

DEPARTMENT OF ENERGY AND ENVIRONMENT, DIVISION OF ENVIRONMENTAL QUALITY

SUBJECT: Rule 12: Storage Tanks

DESCRIPTION: The Arkansas Department of Energy and Environment’s Division of Environmental Quality (DEQ) proposes this rulemaking before the Arkansas Pollution Control and Ecology Commission (PC&EC) to amend its Rule 12: Storage Tanks. This rulemaking is necessary to amend the current rule to implement new requirements set forth in Act 422 of 2023, which amended Arkansas law regarding underground storage tanks and the Petroleum Storage Tank Trust Fund. Act 422 of 2023 increased the maximum amount of reimbursement that can be paid for any one occurrence from \$1,500,000 to \$2,000,000. Rule 12.306, Amount of Reimbursement, must be amended to reflect this statutory change. The practical impact of this amendment will allow qualified claimants to receive additional funds from the Petroleum Storage Tank Trust Fund for any one occurrence, in conformance with Arkansas law. Rules 12.512 and 12.610 were amended to implement provisions regarding lapsed licenses and reinstatement required by Ark. Code Ann. § 17-1-107. This change will allow licensees a more expeditious process to reinstate lapsed licenses. Finally, Rules 12.513 and 12.611 were amended to include provisions regarding reciprocity and provisional licenses as required by Ark. Code Ann. § 17-1-108. This modification allows license applicants who hold the same or similar license from out of state to apply for and receive a license in Arkansas. The provisional license will allow applicants from out of state to immediately be employed while the application is pending.

PUBLIC COMMENT: A public hearing was held on March 27, 2024. The public comment period expired on April 10, 2024. DEQ indicated that it received no comments.

Jason Kearney, an attorney with the Bureau of Legislative Research, asked the following question and received the following agency response:

1) **Rule 12.306: Amount of Reimbursement** – Is there a reason that the proposed cap for reimbursement in the amended rules (\$1,992,500) does not mirror the cap set out in Act 422 of 2023 (\$2,000,000)? **RESPONSE:** Ark. Code Ann. § 8-9-907(a) requires that the owner or operator of the storage tank pay the first \$7,500.00 for corrective action, to “be considered as the equivalent of an insurance deductible.” Ark. Code Ann. § 8-9-907(b), prior to Act 442 of 2023, stated that “[p]ayment for corrective action shall not exceed one million five hundred thousand dollars (\$1,500,000) per occurrence.” Acknowledging the requirements in § 8-9-907(a), Rule 12.306(A) correspondingly provided that the Trust Fund would provide reimbursement to eligible owners/operators in an amount not to exceed one million four hundred ninety-two thousand five hundred dollars (\$1,492,500) per occurrence. The statutory cap in § 8-9-907(b), minus owner/operator’s obligation for the \$7,500 “deductible” in § 8-9-907(a), yields total amount reimbursable from the Trust Fund. Act 442 of 2023 raised the cap in Ark. Code Ann. § 8-9-907(b) from \$1,500,000 to \$2,000,000. This pending rule change amends Rule 12.306(A) to reflect the increase of the reimbursable amount to \$1,992,500. Again, this reflects the statutory cap, minus

owner/operator's obligation for the \$7,500 "deductible", yielding total amount reimbursable from the Trust Fund. This rule amendment is consistent with interpretation and application of the statute reflected in the current rule. Because the rule amendment is consistent with the statute, the Division of Environmental Quality does not recommend any further revision of the rule in response to this point.

2) Did the Advisory Committee on Petroleum Storage Tanks advise DEQ and the Commission regarding promulgation of these rules, per Ark. Code Ann. § 8-7-904(h)?
RESPONSE: Ark. Code Ann. § 8-7-904(h) provides that the Advisory Committee on Petroleum Storage Tanks shall advise the Division of Environmental Quality (DEQ) and the Arkansas Pollution Control and Ecology Commission (PC&EC) regarding promulgation of rules. However, rather than promulgation of new rules or changes initiated by DEQ or PC&EC, these pending revisions to Rule 12 are in response to legislative mandates in Ark. Code Ann. § 17-1-107, Ark. Code Ann. § 17-1-108, and to incorporate the changes approved in Act 422 of 2023. While the Committee was fully informed of the passage of Act 422 and the resulting need to update Rule 12 to reflect the changes in the statutory cap, the advice of the Committee was not required to comply with these legislative mandates.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: DEQ states that the amended rules have no financial impact. DEQ further states that Act 422 of 2023 increased the maximum amount paid in any one year for any one occurrence from \$1,500,000 to 2,000,000. The cost attributed to Act 422 of 2023 is therefore \$500,000 per occurrence. However, there is no additional cost or financial impact to amend this rule to accommodate the Act.

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, which concerns regulated substance storage tanks, rules relating to an underground storage tank release detection, prevention, corrective action, and financial responsibility program as required by the 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 that Act. *See* Ark. Code Ann. § 8-7-903(b). The Advisory Committee on Petroleum Storage Tanks shall advise DEQ and PC&EC regarding promulgation of rules concerning storage tanks. *See* Ark. Code Ann. § 8-7-904(h).

The proposed revisions implement changes brought about by Act 422 of 2023, sponsored by Representative Jack Ladyman, which amended the Petroleum Storage Tank Trust Fund Act and amended the payment limit per occurrence for corrective action.

**QUESTIONNAIRE FOR FILING PROPOSED RULES WITH
THE ARKANSAS LEGISLATIVE COUNCIL**

DEPARTMENT Department of Energy and Environment
 BOARD/COMMISSION Division of Environmental Quality
 BOARD/COMMISSION DIRECTOR Caleb Osborne
 CONTACT PERSON Peter Alberg
 ADDRESS 5301 Northshore Drive, North Little Rock, AR 72118
 PHONE NO. (501) 335-7025 EMAIL Peter.Alberg@adeq.state.ar.us
 NAME OF PRESENTER(S) AT SUBCOMMITTEE MEETING
Lauren Ballard, Chief Counsel Caleb Osborne, Director of the Division of Environmental Quality
 PRESENTER EMAIL(S) Lauren.Ballard@adeq.state.ar.us Caleb.Osborne@adeq.state.ar.us

INSTRUCTIONS

In order to file a proposed rule for legislative review and approval, please submit this Legislative Questionnaire and Financial Impact Statement, and attach (1) a summary of the rule, describing what the rule does, the rule changes being proposed, and the reason for those changes; (2) both a markup and clean copy of the rule; and (3) all documents required by the Questionnaire.

If the rule is being filed for permanent promulgation, please email these items to the attention of Rebecca Miller-Rice, miller-ricer@blr.arkansas.gov, for submission to the Administrative Rules Subcommittee.

If the rule is being filed for emergency promulgation, please email these items to the attention of Director Marty Garrity, garritym@blr.arkansas.gov, for submission to the Executive Subcommittee.

Please answer each question completely using layman terms.

1. What is the official title of this rule?
Rule 12: "Storage Tanks"
2. What is the subject of the proposed rule? The purpose of the rule is to regulate underground storage tanks
3. Is this rule being filed under the emergency provisions of the Arkansas Administrative Procedure Act? Yes No

If yes, please attach the statement required by Ark. Code Ann. § 25-15-204(c)(1).

If yes, will this emergency rule be promulgated under the permanent provisions of the Arkansas Administrative Procedure Act? Yes No

4. Is this rule being filed for permanent promulgation? Yes No

If yes, was this rule previously reviewed and approved under the emergency provisions of the Arkansas Administrative Procedure Act? Yes No

If yes, what was the effective date of the emergency rule? _____

On what date does the emergency rule expire? _____

5. Is this rule required to comply with a *federal* statute, rule, or regulation? Yes No

If yes, please provide the federal statute, rule, and/or regulation citation.

6. Is this rule required to comply with a *state* statute or rule? Yes No

If yes, please provide the state statute and/or rule citation.

[Act 422 of 2023](#)

7. Are two (2) rules being repealed in accord with Executive Order 23-02? Yes No

If yes, please list the rules being repealed.

If no, please explain.

[The purpose of the rule amendment is to implement new requirements enacted in Act 422 of 2023. The act requires that the rule be amended to increase the amount available from the Petroleum Storage Tank Trust Fund for a corrective action from \\$1,500,000 to \\$2,000,000. The Arkansas Pollution Control and Ecology Commission does not have two rules that can be repealed as part the promulgation of this amendment](#)

8. Is this a new rule? Yes No

Does this repeal an existing rule? Yes No

If yes, the proposed repeal should be designated by strikethrough. If it is being replaced with a new rule, please attach both the proposed rule to be repealed and the replacement rule.

Is this an amendment to an existing rule? Yes No

If yes, all changes should be indicated by strikethrough and underline. In addition, please be sure to label the markup copy clearly as the markup.

9. What is the state law that grants the agency its rulemaking authority for the proposed rule, outside of the Arkansas Administrative Procedure Act? Please provide the specific Arkansas Code citation(s), including subsection(s).

The Arkansas Pollution Control and Ecology Commission has general rulemaking authority through Ark. Code Ann. Sec. 8-1-203(b)(1)(A), and specific rulemaking authority for this rule through Ark. Code Ann. Sec. 8-7-802(a)(1) and Ark. Code Ann. Sec. 8-7-903(b).

10. Is the proposed rule the result of any recent legislation by the Arkansas General Assembly?
Yes No

If yes, please provide the year of the act(s) and act number(s).

Act 422 of 2023

11. What is the reason for this proposed rule? Why is it necessary?

The purpose of the rule is to regulate underground storage tank systems and certain aboveground storage tank systems to protect public health and the lands and waters of the State of Arkansas. The rule also was promulgated pursuant to the Petroleum Storage Tank Trust Fund Act to provide procedures to allow eligible owners or operators to obtain partial reimbursement for costs of corrective action taken in response to accidental release from qualified petroleum storage tank systems. The rule further regulates the licensure of persons who install, repair, upgrade and close underground storage tank systems. The rule further regulates the licensure of persons who test underground storage tank systems. The rule also provides a process by which operators of underground storage tank systems are trained and certified.

12. Please provide the web address by which the proposed rule can be accessed by the public as provided in Ark. Code Ann. § 25-19-108(b)(1).

https://www.adeg.state.ar.us/regs/draft_regs.aspx

13. Will a public hearing be held on this proposed rule? Yes No

If yes, please complete the following:

Date: 03/27/2024

Time: 2:00 pm

Place: Commission Room, 5301 Northshore Drive, North Little Rock, AR 72118

Please be sure to advise Bureau Staff if this information changes for any reason.

14. On what date does the public comment period expire for the permanent promulgation of the rule? Please provide the specific date. 04/10/2024

15. What is the proposed effective date for this rule? 06/01/2024

16. Please attach (1) a copy of the notice required under Ark. Code Ann. § 25-15-204(a)(1) and (2) proof of the publication of that notice.

17. Please attach proof of filing the rule with the Secretary of State, as required by Ark. Code Ann. § 25-15-204(e)(1)(A).

18. Please give the names of persons, groups, or organizations that you anticipate will comment on these rules. Please also provide their position (for or against), if known.

Unknown

19. Is the rule expected to be controversial? Yes No

If yes, please explain.



DIVISION OF ENVIRONMENTAL QUALITY

Sarah Huckabee Sanders
GOVERNOR

Shane E. Khoury
SECRETARY

Proposed amendment to APC & EC RULE 12: “STORAGE TANKS”

December, 2023

PURPOSE AND AUTHORITY

The Department of Energy and Environment and the Division of Environmental Quality (DEQ) propose this rulemaking to modify Rule 12: “Storage Tanks.” This rulemaking is necessary to amend the current rule to implement new requirements set forth in Act 422 of 2023, which amended Arkansas law regarding underground storage tanks and the Petroleum Storage Tank Trust Fund. The Arkansas Pollution Control and Ecology Commission has general rulemaking authority through Ark. Code Ann. § 8-1-203(b)(1)(A), and specific authority to promulgate this rule through Ark. Code Ann. § 8-7-802(a)(1) and Ark. Code Ann. § 8-7-903(b).

BACKGROUND

Commission Rule 12: “Storage Tanks” regulates underground storage tank systems and certain aboveground storage tank systems to protect public health and the lands and waters of the State of Arkansas. The rule also was promulgated pursuant to the Petroleum Storage Tank Trust Fund Act to provide procedures to allow eligible owners or operators to obtain partial reimbursement for costs of corrective action taken in response to accidental release from qualified petroleum storage tank systems. The rule further regulates the licensure of persons who install, repair, upgrade and close underground storage tank systems. The rule further regulates the licensure of persons who test underground storage tank systems. The rule also provides a process by which operators of underground storage tank systems are trained and certified.

THE PROPOSED RULE AMENDMENTS

The proposed amendment to Rule 12: “Storage Tanks” amends the rule to conform to the increased reimbursement threshold from the Petroleum Storage Tank Trust Fund, pursuant to Act 422 of 2023. The act increased the amount of refunds available for corrective action from \$1,500,000 to \$2,000,000. Rules 12.512 and 12.610 were also amended to include provisions regarding lapsed licenses and reinstatement as required by Ark. Code Ann. § 17-1-107. Rules 12.513 and 12.611 were also amended to include provisions regarding reciprocity and provisional certificates as required by Ark. Code Ann. § 17-1-108. Section 12.302(E)(2) was also amended to reflect the current structure of the agency division.

NECESSITY AND PRACTICAL IMPACT OF RULE AMENDMENTS

The amendments to Rule 12 are necessary to implement changes in statutory requirements. Act 422 of 2023 increased the maximum amount of reimbursement that can be paid for any one occurrence from \$1,500,000 to \$2,000,000. Rule 12.306, Amount of Reimbursement, must be amended to reflect this statutory change. The practical impact of this amendment will allow

qualified claimants to receive additional funds from the Petroleum Storage Tank Trust Fund for any one occurrence, in conformance with Arkansas law.

Rules 12.512 and 12.610 were amended to implement provisions regarding lapsed licenses and reinstatement required by Ark. Code Ann. § 17-1-107. This change will allow licensees a more expeditious process to reinstate lapsed licenses.

Finally, Rules 12.513 and 12.611 were amended to include provisions regarding reciprocity and provisional licenses as required by Ark. Code Ann. § 17-1-108. This modification allows license applicants who hold the same or similar license from out of state to apply for and receive a license in Arkansas. The provisional license will allow applicants from out of state to immediately be employed while the application is pending.

RECOMMENDATION

The Department of Energy and Environment recommends that the proposed amendments to Rule 12: “Storage Tanks,” be approved.

FINANCIAL IMPACT STATEMENT

PLEASE ANSWER ALL QUESTIONS COMPLETELY.

DEPARTMENT Department of Energy and Environment
BOARD/COMMISSION Division of Environmental Quality
PERSON COMPLETING THIS STATEMENT Peter Alberg
TELEPHONE NO. (501) 335-7025 **EMAIL** Peter.Alberg@adeq.state.ar.us

To comply with Ark. Code Ann. § 25-15-204(e), please complete the Financial Impact Statement and email it with the questionnaire, summary, markup and clean copy of the rule, and other documents. Please attach additional pages, if necessary.

TITLE OF THIS RULE Rule 12, "Storage Tanks"

1. Does this proposed, amended, or repealed rule have a financial impact?
Yes No

2. Is the rule based on the best reasonably obtainable scientific, technical, economic, or other evidence and information available concerning the need for, consequences of, and alternatives to the rule?
Yes No

3. In consideration of the alternatives to this rule, was this rule determined by the agency to be the least costly rule considered? Yes No

If no, please explain:

(a) how the additional benefits of the more costly rule justify its additional cost;

(b) the reason for adoption of the more costly rule;

(c) whether the reason for adoption of the more costly rule is based on the interests of public health, safety, or welfare, and if so, how; and

(d) whether the reason for adoption of the more costly rule is within the scope of the agency's statutory authority, and if so, how.

4. If the purpose of this rule is to implement a *federal* rule or regulation, please state the following:
 - (a) What is the cost to implement the federal rule or regulation?

Current Fiscal Year

General Revenue _____
 Federal Funds _____
 Cash Funds _____
 Special Revenue _____
 Other (Identify) _____

Total \$ 0.00 _____

Next Fiscal Year

General Revenue _____
 Federal Funds _____
 Cash Funds _____
 Special Revenue _____
 Other (Identify) _____

Total \$ 0.00 _____

(b) What is the additional cost of the state rule?

Current Fiscal Year

General Revenue _____
 Federal Funds _____
 Cash Funds _____
 Special Revenue _____
 Other (Identify) _____

Total \$ 0.00 _____

Next Fiscal Year

General Revenue _____
 Federal Funds _____
 Cash Funds _____
 Special Revenue _____
 Other (Identify) _____

Total \$ 0.00 _____

5. What is the total estimated cost by fiscal year to any private individual, private entity, or private business subject to the proposed, amended, or repealed rule? Please identify those subject to the rule, and explain how they are affected.

Current Fiscal Year

\$ 0.00 _____

Next Fiscal Year

\$ 0.00 _____

6. What is the total estimated cost by fiscal year to a state, county, or municipal government to implement this rule? Is this the cost of the program or grant? Please explain how the government is affected.

Current Fiscal Year

\$ 0.00 _____

Next Fiscal Year

\$ 0.00 _____

Act 422 of 2023 increased the maximum amount paid in any one year for any one occurrence from \$1,500,000 to \$2,000,000. The cost attributed to Act 422 of 2023 is therefore \$500,000 per occurrence. However, there is no additional cost or financial impact to amend this rule to accommodate the act.

7. With respect to the agency's answers to Questions #5 and #6 above, is there a new or increased cost or obligation of at least one hundred thousand dollars (\$100,000) per year to a private individual, private entity, private business, state government, county government, municipal government, or to two (2) or more of those entities combined?

Yes No

If yes, the agency is required by Ark. Code Ann. § 25-15-204(e)(4) to file written findings at the time of filing the financial impact statement. The written findings shall be filed simultaneously with the financial impact statement and shall include, without limitation, the following:

- (1) a statement of the rule's basis and purpose;
- (2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute;
- (3) a description of the factual evidence that:
 - (a) justifies the agency's need for the proposed rule; and
 - (b) describes how the benefits of the rule meet the relevant statutory objectives and justify the rule's costs;
- (4) a list of less costly alternatives to the proposed rule and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
- (5) a list of alternatives to the proposed rule that were suggested as a result of public comment and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
- (6) a statement of whether existing rules have created or contributed to the problem the agency seeks to address with the proposed rule and, if existing rules have created or contributed to the problem, an explanation of why amendment or repeal of the rule creating or contributing to the problem is not a sufficient response; and
- (7) an agency plan for review of the rule no less than every ten (10) years to determine whether, based upon the evidence, there remains a need for the rule including, without limitation, whether:
 - (a) the rule is achieving the statutory objectives;
 - (b) the benefits of the rule continue to justify its costs; and
 - (c) the rule can be amended or repealed to reduce costs while continuing to achieve the statutory objectives.



DIVISION OF ENVIRONMENTAL QUALITY

Sarah Huckabee Sanders
GOVERNOR

Shane E. Khoury
SECRETARY

Notice of Proposed Rule Changes, Public Hearing, and Comment Period

The Division of Environmental Quality (DEQ) has proposed amendments to Arkansas Pollution Control and Ecology Commission (APC&EC) Rule 12, “Storage Tanks” pursuant to Arkansas Code Annotated § 8-1-203(b)(1)(a), Arkansas Code Annotated § 8-7-802(a)(1), and Arkansas Code Annotated § 8-7-903(b). Oral and written comments by stakeholders and the public will be received and made a part of the record during the public comment period.

Pursuant to APC&EC Rule 8, DEQ by this notice solicits comments of any interested party to the proposed rule amendments by submitting comments in writing on or before the end of the public comment period, which is April 10, 2024. All comments should be sent to Carol Booth at the address below.

Full and complete copies of the proposed changes to Rule 12 are available for inspection and review after making an appointment during regular business hours at the Department of Energy and Environment headquarters building, 5301 Northshore Drive, North Little Rock, AR 72118. The proposed rule changes are also available at DEQ information depositories located in public libraries at Arkadelphia, Batesville, Blytheville, Camden, Clinton, Crossett, El Dorado, Fayetteville, Forrest City, Fort Smith, Harrison, Helena, Hope, Hot Springs, Jonesboro, Little Rock, Magnolia, Mena, Monticello, Mountain Home, Pocahontas, Russellville, Searcy, Stuttgart, Texarkana, and West Memphis; and in campus libraries at the University of Arkansas at Pine Bluff and the University of Central Arkansas at Conway.

A public hearing will be held on March 27, 2024, beginning at 2:00 p.m., Central Time, to accept comments on the proposed amendments to Rule 12, “Storage Tanks.” The hearing will be held in the Commission Room at the Department of Energy and Environment headquarters building at 5301 Northshore Drive, North Little Rock, AR 72118. The public hearing may be viewed via live broadcast on the E&E YouTube channel at https://www.youtube.com/channel/UCMr_txISHivnxRjg3dmOZ0A. If the hearing is postponed and rescheduled, a new legal notice will be published to announce the details of the new hearing date.

Oral and written comments regarding the rule amendments will be accepted at the hearing, but written comments are preferred in the interest of accuracy. In addition, written and electronic mail comments will be considered if received no later than 4:30 p.m., Central Time, April 10, 2024. Written comments should be delivered or mailed to: Carol Booth, Department of Energy and Environment, 5301 Northshore Drive, North Little Rock, AR 72118. Submit electronic comments on the proposed rule amendments: comment@adeq.state.ar.us.

The proposed amendment to Rule 12, “Storage Tanks,” amends the rule to conform to new requirements for payments made from the Petroleum Storage Tank Trust Fund, which were established in Act 422 of 2023. Rules 12.512 and 12.610 were also amended to include provisions regarding lapsed licenses and reinstatement as required by Ark. Code Ann. § 17-1-107. Rules 12.513 and 12.611 were also amended to include provisions regarding reciprocity and provisional certificates as required by Ark. Code Ann. § 17-1-108. Rule 12.302(E)(2) was updated to replace “Regulated Storage Tank Division Chief” with “Associate Director, Office of Land Resources” to reflect current agency structure within the division. Additional non-substantive or clerical revisions are proposed throughout Rule 12 for consistency and clarity.

A complete listing of the proposed changes to Rule 12 can be found on the Draft Regulations page of the DEQ’s website: https://www.adeq.state.ar.us/regs/draft_regs.aspx under APC&EC Docket No. 24-001-R.

The deadline for submitting written comments on the proposed rule revisions is 4:30 p.m., Central Time, April 10, 2024.

Published March 2nd and 3rd, 2024

Caleb J. Osborne, Chief Administrator of Environment,
Department of Energy and Environment

BEFORE THE ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION

**IN THE MATTER OF AMENDMENTS TO)
RULE 12: "STORAGE TANKS") DOCKET NO. 24-001-R**

RESPONSIVE SUMMARY

Comes now the Department of Energy and Environment, Division of Environmental Quality (DEQ), by and through Michael McAlister, Managing Attorney, and provides this Responsive Summary as required under Arkansas Pollution Control and Ecology Commission Regulation No. 8.815.

I. INTRODUCTION

The public comment record for Docket No. 24-001-R contains one (1) comment pertaining to Arkansas Pollution Control and Ecology Commission Regulation No. 12, entitled "Storage Tanks."

The Notice of Proposed Rule Changes, Public Hearing, and Public Comment Period was published on March 2 and 3, 2024. The Arkansas Pollution Control and Ecology Commission conducted one (1) public hearing on the proposed amendments to Rule 12 in North Little Rock on March 27, 2024. The public comment period ended on April 10, 2024, at 4:30 p.m. (Central Time).

II. RESPONSES TO WRITTEN COMMENTS

The following people or organizations made written comments during the public comment period:

EXHIBIT B

COMMENT 1: Jason Kearney, Legislative Attorney, Administrative Rules Section, Bureau of Legislative Research.

"After reviewing the rule referenced below, I only had the following questions:

1) Rule 12.306: Amount of Reimbursement – Is there a reason that the proposed cap for reimbursement in the amended rule (\$1,992,500) does not mirror the cap set out in Act 422 of 2023 (\$2,000,000)?

2) Did the Advisory Committee on Petroleum Storage Tanks advise DEQ and the Commission regarding promulgation of these rules, per Ark. Code Ann. § 8-7-904(h)?"

RESPONSE: DEQ acknowledges the comment and responds as follows:

In regard to question #1, Ark. Code Ann. § 8-9-907(a) requires that the owner or operator of the storage tank pay the first \$7,500.00 for corrective action, to "be considered as the equivalent of an insurance deductible."

Ark. Code Ann. § 8-9-907(b), prior to Act 442 of 2023, stated that "[p]ayment for corrective action shall not exceed one million five hundred thousand dollars (\$1,500,000) per occurrence." Acknowledging the requirements in § 8-9-907(a), Rule 12.306(A) correspondingly provided that the Trust Fund would provide reimbursement to eligible owners/operators in an amount not to exceed one million four hundred ninety-two thousand five hundred dollars (\$1,492,500) per occurrence. The statutory cap in § 8-9-907(b), minus owner/operator's obligation for the \$7,500 "deductible" in § 8-9-907(a), yields total amount reimbursable from the Trust Fund.

Act 442 of 2023 raised the cap in Ark. Code Ann. § 8-9-907(b) from \$1,500,000 to \$2,000,000. This pending rule change amends Rule 12.306(A) to reflect the increase of the reimbursable amount to \$1,992,500. Again, this reflects the statutory cap, minus

owner/operator's obligation for the \$7,500 "deductible", yielding total amount reimbursable from the Trust Fund.

This rule amendment consistent with interpretation and application of the statute reflected in the current rule. Because the rule amendment is consistent with the statute, the Division of Environmental Quality does not recommend any further revision of the rule in response to this point.

In regard to question #2, Ark. Code Ann. § 8-7-904(h) provides that the Advisory Committee on Petroleum Storage Tanks shall advise the Division of Environmental Quality (DEQ) and the Arkansas Pollution Control and Ecology Commission (PC&EC) regarding promulgation of rules. However, rather than promulgation of new rules or changes initiated by DEQ or PC&EC, these pending revisions to Rule 12 are in response to legislative mandates in Ark. Code Ann. § 17-1-107, Ark. Code Ann. § 17-1-108, and to incorporate the changes approved Act 422 of 2023. While the Committee was fully informed of the passage of Act 422 and the resulting need to update Rule 12 to reflect the changes in the statutory cap, the advice of the Committee was not required to comply with these legislative mandates.

Respectfully Submitted,

By: 

Michael McAlister, Managing Attorney
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Division of Environmental Quality
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ARKANSAS POLLUTION CONTROL
AND ECOLOGY COMMISSION

RULE NO. 12
STORAGE TANKS



INITIAL MARK-UP DRAFT

Submitted to the Arkansas Pollution Control & Ecology Commission
February 23, 2024

EXHIBIT A

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CHAPTER 1: GENERAL PROVISIONS

Rule 12.101 Purpose and Title

The purpose of Arkansas Pollution Control and Ecology Commission Rule Number 12 (Storage Tanks), referred to herein as “Rule” and may be cited as “APC&EC Rule 12 (Storage Tanks),” is to regulate underground storage tank systems and certain aboveground storage tank systems to protect the public health and the lands and waters of the State of Arkansas.

