



## HAZARDOUS WASTE DIVISION

July 28, 2006

Phone: (501) 682-0833  
[www.adeg.state.ar.us](http://www.adeg.state.ar.us)

# RESPONSIVENESS SUMMARY TO COMMENTS

## *APC&EC REGULATION NO. 32*

Responsiveness Summary to Comments received from the public concerning proposed changes to Arkansas Pollution Control and Ecology Commission Regulation Number 32 as prepared for the Arkansas Pollution Control and Ecology Commission's pending rulemaking on Environmental Professional Certification, as Docket #06-006-R in response to Act 2141 of 2005.

A public notice was published in the *Arkansas Democrat-Gazette* on March 29 and 30, 2006. A public hearing was held on May 10, 2006. No public comments were received during the public hearing. The public comment period closed on May 24, 2006.



**Mailing List – Responsiveness Summary to Comments**

*Public Hearing @ Little Rock on May 10, 2006*

*No Comments Received*

*Written Comments Received By May 24, 2006*

**Carrie McWilliams**

[carriemcwilliams@juno.com](mailto:carriemcwilliams@juno.com)

**Arkansas Department of Environment Quality**

**Hazardous Waste Division**

8001 National Drive

P.O. Box 8913

Little Rock, AR 72219-8913

**Arkansas Environmental Federation**

1400 W. Markham Street, Suite 250

Little Rock, AR 72201

**Response to Comments**

<b>COMMENT ID:</b>	<b>MCWILLIAMS-1</b>	<b>AGREE</b>	<b>X</b>	<b>DISAGREE</b>	
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**Comment :**

The "provisional certification" as written in proposed 32.206 - Examinations, Item (K) is not defined or expounded upon anywhere in the proposed regulation.

The "provisional certification" language allows some form of what seems to be a temporary type certification until an examination can be offered to the applicant. However, no other language seems to exist in the proposed regulation that explains what this temporary type certification is and how it is awarded, given or administered. Applicants need to know the details of a temporary type certification if it is going to be made available to them.

Temporary type certification under this language of "provisional certification" is very broad and not defined at all. Some applicants may use this item in the regulation to become "provisionally certified" and then never take the exam, especially if the applicant is accomplishing a particular short term job in the State and the applicant does not feel he needs to be fully certified. That same applicant may later have another contract and he or she may be "provisionally certified" again because an examination is not scheduled to be administer during that job's time frame.

A different way of providing a temporary type certification would be to just offer a "temporary certification" defined as being good for a maximum of say thirty (30) or sixty (60) days, and requiring the applicant to meet all the established criteria except the examination. This way the temporary certification is limited to a short specific time frame for jobs that are short duration within the State, yet it requires the applicant to comply with all other portions of the certification program.

In any event, It is recommended that temporary type certification should be defined and explained within the proposed regulation.

**Response :**

The provisional certification, as originally conceived, is meant to deal with the known situation the applicants are about to face when Regulation No. 32 becomes final and the examinations have not yet been fully developed. The Arkansas Department of Environmental Quality (ADEQ) does not want to force someone to halt their business activities because of the length of the state procurement process. There is also the situation that not all applicants will be able to take the first examination ADEQ offers because of space limitations. Only those applicants that are required to take an examination will be able to request the provisional certification and the provisional certification will only be good until the applicant receives notification of the results of the examination. ADEQ does see that there could potentially be concerns about when the provisional certification expires. Therefore, ADEQ is recommending the following revision to

Reg.32.206(K):

(K) For applicants that must take an examination under § 32.301, § 32.401, or § 32.501 to become certified under this Regulation, the Department will require the applicants to submit their applications and fees to the Department per the requirements of this Regulation. However, the Department, at its sole discretion, may provisionally certify an applicant until such time as the Department can offer an examination to the applicant and notify the applicant with the results of the examination.

**Notes:**

Changes to the regulation were made based on this comment.

<b>COMMENT ID:</b>	<b>MCWILLIAMS-2</b>	<b>AGREE</b>	<b>X</b>	<b>DISAGREE</b>
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**Comment :**

The proposed 32.603 - Certification by Other States or Organizations, Item (A) allows the Department to issue a "comparable certification" without an examination if the applicant holds an equivalent certification in another state. However, 32.501 - Certification of Response Action Contractors, Item (B)(6) requires all applicants seeking a certification for Response Action Contractor must take an exam.

A "comparable certification" doesn't seem to be defined in the proposed regulation. It may be interpreted that another type of certification is available to the applicant (i.e., a "comparable certification"), but that other type of certification is not expounded upon.

The referenced item of this proposed regulation concerning not having to take the examination appears to directly conflict with a previous section of the proposed regulation which requires all applicants for a Response Action Contractor certification fulfill the listed requirements, including an exam.

It is recommended that the term "comparable", relating to the mentioned certification, be removed from the language of the proposed regulation. It is also recommended that the exclusion of taking an exam for the response Action Contractor certification be removed. In order for the proposed regulation to be consistent, language may be added to 32.603(A) which states that Response Action Contractors must take an exam.

