ADMINISTRATIVE RULES AND REGULATIONS SUBCOMMITTEE
OF THE
ARKANSAS LEGISLATIVE COUNCIL

Room A, MAC
Little Rock, Arkansas

Tuesday, April 17, 2018
1:00 p.m.

A. Call to Order.

B. Reports of the Executive Subcommittee on Emergency Rules.

C. Reports on Administrative Directives for the Quarter ending December 31, 2017 Pursuant to Act 1258 of 2015.

1. Arkansas Parole Board (Brooke Cummings)

2. Department of Community Correction (Dina Tyler)

3. Department of Correction (Solomon Graves)

D. Rules Filed Pursuant to A. C. A. § 10-3-309.

1. <u>DEPARTMENT OF CORRECTION</u> (items a, c, d, and e, Solomon Graves; and items b, f, and g, Jim DePriest)

a. <u>SUBJECT</u>: AR 201 Uniform Personnel

<u>DESCRIPTION</u>: The department shall establish and maintain standards for employees' grooming and attire to reflect an appearance commensurate with that employee's position in a professional correctional organization.

<u>PUBLIC COMMENT</u>: No public hearing was held. The public comment period expired on February 9, 2018. No public comments were submitted to the department. The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Department of Correction shall have exclusive jurisdiction over the care, charge, custody, control, management, administration, and supervision of all persons and offenders committed to, or in the custody of, the state penitentiary. Ark. Code Ann. § 12-27-103(b). The department's functions, powers, and duties are administered in accordance with the policies, rules, and regulations promulgated by the Board of Corrections. § 12-27-103(b). The Board of Corrections has general supervisory power and control over the Department of Correction and shall perform all functions with respect to the management and control of the adult correctional institutions of this state contemplated by Arkansas Constitution, Amendment 33. Ark. Code Ann. § 12-27-105(b)(1).

b. SUBJECT: AR 855 Investigation and Transportation of Deceased Inmates

DESCRIPTION: In its current form, this regulation requires the department to ensure that an autopsy is conducted by the medical examiners on all deceased inmates. The amended regulation establishes a system that maximizes the limited resources of the State Crime Laboratory by only requiring the transfer of deceased inmates if the department determines that the death falls into one or more of the following categories:

1. Death due to violence
2. Known or suspected non-natural death
3. Unexpected or unexplained death
4. Death occurring under an unusual or suspicious circumstance
5. Death known or suspected to be caused by disease constituting a threat to public health
6. Death of a person not under the care of a physician
7. Forensic medical examination requested by the Director of the Department of Correction or his or her designee if the person was in the care, custody, or control of the Department of Correction at the time of death

While the amended rule does not require the transfer of a deceased inmate whose death is believed to be due to natural causes, the director may still request a forensic examination for such a, or for that matter any, case.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on February 9, 2018. No public comments were submitted to the department.

Jessica Sutton, an attorney with the Bureau of Legislative Research, asked the following question: The notification requirements under § 12-12-315(b) will still occur, right?
RESPONSE: Yes, the department will still notify the County Coroner and the State Medical Examiner as required by law. While the noted statute only requires the Arkansas State Police (ASP) to be notified when previous medical history does not exist to explain the death, our AD on Incident Notifications requires ASP to also be notified following any death within an ADC facility.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Department of Correction shall have exclusive jurisdiction over the care, charge, custody, control, management, administration, and supervision of all persons and offenders committed to, or in the custody of, the state penitentiary. Ark. Code Ann. § 12-27-103(b). The department's functions, powers, and duties are administered in accordance with the policies, rules, and regulations promulgated by the Board of Corrections. § 12-27-103(b). The Board of Corrections has general supervisory power and control over the Department of Correction and shall perform all functions with respect to the management and control of the adult correctional institutions of this state contemplated by Arkansas Constitution, Amendment 33. Ark. Code Ann. § 12-27-105(b)(1).

c. SUBJECT: AR 001 Administrative Regulations, Directives and Memoranda

DESCRIPTION: Administration-001 establishes the process by which the Department of Correction formulates, amends, and repeals Administrative Regulations, Directives, and Memoranda designed to provide for the lawful, safe, orderly, and responsible operation of the department. This AR also applies to the Board of Corrections, the Director, and such staff as the director may charge

with the responsibility of formulating, amending, and/or reviewing departmental regulations and policies.

AR-001 is amended to ensure compliance with Executive Order 15-02; to ensure compliance with Act 1258 of 2015; and to reflect the Department of Correction's current practices. Changes were also made throughout the AR related to syntax and structure.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on December 15, 2017. No public comments were submitted to the department. The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Department of Correction shall have exclusive jurisdiction over the care, charge, custody, control, management, administration, and supervision of all persons and offenders committed to, or in the custody of, the state penitentiary. Ark. Code Ann. § 12-27-103(b). The department's functions, powers, and duties are administered in accordance with the policies, rules, and regulations promulgated by the Board of Corrections. § 12-27-103(b). The Board of Corrections has general supervisory power and control over the Department of Correction and shall perform all functions with respect to the management and control of the adult correctional institutions of this state contemplated by Arkansas Constitution, Amendment 33. Ark. Code Ann. § 12-27-105(b)(1).

d. SUBJECT: AR 009 Public and Community Relations

DESCRIPTION: This repeals this regulation. This rule is duplicated by AR-011.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on December 15, 2017. No public comments were submitted to the department. The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Department of Correction shall have exclusive jurisdiction over the care, charge, custody, control, management, administration, and supervision of all

persons and offenders committed to, or in the custody of, the state penitentiary. Ark. Code Ann. § 12-27-103(b). The department's functions, powers, and duties are administered in accordance with the policies, rules, and regulations promulgated by the Board of Corrections. § 12-27-103(b). The Board of Corrections has general supervisory power and control over the Department of Correction and shall perform all functions with respect to the management and control of the adult correctional institutions of this state contemplated by Arkansas Constitution, Amendment 33. Ark. Code Ann. § 12-27-105(b)(1).

e. SUBJECT: AR 011 News Media Interview and Correspondence

DESCRIPTION: This amends AR-011 by adding a section entitled "Definition" to clarify the term news media and to establish protocol regulating the approval of admission of news media representatives to ADC Units/Facilities. This amendment also adds protocol that must be followed for emergency notification to the public and news media and to allow the development and implementation of programs designed to keep news media and the general public well-informed of the agency's special events and incidents.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on December 15, 2017. No public comments were submitted to the department.

Jessica Sutton, an attorney with the Bureau of Legislative Research, asked the following questions: Are you deleting the inmate consent form? Is a new one being created? Why is it stricken from the rule? **RESPONSE:** Yes, the waiver form is being removed from the Administrative Regulation (AR). We felt it was more appropriately placed in an Administrative Directive (AD). Placing the waiver form in an AD will bring this AR in line with the formatting of more recently adopted ARs.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Department of Correction shall have exclusive jurisdiction over the care, charge, custody,

control, management, administration, and supervision of all persons and offenders committed to, or in the custody of, the state penitentiary. Ark. Code Ann. § 12-27-103(b). The department's functions, powers, and duties are administered in accordance with the policies, rules, and regulations promulgated by the Board of Corrections. § 12-27-103(b). The Board of Corrections has general supervisory power and control over the Department of Correction and shall perform all functions with respect to the management and control of the adult correctional institutions of this state contemplated by Arkansas Constitution, Amendment 33. Ark. Code Ann. § 12-27-105(b)(1).

f. **SUBJECT: AR 804 Inmate Records**

DESCRIPTION: This establishes that, upon the death of an inmate, access to that inmate's medical or mental health information or records will be provided to designated persons. Consistent with A.C.A § 12-27-113, this rule protects the integrity of inmate records and ensures their proper use. It is unlawful to permit inspection of or disclose information contained in inmate records, or to copy or issue a copy of all or part of any inmate record, except as authorized by administrative regulation or court order.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on December 15, 2017. No public comments were submitted to the department. The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Department of Correction shall have exclusive jurisdiction over the care, charge, custody, control, management, administration, and supervision of all persons and offenders committed to, or in the custody of, the state penitentiary. Ark. Code Ann. § 12-27-103(b). The department's functions, powers, and duties are administered in accordance with the policies, rules, and regulations promulgated by the Board of Corrections. § 12-27-103(b). The Board of Corrections has general supervisory power and control over the Department of Correction and shall perform all functions with respect to the management and control of the adult correctional institutions of this state contemplated by Arkansas Constitution, Amendment 33. Ark. Code Ann. § 12-27-105(b)(1).

The Director of the Department of Correction shall make and preserve a full and complete record of every inmate committed to the Department of Correction, along with a photograph of the inmate and data pertaining to his or her trial conviction and past history. Ark. Code Ann. § 12-27-113(e)(1). To protect the integrity of these records and to ensure their proper use, it is unlawful to permit inspection of or disclose information contained in these records or to copy or issue a copy of all or part of a record except as authorized by law, by court order, or as required to be posted on the department's website pursuant to § 12-27-145. Ark. Code Ann. § 12-27-113(e)(2).

g. SUBJECT: AR 834 Procedure for Handling Disciplinary Infractions of Mentally Disordered Inmates

DESCRIPTION: This amendment sets the policy of the Department of Correction regarding the use of the disciplinary process in the management of the behavior of inmates who are suffering from, or may be suffering from, mental illness. The policy, both existing and as amended, recognizes the need to include the participation of trained mental health staff in the disciplinary process for these inmates. The purpose of the amendment is to adopt a new definition for the term "Serious Mental Illness" to conform to standards in the profession. Other proposed changes are non-substantive, designed only to clarify the existing procedures.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on December 15, 2017. No public comments were submitted to the department. The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Department of Correction shall have exclusive jurisdiction over the care, charge, custody, control, management, administration, and supervision of all persons and offenders committed to, or in the custody of, the state penitentiary. Ark. Code Ann. § 12-27-103(b). The department's functions, powers, and duties are administered in accordance with the policies, rules, and regulations promulgated by the Board of Corrections. § 12-27-103(b). The Board of Corrections has general supervisory power and control over the Department of

Correction and shall perform all functions with respect to the management and control of the adult correctional institutions of this state contemplated by Arkansas Constitution, Amendment 33. Ark. Code Ann. § 12-27-105(b)(1).

2. STATE BOARD OF DENTAL EXAMINERS (Kevin O'Dwyer)

a. SUBJECT: Article VII: Clarify Specialization and Limitation on Practice

DESCRIPTION: Pursuant to Act 489 of 2017, Article VII clarifies that a dentist who chooses to announce specialization should limit their practice exclusively to the announced area of dental practice.

PUBLIC COMMENT: A public hearing was held on January 19, 2018, and the public comment period expired on that date. Public comments were as follows:

Mark Willis
COMMENT: Dr. Willis, in an email, stated that a specialist should not be allowed to practice general dentistry and a general dentist should not be allowed to practice as a specialist.
RESPONSE: Dr. Willis' comments were contrary to the act. The board adopted the regulation as proposed.

James Lee Jr. DDS
COMMENT: Dr. Lee, in an email, stated that a specialist should not be allowed to practice general dentistry and a general dentist should not be allowed to practice as a specialist. **RESPONSE:** Dr. Lee's comments were contrary to the act. The board adopted the regulation as proposed.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Arkansas State Board of Dental Examiners is authorized to promulgate rules and regulations in order to carry out the intent and purposes of the Arkansas Dental Practice Act. *See* Ark. Code Ann. § 17-82-208(a). The board shall by rule or regulation prescribe specifically those acts, services, procedures and practices which constitute the practice of dentistry. Ark. Code Ann. § 17-82-208(b). These rules implement Act 489 of 2017, sponsored by Representative Michelle Gray, which

amended the Arkansas Dental Practice Act, created additional exemptions to the practice of dentistry and dental hygiene, and modified dentistry specialty licenses.

b. **SUBJECT: Article IX: Credentials for License**

DESCRIPTION: Pursuant to Act 489 of 2017, the amendment to Article IX clarifies the required credentials for issuing a dental or dental hygienist license.

PUBLIC COMMENT: A public hearing was held on January 19, 2018, and the public comment period expired on that date. Public comments were as follows:

Mark Willis
COMMENT: Dr. Willis, in an email, stated that a specialist should not be allowed to practice general dentistry and a general dentist should not be allowed to practice as a specialist.
RESPONSE: Dr. Willis' comments were contrary to the act. The board adopted the regulation as proposed.

Jennifer Lamb
COMMENT: Ms. Lamb, spoke for the regulation. Ms. Lamb needed clarification on non-substantive changes. **RESPONSE:** The board adopted the regulation as proposed with Ms. Lamb's clarifications.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Arkansas State Board of Dental Examiners is authorized to promulgate rules and regulations in order to carry out the intent and purposes of the Arkansas Dental Practice Act. *See* Ark. Code Ann. § 17-82-208(a). The board shall by rule or regulation prescribe specifically those acts, services, procedures and practices which constitute the practice of dentistry. Ark. Code Ann. § 17-82-208(b). These rules implement Act 489 of 2017, sponsored by Representative Michelle Gray, which amended the Arkansas Dental Practice Act, created additional exemptions to the practice of dentistry and dental hygiene, and modified dentistry specialty licenses.

c. SUBJECT: An Amendment to Article XXI Establishing Tele Dentistry

DESCRIPTION: Pursuant to Act 203 of 2017, a dentist/patient relationship must be established before the delivery of services via teledentistry.

PUBLIC COMMENT: A public hearing was held on January 19, 2018, and the public comment period expired on that date. Two people spoke against the "in person" point of rule, Zachary Heard and Dr. Danny Leads. The board adopted the regulation as proposed.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Arkansas State Board of Dental Examiners is authorized to promulgate rules and regulations in order to carry out the intent and purposes of the Arkansas Dental Practice Act. *See* Ark. Code Ann. § 17-82-208(a). The board shall by rule or regulation prescribe specifically those acts, services, procedures and practices which constitute the practice of dentistry. Ark. Code Ann. § 17-82-208(b). These rules implement Act 203 of 2017, sponsored by Senator Cecile Bledsoe, which created the Telemedicine Act. Pursuant to that act, state licensing and certification boards for a healthcare professional shall amend their rules where necessary to comply with that act. *See* § 17-80-406.

3. ARKANSAS ECONOMIC DEVELOPMENT COMMISSION
(Kurt Naumann and Anthony Armstrong)

a. SUBJECT: Minority Business Enterprise and Women-Owned Business Enterprise Loan Mobilization Program

DESCRIPTION: These rules are for administering the Minority Business Loan Mobilization Program by the AEDC as authorized by Ark. Code Ann. §§ 15-4-306 and 15-4-209(b)(5) of the enabling legislation. These rules incorporate changes made by Act 1080 of 2017, which include:

1. Revising the name of the Arkansas Economic Development Commission division responsible for program administration from the Small and Minority Business Division to the Minority and Women-Owned Business Enterprise Division;

2. Adding a definition for "Women-owned business enterprise" and amending existing definitions to incorporate name changes to the program and the Arkansas Economic Development Commission division responsible for its administration; and

3. Revising text throughout to expand eligibility to Women-owned business enterprises for all aspects of the Minority Business Enterprise and Women-Owned Business Enterprise Loan Mobilization Program.

These rules also make technical corrections, add provisions for funding from other designated fund accounts, and clarify application requirements established by the Minority and Women-Owned Business Enterprise Division.

PUBLIC COMMENT: A public hearing was held on January 8, 2018. The public comment period expired on January 8, 2018. There were no comments.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Arkansas Economic Development Commission (AEDC) has the power to promulgate rules as necessary to implement its programs and services. *See* Ark. Code Ann. §15-4-209(b)(5) (Repl. 2016). AEDC is authorized to administer the Minority Business Enterprise and Women-Owned Business Enterprise Loan Mobilization Program, *see* Ark. Code Ann. §15-4-306 (Supp. 2017), and the Minority Business Loan Mobilization Revolving Fund to promote the development of and sustain the economic growth of minority business enterprises. *See* Ark. Code Ann. §19-5-1240 (Repl. 2016). Act 1080 of 2017, sponsored by Representative Michael John Gray, expanded eligibility for the program to add Women-Owned Business Enterprises.

4. <u>DEPARTMENT OF EDUCATION</u> (Courtney Salas-Ford, items a and b; Lori Freno, item c)

a. <u>SUBJECT</u>: Required Training for School Board Members

<u>DESCRIPTION</u>: These are changes in the requirements for reporting training hours and ensuring the training hours are completed. The changes include:

Renumbering where insertions/deletions have been made.

Section 1.01 – Regulatory authority updated to include Act 589 of 2017.

Section 6.02 – Clarified that instruction provided by any others than those listed must be pre-approved by ADE in order for the hours to count towards the required training hours.

Section 6.03 – Corrected capitalization of "Section."

Section 7.03 – Section added based on Act 589 of 2017 that requires superintendents to annually prepare a report of the training hours received by each school board member. The added subsections outline what happens when a board member fails to receive the required number of training hours.

Section 9.03 – Section added based on Act 589 of 2017 that adds that a vacancy occurs when a school board member fails to receive the mandatory number of training hours unless the failure was due to military service or serious medical condition of the board member.

Section 9.04 – Section added based on Act 589 of 2017 that prohibits a board member who failed to receive the required number of training hours to fill a vacancy on a school board created by the board member's failure to receive the training.

Changes made during the public comment period:

Section 3.01 – Changed "published" to "posted on the ADE website" as publishing in the newspaper is no longer a requirement.

Section 3.03 – Removed definition of "publish" as publishing in the newspaper is no longer a requirement.

Section 6.03 – Struck through lower-case "s" as an upper-case "S" was added.

Section 6.04 – Corrected spelling of "statutes."

Section 7.02.2 – Changed "published" to "posted" as publishing in the newspaper is no longer a requirement.

