

State of Arkansas  
89th General Assembly  
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As Engrossed: S2/26/13  
**A Bill**

HOUSE BILL 1197

By: Representative Davis

By: Senator *Burnett*

### For An Act To Be Entitled

AN ACT TO AMEND THE LAWS CONCERNING NONMUNICIPAL DOMESTIC SEWAGE TREATMENT WORKS; TO CLARIFY THE LAWS REGARDING THE TRANSFER OF WATER POLLUTION PERMITS; TO CLARIFY THE FINANCIAL ASSURANCE REQUIREMENTS FOR NONMUNICIPAL DOMESTIC SEWAGE TREATMENT WORKS; TO ESTABLISH ADDITIONAL FINANCIAL ASSURANCE REQUIREMENTS FOR NONMUNICIPAL DOMESTIC SEWAGE TREATMENT WORKS; TO CREATE THE WATER PERFORMANCE BOND FUND; AND FOR OTHER PURPOSES.

### Subtitle

TO CLARIFY THE LAWS REGARDING THE TRANSFER OF WATER POLLUTION PERMITS; TO CLARIFY THE FINANCIAL ASSURANCE REQUIREMENTS FOR NONMUNICIPAL DOMESTIC SEWAGE TREATMENT WORKS; AND TO CREATE THE WATER PERFORMANCE BOND FUND.

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

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

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



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

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

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

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

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

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

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

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

years shall be demonstrated to the department by:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(C) For each permit, the financial instrument underlying

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

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

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

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

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

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

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

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

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

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

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

(ii) Deny the permit transfer.

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

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

(ii) Acceptable replacement financial assurance.

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

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

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

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

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

(a) All discharge monitoring reports;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19-5-1140. Water Performance Bond Fund.

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

(b) The fund shall consist of the following:

(1) Funds appropriated by the General Assembly;

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

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

(4) Gifts and donations; and

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

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

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

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

/s/Davis

APPROVED: 03/14/2013