Rule 12.102 Authority

This Rule is promulgated under the authority of Arkansas Code Annotated (Ark. Code Ann.) § 8-7-801 *et seq.* and the Petroleum Storage Tank Trust Fund Act, Ark. Code Ann. § 8-7-901 *et seq.*

Rule 12.103 Definitions

(A) Except for the definitions of “Owner,” “Person,” and “Release” found at 40 C.F.R. § 280.12, the definitions set forth in 40 C.F.R. §§ 280.12 and 280.92 are all adopted by reference herein.

(B) As used in this Rule, unless the context otherwise requires:

(1)(a) **“Aboveground storage tank”** means any one (1) or a combination of containers, vessels, and enclosures located aboveground, including structures and appurtenances connected to them, whose capacity is greater than one thousand three hundred twenty gallons (1,320 gals.) and not more than forty thousand gallons (40,000 gals.) and that is used to contain or dispense motor fuels, distillate special fuels, or other refined petroleum products. The term does not include mobile storage tanks used to transport petroleum from one location to another or those used in the production of petroleum or natural gas.

(b) **“Aboveground storage tank”** shall not include any containers, vessels, or enclosures used to contain or dispense refined petroleum substances listed under Section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C.S. § 9601(14).

(2) **“Advisory Committee”** means the Advisory Committee on Petroleum Storage Tanks as established by state law.

(3) **“Certificate of Registration”** means a certificate issued by the Division to an owner or operator who has paid the applicable storage tank fees and registered his or her storage tank(s) with the Division.

(4) **“Combination,”** for purposes of implementation of this Rule on aboveground storage tanks only, means containers, vessels, and enclosures located aboveground that are joined by common piping and located in tandem.

(5) “**Commission,**” unless indicated otherwise by the context, means the Arkansas Pollution Control & Ecology Commission.

(6) “**Compensatory damages**” means all damages for which an owner or operator may be liable including, without limitation, bodily injury or property damage. This term does not include punitive damages or the costs of litigation, which shall not be limited to attorney or expert witness fees. This definition shall apply to any pending third-party claim that has not been reduced to judgment as of April 7, 2003.

(7) “**Community water system**” means a public water system that serves at least fifteen (15) service connections used by year-round residents or regularly serves at least 25 year-round residents. This term includes any collection, treatment, storage, and distribution facilities under control of the system operator, and used primarily in connection with the system.

(8) “**Corrective action**” means any action that may be necessary to protect human health and the environment as a result of an accidental release, sudden or nonsudden.

(9) “**De minimis concentration of a regulated substance**” means a quantity less than three-tenths percent (0.3%) by volume of a regulated substance in a blended material contained within a storage tank.

(10) “**Division**” means the Division of Environmental Quality.

(11) “**Director**” means the Director of the Division of Environmental Quality.

(12) “**Motor fuel dispenser**” means a device that measures and transfers liquid fuel via pressure or suction from an underground storage tank system into a motor vehicle or container. The term “motor fuel dispenser” does not include the equipment necessary to connect a dispenser to an underground storage tank system.

(13) “**Motor fuel dispenser system**” means the equipment necessary to connect a dispenser to an underground storage tank system, and may include check valves, shear valves, unburied risers or flexible connectors, or other transitional components that are beneath a dispenser and connect a dispenser to underground piping.

(14) “**Operator,**” in addition to having the meaning given in the definition found at 40 C.F.R. § 280.12, means, unless the context dictates otherwise, any person in control of, or having responsibility for, the daily operation of an aboveground storage tank system; provided, however, that “operator” as it is used in Chapters Five, Six, and Seven, and Rule 12.104(A) shall not include such persons.

(15) “**Owner**” means:

(a) In the case of any underground storage tank system in use on November 8, 1984, or brought into use after that date, any person who owns an underground storage tank system used for the storage, use, or dispensing of regulated substances;

(b) In the case of any underground storage tank system in use before November 8, 1984, but no longer in use on that date, any person who owned such tank system immediately before the discontinuation of its use. The term “Owner” does not include any person who, without participation in the management of an underground storage

tank system, holds indicia of ownership primarily to protect a security interest in the tank system; and

(c) Unless the context dictates otherwise, any person who owns an aboveground storage tank; provided, however, that “owner” as it is used in Chapters Five, Six, and Seven, and Rule 12.104(A) shall not include such persons.

(16) **“Person”** means any individual; corporation; company; firm; partnership; association; trust; joint-stock company or trust; venture; municipal, state, or federal government or agency; or any other legal entity, however organized.

(17) **“Potable drinking water well”** means any hole (dug, driven, drilled, or bored) that extends into the earth until it meets groundwater that:

(a) Supplies water for a non-community public water system, or

(b) Otherwise supplies water for household use (consisting of drinking, bathing, and cooking, or other similar uses.)

(18) **“Release”** means any spilling, leaking, emitting, discharging, escaping, leaching or disposing from a storage tank into the groundwater, surface water, or subsurface soils of the state.

(19) **“Secondary containment”** means a release prevention and release detection system for an underground storage tank or piping or both, that provides an inner barrier, an outer barrier, and an interstitial space between the two barriers for monitoring to detect the presence of a leak or release of regulated substances from the underground storage tank or piping, or both. This term includes containment sumps used for interstitial monitoring of piping.

(20) **“Storage tank”** means an aboveground storage tank or underground storage tank as defined by this Rule.

(21) **“Trust fund”** means the Petroleum Storage Tank Trust Fund created by the Petroleum Storage Tank Trust Fund Act, Ark. Code Ann. § 8-7-901 *et seq.*

(22) **“Unknown petroleum storage tank”** means a petroleum storage tank as defined by state law whose existence on a property or at a facility at the time of discovery of a release was not known or should not have been reasonably known by the owner or operator. An owner or operator is deemed to have known of the existence of an unknown petroleum storage tank if there was surficial evidence of the tank in the form of visible vent pipes, fill caps, or lines protruding from the tank.

Rule 12.104 Incorporation of Federal Regulations

(A) The following regulations promulgated on or before August 24, 2018, the United States Environmental Protection Agency are hereby adopted as provisions of this Rule as though set forth herein line for line and word for word, except that unless the context otherwise dictates, all references therein to “Implementing Agency” shall be considered references to “Division of Environmental Quality,” and all references to “Administrator,” “Regional Administrator,” “Director” or “State Director” shall be considered references to the “Director of the Division of Environmental Quality,” and all references to the “U.S. Environmental Protection Agency” or “EPA” shall be considered references to the “Division of Environmental Quality,” and all references elsewhere in this Rule to

any of the following regulations shall constitute a reference to the regulation as herein adopted; and provided that the effective date of the provisions adopted herein by reference as provisions of this Rule shall be the date 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 Rule:

Code of Federal Regulations (C.F.R.), Title 40

- (1) 280.10 through 280.74
- (2) 280.90 through 280.116
- (3) 280.200 through 280.230
- (4) 280.250 through 280.252

(B) The Commission shall conduct rulemaking as necessary to incorporate into this Rule any new or revised federal regulations.

Rule 12.105 Records

(A) In addition to any other records required to be maintained under the Regulated Substance Storage Tanks program, the Petroleum Storage Tank Trust Fund Act, or this Rule, all owners or operators shall maintain and submit or, upon request, make available for review and copying by the Division at all reasonable times, any records that may reasonably be required by the Division, the Commission, or the Advisory Committee in the performance of their duties under law.

(B) Any owner or operator of an underground storage tank shall grant the Division access to all records concerning the storage of regulated substances.

Rule 12.106 Entry and Inspection of Underground Storage Tank Facilities

Any owner or operator of an underground storage tank system shall, upon request of a duly authorized representative of the Division, permit the representative to enter the property at all reasonable times to inspect the facilities and equipment or to conduct monitoring and sampling activities.

Rule 12.107 Entry and Inspection of Aboveground Storage Tank Facilities

The Division shall have the authority to enter upon the property of any owner or operator of an aboveground storage tank to obtain information, conduct surveys, or review records for the purpose of determining compliance with the requirements of the Petroleum Storage Tank Trust Fund Act, relating to aboveground storage tanks prior to approval of a claim for reimbursement from the Petroleum Storage Tank Trust Fund.

Rule 12.108 Notice Requirements

(A) The Division must be given timely notice of any release as required by 40 C.F.R. § 280, Subpart E.

(B)(1) The requirement for giving timely notice of a release from an aboveground storage tank system shall be the same as that for underground storage tank systems.

(2) An owner or operator is required to give notice of a release from an aboveground storage tank system if the amount of the release equals or exceeds existing reporting limits in any other applicable federal or state statutes or regulations.

(C)(1) To ensure timely notice of a release or suspected release from a storage tank system is received by the Division, an owner or operator must follow up a verbal notice to the Division with written notice of the release or suspected release within three (3) business days following the date of the initial verbal notice.

(2) Written notice may be submitted in, but is not limited to, the following forms: facsimile, electronic mail, U. S. mail, hand-written correspondence or by another form as may be provided by the Division.

Rule 12.109 Secondary Containment

(A)(1) Each new underground storage tank, or piping connected to any new underground storage tank¹ shall be secondarily contained and monitored for leaks.

(2) In the case of a new underground storage tank system consisting of one (1) or more underground storage tanks and connected by piping, the requirement to provide secondary containment shall apply to all underground storage tanks and connected pipes comprising the system.

(B)(1) Any existing underground storage tank, or existing piping connected to an existing underground storage tank that is replaced² shall be secondarily contained and monitored for leaks.

(2) In the case of a replacement of an existing underground storage tank, or existing piping connected to the underground storage tank, the requirement to provide secondary containment shall apply only to the specific underground storage tank or piping being replaced, not to other underground storage tanks and connected pipes comprising the system.

(C)(1) Each installation of a new motor fuel dispenser system, or replacement of an existing motor fuel dispenser system³ shall include under-dispenser spill containment.

(2) Under-dispenser spill containment must:

(a) Be liquid-tight on its sides, bottom, and at any penetrations;

(b) Be compatible with the substance conveyed by the piping; and

(c) Allow for visual inspection and access to the components in the containment system and/or be monitored.

¹ A new underground storage tank or its piping is subject to the secondary containment requirements under this section if it was installed after July 1, 2007.

² An existing underground storage tank or existing piping is subject to the secondary containment requirements under this section if it was replaced after July 1, 2007.

³ A new motor fuel dispenser system is subject to the secondary containment requirements under this section if it was installed or replaced after July 1, 2007.

- (3) A motor fuel dispenser system is considered to have been replaced if:
- (a) An existing motor fuel dispenser and the equipment necessary to connect the motor fuel dispenser to the underground storage tank system are removed, and
 - (b) Another motor fuel dispenser and the equipment necessary to connect the motor fuel dispenser to the underground storage tank system are put in its place.
- (D) Secondary containment systems shall be designed, constructed, and installed to:
- (1) Contain regulated substances released from the tank system until they are detected and removed;
 - (2) Prevent the release of regulated substances to the environment at any time during the operational life of the underground storage tank system; and
 - (3) Be checked for evidence of a release at least every thirty (30) days.
- (E) In addition to the requirements of subsection (D) of this section, double-walled tanks must be designed, constructed, and installed to:
- (1) Contain a release from any portion of the inner tank within the outer wall; and
 - (2) Detect the failure of the inner wall.
- (F) In addition to the requirements of subsection (D) of this section, external liners (including vaults) must be designed, constructed, and installed to:
- (1) Contain one hundred percent (100%) of the capacity of the largest tank within its boundary;
 - (2) Prevent the interference of precipitation or groundwater intrusion with the ability to contain or detect a release of regulated substances; and
 - (3) Surround the tank completely (i.e., it is capable of preventing lateral as well as vertical migration of regulated substances.)
- (G) Underground piping must be equipped with secondary containment that satisfies the requirements of subsection (D) of this section.
- (H) In accordance with the requirement of subdivision (D)(3) of this section, interstitial monitoring shall meet at least one (1) of the following requirements:
- (1) For double-walled underground storage tank systems, the sampling or testing method can detect a release through the inner wall in any portion of the tank that routinely contains a regulated substance;
 - (2) For underground storage tank systems with a secondary barrier within the excavation zone, the sampling or testing method used can detect a release between the underground storage tank system and the secondary barrier;
 - (a) The secondary barrier around or beneath the underground storage tank system consists of artificially constructed material that is sufficiently thick and impermeable (at least 10^{-6} cm/sec for the regulated substance stored) to direct a release to the monitoring point and permit its detection;
 - (b) The barrier is compatible with the regulated substance stored so that a release

from the underground storage tank system will not cause a deterioration of the barrier allowing a release to pass through undetected;

(c) For cathodically protected tanks, the secondary barrier must be installed so that it does not interfere with the proper operation of the cathodic protection system;

(d) The groundwater, soil moisture, or rainfall will not render the testing or sampling method used inoperative so that a release could go undetected for more than thirty (30) days;

(e) The site is assessed to ensure that the secondary barrier is always above the groundwater and not in a 25-year flood plain, unless the barrier and monitoring designs are for use under these conditions; and

(f) Monitoring wells are clearly marked and secured to avoid unauthorized access and tampering; or

(3) For tanks with an internally fitted liner, an automated device can detect a release between the inner wall of the tank and the liner, and the liner is compatible with the substance stored.

(I) The requirements of this section do not apply to:

(1) Suction piping that meets the requirements of 40 C.F.R. § 280.41(b)(2)(i)-(v); or

(2) Piping that manifolds two (2) or more underground tanks together.

Rule 12.110 Delivery Prohibition

(A) It shall be unlawful to deliver to, deposit into, or accept a regulated substance into an underground storage tank at a facility that has been identified by the Division as ineligible for fuel delivery or deposit.

(B)(1) To prevent the delivery of a regulated substance into an underground storage tank system that has been identified by the Division as ineligible, a tamper-proof red tag shall be affixed to the fill pipe of the ineligible underground storage tank.

(2) This affixed red tag shall serve as written notification to the owner, operator, and the product delivery industry of the prohibition of delivery to the tank system.

(C) An owner or operator shall not receive any regulated substance into any underground storage tank to which notification of delivery prohibition (red tag) has been affixed.

(D) A person selling any regulated substance shall not deliver or cause to be delivered a regulated substance into any underground storage tank to which notification of delivery prohibition (red tag) has been affixed.

(E) It shall be unlawful for any person, other than an authorized representative of the Division, to remove, tamper with, destroy, or damage a red tag affixed to any underground storage tank by Division personnel.

(F)(1) Under this section, a red tag shall immediately be affixed upon finding by the Division of any of the following:

(a) Required spill prevention equipment is not present;

- (b) Required overfill protection equipment is not present;
- (c) Required release detection equipment is not present; or
- (d) Required corrosion protection equipment is not present.

(2) The Division, in its sole discretion, may delay the affixing of a red tag to an underground storage tank for up to one hundred eighty (180) days upon determination that:

- (a) No urgent threat to public health exists; and
- (b) The action would jeopardize the availability of, or access to, fuel for the local community.

(G) Under this section, a red tag shall be affixed to an underground storage tank upon finding by the Division of any of the following if the owner or operator has been provided a written notice of noncompliance and the owner or operator has failed to comply within the time frame given in the notice:

- (1) Failure to properly operate or maintain release detection equipment;
- (2) Failure to properly operate or maintain spill, overfill, or corrosion protection equipment; or
- (3) Failure to maintain financial responsibility.

(H)(1) For an owner or operator of an underground storage tank that has been red tagged to have the tank reclassified by the Division as eligible to receive delivery of a regulated substance, he or she must provide a written statement to the Division that the deficiencies listed in the notice of noncompliance have been corrected.

(2) The Division will determine whether the deficiencies have been corrected as soon as practicable but within five (5) business days after receipt of the owner's written statement of compliance.

- (3) Upon verification of compliance, Division personnel will remove the red tag.

CHAPTER 2: REGISTRATION OF STORAGE TANKS

Rule 12.201 Registration Requirement

(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 Rule.

(B)(1) An owner or operator shall not receive any regulated substance into any underground storage tank without furnishing current and proper proof of registration under Rule 12.202(A) to the person selling the regulated substance.

(2) 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 under Rule 12.202(A) from the owner or operator.

(C) This Rule shall not apply to aboveground storage tanks located on farms if the contents are used for agricultural purposes and not held for resale.

(D) This Rule 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) This Rule 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 Rule 12.203 must be obtained and the storage tank registration fees under Rule 12.203 must be paid.

Rule 12.202 Certificate of Registration

(A) Proper proof of registration shall be in the form of a Certificate of Registration.

(B) Each year the Division shall issue or renew a Certificate of Registration for each storage tank facility meeting the following requirements:

(1) All storage tanks at the facility must be registered in accordance with this Rule;
and

(2) The registration fees required by Rule 12.203 must be paid.

(C) A Certificate of Registration must be posted in a conspicuous place at each registered facility.

Rule 12.203 Storage Tank Registration Fees

(A)(1) An annual registration fee for each storage tank shall be paid by the tank owner or operator to the Division for each year or portion of a year that the tank is in use.

(2) A storage tank shall be deemed “in use” until it has been removed or otherwise permanently closed in accordance with the procedures mandated by this Rule and written notice of the change in status of the tank has been provided to the Division.

(B) The annual registration fee for a storage tank newly placed into service shall be paid within thirty (30) days after the storage tank is placed into service.

(C) The annual registration fee for all storage tanks shall be seventy-five dollars (\$75) per tank.

(D) The annual registration fees shall be allocated to the Regulated Substance Storage Tank Program Fund and the Department of Arkansas State Police.

(E) If the annual registration fee required by this Chapter is not paid within thirty (30) days of the billing date of the applicable fee invoice from the Division, a late fee shall be imposed in the amount of five dollars (\$5) per storage tank.

(F) Nonpayment of any fee required by this Chapter is grounds for legal action by the Division, and may result in the assessment of civil penalties as provided in Chapter 9 of this Rule.

(G) Any fees required by this Chapter shall be non-refundable.

CHAPTER 3: PETROLEUM STORAGE TANK TRUST FUND CORRECTIVE ACTION REIMBURSEMENT PROCEDURES

Rule 12.301 Purpose

In accordance with the Petroleum Storage Tank Trust Fund Act, eligible owners or operators may obtain partial reimbursement for costs of corrective action taken in response to accidental releases from qualified petroleum storage tank systems. This Chapter establishes the procedures to be followed and documentation required to receive reimbursement from the trust fund.

Rule 12.302 Trust Fund Eligibility

(A)(1) Every owner or operator of an underground petroleum storage tank system is required by 40 C.F.R. § 280.93 to demonstrate financial responsibility for taking corrective action in response to an accidental release from an underground petroleum storage tank system. One mechanism that may be used to partially satisfy this requirement is the Petroleum Storage Tank Trust Fund.

(2) Every owner or operator choosing to use the trust fund as a mechanism to partially satisfy the financial responsibility requirements described in subdivision (A)(1) of this section also must utilize an additional financial responsibility mechanism, as described in subdivision (D)(2) of this section, for the first seven thousand five hundred dollars (\$7,500) of the costs of corrective action.

(B) In accordance with the Petroleum Storage Tank Trust Fund Act, owners or operators of certain aboveground petroleum storage tank systems also may qualify for and access the trust fund.

(C) The trust fund shall not be accessed for storage tank systems storing any substance listed under Section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 [42 U.S.C.S. § 9601 (14)], as amended. These tank systems shall not be considered qualified storage tanks for purposes of Chapters Three and Four of this Rule.

(D) To be eligible for the trust fund, the owner or operator must:

(1) Register each petroleum storage tank and pay the annual storage tank fees required by this Rule for each tank until the permanent closure requirements of this Rule are satisfied; and

(2) Maintain financial responsibility in the amount of seven thousand five hundred dollars (\$7,500) per occurrence for corrective action costs, by any one (1) or combination of the following: insurance, guaranty, surety bond, letter of credit, insurance pool, or any other mechanism allowed by 40 C.F.R. § 280.

(E)(1) Any person requesting Advisory Committee review of a Division determination on trust fund eligibility or costs must file a request with the Division within ninety (90) days of the date of the Division's determination.

(2) A request for Advisory Committee review must be in writing and mailed to the Division's postal address, to the attention of the ~~Regulated Storage Tanks Division Chief~~ Associate Director, Office of Land Resources.

Rule 12.303 Trust Fund Coverage for a Release

(A) For an owner or operator to obtain any coverage by the trust fund for corrective action necessary to address an accidental release, all of the following requirements must be met:

(1) At the time of the discovery of the release, the owner or operator must have met each of the requirements for trust fund eligibility as set forth in Rule 12.302(D);

(2) The release must have occurred after February 22, 1989;

(3) The Division must have been given timely notice of the release as required by Rule 12.305;

(4) The owner or operator must cooperate fully with the Division in conducting corrective action to address the release; and

(5) The owner or operator must have expended seven thousand five hundred dollars (\$7,500) in reasonable, allowable, and necessary corrective action costs for the occurrence.

(B) Upon request by the Division, the owner or operator shall submit proof of compliance with the requirements for trust fund coverage.

Rule 12.304 Trust Fund Coverage for Unknown Petroleum Storage Tanks

(A) Unknown petroleum storage tanks that have satisfied the requirements of Rule 12.303 shall be eligible for reimbursement for corrective action as provided by this section if:

(1) The unknown petroleum storage tank is discovered while removing, upgrading, or replacing a petroleum storage tank meeting the requirements of Rule 12.303, or while performing petroleum investigation or corrective action activities required by federal or state laws, and the petroleum storage tank meeting the requirements of Rule 12.303 is located on the same property or facility; or

(2) The unknown petroleum storage tank is located on a right-of-way purchased by a city, county, or state governmental agency or entity and is discovered during construction in the right-of-way.

(3) Eligibility for reimbursement of an unknown petroleum storage tank will be conditioned on the payment of three hundred seventy-five dollars (\$375) to the Division.

Rule 12.305 Notice Requirements

(A) The Division must be given timely notice of any release as required by 40 C.F.R. § 280, Subpart E.

(B)(1) The requirement for giving timely notice of a release from an aboveground storage tank system shall be the same as that for an underground storage tank system.

(2) An owner or operator is required to give notice of a release from an aboveground storage tank system if the amount of the release equals or exceeds existing reporting limits in any other applicable federal or state statutes or regulations.

(C)(1) To ensure timely notice of a release or suspected release from a storage tank system is received by the Division, an owner or operator must follow up a verbal notice to the

Division with written notice of the release or suspected release within three (3) business days following the date of the initial verbal notice.

(2) Written notice may be submitted in, but is not limited to, the following forms: facsimile, electronic mail, U. S. mail, hand-written correspondence or by another form as may be provided by the Division.

(D) If the Division is not given the required timely notice of a release, and the failure to report the release causes a delay in the corrective action that contributes to an adverse impact to the environment, no reimbursement shall be made under this Chapter for the costs of corrective action incurred in response to the release.

Rule 12.306 Amount of Reimbursement

(A) The trust fund will provide reimbursement to eligible owners or operators of storage tanks for corrective action costs required to address accidental releases in an amount not to exceed one million ~~four~~nine hundred ninety-two thousand five hundred dollars (\$1,~~49~~92,500) per occurrence.

(B) The owner or operator shall be responsible for the first seven thousand five hundred dollars (\$7,500) of corrective action costs per occurrence.

Rule 12.307 Deductible

(A) The first seven thousand five hundred dollars (\$7,500) of corrective action costs incurred by the owner or operator shall be considered a deductible and is not eligible for reimbursement from the trust fund.

(B)(1) A reimbursement for corrective action costs shall not be made from the trust fund until the deductible for the occurrence has been expended by the owner or operator.

(2) An owner or operator may not submit an application for reimbursement for corrective action costs until he or she has expended the deductible.

(3) Proof of payment of the deductible must be provided to the Division prior to approval of reimbursement for any corrective action costs.

(4) For purposes of meeting the deductible, proof of payment shall consist of a receipt, a copy of a money order, or a canceled check. An IOU, a discharge in bankruptcy, a conditional payment, an installment payment, or a down payment shall not be considered proof of payment.

(C) The only corrective action costs that shall be credited toward the deductible are costs that are:

(1) Incurred in response to a release that has been timely reported to the Division; and

(2) Found to be reasonable, allowable, and necessary.

Rule 12.308 Applying for Reimbursement of Corrective Action Costs

(A) To apply for reimbursement of corrective action costs, an owner or operator must meet the requirements for coverage set forth in Rule 12.303 and meet the requirements of this Chapter for reimbursement applications.

(B) An application shall not contain a request for reimbursement, nor shall reimbursement be made, in advance of the reimbursable services being rendered or reimbursable costs being incurred.

(C) Any applications for reimbursement of corrective action costs must be submitted on forms provided by the Division and shall include an accounting of all charges itemized by labor hours and rates, analytical charges, equipment charges and other categories that may be identified by the Division. The application also shall contain the following:

(1) The name, address, and telephone number of the applicant;

(2) The name, address, and telephone number of each owner and operator of each storage tank and the facility owner, if different from the applicant;

(3) The location of the facility where the corrective action was performed or is being performed, identified with sufficient clarity and detail to enable a person unfamiliar with the site to locate it;

(4) A legible copy of all invoices for which reimbursement is requested, providing a description of the work performed, where the work was performed, the dates the work was performed, the unit costs, and the total amount paid;

(5) Evidence that the amounts shown on the invoices for which reimbursement is requested have been paid in full by the applicant. The evidence must be accompanied by a copy of any of the following:

(a) Business receipts, indicating all payments received;

(b) Canceled checks (front and back);

(c) The certification of a certified public accountant that the costs for which reimbursement is requested have been paid in full; or

(d) An affidavit signed by the person who performed the corrective action, affirming what amounts the applicant represents as being paid to that person have been paid in full; and

(6) Any other information that the Division may reasonably require.

(D) An application must be signed as follows:

(1) For a corporation —

(a) By a principal executive officer of at least the level of vice-president;

(b) By a duly authorized representative or agent of the executive officer named in subdivision (D)(1)(a) of this section, provided that the representative or agent is responsible for the overall operation of the facility that is the subject of the application; or

(c) By a person whom the board of directors designates by means of a corporate resolution;

(2) For a partnership, sole proprietorship or individual, by a general partner, the proprietor, or individual, respectively; or

(3) For a municipality, state, federal, or other public agency, by either a principal, executive officer, or ranking elected official.

(E) A person who signs an application for reimbursement shall make the following certification:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I also certify that the amounts for which reimbursement is requested under this application have been paid in full and that I have the authority to submit this application on behalf of _____.

(F) Application for reimbursement of corrective action costs must be made by an eligible owner or operator no later than one (1) year after the Division's issuance of a "No Further Action" letter for the occurrence.

Rule 12.309 Interim Payments

(A) The Director may provide for interim payments, provided the investigation or corrective action is being conducted in accordance with an approved workplan or corrective action plan. Payment will only be made at the following times:

(1) After the completion of a phase, as approved by the Division; or

(2) At points during the corrective action process agreed to by the Division and the applicant.

(B) The applicant must update his or her application with any information not yet submitted to the Division before review of the reimbursement application will commence.

(C) For purposes of this section, the following are the phases of corrective action:

(1) Completion of site stabilization activities;

(2) Completion and submittal of a report for a preliminary investigation;

(3) Implementation of a free product removal system;

(4) Completion and submittal of a report for a secondary investigation and development of a corrective action plan;

(5) Implementation of a corrective action plan; and

(6) Provision of an alternate water supply.

(D)(1) Applications for payments for the implementation of a phase may be submitted ninety (90) days following initiation of work to implement the phase and at ninety-day intervals thereafter until completion of the authorized activities.

(2) Upon request, the Director may approve interim payments at more frequent intervals.

(E) Interim payments shall consist of payment of an amount not to exceed ninety percent (90%) of one million five hundred thousand dollars (\$1,500,000). The remaining ten percent (10%) shall be released only upon final payment for corrective action concerning the occurrence.

