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Bunge North America, Inc. Comments to Draft Executive Summary to the Arkansas Water Plan
("Water Plan")

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ANRC
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Bunge North America, Inc. ("Bunge") has significant investments in and along navigable waterways in Arkansas, primarily the White River, and has developed its business to operate within Arkansas's regulatory and statutory framework.

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Navigation as a relevant and protected water use is weaved throughout Arkansas's laws.

Bunge believes the Arkansas Natural Resources Commission ("ANRC") should not revoke its longstanding limit on withdrawals of excess surface water without well-reasoned standards. To do so would be arbitrary and capricious.

Nonriparian rights in excess surface water are addressed by legislative act and rules. As recently as 1954, the Arkansas Supreme Court had questioned such rights and noted that no common law right to such water exists in non-riparians. *Harrell v. City of Conway*, 224 Ark. 100, 271 S.W.2d 924 (1954).

Since 1985, use of excess surface water for purposes of transfers to nonriparians has been limited to 25% of the excess surface and there are rules regarding prioritization in times of shortage.

Now, as part of updating the Water Plan, ANRC is considering removing the statutory 25% limit without analysis of how any such change will affect protected water needs and uses. Each stream where there is a minimum streamflow will be analyzed for its own requirements, including the protective level of available excess surface water and balanced needs. That process, however, does not justify a sudden shift scrapping the current standard because it may be replaced by a new one. There is no justification for setting aside all protective limits because a different limit may be recommended upon further review.

The enabling law for the Water Plan process requires due consideration for existing water rights of the state. Ark. Code Ann. § 15-22-503.

Excess surface water is defined as twenty-five percent (25%) of the amount of water available on an average annual basis from any watershed above that amount required to satisfy all of the following:

1. Existing riparian rights as of June 28, 1985
2. The water needs of federal water projects existing on June 28, 1985
3. The firm yield of all reservoirs in existence on June 28, 1985
4. Maintenance of instream flows for fish and wildlife, water quality, aquifer recharge requirements, and **navigation**
5. Future water needs of the basis of origin as projected in the State Water Plan

Ark. Code Ann. § 15-22-304(b).

These issues are also addressed in times of shortage: ANRC may allocate a fair share of surface water during periods of shortage in a manner so that each of the needs may obtain an equitable portion of the available water. Water needs to be considered are domestic and municipal water supplies; agricultural and industrial; **navigation**; recreational; fish and wildlife and other ecological needs. Ark. Code Ann. § 15-22-217 (emphasis added).

Prior to allocation, the following priorities are to be met:

1. Domestic and municipal domestic;
2. Minimum streamflow (as established by commission rulemaking pursuant to the Arkansas Natural Resources Commission Rules for the Utilization of Surface Water); and
3. Federal water right.

Ark. Code Ann. § 15-22-217; Title 3, Subtitle VII, Sections 307.3-.4 Rules for the Utilization of Surface Water.

After those categories of use are met, preference is as follows:

1. Priority of Water Use
 - a. Agriculture
 - b. Industry
 - c. Hydropower
 - d. Recreation
2. Priority of Water Diversions
 - a. Riparian

- b. Non-riparian intrabasin transfer
- c. Non-riparian interbasin transfer
- d. Out of state transfer

Title 3, Subtitle VII, Section 307.4 Rules for the Utilization of Surface Water.

Minimum streamflow is the “quantity of water required to meet the largest of the following instream flow needs as determined on a case-by-case basis.”

- 1. Interstate Compacts
- 2. **Navigation**
- 3. Fish and Wildlife
- 4. Water Quality
- 5. Aquifer Recharge

Ark. Code Ann. § 15-22-202; Title 3, Subtitle I, Section 301.3 Rules for the Utilization of Surface Water (emphasis added).

These laws reflect competing interests and established priorities. Navigation interests are to be balanced with other rights and interests.

Bunge actively participated with the ANRC in the rulemaking process where these matters were analyzed and ANRC adopted its Minimum Stream Flows for the White River, included in ANRC’s regulations at the Rules for the Utilization of Surface Water at Section XIV. Such rule was adopted based on the current statutory and regulatory requirements, opportunities and protections, including the 25% limit.

The Water Plan states “[n]onriparians have never been satisfied with this [the 25% limit] as they feel it does not leave sufficient water to satisfy nonriparian withdrawals.” Water Plan, p. 12. Now after several years of study, ANRC may be asked to abandon this state protective limit without any scientific analysis. The Water Plan reference to nonriparians’ dissatisfaction places the interests or concerns of nonriparians ahead of others and abandons the state’s existing system of water rights without scientific analysis or support.

At the Issues and Recommendations meeting in Stuttgart March 17, 2014, the navigation group, which consisted of three parties, presented comments including the following:

- (1) Sustaining river levels in the Arkansas and White Rivers is important to water borne commerce and has a positive impact on water quality, fish and wildlife, recreation and

aquifer recharge.

- (2) Money to maintain both systems is part of the equation.
- (3) We do not understand policy E-9 [from the meeting handout East Region issues] , questioning the 25% excess surface water %.”

Thus, retaining this limit was supported as part of the record. At this Stuttgart meeting, the Agriculture sector spoke in favor of changing the 25% limit. It was noted at the meeting any percentage limit would need to be scientifically justified and transparent.

To our information and belief the 25% limit is not believed to have ever been a problem to date and further analysis is required by basin.

Such a sudden shift in policy without support violates the Arkansas Administrative Procedures Act. Ark. Code Ann. § 25-15-212(h). ANRC is subject to the Arkansas Administrative Procedures Act. *Arkansas Soil and Water Conservation Commission v. City of Bentonville*, 351 Ark. 289, 92 S.W.3d 47 (2002); *City of Benton v. Arkansas Soil & Water Conservation Commission*, 345 Ark. 249, 45 S.W.3d 805 (2001).