<p><b>Response:</b></p> <p>Please see the response to Comment ADEQ-2 below.</p>
<p><b>Notes:</b></p> <p>Revisions were made to the regulation based on Comment ADEQ-2.</p>

<b>COMMENT ID:</b>	<b>MCWILLIAMS-3</b>	<b>AGREE</b>		<b>DISAGREE</b>	<b>X</b>
<p><b>Comment :</b></p> <p>The proposed 32.901 - Effective Date references a section of the proposed regulation that does not appear to exist.</p> <p>Section 32.901 references 32.206(K) relating to the effective date of the regulation and the filing with the Secretary of State, but the referenced regulation section does not seem to exist.</p> <p>It is recommend to check the referenced section and revise as necessary.</p>					
<p><b>Response:</b></p> <p>The reference to 32.206(K) is the reference to the provisional certification process as mentioned in Comment McWilliams-1. This reference was added to highlight the only area of the regulation (i.e., examinations for applicants) that would not be fully in effect after filing with the Secretary of State. The referenced citation is correct.</p>					
<p><b>Notes:</b></p> <p>No changes to the regulation were made based on this comment.</p>					

<b>COMMENT ID:</b>	<b>ADEQ-1</b>	<b>AGREE</b>	<b>X</b>	<b>DISAGREE</b>	
<p><b>Comment :</b></p> <p>The federal All Appropriate Inquiries (AAI) final rule was published by the U.S. EPA on November 1, 2005. AAI governs how Phase I Site Assessments should be conducted and by whom in order to seek innocent landowner liability protection. APC&amp;EC Regulation No. 32 will seek to certify individuals in Arkansas that perform Phase I Site Assessments. HWD is concerned that some individuals may feel that APC&amp;EC Regulation No. 32 supercedes or replaces AAI, which is not the</p>					

case. Therefore, HWD suggests that the following note be placed at the end of Reg.32.201:

*Note: Persons seeking to qualify for certain liability protections under the Comprehensive Environmental Response, Compensation and Liability ACT (CERCLA) must also comply with the current version of the Standards and Practices for All Appropriate Inquiries as promulgated by the United States Environmental Protection Agency (U.S. EPA).*

Additionally, the following note should be placed at the end of Reg.32.301 and Reg.32.401:

*See Note at Reg.32.201.*

**Response:**

The suggested language has been added to the regulation.

**Notes:**

<b>COMMENT ID:</b>	<b>ADEQ-2</b>	<b>AGREE</b>	<b>X</b>	<b>DISAGREE</b>
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**Comment :**

It has come to the attention of the HWD that there may be some conflicting information between the statute and the regulation in regards to certifications by other states or organizations as provided in Reg. 32.603. The statute clearly requires examinations for all Response Action Contractors no matter how the education and experience criteria are met. Therefore, it is recommended that Reg.32.603(D) be revised to read as follows:

(D) An individual who is certified as an environmental site assessment consultant, ~~response action contractor~~, or an equivalent certification by another state or an organization recognized by the Department as a comparable certification may be certified if he or she submits to the Department:

Additionally, it is suggested that a note be placed at the end of Reg.32.603 to read as follows:

*Note: Certification by other states or organizations determined to be comparable to the provisions of this Regulation may be used to demonstrate adequate education by applicants for the Response Action Contractor certification, however, the certification by the other state or organization will not exempt the applicant from taking the Response Action Contractor examination per Reg. 32.501(B)(6).*

**Response:**

The suggested strike-through language has been deleted from the regulation and the suggested note has been added to the regulation.

**Notes:**

Revisions to regulation should also satisfy Comment McWilliams-3.

<b>COMMENT ID:</b>	<b>ADEQ-3</b>	<b>AGREE</b>	<b>X</b>	<b>DISAGREE</b>
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**Comment :**

HWD recommends that the term "direct supervision" be added to Reg.32.201(F) to read as follows:

(F) The provisions of this Regulation do not prohibit the engagement of an associate, apprentice or an assistant, or a subcontractor if an individual who is certified under this Regulation is in responsible charge and direct supervision of that associate, apprentice or assistant, or subcontractor and maintains responsibility for the work of that associate, apprentice or assistant, or subcontractor.

In addition, a definition for "Responsible charge and direct supervision" should be added as (Q) under Reg.32.103 to clear up any confusion in the regulated community over what these terms mean in regards to the oversight of the work of others. The definition should read as follows:

"Responsible charge and direct supervision" means an environmental professional certified under this regulation who exercises personal supervisory control of work as to which the environmental professional has detailed professional knowledge. In respect to preparing technical submissions, "direct supervision and responsible charge" means that the environmental professional has the exercising, directing, guiding, and restraining power over the preparation of any documents, and exercises professional judgment in all professional matters embodied in the documents. Merely reviewing the work prepared by another person does not constitute "responsible charge and direct supervision" unless the reviewer actually exercises supervision and control and is in responsible charge of the work.