Rule 12.310 Reimbursement Application Review

(A)(1) Before commencing a substantive review of an application for reimbursement of corrective action costs, the Division shall determine whether the release meets the requirements of Rule 12.303 for trust fund coverage for corrective action.

(2) Any person aggrieved by the Division's determination of whether a release is eligible for trust fund coverage for corrective action may request that the Advisory Committee, and, if necessary thereafter, the Director, review the Division's determination.

(B) The Division is not required to commence substantive review of an application until it has received a completed application form containing all of the information required by Rule 12.308. If, during the course of the substantive review, the Division finds that additional information is needed to evaluate the application, the Division may require that the information be provided before review of the application may be completed.

(C) The Division and the Advisory Committee shall not recommend, and the Director shall not approve, reimbursement of corrective action costs unless they are reasonable, allowable, and necessary.

(D)(1) After a reimbursement application is complete, the Division shall make a written recommendation to the Advisory Committee as to whether the applicant has met the trust fund eligibility requirements and, if so, what costs specified in the application are reasonable, allowable, and necessary.

(2) The Advisory Committee in its sole discretion may allow supplemental information explaining the application to be presented orally. It may establish a fair and reasonable limit on time allowed for oral presentation.

(3) The Advisory Committee may consider, but is not bound by, the recommendation prepared by the Division under subdivision (D)(1) of this section. It shall make a written recommendation to the Director as to whether the applicant has met the trust fund eligibility requirements and, if so, what costs for which reimbursement is requested are reasonable, allowable, and necessary and should therefore be paid.

(E)(1) The Director shall consider, but is not bound by, the recommendations made by the Division under subdivision (D)(1) of this section and by the Advisory Committee under subdivision (D)(3) of this section.

(2) The Director shall decide whether the applicant has met the trust fund eligibility requirements and, if so, what costs for which reimbursement is requested are reasonable, allowable, and necessary and therefore should be paid.

(3) If the decision of the Director is contrary to the recommendation of the Advisory Committee, the Director shall provide in writing his or her reasons for declining to follow the Advisory Committee's recommendation.

(F)(1) The decision of the Director shall be the final decision of the Division.

(2) The decision of the Director may be appealed to the Commission. An owner or operator who considers himself or herself injured in his or her business, person, or property by a

final decision of the director or his or her designee may, within thirty (30) days after the date of the final decision of the director or his or her designee, appeal the decision to the Commission.

Rule 12.311 Reasonable Costs

(A) “Reasonable costs” means costs or a range of costs commensurate with the level of corrective action necessary to assess or remediate (or both) the petroleum storage tank system release, based on an evaluation of typical costs expected for the particular corrective action under review, with respect to the necessary or required scope and complexity of the action.

(B) Hourly charges for equipment may be established in the cost proposal submitted for each major phase of work. Hourly rates must be competitive with similar charges by other contractors and may be rejected if they are determined to represent unreasonable costs.

(C) A cost is not reasonable unless it is also an allowable cost under this Chapter.

Rule 12.312 Allowable Costs

(A) Only those costs that are allowable costs under this Chapter shall be reimbursable.

(B)(1)(a) Allowable costs are those costs that are approved by the Division and arise directly from the performance of corrective action in accordance with the requirements of this Rule.

(b) For purposes of appeal only, a cost that has been submitted to, reviewed and disallowed by the Division is deemed “approved by the Division” under subdivision (B)(1)(a) of this section.

(c) Approval of costs by the Division shall not be construed to be a contract with the State to pay the costs.

(2) The cost of repairing damages caused by the performance of the corrective action shall be allowable unless otherwise prohibited by this Rule or by other law; provided, however, that the cost of repairing damages resulting from contractor negligence, error, or other wrongful action shall not be allowable.

(C) A reimbursement shall not be made under this Chapter for any costs incurred prior to the discovery of a release.

(D) If the Division is not given timely notice of a release as required by Rule 12.305, no reimbursement shall be made under this Chapter for the costs of corrective action incurred in response to the release.

(E) Reimbursement shall be made under this Chapter only for costs incurred for corrective action that is approved by the Division.

(F) The determination as to what costs are allowable will be made on a case-by-case basis. However, costs for the following types of activities or items will generally be considered reimbursable:

(1) Site investigation, testing, and monitoring necessary for the preparation of an approved corrective action plan;

(2) Preparation of an approved corrective action plan;

(3) Recovery and disposal of contaminated soils;

(4) Cleanup and disposal of contaminated soils;

(5) Installation and operation of monitoring wells;

(6) Analysis of soils and water;

(7) Removal of leaking storage tanks if required by the Division as necessary to the corrective action;

(8) Provision of an alternate water supply;

(9) Treatment and disposal of contaminated groundwater;

(10) Equipment, such as bailers and sample containers, that can be charged to a specific site;

(11) Travel costs that are necessary for corrective action and present the least-cost alternative for the required corrective action; and

(12)(a) Repair, reassembly, or reinstallation of fixtures, equipment, or appurtenances that are disassembled, moved, or otherwise taken apart as a necessary requirement of the investigation or remediation of a petroleum storage tank release and that are, or would be, damaged by the investigation or remediation.

(b) Subdivision (F)(12)(a) of this section shall not apply to structures, landscaping, or petroleum storage tank systems, except for the costs of repairing boring or sampling holes inside structures.

(G) The following types of costs are those that will not be considered allowable costs of corrective action:

(1) Retrofitting, repairing or replacing petroleum storage tank systems or piping;

(2) Loss of revenue;

(3) Profit for the responsible party or for any entity in which the responsible party has an ownership interest of five percent (5%) or more unless payment of the profit is the least-cost alternative for the required corrective action, as determined by the Division's review of reasonable costs;

(4) Rental of temporary petroleum storage tanks not necessary for corrective action;

(5)(a) Rental of real estate or buildings owned in part or in total by the responsible party or by any entity in which the responsible party has an ownership interest of five percent (5%) or more unless the rental is the least-cost alternative for the required corrective action, as determined by the Division;

(b) Rental of real estate or buildings in which the responsible party, or any entity in which the responsible party has an ownership interest of five percent (5%) or more, has a leasehold interest for any reason other than to facilitate the corrective action;

(6) The value of lost trees, shrubs, grass or signs on the owner's or operator's property, or other fixtures, appurtenances or personal property except as allowed in subdivision (F)(12) of this section;

(7) The value of lost petroleum or petroleum products;

(8) The cost of sample analysis performed by a laboratory that is not certified by the Division;

(9) Duplicative charges for travel time and mileage for any trip to multiple job sites where the costs are billed in total to multiple corrective action projects rather than allocated between the separate projects (i.e., only charges based on actual miles traveled for all corrective action projects charged to the trust fund shall be eligible for reimbursement);

(10) Excess charges for travel time and mileage if visits to multiple sites are not scheduled economically so that the costs can be allocated between the projects, if possible;

(11) Corrective action taken in violation of state or federal laws or regulations; and

(12) The costs of equipment purchases; provided, however, that costs of routinely required supplies that are expended at a given site, or equipment that must be installed at a site to implement a corrective action plan, are allowable. Equipment that cannot be charged to a specific site includes without limitation the following:

(a) Drilling rigs;

(b) Earth-moving equipment;

(c) Tools of the trade, such as hand tools, safety or traffic control equipment, personal protective equipment, surveying equipment, etc.

(d) Field analytical and measuring devices, such as groundwater sampling pumps, photoionization detectors, organic vapor meters, infrared analyzers, portable gas chromatographs, dataloggers, soil gas probes, etc.

(H)(1) A reimbursement shall not be made under this Chapter for any item for which payment is made under a third-party claim for the same occurrence under Chapter 4.

(2) A third-party claim reimbursement shall not be made under Chapter 4 for any item that is included in an approved corrective action plan and is reimbursable under this Chapter.

Rule 12.313 Necessary Costs

Only costs that are necessary, as determined by the Division, for conducting approved corrective action shall be reimbursable under this Chapter.

Rule 12.314 Records

(A) Any owner or operator participating in the trust fund shall maintain the following records and submit them or make them available to the Division upon request:

(1) Evidence of current financial responsibility for seven thousand five hundred dollars (\$7,500) per occurrence; and

(2) Any other records as may reasonably be required by the Division or the Advisory Committee in the performance of their duties under law.

(B) All records necessary to demonstrate that the trust fund eligibility requirements of Rule 12.302 have been fulfilled shall be retained by the owner or operator until one (1) of the following is accomplished:

(1) Closure requirements of this Rule, if applicable, are satisfied;

(2) Responsibility for meeting the financial assurance requirements of this Rule is legally transferred; or

(3) The owner or operator is otherwise instructed in writing by the Division.

(C) For auditing purposes, all records necessary to demonstrate that the trust fund coverage requirements of Rule 12.303 have been fulfilled shall be retained by the owner or operator for a minimum of three (3) years from the date of closure of the corrective action project.

Rule 12.315 Audits

(A) The Director may cause audits to be performed as necessary to ensure that costs, for which reimbursement is sought or has been paid, were in fact incurred and necessary, that the work was in fact performed and necessary, and that reimbursement would be, or is, in fact reasonable and allowable.

(B) The audits may be performed by the Division or by any qualified person at the direction of the Director.

(C) Monies in the trust fund may be expended by the Director as necessary to pay the cost of audits performed by persons other than the Division.

Rule 12.316 Cost Recovery

(A) The Division may initiate proceedings against any owner or operator of a petroleum storage tank system for recovery of monies that were solicited and received from the trust fund, regardless of whether it was approved by the Advisory Committee or the Director, if:

(1) The funds were solicited or received through willful or accidental utilization of incorrect information;

(2) The costs were not incurred or were unnecessary;

(3) The work was not performed or was unnecessary; or

(4) The amount of reimbursement is found to be unreasonable or not allowable.

(B) The Division has the right of subrogation that applies to sites where corrective action is taken by owners, operators, or the Division. The right of subrogation extends to:

(1) Any insurance policies in existence at the time of the occurrence to the extent of any rights the owner or operator of a site may have had under that policy; and

(2) Any third party who caused or contributed to the occurrence.

(C) For purposes of subrogation, “third party” does not include a former owner or operator of the site where corrective action is taken.

Rule 12.317 Trust Fund Availability

(A)(1) All claims for reimbursement submitted under this Chapter are subject to the availability of monies in the trust fund.

(2) Nothing in this Rule shall be construed to create a permanent entitlement to monies in the trust fund.

(3) The Commission reserves the right to amend this Chapter, including the provisions regarding coverage and eligibility, and reasonable, allowable, and necessary costs.

(B)(1) If the monies in the trust fund prove insufficient to cover all trust fund claims for reimbursement, the Advisory Committee shall recommend to the Director a priority system based upon whatever factors it deems appropriate.

(2) The Director may adopt a priority system for reimbursement based upon any factors he or she deems appropriate.

Rule 12.318 Obligation to Comply

(A) Eligibility of an owner or operator for the trust fund shall not preclude the Division from taking any appropriate enforcement action.

(B) This Chapter shall not affect the liability or responsibility of an owner or operator of a petroleum storage tank system for taking corrective action, as required by this Rule or any other law, in response to a release.

Rule 12.319 Reimbursement of Equipment Costs

(A) An owner or operator or a consultant may be eligible for reimbursement for the purchase of equipment needed to undertake corrective action.

(B) An eligible cost incurred by a consultant on behalf of an owner or operator for the purchase of equipment needed to perform corrective action, and determined by the Division to be reimbursable, will apply toward the owner’s or operator’s maximum reimbursable amount for the occurrence.

(C) A consultant may not submit an application for reimbursement of eligible costs to purchase equipment for corrective action except in conjunction with a reimbursement application of an owner or operator who provides proof of the equipment purchase by the consultant in the application.

(D) Upon the written permission of the owner or operator, the eligible costs of purchasing equipment needed to perform corrective action, incurred by a consultant on behalf of the owner or operator, may be reimbursed directly to the consultant.

(E) All requests for reimbursement of equipment purchases must, at a minimum, include the following information:

- (1) Name and description of the equipment; and
- (2) Model and serial number(s) (if applicable).

(F) An equipment purchase by the owner or operator or a consultant must be approved by the Division prior to the purchase to be eligible for reimbursement.

(G)(1) For purposes of this Chapter only, “residual value of equipment” means the actual value of the equipment at the time the equipment is taken out of service.

(2) The residual value of equipment is not a reimbursable cost.

(3) The residual value of equipment may be projected based on the expected duration the equipment will be used for corrective action and the salvage value of the equipment, if applicable.

(H)(1) Equipment purchased under this section is the property of the owner or operator or the consultant making the purchase.

(2) Reimbursement to an owner or operator or a consultant for the cost of purchasing equipment needed for undertaking corrective action shall establish a lien by the Division on the equipment for the duration of the corrective action.

(3) If corrective action is not completed by the owner or operator in accordance with Ark. Code Ann. § 8-7-807(a)(1), the Division shall be granted ownership of any equipment upon which a lien is established.

(I) Depreciation schedules for equipment purchased under this section may be determined in accordance with applicable federal and state tax requirements.

(J) Purchase costs and rental costs shall not be reimbursed for the same equipment.

Rule 12.320 Transfer of Trust Fund Eligibility

(A) An owner or operator determined to be eligible for reimbursement of corrective action for a release from a qualified storage tank may transfer the eligibility to a subsequent owner or operator of the qualified storage tank if the Division determines that the subsequent owner or operator has the financial and legal capacity to complete the corrective action and has met all the requirements of this section.

(B) The removal of the storage tank after initiation of corrective action shall not bar the transfer of eligibility as provided in subsection (A) of this section.

(C) An owner or operator must notify the Division no fewer than thirty (30) days prior to any transfer of eligibility and provide documentation that the subsequent owner or operator has the legal and financial capacity to complete the corrective action.

(D) Documentation of legal capacity includes, but is not limited to, the following, as appropriate:

(1) Proof of authorization to conduct business in Arkansas, e.g., current registration with, and a valid certificate of good standing issued by, the Arkansas Secretary of State;

(2) Proof of proper registration of the tank system by the subsequent owner or operator;

(3) Copy of any access agreement(s) between the subsequent tank owner and the owner of the real property, if different from the tank owner or operator; and

(4) Copy of any access agreement(s) between the subsequent tank owner and adjacent property owner(s), if off-site access will be necessary to conduct corrective action.

(E) Documentation of financial capacity includes, but is not limited to, the following:

(1) Accurate and complete cost estimate for remaining corrective action activities required to abate a release from a qualified storage tank;

(2) A time schedule for completion of corrective action; and

(3) Any one (1) or combination of the items below that affirms, as determined by the Division, the subsequent owner or operator has sufficient assets to complete corrective action:

(a) An independently audited copy of the most recent annual financial statements that indicates the availability of sufficient funds to finance the remaining corrective action;

(b) Copies of bank statements or any other financial records that indicate the availability of sufficient funds of the subsequent owner or operator to finance the remaining corrective action;

(c) A letter from a financial institution or other funding agency indicating a binding commitment to provide a specified amount of funds and the uses for which the funds may be utilized; or

(d) In cases where funding is required but there can be no binding commitment of money until approvals are received, a letter of "intent to fund" from the appropriate funding institution indicating the amount of funds and their specified uses.

(F) Upon approval of the Division that the subsequent owner or operator has both the legal and financial capacity to complete corrective action, the owner or operator, the subsequent owner or operator, and the Division will enter into a consent administrative order, upon agreement of all parties, setting forth the following:

(1) The owner or operator relinquishes eligibility for trust fund coverage for the occurrence;

(2) The owner or operator acknowledges continuing liability for undertaking corrective action for the occurrence; and

(3) The subsequent owner or operator assumes responsibility for completion of corrective action for the occurrence.

(G) Transfer of eligibility for trust fund coverage for the occurrence is effective upon execution of the consent administrative order.

(H) Nothing in this section shall be construed to alter the limits of reimbursement for corrective action set out in Ark. Code Ann. § 8-7-907.

Rule 12.321 Reimbursement to Lender or Secured Creditor

(A) A lender or secured creditor that holds ownership in a storage tank primarily to protect a security interest on the storage tank or the facility where it is located, or both, is eligible for reimbursement for corrective action if the lender or secured creditor assumes responsibility for completing the corrective action of a release from a qualified storage tank.

(B) If an owner or operator is performing corrective action to the Division's satisfaction, a lender or secured creditor is not eligible to assume responsibility for corrective action or to receive reimbursement for corrective action.

(C) A lender or secured creditor must notify the Division thirty (30) days prior to assuming responsibility for completing corrective action for a release from a qualified storage tank and provide documentation of the security interest in the storage tank or the facility where the storage tank is located.

(D) Upon verification of the security interest of the lender or secured creditor and determination by the Division that the owner or operator is performing corrective action in an unsatisfactory manner, the lender or secured creditor will enter into a consent administrative order with the Division setting forth the following:

(1) The lender or secured creditor assumes responsibility for completing the corrective action for a release from a qualified storage tank; and

(2) The lender or secured creditor shall cooperate fully with the Division in conducting the corrective action for a release from a qualified storage tank.

(E) A lender or secured creditor that is eligible for reimbursement for corrective action for a release from a qualified storage tank under this section shall comply with this Rule.

(F) Eligibility for reimbursement of corrective action costs for the occurrence is effective upon execution of the consent administrative order.

(G) Nothing in this section shall be construed to alter the limits of reimbursement for corrective action set out in Ark. Code Ann. § 8-7-907.

CHAPTER 4: PETROLEUM STORAGE TANK TRUST FUND THIRD-PARTY PAYMENT PROCEDURES

Rule 12.401 Purpose

In accordance with the Petroleum Storage Tank Trust Fund Act, eligible owners, operators, or third parties may obtain partial payment for valid compensatory damage claims caused by accidental releases from qualified petroleum storage tank systems. This Chapter establishes the procedures to be followed and documentation required to receive payment from the trust fund.

Rule 12.402 Trust Fund Eligibility

(A)(1) Every owner or operator of an underground petroleum storage tank system is required by 40 C.F.R. § 280.93 to demonstrate financial responsibility for compensating third parties for bodily injury and property damage caused by accidental releases from underground petroleum storage tank systems. One mechanism that may be used to partially satisfy this requirement is the Petroleum Storage Tank Trust Fund.

(2) Every owner or operator choosing to use the trust fund as a mechanism to partially satisfy the financial responsibility requirements described in subdivision (A)(1) of this section also must utilize an additional financial responsibility mechanism, as described in subdivision (C)(1) of this section, for the first seven thousand five hundred dollars (\$7,500) of the costs of third-party claims.

(B) In accordance with the Petroleum Storage Tank Trust Fund Act, owners or operators of certain aboveground petroleum storage tank systems also may qualify for and access the trust fund.

(C) To be eligible for the trust fund, the owner or operator must:

(1) Register each petroleum storage tank and pay the annual storage tank fee required by this Rule for each tank until the permanent closure requirements of this Rule are satisfied;

(2) Maintain financial responsibility in the amount of seven thousand five hundred dollars (\$7,500) per occurrence for third-party claims, by any one or combination of the following: insurance, guaranty, surety bond, letter of credit, insurance pool, or any other mechanism allowed by 40 C.F.R. § 280; and

(3) For each petroleum storage tank for which trust fund eligibility is sought, certify, on forms supplied by the Division, that he or she is in substantial compliance, as defined by Rule 12.403(B).

Rule 12.403 Trust Fund Coverage for a Release

(A) For an owner or operator to obtain third-party coverage by the trust fund for a release, the following requirements must be met:

(1) At the time of the discovery of the release the owner or operator must have met each of the requirements for trust fund eligibility as set forth in Rule 12.402(C);

(2) The release must have occurred after February 22, 1989;

(3) The Division must have been given timely notice of the third-party claim as required by Rule 12.405;

(4) The owner or operator must have expended seven thousand five hundred dollars (\$7,500) on reasonable and allowable third-party claims for the occurrence; and

(5) At the time of the release, the owner or operator must have been in substantial compliance, as defined in subsection (B) of this section.

(B)(1) For purposes of this Chapter only, “substantial compliance” means compliance with the requirement for the owner or operator to maintain financial responsibility in the amount of seven thousand five hundred dollars (\$7,500) per occurrence for third-party claims, by any one or combination of the following: insurance, guaranty, surety bond, letter of credit, insurance pool or any other mechanism allowed by 40 C.F.R. § 280.

(2) An owner or operator who in fact expends seven thousand five hundred dollars (\$7,500) on reasonable and allowable third-party claims for the occurrence shall be deemed to be in substantial compliance.

(C) Upon request by the Division, the owner or operator shall submit proof of compliance with the requirements for trust fund coverage.

Rule 12.404 Trust Fund Coverage for Unknown Petroleum Storage Tanks

(A) Unknown petroleum storage tanks that have satisfied the requirements of Rule 12.408(C) of this Chapter shall be eligible for reimbursement for third-party claims as provided by this section if:

(1) The unknown petroleum storage tank is discovered while removing, upgrading, or replacing a petroleum storage tank meeting the requirements of Rule 12.402(C) or while performing petroleum investigation or corrective action activities required by federal or state laws, and the petroleum storage tank meeting the requirements of Rule 12.402(C) is located on the same property or facility; or

(2) The unknown petroleum storage tank is located on a right-of-way purchased by a city, county, or state governmental agency or entity and is discovered during construction in the right-of-way.

(3) Eligibility for reimbursement of an unknown petroleum storage tank will be conditioned on the payment of three hundred seventy-five dollars (\$375) to the Division.

Rule 12.405 Notice Requirements

(A)(1) The owner or operator shall give written notice to the Division of any potential third-party claim within thirty (30) days of his or her knowledge of the potential claim.

(2) The notice required by subdivision (A)(1) of this section shall provide the names and addresses of all persons and properties alleged to be injured, as well as the time, place, and circumstances of the release.

(B)(1) Any owner or operator against whom a third-party claim is filed in court or in the

Arkansas State Claims Commission shall provide a copy of the complaint to the Division no later than twenty (20) days after service of summons or receipt of notification of the claim from the Arkansas State Claims Commission.

(2) Upon receipt of notice under subdivision (B)(1) of this section, the Division shall immediately notify the Attorney General, who shall have the right to intervene in any lawsuit or proceeding.

(3) Payment of third-party claims from the fund may be denied for any owner or operator who fails to give the Division notice as required in subsection (B) of this section.

Rule 12.406 Amount of Payment

(A) The trust fund will reimburse eligible owners or operators of storage tanks for compensating third parties, or will provide payment to third parties, for compensatory damages caused by accidental releases in an amount not to exceed nine hundred ninety-two thousand five hundred dollars (\$992,500) per occurrence.

(B) The owner or operator shall be responsible for the first seven thousand five hundred dollars (\$7,500) of third-party compensatory damage claims per occurrence.

Rule 12.407 Deductible

(A) The first seven thousand five hundred dollars (\$7,500) of costs incurred by the owner or operator for third-party compensatory damage claims for an occurrence shall be considered a deductible and is not eligible for reimbursement from the trust fund.

(B)(1) No payment to any third-party or to any owner or operator against whom a third-party claim is brought for compensatory damages shall be made from the trust fund until the owner or operator has expended the deductible amount on third-party claims for the occurrence, unless the owner or operator has been discharged under the United States Bankruptcy Code or is determined by a court to be insolvent.

(2) Proof of payment of the deductible must be provided to the Division prior to approval of a third-party claim for payment.

(3) For purposes of meeting the deductible, proof of payment shall consist of a receipt, a copy of a money order, or a canceled check. An IOU, a conditional payment, an installment payment, or a down payment shall not be considered proof of payment.

(C) Only third-party claims found to be reasonable and allowable shall be credited toward the deductible.

Rule 12.408 Applying for Payment of Third-Party Claims

(A) To apply for payment of a third-party claim, an owner or operator must meet the requirements for coverage set forth in Rule 12.403 and meet the application requirements of either subsection (C) of this section for judgments or subsection (E) of this section for settlements.

(B)(1) Unless otherwise stated in writing, an item is considered satisfied or compensated if it is:

- (a) Contained in any information submitted to support a third-party claim;
- (b) Presented for payment; and
- (c) Approved and paid.

(2) A third-party claim is not reimbursable as corrective action under Chapter 3 unless otherwise agreed in writing before it is approved for payment.

(C) An owner or operator against whom a judgment has been entered, by either a valid final court order or valid final order of the Arkansas Claims Commission, for compensatory damages caused by an accidental release from a qualified petroleum storage tank system, must submit:

(1) A copy of the order;

(2) Proof that the judgment, or a portion of the judgment, is for compensatory damages, if the proof is not clearly shown on the face of the order; and

(3) Before payment is made from the trust fund, proof of payment of the deductible of seven thousand five hundred dollars (\$7,500).

(D)(1) An owner or operator shall cooperate with and assist the Division and, if applicable, the Attorney General's Office in connection with the third-party claim. At a minimum, cooperation shall include active participation by the owner or operator throughout the litigation and providing assistance as required by the Division or the Attorney General's Office during resolution of a third-party claim.

(2) Reimbursement or payment of a third-party claim may be denied if an owner or operator fails to comply with the requirements of subdivision (D)(1) of this section.

(E)(1) An owner or operator who has entered into a settlement agreement with a third-party resolving a claim for compensatory damages caused by an accidental release from a qualified petroleum storage tank system must submit to the Division:

(a) A copy of the legally binding settlement agreement, including a dismissal with prejudice of the third-party's cause of action in accordance with the Arkansas or federal rules of civil procedure, that releases the owner or operator from all future liability to the third-party claimant for the occurrence;

(b) Documentation supporting each claim for which payment is sought;

(c) A notarized certification from the owner or operator and the third-party claimant that the third-party claim should rightfully be paid; and

(d) Before payment is made from the trust fund, proof of payment of the deductible of seven thousand five hundred dollars (\$7,500).

(2) As an alternative to providing a legally binding settlement agreement under subdivision (E)(1)(a) of this section, an owner or operator may submit a copy of a proposed settlement agreement and request a preliminary Division review of the agreement before it is made binding. However, the settlement agreement must be made binding, except as provided in subdivision (E)(3) of this section, before it is submitted to the Advisory Committee.

(3) Any otherwise binding settlement agreement submitted under subsection (E) of this

section may be conditioned upon approval of payment from the trust fund.

Rule 12.409 Third-Party Claim Review

(A)(1) Before commencing a substantive review of a third-party claim, the Division shall determine whether the release meets the requirements of Rule 12.403 for third-party coverage by the trust fund.

(2) Any person aggrieved by the Division's determination of whether a release is eligible for third-party coverage by the trust fund may request that the Advisory Committee, and, if necessary thereafter, the Director, review the Division's determination.

(B) The Division is not required to commence substantive review of a third-party claim until any corrective action necessary to address the release has been completed.

(C) The Division is not required to commence substantive review of a third-party claim until it has received all of the information required by Rule 12.408(C) or Rule 12.408(E), as applicable. If, during the course of the substantive review, the Division finds that additional information is needed to evaluate the claim, the Division may require that the information be provided before review of the claim may be completed.

(D) The Division and the Advisory Committee shall not recommend, and the Director shall not approve, payment of third-party claims unless they are reasonable and allowable.

(E) The Division and the Advisory Committee shall recommend, and the Director shall approve, payment of a settled claim only upon determining that litigation would result in costs to the trust fund that would exceed the settlement amount and therefore it would be in the best interests of the fund to pay the settlement amount.