PUBLIC COMMENT: A public hearing was held on December 7, 2017. The public comment period expired on December 27, 2017. The Department submitted the following summary of the public comments that it received and its responses:

Name: Lucas Harder, Arkansas School Boards Association
Comment: 3.01: The annual school performance report under § 6-15-1402 is no longer required to be published in the newspaper due to a combination of Acts 869 and 930 of 2017 removing reference to § 6-15-1402 from § 6-15-2006(c). The annual school performance report under § 6-15-1402 is now only required to be posted to the ADE and the district's website.

3.03: Due to the change that no longer requires the § 6-15-1402 annual school performance report to be published in the newspaper, I would recommend either striking this definition entirely or change it to state that publish means to post to the district's website under the state required information link along with the other required items under § 6-11-129.
AGENCY RESPONSE: Comments considered. Section 3.03 (definition of publish) deleted and Sections 3.01 and 7.02.2 changed from "published" to "posted" to comport with the changes in the law, which no longer require publishing in the newspaper.

Comment: 4.02.1: As written, this section is duplicative language for that in 4.02 as all of the board members who were elected in September would have had to have completed the nine hours within fifteen months in order to have them by the end of December of the year following their election. Moreover, this language does not match the intent of § 6-13-629(a)(1)(B)(ii) from Act 1213 of 2011, which was to require that a board member receive training on how to read and interpret an audit within the first fifteen months of service as subdivision (a)(3)(B) is specific to

the audit training. For accuracy and to account for the change in the election timeline, I would recommend changing this section to read "The nine (9) hours of training required under 4.02 shall include the training on how to read and interpret an audit report from Section 5.01.3 of these Rules."
AGENCY RESPONSE: Comment considered. No changes made.

Comment: 6.03: The lowercase "s" in "Section" appears to be underlined instead of struck through as the capital "S" is the new language.
AGENCY RESPONSE: Comment considered, correction made.

Comment: 6.04: The third "t" is missing from "statutes."
AGENCY RESPONSE: Comment considered, spelling error corrected.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The proposed changes include revisions made in light of Act 589 of 2017, sponsored by Representative James Sturch, which concerned the training of members of the board of directors of a public school district. Pursuant to Arkansas Code Annotated § 6-13-629(c)(2), the State Board of Education shall promulgate rules as necessary to carry out the provisions and intent of the statute, which concerns the requisite training and instruction of a member of a local school district board of directors.

b. SUBJECT: Education Service Cooperatives

DESCRIPTION: The proposed changes include:

Section 1.2 – Regulatory authority updated to include Act 741 of 2017.

Section 3.4.9 – Updated cooperative responsibilities regarding facilities and buildings to include (1) renting, leasing, purchasing, constructing, or gift, (2) borrowing from the revolving loan fund, or (3) borrowing from other sources for limited and unusual circumstances. Changes mirror the law in Act 741 of 2017.

Page 34 – Corrected Level 5 scoring to reflect at least 6 of the 9 categories. Was previously listed incorrectly as 6 of 8 categories.

Page 42 – Corrected Level 5 scoring to reflect at least 6 of the 9 categories. Was previously listed incorrectly as 6 of 8 categories.

PUBLIC COMMENT: A public hearing was held on December 7, 2017. The public comment period expired on December 27, 2017. The Department received no comments.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The proposed changes include revisions made in light of Act 741 of 2017, sponsored by Representative Bruce Cozart, which amended the law concerning the authority of a board of directors of an education service cooperative. Pursuant to Arkansas Code Annotated § 6-13-1013(a), the State Board of Education shall develop such policies, rules, and regulations as may be needed for the proper administration of The Education Service Cooperative Act of 1985, codified at Ark. Code Ann. §§ 6-13-1001 through 6-13-1031, consistent with the need to support and assist education service cooperatives in the delivery of services to school districts and with prudent use of available human and financial resources. The policies and rules shall include without limitation: (1) the rules governing the operation of an education service cooperative within appropriate state and federal laws; (2) guidelines for settling possible disputes between school districts and in equity or jurisdictional matters relating to shared assets and services; (3) the obligation of an education service cooperative board of directors for overseeing administrative and program expenditures; and (4) the fiscal distress status of an education service cooperative under Ark. Code Ann. §§ 6-13-1027 through 6-13-1031. *See* Ark. Code Ann. § 6-13-1013(b).

c. SUBJECT: Rules Governing Educator Licensure and Repeal of Rules Governing Educator Preparation Program Approval

DESCRIPTION: These rules regulate licensure for Arkansas teachers and administrators. The proposed rules reflect changes pursuant to Act 294 of 2017. Also, Act 416 of 2017 provides for a

new stand-alone reading test that is added to these rules. *Provisions of Act 1063 of 2017, the "Right to Read Act" are also added to these rules.* Under Act 588 of 2017, the provisions for a lifetime teaching license are revised.

The proposed rules incorporate the Rules Governing Educator Preparation Program Approval in Chapter 3, and there are definitions added for this purpose. The Rules Governing Educator Preparation Program Approval will be simultaneously repealed with the adoption of these rules.

These proposed rules implement changes authorized by Act 294 of 2017 for:

- Arkansas Teacher Residency Program (1-2.15)
- Core Subject Areas for Arkansas Qualified Teacher Requirements (1-2.20)
- ESSA definitions for Effective Leader and Effective Teacher (1-2.27 and 1-2.28), Ineffective Leader and Ineffective Teacher (1-2.33 and 1-2.34)
- Educator Career Continuum (Chapter 2)
- The elimination of a basic skills exam for licensure (4-2.01.3, 4-3.01.4.1, 4-8.03.3)
- Licensure Exceptions (in addition to Additional Licensure Plans), these rules provide for an Emergency Teaching Permit (7-2.0), and an Effective Teacher Waiver (7-3.0)

The rules are reorganized and contain the following substantive changes:

Chapter 1 – Definitions

Definitions from the Rules Governing Educator Preparation Program Approval are incorporated.

The definition of "internship" has been replaced with a definition for "supervised clinical practice."

A definition for "semester" is added to clarify the meaning for additional licensure plans, which are now based on semesters rather than school years.

Chapter 2 – Types of Permits and Licenses

This chapter provides explanations for each type of license and for the tiered licensure system being developed as the Educator Career Continuum.

- *Section 2-4.02.4 – clarifies that the full requirements for the Educator Career Continuum will be appended to these rules upon State Board approval.*

- *Section 2-4.02.5 – clarifies how application fees will apply when applying for a license under the Educator Career Continuum.*

Chapter 3 – Preparation for Licensure

This chapter incorporates the Rules Governing Educator Preparation Programs and the provisions of the former Chapter 5 of these rules. The chapter is reorganized to more clearly provide requirements that apply to all programs, requirements specific to institutions of higher education undergraduate programs, alternative educator preparation programs, and educational leadership preparation programs.

The CAEP accreditation has changed from an input-based accreditation process to an outcome-based accreditation. The new stringent accreditation standards now have rigorous standards for admission, internships, exiting grade point averages, and post-graduation teacher impact on students.

Section 3-1.05 – introduces the concept of teacher or administrator residency programs permitted by the Every Student Succeeds Act and Act 294 of 2017. This section clarifies that the full requirements will be promulgated at a later date.

Chapter 4 – Application Requirements

This chapter sets out the requirements for applying for a Career-Technical Permit, a Standard License (for in-state, out-of-state, and out-of-country applicants), a Standard Lifetime Teaching License (incorporating changes in Act 588), and a provisional license for a candidate in an alternative educator preparation program or pathway.

The stand-alone reading test requirements of Act 416 are incorporated.

Section 4-2.01.9.3 – provides flexibility for the Department to approve a provisional license when an applicant "meets other extenuating circumstances approved by the State Board."

Sections 4-3.01.4 and 4-3.01.5 – clarify that out-of-state applicants with less than three (3) years of experience, or who have an expired out-of-state license will have to take the stand-alone reading test if they are licensing in the applicable areas.

Section 4-3.01.8 – clarifies what licensure levels must complete the Arkansas History coursework.

Section 4-5.03 – clarifies that a Provisional License may be extended but will not be issued past three (3) years.

Section 4-9.0 – provides that the licensure areas available for an Ancillary License will be set by the State Board, excluding an administrator's endorsement. Section 4-9.02 provides that the licensure areas will require post-baccalaureate coursework or equivalent nationally recognized certification, and the successful completion of a content area assessment, if one is required by the State Board.

Section 4-9.03 – provides for adding the following to an ancillary license: Curriculum Program/Administrator for Special Education, English for Speakers of Other Languages (ESOL), Dyslexia, and any other licensure area added by the State Board of Education.

Section 4-10.03 – provides that when adding an endorsement to a Standard License, the endorsement licensure level may only be one level above or one level below the first-time license, unless "the applicant has completed three (3) years of teaching at the licensure level sought to be added." This provides flexibility for educators who may have taught in a private school or under a waiver from licensure.

Chapter 5 – License Effective Dates, Renewal, Reinstatement, and Conversion

Section 5-2.0 – revises the number of professional development hours for the renewal of an expired teaching license.

Section 5-3.0 – contains a new provision for the reinstatement of a suspended license.

Section 5-5.02 – adds a provision under Act 294 of 2017 to allow the Department to request that the State Board approve an alternative method of demonstrating subject matter content competency when there is not an existing assessment available.

Section 5-5.08 – adds that the Department may deny a license to an applicant who has been sanctioned by the State Board at a level equivalent to a suspension (during the period of suspension) or a revocation.

Chapter 6 – Administrator Endorsement Requirements

Sections 6-1.0.4 and 6-2.01.4 – change the number of years of teaching experience required for an administrator endorsement from four years to three years.

Section 6-1.01.4.1.2 – adds library media specialist back to the provision for building-level administrator licensure (inadvertently omitted from the previous rules).

Chapter 7 – Licensure Exceptions

This Chapter contains existing provisions for additional licensure plans (ALP), administrator licensure completion plans (ALCP), substitute teachers, and new provisions for an Emergency Teaching Permit (7-2.0) and an Effective Teacher Licensure Exception (7-3.0). The chapter also includes provisions for licensure waivers granted by the State Board, adding that those persons shall meet the requirements of the Rules Governing Arkansas Qualified Teacher Requirements if teaching in a core subject area (7-7.0).

Section 7-3.01.1 – provides an example of the Effective Teacher Licensure Exception.

Section 7-3.01.5.2 – requires the maintenance of records concerning the Effective Teacher Licensure Exception determination, which are subject to Department monitoring.

Section 7-4.03.2 – clarifies the adequately yearly progress required for an educator completing an ALP.

Appendix A – has been revised and includes the following new licensure areas:

- Alternative Learning (K-12) as an endorsement
- Dance (K-12) as a first-time license and an endorsement *(including by testing out)*
- Online Teaching (K-12) as an endorsement
- Dyslexia (K-12) as an Ancillary License and as an endorsement to an Ancillary License
- English for Speakers of Other Languages (ESOL) (K-12) as an Ancillary License and as an endorsement to an Ancillary License

Appendix A also now includes the areas for Career-Technical Permits

Appendix B – is new and includes the licensure application fees.

- Fees will be nonrefundable application fees.
- Only one fee will be required for multiple simultaneous applications.

PUBLIC COMMENT: This rule was reviewed and approved by the Executive Subcommittee at its meeting of March 5, 2018, for emergency promulgation. With respect to permanent promulgation, a public hearing was first held on October 31, 2017, and the public comment period expired on November 13, 2017. Substantive changes were subsequently made, and a second public hearing was held on January 10, 2018. The second public comment period expired on January 22, 2018. The agency submitted a public comment summary, attached hereto, detailing all of the comments received, as well as its responses.

Rebecca Miller-Rice, an attorney with the Bureau of Legislative Research, asked the following initial questions:

(1) Section 3-5.02.4 – I believe there might be an extra "s" on the reference to the Administrative Procedure Act, as that Act is entitled in Ark. Code Ann. § 25-15-201. **RESPONSE:** A correction has been made.

(2) Section 4-2.01.9.1.3 – I think there might be a duplicative "if applicable." **RESPONSE:** A correction has been made.

(3) Section 4-3.05 – Aren't the Arkansas license and the license issued by reciprocity the same? Is it the fact that the out-of-state license was no longer in good standing that permits the Department to rescind the license it issued? **RESPONSE:** Yes, if the out-of-state license is no longer in good standing, the Arkansas license may be rescinded.

(4) Section 4-4.01.2 – I think there might be an extra "27" in the second cited statutory reference? **RESPONSE:** A correction has been made.

(5) Section 4-4.02.2 – I believe the same issue might be present as referenced above in question (4). **RESPONSE:** A correction has been made.

(6) Page ADE 317-57 – I believe there might be two sections numbered 6-2.01.2.4. **RESPONSE:** A correction has been made.

(7) Section 7-4.03.2.2 – Could something be missing here? Maybe "the applicant must" before successfully? **RESPONSE:** A correction has been made.

Following the revisions made after the first public comment period, Ms. Miller-Rice posed the following questions:

(1) Section 2-4.02.3 – The revised rule states that the "full requirements will be appended to these rules upon approval." Will these appendixes go through the rule promulgation process before being appended? **RESPONSE:** Yes.

(2) Section 3-1.05 – In the same vein, the revised rule provides that any "specific additional requirements for educator residency programs" will be appended to the rules after recommendation by the Professional Licensure Standards Board and approval by the State Board. Will these also go through the rule promulgation process before being appended? **RESPONSE:** Yes.

(3) Section 4-3.01 – The revised rule allows reciprocity to a person holding a current or "expired" Standard License from another state; however, the following sections, sections 4-3.01.1 and 4-3.01.1.2, require the receipt of a "valid" Standard License that has been in good standing. Does an "expired" license constitute a "valid" one, and can an expired license be in "good standing"? **RESPONSE:** The educator must bring their license current if it is expired. If they don't, then they have to take all of our current tests for their licensure area and level.

(4) Section 5-5.02 – Section 1 of Act 294 of 2017 appears to permit the Department to seek approval of an alternative method of demonstrating subject matter competency, "[i]f there is no assessment *available*." The revised rule, however, provides that such approval may be sought if a licensure content area assessment is not available or "*approved*." What is the reasoning behind the inclusion of the latter term, where that provision is not found in the Act? **RESPONSE:** A correction has been made to follow the language of the Act.

The proposed effective date is May 1, 2018.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Changes to the rules were made in light of Act 294 of 2017, sponsored by Representative DeAnn Vaught, which amended the Arkansas Code concerning the licensure of public school teachers and administrators and licensure exceptions, authorized a tiered licensure system, and allowed school districts to base teacher compensation of licensure levels approved by the State Board of Education ("State Board"); Act 416 of 2017, sponsored by Senator Alan Clark, which required a person who applies for an elementary education K-6 teaching license or a special education K-12 teaching license to successfully pass a stand-alone reading test and a multi-subject test as a condition of licensure; Act 564 of 2017, sponsored by Representative DeAnn Vaught, which amended the Arkansas Code concerning the Professional Licensure Standards Board; Act 588 of 2017, sponsored by Representative Ron McNair, which altered the requirements for a lifetime teaching license; and Act 1063 of 2017, sponsored by Senator Joyce Elliott, which created the Right to Read Act, required licensed teachers at the elementary level to be proficient in scientific reading instruction, and required all other licensed teachers to have a cursory knowledge of scientific reading instruction.

Pursuant to Arkansas Code Annotated § 6-17-402(b), as amended by Acts 294, § 3, and 416, § 1, the State Board shall promulgate rules for the issuance, licensure, relicensure, and continuance of licensure of teachers in the public schools of this state. The rules shall require at a minimum that each in-state applicant: (1) for teacher licensure, completes an educator preparation program approved by the Department and demonstrates licensure content area knowledge and knowledge of teaching methods; and (2) for an administrator's license, demonstrates knowledge of state-adopted competencies and standards for educational leaders. *See* Ark. Code Ann. § 6-17-402(b)(1), (2), as amended by Act 294, § 3. Further, the State Board may promulgate rules for a tiered system of licensure, which may include without limitation: (1) an emergency teaching permit; (2) a technical permit; (3) a provisional license; (4) a novice or first-time license; (5) a standard license; and (6) a license with advanced requirements. *See* Ark. Code Ann. § 6-17-402(c)(1), as amended by Act 294, § 3. The State Board shall also promulgate rules for the licensure of individuals through reciprocity with other states under Ark. Code

Ann. § 6-17-403. *See* Ark. Code Ann. § 6-17-402(f), as amended by Act 294, § 3.

5. <u>DEPARTMENT OF ENVIRONMENTAL QUALITY, OFFICE OF LAND RESOURCES</u> (Kevin White and Jarrod Zweifel)

a. <u>SUBJECT</u>: Regulation No. 12: Storage Tanks

<u>DESCRIPTION</u>: The Arkansas Department of Environmental Quality (ADEQ) proposed this rulemaking before the Arkansas Pollution and Ecology Commission (APC&EC) to Regulation No. 12 (Storage Tanks) to incorporate state law changes concerning storage tanks made by the Arkansas General Assembly, to include without limitation Acts 257, 534, and 584 of 2017; and federal regulatory changes promulgated by the United States Environmental Protection Agency (EPA) in the *Federal Register*, 80 FR 41566-41683, July 15, 2015, concerning 40 C.F.R. Parts 280-281. The Commission's authority for amending Regulation 12 is found in Ark. Code Ann. § 8-7-802 and the Petroleum Storage Tank Trust Fund Act, Ark. Code Ann. § 8-7-901 *et seq*.

