ADMINISTRATIVE RULES AND REGULATIONS SUBCOMMITTEE
OF THE
ARKANSAS LEGISLATIVE COUNCIL

Room A, MAC
Little Rock, Arkansas

Tuesday, May 15, 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 March 31, 2018 Pursuant to Act 1258 of 2015.

1. Arkansas Parole Board (Brooke Cummings)

2. Department of Community Correction (Dina Tyler)

D. Rules Deferred from the April 17, 2018 Meeting of the Administrative Rules and Regulations Subcommittee:

1. <u>DEPARTMENT OF EDUCATION</u> (Jennifer Davis)

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.

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.

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.

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.

3. 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.

4. DEPARTMENT OF ENVIRONMENTAL QUALITY, OFFICE OF LAND RESOURCES

a. SUBJECT: Regulation 30: Remedial Action Trust Fund Hazardous Substance Site Priority List

DESCRIPTION: 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 pending legislative review and approval.

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.

E. Rules Rereferred to the Administrative Rules and Regulations Subcommittee by the Legislative Council at its Meeting on April 20, 2018.

1. DEPARTMENT OF ENVIRONMENTAL QUALITY, OFFICE OF LAND RESOURCES

a. SUBJECT: Regulation No. 12: Storage Tanks

DESCRIPTION: 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:

Reuse of Water in Hydrostatic Testing

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.

F. Rules Filed Pursuant to Ark. Code Ann. § 10-3-309.

1. <u>DEPARTMENT OF FINANCE AND ADMINISTRATION, REVENUE SERVICES</u> (Paul Gehring)

a. <u>SUBJECT</u>: Rule 2018-1: Standard Mileage Rates for Income Tax Purposes

<u>DESCRIPTION</u>: This rule sets the optional standard mileage rates effective January 1, 2018 through December 31, 2018, as follows:

1. For employees or self-employed individuals, the rate will increase by 1 cent from 53.5 cents per mile to 54.5 cents per mile.

2. For transportation expenses deductible as medical or moving expense, the rate will increase by 1 cent per mile from 17 cents per mile to 18 cents per mile.

3. For charitable organizations, the rate will remain at 14 cents per mile.

<u>PUBLIC COMMENT</u>: A public hearing was held on March 30, 2018. The public comment period expired on April 6, 2018. The Department received no public comments.

The proposed effective date is pending legislative review and approval.

<u>FINANCIAL IMPACT</u>: This will result in less than a $10,000 increase in cost to state general revenue for both the current fiscal year and the next fiscal year.

<u>LEGAL AUTHORIZATION</u>: Pursuant to Ark. Code Ann. § 26-18-301(a)(1), the Director of the Department of Finance and Administration, or his or her authorized agent, has authority to administer and enforce the provisions of every state tax law and when necessary, shall promulgate and enforce the rules and regulations. The Director shall determine the deduction for vehicle miles in determining travel expenses deductible as a business expense in computing net income. *See* Ark. Code Ann. § 26-51-423(a)(3).

On December 14, 2017, the Internal Revenue Service issued the 2018 optional standard mileage rates used to calculate the deductible costs of operating an automobile for business, charitable, medical or moving purposes. As of January 1, 2018, the standard mileage rates for the use of a car (also vans, pickups or panel trucks) is 54.5 cents for every mile of business travel driven; 18 cents per mile driven for medical or moving purposes; and 14 cents per mile driven in service of charitable organizations. The business mileage rate and the medical and moving expense rates each increased 1 cent per mile from the rates for 2017. The charitable rate is set by statute and remains unchanged.

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

a. SUBJECT: Emergent Care Section I-6-17

DESCRIPTION: Effective for dates of service on or after May 1, 2018, four primary care visits per state fiscal year to a hospital based walk-in clinic or hospital based emergent care center will no longer require a referral from a primary care physician if the beneficiary has not yet been assigned a primary care physician. These visits still count toward existing benefit limits.

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

Department is authorized to promulgate rules as necessary to conform to federal rules that affect its programs as necessary to receive any federal funds. *See* Ark. Code Ann. § 25-10-129(b) (Supp. 2017).