(F)(1) After its third-party claim eligibility determination and substantive review is complete, the Division shall make a written recommendation to the Advisory Committee as to whether the applicant has met the trust fund eligibility requirements and, if so, whether the claim, or any portion of it, is both reasonable and allowable.

(2) The Advisory Committee in its sole discretion may allow supplemental information explaining the claim to be presented orally. It may establish a fair and reasonable limit on time allowed for oral presentation.

(3) The Advisory Committee may consider, but is not bound by, the recommendation prepared by the Division under subdivision (F)(1) of this section. It shall make a written recommendation to the Director as to whether the applicant has met the trust fund eligibility requirements and, if so, whether the claim, or any portion of it, is both reasonable and allowable and therefore should be paid.

(G)(1) The Director shall consider, but is not bound by, the recommendations made by the Division under subdivision (F)(1) of this section and by the Advisory Committee under subdivision (F)(3) of this section.

(2) The Director shall decide whether the applicant has met the trust fund eligibility requirements and, if so, whether the claim, or any portion of it, is both reasonable and allowable and should therefore be paid.

(3) The Director may solicit advice on a claim from the Commission.

(4) If the decision of the Director is contrary to the recommendation of the Advisory Committee, the Director shall provide in writing his or her reasons for declining to follow the Advisory Committee's recommendation.

(H)(1) The decision of the Director shall be the final decision of the Division.

(2) The decision of the Director may be appealed to the Commission. An owner or operator who considers himself or herself injured in his or her business, person or property by a final decision of the director or his designee, may, within thirty (30) days after the date of the final decision of the director or his designee, appeal the decision to the Commission.

Rule 12.410 Reasonable Claims

(A) Third-party claims that have been reduced to judgment and for which payment is requested under Rule 12.408(C) shall be presumed reasonable under this Chapter.

(B) All settled third-party claims for which payment is requested under Rule 12.408(E) must be shown to be reasonable as compared to similar claims for compensatory damages.

Rule 12.411 Allowable Claims

(A) Only claims for compensatory damages, as the term is defined by this Rule, caused by an accidental release from a qualified storage tank are considered allowable under this Chapter.

(B) A payment shall not be made under this Chapter for any injury or damages caused by the performance of corrective action.

(C)(1) A payment shall not be made under this Chapter for any item for which reimbursement is made for the same occurrence under corrective action under Chapter 3.

(2) A payment shall not be made under this Chapter for any item that is included in an approved corrective action plan and reimbursable under Chapter 3.

Rule 12.412 Records

(A) Any owner or operator participating in the trust fund shall maintain the following records and submit them or make them available to the Division upon request:

(1) Evidence of current financial responsibility for seven thousand five hundred dollars (\$7,500) per occurrence; and

(2) Any other records as may reasonably be required by the Division or the Advisory Committee in the performance of their duties under law.

(B) All records necessary to demonstrate that the trust fund eligibility requirements of Rule 12.402 and the trust fund coverage requirements of Rule 12.403 have been fulfilled shall be retained by the owner or operator until one of the following is accomplished:

(1) Closure requirements of this Rule, if applicable, are satisfied;

(2) Responsibility for meeting the financial assurance requirements of this Rule is legally transferred;

(3) The owner or operator is otherwise instructed in writing by the Division.

Rule 12.413 Audits

- (A) The Director may cause audits to be performed as necessary to ensure that claims, for which payment is sought or has been made, were in fact reasonable and allowable.
- (B) The audits may be performed by the Division or by any qualified person at the direction of the Director.
- (C) Monies in the trust fund may be expended by the Director as necessary to pay the cost of audits performed by persons other than the Division.

Rule 12.414 Cost Recovery

- (A) The Division may initiate proceedings against any owner or operator of a petroleum storage tank system or third-party claimant for recovery of monies that were solicited and received from the trust fund either through willful or accidental utilization of incorrect information.
- (B)(1) Any owner or operator of a petroleum storage tank system who was not in substantial compliance at the time of a release, as defined by Rule 12.402, for which a third-party claimant was compensated from the trust fund, shall be required to reimburse the trust fund for the amount of the claim paid.
 - (2) If the owner or operator does not reimburse the trust fund as required in subdivision (B)(1) of this section, the Division may institute an action against the owner or operator to recover such monies under the authority of the Regulated Substance Storage Tank program, the Petroleum Storage Tank Trust Fund Act, or this Rule.
- (C) The Division has the right of subrogation that applies to sites where corrective action is taken by owners, operators, or the Division. The right of subrogation extends to:
 - (1) Any insurance policies in existence at the time of the occurrence to the extent of any rights the owner or operator of a site may have had under that policy; and
 - (2) Any third party who caused or contributed to the occurrence.
- (D) For purposes of subrogation, “third party” does not include a former owner or operator of the site where corrective action is taken.

Rule 12.415 Trust Fund Availability

- (A)(1) All claims for payment submitted under this Chapter are subject to the availability of monies in the trust fund.
 - (2) Nothing in this Rule shall be construed to create a permanent entitlement to monies in the trust fund.
 - (3) The Commission reserves the right to amend this Chapter, including the provisions regarding coverage and eligibility and reasonable and allowable costs.

(B)(1) If the monies in the trust fund prove insufficient to cover all trust fund claims for reimbursement, the Advisory Committee shall recommend to the Director a priority system based upon any factors it deems appropriate.

(2) The Director may adopt a priority system based upon any factors he or she deems appropriate.

Rule 12.416 Obligation to Comply

(A) Eligibility of an owner or operator for the trust fund shall not preclude the Division's taking any appropriate enforcement action.

(B) Nothing in this Chapter shall affect the liability or responsibility of an owner or operator of a petroleum storage tank system for taking corrective action, as required by this Rule or any other law, in response to a release.

Rule 12.417 Transfer of Trust Fund Eligibility

(A) An owner or operator determined to be eligible for payment of third-party claims for a release may transfer the eligibility to a subsequent owner or operator if the Division determines that the subsequent owner or operator has the financial and legal capacity to pay third-party claims and has met all the requirements of this section.

(B) A transfer under this section shall not affect the potential liability of the owner or operator for payment of compensatory damages to a third party.

(C) An owner or operator must notify the Division thirty (30) days prior to any transfer of eligibility and provide documentation that the subsequent owner or operator has the legal and financial capacity to pay third-party claims.

(D) Documentation of legal capacity includes, but is not limited to, the following, as appropriate:

(1) Proof of authorization to conduct business in Arkansas, e.g., current registration with, and a valid certificate of good standing issued by, the Arkansas Secretary of State; and

(2) Proof of proper registration of the tank system by the subsequent owner or operator.

(E) Documentation of financial capacity includes, but is not limited to, any one (1) or combination of items below that affirms, as determined by the Division, that the subsequent owner or operator has sufficient assets to pay third-party claims of at least one million dollars (\$1,000,000):

(1) An independently audited copy of the most recent annual financial statements that indicates the availability of sufficient funds;

(2) Copies of bank statements or other financial records that indicate availability of sufficient funds for the subsequent owner or operator to pay third-party claims;

(3) A letter from a financial institution or other funding agency indicating a binding commitment to provide a specified amount of funds and the uses for which the funds may be utilized; or

(4) In cases where funding is required but there can be no binding commitment of money until approvals are received, a letter of “intent to fund” from the appropriate funding institution indicating the amount of funds and their specified uses.

(F) Upon approval of the Division that the subsequent owner or operator has both the legal and financial capacity to assume responsibility for third-party claims, the owner or operator, the subsequent owner or operator, and the Division will enter into a consent administrative order, upon agreement of all parties, setting forth the following:

(1) The owner or operator relinquishes eligibility for trust fund coverage for any third-party claims for damages resulting from the occurrence;

(2) The owner or operator acknowledges a transfer of eligibility under this section does not affect the potential liability of the owner or operator for payment of compensatory damages to a third party; and

(3) The subsequent owner or operator assumes responsibility for any third-party claims for damages resulting from the occurrence.

(G) Transfer of eligibility for trust fund payment of third-party claims for damages resulting from a release from a qualified storage tank is effective upon execution of the consent administrative order.

(H) Nothing in this section shall be construed to alter the limits for payment of third-party claims as set out in Ark. Code Ann. § 8-7-908.

CHAPTER 5: LICENSING OF UNDERGROUND STORAGE TANK INSTALLERS AND SERVICE PERSONNEL

Rule 12.501 Purpose

The purpose of this Chapter is to provide for the regulation of persons installing, repairing, upgrading and closing underground storage tank systems that contain regulated substances to assure that the systems are installed, repaired, upgraded and closed in a manner that will not encourage or facilitate leaking and will protect the public health and the lands and waters of the State of Arkansas.

Rule 12.502 Definitions

The following definitions, in addition to the definitions in Chapter 1, apply to this Chapter:

- (A) **“Closing” or “closure”** means the process of removing and disposing of or closing in place an underground storage tank system.
- (B) **“Contractor”** means any person who contracts to install, repair, upgrade or close an underground storage tank system for a third party.
- (C) **“Critical junctures,”** in the case of an installation, means the steps in the installation of an underground storage tank system that are important to the prevention of releases and shall, at a minimum, include all of the following:
- (1) Preparation of the excavation immediately prior to receiving backfill and the tank;
 - (2) Setting of the tank and the piping, including placement of any strapping or other anchoring devices and backfilling to the level of the tank;
 - (3) Any time during the installation in which components of the piping are connected;
 - (4) Any time during the installation of corrosion protection measures;
 - (5) All pressure testing of the underground storage tank system, including associated piping, performed during the installation; and
 - (6) Placement of backfill and filling of the excavation.
- (D) **“Critical junctures,”** in the case of the repair or upgrade of an underground storage tank system, means the steps in the project that are comparable to the steps listed in subsection (C) of this section in terms of their importance in the prevention of leaks and shall, at a minimum, include all of the following:
- (1) The excavation of the existing tank or piping;
 - (2) The actual performance of the repairs or upgrades to the tank or the piping;
 - (3) Any time during the project in which components of the piping are connected; and
 - (4) Any time during the project in which the tank system or its associated piping is tested.
- (E) **“Critical junctures”** in the case of a closure means the steps in the removal or in-place closure of an underground storage tank system that are important to the safe removal or closure

in place (including the detection of current or previous leakage) and shall, at a minimum, include all of the following:

- (1) The purging or inerting of vapors;
- (2) The removal and disposal of underground storage tank contents;
- (3) The excavation of the existing underground storage tank system;
- (4) The actual performance of the tests or monitoring to determine if previous or current leakage is present;
- (5) The actual removal of the existing underground storage tank and piping; and
- (6) The assessment of the site to ascertain if a current or previous release has resulted in contamination of the environment.

(F) **“Install”** or **“installation”** means the work involved in placing an underground storage tank system or any part thereof in the ground and preparing it to be placed in service.

(G) **“Repair”** means the correction or modification of an underground storage tank system, including but not limited to the replacement of piping, valves, fill pipes or vents and any repairs to the tank.

(H) **“Upgrade”** means the addition or retrofit of systems such as cathodic protection, lining, spill and overflow controls, or leak detection devices to improve the ability of an underground storage tank system to prevent the release of product to the environment.

Rule 12.503 Applicability

(A) This Chapter applies to all persons who install, repair, upgrade or close underground storage tank systems in Arkansas, including officers or employees of owners or operators, except as provided in subsections (B) and (C) of this section.

(B) This Chapter does not apply to the installation, repair, upgrade or closure of the following underground storage tanks:

- (1) Wastewater treatment tanks;
- (2) Sumps;
- (3) Underground storage tanks containing radioactive waste;
- (4) Electrical equipment tanks;
- (5) Hydraulic lift tanks; and
- (6) Any underground storage tank with a capacity of one hundred ten gallons (110 gals.) or less.

(C) This Chapter does not apply to the installation, repair, upgrade or closure of any underground storage tank systems holding hazardous wastes that are listed or identified under the Resource Conservation and Recovery Act of 1976, as amended, or the Arkansas Hazardous Waste Management Act of 1979, as amended.

Rule 12.504 General Requirements

(A)(1) A person shall not install, repair, upgrade or close underground storage tank systems in Arkansas unless the person is, or employs, an individual who is licensed by the Division to perform the work.

(2) A person shall not exercise supervisory control over installations, repairs, upgrades or closures unless that person is licensed by the Division to perform the work.

(B) Neither a contractor nor individual shall perform or agree to perform any installation, repair, upgrade, or closure unless it is or has in its employ one or more licensed individuals who:

(1) Exercises responsible supervisory control over any installation, repair, upgrade or closure undertaken;

(2) At a minimum, is physically present on site at all critical junctures in the installation, repair, upgrade and closure;

(3) Is competent to perform the installation, repair, upgrade or closure; and

(4) Has adequate knowledge of appropriate materials, technical requirements and installation, repair, upgrade and closure procedures for the work.

(C)(1) Neither a contractor nor individual shall affix his or her signature or license number to certify any installation, repair, upgrade or closure for which he or she lacks competence.

(2) Neither a contractor nor individual shall certify to an owner or operator that an installation, repair, upgrade or closure is complete unless the installation, repair, upgrade or closure complies with this Rule.

(3) If an installation, repair, upgrade or closure is performed for an owner or operator on a contract basis, both the individual and the contractor for whom the individual works are responsible for the accuracy of any representations made concerning the work.

(D) This Chapter is not intended to prohibit the employment of apprentices or helpers so long as a licensed individual exercises responsible supervisory control and is physically present on site at the critical junctures in the installation, repair, upgrade or closure.

(E) This Chapter is in addition to, and not in lieu of, any other licensing and registration requirements imposed by other local, state, or federal laws or regulations.

(F) This Chapter does not relieve the owner or operator of any obligations or liabilities under any other applicable state and federal laws or regulations.

Rule 12.505 Surety Requirement

(A) A person shall not install, repair, close, or upgrade any underground storage tank system unless that person or the contractor by whom he or she is employed has purchased a surety bond, letter of credit, or cash bond in the amount of at least twenty-five thousand dollars (\$25,000), which provides that the Division is the obligee or payee of the instrument, and otherwise complies with the rules promulgated under this subchapter.

(B) Persons whose installation, repair, closure, or upgrade activities are limited to their own underground storage tank system or their employers' companies' underground storage tank systems are exempt from the surety requirement of subsection (A) of this section.

(C) If the licensee or contracting company fails to properly install, remove, repair, close, or upgrade any underground storage tank under state law or rule, the Director shall commence proceedings to collect on the surety.

(D) The Division shall notify the licensee or contracting company in writing of the collection against the surety, and the licensee or contracting company shall be given an opportunity for a hearing as provided herein.

Rule 12.506 Notification Requirement

(A) For any installation or upgrade, the individual or contractor shall notify the Division at least one (1) week prior to the beginning of the second critical juncture as described in Rule 12.502(C)(2) and Rule 12.502(D)(2).

(B)(1) For any repair, the individual or contractor shall notify the Division at least one (1) week prior to the beginning of the second critical juncture as described in Rule 12.502(D)(2).

(2) Notwithstanding subdivision (B)(1) of this section, if the repair is necessary to prevent or abate a release to the environment, the repair shall be performed immediately and the Division shall be notified within twenty-four (24) hours.

(C) If the date scheduled for installation or upgrade, or repair under subdivision (B)(1) of this section, changes, the Division must be notified immediately of the change and the revised schedule.

Rule 12.507 Contractor Licensing

(A) An applicant for a contractor's license must meet all of the following requirements to be licensed by the Division:

(1) The applicant must file an application with the Division on a form furnished by the Division, accompanied by a non-refundable fee of three hundred dollars (\$300); (2)

The applicant, if an individual, must be at least eighteen (18) years of age;

(3) The applicant need not, for purposes of this Rule, be a resident of Arkansas;

(4) The applicant must demonstrate that:

(a) It is in good standing with all licensing authorities by whom licensing is required, given the nature and scope of its business;

(b) It holds a current contractor's license, if required by local, state, or federal laws or regulations; and

(c) It has not had a business or occupational license suspended or revoked in Arkansas or any other state, except as provided in subsection (B) of this section;

(5) At least one (1) active officer, partner, owner, or designated managerial representative of the contractor must pass Part One of the licensing examination described in Rule 12.511; and

(6) The applicant must attest in the application that on any job involving the installation, repair, upgrade or closure of an underground storage tank system, a licensed individual will

exercise responsible supervisory control over the work and will be physically present on the site at all critical junctures in the installation, repair, upgrade or closure.

(B) An application filed with the Division will remain pending for one (1) year from the date of the application. If, during that year, a license is not issued to the applicant, the applicant must file a new application, complete with the appropriate fee, to obtain a license from the Division.

(C) Notwithstanding subdivision (A)(4)(c) of this section, the Division may grant a license to an applicant who has had a business or occupational license or certificate suspended or revoked if the suspension or revocation, by reason of its date or nature or because of other considerations, is not relevant to the applicant's competence to install, repair, upgrade or close underground storage tanks systems.

Rule 12.508 Individual Licensing

(A) An applicant for an individual license must meet all of the following requirements to receive a license from the Division:

(1) The applicant must file an application with the Division on a form furnished by the Division, accompanied by a non-refundable fee of one hundred fifty dollars (\$150);

(2) The applicant must be an individual and must be at least eighteen (18) years of age;

(3) The applicant need not, for purposes of this Rule, be a resident of Arkansas;

(4) The applicant must demonstrate that he or she is in good standing with all licensing authorities by whom licensing is required, given the nature and scope of the applicant's work, and that he or she has not had a business or occupational license or certificate suspended or revoked in Arkansas or any other state, except as provided in subsection (B) of this section;

(5) The applicant must meet the experience requirements of Rule 12.510; and

(6) The applicant must pass the licensing examination required by Rule 12.511.

(B) An application filed with the Division will remain pending for one (1) year from the date of the application. If, during that year, a license is not issued to the applicant, the applicant must file a new application, complete with the appropriate fee, to obtain a license from the Division.

(C) Notwithstanding subdivision (A)(4) of this section, the Division may grant a license to an applicant who has had a business or occupational license or certificate suspended or revoked if the suspension or revocation, by reason of its date or nature or because of other considerations, is not relevant to the applicant's competence to install, repair, upgrade or close underground storage tank systems.

Rule 12.509 Contractor/Individual Licensing

A person who is seeking to be both the contractor and the sole licensed individual exercising supervisory control, as required by Rule 12.507(A)(6), under that contractor's license need only pay the contractor licensing fee required by Rule 12.507(A)(1). The person must meet all of the requirements for an individual license set forth in Rule 12.508 except for the fee requirement of Rule 12.508(A)(1).

Rule 12.510 Experience Requirements

To qualify for an individual license under Rule 12.508, an applicant must demonstrate that he or she has had, within the three (3) years immediately prior to making the application, one (1) year of field experience in installation, repair, upgrade or closure of underground storage tank systems.

Rule 12.511 Licensing Examination

(A) To qualify for an individual license under Rule 12.508, an applicant shall pass a written examination covering all aspects of the installation, repair, upgrade or closure of underground storage tank systems.

(B) At the time an application is filed, the Division will furnish the applicant with a study package to assist him or her in preparing for the examination. The study package will refer applicants to the appropriate laws and rules and industry publications used by the Division in preparing the examination and upon which the examination will be based.

(C) The examination will consist of three (3) parts, as follows:

(1) Part One will test an applicant's familiarity with this Rule and the applicable Arkansas and federal laws and regulations;

(2) Part Two will test an applicant's familiarity with current technology and industry recommended practices with respect to the proper installation, repair and upgrade of underground storage tank systems;

(3) Part Three will test an applicant's familiarity with current technology and industry recommended practices for proper closure of underground storage tank systems.

(D)(1) To be licensed to perform installations, repairs, or upgrades, an applicant must pass Parts One and Two.

(2) To be licensed to perform closures, an applicant must pass Parts One and Three.

(3) To be licensed to perform installations, repairs, upgrades, and closures, an applicant must pass all parts of the examination.

(E)(1) An applicant must score seventy percent (70%) or higher on each part of the examination taken to pass the examination.

(2) An applicant passing any part of the initial examination taken need not be retested on that part, provided that any part taken but not passed must be passed within one (1) year of the initial testing date; otherwise, the entire examination must be retaken.

(3)(a) An applicant who fails the examination may, by paying a non-refundable fee of twenty-five dollars (\$25), retake the examination.

(b) This fee must accompany each request for retesting after initial failure of the examination.

(c) For purposes of retesting, an application will remain pending for a period of one (1) year after the applicant's failure to pass the initial examination.

(d) If the applicant has not requested retesting within the one-year period, the applicant must file a new application, complete with the appropriate fee, to obtain a license from the Division.

(F)(1) The Division shall offer the examination at least four (4) times each year.

(2) At least thirty (30) days prior to the date of a licensing examination, the Division shall provide notice of the examination to all persons who have requested the notice and to any person who has completed an application for a license since the date of the last examination.

(3) Only persons who have filed applications at least ten (10) business days in advance of an examination are eligible to take the examination.

(G)(1) The Division shall grade all examinations and notify the applicants of the results within thirty (30) days of the date of the examination.

(2) Examination papers will not be returned to applicants, but may be reviewed by applicants at the Division offices in North Little Rock.

Rule 12.512 Renewal of Licenses, Lapsed Licenses, and Reinstatement

(A) Any license issued under Rule 12.507 or Rule 12.508 must be renewed every two (2) years.

(B)(1) At least thirty (30) days before the expiration date of a license, the Division shall mail a renewal application form to the licensee, at the licensee's address of record with the Division.

(2) The licensee shall renew the license on a timely basis regardless of whether an application form has been received from the Division. A form may be requested from the Division if it has not been received by mail.

(C) To qualify for renewal, a licensed contractor must:

(1) Apply for renewal on a form furnished by the Division and accompanied by a non-refundable fee of three hundred dollars (\$300); and

(2) Attest in its renewal application that on any job involving the installation, repair, upgrade or closure of an underground storage tank system, a licensed individual will exercise responsible supervisory control over the work and will be physically present on the site at all critical junctures in the installation, repair, upgrade or closure.

(D) To qualify for renewal, a licensed individual must:

(1) Apply for renewal on a form furnished by the Division and accompanied by a non-refundable fee of one hundred fifty dollars (\$150);

(2) Demonstrate that he or she has completed at least three (3) installations, repairs, upgrades or closures during the two-year period preceding the renewal application; and

(3) Demonstrate that he or she has completed sixteen (16) hours of Division-approved continuing education in the two-year period preceding the renewal application.

(E) Any license that is not renewed prior to its expiration date shall be considered lapsed and shall not be used in the solicitation or performance of any installation, repair, upgrade or closure.

(F)(1) A license should be renewed prior to its expiration date but may be renewed up to two (2) months after the date of expiration if the following requirements are met:

(a) A late fee of twenty-five dollars (\$25) in addition to the renewal fee must be paid; and

(b) The requirements for renewal must be satisfied.

(2) Licenses not renewed within two (2) months after the date of expiration shall be considered lapsed and invalid and applications for renewal will not be accepted after that time.

(3) Any individual or contractor whose license has become lapsed and invalid, as provided in subdivision (F)(2) of this section, must submit an application for a new license under Rule 12.507 or Rule 12.508, ~~and~~ comply with the requirements therein, and comply with Ark. Code Ann. § 17-1-107.

(4) Any individual applying for a new license under Rule 12.508 who previously held a license within the past two years that is lapsed and invalid must meet the continuing education requirements of subdivision (D)(3) of this section and submit a certificate or certificates as proof of meeting those requirements as part of his or her application.

Rule 12.513 Reciprocity and Provisional Certificate

The Division shall issue a contractor license to an applicant who holds a comparable contractor license that is substantially similar to practice in the field of his or her occupation in another state, territory, or district in the United States. The applicant must demonstrate that he or she holds a similar license in good standing, has not had a license revoked for bad faith or violation of law, rule, or ethics, is not holding a suspended or probationary license, is sufficiently competent in his or her field, and pays any fee required by this rule. The applicant for a reciprocal license must also comply with continuing education and training requirements, and all bonding, financial security, and insurance requirements, applicable for all contractors to maintain a license.

If the applicant presents evidence of a current and active occupational license that is substantially similar to practice the field of his or her occupation in another state, territory, or district of the United States, and pays the necessary fee, the Division will issue a temporary or provisional license. The temporary or provisional license will be effective for at least ninety (90) days, or until the Division makes a decision on the application for license, unless the Division determines that the applicant does not meet the requirements for reciprocity under this section, in which case the provisional or temporary license shall be revoked.

If the state, territory, or district from which the applicant has previously resided and worked does not issue the same or substantially similar license, the Division shall require

testing to demonstrate competency in the field and at least three (3) letters of recommendation.

Rule 12.51~~34~~ Denial of Licenses

(A) A license required by this Chapter shall not be issued or renewed if the applicant for issuance or renewal fails to meet any of the applicable licensing requirements.

(B)(1) The Division shall, by certified mail with return receipt requested, give written notice to the applicant of its decision to deny the issuance or renewal of a license.

(2) The notice of denial shall state:

(a) The specific reasons for the denial;

(b) That to appeal the denial, the applicant must submit a written request for a meeting with the Director to review the Division's decision; and

(c) That the request for a meeting with the Director must be received by the Division no later than ten (10) days following the applicant's receipt of the notice of denial.

(C)(1) An applicant shall be afforded an opportunity to appeal to the Director a decision of the Division to deny the license.

(2)(a) To appeal the Division's decision to deny the license, an applicant must submit to the Director a written request for a meeting to review the Division's decision.

(b) The request must be received by the Director no later than ten (10) days following the applicant's receipt of the notice described in subsection (B) of this section.

(c) If no request is received by the Director within the time specified in subdivision (C)(2)(b) of this section, the decision of the Division shall be final and may not be appealed.

(3) The Director or his or her designee shall arrange a meeting to discuss the denial of the license within fifteen (15) days of the Director's receipt of the applicant's request under subdivisions (C)(2)(a) and (b) of this section.

(D)(1) Following a meeting held under subdivision (C)(3) of this section, the Director shall issue a written decision to issue or deny the license in accordance with Rule No. 8 (Administrative Procedures).

(2) The decision of the Director shall be final; however, it may be appealed to the Commission by filing a Request for Commission Review and Adjudicatory Hearing in accordance with Rule No. 8.

(E) During the pendency of an appeal under this section, the denial of a license shall stand.

Rule 12.51~~45~~ Division Approval of Training and Continuing Education

(A)(1) The types of training and continuing education required by this Chapter that may be eligible for approval include instructional courses, seminars, or conferences sponsored by the Division, the Environmental Protection Agency, educational institutions, independent professional or trade associations, manufacturers, or firms engaged in underground storage tank system installation, repair, upgrade, closure or management.

(2) Course content must be reasonably related to work performed by persons installing, maintaining, repairing, upgrading or closing underground storage tank systems.

(B) Evidence of participation by the individual must be furnished to the Division by the organization sponsoring the approved training or continuing education.

Rule 12.5156 Violations

(A)(1) The Division may undertake investigations it deems necessary to ensure compliance with this Chapter.

(2)(a) The Division may take actions it deems necessary to ensure compliance with this Chapter, including issuing compliance orders, assessing penalties, and revoking or suspending licenses.

(b) The Division may, to effectuate the actions described in subdivision (A)(2)(a) of this section, commence civil or administrative actions under Arkansas law or Chapter 9 of this Rule.

(B) The Division may suspend or revoke the license for an individual or contractor upon grounds that the individual or contractor:

- (1) Exercised fraud, misrepresentation or deception in obtaining a license;
- (2) Exhibited gross incompetence in the performance of an installation, repair, upgrade or closure;
- (3) Was derelict in the performance of a duty as a licensed individual or contractor; or
- (4) Knowingly violated any provision of this Rule.