The proposed amendments to the regulation include the following:

- Revisions to Reg.12.109 to remove the one thousand foot (1,000') limitation related to secondary containment and monitoring for all new or replaced underground storage tanks, secondary containment and monitoring for all new or replaced piping connected to any underground storage tank, and an under-dispenser spill containment for all new or replacement motor fuel dispenser systems consistent with Act 534 of 2017;

- Revisions to Reg.12.201 to make the registration of aboveground storage tanks optional; to allow the owner or operator of an aboveground storage tank containing petroleum to be potentially eligible for reimbursement under the Petroleum Storage Tank Trust Fund Act if the tank is registered and all fees required under state law or regulation are paid consistent with Act 584 of 2017;

- Incorporates changes to 40 C.F.R. Parts 280-281 that concern airport hydrant fuel distribution systems and field constructed tanks, which are now defined as underground storage

tanks, in Reg.12.104 by changing the date that Regulation 12 incorporates federal regulations by reference; and

- Minor revisions to include correcting typographical, grammatical, formatting, and stylistic errors, to include without limitation a minor change to Reg.12.320 required by Act 257 of 2017.

PUBLIC COMMENT: A public hearing was held on September 6, 2017. The public comment period expired on September 20, 2017. The Department provided the following summary of the comments that it received and its responses:

Charles M. Miller, Executive Director, Arkansas Environmental Federation

Comment: The Arkansas Environmental Federation (AEF) is a non-profit association with over 200 members, primarily Arkansas businesses and industries that manufacture products, provide services, and employ skilled workers in Arkansas while also insuring that their operations comply with all federal and state environmental, safety and health regulations. As such, the AEF appreciates the opportunity to submit comments on proposed revisions to Arkansas Pollution Control & Ecology Commission (APC&EC) Regulation 12 (storage tanks).
Response: The Department acknowledges the comment.

Comment: AEF's comments focus specifically on the Act 584 of 2017 provisions that eliminate the registration and fee requirements for petroleum aboveground storage tanks ("ASTs"). Additional provisions of Act 584 provided petroleum ASTs the ability to access the Arkansas Petroleum Storage Tank Trust Fund in the event such tanks opted to meet the registration/fee requirements.

Reg.12.201 Registration Requirements
(A) As provided by state and federal law and except as otherwise provided in this section, all owners and operators of storage tanks must register their tanks in accordance with this Regulation.
(B)(1) ~~No~~ An owner or operator shall not receive any regulated substance into any underground storage tank ~~for which~~ without furnishing current and proper proof of registration, ~~as provided by~~

under Reg.12.202(A), ~~has not been furnished~~ to the person selling the regulated substance.
(2) ~~No~~ A person selling any regulated substance shall not deliver, or cause to be delivered, a regulated substance into any underground storage tank for which he or she has not obtained current and proper proof of registration, ~~as provided by~~ under Reg.12.202(A), from the owner or operator.
(C) ~~The provisions of this~~ This Regulation shall not apply to aboveground tanks located on farms, if the contents ~~of which~~ are used for agricultural purposes and not held for resale.
(D) ~~The provisions of this~~ This Regulation shall not apply to aboveground tanks storing a regulated substance at a location on a transitory or temporary basis, for example, short-term use at non-permanent construction, roadway maintenance, timber harvesting, or emergency response locations.
(E) ~~The provisions of this~~ This Regulation shall not apply to storage tanks containing a *de minimis* concentration of a regulated substance.
(F)(1) An aboveground storage tank that contains petroleum may be registered under this section at the option of the owner or operator for the purpose of allowing potential eligibility for reimbursement under the Petroleum Storage Tank Trust Fund Act, Ark. Code Ann.§ 8-7-901 et seq.
(2) If an owner or operator of an aboveground storage tank that contains petroleum chooses to register the aboveground storage tank under this section, a certification of registration under Reg.12.203 must be obtained and the storage tank registration fees under Reg.12.203 must be paid.
Response: The Department agrees that the suggested change would provide helpful clarification. Reg. 12.201(F) will be changed to add a new subdivision (F)(2) as indicated above.

Steve Ferren, Executive Vice President, Arkansas Oil Marketers Association

Comment: I am writing on behalf of the Arkansas Oil Marketers ("AOMA") in regards to Notice of Proposed Regulation Changes, Public Hearing, and Public Comment Period – Regulation 12. AOMA very much appreciated the Arkansas Department of Environmental Quality ("ADEQ") holding the June 8th stakeholder meeting which provided myself and several of our members the opportunity to express views on the draft and related issues. We have appreciated the opportunity to work with the agency as it finalizes formal proposed revisions to Regulation 12.

AOMA has over 200 members which include independent petroleum marketing companies who represent wholesaler and retailers of gasoline, diesel, lubricants and renewable fuels. Associate members include companies that provide petroleum equipment and environmental services to our industry. Many of our members are small family-owned businesses and play a vital role in supplying petroleum products to various areas of our state. By necessity, both underground storage tanks ("USTs") and aboveground storage tanks ("ASTs") are a critical component of a typical AOMA member's operation.

As you may know, AOMA has a long history in working with ADEQ on the Arkansas statutory and regulatory provisions addressing both USTs and ASTs. We worked with ADEQ and the Arkansas General Assembly in the late 1980s in crafting the two statutes that both provided the agency authority to regulate USTs and created the trust fund. Further, we have continued to stay involved with legislative and regulatory changes related to these programs over the past two-and-a-half decades.

We have always appreciated ADEQ's sensitivity to the need to protect the environment along with recognition that a substantial portion of the regulated community using USTs and ASTs are small businesses. Further, these facilities are often located in rural parts of the state and may be critical sources of petroleum products for a large area. In other words, these facilities play a vital role in many Arkansas communities.

AOMA recognizes that the changes to Regulation No. 12 are driven by the 2015 revisions to the federal UST regulations along with the Arkansas General Assembly legislation which includes:

- Act 534 (addressing UST piping secondary containment)
- Act 584 (AST registration/fees)

AOMA would like to emphasize that it continues to support Arkansas's operation of this delegated federal UST program. We recognize the need for swift preparation by ADEQ of a rules/program package that can be approved by the United States Environmental Protection Agency ("EPA"). Therefore, we plan to provide to ADEQ any necessary assistance to facilitate revision of Regulation No.12.

As you know, revisions to the federal UST regulations have been minor and infrequent since their original promulgation. The Arkansas UST statute has always required that Arkansas promulgate companion regulations that are neither more nor less stringent than the federal UST regulations. Further, Arkansas Pollution Control and Ecology Commission Reg. 12.104 has simply mandated that the UST regulations adopted by the EPA be incorporated by reference.

The Reg. 12.104 (Incorporation of Federal Regulations) language has simplified the Arkansas rulemaking process in regards to USTs. However, as we discussed in prior stakeholder meetings, the 2015 UST revisions offer states certain choices in terms of regulatory requirements. Therefore, AOMA believes it important to identify for ADEQ the areas in which EPA has provided the states flexibility in terms of certain UST regulatory requirements. We would like to work with ADEQ in determining how these choices can be specified in Regulation No. 12 and yet maintain the simplicity provided by Reg. 12.104 (Incorporation of Federal Regulations).
Response: The Department acknowledges the comment.

Comment: The choices discussed below were identified in a June 8th memorandum from our national association (Petroleum Marketers Association of America) ("PMAA") titled *Strategies for State Adoption of EPA 2015 UST Amendments*. An abbreviated discussion of these choices/recommendations include:

- AOMA opposes and believes ADEQ should consider adopting language that would eliminate use of the Petroleum Equipment Institute UST Standards as either part of Regulation No. 12 or as a matter of agency policy which include:
  - PEI Recommended Practice 1200 (RP-1200) protesting an inspection of UST systems
  - PEI Recommended Practice 900 (RP-900) addressing walk-through inspections

- AOMA requests that the agency consider language which states that any referenced industry standards shall not impose any additional regulatory requirements not included under 40 CFR Part 280 of the federal UST regulations.

- Incorporate in Regulation No. 12 the alternative test method for containment sumps that was proposed by PMAA and subsequently adopted by EPA

- EPA recognized PMAA's alternative integrity test method for sumps used as secondary containment and interstitial monitoring for UST system piping as "equally protective of the environment"
  - PMAA notes that this test method can therefore be used in place of the RP-1200 containment sump test method referenced in the 2015 revisions
  - AOMA will provide ADEQ any necessary documentation regarding EPA's prior recent approval

Response: According to 40 CFR 280 of the Federal Regulations, PEI Recommended Practice 900 (RP-900) is only an option for owners and operators to use to meet the monthly walk-through inspection requirements. PEI Recommended Practice 1200 (RP-1200) is an option allowing alternatives in case codes of practice and manufacturer's requirements are not available. ADEQ acknowledges that EPA approved PMAA's low liquid level integrity test as an alternative test method for containment sumps.

Comment: Since ADEQ has delegated UST program authority the State has two compliance deadline options
  - A later compliance deadline will provide the many Arkansas service and small businesses affected by the 2015 UST revisions additional time to obtain the necessary capital and/or financing to fund the necessary improvements
  - The October 13, 2021 deadline option should be adopted by ADEQ

Response: The October 13, 2021 deadline is being adopted by ADEQ for the date of full compliance with the federal regulations. In order to meet that deadline ADEQ will require monthly walk-through inspections to be initiated by no later than October 13, 2018, and within one year, annual release detection equipment testing will need to be completed. Spill containment, liquid tight sumps (sumps installed on or after July 1, 2007), and overfill prevention devices will need to be tested before October 13, 2021.

Comment: As to the legislatively driven Regulation No. 12 revisions, AOMA has the following comments.

First, the revisions to Regulation No. 12 that correspond to Act 534 appear to accurately track that legislation. ADEQ had previously

asked for our input as to the legislative choice in terms of secondary containment. As a result, we support the relevant language.
Response: The Department acknowledges the comment.

Comment: Second, significant revisions to Regulation No. 12 will need to be made to the draft revisions to comply with Act 584. The Arkansas Environmental Federation ("AEF") has submitted comments providing the necessary changes. AOMA supports these proposed changes and they are attached to our comments. Again, we believe that Regulation No. 12 should be revised to reflect Act 584's mandates.

In summary, Act 584 eliminated any mandatory registration or fee requirements for ASTs. Instead, it provided that the registration and fee requirements would only be applicable if an AST chose to participate in the trust fund. The elimination of mandatory fee and payment requirements also meant that the AST delivery and receipt prohibitions found in Chapter 2 would logically be eliminated.

Our reading of the draft revisions indicates that the only change to Chapter 2 is the adding of "F" which provides owners or operators of ASTs the option of registration to access the trust fund. It does not appear that the provisions of Chapter 2 mandating AST registration/fee payment have been removed. Further, the provisions prohibiting sale or receipt of motor fuel to such ASTs also remain in Chapter 2. This is at odds with the legislation and necessary revisions must be made. We believe this was simply an agency oversight.
Response: See response to Comment by Charles M. Miller, regarding Reg.12.201.

Comment: Finally, in regards to Regulation No. 12, a number of AOMA members have raised an issue that we would like to see addressed as soon as possible. We would be happy to work with ADEQ in drafting appropriate language.

As you know, the Chapter 2 UST requirements mandate registration certification (with appropriate color sticker for the current year) prominently displayed at the location. It is our understanding that transport companies rely on that certification when delivering motor fuel to that location.

AOMA understands that ADEQ takes the position that if there is a change in ownership in the USTs/property the current certificate is invalid. Further, we understand that the transport company may be subject to penalties for delivering motor fuel into an unregistered UST. Similarly, it is our understanding that until the new certificate (with the new owner) is issued and prominently displayed at the site, no deliveries may be made. AOMA respectfully suggests that Chapter 2 should be revised to provide a "Safe Harbor" of some type for a valid certification being posted.

AOMA has serious concerns about penalties being imposed upon marketers or transportation companies that deliver motor fuel to a location if it has a current UST certificate at the site or the ADEQ website identifies the UST fees as having been paid (i.e., current).

We would suggest that Chapter 2 be revised to provide a grace period for filing registration paperwork. A 30-day grace period for the UST seller and buyer to submit the relevant paperwork and receive the new registration certificate should therefore be incorporated into Chapter 2. Further, penalties for failing to timely file a change of registration should not be imposed upon transportation companies or a marketer supplying the fuel in such limited circumstances. Instead, the only parties that should be penalized during this limited period would be the seller or buyer of the UST.
Response: The Department acknowledges the comment. The changes recommended in this comment were not proposed in the pending regulatory amendment and not included in the statutorily-required public notice. Therefore, this comment is beyond the scope of this rulemaking.

Comment: AOMA also would like to address three issues that may not necessarily be incorporated into Regulation No. 12. We believe one or more other commenters are putting forth these recommendations. These issues need to be considered as ADEQ begins implementation of the 2015 UST revisions. They include:

<u>Reuse of Water in Hydrostatic Testing</u>

Under the topic, "UST Sump Test Water Characterization And Disposal" within the EPA "Questions and Answers About the 2015 UST Regulations – As of May 2017" ("Q&A"), EPA provides multiple references indicating the reuse of test waster is permissible. We support other commenters' recommendation of

the reuse of test water to support conservation goals, reduce (potentially hazardous) waste generation, and reduce the burden of increased costs on the industry. We recommend as an option organizations work with third party service providers to develop a testing approach incorporating a "milk-run" schedule in which it would only service their organization during the milk-run; thereby, eliminating the potential for cross contamination between fuel stations from separate companies. In this approach, test water will be introduced to sumps for site testing, and at the conclusion of the test, the water will be placed into a mobile tank and transported to the next test site.

Test Water Management

EPA also provides in the Q&A additional direction under the "UST Sump Test Water Characterization and Disposal" topic that test water can be cleaned or filtered while the water is being used/reused to test multiple sumps. Specifically, the Q&A states:

"A testing contractor or UST facility owner and operator could potentially reuse the water over and over again, especially if the test water is filtered in between uses to remove any free or dissolved petroleum. When the tester decides not to reuse the water, it then becomes a waste, must be characterized, and either properly disposed or determined if it can be reclaimed."

We support other commenters that recommend the approval of filtration, absorption, or enzymatic cleaning agents to remove and/or reduce the petroleum constituents to further prolong the test water life cycle. They also note and we support their analysis that EPA has concluded that a waste determination would not need to be made until the completion of the testing cycle. The testing contractor who determines when to remove the water from service should be considered the "generator" of the test water.

Alternative Test Methods

Other commenters note that in the Q&A topic "Containment Sump – Alternative Test Procedures," EPA acknowledges that requiring UST owners to test sumps at 4 inches above the highest penetration as outlined in PEI RP1200 "*may create unusual challenges and unintended consequences.*" They note that EPA provides an example of a site using liquid sensors in the sumps along with positive shutdown to illustrate an acceptable alternative

test method. In this example, the agency provides guidance that an acceptable test measure would be to fill the sump to the level which would activate the sensor. AOMA also agrees with this position, and recommends ADEQ approve this test method to conserve water and significantly reduce waste.

Finally, AOMA is concerned that the 2015 UST revisions will require activities that generate greater amounts of water that may be regulated. The previous example of hydrostatic testing is one example. We would respectfully request the initiation of a stakeholder process with ADEQ Water and UST personnel to explore creative options for addressing the disposition options. Temporary, General NPDES or authorizations need to be discussed. Because it will take some time to consider alternatives and the length of the permitting process AOMA believes this discussion should start in the near future.

AOMA recognizes that several of these comments are not germane to the proposed revisions to Regulation 12. Nevertheless, we believe that these suggested action items are time sensitive and discussions should begin in the near future on how to address these issues.
Response: The Department acknowledges the comment. This comment concerns issues that were not proposed in the pending regulatory amendment and not included in the statutorily-required public notice. Therefore, this comment is beyond the scope of this rulemaking.

Audray K. Lincoln, Region 6, Environmental Protection Agency

Comment: What are the implementation dates for your rules?
Response: Arkansas does and will continue to use the implementation dates required by the federal regulations for SPA states.

Comment: ADEQ IBR which takes in all of the federal dates but many of these will be before the effective date of the rule. How will ADEQ deal with implementation dates of different issues?
Response: For clarity, the difference between the effective date of APC&EC Reg. 12 and the EPA's implementation dates will be distinguished. First, the effective date of the amended APC&EC Reg. 12 as a state regulation is the date the regulation will have the full force and effect of law in Arkansas, which is ten (10) days

after filing with the Arkansas Secretary of State after final adoption by the APC&EC.

As for the incorporation by reference (IBR) date, Arkansas law does not allow for the prospective adoption of federal law or regulations. Historically, all amendments to APC&EC Reg. 12 have used the date of the APC&EC's final adoption of the rulemaking as the date the most recent version of federal law and regulation can be incorporated in Reg. 12.104. Therefore, the effective date of the amendments to APC&EC Reg. 12 will be after APC&EC's final adoption and ten (10) days after filing with the Arkansas Secretary of State.

Second, as far as the EPA's implementation timeline, Arkansas has been using and will continue to use the implementation dates that have occurred to date as required by the SPA. All EPA implementation dates in the federal regulations will be incorporated by reference into APC&EC Reg. 12 after it is effective.

Comment: We find it confusing as to what Reg 12.104 means if there are not specified implementation dates for specific requirements: 12.104 "…and provided that the effective date of the provisions adopted herein by reference as provisions of this Regulation shall be the date such the provisions are specified as being effective by the Commission in its rulemaking and the effective date of the federal regulations adopted herein shall have no bearing on the effective date of any provisions of this Regulation:…"
Response: The quoted language is distinguishing between the effective date of APC&EC Reg. 12 and the federal regulations cited in Reg. 12.104. Arkansas law does not allow for the prospective adoption of federal law or regulations. However, nothing in Reg. 12.104 restricts ADEQ from following the EPA's implementation timeline that exists in the cited federal regulations as they exist on the date the APC&EC adopts the amendments to Reg. 12.

