary choice on the part of each participant in the nutrient  
14 water quality trading program or arrangement.

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16          8-4-233. Nutrient Water Quality Trading Advisory Panel – Created  
17 – Members – Duties.

18          (a) The Nutrient Water Quality Trading Advisory Panel is created,  
19 consisting of nine (9) members as follows:

20           (1) One (1) member appointed by the President Pro Tempore of the  
21 Senate;

22           (2) One (1) member appointed by the Speaker of the House of  
23 Representatives;

24           (3) Seven (7) members appointed by the Governor as follows:

25                   (A) One (1) member to represent agricultural interests;

26                   (B) One (1) member to represent forestry interests;

27                   (C) One (1) member to represent municipal wastewater

28 treatment facility interests;

29                   (D) One (1) member to represent public drinking water  
30 supply interests;

31                   (E) One (1) member to represent the interests of  
32 industries that hold point source wastewater discharge permits; and

33                   (F) Two (2) members to represent the interests of  
34 environmental organizations regarding water quality.

35          (b)(1) A member shall serve a term of two (2) years or until a  
36 successor is appointed.

1           (2) A member may serve successive terms without limitation.

2           (3) If a vacancy occurs, the officer who made the original  
3 appointment for that position shall appoint a person who represents the same  
4 constituency as the member being replaced.

5           (c)(1) A majority of the members shall constitute a quorum for the  
6 transaction of business.

7           (2) Meetings may be conducted with members participating via  
8 telephonic or other electronic conferencing methods.

9           (d)(1) The advisory panel shall elect a chair and vice chair.

10           (2) The advisory panel may adopt rules relating to the conduct  
11 of its meetings.

12           (e) Members shall serve without compensation but may be reimbursed for  
13 expenses in accordance with § 25-16-902, if funds are available.

14           (f) The Arkansas Department of Environmental Quality shall provide  
15 meeting space and administrative services for the advisory panel.

16           (g) The advisory panel may:

17           (1) Advise the department and the Arkansas Natural Resources  
18 Commission regarding the desirability, design, and operation of nutrient  
19 water quality trading programs; and

20           (2) Advise the Arkansas Pollution Control and Ecology Commission  
21 and the Arkansas Natural Resources Commission regarding the promulgation of  
22 regulations involving nutrient water quality trading programs.

23           (h) The Arkansas Pollution Control and Ecology Commission shall not  
24 initiate a rulemaking proceeding to adopt a regulation that authorizes or  
25 governs nutrient water quality trading unless:

26           (1) The proposed regulation has been recommended by the advisory  
27 panel; or

28           (2) A copy of the proposed regulation has been delivered to the  
29 advisory panel at least sixty (60) calendar days before the date the request  
30 to initiate the rulemaking is filed with the Arkansas Pollution Control and  
31 Ecology Commission.

32           (i) Subsection (h) of this section does not limit the authority of the  
33 Arkansas Pollution Control and Ecology Commission to:

34           (1) Alter a proposed regulation at any time during the  
35 rulemaking proceeding; or

36           (2) Initiate a rulemaking proceeding if:

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(A) The members of the advisory panel have not been appointed; or

(B) The advisory panel lacks an actively serving quorum.

/s/Collins

**APPROVED: 03/06/2015**

**Nutrient Water Quality Trading Advisory Panel Members:**

- 1. Jamie Burr, Fayetteville**
- 2. Daniel Dawson, Searcy (Vice Chair)**
- 3. Mark Gross, West Fork**
- 4. Dr. Delia Haak, Gentry**
- 5. Larry Lloyd, Fayetteville**
- 6. Jimmy Mardis, Rogers**
- 7. Rick Rodenroth, Fouke**
- 8. Evan Teague, Little Rock**
- 9. Heath Ward, Springdale (Chair)**

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2                   **STRAW MAN DISCUSSION DRAFT**  
3                   **ARKANSAS NUTRIENT WATER QUALITY**  
4                   **TRADING REGULATION**  
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6    **SECTION 1. AUTHORITY TO ACCEPT NUTRIENT CREDITS AS OFFSETS.**

7    In determining whether an NPDES permit holder is in compliance with permit effluent  
8    limitations for nutrients, the Arkansas Department of Environmental Quality shall have authority  
9    to accept Approved Nutrient Credits to offset nutrients discharged by the permit holder if:

- 10       (1) The Approved Nutrient Credits are used as offsets in the same watershed or sub-  
11       watershed for which the credits were approved;
- 12       (2) The Approved Nutrient Credits are used as offsets in a time period for which the credits  
13       were approved;
- 14       (3) Use of the Approved Nutrient Credits does not result in any localized violation of water  
15       quality standards;
- 16       (4) Use of the Approved Nutrient Credits does not result in a net increase in pollutant loading  
17       in the relevant watershed above that allowed by existing permits and regulations;
- 18       (5) Use of nutrient credits is expressly authorized by the NPDES permit in question; and



1 (6) Each use of an Approved Nutrient Credit is specifically identified in supplemental  
2 information in Discharge Monitoring Reports in which the offset is claimed.