CHAPTER 6: LICENSING OF UNDERGROUND STORAGE TANK TESTERS

Rule 12.601 Purpose

The purpose of this Chapter is to provide for the regulation of persons testing underground storage tank systems that contain regulated substances to assure that the systems are tested in a manner that will not encourage or facilitate leaking and will protect the public health and the lands and waters of the State of Arkansas.

Rule 12.602 Definitions

The following definitions, in addition to the definitions in Chapter 1, apply to this Chapter:

- (A) **“Company”** means any person who contracts to test an underground storage tank system for a third party.
- (B) **“Tester”** means an individual or company who tests underground storage tank systems in Arkansas; and
- (C) **“Test”** or **“testing”** means the work involved in assessing the integrity of an underground storage tank system, including associated piping, to determine whether or not it is capable of meeting the tightness testing performance standards of 40 C.F.R. §§ 280.43(c) and 280.44(b).

Rule 12.603 Applicability

- (A) This Chapter applies to all persons who perform testing on underground storage tank systems in Arkansas, including officers or employees of owners or operators, except as provided in subsections (B) and (C) of this section.
- (B) This Chapter does not apply to the testing of the following underground storage tanks:
 - (1) Wastewater treatment tanks;
 - (2) Sumps;
 - (3) Underground storage tanks containing radioactive waste;
 - (4) Electrical equipment tanks;
 - (5) Hydraulic lift tanks; and
 - (6) Any underground storage tank with a capacity of one hundred ten gallons (110 gals.) or less.
- (C) This Chapter does not apply to the testing of any underground storage tank system holding hazardous wastes listed or identified under the Resource Conservation and Recovery Act (RCRA) of 1976 as amended, or the Arkansas Hazardous Waste Management Act of 1979, as amended.

Rule 12.604 General Requirements

(A)(1) A person shall not test underground storage tank systems in Arkansas unless the person is or employs an individual who has been licensed by the Division to perform the testing.

(2) A person shall not exercise supervisory control over a test unless that person is licensed by the Division to perform the testing.

(B) A tester shall not perform or agree to perform a test unless he or she is licensed as an individual or has in his or her employ one or more licensed individuals who:

(1) Will exercise responsible supervisory control over any testing undertaken;

(2) Will, at a minimum, be physically present on the site during all preparations for the test and during the actual test itself;

(3) Is certified by the test method manufacturer to perform the particular test method utilized; and

(4) Has adequate knowledge of appropriate materials, technical requirements and testing procedures for the testing.

(C)(1) A tester shall not affix his or her signature or license number to certify any testing for which he or she lacks competence.

(2) A tester shall not certify to an owner or operator that a test is complete unless the test complies with this Rule.

(3) If a test is performed for an owner or operator on a contract basis, both the individual and the company for whom the individual works are responsible for the accuracy of any representations made concerning the test.

(D) The requirements of this Chapter are not intended to prohibit the employment of apprentices or helpers so long as a licensed individual exercises responsible supervisory control and is physically present on site during all preparations for the test and during the actual test itself.

(E) The requirements of this Chapter are in addition to, not in lieu of, any other licensing and registration requirements imposed by local, state, or federal laws or regulations.

(F) This Chapter does not relieve the owner or operator of any obligations or liabilities under any other applicable state and federal laws or regulations.

Rule 12.605 Surety Requirement

(A) A person shall not test any underground storage tank system unless that person or the contractor by whom he or she is employed has purchased a surety bond, letter of credit, or cash bond in the amount of at least twenty-five thousand dollars (\$25,000), which provides that the Division is the obligee or payee of the instrument, and otherwise complies with the rules promulgated under this subchapter.

(B) Persons whose testing activities are limited to their own underground storage tank systems or their employers' companies' underground storage tank systems are exempt from the surety requirement of subsection (A) of this section.

(C) If the licensee or contracting company fails to properly test any underground storage tank under state law or rule, the Director shall commence proceedings to collect on the surety bond, letter of credit or cash bond.

(D) The Division shall notify the licensee or contracting company in writing of the collection against the surety, and the licensee or contracting company shall be given an opportunity for a hearing as provided herein.

Rule 12.606 Company Licensing

(A) An applicant for a company license must meet all of the following requirements to be licensed by the Division:

(1) The applicant must file an application with the Division on a form furnished by the Division, accompanied by a non-refundable fee of three hundred dollars (\$300); (2)

The applicant, if an individual, must be at least eighteen (18) years of age;

(3) The applicant need not, for purposes of this Rule, be a resident of Arkansas;

(4) The applicant must demonstrate that:

(a) It is in good standing with all licensing authorities by whom licensing is required, given the nature and scope of its business;

(b) It holds a current contractor's license, if required by local, state, or federal laws or regulations; and

(c) It has not had a business or occupational license suspended or revoked in Arkansas or any other state, except as provided in subsection (C) of this section;

(5) At least one (1) active officer, partner, owner, or designated managerial representative of the company must pass Part One of the licensing examination described in Rule 12.511; and

(6) The applicant must attest in the application that on any job involving the testing of an underground storage tank system, a licensed individual will exercise responsible supervisory control over the work and will be physically present on the site during all preparations for the test and during the actual test itself.

(B) An application filed with the Division will remain pending for one (1) year from the date of the application. If, during that year, a license is not issued to the applicant, the applicant must file a new application, complete with the appropriate fee, to obtain a license from the Division.

(C) Notwithstanding subdivision (A)(4)(c) of this section, the Division may grant a license to an applicant who has had a business or occupational license or certificate suspended or revoked if the suspension or revocation, by reason of its date or nature or because of other considerations, is not relevant to the applicant's competence to test underground storage tank systems.

Rule 12.607 Individual Licensing

(A) An applicant for an individual license must meet all of the following requirements to receive a license from the Division:

(1) The applicant must file an application with the Division on a form furnished by the Division, accompanied by a non-refundable fee of one hundred fifty dollars (\$150);

(2) The applicant must be an individual and must be at least eighteen (18) years of age;

(3) The applicant need not, for the purposes of this Rule, be a resident of Arkansas;

(4) The applicant must demonstrate that he or she is in good standing with all licensing authorities by whom licensing is required, given the nature and scope of the applicant's work, and that he or she has not had a business or occupational license or certificate suspended or revoked in Arkansas or any other state, except as provided in subsection (C) of this section;

(5) The applicant must meet the experience requirements of Rule 12.609;

(6) The applicant must provide the Division with certification by the manufacturer of the testing method to be used by the applicant that the method will meet the federal performance standard as stated in 40 C.F.R. §§ 280.43(c) and 280.44(b);

(7) At the time application for the license is made, the applicant must provide the Division with certification from the manufacturer of the test method to be used by the applicant that the applicant has received training, been examined, and satisfactorily shown proficiency in the use of the chosen testing method; and

(8) The applicant must pass Part One of the licensing examination described in Rule 12.511.

(B) An application filed with the Division will remain pending for one year (1) from the date of the application. If, during that year, a license is not issued to the applicant, the applicant must file a new application, complete with the appropriate fee, to obtain a license from the Division.

(C) Notwithstanding subdivision (A)(4) of this section, the Division may grant a license to an applicant who has had a business or occupational license or certificate suspended or revoked if the suspension or revocation, by reason of its date or nature or because of other considerations, is not relevant to the applicant's competence to test underground storage tank systems.

(D)(1) If an individual chooses a test method that is different from that for which he or she is licensed, the individual must provide proof to the Division that he or she has met the requirements of subdivisions (A)(6) and (A)(7) of this section for the chosen method. Upon receipt of adequate documentation, the Division shall update its file on that license to reflect the change in method.

(2) The requirements of subdivision (D)(1) of this section must be met before the individual performs any testing as a licensed tester using a method different from that for which the existing license was issued.

(3) If the change in test method is made before the expiration of the existing license, no additional fee is required to update that license.

Rule 12.608 Company/Individual Licensing

A person who is seeking to be both the company and the sole licensed individual exercising supervisory control, as required by Rule 12.606(A)(6), under that company's license need only pay the company licensing fee required by Rule 12.606(A)(1). The person must meet all of the requirements for an individual license set forth in Rule 12.607 except for the fee requirement of Rule 12.607(A)(1).

Rule 12.609 Experience Requirements

To qualify for an individual license under Rule 12.607, an applicant must demonstrate that he or she has had, within the three (3) years immediately prior to making the application, one (1) year of field experience in testing.

Rule 12.610 Renewal of Licenses, Lapsed Licenses, and Reinstatement

(A) Any license issued under Rule 12.606 or Rule 12.607 must be renewed every two (2) years.

(B)(1) At least thirty (30) days before the expiration date of a license, the Division shall mail a renewal application form to the licensee, at the licensee's address of record with the Division.

(2) The licensee shall renew the license on a timely basis regardless of whether an application form has been received from the Division. A form may be requested from the Division if it has not been received by mail.

(C) To qualify for renewal, a licensed company must:

(1) Apply for renewal on a form furnished by the Division and accompanied by a non-refundable fee of three hundred dollars (\$300); and

(2) Attest in its renewal application that on any job involving the testing of an underground storage tank system, a licensed individual will exercise responsible supervisory control over the work and will be physically present on the site during all preparations for the test and during the actual test itself.

(D) To qualify for renewal, a licensed individual must:

(1) Apply for renewal on a form furnished by the Division accompanied by a non-refundable fee of one hundred fifty dollars (\$150);

(2) Demonstrate that he or she has completed at least three (3) tests during the two-year period preceding the renewal application; and

(3) Demonstrate that he or she has completed continuing education in the test method chosen for use by that individual and received recertification by the manufacturer of the test method.

(E) Any license that is not renewed prior to its expiration date shall be considered lapsed and shall not be used in the solicitation or performance of any test.

(F)(1) A license should be renewed prior to its expiration but may be renewed up to two (2) months after the date of expiration if the following requirements are met:

- (a) A late fee of twenty-five dollars (\$25) in addition to the renewal fee must be paid; and
- (b) The requirements for renewal must be satisfied.

(2) Licenses that have not been renewed within two (2) months after the date of expiration shall be considered lapsed and invalid and applications for renewal will not be accepted after that time.

(3) Any individual or company whose license has lapsed as provided in subdivision (F)(2) of this section must submit an application for a new license under Rule 12.606 or Rule 12.607, ~~and~~ comply with the requirements therein, and if the applicant is a person, comply with Ark. Code Ann. § 17-1-107.

Rule 12.611 Reciprocity and Provisional Certificate

The Division shall issue a license to test underground storage systems to an applicant who holds a comparable license that is substantially similar to practice in the field of his or her occupation in another state, territory, or district in the United States. The applicant must demonstrate that he or she holds a similar license in good standing, has not had a license revoked for bad faith or violation of law, rule, or ethics, is not holding a suspended or probationary license, is sufficiently competent in his or her field, and pays any fee required by this rule. The applicant for a reciprocal license must also comply with continuing education and training requirements, and all bonding, financial security, and insurance requirements, applicable to maintain a license.

If the applicant presents evidence of a current and active occupational license that is substantially similar to practice the field of his or her occupation in another state, territory, or district of the United States, and pays the necessary fee, the Division will issue a temporary or provisional license. The temporary or provisional license will be effective for at least ninety (90) days, or until the Division makes a decision on the application for license, unless the Division determines that the applicant does not meet the requirements for reciprocity under this section, in which case the provisional or temporary license shall be revoked.

If the state, territory, or district from which the applicant has previously resided and worked does not issue the same or substantially similar license, the Division shall require testing to demonstrate competency in the field and at least three (3) letters of recommendation.

Rule 12.611~~2~~ Denial of Licenses

(A) A license required by this Chapter shall not be issued or renewed if the applicant for issuance or renewal fails to meet any of the applicable licensing requirements.

(B)(1) The Division shall, by certified mail with return receipt requested, give written notice to the applicant of its decision to deny the issuance or renewal of a license.

(2) The notice of denial shall state:

- (a) The specific reasons for the denial;
- (b) That to appeal the denial, the applicant must submit a written request for a

meeting with the Director to review the Division's decision; and

(c) That the request for a meeting with the Director must be received by the Division no later than ten (10) days following the applicant's receipt of the notice of denial.

(C)(1) An applicant shall be afforded an opportunity to appeal to the Director a decision of the Division to deny the license.

(2)(a) To appeal the Division's decision to deny the license, an applicant must submit to the Director a written request for a meeting to review the Division's decision.

(b) The request must be received by the Director no later than ten (10) days following the applicant's receipt of the notice described in subsection (B) of this section.

(c) If no request is received by the Director within the time specified in subdivision (C)(2)(b) of this section, the decision of the Division shall be final and may not be appealed.

(3) The Director or his or her designee shall arrange a meeting to discuss the denial of the license within fifteen (15) days of the Director's receipt of the applicant's request under subdivisions (C)(2)(a) and (b) of this section.

(D)(1) Following a meeting held under subdivision (C)(3) of this section, the Director shall issue a written decision to issue or deny the license in accordance with Rule No. 8 (Administrative Procedures).

(2) The decision of the Director shall be final; however, it may be appealed to the Commission by filing a Request for Commission Review and Adjudicatory Hearing in accordance with Rule No. 8.

(E) During the pendency of an appeal under this section, the denial of a license shall stand.

Rule 12.6123 Division Approval of Training and Continuing Education

(A)(1) The types of training and continuing education required by this Chapter that may be eligible for approval include instructional courses, seminars or conferences sponsored by the Division, the Environmental Protection Agency, educational institutions, independent professional or trade associations, manufacturers, or firms engaged in underground storage tank system testing.

(2) Course content must be reasonably related to work performed by persons testing underground storage tank systems.

(B) Evidence of participation by the individual must be furnished to the Division by the organization sponsoring the approved training or continuing education.

Rule 12.6134 Violations

(A)(1) The Division may undertake investigations it deems necessary to ensure compliance with this Chapter.

(2)(a) The Division may take actions it deems necessary to ensure compliance with this Chapter, including issuing compliance orders, assessing penalties, and revoking or suspending licenses.

(b) The Division may, to effectuate the actions described in subdivision (A)(2)(a) of

this section, commence civil or administrative actions under Arkansas law or Chapter 9 of this Rule.

(B) The Division may suspend or revoke the license for an individual or contractor upon grounds that the individual or contractor:

- (1) Exercised fraud, misrepresentation or deception in obtaining a license;
- (2) Exhibited gross incompetence in the performance of a test;
- (3) Was derelict in the performance of a duty as a licensed individual or company; or
- (4) Knowingly violated any provision of this Rule.

CHAPTER 7: OPERATOR TRAINING

Rule 12.701 Purpose

The purpose of this Chapter is to provide for the training or certification of persons operating and maintaining underground storage tank systems that contain regulated substances to assure that the systems are operated and maintained in a manner that will protect the public health and the lands and waters of the State of Arkansas.

Rule 12.702 Definitions

The following definitions, in addition to the definitions in Chapter 1, apply to this Chapter:

(A) **“Operator”** means any person in control of, or having responsibility for, the daily operation of the underground storage tank system. This term shall not include contractors or consultants performing compliance monitoring, testing, emergency response, or other services on an underground storage tank system for a tank owner or operator.

(1) **“Class A Operator”** means any operator having primary responsibility for onsite operation and maintenance of underground storage tank systems.

(2) **“Class B Operator”** means any operator having daily onsite responsibility for the operation and maintenance of underground storage tank systems.

(3) **“Class C Operator”** means a daily, onsite employee having primary responsibility for addressing emergencies presented by a spill or release from an underground storage tank system.

(B) **“Unmanned facility”** means any facility that does not have an operator onsite during operation of the underground storage tank system.

Rule 12.703 Applicability

(A) This Chapter applies to all persons who are responsible for operating or maintaining underground storage tank systems in Arkansas as defined in Rule 12.702.

(B) This Chapter does not relieve the owner or operator, as defined in 40 C.F.R. § 280 and this Rule, from any legal responsibility mandated by federal and state underground storage tank laws and regulations.

Rule 12.704 General Requirements

(A)(1) By August 8, 2012, each facility with an underground storage tank system must have a Class A, Class B, and Class C operator designated for that facility who has been trained or certified in accordance with the requirements of this Chapter.

(2) Separate individuals may be designated for each class of operator, or one (1) individual may be designated to more than one (1) operator class provided he or she is trained in accordance with Division requirements for the class or classes designated.

(3) At least one (1) Class C operator must be present onsite during all hours of operation of an underground storage tank facility with the exception of:

- (a) Unmanned facilities with an emergency generator tank(s) only; or
- (b) Unmanned facilities that meet the compliance requirements of the Arkansas State Fire Code.

(B) The Division may accept Class A or Class B operator certification from another state with an EPA-recognized operator training program.

(C) An owner or operator must maintain records documenting the training or certification for all Class A, Class B, and Class C operators at the underground storage tank facility, immediately available for inspection by the Division, or at a readily available alternative location and shall provide the records for inspection to the Division upon request.

(D) If the Division determines an underground storage tank facility has been identified as ineligible for fuel delivery under this Rule, both the designated Class A operator and the designated Class B operator for that facility must complete Division-provided retraining and be recertified within forty-five (45) days of the facility being identified as ineligible for fuel delivery.

(E) Certification required by this Chapter may be denied by the Division if the individual fails to meet any of the applicable operator training or certification requirements.

(F) A denial of certification will be considered a final decision of the Director for purposes of appeal.

Rule 12.705 Class A Operator Certification

(A) At a minimum, a Class A operator must be certified by the Division in the following areas:

(1) A general knowledge of applicable federal and state underground storage tank system requirements for operation, maintenance, and recordkeeping including, but not limited to:

- (a) Release prevention;
- (b) Release detection;
- (c) Emergency response; and
- (d) Product compatibility;

(2) Financial responsibility requirements;

(3) Notification requirements;

(4) Release and suspected release reporting requirements;

(5) Temporary and permanent closure requirements; and

(6) Operator training requirements.

(B) After August 8, 2012, Class A operators must be certified within thirty (30) days after assuming operation and maintenance responsibilities for an underground storage tank system.

Rule 12.706 Class B Operator Certification

(A) At a minimum, a Class B operator must be certified by the Division in the following

areas and demonstrate an in-depth knowledge of underground storage tank system requirements for day-to-day operation, maintenance, and recordkeeping including, but not limited to:

- (1) Release prevention;
- (2) Release detection;
- (3) Components of underground storage tank systems;
- (4) Materials of underground storage tank system components;
- (5) Emergency response;
- (6) Product compatibility;
- (7) Reporting and recordkeeping requirements; and
- (8) Class C operator training requirements.

(B) After August 8, 2012, Class B operators must be certified within thirty (30) days after assuming operation and maintenance responsibilities for an underground storage tank system.

Rule 12.707 Class C Operator Training

(A) At a minimum, a Class C operator must be trained in:

- (1) Delivery controls and monitoring of the dispensing or sale of regulated substances;
- (2) Initial response to alarms or releases; and
- (3) Appropriate actions to be taken in response to spills or releases from an underground storage tank system.

(B)(1) A Class C operator must be trained by a Division-certified Class A or Class B operator, and the training must be specific to the facility at which the Class C operator is employed.

(2) Training for Class C operators must be documented on forms provided by the Division.

(C) An up-to-date list of trained Class C operators and training documentation must be maintained on site at the facility or at a readily available alternative site for inspection by the Division upon request.

(D) Class C operators must be trained before assuming responsibility for responding to emergencies.

(E) Division-certified Class A and Class B operators meet the training requirements of a Class C operator.

Rule 12.708 Operator Examination

(A) To be certified as a Class A or Class B operator under Rule 12.705 or Rule 12.706, an individual shall pass a written examination given by the Division, covering the requirements of those sections, with a score of seventy percent (70%) or higher.

(B) To take the exam to be certified as a Class A or Class B operator under this Rule, an individual must be at least eighteen (18) years of age.

(C) At least one (1) week prior to the date of examination, a registration form along with a non-refundable examination fee of twenty-five dollars (\$25) for each examination taken must be received by the Division.

(D) Any individual taking a Class A or Class B operator exam must, at the time of the exam, declare on forms provided by the Division, the facility identification number of each underground storage tank facility for which the individual will be the designated Class A or Class B operator.

Rule 12.709 Violations

(A)(1) The Division may undertake investigations it deems necessary to ensure compliance with this Chapter.

(2)(a) The Division may take actions it deems necessary to ensure compliance with this Chapter, including issuing enforcement actions, assessing penalties, and revoking certifications.

(b) The Division may, to effectuate the actions described in subdivision (A)(2)(a) of this section, commence civil or administrative actions under Arkansas law or Chapter 9 of this Rule.

(B) The Rule may revoke the certification for an individual upon grounds that the individual:

(1) Exercised fraud, misrepresentation or deception in obtaining certification;

(2) Exercised fraud, misrepresentation or deception in the training, certification or documentation of training for other operators as defined in this Chapter;

(3) Exhibited gross negligence regarding the operation, maintenance, or recordkeeping of an underground storage tank facility or Class C operator training requirements.

Rule 12.710 Disclosure Exemption

Any certification required by this Chapter is exempt from the disclosure requirements of Ark. Code Ann. § 8-1-106 and Rule No. 8.

CHAPTER 8: CONFIDENTIALITY

Rule 12.801 Requests for Confidentiality

(A)(1) Any information submitted to the Division may be claimed as confidential.

(2) Any claim must be asserted at the time of submission.

(3) No information shall be eligible for protection as confidential information under Rule 12.805 unless it is submitted in accordance with this Chapter.

(B) If no claim of confidentiality is made at the time of submission, the Division may make the information available to the public without further notice.

(C) If a claim of confidentiality is asserted at the time of submission, the Director or his or her designee shall make a determination of eligibility for protection as confidential information in accordance with Rule 12.803.

Rule 12.802 Submission Procedures

(A) Any person claiming information as confidential under Rule 12.801 shall:

(1) Clearly mark each page containing information with the word “CONFIDENTIAL”; and

(2) Submit an affidavit setting forth the reasons that the person believes the information is entitled to protection as a trade secret.

(B)(1) Any information submitted to the Division for which a claim of confidentiality is made shall be submitted in a sealed envelope marked “CONFIDENTIAL” and addressed to the Director.

(2) The information shall be submitted in two separate parts as follows:

(a) The first part shall contain all information that is not deemed by the submitter to be confidential and shall include appropriate cross references to the second part; and

(b) The second part shall contain data, words, phrases, paragraphs or pages and appropriate affidavits containing or relating to the information that is claimed to be confidential.

Rule 12.803 Prerequisites for Protection

(A) No information shall be protected as confidential unless:

(1) It is submitted in accordance with this Chapter; and

(2) The Director finds the information would constitute a trade secret under Arkansas law.

(B) If the Director determines information that is properly submitted constitutes a trade secret, then the information shall be kept confidential in accordance with Rule 12.805.

Rule 12.804 Acceptability of Information

(A) The Director or his or her designee shall give written notice to any person submitting information for which confidentiality is claimed of his or her decision on whether the information has been accepted as confidential.

(B) All information that the Director or his or her designee determines is entitled to protection shall be marked with the term "ACCEPTED" and shall be protected in accordance with Rule 12.805.

(C)(1) If the Director or his or her designee finds the information submitted does not meet the requirements of Rule 12.803, he or she shall promptly notify the person submitting the information of this finding. The Director or his or her designee shall give the person reasonable opportunity to further justify his or her claim that the information deserves protection as a trade secret or to limit the scope of information for which the request for protection is made.

(2) If the person fails to satisfactorily demonstrate to the Director or the Director's designee that the information submitted meets the criteria of Rule 12.803, the information shall be marked with the term "REJECTED" and promptly returned to the person submitting the information.

Rule 12.805 Security

(A)(1) All information accepted by the Director as confidential shall be stored in locked filing cabinets.

(2) A person shall not have access to confidential information unless the person requires access to carry out his or her responsibilities under the Regulated Substance Storage Tank program, the Petroleum Storage Tank Trust Fund Act, or this Rule.

(B) A person shall not disclose any confidential information except in accordance with applicable state law.

CHAPTER 9: ENFORCEMENT AND ADMINISTRATIVE PROCEDURES

Rule 12.901 Enforcement

(A) Violation of any provision of this Rule, or of any order issued by the Division pursuant thereto, shall be considered a violation of this Rule and shall be subject to the penalty provisions of the Regulated Substance Storage Tank program.

(B) Rule No. 7 (Civil Penalties) shall apply to enforcement actions taken under this Rule.

Rule 12.902 Administrative Procedures

Rule No. 8 (Administrative Procedures) shall apply to administrative licensing, operator training and certification, or enforcement actions taken under this Rule. Additionally, all administrative hearings and appeals arising under this Rule shall be conducted in accordance with the procedures described in Ark. Code Ann. § 8-7-804 and Rule No. 8.

CHAPTER 10: SEVERABILITY AND EFFECTIVE DATE

Rule 12.1001 Severability

The provisions of this rule are severable. If any part of this rule is declared invalid or unenforceable by a court, the remainder of the rule will continue to be valid and enforceable.

Rule 12.1002 Effective Date

This Rule is effective ten (10) days after filing with the Secretary of State, the State Library, and the Bureau of Legislative Research.

ARKANSAS POLLUTION CONTROL
AND ECOLOGY COMMISSION

RULE NO. 12
STORAGE TANKS



CLEAN DRAFT

Submitted to the Arkansas Pollution Control & Ecology Commission

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CHAPTER 1: GENERAL PROVISIONS

Rule 12.101 Purpose and Title

The purpose of Arkansas Pollution Control and Ecology Commission Rule Number 12 (Storage Tanks), referred to herein as “Rule” and may be cited as “APC&EC Rule 12 (Storage Tanks),” is to regulate underground storage tank systems and certain aboveground storage tank systems to protect the public health and the lands and waters of the State of Arkansas.

Rule 12.102 Authority

This Rule is promulgated under the authority of Arkansas Code Annotated (Ark. Code Ann.) § 8-7-801 *et seq.* and the Petroleum Storage Tank Trust Fund Act, Ark. Code Ann. § 8-7-901 *et seq.*

Rule 12.103 Definitions

(A) Except for the definitions of “Owner,” “Person,” and “Release” found at 40 C.F.R. § 280.12, the definitions set forth in 40 C.F.R. §§ 280.12 and 280.92 are all adopted by reference herein.

(B) As used in this Rule, unless the context otherwise requires:

(1)(a) **“Aboveground storage tank”** means any one (1) or a combination of containers, vessels, and enclosures located aboveground, including structures and appurtenances connected to them, whose capacity is greater than one thousand three hundred twenty gallons (1,320 gals.) and not more than forty thousand gallons (40,000 gals.) and that is used to contain or dispense motor fuels, distillate special fuels, or other refined petroleum products. The term does not include mobile storage tanks used to transport petroleum from one location to another or those used in the production of petroleum or natural gas.

(b) **“Aboveground storage tank”** shall not include any containers, vessels, or enclosures used to contain or dispense refined petroleum substances listed under Section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C.S. § 9601(14).

(2) **“Advisory Committee”** means the Advisory Committee on Petroleum Storage Tanks as established by state law.

(3) **“Certificate of Registration”** means a certificate issued by the Division to an owner or operator who has paid the applicable storage tank fees and registered his or her storage tank(s) with the Division.

(4) **“Combination,”** for purposes of implementation of this Rule on aboveground storage tanks only, means containers, vessels, and enclosures located aboveground that are joined by common piping and located in tandem.

(5) “**Commission,**” unless indicated otherwise by the context, means the Arkansas Pollution Control & Ecology Commission.