Rebecca Miller-Rice, an attorney with the Bureau of Legislative Research, asked the following question:

Reg.12.109: In Sections (A)(1), (B)(1), and (C)(1), the proposed revisions, via footnotes, have maintained the limitation that the sections apply only to those respective tanks or fuel dispenser

systems installed or replaced after July 1, 2007; however, that date limitation appears to have been specifically stricken from the respective provisions in Act 534 of 2017, §§ 1, 2, and 4. Can you reconcile this for me? **RESPONSE:** The federal regulation removed the July 1, 2007 reference. Act 534 of 2017 removed this date as well to avoid any interpretation that the state law was more stringent than the federal regulation. However, during the stakeholder meetings on the regulation, an issue was raised that the removal of the date completely from the regulation may cause confusion to the regulated community as far as establishing that an underground storage tank or piping was not in compliance with the secondary containment requirements in the regulation because the tank or piping was installed before July 1, 2007. Inspectors are trained about this and this date is included in inspection forms. In response to all of this information, the decision was made to include the date in footnotes for clarity and as historical reference to the regulated community and the public.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: For owners and operators of regulated storage tanks, there is an estimated cost of $2,400 for walk-through inspections, testing of sumps, and spill buckets.

There is no cost to state, county, and municipal governments to implement the rule.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 8-7-802(a)(1), the Arkansas Pollution Control and Ecology Commission has the power and duty to promulgate, after notice and public hearing, and to modify, repeal, and enforce, as necessary or appropriate to implement or effectuate the purposes and intent of Title 8, Chapter 7, Subchapter 8 of the Arkansas Code concerning regulated substance storage tanks, rules and regulations relating to an underground storage tank release detection, prevention, corrective action, and financial responsibility program as required by the federal Resource Conservation and Recovery Act of 1976 and the Energy Policy Act of 2005, Pub. L. No. 109-58. The Commission is further authorized to adopt appropriate rules and regulations not inconsistent with the Petroleum Storage Tank Trust Fund Act, codified at Ark. Code Ann. §§ 8-7-901 through 8-7-909, to carry out the intent and purposes of and to assure compliance with the Act. *See* Ark. Code Ann. § 8-7-903(b).

The proposed revisions implement changes brought about by Act 257 of 2017, sponsored by Representative Matthew Shepherd, which made technical corrections to Title 8 of the Arkansas Code concerning environmental law; Act 534 of 2017, sponsored by Representative Les Eaves, which amended the law concerning underground storage tanks and secondary containment; and Act 584 of 2017, sponsored by Representative Andy Davis, which amended the law to make the registration of aboveground storage tanks optional and amended the eligibility for reimbursement from the Petroleum Storage Tank Trust Fund. Per the Department, the revisions also include changes required to comply with federal law, specifically, *Federal Register*, 80 FR 41566-41683, July 15, 2015, concerning 40 C.F.R. Parts 280-281.

b. <u>SUBJECT</u>: Regulation 30: Remedial Action Trust Fund Hazardous Substance Site Priority List

<u>DESCRIPTION</u>: The Arkansas Department of Environmental Quality (ADEQ) proposes this rulemaking before the Arkansas Pollution Control and Ecology Commission (Commission) for amendments to Regulation No. 30 (Arkansas Remedial Action Trust Fund Hazardous Substances Site Priority List) to adopt changes to state law in Act 1073 of the 2017 Regular Session of the Arkansas General Assembly and update the State Priority List Sites. The Commission's authority for amending Regulation 30 is found in the Remedial Action Trust Fund Act, Ark. Code Ann. § 8-7-501 *et seq.*

The proposed amendments to the regulation include the following:

● **Sites Proposed for Deletion from the State Priority List:** In Chapter 3, two (2) sites are proposed to be deleted from those currently listed because site investigation and necessary remedial activities have been completed and the sites no longer pose a potential unacceptable risk to human health or the environment from hazardous substances defined under the Remedial Action Trust Fund Act. The sites proposed for delisting are:

(1) Star Starett/Leer Mfg., Dumas, Desha County; and
(2) Value Line, Arkadelphia, Clark County;

● **Brownfield Assessment Funding:** A new Chapter 4 was added to address Act 1073 and the use of assessment grants for potentially contaminated sites for the facilitation of economic development and environmental improvement. Act 1073

authorizes the use of up to ten percent (10%) of the moneys collected for the Hazardous Substance Remedial Action Trust Fund to be used for conducting site assessments of potentially contaminated sites under certain conditions; and

● **Minor revisions** to include correcting typographical, grammatical, formatting, and stylistic errors.

There are no sites proposed for addition to the State Priority List and no changes to the National Priority List Sites.

PUBLIC COMMENT: A public hearing was held on December 4, 2017. The public comment period expired on December 18, 2017. The Department received no comments.

The proposed effective date is May 1, 2018.

FINANCIAL IMPACT: There is no financial impact. There is a total program cost for implementing investigations, cleanup, and long-term care of sites listed in the regulation of $2.25 million for this fiscal year and $2.25 million for the next fiscal year.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 8-7-506, the Arkansas Pollution Control and Ecology Commission shall adopt regulations under the Remedial Action Trust Fund Act, codified at Ark. Code Ann. §§ 8-7-501 through 8-7-525, necessary to implement or effectuate the purposes and intent of the Act. Included among the proposed rule changes are those made in light of Act 1073 of 2017, sponsored by Senator John Cooper, which amended the law concerning the use of assessment grants for potentially contaminated sites for the facilitation of economic development and environmental improvement, amended the Remedial Action Trust Fund Act, and amended the Hazardous Substance Remedial Action Trust Fund.

6. DEPARTMENT OF FINANCE AND ADMINISTRATION, OFFICE OF STATE PROCUREMENT (David Withrow, Mary Kathryn Williams, and Edward Armstrong)

a. SUBJECT: Amendments to Arkansas Procurement Law

DESCRIPTION: Due to legislation passed during the 91st General Assembly, as well as other rule changes deemed necessary, the rules are being amended.

Rule Changes Pursuant to Legislation

Act 609

- R7: 19-11-203 is being added to define "academic medical center," which will be defined as consisting "of a public medical school and its primary teaching hospitals and clinical programs."

Act 617

- R1: 15-4-3803 is being added to provide definitions to help agencies implement the local food, farms, and jobs requirements.

- R2: 15-4-3803 is being added to provide guidance on how agencies should implement the local food, farms, and jobs requirements.

Act 696

- R15: 19-11-229 is being amended to provide guidance on negotiations of competitive sealed bids. The rule is substantially similar to the one in place, but further amplifies appropriate circumstances in which to conduct negotiations, pursuant to the amended statute. Additionally, it is being renumbered to R14: 19-11-229 due to numbering changes in the rules to this statute.

Act 710

- R1: 25-1-503 is being added to provide guidance for how agencies should implement the new prohibition against contracting with and investing in companies that boycott Israel. The new rule follows a similar process as the contractor certification regarding the prohibition of employing or contracting with illegal immigrants.

- R3: 19-11-265 is being amended for clarity and housekeeping. Additionally, the rule is being amended to add language requiring proper certification from contractors before entering a contract, pursuant to ACA § 25-1-503.

Act 882

- R1: 19-11-244 and R2: 19-11-244 are being rescinded and replaced in their entirety by new rules R1: 19-11-244, R2: 19-11-244, R3: 19-11-244, R4: 19-11-244, R5: 19-11-244 and R6: 19-11-244. The new rules provide more clearly defined requirements and

rules of procedure for protestors, agencies, and interested parties, as well as reflect the amended statute.

Act 1004

- The following rules are being amended to reflect the new review thresholds: R1: 19-11-204 (b), R2: 19-11-204, R2: 19-11-229, R14: 19-11-229, R10: 19-11-230, R1: 19-11-231(1), R2: 19-11-232, R2: 19-11-233, R1: 19-11-234, R2: 19-11-234, R7: 19-11-234, R1: 19-11-251. The amended rules are substantially the same as the old rules except that the thresholds have been updated per the amended statutes.

Act 1080

- R1: 19-11-231(3) is being added to provide guidance for agencies to utilize the small procurement thresholds for certified minority business enterprises and certified women-owned business enterprises.

Rule Changes for Clarity or Housekeeping

- R1: 19-11-105 is being amended to better align the relevant procurement processes with the statutory requirements. The rule is substantially the same as the old rule except that it requires contractors to specifically agree to refrain from prohibited activity for the aggregate term of the contract.

- R1: 19-11-203(f) is being amended for clarity.

- R1: 19-11-203(i) is being added to define “fees” in order to provide guidance to agencies regarding exempt commodities and services.

- R2: 19-11-203 is being amended to cross reference the relevant code citation, rescinding the language referencing the specific threshold amount. The rule is substantially the same as the old rule except that the new rule will not require updating if the threshold amounts are modified by future legislation.

- R6: 19-11-203 is being amended to reference the correct code subsection citation.

- R1: 19-11-204 is being amended to provide better clarity as to the appropriate utilization of requests for qualifications.

- R1: 19-11-217 is being amended to designate the using agency as the party responsible for inspecting and accepting delivery of services or commodities.

- R2: 19-11-217 is being amended to better align the rule with statutory responsibilities of the State Procurement Director to collect procurement information and data from agencies.

- R3: 19-11-217 is being re-promulgated without amendment for housekeeping purposes.

- R4: 19-11-217 is being amended for clarity and housekeeping.

- R1: 19-11-223 is being amended to rescind language to better align the rule with procurement law.

- R1: 19-11-229, R3: 19-11-229, R5: 19-11-229, R7: 19-11-229, R8: 19-11-229, R9: 19-11-229, R10: 19-11-229, R12: 19-11-229, and R13: 19-11-229 are being amended for clarity and housekeeping.

- R1: 19-11-230, R2: 19-11-230, R3: 19-11-230, R4: 19-11-230 and R5: 19-11-230 are being amended for clarity and housekeeping.

- R6: 19-11-230 is being amended to add and clarify grounds for rejecting offeror proposals. The offeror's record of past performance or irresponsibility is being added as grounds for rejection, and clarifying language has been added to require documentation for reasons supporting a written determination that it is in the best interest of the state to reject a proposal.

- R7: 19-11-230 is being amended for clarity and housekeeping. Additionally, the rule is being amended to add language stating that disqualifying offerors for minor technical deficiencies or irregularities is not necessarily aligned with the public interest of maintaining robust competition.

- R8: 19-11-230 is being amended for clarity and housekeeping.

- R1: 19-11-232 is being amended for clarity and housekeeping. Additionally, the rule is being amended to rescind outdated language regarding sole source procurements.

- R1: 19-11-233 is being amended for clarity and housekeeping.

- R1: 19-11-241 is being re-promulgated without amendment for housekeeping purposes.

- R2: 19-11-241 is being amended for clarity and housekeeping.

- R1: 19-11-242 is being amended for clarity and housekeeping. Additionally, the rule is being amended to add language permitting the Director of Marketing and Redistribution to offer commodities valued at one hundred dollars ($100) or less for sale to the public without the going through twenty day hold period.

- R2: 19-11-242 is being amended for clarity and housekeeping. Additionally, the rule is being amended to add language to better align the rule with the statute, specifically adding rules pertaining to agencies leasing commodities to nonprofits, as well as requiring purchasers to pick up purchased commodities.

- R3: 19-11-242 is being amended to add definitions to better align the rule with the statute, specifically defining “lease” and “donation.”

- R3: 19-11-245 is being amended for clarity and housekeeping.

- R1: 19-11-246 is being amended to add language to better align the rule with the statute, specifically adding language capturing the various potential causes for contract termination referenced in the statute.

- R1: 19-11-265 and R2: 19-11-265 are being re-promulgated without amendment for housekeeping purposes.

- R6: 19-11-265 is being amended to add guidance for agencies as to reporting requirements under the statute.

Specifically, maintenance contracts have been defined and excluded from the reporting requirements, and for purposes of the statute, "regular" has been defined and clarified.

- R1: 19-11-715 is being added to provide guidance for agencies when requesting advisory opinions or waivers of conflicts of interest. Specifically, the information required pursuant to the statute is explained, as well as other information the Director of the Department of Finance and Administration requires to ensure determinations comply with ethics and procurement law.

- R1: 19-11-802 is being amended to add guidance and clarity related to sending notice to vendors deemed best suited to perform the work specified. Specifically, vendors should register with the Office of State Procurement for the scope of work or services they provide, or vendors recommended to the Office of State Procurement for the scope of the work or services sought.

- Appendix 8 is being rescinded in its entirety for better efficiency and housekeeping purposes.

PUBLIC COMMENT: A public hearing was held on January 8, 2018. The public comment period expired on January 8, 2018. There were no comments.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The State Procurement Director, upon the approval of the Director of the Department of Finance and Administration, has the authority and responsibility to promulgate regulations and may also adopt rules governing the internal procedures of the Office of State Procurement. *See* Ark. Code Ann. §19-11-217(b)(1) and (2) (Repl. 2016). Regulations shall be promulgated by the Director in accordance with the applicable provisions of this subchapter [Procurement Law] and of the Arkansas Administrative Procedure Act, §25-15-201 et seq. *See* Ark. Code Ann. §19-11-225 (a) (Repl. 2016).

Definitions and agency guidance was added to the rules to implement the Local Food, Farms, and Jobs Act, Act 617 of 2017, sponsored by Representative Rick Beck. *See* Ark. Code Ann. §15-

4-3808 (Supp. 2017). Additional proposed changes to procurement rules were made pursuant to Senator Bart Hester's Act 609 of 2017, which added "commodities and services purchased by an academic medical enter using revenue derived from and used for patient care and hospital enterprises" to the definition of "exempt commodities and services." *See* Ark. Code Ann. §19-11-203(14) (Supp. 2017). The changes also provide guidance on appropriate circumstances in which to conduct negotiations of competitive sealed bids as directed by Act 696 of 2017, sponsored by Senator Hester. *See* Ark. Code Ann. §19-11-229(h) (Supp. 2017).

The proposed amendments implement Act 710 of 2017, sponsored by Senator Hester, which prohibits public entities from contracting with and investing in companies that boycott Israel. *See* Ark. Code Ann. §25-1-503 (Supp. 2017). The changes implement Act 882 of 2017, sponsored by Senator Hester, which addressed resolution of protested solicitations and awards of a contract. The proposed rules clarify the protest process and procedure under which the Director utilizes the authority to settle or resolve a protest in accordance with the law and procurement rules. *See* Ark. Code Ann. §19-11-244 (Supp. 2017). The rules reflect the changes made by Act 1004 of 2017, sponsored by Representative Grant Hodges, which amended the law to increase the price thresholds on small procurements and competitive sealed bidding. *See* Ark. Code Ann. §19-11-229 and 234 (Supp. 2017). Finally, the proposed changes provide guidance for agencies to help implement Act 1080 of 2017, sponsored by Representative Michael John Gray, which encourages procurement from certified minority and women-owned business enterprises. *See* Ark. Code Ann. §15-4-315.

7. <u>ARKANSAS GEOGRAPHIC INFORMATION SYSTEMS OFFICE</u> (Shelby Johnson)

a. <u>SUBJECT</u>: Arkansas Centerline File Standard

<u>DESCRIPTION</u>: The Arkansas Centerline File (ACF) Standard was first promulgated as a state rule September 15, 2002, and this data standard is intended to make road centerline files more uniform and to facilitate the sharing of a statewide seamless road centerline spatial data layer. These data are created locally by individual cities or counties, then shared with the Arkansas

Geographic Information Systems (GIS) Office for publication into an aggregated collection of the whole state. Therefore, it is essential for all those involved in the process to utilize a common structure.

The impetus for the revision was largely born out of the all public linear referencing system project the Arkansas Geographic Information Systems (GIS) Office jointly completed with the Arkansas Department of Transportation (ARDOT). To meet Federal Highway Administration (FHWA) specifications, the ARDOT has a need to incorporate certain standardized attributes in addition to those already in the standard. These additions also greatly enhance the ability of counties and other local public jurisdictions to use the data to inventory and manage their road networks by incorporating attributes such as road jurisdiction and surface type in a standardized manner.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on February 15, 2018. Public comments were as follows:

(1) **Commenter's Name**: Judi Frigon
Commenter's Business/Agency: Benton County 9-1-1 Administration
Summary of Comments:
a. CITY_L and CITY_R would be a problem for emergency 9-1-1 dispatching because we need to know what municipality is the responding agency or if it is in the County. Some of our zip codes do not correspond with the city it is actually located in. We have a field CITY_ZIP that uses the USPS city name.
b. RD_CLASS AND RD_DESIGN should be spelled out and not abbreviated. You would need a code book to understand what the abbreviations designate.
c. LOG_DIRECT should be designated as log and anti-log. A and B is very confusing.
Agency's response to comment:
a. Thank you for your comments on the proposed revisions to the Arkansas Centerline File Standard. We appreciate your interest in our rule making process. We will give careful consideration to your suggestions as we move forward.
b. We have completed review of all public comments submitted. Based on your comments, we will make the following changes to the proposed revision of the ACF Standard.

i. Add two additional data fields to reflect a road's location in relation to the municipal boundaries in which the road may be situated. Those values may be different than the USPS city name used for mailing purposes. The addition of separate fields for left and right side municipal city name will accommodate E9-1-1 dispatch functions.

ii. Utilize the previously established standardized full text descriptors rather than codes to populate the RD_CLASS, RD_DESIGN, and LOG_DIRECT data fields.

iii. Add a street prefix type field

iv. Add a concatenated full street name field

v. Add graphics and/or aerial imagery snapshots in the Definition of Terms section

Changes made to proposed revision as a result of these comments:

a. The agency will add two additional data fields to reflect a road's location in relation to the municipal boundaries in which the road may be situated. Those values may be different than the USPS city name used for mailing purposes. The addition of separate fields for left and right side municipal city name will accommodate E9-1-1 dispatch
functions.

b. The agency will utilize the previously established standardized full text descriptors rather than codes to populate the RD_CLASS, RD_DESIGN, and LOG_DIRECT data fields.