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5 **SECTION 2. APPROVAL OF NUTRIENT CREDITS.**

6 (A) The Arkansas Department of Environmental Quality shall have the authority to  
7 determine whether a reduction in a point source discharge of nutrients will be certified as  
8 an Approved Nutrient Credit.

9 (B) The [insert name: ANRC, ADEQ, other?] shall have the authority to determine whether  
10 a proposed project or activity involving non-point source discharge reductions will be  
11 certified as generating Approved Nutrient Credits.

12 (C) The certification of an Approved Nutrient Credit shall specify the conditions and  
13 limitations that will apply to any use of the Approved Nutrient Credit. At a minimum,  
14 the conditions applicable to an Approved Nutrient Credit shall specify:

15 (1) The watershed or sub-watershed in which the Approved Nutrient Credit may be  
16 used as an offset;

1 (2) The time period in which the Approved Nutrient Credit may be used as an offset;

2 and

3 (3) The method by which implementation of the credit generating project or activity

4 will be verified and the identity of the person or entity responsible for

5 documenting the verification.

6 (D) Prior to taking final action on a request for certification of an Approved Nutrient Credit,

7 public notice shall be published in a newspaper of general circulation in the watershed

8 where the credit will be generated. The public shall be allowed a period of not less than

9 30 calendar days in which to submit written comments. The decision to grant or deny

10 certification of a project, activity, or discharge reduction as an Approved Nutrient Credit

11 shall include a written response to all issues raised in comments submitted during the

12 public comment period. A copy of the final decision granting or denying certification of

13 an Approved Nutrient Credit shall be sent to each person who submitted written

14 comments within the public comment period.

1 (E) No project, activity, or discharge reduction shall be certified as an Approved Nutrient  
2 Credit unless the project, activity, or discharge reduction will reduce the nutrient load in  
3 the relevant watershed below the nutrient load allowed under applicable baseline  
4 requirements.

5 (1) For point source reductions, the baseline requirements shall be the NPDES  
6 permit limits for the point source in question or the wasteload allocation in  
7 any applicable TMDL, whichever is more stringent.

8 (2) For non-point source activities or projects, the baseline shall be the regulatory  
9 requirements applicable to the location where the project or activities will  
10 generate the credits.

11 (3) If the baseline requirements applicable to an Approved Nutrient Credit change  
12 after the date the Approved Nutrient Credit was certified but before it is used,  
13 the amount of offset allowed from use of the Approved Nutrient Credit shall  
14 be reduced to conform to the baseline requirements applicable at the time the  
15 Approved Nutrient Credit is used.

1 (4) No point source shall be eligible to obtain certification of an Approved  
2 Nutrient Credit for discharge reductions if the point source has been named as  
3 a respondent in formal enforcement proceedings related to its NPDES permit  
4 within three years prior to the date the request for certification is made.

5 (5) No non-point source nutrient reduction project or activity shall be eligible for  
6 certification as an Approved Nutrient Credit if a person responsible for  
7 implementing the project or activity has been named as a respondent in formal  
8 environmental enforcement proceedings within three years prior to the date  
9 the request for certification is made.

10 (6) The fact that a non-point source project or activity or a point source pollution  
11 reduction may be supported in part or entirely by government grants or other  
12 third party financial funding shall not prevent the project, activity, or pollution  
13 reduction from being eligible for certification as an Approved Nutrient  
14 Reduction.

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

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(A) A permittee relying on Approved Nutrient Credits to demonstrate compliance with its

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NPDES permit limits retains full responsibility for achieving and maintaining permit

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compliance. A permittee relying on Approved Nutrient Credits shall be responsible for

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enforcing the terms and conditions of the Approved Nutrient Credits when those credits

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are needed to assure permit compliance.

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(B) The Arkansas Department of Environmental Quality may exercise enforcement discretion

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to forego formal enforcement or reduce formal enforcement sanctions with respect to

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permit violations that arise from the complete or partial failure to implement an

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Approved Nutrient Credit in accordance with the certification if:

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(1) The permittee exercised reasonable diligence in monitoring implementation of

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the Approved Nutrient Credit;

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(2) The permittee promptly notified the Arkansas Department of Environmental

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Quality of any information demonstrating that the Approved Nutrient Credit

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was not implemented in accordance with the certification;

1 (3) The failure to implement the Approved Nutrient Credit in accordance with its  
2 certification was not attributable to negligence or willful misconduct on the  
3 part of the permittee; and

4 (4) The permittee took prompt action to regain permit compliance after learning  
5 of the failure to implement the Approved Nutrient Credit in accordance with  
6 its certification.

DRAFT