**Response:**

Based on the comment Reg.32.201(F) has been modified to read as follows:

(F) The provisions of this Regulation do not prohibit the engagement of an associate, apprentice or an assistant, or a subcontractor if an individual who is certified under this Regulation supervises that associate, apprentice or assistant, or subcontractor and

maintains responsible charge for the work of that associate, apprentice or assistant, or subcontractor.

No definition has been added based on the comment. It was determined that the existing language in the regulation and statute is sufficient.

**Notes:**

COMMENT ID:	AEF-1	AGREE	X	DISAGREE	
<p><b>Comment :</b></p> <p>The AEF is, however, concerned about the disclosure aspects of the proposal found in section 32.302 related to Required Relevant Experience for Phase I Consultants. The regulation requires the submittal to ADEQ of project examples and case histories. The requirement specifically calls for the listing of five phase I project examples completed in the last five years, including project name, type of property, dates of the project, case histories including "...relevant site-specific information about a property..." and "...final outcomes for finished projects and whether additional investigation was recommended or required." The AEF believes that the disclosure of this site-specific information to ADEQ is a serious and unwarranted breach of the client / consultant relationship. Clients may be intimidated by the knowledge that their particular project may be used by their own consultant as justification for his/her licensing without client approval or knowledge. The required "letter of reference" by the client will not address these confidentiality concerns.</p> <p>We respectfully remind the Department that this very issue of client / consultant confidentiality was at the core of dialogue and negotiations with the Department several Legislative Sessions ago when Arkansas' environmental audit legislation was passed with the Department's support. There is a fundamental need for both parties to have confidence that sensitive information remain confidential.</p> <p>The AEF strongly believes that Reg. 32 should not be used as a back door excuse to breach that relationship without <u>specific</u> Legislative authority, which we do not find in Act 2141 of 2005 which <u>specifically</u> established this certification program. Even more worrisome is the lack of Departmental control of the information once it is submitted. Regulation 32 does not address who may have access to information contained in the five submitted project examples and case histories. Considering the large number of current professionals who pre-registered for the certification program earlier this year, it is not unreasonable to expect a thousand or more "project examples" on file at ADEQ, without the knowledge of the clients and with no formal, regulated control of the information contained therein. Reassure us—will the information be filed</p>					



in the warehouse of dusty boxes noted in recent news articles, accessible to ADEQ staff, accessible to the public, accessible via the Freedom of Information Act, posted on the ADEQ's website, shared with other ADEQ divisions, sent directly to enforcement or held in confidence? The law is silent on this "requirement" and the Regulation as proposed ignores the issue.

Section 32.608 further allows ADEQ access to environmental professional's written or electronic records of projects used as examples in 32.302 above. One can assume that unlimited access by the policing agency could allow ADEQ to initiate enforcement actions against the facility based upon a consultant's licensure application. I do not believe that Senator Wooldridge, nor the members of the 85<sup>th</sup> General Assembly, envisioned this aspect when they passed Act 2141 of 2005. In fact, to his credit, Senator Wooldridge agreed during the negotiations that consultants should not be transformed into an adjunct army of ADEQ inspectors.

As written, Reg. 32 will have a chilling effect on the utilization of outside consultants at facility settings.

We recommend the following language be inserted in as 32.302 (B) (6).

*"Nothing in this rule shall require a an applicant for certification or Comprehensive site assessment consultant, or a Phase I consultant, or a response action contractor or other person to submit to the Department any information that was compiled on behalf of a client if the client or the landowner deems such information privileged or confidential and has not authorized such information to be released publicly. In order to resolve such issues, a redacted copy which has been approved by the client or landowner for release may be submitted."*

**Response:**

Act 2141 of 2005 did not give any confidential protection to the documents submitted by applicants under the regulations. The only confidential provision within the statute is for the examinations themselves. Therefore, anything that is submitted by an applicant is subject to being released if requested under the Freedom of Information Act. However, it is not the intent of ADEQ to require a consultant or contractor to disclose information to the Department that is considered confidential or privileged. ADEQ believes that the regulation, as drafted, allows the applicant to submit information that is both informative enough to illustrate the applicant's experience and knowledge but broad enough for the project itself to not be recognizable to Department staff. The application will be drafted in a manner to allow the project to be described generically. The application will also carry the statement that the applicant is not releasing any confidential or privileged information. To that end, we are adding a revised version of the requested language to the regulation in 32.302(D), 32.402(D), and 32.502(B), since this request potentially applies to all

three certification criteria. The revised language is as follows:

- (D) **Confidential/Privileged Information.** ADEQ will not require an applicant to submit project examples that contain privileged or confidential information. The applicant may choose to submit a redacted copy of the project example to the Department. The Department reserves sole discretion to determine sufficiency of any redacted materials submitted in support of an applicant's proficiency requirements.

*Note: Applications and other documents provided to the Department are subject to public disclosure pursuant to the Arkansas Freedom Of Information Act codified at Arkansas Code Annotated § 25-19-101 et seq.*

A copy of the section of the application regarding project examples has been attached.

**Notes:**

**END OF RESPONSIVENESS SUMMARY**