(2) **Commenter's Name**: Lara Wood

Commenter's Business/Agency: Arkansas GIS Office

Summary of Comments:

a. I'd like to propose including a PSTR_FULNAM (corresponding to the current APF standard) field, which would consist of a concatenation of the four street name elements (PRE_DIR, PSTR_NAME, PSTR_TYPE, PSUF_DIR). This addition could aid in definition queries and labeling, among other things.

b. I would like to suggest changing the Left and Right From and To range fields for all appropriate fields (16 total, including Alternate name fields) from Text to Integer. This allows for sorting numerically, as well as aiding in definition queries involving mathematical operators such as "greater than" or "less than".

Agency's response to comment:

a. Thank you for your comments on the proposed revisions to the Arkansas Centerline File Standard. We appreciate your interest in our rule making process. We will give careful consideration to your suggestions as we move forward.

b. As a result of your comments on the proposed revision to the ACF Standard, the agency will add a concatenated street name field to the table schema and change the address range fields to a long integer.

Changes made to proposed revision as a result of these comments:

a. The agency will add a data field containing a concatenated version of the complete street name.

b. The agency will also change the address range data fields' type from text to long integer.

(3) **Commenter's Name**: Jonathan Hall

Commenter's Business/Agency: Little Rock Police Department

Summary of Comments:

a. The proposed standard does not clearly articulate "exceptions" to the "Must Not Intersect" Topology rule. These exceptions are necessary, unless additional attributes are added to the standard, to build topologically correct street networks for routing (navigation).

In my opinion, 1.b. should explicitly state that centerlines shall not be split at grade-separated overpasses and underpasses.

The standard's intent may be consistent with my comment, but the language describing "exceptions" in 1.b. is not clear. As worded currently, ("exceptions to this could be"), the standard may lead GIS technicians to split every centerline where "Must Not Intersect" topology errors occur.

Admittedly, not splitting centerlines at grade-separations complicates a GIS technician's work, applying the "Must Not Intersect" Topology rule, and identifying legitimate "exceptions" to the rule at every overpass or underpass.

Modern CAD (Computer Assisted Dispatch) software is capable of generating turn-by-turn driving directions for first responders to an emergency location, and locating the first responder with the shortest drive-time from the emergency location. Most, if not all, CAD software that supports generating driving directions, and nearest-unit dispatching, require centerlines have additional attributes, or require centerlines that have no node at grade-separated overpasses and underpasses.

I am not suggesting additional attributes. I suggest that for ACF to support CAD navigation and routing functions, centerlines must not be split at grade separations.

Agency's response to comment:

Thank you for your comments on the proposed revisions to the Arkansas Centerline File Standard. We appreciate your interest in our rule making process. We will give careful consideration to your suggestions as we move forward.

Changes made to proposed revision as a result of these comments:

a. The agency clarified the language, making it more specific, pertaining to the geometry of grade-separated intersections in the sections referenced by Mr. Hall's comments.

(4) **Commenter's Name**: Elizabeth Bowen

Commenter's Business/Agency: Northwest Arkansas Regional Planning Commission

Summary of Comments:

a. Add Prefix_Type
b. Add complete road name field
c. Add USPS City_L
d. Add USPS City_R
e. Add Functional Class
f. For RD-Class spell out instead of abbreviations
g. For Rd-Design spell out instead of abbreviations
h. Add Hwy_Num
i. Add Ownership
j. Add CommunityL Add CommunityR
k. Add speed Limit
l. Add speed emveh
m. Add Rd_Width
n. Add Max height
o. Add max Weight
p. Add One way
q. Add Sign_Color
r. For Log_Direct - instead of A&B put log and anti-log
s. Add Rd_SurfMat (ie asphalt, chip&seal, gravel, concrete, etc)
t. Page 15 add visuals like you have on pages 4&5

Agency's response to comment:

a. Thank you for your comments on the proposed revisions to the Arkansas Centerline File Standard. We appreciate your interest in our rule making process. We will give careful consideration to your suggestions as we move forward.

b. We have completed review of all public comments submitted. Based on your comments, we will make the following changes to the proposed revision of the ACF Standard.

i. Add two additional data fields to reflect a road's location in relation to the municipal boundaries in which the road may be

situated. Those values may be different than the USPS city name used for mailing purposes. The addition of separate fields for left and right side municipal city name will accommodate E9-1-1 dispatch functions.

ii. Utilize the previously established standardized full text descriptors rather than codes to populate the RD_CLASS, RD_DESIGN, and LOG_DIRECT data fields.

iii. Add a street prefix type field

iv. Add a concatenated full street name field

v. Add graphics and/or aerial imagery snapshots in the Definition of Terms section

Changes made to proposed revision as a result of these comments:

a. The agency will add data fields to the standard schema containing the following attributes:

i. Street prefix type

ii. Concatenated street name

iii. The agency will add two additional data fields to reflect a road's location in relation to the municipal boundaries in which the road may be situated. Those values may be different than the U.S. Postal City name used for mailing purposes. The addition of separate fields for left and right side municipal city name will accommodate E9-1-1 dispatch functions.

b. The agency will utilize the previously established standardized full text descriptors rather than codes to populate the RD_CLASS, RD_DESIGN, and LOG_DIRECT data fields.

c. Add graphics and/or aerial imagery snapshots in the Definition of Terms section

(5) **Commenter's Name**: Mayor Kevin Johnston

Commenter's Business/Agency: City of Gentry

Summary of Comments:

a. I received an email from the Arkansas Municipal League in reference to the "PROPOSED REVISION TO THE ARKANSAS CENTERLINE FILE STANDARD - OPPORTUNITY TO COMMENT."

I merely wanted to confirm the response you were hoping to receive from municipalities as, we, at the City of Gentry want to do all we can to assist in your successful project.

Are you in need of any necessary comments on the proposed revision or are you in need of our city's assistance as it pertains to our boundaries?

Agency's response to comment:

Thank you for your inquiry. Since the Arkansas Centerline File (ACF) Standard (primarily a database publication standard) is an official state rule, a public comment period is required when revisions are proposed. We distributed notice of such via as many of the appropriate channels that are available to us, e.g. the Arkansas Municipal League. We would welcome any comments you may wish to submit, but the revisions to the standard are not likely to affect you directly, outside of your relationship with the Benton County 9-1-1 office. The standard and the proposed revisions more directly impact them since they maintain a countywide dataset compatible with the existing data standard.

Part of revision that may be of interest or benefit to you, however, are the data fields we added that store attributes pertaining to a road's jurisdiction (state, county, municipal, private, etc.) and surface type (paved or unpaved). This level of detail has not been present in a standardized form until now, and it allows a data user to quickly map, query, and summarize roads of various types.

Changes made to proposed revision as a result of these comments:

None

(6) **Commenter's Name**: Matthew Charton

Commenter's Business/Agency: DataScout, LLC; Arkansas GIS Board member

Summary of Comments:

a. You have two "or" in your description of RD_DESIGN: Design characteristic of the road. Acceptable values are 'DC', 'SC', 'TC', 'CS', or 'RA', 'RG', 'FR', or 'HF'.

Agency's response to comment:

Thank you for your comments on the proposed revisions to the Arkansas Centerline File Standard. We appreciate your interest in our rule making process and have corrected the error you identified.

Changes made to proposed revision as a result of these comments:

Corrected repeated word error.

(7) **Commenter's Name**: Matthew DeLong

Commenter's Business/Agency: Arkansas GIS Office

Summary of Comments:

a. Change AH_District to AH_Dist to keep field names less than 11 characters which causes truncation of field names with some GIS file formats.

b. Change Unique_ID data type to Long Integer so the field will sort.

Agency's response to comment:
Thank you for your comments on the proposed revisions to the Arkansas Centerline File Standard. We appreciate your interest in our rule making process. We will make the two revisions you suggested in your comments.
Changes made to proposed revision as a result of these comments:
The agency will change the field name and data type for AH_District and Unique_ID, respectively, as recommended in Mr. DeLong's comments.

The proposed effective date is June 6, 2018.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Arkansas Geographic Information Systems Board shall coordinate the development and maintenance of a statewide road centerline database. Ark. Code Ann. § 15-21-504(d)(2)(C).

8. DEPARTMENT OF HEALTH, CENTER FOR HEALTH PROTECTION, HEALTH FACILITIES SECTION (Robert Brech)

a. SUBJECT: Abortion Facilities in Arkansas – Fetal Tissue Disposal

DESCRIPTION: This clarifies that abortion facilities are not responsible for fetal remains expelled away from their facilities.

PUBLIC COMMENT: The Department had a public hearing on November 13, 2017, and the public comment period expired on that date. The Department received two written comments:

Bettina Brownstein, an attorney representing Little Rock Family Planning Services, stated the following in an October 23, 2017, letter regarding the proposed revisions to the Rules and Regulations for Abortion Facilities in Arkansas promulgated pursuant to Act 535 of 2015 and Act 603 of 2017:

The enforcement of Act 603 was preliminarily enjoined by order of the Eastern District of Arkansas on February 28, 2017. The Court found that Act 603 was likely to be found unconstitutionally vague. This order has been appealed. However, only until such

time and only if the February 28, 2017, order is reversed would Act 603 go into effect. Of course, the enforcement of any ADH rules and regulations implementing Act 603 is contingent on the federal court's decision, and no rule or regulation can go into effect absent a court order upholding its constitutionality.

Bettina Brownstein, as cooperating attorney for the ACLU of Arkansas, Susan Talcott Camp and Ruth Harlow, of the American Civil Liberties Union Foundation, and Hillary Schneller, from the Center for Reproductive Rights, all serving as attorneys for Little Rock Planning Services, sent a November 13, 2017, letter submitting comments in response to the Notice of Public Hearing. The comments to the 2017 proposed rules for abortion facilities regarding tissue disposal stated the following:

These proposed changes, as summarized in the Notice, alter a definition, "add[] requirements for proper disposition of dead fetuses and fetal remains, and specif[y] circumstances under which the requirements are inapplicable." The Notice acknowledges that it relies on Act 603 of 2017 (referred to herein as the "Tissue Disposal Mandate") as purposed authority for these changes.

Our comments raise three objections in opposition to the noticed rulemaking. First, no public hearing, public comment process, or other regulatory action, should be occurring at this time, because the Tissue Disposal Mandate has been enjoined. The Department of Health's proposed rule and solicitation of input only cause confusion for abortion facilities, their physicians and their patients, at a time when the law and rules that pre-date the Tissue Disposal Mandate continue to govern. Second, even if the Department could proceed with a rules change, the proposal—like the Tissue Disposal Mandate on which it is based—would impose unconstitutional burdens on women, is inconsistent with other legal obligations of abortion facilities, and is unworkable. Third, to the extent that the Department may wish to clarify the application of any of its rules to medication abortions, versus surgical abortions, it must do so separate and apart from any reliance on the enjoined Tissue Disposal Mandate. The currently-proposed Subsection 6(O)(1), which attempts to differentiate medical from surgical procedures and waive tissue disposal requirements from medication abortions, shares the same flaws as the larger proposed Section 6(O).

1. State Action to Enforce the Tissue Disposal Mandate is Barred By a Preliminary Injunction

As you know, the United States District Court for the Eastern district of Arkansas in *Hopkins v. Jegley*, Case No. 4:17-cv-00404-KGB, has found Dr. Hopkins likely to succeed in striking down the Tissue Disposal Mandate as unconstitutional. That Court found that the Mandate likely imposes an unconstitutional undue burden on Arkansas abortion patients and is impermissibly vague. The Court entered a preliminary injunction enjoining enforcement of any of the Tissue Disposal Mandate's requirements on July 28, 2017. The Court ordered the direct defendant in the litigation, including the Prosecuting Attorney for Pulaski County and all members of the Arkansas State Medical Board, "to notify immediately all state officials responsible for enforcing [the Tissue Disposal Mandate] about the existence and requirements of the preliminary injunction," which remains in force today and prohibits enforcement of the Mandate. An appeal has been filed, and it will likely be years before the *Hopkins v. Jegley* litigation is finally resolved.

In light of the preliminary injunction, the Tissue Disposal Mandate, including as it sought to amend Ark. Code Ann. §§20-17-801 and -802, currently has no regulatory force or effect. The prior version of Sections 801 and 802 continue to govern the operation of abortion facilities and you Department's oversight of them. In particular, the pre-existing Subsections 801(a)(1)(A), 801(a)(3), and 802 (a), as provided in Act 535 of 2015, specify that physicians and facilities disposing of tissue after an abortion "shall ensure that the fetal remains and all parts are disposed of in a fashion similar to that in which other [human] tissue is disposed and in a respectful and proper manner," including by directly releasing the human tissue for incineration, cremation or other specified methods of tissue disposal.

It was only with the Tissue Disposal mandate enacted in 2017 that Arkansas attempted to require that tissue from an abortion be "disposed of in accordance with the provisions of Ark. Code Ann. §20-17-102[,]" the Final Disposition Rights Act ("FDRA"). The Department's proposed new Part O in Section 6 of the Rules and Regulations for Abortion Facilities attempts to impose such a requirement of ensuring compliance with the FDRA, but doing so now, by regulation, is contrary to the currently-governing version of Sections 801 and 802. Those statutes govern how facilities and

physicians who provide abortions are to dispose of embryonic and fetal tissue (with patients having 48 hours in some instances to direct otherwise), and apply the general standards quoted in the previous paragraph. The FDRA, by contrast, describes an elaborate system of determining control over one's own eventual remains or over the dead bodies of next of kin, and is directed at funeral homes and crematoria, not health care providers.

Of course, a regulation cannot amend a statute by rulemaking, nor can a regulation specify requirements that are contrary to statute. *See Yamaha Motor Corp., U.S.A. v. Richard's Honda Yamaha*, 344 Ark. 44, 56, 38 S.W.3d 356, 363 (2001) ("an administrative regulation cannot be contrary to statute"); *State ex rel. Atty. Gen. v. Burnett*, 200 Ark. 655, 140 S.W.2d 673, 675 (1940) (striking as void a rule that attempted to amend the governing statute). The proposed new Section 6(O) should be withdrawn and considered no further, because there is no statutory authority for it. It contradicts the currently governing law in Section 801 and 802.[1]

2. Proposed Section 6(O) Is Not Only Contrary to Current Governing Law, But Suffers from the Same Defects as the Enjoined Mandate

As exhaustively shown in the *Hopkins v. Jegley* litigation, it is impossible for abortion physicians or facilities, in the context of that care, to ensure compliance with the FDRA and its rules for control over disposition of dead bodies. *See* 2017 WL 3220445 at *56-*68. For example, a woman's decision about whether to proceed with an abortion or continue her pregnancy is constitutionally protected as her own yet the FDRA introduces additional decision-makers into her abortion care, such as her sexual partner, or, if she and her sexual partner are minors, both her own parents and his parents. Attempting to comply with the FDRA would cause abortion facilities and their staffs not only to

[1] To the extent that the Department wishes to clarify the regulatory definition of "dead fetus" in Part F of Section 3 ("Definitions'), to become a definition of both "dead fetus and fetal remains," the Department has the statutory authority to do that under the currently governing versions of Sections 801 and 802, which came from Act 535 of 2015. Act 535 is also referenced in the Notice of Public Hearing for November 13, 2017. Such amendment of that definition, however, which tracks Section 801(b)(2)(A) and reflects the use of the phrase "fetal remains" elsewhere in Sections 801 and 802, will not affect how tissue disposal currently occurs.

intrude upon their patient's autonomy, but also to breach physician-patient confidentiality. The FDRA, as another example, also includes cost-sharing and dispute-resolution mechanisms over which a physician or facility has no control, and that they cannot police to ensure compliance. Moreover, the FDRA was enacted to govern much different circumstances, and is repeatedly vague or inapposite as applied to physicians and health care facilities. As the District Court found, it fails to explain to either providers or enforcement authorities what exactly is required or forbidden. 2017 WL 3220445 at *67.

Proposed Section 6(O) has all the same failings, because it states only that, "Each facility shall ensure that each dead fetus or fetal remains are disposed of in accordance with the provisions of Ark. Code Ann. §20-17-102" – the FDRA – but adds no clarity or explanation as to how that might conceivably occur. The proposed regulation is therefore itself unconstitutionally vague, and threatens to impose the same undue burdens as the Tissue Disposal Mandate if it were ever allowed to become final and effective. The Department should, instead, withdraw the proposed regulation.

3. Subsection (1) Also Rests on Flawed Authority; It Confuses Further with "Human Remains"

Subsection 6(O)(1) attempts to carve out medication abortions from the over-arching requirement of Section 6(O), and thus is attempting to limit the Departments' regulation and oversight of tissue disposal. But that sub-part is part of a larger regulatory section that conflicts with the Constitution and is without current statutory authority. See supra Points 1 & 2. In addition, the Department does not have sole regulatory and enforcement authority with regard to the requirements of the Tissue Disposal Mandate, should they ever take effect. Thus, the Department cannot, without a court's intervention or the participation of all other enforcement authorities, unilaterally adopt a limiting construction of the Mandate.

The subsection also adds to the confusion created by the proposed regulations, because it references "human remains" when the definition in the proposed regulatory changes uses the terms "dead fetus or fetal remains[.]" That definition encompasses either embryonic or fetal tissue, and under the current versions of the statutory Sections 801 and 802, such tissue also is included in the definition of "human tissue." Subsection 6 (O)(1)'s reference to "human remains," however, does not track any aspect of the

currently-governing statutes that relate to tissue disposal after an abortion, and instead is a phrase used at time in the FDRA to reference an individual's body after death. Even this exclusion from Section 6(O)'s requirements, in light of its confusing content and lack of any proper statutory authority, cannot stand alone and should be abandoned.