Act 546 of 2017, sponsored by Representative Aaron Pilkington, mandates that the Arkansas Medicaid Program provide for reimbursement for up to four (4) healthcare visits per year at an emergent care clinic or a walk-in clinic when the Medicaid beneficiary does not have a primary care provider assigned if the walk-in clinic or emergent care is associated with a hospital. *See* Ark. Code Ann. § 20-77-132 (Supp. 2017). Under Arkansas law, an "emergent care clinic" is a walk-in clinic focused on the delivery of ambulatory care in a facility outside of traditional emergency care, and a "walk-in clinic" is a medical clinic that accepts patients on a walk-in basis without an appointment. *See* Ark. Code Ann. § 20-77-132 (Supp. 2017).

3. STATE MEDICAL BOARD (Kevin O'Dwyer)

a. SUBJECT: Continuing Education

DESCRIPTION: This amendment clarifies the amount of medical education hours that is required for anyone holding an active medical license in the state. The substantive addition follows:

"C. Each year, each physician and physician assistant shall obtain at least one (1) hour of CME credit specifically regarding the prescribing of opioids and benzodiazepines. The one hour may be included in the twenty (20) credit hours per year of continuing medical education required in Paragraph A of this regulation and shall not constitute an additional hour of CME per year."

PUBLIC COMMENT: A public hearing was held on April 5, 2018. The public comment period expired on April 4, 2018. One public comment was made by David Wroten, who recommended that the board consider an exemption from the one (1) hour requirement for physicians who, because of specialty or type of practice, do not prescribe these drugs. **RESPONSE:** No change was made. 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 State Medical Board is authorized to adopt regulations requiring the continuing education of the persons licensed by the board. *See* Ark. Code Ann. § 17-80-104(a). The board shall establish by regulation the number of hours of credit and the manner and methods of obtaining the hours of credit by its licensees. Ark. Code Ann. § 17-80-104(c).

4. NATURAL RESOURCES COMMISSION, WATER RESOURCES MANAGEMENT (Bruce Holland, Ryan Benefield, and Crystal Phelps)

a. SUBJECT: Title 18: Floodplain Administrator Accreditation Rules

DESCRIPTION: This update is proposed to comply with recent updates to Ark. Code Ann. § 17-1-106. These updates are intended to address hardship experienced by active duty service members, returning military veterans, and their spouses related to compliance with administrative rules regarding the issuance of floodplain administrator accreditation. ANRC proposes adding Sections 1802.4 – 1802.6, as well as modification to Section 1803.2 and Section 1803.4, to address accreditation, expedited accreditation, consideration of military training and experience, and continuing education exemptions for active duty service members, returning military veterans, and their spouses. Arkansas Code Annotated § 17-1-106 has been added to Section 1801.2, "Enabling and pertinent legislation." The statutory definition of "returning military veteran" has also been added to the definitions found at Section 1801.3. Additionally, Section 1801.5 requiring all floodplain administrators be accredited by July 1, 2004 was deleted. No other changes are proposed.

PUBLIC COMMENT: A public hearing was held on December 11, 2017. The public comment period expired on December 27, 2017. The Commission received no public comments.

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

(1) Section 1802.4 – It appears that this section is premised on Ark. Code Ann. § 17-1-106(d), which appears to apply to both an active duty military member "stationed in the State of Arkansas" and a returning military veteran "applying within one (1) year of his or her discharge from active duty." Was there a reason the Commission did not include these qualifiers in the rule?

(2) Section 1802.6 – It appears that this section is premised on Ark. Code Ann. § 17-1-106(c), which requires a commission to expedite the process for full licensure for certain enumerated individuals. The rule, however, seems to only allow expediency of the process for those who have qualified for temporary accreditation, i.e., an enumerated individual who is the holder in good standing of another state's license. Say the person seeking full accreditation is one of the enumerated individuals, but does not hold another state's license; he or she is seeking accreditation for the first time. Would the process and procedures for full accreditation also be expedited for him or her?

AGENCY RESPONSE: ANRC resolved concerns (1) and (2) by striking all references to temporary or full accreditation. Once these references were removed, the rule reads more clearly. Ark. Code. Ann. § 17-1-106(d) requires boards and commissions to allow qualifying individuals to obtain temporary accreditation. Although ANRC's current process does not offer temporary accreditation, ANRC's initial draft attempted to satisfy the statutory temporary accreditation requirement by expressly adding a temporary accreditation component to ANRC's rules. However, after further consideration, ANRC realized that its process already provides immediate accreditation at the moment an individual provides materials indicating that he or she meets accreditation criteria. Anyone qualifying for accreditation through § 17-1-106 would be able to demonstrate basic knowledge of floodplain management and would immediately be accredited.