(6) “**Compensatory damages**” means all damages for which an owner or operator may be liable including, without limitation, bodily injury or property damage. This term does not include punitive damages or the costs of litigation, which shall not be limited to attorney or expert witness fees. This definition shall apply to any pending third-party claim that has not been reduced to judgment as of April 7, 2003.

(7) “**Community water system**” means a public water system that serves at least fifteen (15) service connections used by year-round residents or regularly serves at least 25 year-round residents. This term includes any collection, treatment, storage, and distribution facilities under control of the system operator, and used primarily in connection with the system.

(8) “**Corrective action**” means any action that may be necessary to protect human health and the environment as a result of an accidental release, sudden or nonsudden.

(9) “**De minimis concentration of a regulated substance**” means a quantity less than three-tenths percent (0.3%) by volume of a regulated substance in a blended material contained within a storage tank.

(10) “**Division**” means the Division of Environmental Quality.

(11) “**Director**” means the Director of the Division of Environmental Quality.

(12) “**Motor fuel dispenser**” means a device that measures and transfers liquid fuel via pressure or suction from an underground storage tank system into a motor vehicle or container. The term “motor fuel dispenser” does not include the equipment necessary to connect a dispenser to an underground storage tank system.

(13) “**Motor fuel dispenser system**” means the equipment necessary to connect a dispenser to an underground storage tank system, and may include check valves, shear valves, unburied risers or flexible connectors, or other transitional components that are beneath a dispenser and connect a dispenser to underground piping.

(14) “**Operator,**” in addition to having the meaning given in the definition found at 40 C.F.R. § 280.12, means, unless the context dictates otherwise, any person in control of, or having responsibility for, the daily operation of an aboveground storage tank system; provided, however, that “operator” as it is used in Chapters Five, Six, and Seven, and Rule 12.104(A) shall not include such persons.

(15) “**Owner**” means:

(a) In the case of any underground storage tank system in use on November 8, 1984, or brought into use after that date, any person who owns an underground storage tank system used for the storage, use, or dispensing of regulated substances;

(b) In the case of any underground storage tank system in use before November 8, 1984, but no longer in use on that date, any person who owned such tank system immediately before the discontinuation of its use. The term “Owner” does not include any person who, without participation in the management of an underground storage

tank system, holds indicia of ownership primarily to protect a security interest in the tank system; and

(c) Unless the context dictates otherwise, any person who owns an aboveground storage tank; provided, however, that “owner” as it is used in Chapters Five, Six, and Seven, and Rule 12.104(A) shall not include such persons.

(16) **“Person”** means any individual; corporation; company; firm; partnership; association; trust; joint-stock company or trust; venture; municipal, state, or federal government or agency; or any other legal entity, however organized.

(17) **“Potable drinking water well”** means any hole (dug, driven, drilled, or bored) that extends into the earth until it meets groundwater that:

(a) Supplies water for a non-community public water system, or

(b) Otherwise supplies water for household use (consisting of drinking, bathing, and cooking, or other similar uses.)

(18) **“Release”** means any spilling, leaking, emitting, discharging, escaping, leaching or disposing from a storage tank into the groundwater, surface water, or subsurface soils of the state.

(19) **“Secondary containment”** means a release prevention and release detection system for an underground storage tank or piping or both, that provides an inner barrier, an outer barrier, and an interstitial space between the two barriers for monitoring to detect the presence of a leak or release of regulated substances from the underground storage tank or piping, or both. This term includes containment sumps used for interstitial monitoring of piping.

(20) **“Storage tank”** means an aboveground storage tank or underground storage tank as defined by this Rule.

(21) **“Trust fund”** means the Petroleum Storage Tank Trust Fund created by the Petroleum Storage Tank Trust Fund Act, Ark. Code Ann. § 8-7-901 *et seq.*

(22) **“Unknown petroleum storage tank”** means a petroleum storage tank as defined by state law whose existence on a property or at a facility at the time of discovery of a release was not known or should not have been reasonably known by the owner or operator. An owner or operator is deemed to have known of the existence of an unknown petroleum storage tank if there was surficial evidence of the tank in the form of visible vent pipes, fill caps, or lines protruding from the tank.

Rule 12.104 Incorporation of Federal Regulations

(A) The following regulations promulgated on or before August 24, 2018, the United States Environmental Protection Agency are hereby adopted as provisions of this Rule as though set forth herein line for line and word for word, except that unless the context otherwise dictates, all references therein to “Implementing Agency” shall be considered references to “Division of Environmental Quality,” and all references to “Administrator,” “Regional Administrator,” “Director” or “State Director” shall be considered references to the “Director of the Division of Environmental Quality,” and all references to the “U.S. Environmental Protection Agency” or “EPA” shall be considered references to the “Division of Environmental Quality,” and all references elsewhere in this Rule to

any of the following regulations shall constitute a reference to the regulation as herein adopted; and provided that the effective date of the provisions adopted herein by reference as provisions of this Rule shall be the date 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 Rule:

Code of Federal Regulations (C.F.R.), Title 40

- (1) 280.10 through 280.74
- (2) 280.90 through 280.116
- (3) 280.200 through 280.230
- (4) 280.250 through 280.252

(B) The Commission shall conduct rulemaking as necessary to incorporate into this Rule any new or revised federal regulations.

Rule 12.105 Records

(A) In addition to any other records required to be maintained under the Regulated Substance Storage Tanks program, the Petroleum Storage Tank Trust Fund Act, or this Rule, all owners or operators shall maintain and submit or, upon request, make available for review and copying by the Division at all reasonable times, any records that may reasonably be required by the Division, the Commission, or the Advisory Committee in the performance of their duties under law.

(B) Any owner or operator of an underground storage tank shall grant the Division access to all records concerning the storage of regulated substances.

Rule 12.106 Entry and Inspection of Underground Storage Tank Facilities

Any owner or operator of an underground storage tank system shall, upon request of a duly authorized representative of the Division, permit the representative to enter the property at all reasonable times to inspect the facilities and equipment or to conduct monitoring and sampling activities.

Rule 12.107 Entry and Inspection of Aboveground Storage Tank Facilities

The Division shall have the authority to enter upon the property of any owner or operator of an aboveground storage tank to obtain information, conduct surveys, or review records for the purpose of determining compliance with the requirements of the Petroleum Storage Tank Trust Fund Act, relating to aboveground storage tanks prior to approval of a claim for reimbursement from the Petroleum Storage Tank Trust Fund.

Rule 12.108 Notice Requirements

(A) The Division must be given timely notice of any release as required by 40 C.F.R. § 280, Subpart E.

(B)(1) The requirement for giving timely notice of a release from an aboveground storage tank system shall be the same as that for underground storage tank systems.

(2) An owner or operator is required to give notice of a release from an aboveground storage tank system if the amount of the release equals or exceeds existing reporting limits in any other applicable federal or state statutes or regulations.

(C)(1) To ensure timely notice of a release or suspected release from a storage tank system is received by the Division, an owner or operator must follow up a verbal notice to the Division with written notice of the release or suspected release within three (3) business days following the date of the initial verbal notice.

(2) Written notice may be submitted in, but is not limited to, the following forms: facsimile, electronic mail, U. S. mail, hand-written correspondence or by another form as may be provided by the Division.

Rule 12.109 Secondary Containment

(A)(1) Each new underground storage tank, or piping connected to any new underground storage tank¹ shall be secondarily contained and monitored for leaks.

(2) In the case of a new underground storage tank system consisting of one (1) or more underground storage tanks and connected by piping, the requirement to provide secondary containment shall apply to all underground storage tanks and connected pipes comprising the system.

(B)(1) Any existing underground storage tank, or existing piping connected to an existing underground storage tank that is replaced² shall be secondarily contained and monitored for leaks.

(2) In the case of a replacement of an existing underground storage tank, or existing piping connected to the underground storage tank, the requirement to provide secondary containment shall apply only to the specific underground storage tank or piping being replaced, not to other underground storage tanks and connected pipes comprising the system.

(C)(1) Each installation of a new motor fuel dispenser system, or replacement of an existing motor fuel dispenser system³ shall include under-dispenser spill containment.

(2) Under-dispenser spill containment must:

- (a) Be liquid-tight on its sides, bottom, and at any penetrations;
- (b) Be compatible with the substance conveyed by the piping; and
- (c) Allow for visual inspection and access to the components in the containment system and/or be monitored.

¹ A new underground storage tank or its piping is subject to the secondary containment requirements under this section if it was installed after July 1, 2007.

² An existing underground storage tank or existing piping is subject to the secondary containment requirements under this section if it was replaced after July 1, 2007.

³ A new motor fuel dispenser system is subject to the secondary containment requirements under this section if it was installed or replaced after July 1, 2007.

- (3) A motor fuel dispenser system is considered to have been replaced if:
- (a) An existing motor fuel dispenser and the equipment necessary to connect the motor fuel dispenser to the underground storage tank system are removed, and
 - (b) Another motor fuel dispenser and the equipment necessary to connect the motor fuel dispenser to the underground storage tank system are put in its place.
- (D) Secondary containment systems shall be designed, constructed, and installed to:
- (1) Contain regulated substances released from the tank system until they are detected and removed;
 - (2) Prevent the release of regulated substances to the environment at any time during the operational life of the underground storage tank system; and
 - (3) Be checked for evidence of a release at least every thirty (30) days.
- (E) In addition to the requirements of subsection (D) of this section, double-walled tanks must be designed, constructed, and installed to:
- (1) Contain a release from any portion of the inner tank within the outer wall; and
 - (2) Detect the failure of the inner wall.
- (F) In addition to the requirements of subsection (D) of this section, external liners (including vaults) must be designed, constructed, and installed to:
- (1) Contain one hundred percent (100%) of the capacity of the largest tank within its boundary;
 - (2) Prevent the interference of precipitation or groundwater intrusion with the ability to contain or detect a release of regulated substances; and
 - (3) Surround the tank completely (i.e., it is capable of preventing lateral as well as vertical migration of regulated substances.)
- (G) Underground piping must be equipped with secondary containment that satisfies the requirements of subsection (D) of this section.
- (H) In accordance with the requirement of subdivision (D)(3) of this section, interstitial monitoring shall meet at least one (1) of the following requirements:
- (1) For double-walled underground storage tank systems, the sampling or testing method can detect a release through the inner wall in any portion of the tank that routinely contains a regulated substance;
 - (2) For underground storage tank systems with a secondary barrier within the excavation zone, the sampling or testing method used can detect a release between the underground storage tank system and the secondary barrier;
 - (a) The secondary barrier around or beneath the underground storage tank system consists of artificially constructed material that is sufficiently thick and impermeable (at least 10^{-6} cm/sec for the regulated substance stored) to direct a release to the monitoring point and permit its detection;
 - (b) The barrier is compatible with the regulated substance stored so that a release

from the underground storage tank system will not cause a deterioration of the barrier allowing a release to pass through undetected;

(c) For cathodically protected tanks, the secondary barrier must be installed so that it does not interfere with the proper operation of the cathodic protection system;

(d) The groundwater, soil moisture, or rainfall will not render the testing or sampling method used inoperative so that a release could go undetected for more than thirty (30) days;

(e) The site is assessed to ensure that the secondary barrier is always above the groundwater and not in a 25-year flood plain, unless the barrier and monitoring designs are for use under these conditions; and

(f) Monitoring wells are clearly marked and secured to avoid unauthorized access and tampering; or

(3) For tanks with an internally fitted liner, an automated device can detect a release between the inner wall of the tank and the liner, and the liner is compatible with the substance stored.

(I) The requirements of this section do not apply to:

(1) Suction piping that meets the requirements of 40 C.F.R. § 280.41(b)(2)(i)-(v); or

(2) Piping that manifolds two (2) or more underground tanks together.

Rule 12.110 Delivery Prohibition

(A) It shall be unlawful to deliver to, deposit into, or accept a regulated substance into an underground storage tank at a facility that has been identified by the Division as ineligible for fuel delivery or deposit.

(B)(1) To prevent the delivery of a regulated substance into an underground storage tank system that has been identified by the Division as ineligible, a tamper-proof red tag shall be affixed to the fill pipe of the ineligible underground storage tank.

(2) This affixed red tag shall serve as written notification to the owner, operator, and the product delivery industry of the prohibition of delivery to the tank system.

(C) An owner or operator shall not receive any regulated substance into any underground storage tank to which notification of delivery prohibition (red tag) has been affixed.

(D) A person selling any regulated substance shall not deliver or cause to be delivered a regulated substance into any underground storage tank to which notification of delivery prohibition (red tag) has been affixed.

(E) It shall be unlawful for any person, other than an authorized representative of the Division, to remove, tamper with, destroy, or damage a red tag affixed to any underground storage tank by Division personnel.

(F)(1) Under this section, a red tag shall immediately be affixed upon finding by the Division of any of the following:

(a) Required spill prevention equipment is not present;

- (b) Required overfill protection equipment is not present;
- (c) Required release detection equipment is not present; or
- (d) Required corrosion protection equipment is not present.

(2) The Division, in its sole discretion, may delay the affixing of a red tag to an underground storage tank for up to one hundred eighty (180) days upon determination that:

- (a) No urgent threat to public health exists; and
- (b) The action would jeopardize the availability of, or access to, fuel for the local community.

(G) Under this section, a red tag shall be affixed to an underground storage tank upon finding by the Division of any of the following if the owner or operator has been provided a written notice of noncompliance and the owner or operator has failed to comply within the time frame given in the notice:

- (1) Failure to properly operate or maintain release detection equipment;
- (2) Failure to properly operate or maintain spill, overfill, or corrosion protection equipment; or
- (3) Failure to maintain financial responsibility.

(H)(1) For an owner or operator of an underground storage tank that has been red tagged to have the tank reclassified by the Division as eligible to receive delivery of a regulated substance, he or she must provide a written statement to the Division that the deficiencies listed in the notice of noncompliance have been corrected.

(2) The Division will determine whether the deficiencies have been corrected as soon as practicable but within five (5) business days after receipt of the owner's written statement of compliance.

- (3) Upon verification of compliance, Division personnel will remove the red tag.

CHAPTER 2: REGISTRATION OF STORAGE TANKS

Rule 12.201 Registration Requirement

(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 Rule.

(B)(1) An owner or operator shall not receive any regulated substance into any underground storage tank without furnishing current and proper proof of registration under Rule 12.202(A) to the person selling the regulated substance.

(2) 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 under Rule 12.202(A) from the owner or operator.

(C) This Rule shall not apply to aboveground storage tanks located on farms if the contents are used for agricultural purposes and not held for resale.

(D) This Rule 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) This Rule 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 Rule 12.203 must be obtained and the storage tank registration fees under Rule 12.203 must be paid.

Rule 12.202 Certificate of Registration

(A) Proper proof of registration shall be in the form of a Certificate of Registration.

(B) Each year the Division shall issue or renew a Certificate of Registration for each storage tank facility meeting the following requirements:

(1) All storage tanks at the facility must be registered in accordance with this Rule;
and

(2) The registration fees required by Rule 12.203 must be paid.

(C) A Certificate of Registration must be posted in a conspicuous place at each registered facility.

Rule 12.203 Storage Tank Registration Fees

(A)(1) An annual registration fee for each storage tank shall be paid by the tank owner or operator to the Division for each year or portion of a year that the tank is in use.

(2) A storage tank shall be deemed “in use” until it has been removed or otherwise permanently closed in accordance with the procedures mandated by this Rule and written notice of the change in status of the tank has been provided to the Division.

(B) The annual registration fee for a storage tank newly placed into service shall be paid within thirty (30) days after the storage tank is placed into service.

(C) The annual registration fee for all storage tanks shall be seventy-five dollars (\$75) per tank.

(D) The annual registration fees shall be allocated to the Regulated Substance Storage Tank Program Fund and the Department of Arkansas State Police.

(E) If the annual registration fee required by this Chapter is not paid within thirty (30) days of the billing date of the applicable fee invoice from the Division, a late fee shall be imposed in the amount of five dollars (\$5) per storage tank.

(F) Nonpayment of any fee required by this Chapter is grounds for legal action by the Division, and may result in the assessment of civil penalties as provided in Chapter 9 of this Rule.

(G) Any fees required by this Chapter shall be non-refundable.

CHAPTER 3: PETROLEUM STORAGE TANK TRUST FUND CORRECTIVE ACTION REIMBURSEMENT PROCEDURES

Rule 12.301 Purpose

In accordance with the Petroleum Storage Tank Trust Fund Act, eligible owners or operators may obtain partial reimbursement for costs of corrective action taken in response to accidental releases from qualified petroleum storage tank systems. This Chapter establishes the procedures to be followed and documentation required to receive reimbursement from the trust fund.

Rule 12.302 Trust Fund Eligibility

(A)(1) Every owner or operator of an underground petroleum storage tank system is required by 40 C.F.R. § 280.93 to demonstrate financial responsibility for taking corrective action in response to an accidental release from an underground petroleum storage tank system. One mechanism that may be used to partially satisfy this requirement is the Petroleum Storage Tank Trust Fund.

(2) Every owner or operator choosing to use the trust fund as a mechanism to partially satisfy the financial responsibility requirements described in subdivision (A)(1) of this section also must utilize an additional financial responsibility mechanism, as described in subdivision (D)(2) of this section, for the first seven thousand five hundred dollars (\$7,500) of the costs of corrective action.

(B) In accordance with the Petroleum Storage Tank Trust Fund Act, owners or operators of certain aboveground petroleum storage tank systems also may qualify for and access the trust fund.

(C) The trust fund shall not be accessed for storage tank systems storing any substance listed under Section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 [42 U.S.C.S. § 9601 (14)], as amended. These tank systems shall not be considered qualified storage tanks for purposes of Chapters Three and Four of this Rule.

(D) To be eligible for the trust fund, the owner or operator must:

(1) Register each petroleum storage tank and pay the annual storage tank fees required by this Rule for each tank until the permanent closure requirements of this Rule are satisfied; and

(2) Maintain financial responsibility in the amount of seven thousand five hundred dollars (\$7,500) per occurrence for corrective action costs, by any one (1) or combination of the following: insurance, guaranty, surety bond, letter of credit, insurance pool, or any other mechanism allowed by 40 C.F.R. § 280.

(E)(1) Any person requesting Advisory Committee review of a Division determination on trust fund eligibility or costs must file a request with the Division within ninety (90) days of the date of the Division's determination.

(2) A request for Advisory Committee review must be in writing and mailed to the Division's postal address, to the attention of the Associate Director, Office of Land Resources.

Rule 12.303 Trust Fund Coverage for a Release

(A) For an owner or operator to obtain any coverage by the trust fund for corrective action necessary to address an accidental release, all of the following requirements must be met:

(1) At the time of the discovery of the release, the owner or operator must have met each of the requirements for trust fund eligibility as set forth in Rule 12.302(D);

(2) The release must have occurred after February 22, 1989;

(3) The Division must have been given timely notice of the release as required by Rule 12.305;

(4) The owner or operator must cooperate fully with the Division in conducting corrective action to address the release; and

(5) The owner or operator must have expended seven thousand five hundred dollars (\$7,500) in reasonable, allowable, and necessary corrective action costs for the occurrence.

(B) Upon request by the Division, the owner or operator shall submit proof of compliance with the requirements for trust fund coverage.

Rule 12.304 Trust Fund Coverage for Unknown Petroleum Storage Tanks

(A) Unknown petroleum storage tanks that have satisfied the requirements of Rule 12.303 shall be eligible for reimbursement for corrective action as provided by this section if:

(1) The unknown petroleum storage tank is discovered while removing, upgrading, or replacing a petroleum storage tank meeting the requirements of Rule 12.303, or while performing petroleum investigation or corrective action activities required by federal or state laws, and the petroleum storage tank meeting the requirements of Rule 12.303 is located on the same property or facility; or

(2) The unknown petroleum storage tank is located on a right-of-way purchased by a city, county, or state governmental agency or entity and is discovered during construction in the right-of-way.

(3) Eligibility for reimbursement of an unknown petroleum storage tank will be conditioned on the payment of three hundred seventy-five dollars (\$375) to the Division.

Rule 12.305 Notice Requirements

(A) The Division must be given timely notice of any release as required by 40 C.F.R. § 280, Subpart E.

(B)(1) The requirement for giving timely notice of a release from an aboveground storage tank system shall be the same as that for an underground storage tank system.

(2) An owner or operator is required to give notice of a release from an aboveground storage tank system if the amount of the release equals or exceeds existing reporting limits in any other applicable federal or state statutes or regulations.

(C)(1) To ensure timely notice of a release or suspected release from a storage tank system is received by the Division, an owner or operator must follow up a verbal notice to the

Division with written notice of the release or suspected release within three (3) business days following the date of the initial verbal notice.

(2) Written notice may be submitted in, but is not limited to, the following forms: facsimile, electronic mail, U. S. mail, hand-written correspondence or by another form as may be provided by the Division.

(D) If the Division is not given the required timely notice of a release, and the failure to report the release causes a delay in the corrective action that contributes to an adverse impact to the environment, no reimbursement shall be made under this Chapter for the costs of corrective action incurred in response to the release.

Rule 12.306 Amount of Reimbursement

(A) The trust fund will provide reimbursement to eligible owners or operators of storage tanks for corrective action costs required to address accidental releases in an amount not to exceed one million nine hundred ninety-two thousand five hundred dollars (\$1,992,500) per occurrence.

(B) The owner or operator shall be responsible for the first seven thousand five hundred dollars (\$7,500) of corrective action costs per occurrence.

Rule 12.307 Deductible

(A) The first seven thousand five hundred dollars (\$7,500) of corrective action costs incurred by the owner or operator shall be considered a deductible and is not eligible for reimbursement from the trust fund.

(B)(1) A reimbursement for corrective action costs shall not be made from the trust fund until the deductible for the occurrence has been expended by the owner or operator.

(2) An owner or operator may not submit an application for reimbursement for corrective action costs until he or she has expended the deductible.

(3) Proof of payment of the deductible must be provided to the Division prior to approval of reimbursement for any corrective action costs.

(4) For purposes of meeting the deductible, proof of payment shall consist of a receipt, a copy of a money order, or a canceled check. An IOU, a discharge in bankruptcy, a conditional payment, an installment payment, or a down payment shall not be considered proof of payment.

(C) The only corrective action costs that shall be credited toward the deductible are costs that are:

(1) Incurred in response to a release that has been timely reported to the Division; and

(2) Found to be reasonable, allowable, and necessary.

Rule 12.308 Applying for Reimbursement of Corrective Action Costs

(A) To apply for reimbursement of corrective action costs, an owner or operator must meet the requirements for coverage set forth in Rule 12.303 and meet the requirements of this Chapter for reimbursement applications.

(B) An application shall not contain a request for reimbursement, nor shall reimbursement be made, in advance of the reimbursable services being rendered or reimbursable costs being incurred.

(C) Any applications for reimbursement of corrective action costs must be submitted on forms provided by the Division and shall include an accounting of all charges itemized by labor hours and rates, analytical charges, equipment charges and other categories that may be identified by the Division. The application also shall contain the following:

(1) The name, address, and telephone number of the applicant;

(2) The name, address, and telephone number of each owner and operator of each storage tank and the facility owner, if different from the applicant;

(3) The location of the facility where the corrective action was performed or is being performed, identified with sufficient clarity and detail to enable a person unfamiliar with the site to locate it;

(4) A legible copy of all invoices for which reimbursement is requested, providing a description of the work performed, where the work was performed, the dates the work was performed, the unit costs, and the total amount paid;

(5) Evidence that the amounts shown on the invoices for which reimbursement is requested have been paid in full by the applicant. The evidence must be accompanied by a copy of any of the following:

(a) Business receipts, indicating all payments received;

(b) Canceled checks (front and back);

(c) The certification of a certified public accountant that the costs for which reimbursement is requested have been paid in full; or

(d) An affidavit signed by the person who performed the corrective action, affirming what amounts the applicant represents as being paid to that person have been paid in full; and

(6) Any other information that the Division may reasonably require.

(D) An application must be signed as follows:

(1) For a corporation —

(a) By a principal executive officer of at least the level of vice-president;

(b) By a duly authorized representative or agent of the executive officer named in subdivision (D)(1)(a) of this section, provided that the representative or agent is responsible for the overall operation of the facility that is the subject of the application; or

(c) By a person whom the board of directors designates by means of a corporate resolution;

(2) For a partnership, sole proprietorship or individual, by a general partner, the proprietor, or individual, respectively; or

(3) For a municipality, state, federal, or other public agency, by either a principal, executive officer, or ranking elected official.

(E) A person who signs an application for reimbursement shall make the following certification:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I also certify that the amounts for which reimbursement is requested under this application have been paid in full and that I have the authority to submit this application on behalf of _____.

(F) Application for reimbursement of corrective action costs must be made by an eligible owner or operator no later than one (1) year after the Division's issuance of a "No Further Action" letter for the occurrence.

Rule 12.309 Interim Payments

(A) The Director may provide for interim payments, provided the investigation or corrective action is being conducted in accordance with an approved workplan or corrective action plan. Payment will only be made at the following times:

(1) After the completion of a phase, as approved by the Division; or

(2) At points during the corrective action process agreed to by the Division and the applicant.

(B) The applicant must update his or her application with any information not yet submitted to the Division before review of the reimbursement application will commence.

(C) For purposes of this section, the following are the phases of corrective action:

(1) Completion of site stabilization activities;

(2) Completion and submittal of a report for a preliminary investigation;

(3) Implementation of a free product removal system;

(4) Completion and submittal of a report for a secondary investigation and development of a corrective action plan;

(5) Implementation of a corrective action plan; and

(6) Provision of an alternate water supply.

(D)(1) Applications for payments for the implementation of a phase may be submitted ninety (90) days following initiation of work to implement the phase and at ninety-day intervals thereafter until completion of the authorized activities.

(2) Upon request, the Director may approve interim payments at more frequent intervals.

(E) Interim payments shall consist of payment of an amount not to exceed ninety percent (90%) of one million five hundred thousand dollars (\$1,500,000). The remaining ten percent (10%) shall be released only upon final payment for corrective action concerning the occurrence.

Rule 12.310 Reimbursement Application Review

(A)(1) Before commencing a substantive review of an application for reimbursement of corrective action costs, the Division shall determine whether the release meets the requirements of Rule 12.303 for trust fund coverage for corrective action.

(2) Any person aggrieved by the Division's determination of whether a release is eligible for trust fund coverage for corrective action may request that the Advisory Committee, and, if necessary thereafter, the Director, review the Division's determination.

(B) The Division is not required to commence substantive review of an application until it has received a completed application form containing all of the information required by Rule 12.308. If, during the course of the substantive review, the Division finds that additional information is needed to evaluate the application, the Division may require that the information be provided before review of the application may be completed.

(C) The Division and the Advisory Committee shall not recommend, and the Director shall not approve, reimbursement of corrective action costs unless they are reasonable, allowable, and necessary.

(D)(1) After a reimbursement application is complete, the Division shall make a written recommendation to the Advisory Committee as to whether the applicant has met the trust fund eligibility requirements and, if so, what costs specified in the application are reasonable, allowable, and necessary.

(2) The Advisory Committee in its sole discretion may allow supplemental information explaining the application to be presented orally. It may establish a fair and reasonable limit on time allowed for oral presentation.

(3) The Advisory Committee may consider, but is not bound by, the recommendation prepared by the Division under subdivision (D)(1) of this section. It shall make a written recommendation to the Director as to whether the applicant has met the trust fund eligibility requirements and, if so, what costs for which reimbursement is requested are reasonable, allowable, and necessary and should therefore be paid.