If the Department sought to draft a new regulation specifying that its oversight of abortion facilities' proper disposition of embryonic and fetal tissue does not extend to tissue expelled or evacuated after a patient leaves the facility, as is the case in medication abortion, the Department could do so under the current governing statutes. The limitations in Section 801, for example, do not apply unless a physician or facility has acquired possession of the tissue, which would not occur when tissue passes outside the facility. Section 802's requirement is simply that "tissue be disposed of in a fashion similar to that in which other tissue is disposed," and that would encompass tissue, for example, passed through miscarriage at home and disposed there; the "same fashion" of disposal is permitted for tissue from a medication abortion. Thus, the objective of Subsection 6(O)(1) can be accomplished, but not pursuant to that subsection as proposed.

RESPONSE: The Department has no plans to enforce the controverted provisions until the matter is resolved.

The proposed effective date for the rule is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Department of Health has the authority to make any and all necessary and reasonable rules and regulations of a general nature for the protection of the public health and safety. *See* Ark. Code Ann. §20-7-109(a)(1)(A).

The purpose of this proposed rule is to implement changes resulting from Act 603 of 2017, sponsored by Representative Kim Hammer, which requires "all dead fetuses be disposed of in accordance with the Arkansas Final Disposition Rights Act." In addition to adding the requirements of Act 603, the Department states that the purpose is to clarify that abortion facilities are not responsible for the disposition of dead fetuses and fetal tissue when the evacuation occurs outside the presence of the inducing

physician or away from the facility in which the physician administered the inducing medications. This proposed rule change also amends the current rules to include the definition of "dead fetus [or fetal tissue]" as defined by Ark. Code Ann. §20-17-801(b)(2)(A).

9. <u>DEPARTMENT OF HEALTH, CENTER FOR HEALTH PROTECTION, PHARMACY SERVICES</u> (Robert Brech)

a. <u>SUBJECT</u>: List of Controlled Substances

<u>DESCRIPTION</u>: The proposed amendments update the List of Controlled Substances to include these drugs.

1. 25B-NBOMe.2-(4-bromo-2,5-dimethoxyphenyl)-N-(2-ethoxybenzyl)ethanamine. The DEA has placed this hallucinogenic substance into Schedule 1 because it has no recognized medical use. To follow DEA scheduling, this drug would be included as Schedule 1. Page 5, (46).

2. AB-FUBINICA. N-(1-amino-3-methyl-1-oxobutan-2-yl)-1-(4-fluorobenzyl)-1H-indazole- 3-carboxamide. The DEA has scheduled this synthetic cannabinoid because it has no recognized medical use. This drug would be included as Schedule VI. Page 19, I, (ix).

3. ADB-PINACA. N-(1-amino-3,3-dimethyl-1-oxobutan-2-yl)-1-pentyl-1H-indazole-3- carboxamide. The DEA has scheduled this synthetic cannabinoid because it has no recognized medical use. This drug would be included as Schedule VI. Page 19, I, (x).

4. The DEA has scheduled the following synthetic cathinones as Schedule 1 because they have no recognized medical use. These drugs will be included as Schedule I. Page 6, 11b, 9-16.

- 4-methyl-N-ethylcathinone (4-MEC)
- 4-methyl-alpha-pyrrolidinopropiophenone (4-MePPP)
- 2-(methylamino)-1-phenylpentan-1-one (Pentedrone)
- 1-(1,3-benzodioxol-5-yl)-2-(methylamino) pentan-1-one (Pentylone, MDBP)
- 4-fluoro-N-methylcathinone (4-FMC,Flephedrone)
- 3-fluoro-N-methylcathinone (3-FMC)

- 1-(naphthalen-2-yl)-2-(pyrrolidin-1-yl) pentan-1-one (Naphyrone)
- Alpha-pyrrolidinobutiophenone ([Alpha]-PBP)

5. 5-Flouro-AMB. N-[[1-(5-fluoropentyl)-1H-indazol-3-yl]carbonyl]-L-valine, methyl ester. Page 20, (K) (xvi). Felisia Lackey, Chief Forensic Chemist-Drug Section, Arkansas State Crime Laboratory, requested that this synthetic cannabinoid with no recognized medical use be included into Schedule VI. Page 20, (K), xvi.

6. MMB-CHMICA. Methyl (1-(cyclohexylmethyl)-1H-indole-3-carbonyl)-L-valinate. Page 20, (K) (xvii). Felisia Lackey, Chief Forensic Chemist-Drug Section, Arkansas State Crime Laboratory, requested that this synthetic cannabinoid with no recognized medical use be included into Schedule VI. Page 20, (K), xvii.

7. To follow Act 440 of 2017, language is added on page 21 (c) (1) to consider the designation, rescheduling, or de scheduling of a marijuana derived substance. This will allow the scheduling if FDA approves cannabidiol and other substances to be prescribed to treat medical conditions. Page 21, (c)(1).

PUBLIC COMMENT: A public hearing was held on December 5, 2017, and the public comment period expired on the same date. No public comments were submitted to the Department regarding the proposed rule.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: A "controlled substance" is a drug, substance, or immediate precursor in Schedules I through VI. *See* Ark. Code Ann. §5-64-101(4) (Repl. 2016). The Director of the Department of Health may "add a substance to or delete or reschedule any substance enumerated in a schedule pursuant to the procedures of the Arkansas Administrative Procedure Act[.]" *See* Ark. Code Ann. §5-64-201(a)(1)(A)(i) (Supp. 2017). If any substance is designated as a controlled substance under federal law and notice of the designation is given to the Director, the Director

shall similarly control the substance unless the Director objects to the inclusion. *See* Ark. Code Ann. §5-64-201(d)(1) (Supp. 2017).

Additional authority is provided by Act 440 of 2017, sponsored by Representative Justin Boyd, to allow for potential future recognition of a legal marijuana-derived Schedule VI controlled substance. If notice has been given to the Director that the United States Food and Drug Administration has designated, rescheduled, or de-scheduled a marijuana-derived substance as a prescription medication, the Director shall consider the designation, rescheduling, or descheduling of the marijuana-derived substance. *See* Ark Code Ann. §5-64-201(d)(4) (Supp. 2017).

10. DEPARTMENT OF HUMAN SERVICES, AGING AND ADULT SERVICES (Craig Cloud)

a. SUBJECT: 502: Senior Community Service Employment Program (SCSEP)

DESCRIPTION: Division of Aging and Adult Services (DAAS) policy at section 502 is being amended to comply with the Older Americans Act Title V § 518(a)(3). Individuals are only eligible to receive SCSEP services for a total of 48 months in their lifetime. This change eliminates any extensions to this timeframe to align policy with the DAAS SCSEP goal of helping each participant transition from the program to unsubsidized employment as soon as possible.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on December 19, 2017. The Department received no comments.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: DHS is authorized to "make rules and regulations and take actions as are necessary or desirable to carry out the provisions of this chapter [Public Assistance] and that are not inconsistent therewith." Arkansas Code Annotated §20-76-201 (12). DHS and its various divisions are authorized to promulgate rules as necessary to conform to federal statutes, rules,

and regulations. *See* Ark. Code Ann. §25-10-129(a)(2)(A) and (b) (Supp. 2017).

The Division of Aging, Adult, [and Behavioral Health] Services is the programmatic division within DHS, *see* Ark. Code Ann. §25-10-102 (Supp. 2017), that serves as the state unit on aging that administers the federal programs created by the federal Older Americans Act, which was reauthorized in 2016. The Senior Community Service Employment Program, under Title V §518(a)(3) of the Older Americans Act, allows for participation for a period of up to 48 months in the aggregate (whether or not consecutive) under its definition of "eligible individual." *See* 42 U.S.C. 3056p.

The Senior Community Service Employment Program (SCSEP) is the federal program providing subsidized community service and employment training for low-income, unemployed persons age 55 and over. To implement this program, the Division of Aging, Adult, [and Behavioral Health] Services is authorized to enter into agreements and make program grants, and to make, issue, and amend rules and policies as necessary. *See* Ark. Code Ann. §20-80-204 (Supp. 2017).

11. DEPARTMENT OF HUMAN SERVICES, CHILDREN AND FAMILY SERVICES (Christin Harper)

a. SUBJECT: Case Opening

DESCRIPTION: A summary follows:

The purpose of this regular promulgation is to:

- Revise the Division's procedure concerning Protection Planning, specifically to add the requirement for Division staff to reassess protection plans at 30 days to determine if a safety factor continues to exist and subsequently follow up with a petition for dependency-neglect if a safety factor continues. This revised rule will ensure State compliance with Act 963 of the 91st General Assembly, Regular Session.

- Clarify the Division's procedure concerning service provision across multiple counties, specifically to ensure consistent

provision of services to families being served by more than one DCFS County office.

- Update the Division's Safe Haven Procedure, specifically to ensure this procedure is consistent with the language in the newly added POLICY III-G: Services Case Opening for Infants if Abortion Results in Live Birth.

- Create Division policy to ensure service provision for infants if an abortion attempt results in live birth. This new rule will ensure State compliance with Act 392 of the 91st General Assembly, Regular Session.

- Create Division policy to ensure incarcerated parents are identified and included in case planning, monitoring of services, and are offered visitation as appropriate and in the best interest of the children involved. This new rule will ensure State compliance with Act 993 of the 91st General Assembly, Regular Session.

- Create Division policy to ensure consistent provision of services to families when the family includes an active duty military service member. This new rule will ensure State compliance with Act 528 of the 91st General Assembly, Regular Session.

Final Filing Summary of Changes

Revised Rule

- **PROCEDURE III-A1: Protective/Supportive Services Case Opening**
  - Updated the Division's procedure to add the requirement for Division staff to reassess protection plans at 30 days to determine if a safety factor continues to exist and subsequently follow up with a petition for dependency-neglect if a safety factor continues.

- **PROCEDURE III-A2: Out-of-Home Placement Services Case Opening**
  - Update the Division's procedure to add the requirement for Division staff to reassess protection plans at 30 days.

- **PROCEDURE III-A4: Out-of-Home Placement Outside the Initiating County**

- Ensures consistent provision of services to families being served by more than one DCFS County office.

- **PROCDURE VIII-F2: Voluntary Delivery of an Infant Under the Provisions of the Safe Haven Act**
  - Ensures the language in the Division's Safe Haven Procedure is consistent with the language in the newly added POLICY III-G: Services Case Opening for Infants if Abortion Results in Live Birth.

- **POLICY III-G: Services Case Opening for Infants if Abortion Results in Live Birth**
  - Ensures service provision for infants if an abortion attempt results in live birth.

- **POLICY III-H: Services Case Opening for Incarcerated Parents**
  - Ensures incarcerated parents are identified and included in case planning, monitoring of services and are offered visitation as appropriate and in the best interest of the children involved.

- **POLICY III-I: Coordination of Services for Active Duty Service Members**
  - Ensures consistent provision of services to families when the family includes an active duty military service member.

PUBLIC COMMENT: The Department did not hold a public hearing. The public comment period expired on December 13, 2017. The Department did not receive any comments.

The proposed effective date for the changes to the rule is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Generally, the Department of Human Services is authorized to "make rules and regulations and take actions as are necessary or desirable to carry out the provisions of this chapter [Public Assistance] and that are not

inconsistent therewith." Arkansas Code Annotated § 20-76-201 (12). The Department's Division of Children and Family Services (DCFS) has the power to promulgate rules necessary to administer the laws that address protecting children from abuse and neglect and providing services and support to promote the safety, permanency, and well-being of Arkansas children and families. *See* Ark. Code Ann. §§9-28-101 and 103 (Repl. 2015).

Arkansas law requires DCFS to utilize the Missing Persons Information Clearinghouse after delivery of an infant under the Safe Haven Act. *See* Ark. Code Ann. §9-34-204. (Repl. 2015). Pursuant to Act 392 of 2017, sponsored by Senator Gary Stubblefield, any infant who is born alive as a result of an abortion shall be a ward of the state if before the abortion, the pregnant woman, or if married, the pregnant woman and her spouse, have stated in writing that they do not wish to keep the infant. *See* Ark. Code Ann. §20-16-604(h) (Supp. 2017).

Moreover, Act 528 of 2017, sponsored by Representative Charlene Fite, specified that the Department may promulgate rules and enter into an MOU with the U.S. Department of Defense to ensure that the appropriate military organization is notified of any member's alleged child maltreatment. *See* Ark. Code Ann. §12-18-508(f) (Supp. 2017). Act 963 of 2017, sponsored by Representative David Meeks, provided that the Department must reassess within thirty (30) days the health and safety of a child subject to a dependency-neglect protection plan that allowed a child to remain in his or her place of residence. *See* Ark. Code Ann. §12-18-1001(d) (Supp. 2017). Additional authority is found in Act 993 of 2017, sponsored by Representative Vivian Flowers, which added to the definition of "reasonable efforts" to include the Department's responsibility to involve an incarcerated parent, under appropriate circumstances, in efforts to preserve a family before placing a child in foster care. *See* Ark. Code Ann. §9-27-303(48) (Supp. 2017).

b. <u>SUBJECT</u>: Volunteer and Relative Support and Involvement

<u>DESCRIPTION</u>: A summary follows:

The purpose of this regular promulgation is to revise Division policy regarding:

- Division Volunteers. This revised rule will create new procedure to ensure State compliance with ACT 1111 of the 91st General Assembly Regular Session.

- The presumption of fitness of non-custodial parents. This revised rule will ensure State compliance with ACT 701 of the 91st General Assembly Regular Session.

Final Filing Summary of Changes

New Procedure

- **Policy I-D: Division Volunteers and Related Procedures:**
  - Updated the DCFS volunteer policy to clarify roles and responsibilities regarding processing and approving volunteers.
  - Added relative and fictive kin volunteers.
  - Addressed non-custodial parental visitation and contact.

Revised Rule

- **POLICY VI-C: Maintaining Family Ties in Out-of-Home Placements**:
  - Updated the Division's procedure to add the requirement for Division staff to accept and process requests from relatives and fictive kin to become Division volunteers on a case specific basis and if in the best interest of the child.
  - Provided clarity surrounding visitation and contact between foster children and non-custodial parents presumed fit.

PUBLIC COMMENT: The Department did not hold a public hearing. The public comment period expired on December 13, 2017. The Department did not receive any comments.

The proposed effective date for the changes to the rule is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Generally, the Department of Human Services is authorized to "make rules and regulations and take actions as are necessary or desirable to carry out the provisions of this chapter [Public Assistance] and that are not inconsistent therewith." Arkansas Code Annotated §20-76-201 (12). The Department's Division of Children and Family Services (DCFS) has the power to promulgate rules necessary to administer the laws that address protecting children from abuse and neglect

and providing services and support to promote the safety, permanency, and well-being of Arkansas children and families. *See* Ark. Code Ann. §§9-28-101 and 103 (Repl. 2015).

Specific changes adding "relative or fictive kin volunteers" and applications and an approval process were made to the clarify roles and responsibilities as volunteer transporters for families pursuant to Senator Alan Clark's Act 1111 of 2017. In response to Act 701 of 2017, sponsored by Senator Clark, the policy on maintaining family ties in out-of-home was amended to clarify visitation and recognize the presumption that non-custodial parents are fit for purposes of contact and visitation with foster children in the absence of evidence to the contrary.

c. <u>SUBJECT</u>: Foster Parent Access to Records and Case Proceedings

<u>DESCRIPTION</u>: A summary follows:

The purpose of this regular promulgation is to revise Division policy regarding:

- Foster parent access to records, specifically:

  - To clarify that information about a child in care may be provided to the foster parent whose home serves as placement for the child -- even though it may also contain information about the child's biological parents and/or siblings not placed in the foster home.
  - To ensure the foster parent uses such information to help the child better understand the progression of his or her family's case and does not re-disclose information found in such records. This revised rule will ensure the State complies with Act 329 of the 91st General Assembly, Regular Session.

- Foster parents becoming a party to a foster care case while reunification remains the goal of the case. This revised rule will ensure the State complies with Act 701 of the 91st General Assembly, Regular Session.

Final Filing Summary of Changes

- **POLICY I-F: Confidentiality**

- Clarified that foster parents may receive (but not re-disclose) reports, case histories, and other written documents related to a foster care case of a child placed in the foster home even if such information contains information regarding the child's parents and/or siblings not placed in that foster home.
- Updated the form number for Department Release of Information Form.

- **POLICY VII-H: Providing Information to Foster Parents**
  - Clarified that foster parents are included in case planning and hearings as appropriate and in the best interest of the children involved and provided an entire copy of the case plan for children in their home.
  - Clarified that foster parents are not to be made parties to a foster care case while reunification remains the court ordered goal of the case.

PUBLIC COMMENT: The Department did not hold a public hearing. The public comment period expired on December 13, 2017. The Department did not receive any comments.

The proposed effective date for the changes to the rule is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Generally, the Department of Human Services is authorized to "make rules and regulations and take actions as are necessary or desirable to carry out the provisions of this chapter [Public Assistance] and that are not inconsistent therewith." Arkansas Code Annotated §20-76-201 (12). The Department's Division of Children and Family Services (DCFS) has the power to promulgate rules necessary to administer the laws that address protecting children from abuse and neglect and providing services and support to promote the safety, permanency, and well-being of Arkansas children and families. *See* Ark. Code Ann. §§9-28-101 and 103 (Repl. 2015).

The confidentiality rules were updated to reflect Act 329 of 2017, sponsored by Representative Charlene Fite, that allows a foster parent to receive, but not disclose, information about a child's siblings and family. *See* Ark. Code Ann. §9-28-407 (h) (Supp. 2017). Further authority is provided, pursuant to Act 701 of 2017,

sponsored by Senator Alan Clark, in circumstances when reunification remains the goal, foster parents are included in case planning as appropriate for the best interest of the child but are not made parties to the case *See* Ark. Code Ann. §9-27-325 (Supp. 2017).

d. **SUBJECT: Resumption of Services Post-Termination and Reinstatement of Parental Rights**

DESCRIPTION: A summary follows:

The purpose of this regular promulgation is to create Division policy and procedure regarding resumption of services to parents whose parental rights have been previously terminated, but who have had a material change in circumstance and whose children remain in foster care. Based on the resumption of services period, a reinstatement of parental rights may then be considered, as appropriate. This new rule will ensure the State is in compliance with Act 994 of the 91st General Assembly, Regular Session.