(3) Section 1803.2(F)(1) – It appears that this section 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? **AGENCY RESPONSE:** ANRC adopted this suggestion.

The proposed effective date is June 1, 2018.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 14-268-106(b), each floodplain administrator shall become accredited by the Arkansas Natural Resources Commission ("Commission") under the Commission's authority regarding flood control. It is the duty of the Commission to accredit persons having requisite knowledge in floodplain management and in minimization and prevention of flood hazards and losses. *See* Ark. Code Ann. § 15-24-102(a)(3). For the purpose of carrying out its functions, the Commission shall have the authority to make and amend and enforce all necessary or desirable rules, regulations, and orders not inconsistent with the law. *See* Ark. Code Ann. § 15-20-206(a). The proposed rule changes include revisions made in light of Act 248 of 2017, sponsored by Representative David Meeks, which served to require state boards and commissions to promulgate rules for temporary licensure, certification, or permitting of spouses of active duty service members by amending Ark. Code Ann. § 17-1-106(g).

b. SUBJECT: Title 20: Nutrient Management Planner Certification Rules

DESCRIPTION: This update is proposed to comply with recent updates to Ark. Code Ann. § 17-1-106. These updates are intended to address hardships related to compliance with nutrient management planner certification rules that may be experienced by active duty service members, returning military veterans, and their spouses. ANRC proposes adding Subtitle V to address 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. Ark. Code Ann. § 17-1-106 has been added to Section 2001.2, "Enabling and pertinent legislation." The statutory definition of "returning military veteran" has also been added to the definitions found at Section 2001.3. 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 Commission received no public comments.

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

It appears that Section 2005.5 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?
AGENCY RESPONSE: Language in the rule was changed to mirror that of the statute.

The proposed effective date is June 1, 2018.

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 served to require state boards and commissions to promulgate rules for temporary licensure, certification, or permitting of spouses of active duty service members by amending Arkansas Code Annotated § 17-1-106(g). Pursuant to Ark. Code Ann. § 15-20-1004(c), the Arkansas Natural Resources Commission ("Commission") shall promulgate regulations that: specify qualifications and standards for a person to be deemed competent in nutrient management plan preparation and provide for the issuance of documentation of certification to the person; specify the conditions under which a certification issued may be suspended or revoked; establish fees to be paid by a

person enrolling in the training and certification programs; provide for the performance of other duties and the exercise of other powers by the Executive Director of the Commission as may be necessary to provide for the training and certification of a person preparing nutrient management plans; and give due consideration to relevant existing agricultural or other certification programs.

c. SUBJECT: Title 21: Nutrient Management Applicator Certification Rules

DESCRIPTION: This update is proposed to comply with recent updates to Ark. Code Ann. § 17-1-106. These updates are intended to address hardships related to compliance with nutrient management applicator certification rules that may be experienced by active duty service members, returning military veterans, and their spouses. ANRC proposes adding Subtitle V to address 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. Ark. Code Ann. § 17-1-106 has been added to Section 2101.2, "Enabling and pertinent legislation." The statutory definition of "returning military veteran" has also been added to the definitions found at Section 2101.3. 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 Commission received no public comments.

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

It appears that Section 2105.5 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?
AGENCY RESPONSE: Language was changed to mirror that of the statute.

The proposed effective date is June 1, 2018.

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 served to require state boards and commissions to promulgate rules for temporary licensure, certification, or permitting of spouses of active duty service members by amending Arkansas Code Annotated § 17-1-106(g). Pursuant to Ark. Code Ann. § 15-20-1005(c), the Arkansas Natural Resources Commission ("Commission") shall promulgate regulations that: specify the qualifications and standards for a person to be deemed competent in nutrient application and provide for the issuance of documentation of certification to the person; specify the conditions under which a certification issued may be suspended or revoked; establish fees to be paid by persons enrolling in the training and certification programs; and provide for the performance of other duties and the exercise of other powers by the Executive Director of the Commission as may be necessary to provide for the training and certification of a person making nutrient application.

G. Adjournment.