(E)(1) The Director shall consider, but is not bound by, the recommendations made by the Division under subdivision (D)(1) of this section and by the Advisory Committee under subdivision (D)(3) of this section.

(2) The Director shall decide whether the applicant has met the trust fund eligibility requirements and, if so, what costs for which reimbursement is requested are reasonable, allowable, and necessary and therefore should be paid.

(3) If the decision of the Director is contrary to the recommendation of the Advisory Committee, the Director shall provide in writing his or her reasons for declining to follow the Advisory Committee's recommendation.

(F)(1) The decision of the Director shall be the final decision of the Division.

(2) The decision of the Director may be appealed to the Commission. An owner or operator who considers himself or herself injured in his or her business, person, or property by a

final decision of the director or his or her designee may, within thirty (30) days after the date of the final decision of the director or his or her designee, appeal the decision to the Commission.

Rule 12.311 Reasonable Costs

(A) “Reasonable costs” means costs or a range of costs commensurate with the level of corrective action necessary to assess or remediate (or both) the petroleum storage tank system release, based on an evaluation of typical costs expected for the particular corrective action under review, with respect to the necessary or required scope and complexity of the action.

(B) Hourly charges for equipment may be established in the cost proposal submitted for each major phase of work. Hourly rates must be competitive with similar charges by other contractors and may be rejected if they are determined to represent unreasonable costs.

(C) A cost is not reasonable unless it is also an allowable cost under this Chapter.

Rule 12.312 Allowable Costs

(A) Only those costs that are allowable costs under this Chapter shall be reimbursable.

(B)(1)(a) Allowable costs are those costs that are approved by the Division and arise directly from the performance of corrective action in accordance with the requirements of this Rule.

(b) For purposes of appeal only, a cost that has been submitted to, reviewed and disallowed by the Division is deemed “approved by the Division” under subdivision (B)(1)(a) of this section.

(c) Approval of costs by the Division shall not be construed to be a contract with the State to pay the costs.

(2) The cost of repairing damages caused by the performance of the corrective action shall be allowable unless otherwise prohibited by this Rule or by other law; provided, however, that the cost of repairing damages resulting from contractor negligence, error, or other wrongful action shall not be allowable.

(C) A reimbursement shall not be made under this Chapter for any costs incurred prior to the discovery of a release.

(D) If the Division is not given timely notice of a release as required by Rule 12.305, no reimbursement shall be made under this Chapter for the costs of corrective action incurred in response to the release.

(E) Reimbursement shall be made under this Chapter only for costs incurred for corrective action that is approved by the Division.

(F) The determination as to what costs are allowable will be made on a case-by-case basis. However, costs for the following types of activities or items will generally be considered reimbursable:

(1) Site investigation, testing, and monitoring necessary for the preparation of an approved corrective action plan;

(2) Preparation of an approved corrective action plan;

(3) Recovery and disposal of contaminated soils;

(4) Cleanup and disposal of contaminated soils;

(5) Installation and operation of monitoring wells;

(6) Analysis of soils and water;

(7) Removal of leaking storage tanks if required by the Division as necessary to the corrective action;

(8) Provision of an alternate water supply;

(9) Treatment and disposal of contaminated groundwater;

(10) Equipment, such as bailers and sample containers, that can be charged to a specific site;

(11) Travel costs that are necessary for corrective action and present the least-cost alternative for the required corrective action; and

(12)(a) Repair, reassembly, or reinstallation of fixtures, equipment, or appurtenances that are disassembled, moved, or otherwise taken apart as a necessary requirement of the investigation or remediation of a petroleum storage tank release and that are, or would be, damaged by the investigation or remediation.

(b) Subdivision (F)(12)(a) of this section shall not apply to structures, landscaping, or petroleum storage tank systems, except for the costs of repairing boring or sampling holes inside structures.

(G) The following types of costs are those that will not be considered allowable costs of corrective action:

(1) Retrofitting, repairing or replacing petroleum storage tank systems or piping;

(2) Loss of revenue;

(3) Profit for the responsible party or for any entity in which the responsible party has an ownership interest of five percent (5%) or more unless payment of the profit is the least-cost alternative for the required corrective action, as determined by the Division's review of reasonable costs;

(4) Rental of temporary petroleum storage tanks not necessary for corrective action;

(5)(a) Rental of real estate or buildings owned in part or in total by the responsible party or by any entity in which the responsible party has an ownership interest of five percent (5%) or more unless the rental is the least-cost alternative for the required corrective action, as determined by the Division;

(b) Rental of real estate or buildings in which the responsible party, or any entity in which the responsible party has an ownership interest of five percent (5%) or more, has a leasehold interest for any reason other than to facilitate the corrective action;

(6) The value of lost trees, shrubs, grass or signs on the owner's or operator's property, or other fixtures, appurtenances or personal property except as allowed in subdivision (F)(12) of this section;

(7) The value of lost petroleum or petroleum products;

(8) The cost of sample analysis performed by a laboratory that is not certified by the Division;

(9) Duplicative charges for travel time and mileage for any trip to multiple job sites where the costs are billed in total to multiple corrective action projects rather than allocated between the separate projects (i.e., only charges based on actual miles traveled for all corrective action projects charged to the trust fund shall be eligible for reimbursement);

(10) Excess charges for travel time and mileage if visits to multiple sites are not scheduled economically so that the costs can be allocated between the projects, if possible;

(11) Corrective action taken in violation of state or federal laws or regulations; and

(12) The costs of equipment purchases; provided, however, that costs of routinely required supplies that are expended at a given site, or equipment that must be installed at a site to implement a corrective action plan, are allowable. Equipment that cannot be charged to a specific site includes without limitation the following:

(a) Drilling rigs;

(b) Earth-moving equipment;

(c) Tools of the trade, such as hand tools, safety or traffic control equipment, personal protective equipment, surveying equipment, etc.

(d) Field analytical and measuring devices, such as groundwater sampling pumps, photoionization detectors, organic vapor meters, infrared analyzers, portable gas chromatographs, dataloggers, soil gas probes, etc.

(H)(1) A reimbursement shall not be made under this Chapter for any item for which payment is made under a third-party claim for the same occurrence under Chapter 4.

(2) A third-party claim reimbursement shall not be made under Chapter 4 for any item that is included in an approved corrective action plan and is reimbursable under this Chapter.

Rule 12.313 Necessary Costs

Only costs that are necessary, as determined by the Division, for conducting approved corrective action shall be reimbursable under this Chapter.

Rule 12.314 Records

(A) Any owner or operator participating in the trust fund shall maintain the following records and submit them or make them available to the Division upon request:

(1) Evidence of current financial responsibility for seven thousand five hundred dollars (\$7,500) per occurrence; and

(2) Any other records as may reasonably be required by the Division or the Advisory Committee in the performance of their duties under law.

(B) All records necessary to demonstrate that the trust fund eligibility requirements of Rule 12.302 have been fulfilled shall be retained by the owner or operator until one (1) of the following is accomplished:

(1) Closure requirements of this Rule, if applicable, are satisfied;

(2) Responsibility for meeting the financial assurance requirements of this Rule is legally transferred; or

(3) The owner or operator is otherwise instructed in writing by the Division.

(C) For auditing purposes, all records necessary to demonstrate that the trust fund coverage requirements of Rule 12.303 have been fulfilled shall be retained by the owner or operator for a minimum of three (3) years from the date of closure of the corrective action project.

Rule 12.315 Audits

(A) The Director may cause audits to be performed as necessary to ensure that costs, for which reimbursement is sought or has been paid, were in fact incurred and necessary, that the work was in fact performed and necessary, and that reimbursement would be, or is, in fact reasonable and allowable.

(B) The audits may be performed by the Division or by any qualified person at the direction of the Director.

(C) Monies in the trust fund may be expended by the Director as necessary to pay the cost of audits performed by persons other than the Division.

Rule 12.316 Cost Recovery

(A) The Division may initiate proceedings against any owner or operator of a petroleum storage tank system for recovery of monies that were solicited and received from the trust fund, regardless of whether it was approved by the Advisory Committee or the Director, if:

(1) The funds were solicited or received through willful or accidental utilization of incorrect information;

(2) The costs were not incurred or were unnecessary;

(3) The work was not performed or was unnecessary; or

(4) The amount of reimbursement is found to be unreasonable or not allowable.

(B) The Division has the right of subrogation that applies to sites where corrective action is taken by owners, operators, or the Division. The right of subrogation extends to:

(1) Any insurance policies in existence at the time of the occurrence to the extent of any rights the owner or operator of a site may have had under that policy; and

(2) Any third party who caused or contributed to the occurrence.

(C) For purposes of subrogation, “third party” does not include a former owner or operator of the site where corrective action is taken.

Rule 12.317 Trust Fund Availability

(A)(1) All claims for reimbursement submitted under this Chapter are subject to the availability of monies in the trust fund.

(2) Nothing in this Rule shall be construed to create a permanent entitlement to monies in the trust fund.

(3) The Commission reserves the right to amend this Chapter, including the provisions regarding coverage and eligibility, and reasonable, allowable, and necessary costs.

(B)(1) If the monies in the trust fund prove insufficient to cover all trust fund claims for reimbursement, the Advisory Committee shall recommend to the Director a priority system based upon whatever factors it deems appropriate.

(2) The Director may adopt a priority system for reimbursement based upon any factors he or she deems appropriate.

Rule 12.318 Obligation to Comply

(A) Eligibility of an owner or operator for the trust fund shall not preclude the Division from taking any appropriate enforcement action.

(B) This Chapter shall not affect the liability or responsibility of an owner or operator of a petroleum storage tank system for taking corrective action, as required by this Rule or any other law, in response to a release.

Rule 12.319 Reimbursement of Equipment Costs

(A) An owner or operator or a consultant may be eligible for reimbursement for the purchase of equipment needed to undertake corrective action.

(B) An eligible cost incurred by a consultant on behalf of an owner or operator for the purchase of equipment needed to perform corrective action, and determined by the Division to be reimbursable, will apply toward the owner’s or operator’s maximum reimbursable amount for the occurrence.

(C) A consultant may not submit an application for reimbursement of eligible costs to purchase equipment for corrective action except in conjunction with a reimbursement application of an owner or operator who provides proof of the equipment purchase by the consultant in the application.

(D) Upon the written permission of the owner or operator, the eligible costs of purchasing equipment needed to perform corrective action, incurred by a consultant on behalf of the owner or operator, may be reimbursed directly to the consultant.

(E) All requests for reimbursement of equipment purchases must, at a minimum, include the following information:

- (1) Name and description of the equipment; and
- (2) Model and serial number(s) (if applicable).

(F) An equipment purchase by the owner or operator or a consultant must be approved by the Division prior to the purchase to be eligible for reimbursement.

(G)(1) For purposes of this Chapter only, “residual value of equipment” means the actual value of the equipment at the time the equipment is taken out of service.

(2) The residual value of equipment is not a reimbursable cost.

(3) The residual value of equipment may be projected based on the expected duration the equipment will be used for corrective action and the salvage value of the equipment, if applicable.

(H)(1) Equipment purchased under this section is the property of the owner or operator or the consultant making the purchase.

(2) Reimbursement to an owner or operator or a consultant for the cost of purchasing equipment needed for undertaking corrective action shall establish a lien by the Division on the equipment for the duration of the corrective action.

(3) If corrective action is not completed by the owner or operator in accordance with Ark. Code Ann. § 8-7-807(a)(1), the Division shall be granted ownership of any equipment upon which a lien is established.

(I) Depreciation schedules for equipment purchased under this section may be determined in accordance with applicable federal and state tax requirements.

(J) Purchase costs and rental costs shall not be reimbursed for the same equipment.

Rule 12.320 Transfer of Trust Fund Eligibility

(A) An owner or operator determined to be eligible for reimbursement of corrective action for a release from a qualified storage tank may transfer the eligibility to a subsequent owner or operator of the qualified storage tank if the Division determines that the subsequent owner or operator has the financial and legal capacity to complete the corrective action and has met all the requirements of this section.

(B) The removal of the storage tank after initiation of corrective action shall not bar the transfer of eligibility as provided in subsection (A) of this section.

(C) An owner or operator must notify the Division no fewer than thirty (30) days prior to any transfer of eligibility and provide documentation that the subsequent owner or operator has the legal and financial capacity to complete the corrective action.

(D) Documentation of legal capacity includes, but is not limited to, the following, as appropriate:

(1) Proof of authorization to conduct business in Arkansas, e.g., current registration with, and a valid certificate of good standing issued by, the Arkansas Secretary of State;

(2) Proof of proper registration of the tank system by the subsequent owner or operator;

(3) Copy of any access agreement(s) between the subsequent tank owner and the owner of the real property, if different from the tank owner or operator; and

(4) Copy of any access agreement(s) between the subsequent tank owner and adjacent property owner(s), if off-site access will be necessary to conduct corrective action.

(E) Documentation of financial capacity includes, but is not limited to, the following:

(1) Accurate and complete cost estimate for remaining corrective action activities required to abate a release from a qualified storage tank;

(2) A time schedule for completion of corrective action; and

(3) Any one (1) or combination of the items below that affirms, as determined by the Division, the subsequent owner or operator has sufficient assets to complete corrective action:

(a) An independently audited copy of the most recent annual financial statements that indicates the availability of sufficient funds to finance the remaining corrective action;

(b) Copies of bank statements or any other financial records that indicate the availability of sufficient funds of the subsequent owner or operator to finance the remaining corrective action;

(c) A letter from a financial institution or other funding agency indicating a binding commitment to provide a specified amount of funds and the uses for which the funds may be utilized; or

(d) In cases where funding is required but there can be no binding commitment of money until approvals are received, a letter of "intent to fund" from the appropriate funding institution indicating the amount of funds and their specified uses.

(F) Upon approval of the Division that the subsequent owner or operator has both the legal and financial capacity to complete corrective action, the owner or operator, the subsequent owner or operator, and the Division will enter into a consent administrative order, upon agreement of all parties, setting forth the following:

(1) The owner or operator relinquishes eligibility for trust fund coverage for the occurrence;

(2) The owner or operator acknowledges continuing liability for undertaking corrective action for the occurrence; and

(3) The subsequent owner or operator assumes responsibility for completion of corrective action for the occurrence.

(G) Transfer of eligibility for trust fund coverage for the occurrence is effective upon execution of the consent administrative order.

(H) Nothing in this section shall be construed to alter the limits of reimbursement for corrective action set out in Ark. Code Ann. § 8-7-907.

Rule 12.321 Reimbursement to Lender or Secured Creditor

(A) A lender or secured creditor that holds ownership in a storage tank primarily to protect a security interest on the storage tank or the facility where it is located, or both, is eligible for reimbursement for corrective action if the lender or secured creditor assumes responsibility for completing the corrective action of a release from a qualified storage tank.

(B) If an owner or operator is performing corrective action to the Division's satisfaction, a lender or secured creditor is not eligible to assume responsibility for corrective action or to receive reimbursement for corrective action.

(C) A lender or secured creditor must notify the Division thirty (30) days prior to assuming responsibility for completing corrective action for a release from a qualified storage tank and provide documentation of the security interest in the storage tank or the facility where the storage tank is located.

(D) Upon verification of the security interest of the lender or secured creditor and determination by the Division that the owner or operator is performing corrective action in an unsatisfactory manner, the lender or secured creditor will enter into a consent administrative order with the Division setting forth the following:

(1) The lender or secured creditor assumes responsibility for completing the corrective action for a release from a qualified storage tank; and

(2) The lender or secured creditor shall cooperate fully with the Division in conducting the corrective action for a release from a qualified storage tank.

(E) A lender or secured creditor that is eligible for reimbursement for corrective action for a release from a qualified storage tank under this section shall comply with this Rule.

(F) Eligibility for reimbursement of corrective action costs for the occurrence is effective upon execution of the consent administrative order.

(G) Nothing in this section shall be construed to alter the limits of reimbursement for corrective action set out in Ark. Code Ann. § 8-7-907.

CHAPTER 4: PETROLEUM STORAGE TANK TRUST FUND THIRD-PARTY PAYMENT PROCEDURES

Rule 12.401 Purpose

In accordance with the Petroleum Storage Tank Trust Fund Act, eligible owners, operators, or third parties may obtain partial payment for valid compensatory damage claims caused by accidental releases from qualified petroleum storage tank systems. This Chapter establishes the procedures to be followed and documentation required to receive payment from the trust fund.

Rule 12.402 Trust Fund Eligibility

(A)(1) Every owner or operator of an underground petroleum storage tank system is required by 40 C.F.R. § 280.93 to demonstrate financial responsibility for compensating third parties for bodily injury and property damage caused by accidental releases from underground petroleum storage tank systems. One mechanism that may be used to partially satisfy this requirement is the Petroleum Storage Tank Trust Fund.

(2) Every owner or operator choosing to use the trust fund as a mechanism to partially satisfy the financial responsibility requirements described in subdivision (A)(1) of this section also must utilize an additional financial responsibility mechanism, as described in subdivision (C)(1) of this section, for the first seven thousand five hundred dollars (\$7,500) of the costs of third-party claims.

(B) In accordance with the Petroleum Storage Tank Trust Fund Act, owners or operators of certain aboveground petroleum storage tank systems also may qualify for and access the trust fund.

(C) To be eligible for the trust fund, the owner or operator must:

(1) Register each petroleum storage tank and pay the annual storage tank fee required by this Rule for each tank until the permanent closure requirements of this Rule are satisfied;

(2) Maintain financial responsibility in the amount of seven thousand five hundred dollars (\$7,500) per occurrence for third-party claims, by any one or combination of the following: insurance, guaranty, surety bond, letter of credit, insurance pool, or any other mechanism allowed by 40 C.F.R. § 280; and

(3) For each petroleum storage tank for which trust fund eligibility is sought, certify, on forms supplied by the Division, that he or she is in substantial compliance, as defined by Rule 12.403(B).

Rule 12.403 Trust Fund Coverage for a Release

(A) For an owner or operator to obtain third-party coverage by the trust fund for a release, the following requirements must be met:

(1) At the time of the discovery of the release the owner or operator must have met each of the requirements for trust fund eligibility as set forth in Rule 12.402(C);

(2) The release must have occurred after February 22, 1989;

(3) The Division must have been given timely notice of the third-party claim as required by Rule 12.405;

(4) The owner or operator must have expended seven thousand five hundred dollars (\$7,500) on reasonable and allowable third-party claims for the occurrence; and

(5) At the time of the release, the owner or operator must have been in substantial compliance, as defined in subsection (B) of this section.

(B)(1) For purposes of this Chapter only, “substantial compliance” means compliance with the requirement for the owner or operator to maintain financial responsibility in the amount of seven thousand five hundred dollars (\$7,500) per occurrence for third-party claims, by any one or combination of the following: insurance, guaranty, surety bond, letter of credit, insurance pool or any other mechanism allowed by 40 C.F.R. § 280.

(2) An owner or operator who in fact expends seven thousand five hundred dollars (\$7,500) on reasonable and allowable third-party claims for the occurrence shall be deemed to be in substantial compliance.

(C) Upon request by the Division, the owner or operator shall submit proof of compliance with the requirements for trust fund coverage.

Rule 12.404 Trust Fund Coverage for Unknown Petroleum Storage Tanks

(A) Unknown petroleum storage tanks that have satisfied the requirements of Rule 12.408(C) of this Chapter shall be eligible for reimbursement for third-party claims as provided by this section if:

(1) The unknown petroleum storage tank is discovered while removing, upgrading, or replacing a petroleum storage tank meeting the requirements of Rule 12.402(C) or while performing petroleum investigation or corrective action activities required by federal or state laws, and the petroleum storage tank meeting the requirements of Rule 12.402(C) is located on the same property or facility; or

(2) The unknown petroleum storage tank is located on a right-of-way purchased by a city, county, or state governmental agency or entity and is discovered during construction in the right-of-way.

(3) Eligibility for reimbursement of an unknown petroleum storage tank will be conditioned on the payment of three hundred seventy-five dollars (\$375) to the Division.

Rule 12.405 Notice Requirements

(A)(1) The owner or operator shall give written notice to the Division of any potential third-party claim within thirty (30) days of his or her knowledge of the potential claim.

(2) The notice required by subdivision (A)(1) of this section shall provide the names and addresses of all persons and properties alleged to be injured, as well as the time, place, and circumstances of the release.

(B)(1) Any owner or operator against whom a third-party claim is filed in court or in the

Arkansas State Claims Commission shall provide a copy of the complaint to the Division no later than twenty (20) days after service of summons or receipt of notification of the claim from the Arkansas State Claims Commission.

(2) Upon receipt of notice under subdivision (B)(1) of this section, the Division shall immediately notify the Attorney General, who shall have the right to intervene in any lawsuit or proceeding.

(3) Payment of third-party claims from the fund may be denied for any owner or operator who fails to give the Division notice as required in subsection (B) of this section.

Rule 12.406 Amount of Payment

(A) The trust fund will reimburse eligible owners or operators of storage tanks for compensating third parties, or will provide payment to third parties, for compensatory damages caused by accidental releases in an amount not to exceed nine hundred ninety-two thousand five hundred dollars (\$992,500) per occurrence.

(B) The owner or operator shall be responsible for the first seven thousand five hundred dollars (\$7,500) of third-party compensatory damage claims per occurrence.

Rule 12.407 Deductible

(A) The first seven thousand five hundred dollars (\$7,500) of costs incurred by the owner or operator for third-party compensatory damage claims for an occurrence shall be considered a deductible and is not eligible for reimbursement from the trust fund.

(B)(1) No payment to any third-party or to any owner or operator against whom a third-party claim is brought for compensatory damages shall be made from the trust fund until the owner or operator has expended the deductible amount on third-party claims for the occurrence, unless the owner or operator has been discharged under the United States Bankruptcy Code or is determined by a court to be insolvent.

(2) Proof of payment of the deductible must be provided to the Division prior to approval of a third-party claim for payment.

(3) For purposes of meeting the deductible, proof of payment shall consist of a receipt, a copy of a money order, or a canceled check. An IOU, a conditional payment, an installment payment, or a down payment shall not be considered proof of payment.

(C) Only third-party claims found to be reasonable and allowable shall be credited toward the deductible.

Rule 12.408 Applying for Payment of Third-Party Claims

(A) To apply for payment of a third-party claim, an owner or operator must meet the requirements for coverage set forth in Rule 12.403 and meet the application requirements of either subsection (C) of this section for judgments or subsection (E) of this section for settlements.

(B)(1) Unless otherwise stated in writing, an item is considered satisfied or compensated if it is:

- (a) Contained in any information submitted to support a third-party claim;
- (b) Presented for payment; and
- (c) Approved and paid.

(2) A third-party claim is not reimbursable as corrective action under Chapter 3 unless otherwise agreed in writing before it is approved for payment.

(C) An owner or operator against whom a judgment has been entered, by either a valid final court order or valid final order of the Arkansas Claims Commission, for compensatory damages caused by an accidental release from a qualified petroleum storage tank system, must submit:

(1) A copy of the order;

(2) Proof that the judgment, or a portion of the judgment, is for compensatory damages, if the proof is not clearly shown on the face of the order; and

(3) Before payment is made from the trust fund, proof of payment of the deductible of seven thousand five hundred dollars (\$7,500).

(D)(1) An owner or operator shall cooperate with and assist the Division and, if applicable, the Attorney General's Office in connection with the third-party claim. At a minimum, cooperation shall include active participation by the owner or operator throughout the litigation and providing assistance as required by the Division or the Attorney General's Office during resolution of a third-party claim.

(2) Reimbursement or payment of a third-party claim may be denied if an owner or operator fails to comply with the requirements of subdivision (D)(1) of this section.

(E)(1) An owner or operator who has entered into a settlement agreement with a third-party resolving a claim for compensatory damages caused by an accidental release from a qualified petroleum storage tank system must submit to the Division:

(a) A copy of the legally binding settlement agreement, including a dismissal with prejudice of the third-party's cause of action in accordance with the Arkansas or federal rules of civil procedure, that releases the owner or operator from all future liability to the third-party claimant for the occurrence;

(b) Documentation supporting each claim for which payment is sought;

(c) A notarized certification from the owner or operator and the third-party claimant that the third-party claim should rightfully be paid; and

(d) Before payment is made from the trust fund, proof of payment of the deductible of seven thousand five hundred dollars (\$7,500).

(2) As an alternative to providing a legally binding settlement agreement under subdivision (E)(1)(a) of this section, an owner or operator may submit a copy of a proposed settlement agreement and request a preliminary Division review of the agreement before it is made binding. However, the settlement agreement must be made binding, except as provided in subdivision (E)(3) of this section, before it is submitted to the Advisory Committee.

(3) Any otherwise binding settlement agreement submitted under subsection (E) of this

section may be conditioned upon approval of payment from the trust fund.

Rule 12.409 Third-Party Claim Review

(A)(1) Before commencing a substantive review of a third-party claim, the Division shall determine whether the release meets the requirements of Rule 12.403 for third-party coverage by the trust fund.

(2) Any person aggrieved by the Division's determination of whether a release is eligible for third-party coverage by the trust fund may request that the Advisory Committee, and, if necessary thereafter, the Director, review the Division's determination.

(B) The Division is not required to commence substantive review of a third-party claim until any corrective action necessary to address the release has been completed.

(C) The Division is not required to commence substantive review of a third-party claim until it has received all of the information required by Rule 12.408(C) or Rule 12.408(E), as applicable. If, during the course of the substantive review, the Division finds that additional information is needed to evaluate the claim, the Division may require that the information be provided before review of the claim may be completed.

(D) The Division and the Advisory Committee shall not recommend, and the Director shall not approve, payment of third-party claims unless they are reasonable and allowable.

(E) The Division and the Advisory Committee shall recommend, and the Director shall approve, payment of a settled claim only upon determining that litigation would result in costs to the trust fund that would exceed the settlement amount and therefore it would be in the best interests of the fund to pay the settlement amount.

(F)(1) After its third-party claim eligibility determination and substantive review is complete, the Division shall make a written recommendation to the Advisory Committee as to whether the applicant has met the trust fund eligibility requirements and, if so, whether the claim, or any portion of it, is both reasonable and allowable.

(2) The Advisory Committee in its sole discretion may allow supplemental information explaining the claim to be presented orally. It may establish a fair and reasonable limit on time allowed for oral presentation.

(3) The Advisory Committee may consider, but is not bound by, the recommendation prepared by the Division under subdivision (F)(1) of this section. It shall make a written recommendation to the Director as to whether the applicant has met the trust fund eligibility requirements and, if so, whether the claim, or any portion of it, is both reasonable and allowable and therefore should be paid.

(G)(1) The Director shall consider, but is not bound by, the recommendations made by the Division under subdivision (F)(1) of this section and by the Advisory Committee under subdivision (F)(3) of this section.

(2) The Director shall decide whether the applicant has met the trust fund eligibility requirements and, if so, whether the claim, or any portion of it, is both reasonable and allowable and should therefore be paid.

(3) The Director may solicit advice on a claim from the Commission.

(4) If the decision of the Director is contrary to the recommendation of the Advisory Committee, the Director shall provide in writing his or her reasons for declining to follow the Advisory Committee's recommendation.

(H)(1) The decision of the Director shall be the final decision of the Division.

(2) The decision of the Director may be appealed to the Commission. An owner or operator who considers himself or herself injured in his or her business, person or property by a final decision of the director or his designee, may, within thirty (30) days after the date of the final decision of the director or his designee, appeal the decision to the Commission.

Rule 12.410 Reasonable Claims

(A) Third-party claims that have been reduced to judgment and for which payment is requested under Rule 12.408(C) shall be presumed reasonable under this Chapter.