Final Filing Summary of Changes

New Rule

- **POLICY VIII-F: Resumption of Services Post-Termination and Reinstatement of Parental Rights and related procedures**
Created Division policy and procedure to provide guidance regarding determining appropriate cases for resumption of services and how to proceed if the court determines that, following resumption of services, a reinstatement of parental rights is in the best interest of the child.

PUBLIC COMMENT: The Department did not hold a public hearing. The public comment period expired on December 13, 2017. The Department did not receive any comments.

The proposed effective date for the changes to the rule is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Generally, the Department of Human Services is authorized to "make rules and regulations and

take actions as are necessary or desirable to carry out the provisions of this chapter [Public Assistance] and that are not inconsistent therewith." Arkansas Code Annotated §20-76-201 (12). The Department's Division of Children and Family Services (DCFS) has the power to promulgate rules necessary to administer the laws that address protecting children from abuse and neglect and providing services and support to promote the safety, permanency, and well-being of Arkansas children and families. *See* Ark. Code Ann. §§9-28-101 and 103 (Repl. 2015).

The proposed new rules provide guidance to resume services to parents of children in foster care whose rights have been previously terminated under certain circumstances pursuant to Act 994 of 2017, sponsored by Representative David Meeks.

12. <u>DEPARTMENT OF HUMAN SERVICES, COUNTY OPERATIONS</u> (Mary Franklin)

a. <u>SUBJECT</u>: Medical Services Policy Manual Sections A-210, B-500, D-372 and D-373

<u>DESCRIPTION</u>: The changes follow:

A-210 – If eligible, retroactive coverage for the Adult Expansion Group may start 30 days prior to the date of application.

B-500 – If eligible, retroactive coverage for Emergency Medicaid may start 30 days prior to the date of application. Removed example (e.g. the date of admission through the date of discharge from the hospital).

D-372 – If eligible, retroactive coverage for incarcerated individuals who are eligible in the adult expansion group may start 30 days prior to the date of application.

D-373 – Changed Health Care Independence Program to Adult Expansion Group. Removed guidance that incarcerated individuals cases should be closed due to incarceration status. Incarcerated individuals will now remain open in with no Medicaid coverage, until coverage is requested for dates of overnight medical treatment.
Retroactive coverage for the Adult Expansion Group is date specific.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on February 9, 2018. The Department provided the following comment from Tom Masseau, Executive Director of Disability Rights Arkansas, and its response:

Disability Rights Arkansas, Inc. (DRA) is the federally authorized and funded nonprofit organization serving as the Protection & Advocacy System for individuals with disabilities in Arkansas. DRA is authorized to advocate for and protect human, civil, and legal rights of all Arkansas with disabilities consistent with federal and state law. I am writing on behalf of DRA to submit this letter with our comments on the proposed change to retroactive Medicaid eligibility from ninety (90) days prior to date of application to thirty (30) days prior. DRA is not in favor of this change.

A reduction in the retroactive eligibility period accomplishes nothing but increasing the financial burden on those who are already struggling with expensive and unforeseen medical emergencies. Additionally, it increases the financial burden on healthcare providers and the state by increasing the amount of uncompensated medical care costs in the state. Healthcare costs are already a significant driver of debt and bankruptcy, both in this state and nationwide, and it makes little sense to roll back protections meant to protect disadvantaged Arkansans.

There are ways to mitigate the potential damage caused by this change, such as an effective presumptive eligibility system. In 2016, when Arkansas last sought approval to eliminate retroactive eligibility, one aspect of the conditional approval was the implementation of a presumptive eligibility system. Presumptive eligibility would allow the state to enable qualified entities to make an immediate temporary eligibility decision, which would greatly streamline the determination process. Currently, presumptive eligibility is only used for pregnant women in Arkansas.

Another problem with the reduction of retroactive eligibility is that it is yet another change to the Medicaid system in Arkansas. Since the creation of Arkansas Works in 2014, there have been significant changes to the program every year. The elimination of retroactive eligibility is only one of several pending waiver amendments for the upcoming year. The confusion caused by keeping this program in permanent flux is bad not only for

consumers, but for the providers, and will lead to breaks in coverage and increased administrative costs.

While DRA understands that the state is concerned with making the best use of their Medicaid dollars, we feel that there are better ways to accomplish this goal than shortening the retroactive eligibility period. DRA appreciates the opportunity to provide these comments, and we hope that the State will carefully consider our position and recommendations.

The Department's Response:
Thank you for your comment regarding the proposed Medicaid policy revisions concerning retroactive coverage for the Arkansas Works eligibility group. Act 1 of the 90th General Assembly, Second Extraordinary Session of 2016 amended and added language to Title 23 of the Arkansas Code requiring that Arkansas request this waiver of retroactive coverage for the Arkansas Works population.

The Department stated that it received CMS approval in March of 2018. The proposed effective date is May 1, 2018.

FINANCIAL IMPACT: The changes will result in a savings of $6,945,192 in the current fiscal year ($6,528,480 in federal funds and $416,712 in general revenue) and a savings of $20,835,576 in the next fiscal year ($19,481,264 in federal funds and $1,354,312 in general revenue).

LEGAL AUTHORIZATION: The Department of Human Services is authorized to "make rules and regulations and take actions as are necessary or desirable to carry out the provisions of this chapter [Public Assistance] and that are not inconsistent therewith." Arkansas Code Annotated §20-76-201 (12). Arkansas Code §20-77-107 specifically authorizes the department to "establish and maintain an indigent medical care program."

The Arkansas Works Program, created by Act 1 of the Second Extraordinary Session of 2016, empowered the Department to seek a waiver to eliminate retroactive eligibility for an eligible individual. *See* Ark. Code Ann. §23-61-1004 (a)(1)(E) (Supp. 2017). The Department is authorized to promulgate and administer rules to implement the Arkansas Works Program. *See* Ark. Code Ann. §23-61-1004 (c) (Supp. 2017).

13. DEPARTMENT OF HUMAN SERVICES, MEDICAL SERVICES (Tami Harlan)

a. SUBJECT: Chiropractic 1-17, Section I-4-17 and State Plan Amendment 2017-012

DESCRIPTION: In accordance with Act 1092 of 2017, effective for dates of service on or after January 1, 2018, a primary care physician referral is no longer necessary for Chiropractic Services for Arkansas Medicaid beneficiaries. This will not affect current benefit limits or private insurance requirements.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on February 8, 2018. The Department received no comments.

The Department stated that it received CMS approval in March of 2018. The proposed effective date is May 1, 2018.

FINANCIAL IMPACT: The financial impact for the current fiscal year is $14,212 ($10,031 in federal funds and $4,181 in general revenue) and $56,849 for the next fiscal year ($40,124 in federal funds and $16,725 in general revenue). A small increase is anticipated in state funds in utilization with elimination of the PCP referral.

LEGAL AUTHORIZATION: The Department of Human Services is authorized to "make rules and regulations and take actions as are necessary or desirable to carry out the provisions of this chapter [Public Assistance] and that are not inconsistent therewith." Arkansas Code Annotated §20-76-201 (12). Arkansas Code §20-77-107 specifically authorizes the department to "establish and maintain an indigent medical care program."

Representative Jim Dotson's Act 1092 of 2017 directed the Department to adopt rules to allow a Medicaid recipient direct access to a chiropractic physician. The rules must allow a Medicaid recipient to receive diagnosis and treatment from a chiropractic physician without a referral from a primary care physician. The rules must provide a process for reporting diagnosis, treatment, costs of services, and cost-savings benefits and specify that the chiropractic physician shall receive the same reimbursement as if the Medicaid recipient had been referred by a

primary care physician. *See* Ark. Code Ann. §20-77-132 (b) (Supp. 2017).

Federal law requires states to provide certain mandatory benefits and allows states the choice of covering other optional benefits. Under federal law, chiropractic services are optional benefits that states may cover. Section 273 of the 1972 Social Security Act Amendments expanded the Medicare definition of "physician" to include chiropractors. Expansion of this definition allowed chiropractors to participate in the Medicare and Medicaid programs.

14. <u>DEPARTMENT OF HUMAN SERVICES, PROVIDER SERVICES AND QUALITY ASSURANCE</u> (Craig Cloud and Mark White)

a. <u>SUBJECT</u>: Criminal Records Check (DMS-736) Update; OLTC Rules and Regulations for Conducting Criminal Record Checks for Employees of Long Term Care Facilities §§303, 304, 305 and 306

<u>DESCRIPTION</u>: The Office of Long Term Care underwent an audit performed by the Arkansas State Police (ASP) on behalf of the FBI to determine compliance with FBI requirements for performing national criminal background checks for long-term care employees and applicants for employment. The amendments are to correct deficiencies identified in the audit and that, if uncorrected, would bar federal background checks. Those changes include:

1. Having applications for background checks routed through the Office of Long Term Care rather than being submitted directly to the ASP.
2. Requiring the Office of Long Term Care to verify the identity of the applicant or employee prior to releasing the determination resulting from the background check.
3. No longer listing the actual convictions of the employee or the applicant.
4. Having all state background checks performed on-line with the ASP to allow current Office of Long Term Care staff to meet new federal requirements without the necessity of additional staff.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on February 9, 2018. The Department received no public comments.

The proposed effective date is May 1, 2018.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Department of Human Services is authorized to "make rules and regulations and take actions as are necessary or desirable to carry out the provisions of this chapter [Public Assistance] and that are not inconsistent therewith." Arkansas Code Annotated §20-76-201 (12). The authority for the revision to update the criminal records check policy is found in Chapter 38 of Title 20 of the Arkansas Code, which provides the procedures for the Department's Criminal Background Checks applicable to service providers, operators, employees or potential employees of a service provider. *See* Ark. Code Ann. §20-38-101, et seq. (Supp. 2017).

The Office of Long-Term Care is designated as the unit of state government primarily responsible for the inspection, regulation, and licensure of long-term care facilities and the regulation and licensure of long-term care facility administrators, and may promulgate rules and regulations as it shall deem necessary or desirable to properly and efficiently carry out its duties. *See* Ark. Code Ann. §20-10-203 (Repl. 2014). The Office is required to promulgate appropriate rules and regulations prescribing minimum staffing requirements for all long-term care facilities in the state. *See* Ark. Code Ann. §20-10-211 (Repl. 2014).

15. ARKANSAS JUDICIAL RETIREMENT SYSTEM (Gail Stone and Jessica Middleton)

a. SUBJECT: Declaratory Order

DESCRIPTION: Regulation 22 permits any retirant or member of the Arkansas Judicial Retirement System (AJRS) to ask questions concerning the applicability of any rule, statute, or other order of the AJRS Board of Directors. The retiree or member must submit a written petition for a declaratory order to the Executive Director of AJRS.

PUBLIC COMMENT: A public hearing was held on January 12, 2018. The public comment period expired that same day. The System received no comments.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 25-15-206, each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory orders as to the applicability of any rule, statute, or order enforced by it.

16. COMMISSION ON LAW ENFORCEMENT STANDARDS AND TRAINING (Jami Cook, Brad King, and Amanda Yarbrough)

a. SUBJECT: CLEST Revision of Regulations and Specifications

DESCRIPTION: The proposed rules change "law enforcement unit" to "law enforcement agency" throughout. Other regulations are being changed so that they cite current law or regulation.

The changes made by Act 497 of 2017 are addressed in the proposed regulations and specifications. The Act provided for the Commission's discretion in granting extensions of time to attend the academy. The Act granted the Director authority to temporarily suspend a law enforcement officer's ability to serve as a law enforcement officer. The Act also incorporated administrative penalties related to violations of Commission rules.

Regulation 1034 is a new regulation designed to clean up and fully outline the decertification process. Many of the regulations in 1034 exist as they existed in prior regulations. It specifies that an officer may request a hearing within 20 days of the date of the notice, deferring to the Administrative Procedures Act for notification procedures. It incorporates the requirement that officers decertified from another state can only serve in this state at the discretion of the Commission. It states that hearings are to be conducted in accordance with the Administrative Procedures Act, and incorporates the subpoena power granted to the Commission in the 2017 session.

Regulation 1005 adds the stipulation that auxiliary, part-time II and specialized officers that have previously been certified as a full-time law enforcement officers and maintained the mandatory training requirements can return to full-time status without additional training. It also changes Full-time and Part-time I to "law enforcement officer."

Regulation 1002 restricts law enforcement officers to one classification within an agency.

Regulation 1001 clarifies that a law enforcement officer is employed by a law enforcement agency, receives a salary, or is an appointed auxiliary.

Regulation 1010 adds the requirement for an officer to get a certificate for classification within 90 days after completing the probationary period. It also provides for the expiration of certification of any law enforcement officer that has not served as a law enforcement officer for three consecutive years.

Regulation 1028 clarifies that the canine certification is voluntary but must meet standards if chosen.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on December 19, 2017. No public comments were submitted to the agency. The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Arkansas Commission on Law Enforcement Standards and Training is authorized to promulgate rules for the administration of Ark. Code Ann. § 12-9-101 *et seq.* *See* Ark. Code Ann. § 12-9-104(1)(A). The commission may establish minimum selection and training standards for admission to employment as a law enforcement officer. *See* Ark. Code Ann. § 12-9-104(3)(A). Additionally, the commission is authorized to impose administrative penalties against a law enforcement agency or governmental entity for violations of commission rules as permitted under § 12-9-120. *See* Ark. Code Ann. § 12-9-104(18). Portions of these rules implement Act 497 of 2017, sponsored by Representative Dwight Tosh, concerning law enforcement officer standards and training.

17. STATE MEDICAL BOARD (Kevin O'Dwyer)

a. SUBJECT: Regulation 24 Governing Physician Assistants

DESCRIPTION: This amendment eliminates the 60 minute rule as follows:

~~A supervising physician must be able to reach the location of where the physician assistant is rendering services to the patients within one hour.~~

This has become outdated.

PUBLIC COMMENT: A public hearing was held on December 7, 2017, and the public comment period expired on that date. No public comments were submitted to the board. The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Arkansas State Medical Board shall administer the provisions of Ark. Code Ann. § 17-105-101 et seq., under such procedures as it considers advisable and may adopt rules that are reasonable and necessary to implement the provisions of this chapter (concerning physician assistants). Ark. Code Ann. § 17-105-118.

18. STATE PLANT BOARD, PESTICIDE DIVISION (Terry Walker)

a. SUBJECT: Regulation No. 7: Arkansas Pesticide Control Act Regulations

DESCRIPTION: This rule will allow the State Plant Board to request additional information/research before a pesticide is registered for use in the State of Arkansas. The rule will allow the introduction of new pesticide technologies while providing protection for farmers who choose not to use the technology.

PUBLIC COMMENT: A public hearing was held on December 12, 2017. The public comment period expired on December 3, 2017. The Board provided the following public comment summary:

One comment was received regarding Regulation # 7. Monsanto submitted a 23 page comment against Regulation # 7. In summary, Monsanto did not believe Regulation # 7 would solve the problems plaguing the Plant Board's regulatory process. The Board discussed Regulation # 7 and reviewed all comments. After deliberation, the Board voted to approve Regulation # 7 as is.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Arkansas State Plant Board ("Board") is authorized, after due notice and a public hearing, to make appropriate regulations where the regulations are necessary for the enforcement and administration of the Arkansas Pesticide Control Act ("Act"), codified at Arkansas Code Annotated §§ 2-16-401 through 2-16-419. *See* Ark. Code Ann. § 2-16-406(c). Unless exempted by Ark. Code Ann. § 2-16-407, each pesticide must have been accepted for registration by the Board, and the registration must be in force at the time it is sold, offered for sale, or distributed in this state. *See* Ark. Code Ann. § 2-16-407(a). In addition to the information statutorily required to be included in the statement filed with the Board by an applicant for registration, the Board may require: (1) the submission of the complete formula of any pesticide, including the active and inert ingredients, when the Board deems it necessary in the administration of the Act; and (2) a full description of the tests made and the results upon which the claims are based on any pesticide not registered pursuant to § 3 of the Federal Insecticide, Fungicide, and Rodenticide Act or any pesticide on which restrictions are being considered. *See* Ark. Code Ann. § 2-16-407(c)–(d). Pursuant to Ark. Code Ann. § 2-16-407(e), the Board may further prescribe other necessary information by regulation.

b. SUBJECT: Arkansas Regulations on Pesticide Classification and Use-Enlist One

DESCRIPTION: The amended Arkansas Regulations on Pesticide – Classification and Use will allow the introduction of a new pesticide technology while still providing a level of protection for the farmers with susceptible crops who do not choose to use the technology. The current regulation allows for the use of the

pesticide Enlist Duo. The proposed regulation would also allow for the use of the stand-alone pesticide Enlist One under the same restrictions as Enlist Duo.

PUBLIC COMMENT: This rule was reviewed and approved by the Executive Subcommittee at its meeting of March 5, 2018, for emergency promulgation. With respect to permanent promulgation, a public hearing was originally scheduled for March 8, 2018, but was cancelled. The public comment period expired on March 4, 2018. The Board received no comments.

Rebecca Miller-Rice, an attorney with the Bureau of Legislative Research, asked the following question:

Was there a reason for the cancellation of the hearing?
RESPONSE: The March 8 meeting was cancelled due to using the Emergency Rule process to get the Enlist One rule into effect quickly rather than have the Special Called Board meeting on the 8th. The meeting on the 8th was specifically to address the Enlist One rule but since we could not get on the calendar for a Rules and Regs Subcommittee meeting until April (which would be too late to allow usage of the product) we opted to use an emergency rule. Once the need for the meeting on the 8th was eliminated and we already have a regular quarterly meeting scheduled for the 27th, we opted to wait and address the Enlist One permanent rule promulgation on the 27th. We started this process last year in sufficient time to get the regular promulgation done but a problem with the label language on the product forced the manufacturer to get it corrected before proceeding.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The State Plant Board shall administer and enforce the Arkansas Pesticide Use and Application Act ("Act"), codified at Arkansas Code Annotated §§ 20-20-201 through 20-20-227, and shall have authority to issue regulations after a public hearing following due notice to all interested persons to carry out the provisions of the Act. *See* Ark. Code Ann. § 20-20-206(a)(1). When the Board finds it necessary to carry out the purpose and intent of the Act, regulations may relate to the time, place, manner, amount, concentration, or other conditions under

which pesticides may be distributed or applied and may restrict or prohibit use of pesticides in designated areas during specified periods of time to prevent unreasonable adverse effects by drift or misapplication to: plants, including forage plants, or adjacent or nearby lands; wildlife in the adjoining or nearby areas; fish and other aquatic life in waters in reasonable proximity to the area to be treated; and humans, animals, or beneficial insects. *See id*. In issuing regulations, the Board shall give consideration to pertinent research findings and recommendations of other agencies of this state, the federal government, or other reliable sources. *See* Ark. Code Ann. § 20-20-206(a)(2).

19. <u>STATE BOARD OF PUBLIC ACCOUNTANCY</u> (James Corley and Mark Ohrenberger)

a. <u>SUBJECT</u>: Rule 1 – Definitions

<u>DESCRIPTION</u>: This rule updates definitions in Rule 1 due to changes made in the definitions in Act 277 of 2017.

<u>PUBLIC COMMENT</u>: A public hearing was held on November 17, 2017. The public comment period expired on November 16, 2017. No public comments were submitted to the agency.

Jessica Sutton, an attorney with the Bureau of Legislative Research, asked the following question: Concerning Rule 1, I noticed that Act 277 of 2017 had stricken the "financial statement" language from the definition of "attest," so it merely reads "services," not "financial statement services." The rule still reads "financial statement services," so I am curious if there is a reason the agency chose not to strike the language? **RESPONSE:** That was a drafting error. Change was made to match the rule with the statute.

The proposed effective date is pending legislative review and approval.

<u>FINANCIAL IMPACT</u>: There is no financial impact.

<u>LEGAL AUTHORIZATION</u>: The State Board of Public Accountancy may adopt rules for the orderly conduct of its affairs and for the administration of the Public Accountancy Act of 1975. *See* Ark. Code Ann. § 17-12-203(a). These rules implement Act

277 of 2017, sponsored by Senator David Wallace, amending definitions concerning the profession of public accountancy.

b. SUBJECT: Rule 302 Client Records – Code of Professional Conduct

DESCRIPTION: Rule 302 of the Board's Code of Professional Conduct involves requirements regarding records of clients of CPAs or CPA firms. This change would clarify that CPA's or CPA firms can only withhold certain records if there is an unpaid balance of fees owed to the CPA if those unpaid fees relate directly to the specific records being requested. For example, if a client requests copies of records related to their 2015 tax return that has been paid for, the CPA or CPA firm cannot withhold the records if there is an unpaid balance related to their 2016 tax return.

PUBLIC COMMENT: A public hearing was held on November 17, 2017. The public comment period expired on November 16, 2017. No public comments were submitted to the agency. The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The State Board of Public Accountancy may adopt rules for the orderly conduct of its affairs and for the administration of the Public Accountancy Act of 1975. *See* Ark. Code Ann. § 17-12-203(a). Additionally, the board may promulgate and amend rules of professional conduct appropriate to establish and maintain a high standard of integrity and dignity in the profession of public accountancy. Ark. Code Ann. § 17-12-203(c)(1).

c. SUBJECT: Rule 13.8 – Retired and Disabled License Status for CPA's

DESCRIPTION: Board Rule 13.8 contains requirements for when CPAs can take retired status, which allows them to not have to pay annual licensing fees or taking continuing education classes while remaining in good standing with the board. This amendment would relax the requirements for being eligible for retired status as well as create a similar status for disabled CPAs.

PUBLIC COMMENT: A public hearing was held on November 17, 2017. The public comment period expired on November 16, 2017. Public comments were as follows:

Don Hollin

COMMENT: Retired and disabled CPAs who are no longer able to work should not have to pay Arkansas membership dues. **RESPONSE:** No fees will be charged to retired or disabled CPAs under this proposed rule change.

Alfred Ferrell

COMMENT: Too restrictive on the retired accountants who want to serve on a corporation board that they are also an investor or school board or other entity. **RESPONSE:** Retired CPAs will be able to serve on boards on a volunteer basis.

Internal – ASBPA Board Attorney

COMMENT: Rule 13.8(c)(4) as currently worded implies that all determinations of employment/activity should be made in the affirmative, regardless of circumstance. **RESPONSE:** Change was made striking "For purposes of making a determination as to whether the individual fits one of these categories, the questions shall be resolved in favor of including the work as "an association with accounting work."

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The State Board of Public Accountancy may adopt rules for the orderly conduct of its affairs and for the administration of the Public Accountancy Act of 1975. *See* Ark. Code Ann. § 17-12-203(a).

d. SUBJECT: Rule 20 – Peer Review

DESCRIPTION: This new rule gives licensees instruction/guidance on how to meet the new peer review requirement as required by Act 278 of 2017. This act requires all CPAs/CPA firms that issue audits, reviews, or agreed upon

procedures reports to enroll in a board approved peer review program by January 2019.

PUBLIC COMMENT: A public hearing was held on November 17, 2017. The public comment period expired on November 16, 2017. Public comments were as follows:

Lance Talkington, CPA

COMMENT: This appears to be a one size fits all approach that will benefit those who do the highest volume and effectively shrink the market in favor of those whose volume can justify the cost of participation. This kind of work is low profit relative to the ever increasing compliance requirements that continue to be put into play. In our case, we do this work as a favor to clients who engage us primarily for other more profitable matters. We will have no choice but to stop providing attest services if something like this passes given the unfavorable cost/benefit relationship that paying for AICPA type peer reviews entails for a firm of our size.

Larger firms who can justify participation will certainly be hoping that smaller firms choose as we do to hand over our clients willingly. I would personally expect more from my peers in terms of thinking something like through in a more thorough manner with consideration to the real business world side of it. The proposal as it stands now in our opinion is a purely academic proposal that ignores real world issues.

RESPONSE: This comment is not responsive to the rule changes being proposed, but the law change that was passed during the 2017 session. Under Ark. Code Ann. § 17-12-508, the Board is mandated to create rules that require licensees who provide attest services to go through peer review.

American Institute of CPAs

COMMENT: Rule 20.1(b) – we suggest removing this because it duplicates Rule 20.3(b). **RESPONSE:** We agree with this suggested change. Change was made.

COMMENT: Rule 20.2 – we suggest removing definitions from the rule. The Board should refer and rely on the definitions that are included in the AICPA Standards on Peer Review. This would eliminate the need to revise rules if definitions were to change.

RESPONSE: We do not agree with this suggested change. We believe it is appropriate for our licensees to have important terms clearly defined within the rule itself in order to avoid confusion. Also under the proposed rule other organizations besides the AICPA may be recognized by the Board as an approved sponsoring organization (Rule 20.3(c)). If that were to occur, it would not be appropriate to require another organization to operate under terms defined by the AICPA.

COMMENT: Rule 20.3 – minor wording changes. **RESPONSE:** We agree with the suggested changes. Changes were made.

COMMENT: Rule 20.4 – minor wording changes. **RESPONSE:** We agree with the suggested changes. Changes were made.

COMMENT: Rule 20.6 – Adding a starting date would eliminate confusion for licensees who have reviews in process prior to January 1, 2019. **RESPONSE:** We disagree with the changes. Licensees may have a peer review that was performed before January 1, 2019 that would need to be submitted to the Board to demonstrate that a valid peer review had been performed.

COMMENT: Rule 20.7(B) – change the term "practice monitoring" to "peer review." **RESPONSE:** We agree with this suggested change. Change was made.

COMMENT: Rule 20.7(b)(3) – add language stating that a PROC member is required to sign a confidentiality agreement. **RESPONSE:** We disagree with this suggested change. This is an AICPA policy but we do not believe it is appropriate to codify this within Board rules.

COMMENT: Rule 20.7(C) – minor wording changes. **RESPONSE:** We agree with the suggested changes. Changes were made.

COMMENT: Rule 20.7(e)(4). The PROC should observe, not establish, processes. **RESPONSE:** We agree with the suggested changes. Changes were made.

COMMENT: Rule 20.7(e)(5)(a) – Change the term "registrants" to "licensees." **RESPONSE:** We agree with the suggested changes. Changes were made.

Jessica Sutton, an attorney with the Bureau of Legislative Research, asked the following question: Concerning Rule 20, Act 278 of 2017 requires the peer review to occur one time every three years. The rule states that "[s]ubsequent peer reviews shall be completed such that the peer review has taken place and all peer review materials are submitted to the sponsoring organization within three years and six months from the peer review year end of the previous peer review." So would this mean that if a peer review occurs anytime in 2019, the next peer review will need to be completed no later than mid-year 2022, so that the peer review is occurring every 3 years? **RESPONSE:** The peer reviews do have to be completed every three years but the peer review report date and the peer review year are two different concepts. Licensees have some latitude in selecting their peer review year (fiscal year, calendar year, etc.) on their first peer review, so this wording is there to ensure that the subsequent peer reviews do not occur too far away from the original peer review year – but bottom line yes, the peer review reports need to be dated within three years of each other.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: Beginning January 1, 2019, CPAs and CPA firms who issue attest reports will have to provide that they are enrolled in a peer review program. Then they have 18 months to complete the peer review. Once fully implemented, the board believes that the peer review requirements will impact approximately 200 licensees (individuals or firms). The cost of peer review will be approximately $2,500 to $9,000 every three years depending on the report types issued by the licensee. If no audits are issued, the costs will be on the lower end of the range. Of the 200 licensees, the board expects to be impacted approximately 50 issue audit reports. Note that the majority of the licensees (approximately 2/3) who issue attest reports are already going through peer review, so there will be no impact to them.

There is no cost to the state to implement this rule.

LEGAL AUTHORIZATION: The State Board of Public Accountancy may adopt rules for the orderly conduct of its affairs and for the administration of the Public Accountancy Act of 1975. *See* Ark. Code Ann. § 17-12-203(a). These rules implement Act

278 of 2017, sponsored by Senator David Wallace, which requires a peer review program for public accountancy licensees.

20. PUBLIC SERVICE COMMISSION (John Bethel)

a. SUBJECT: Amendments to Rules for Conservation and Energy Efficiency

DESCRIPTION: The instant changes are recommended in order to incorporate statutory amendments to the conditions under which a qualified nonresidential customer may opt out of a utility's conservation and energy efficiency programs and measures, and direct its own conservation and energy efficiency programs and measures. Specifically, the proposed rule changes will incorporate the provisions of Act 309 of 2017, which added a state-supported institution of higher education as a qualifying entity, and Acts 78 of 2015 and 1102 of 2017, concerning the terms and conditions under which a qualified entity may repay an incentive or other benefits received from the utility as a condition of opting out of the utility's energy efficiency programs and measures. The proposed rule changes also: (1) clarify that the Arkansas Public Service Commission will provide on its official website and update as necessary the forms and instructions used to comply with the statutory requirements; (2) make minor, non-substantive, structural, and grammatical revisions; and (3) revise the rules' cover page, administrative history, and table of contents to incorporate the proposed changes.

PUBLIC COMMENT: A public hearing was held on January 9, 2018. The public comment period expired that same day. The Commission received no comments.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Arkansas Public Service Commission is authorized to propose, develop, solicit, approve, require, implement, and monitor measures by utility companies that cause the companies to incur costs of service and investments that conserve, as well as distribute, electrical energy and existing supplies of natural gas, oil, and other fuels. *See* Ark. Code Ann.

§ 23-3-405(a)(1)(A). Pursuant to Arkansas Code Annotated § 23-3-405(f), the Commission shall revise its rules and promulgate new rules only to the extent required to allow the Commission to incorporate and comply with subsections (c)–(e) of the statute, concerning the authority of the Commission, rates and charges, and exemptions relating to the Energy Conservation Endorsement Act of 1977, codified at Ark. Code Ann. §§ 23-3-401 through 23-3-405. The proposed changes include revisions made in light of Act 78 of 2015, sponsored by Representative Charlie Collins, which served to clarify the regulation of rates and charges under the Energy Conservation Endorsement Act of 1977; Act 309 of 2017, sponsored by Representative Rick Beck, which concerned the criteria that nonresidential business consumers must meet in order to opt out of utility-sponsored energy conservation programs and measures; and Act 1102 of 2017, also sponsored by Representative Beck, which amended the law concerning certain powers of the Commission and amended the law concerning the Commission's authority over energy conservation programs and measures.

21. <u>TREASURER OF STATE</u> (Emma Wills and T. J. Lawhon)

a. <u>SUBJECT</u>: The Arkansas ABLE Program Rules and Regulations

<u>DESCRIPTION</u>: The Arkansas Achieving a Better Life Experience (ABLE) Program is established pursuant to the Arkansas ABLE Act. The program is designed to satisfy the requirements of Section 529A of the Internal Revenue Code of 1986, as amended, and any regulations, rulings, announcements and other guidance issued thereunder. The Arkansas ABLE Committee established these rules governing the operation of the program. To the extent that these rules and regulations are interpreted to be inconsistent with provisions of Section 529A, the provisions of Section 529A shall prevail. The program may be affected by subsequent changes in federal and state legislation. The committee shall have the right to modify these rules from time to time to comply with then current federal law and regulations applicable to the program and for other purposes.

<u>PUBLIC COMMENT</u>: A public hearing was held on November 28, 2017. The public comment period expired on November 28, 2017. There were no comments. The proposed rules were

promulgated on an emergency basis and approved at a meeting of the Executive Subcommittee on September 27, 2017.

The proposed effective date is upon review and approval by the Legislature.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The proposed rules comply with Act 1238 of 2015, sponsored by Representative Julie Mayberry, and Act 324 of 2017, sponsored by Representative Andy Mayberry, to govern the operation and management of the Achieving a Better Life Experience ("ABLE") Program in Arkansas. ABLE Accounts, which are tax-advantaged savings accounts for individuals with disabilities and their families, were created as a result of the federal Achieving a Better Life Experience Act of 2014 or better known as the ABLE Act. *See* 26 U.S.C. 529A, as amended, as provided under the Tax Increase Prevention Act of 2014, Pub. L. No. 113-295.

An ABLE "Program Committee" is composed of the director of the Department of Human Services, the director of Arkansas Rehabilitation Services of the Department of Career Education and Workforce Development, and the Treasurer of State, or their respective designees. *See* Ark. Code Ann. §20-3-105(a) (Supp.2017). The Committee is authorized to adopt rules necessary to administer the ABLE Program and for the general administration of the program. *See* Ark. Code Ann. §20-3-105(c) and (d)(2) (Supp. 2017). The Treasurer of State shall manage the program for the Committee; provide office space, staff, and materials for the Committee; perform other services necessary to implement the Act; and conduct outreach and engage in financial educational activities with individuals with disabilities, stakeholders within the community of individuals with disabilities, and their support system. *See* Ark. Code Ann. §20-3-105(b) (Supp.2017).

22. WATER WELL CONSTRUCTION COMMISSION (Crystal Phelps and Bruce Holland)

a. SUBJECT: Rules and Regulations – Licensing and Permitting Rules

DESCRIPTION: This update is proposed to comply with recent updates to Ark. Code Ann. § 17-1-106. These updates address hardship related to compliance with administrative rules regarding the issuance of licenses, certificates, and permits experienced by active duty service members, returning military veterans, and their spouses. AWWCC proposes adding Section 3.11 to address temporary accreditation, expedited certification, consideration of military training and experience, license or permit expiration, and continuing education exemptions for active duty service members, returning military veterans, and their spouses. The statutory definition of "returning military veteran" has also been added to the definitions found at Section 10. No other changes have been made.

PUBLIC COMMENT: A public hearing was held on December 11, 2017. The public comment period expired on December 27, 2017. The agency provided the following summary of the sole comment it received and its response:

Stanley L. Rasmussen, the Director of the Army Regional and Environmental Energy Office–Central, authored a letter welcoming the addition of Section 3.11. He stated that the addition of Section 3.11 acknowledges the skills and sacrifices of active duty service members, returning military veterans, and their spouses. **AGENCY RESPONSE:** Comment noted and appreciated.

Rebecca Miller-Rice, an attorney with the Bureau of Legislative Research, asked the following question:

It appears that Section 3.11.5 is premised on Ark. Code Ann. § 17-1-106(f)(1), which requires a commission to allow full or partial exemption from continuing education for an active duty military service member "deployed outside of the State." The rule, however, appears to permit the exemption to an active duty military service member stationed in the State of Arkansas; it does not appear to require that the member be deployed outside of the state. Was there a reason for the Commission's distinction? **RESPONSE:** Language changed to mirror that of statute.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The proposed rule changes include revisions made in light of Act 248 of 2017, sponsored by Representative David Meeks, which amended Arkansas Code Annotated § 17-1-106 to require state boards and commissions to promulgate rules necessary to carry out the provisions of the statute, concerning the temporary licensure, certification, or permitting of spouses of active duty service members. Pursuant to Ark. Code Ann. § 17-50-204(a), the Commission on Water Well Construction ("Commission") shall be responsible for the administration of Title 17, Chapter 50 of the Arkansas Code, concerning Water Well Constructors, and shall adopt, and from time to time amend or repeal, necessary rules and regulations governing the installation, construction, repair, and abandonment of water wells and pumping equipment. The Commission may further adopt, and from time to time amend or repeal, rules and regulations governing applications for water well contractor licenses. *See* Ark. Code Ann. § 17-50-305(a)(1).

E. Adjournment.