(B) All settled third-party claims for which payment is requested under Rule 12.408(E) must be shown to be reasonable as compared to similar claims for compensatory damages.

Rule 12.411 Allowable Claims

(A) Only claims for compensatory damages, as the term is defined by this Rule, caused by an accidental release from a qualified storage tank are considered allowable under this Chapter.

(B) A payment shall not be made under this Chapter for any injury or damages caused by the performance of corrective action.

(C)(1) A payment shall not be made under this Chapter for any item for which reimbursement is made for the same occurrence under corrective action under Chapter 3.

(2) A payment shall not be made under this Chapter for any item that is included in an approved corrective action plan and reimbursable under Chapter 3.

Rule 12.412 Records

(A) Any owner or operator participating in the trust fund shall maintain the following records and submit them or make them available to the Division upon request:

(1) Evidence of current financial responsibility for seven thousand five hundred dollars (\$7,500) per occurrence; and

(2) Any other records as may reasonably be required by the Division or the Advisory Committee in the performance of their duties under law.

(B) All records necessary to demonstrate that the trust fund eligibility requirements of Rule 12.402 and the trust fund coverage requirements of Rule 12.403 have been fulfilled shall be retained by the owner or operator until one of the following is accomplished:

(1) Closure requirements of this Rule, if applicable, are satisfied;

(2) Responsibility for meeting the financial assurance requirements of this Rule is legally transferred;

(3) The owner or operator is otherwise instructed in writing by the Division.

Rule 12.413 Audits

- (A) The Director may cause audits to be performed as necessary to ensure that claims, for which payment is sought or has been made, were in fact reasonable and allowable.
- (B) The audits may be performed by the Division or by any qualified person at the direction of the Director.
- (C) Monies in the trust fund may be expended by the Director as necessary to pay the cost of audits performed by persons other than the Division.

Rule 12.414 Cost Recovery

- (A) The Division may initiate proceedings against any owner or operator of a petroleum storage tank system or third-party claimant for recovery of monies that were solicited and received from the trust fund either through willful or accidental utilization of incorrect information.
- (B)(1) Any owner or operator of a petroleum storage tank system who was not in substantial compliance at the time of a release, as defined by Rule 12.402, for which a third-party claimant was compensated from the trust fund, shall be required to reimburse the trust fund for the amount of the claim paid.
 - (2) If the owner or operator does not reimburse the trust fund as required in subdivision (B)(1) of this section, the Division may institute an action against the owner or operator to recover such monies under the authority of the Regulated Substance Storage Tank program, the Petroleum Storage Tank Trust Fund Act, or this Rule.
- (C) The Division has the right of subrogation that applies to sites where corrective action is taken by owners, operators, or the Division. The right of subrogation extends to:
 - (1) Any insurance policies in existence at the time of the occurrence to the extent of any rights the owner or operator of a site may have had under that policy; and
 - (2) Any third party who caused or contributed to the occurrence.
- (D) For purposes of subrogation, “third party” does not include a former owner or operator of the site where corrective action is taken.

Rule 12.415 Trust Fund Availability

- (A)(1) All claims for payment submitted under this Chapter are subject to the availability of monies in the trust fund.
 - (2) Nothing in this Rule shall be construed to create a permanent entitlement to monies in the trust fund.
 - (3) The Commission reserves the right to amend this Chapter, including the provisions regarding coverage and eligibility and reasonable and allowable costs.

(B)(1) If the monies in the trust fund prove insufficient to cover all trust fund claims for reimbursement, the Advisory Committee shall recommend to the Director a priority system based upon any factors it deems appropriate.

(2) The Director may adopt a priority system based upon any factors he or she deems appropriate.

Rule 12.416 Obligation to Comply

(A) Eligibility of an owner or operator for the trust fund shall not preclude the Division's taking any appropriate enforcement action.

(B) Nothing in this Chapter shall affect the liability or responsibility of an owner or operator of a petroleum storage tank system for taking corrective action, as required by this Rule or any other law, in response to a release.

Rule 12.417 Transfer of Trust Fund Eligibility

(A) An owner or operator determined to be eligible for payment of third-party claims for a release may transfer the eligibility to a subsequent owner or operator if the Division determines that the subsequent owner or operator has the financial and legal capacity to pay third-party claims and has met all the requirements of this section.

(B) A transfer under this section shall not affect the potential liability of the owner or operator for payment of compensatory damages to a third party.

(C) An owner or operator must notify the Division thirty (30) days prior to any transfer of eligibility and provide documentation that the subsequent owner or operator has the legal and financial capacity to pay third-party claims.

(D) Documentation of legal capacity includes, but is not limited to, the following, as appropriate:

(1) Proof of authorization to conduct business in Arkansas, e.g., current registration with, and a valid certificate of good standing issued by, the Arkansas Secretary of State; and

(2) Proof of proper registration of the tank system by the subsequent owner or operator.

(E) Documentation of financial capacity includes, but is not limited to, any one (1) or combination of items below that affirms, as determined by the Division, that the subsequent owner or operator has sufficient assets to pay third-party claims of at least one million dollars (\$1,000,000):

(1) An independently audited copy of the most recent annual financial statements that indicates the availability of sufficient funds;

(2) Copies of bank statements or other financial records that indicate availability of sufficient funds for the subsequent owner or operator to pay third-party claims;

(3) A letter from a financial institution or other funding agency indicating a binding commitment to provide a specified amount of funds and the uses for which the funds may be utilized; or

(4) In cases where funding is required but there can be no binding commitment of money until approvals are received, a letter of “intent to fund” from the appropriate funding institution indicating the amount of funds and their specified uses.

(F) Upon approval of the Division that the subsequent owner or operator has both the legal and financial capacity to assume responsibility for third-party claims, the owner or operator, the subsequent owner or operator, and the Division will enter into a consent administrative order, upon agreement of all parties, setting forth the following:

(1) The owner or operator relinquishes eligibility for trust fund coverage for any third-party claims for damages resulting from the occurrence;

(2) The owner or operator acknowledges a transfer of eligibility under this section does not affect the potential liability of the owner or operator for payment of compensatory damages to a third party; and

(3) The subsequent owner or operator assumes responsibility for any third-party claims for damages resulting from the occurrence.

(G) Transfer of eligibility for trust fund payment of third-party claims for damages resulting from a release from a qualified storage tank is effective upon execution of the consent administrative order.

(H) Nothing in this section shall be construed to alter the limits for payment of third-party claims as set out in Ark. Code Ann. § 8-7-908.

CHAPTER 5: LICENSING OF UNDERGROUND STORAGE TANK INSTALLERS AND SERVICE PERSONNEL

Rule 12.501 Purpose

The purpose of this Chapter is to provide for the regulation of persons installing, repairing, upgrading and closing underground storage tank systems that contain regulated substances to assure that the systems are installed, repaired, upgraded and closed in a manner that will not encourage or facilitate leaking and will protect the public health and the lands and waters of the State of Arkansas.

Rule 12.502 Definitions

The following definitions, in addition to the definitions in Chapter 1, apply to this Chapter:

- (A) **“Closing” or “closure”** means the process of removing and disposing of or closing in place an underground storage tank system.
- (B) **“Contractor”** means any person who contracts to install, repair, upgrade or close an underground storage tank system for a third party.
- (C) **“Critical junctures,”** in the case of an installation, means the steps in the installation of an underground storage tank system that are important to the prevention of releases and shall, at a minimum, include all of the following:
- (1) Preparation of the excavation immediately prior to receiving backfill and the tank;
 - (2) Setting of the tank and the piping, including placement of any strapping or other anchoring devices and backfilling to the level of the tank;
 - (3) Any time during the installation in which components of the piping are connected;
 - (4) Any time during the installation of corrosion protection measures;
 - (5) All pressure testing of the underground storage tank system, including associated piping, performed during the installation; and
 - (6) Placement of backfill and filling of the excavation.
- (D) **“Critical junctures,”** in the case of the repair or upgrade of an underground storage tank system, means the steps in the project that are comparable to the steps listed in subsection (C) of this section in terms of their importance in the prevention of leaks and shall, at a minimum, include all of the following:
- (1) The excavation of the existing tank or piping;
 - (2) The actual performance of the repairs or upgrades to the tank or the piping;
 - (3) Any time during the project in which components of the piping are connected; and
 - (4) Any time during the project in which the tank system or its associated piping is tested.
- (E) **“Critical junctures”** in the case of a closure means the steps in the removal or in-place closure of an underground storage tank system that are important to the safe removal or closure

in place (including the detection of current or previous leakage) and shall, at a minimum, include all of the following:

- (1) The purging or inerting of vapors;
- (2) The removal and disposal of underground storage tank contents;
- (3) The excavation of the existing underground storage tank system;
- (4) The actual performance of the tests or monitoring to determine if previous or current leakage is present;
- (5) The actual removal of the existing underground storage tank and piping; and
- (6) The assessment of the site to ascertain if a current or previous release has resulted in contamination of the environment.

(F) **“Install”** or **“installation”** means the work involved in placing an underground storage tank system or any part thereof in the ground and preparing it to be placed in service.

(G) **“Repair”** means the correction or modification of an underground storage tank system, including but not limited to the replacement of piping, valves, fill pipes or vents and any repairs to the tank.

(H) **“Upgrade”** means the addition or retrofit of systems such as cathodic protection, lining, spill and overflow controls, or leak detection devices to improve the ability of an underground storage tank system to prevent the release of product to the environment.

Rule 12.503 Applicability

(A) This Chapter applies to all persons who install, repair, upgrade or close underground storage tank systems in Arkansas, including officers or employees of owners or operators, except as provided in subsections (B) and (C) of this section.

(B) This Chapter does not apply to the installation, repair, upgrade or closure of the following underground storage tanks:

- (1) Wastewater treatment tanks;
- (2) Sumps;
- (3) Underground storage tanks containing radioactive waste;
- (4) Electrical equipment tanks;
- (5) Hydraulic lift tanks; and
- (6) Any underground storage tank with a capacity of one hundred ten gallons (110 gals.) or less.

(C) This Chapter does not apply to the installation, repair, upgrade or closure of any underground storage tank systems holding hazardous wastes that are listed or identified under the Resource Conservation and Recovery Act of 1976, as amended, or the Arkansas Hazardous Waste Management Act of 1979, as amended.

Rule 12.504 General Requirements

(A)(1) A person shall not install, repair, upgrade or close underground storage tank systems in Arkansas unless the person is, or employs, an individual who is licensed by the Division to perform the work.

(2) A person shall not exercise supervisory control over installations, repairs, upgrades or closures unless that person is licensed by the Division to perform the work.

(B) Neither a contractor nor individual shall perform or agree to perform any installation, repair, upgrade, or closure unless it is or has in its employ one or more licensed individuals who:

(1) Exercises responsible supervisory control over any installation, repair, upgrade or closure undertaken;

(2) At a minimum, is physically present on site at all critical junctures in the installation, repair, upgrade and closure;

(3) Is competent to perform the installation, repair, upgrade or closure; and

(4) Has adequate knowledge of appropriate materials, technical requirements and installation, repair, upgrade and closure procedures for the work.

(C)(1) Neither a contractor nor individual shall affix his or her signature or license number to certify any installation, repair, upgrade or closure for which he or she lacks competence.

(2) Neither a contractor nor individual shall certify to an owner or operator that an installation, repair, upgrade or closure is complete unless the installation, repair, upgrade or closure complies with this Rule.

(3) If an installation, repair, upgrade or closure is performed for an owner or operator on a contract basis, both the individual and the contractor for whom the individual works are responsible for the accuracy of any representations made concerning the work.

(D) This Chapter is not intended to prohibit the employment of apprentices or helpers so long as a licensed individual exercises responsible supervisory control and is physically present on site at the critical junctures in the installation, repair, upgrade or closure.

(E) This Chapter is in addition to, and not in lieu of, any other licensing and registration requirements imposed by other local, state, or federal laws or regulations.

(F) This Chapter does not relieve the owner or operator of any obligations or liabilities under any other applicable state and federal laws or regulations.

Rule 12.505 Surety Requirement

(A) A person shall not install, repair, close, or upgrade any underground storage tank system unless that person or the contractor by whom he or she is employed has purchased a surety bond, letter of credit, or cash bond in the amount of at least twenty-five thousand dollars (\$25,000), which provides that the Division is the obligee or payee of the instrument, and otherwise complies with the rules promulgated under this subchapter.

(B) Persons whose installation, repair, closure, or upgrade activities are limited to their own underground storage tank system or their employers' companies' underground storage tank systems are exempt from the surety requirement of subsection (A) of this section.

(C) If the licensee or contracting company fails to properly install, remove, repair, close, or upgrade any underground storage tank under state law or rule, the Director shall commence proceedings to collect on the surety.

(D) The Division shall notify the licensee or contracting company in writing of the collection against the surety, and the licensee or contracting company shall be given an opportunity for a hearing as provided herein.

Rule 12.506 Notification Requirement

(A) For any installation or upgrade, the individual or contractor shall notify the Division at least one (1) week prior to the beginning of the second critical juncture as described in Rule 12.502(C)(2) and Rule 12.502(D)(2).

(B)(1) For any repair, the individual or contractor shall notify the Division at least one (1) week prior to the beginning of the second critical juncture as described in Rule 12.502(D)(2).

(2) Notwithstanding subdivision (B)(1) of this section, if the repair is necessary to prevent or abate a release to the environment, the repair shall be performed immediately and the Division shall be notified within twenty-four (24) hours.

(C) If the date scheduled for installation or upgrade, or repair under subdivision (B)(1) of this section, changes, the Division must be notified immediately of the change and the revised schedule.

Rule 12.507 Contractor Licensing

(A) An applicant for a contractor's license must meet all of the following requirements to be licensed by the Division:

(1) The applicant must file an application with the Division on a form furnished by the Division, accompanied by a non-refundable fee of three hundred dollars (\$300); (2)

The applicant, if an individual, must be at least eighteen (18) years of age;

(3) The applicant need not, for purposes of this Rule, be a resident of Arkansas;

(4) The applicant must demonstrate that:

(a) It is in good standing with all licensing authorities by whom licensing is required, given the nature and scope of its business;

(b) It holds a current contractor's license, if required by local, state, or federal laws or regulations; and

(c) It has not had a business or occupational license suspended or revoked in Arkansas or any other state, except as provided in subsection (B) of this section;

(5) At least one (1) active officer, partner, owner, or designated managerial representative of the contractor must pass Part One of the licensing examination described in Rule 12.511; and

(6) The applicant must attest in the application that on any job involving the installation, repair, upgrade or closure of an underground storage tank system, a licensed individual will

exercise responsible supervisory control over the work and will be physically present on the site at all critical junctures in the installation, repair, upgrade or closure.

(B) An application filed with the Division will remain pending for one (1) year from the date of the application. If, during that year, a license is not issued to the applicant, the applicant must file a new application, complete with the appropriate fee, to obtain a license from the Division.

(C) Notwithstanding subdivision (A)(4)(c) of this section, the Division may grant a license to an applicant who has had a business or occupational license or certificate suspended or revoked if the suspension or revocation, by reason of its date or nature or because of other considerations, is not relevant to the applicant's competence to install, repair, upgrade or close underground storage tanks systems.

Rule 12.508 Individual Licensing

(A) An applicant for an individual license must meet all of the following requirements to receive a license from the Division:

(1) The applicant must file an application with the Division on a form furnished by the Division, accompanied by a non-refundable fee of one hundred fifty dollars (\$150);

(2) The applicant must be an individual and must be at least eighteen (18) years of age;

(3) The applicant need not, for purposes of this Rule, be a resident of Arkansas;

(4) The applicant must demonstrate that he or she is in good standing with all licensing authorities by whom licensing is required, given the nature and scope of the applicant's work, and that he or she has not had a business or occupational license or certificate suspended or revoked in Arkansas or any other state, except as provided in subsection (B) of this section;

(5) The applicant must meet the experience requirements of Rule 12.510; and

(6) The applicant must pass the licensing examination required by Rule 12.511.

(B) An application filed with the Division will remain pending for one (1) year from the date of the application. If, during that year, a license is not issued to the applicant, the applicant must file a new application, complete with the appropriate fee, to obtain a license from the Division.

(C) Notwithstanding subdivision (A)(4) of this section, the Division may grant a license to an applicant who has had a business or occupational license or certificate suspended or revoked if the suspension or revocation, by reason of its date or nature or because of other considerations, is not relevant to the applicant's competence to install, repair, upgrade or close underground storage tank systems.

Rule 12.509 Contractor/Individual Licensing

A person who is seeking to be both the contractor and the sole licensed individual exercising supervisory control, as required by Rule 12.507(A)(6), under that contractor's license need only pay the contractor licensing fee required by Rule 12.507(A)(1). The person must meet all of the requirements for an individual license set forth in Rule 12.508 except for the fee requirement of Rule 12.508(A)(1).

Rule 12.510 Experience Requirements

To qualify for an individual license under Rule 12.508, an applicant must demonstrate that he or she has had, within the three (3) years immediately prior to making the application, one (1) year of field experience in installation, repair, upgrade or closure of underground storage tank systems.

Rule 12.511 Licensing Examination

(A) To qualify for an individual license under Rule 12.508, an applicant shall pass a written examination covering all aspects of the installation, repair, upgrade or closure of underground storage tank systems.

(B) At the time an application is filed, the Division will furnish the applicant with a study package to assist him or her in preparing for the examination. The study package will refer applicants to the appropriate laws and rules and industry publications used by the Division in preparing the examination and upon which the examination will be based.

(C) The examination will consist of three (3) parts, as follows:

(1) Part One will test an applicant's familiarity with this Rule and the applicable Arkansas and federal laws and regulations;

(2) Part Two will test an applicant's familiarity with current technology and industry recommended practices with respect to the proper installation, repair and upgrade of underground storage tank systems;

(3) Part Three will test an applicant's familiarity with current technology and industry recommended practices for proper closure of underground storage tank systems.

(D)(1) To be licensed to perform installations, repairs, or upgrades, an applicant must pass Parts One and Two.

(2) To be licensed to perform closures, an applicant must pass Parts One and Three.

(3) To be licensed to perform installations, repairs, upgrades, and closures, an applicant must pass all parts of the examination.

(E)(1) An applicant must score seventy percent (70%) or higher on each part of the examination taken to pass the examination.

(2) An applicant passing any part of the initial examination taken need not be retested on that part, provided that any part taken but not passed must be passed within one (1) year of the initial testing date; otherwise, the entire examination must be retaken.

(3)(a) An applicant who fails the examination may, by paying a non-refundable fee of twenty-five dollars (\$25), retake the examination.

(b) This fee must accompany each request for retesting after initial failure of the examination.

(c) For purposes of retesting, an application will remain pending for a period of one (1) year after the applicant's failure to pass the initial examination.

(d) If the applicant has not requested retesting within the one-year period, the applicant must file a new application, complete with the appropriate fee, to obtain a license from the Division.

(F)(1) The Division shall offer the examination at least four (4) times each year.

(2) At least thirty (30) days prior to the date of a licensing examination, the Division shall provide notice of the examination to all persons who have requested the notice and to any person who has completed an application for a license since the date of the last examination.

(3) Only persons who have filed applications at least ten (10) business days in advance of an examination are eligible to take the examination.

(G)(1) The Division shall grade all examinations and notify the applicants of the results within thirty (30) days of the date of the examination.

(2) Examination papers will not be returned to applicants, but may be reviewed by applicants at the Division offices in North Little Rock.

Rule 12.512 Renewal of Licenses, Lapsed Licenses, and Reinstatement

(A) Any license issued under Rule 12.507 or Rule 12.508 must be renewed every two (2) years.

(B)(1) At least thirty (30) days before the expiration date of a license, the Division shall mail a renewal application form to the licensee, at the licensee's address of record with the Division.

(2) The licensee shall renew the license on a timely basis regardless of whether an application form has been received from the Division. A form may be requested from the Division if it has not been received by mail.

(C) To qualify for renewal, a licensed contractor must:

(1) Apply for renewal on a form furnished by the Division and accompanied by a non-refundable fee of three hundred dollars (\$300); and

(2) Attest in its renewal application that on any job involving the installation, repair, upgrade or closure of an underground storage tank system, a licensed individual will exercise responsible supervisory control over the work and will be physically present on the site at all critical junctures in the installation, repair, upgrade or closure.

(D) To qualify for renewal, a licensed individual must:

(1) Apply for renewal on a form furnished by the Division and accompanied by a non-refundable fee of one hundred fifty dollars (\$150);

(2) Demonstrate that he or she has completed at least three (3) installations, repairs, upgrades or closures during the two-year period preceding the renewal application; and

(3) Demonstrate that he or she has completed sixteen (16) hours of Division-approved continuing education in the two-year period preceding the renewal application.

(E) Any license that is not renewed prior to its expiration date shall be considered lapsed and shall not be used in the solicitation or performance of any installation, repair, upgrade or closure.

(F)(1) A license should be renewed prior to its expiration date but may be renewed up to two (2) months after the date of expiration if the following requirements are met:

(a) A late fee of twenty-five dollars (\$25) in addition to the renewal fee must be paid; and

(b) The requirements for renewal must be satisfied.

(2) Licenses not renewed within two (2) months after the date of expiration shall be considered lapsed and invalid and applications for renewal will not be accepted after that time.

(3) Any individual or contractor whose license has become lapsed and invalid, as provided in subdivision (F)(2) of this section, must submit an application for a new license under Rule 12.507 or Rule 12.508, comply with the requirements therein, and comply with Ark. Code Ann. § 17-1-107.

(4) Any individual applying for a new license under Rule 12.508 who previously held a license within the past two years that is lapsed and invalid must meet the continuing education requirements of subdivision (D)(3) of this section and submit a certificate or certificates as proof of meeting those requirements as part of his or her application.

Rule 12.513 Reciprocity and Provisional Certificate

The Division shall issue a contractor license to an applicant who holds a comparable contractor license that is substantially similar to practice in the field of his or her occupation in another state, territory, or district in the United States. The applicant must demonstrate that he or she holds a similar license in good standing, has not had a license revoked for bad faith or violation of law, rule, or ethics, is not holding a suspended or probationary license, is sufficiently competent in his or her field, and pays any fee required by this rule. The applicant for a reciprocal license must also comply with continuing education and training requirements, and all bonding, financial security, and insurance requirements, applicable for all contractors to maintain a license.

If the applicant presents evidence of a current and active occupational license that is substantially similar to practice the field of his or her occupation in another state, territory, or district of the United States, and pays the necessary fee, the Division will issue a temporary or provisional license. The temporary or provisional license will be effective for at least ninety (90) days, or until the Division makes a decision on the application for license, unless the Division determines that the applicant does not meet the requirements for reciprocity under this section, in which case the provisional or temporary license shall be revoked.

If the state, territory, or district from which the applicant has previously resided and worked does not issue the same or substantially similar license, the Division shall require testing to demonstrate competency in the field and at least three (3) letters of recommendation.

Rule 12.514 Denial of Licenses

(A) A license required by this Chapter shall not be issued or renewed if the applicant for issuance or renewal fails to meet any of the applicable licensing requirements.

(B)(1) The Division shall, by certified mail with return receipt requested, give written notice to the applicant of its decision to deny the issuance or renewal of a license.

(2) The notice of denial shall state:

(a) The specific reasons for the denial;

(b) That to appeal the denial, the applicant must submit a written request for a meeting with the Director to review the Division's decision; and

(c) That the request for a meeting with the Director must be received by the Division no later than ten (10) days following the applicant's receipt of the notice of denial.

(C)(1) An applicant shall be afforded an opportunity to appeal to the Director a decision of the Division to deny the license.

(2)(a) To appeal the Division's decision to deny the license, an applicant must submit to the Director a written request for a meeting to review the Division's decision.

(b) The request must be received by the Director no later than ten (10) days following the applicant's receipt of the notice described in subsection (B) of this section.

(c) If no request is received by the Director within the time specified in subdivision (C)(2)(b) of this section, the decision of the Division shall be final and may not be appealed.

(3) The Director or his or her designee shall arrange a meeting to discuss the denial of the license within fifteen (15) days of the Director's receipt of the applicant's request under subdivisions (C)(2)(a) and (b) of this section.

(D)(1) Following a meeting held under subdivision (C)(3) of this section, the Director shall issue a written decision to issue or deny the license in accordance with Rule No. 8 (Administrative Procedures).

(2) The decision of the Director shall be final; however, it may be appealed to the Commission by filing a Request for Commission Review and Adjudicatory Hearing in accordance with Rule No. 8.

(E) During the pendency of an appeal under this section, the denial of a license shall stand.

Rule 12.515 Division Approval of Training and Continuing Education

(A)(1) The types of training and continuing education required by this Chapter that may be eligible for approval include instructional courses, seminars, or conferences sponsored by the Division, the Environmental Protection Agency, educational institutions, independent professional or trade associations, manufacturers, or firms engaged in underground storage tank system installation, repair, upgrade, closure or management.

(2) Course content must be reasonably related to work performed by persons installing, maintaining, repairing, upgrading or closing underground storage tank systems.

(B) Evidence of participation by the individual must be furnished to the Division by the

organization sponsoring the approved training or continuing education.

Rule 12.516 Violations

(A)(1) The Division may undertake investigations it deems necessary to ensure compliance with this Chapter.

(2)(a) The Division may take actions it deems necessary to ensure compliance with this Chapter, including issuing compliance orders, assessing penalties, and revoking or suspending licenses.

(b) The Division may, to effectuate the actions described in subdivision (A)(2)(a) of this section, commence civil or administrative actions under Arkansas law or Chapter 9 of this Rule.

(B) The Division may suspend or revoke the license for an individual or contractor upon grounds that the individual or contractor:

- (1) Exercised fraud, misrepresentation or deception in obtaining a license;
- (2) Exhibited gross incompetence in the performance of an installation, repair, upgrade or closure;
- (3) Was derelict in the performance of a duty as a licensed individual or contractor; or
- (4) Knowingly violated any provision of this Rule.

CHAPTER 6: LICENSING OF UNDERGROUND STORAGE TANK TESTERS

Rule 12.601 Purpose

The purpose of this Chapter is to provide for the regulation of persons testing underground storage tank systems that contain regulated substances to assure that the systems are tested in a manner that will not encourage or facilitate leaking and will protect the public health and the lands and waters of the State of Arkansas.

Rule 12.602 Definitions

The following definitions, in addition to the definitions in Chapter 1, apply to this Chapter:

(A) “**Company**” means any person who contracts to test an underground storage tank system for a third party.

(B) “**Tester**” means an individual or company who tests underground storage tank systems in Arkansas; and

(C) “**Test**” or “**testing**” means the work involved in assessing the integrity of an underground storage tank system, including associated piping, to determine whether or not it is capable of meeting the tightness testing performance standards of 40 C.F.R. §§ 280.43(c) and 280.44(b).

Rule 12.603 Applicability

(A) This Chapter applies to all persons who perform testing on underground storage tank systems in Arkansas, including officers or employees of owners or operators, except as provided in subsections (B) and (C) of this section.

(B) This Chapter does not apply to the testing of the following underground storage tanks:

- (1) Wastewater treatment tanks;
- (2) Sumps;
- (3) Underground storage tanks containing radioactive waste;
- (4) Electrical equipment tanks;
- (5) Hydraulic lift tanks; and

(6) Any underground storage tank with a capacity of one hundred ten gallons (110 gals.) or less.

(C) This Chapter does not apply to the testing of any underground storage tank system holding hazardous wastes listed or identified under the Resource Conservation and Recovery Act (RCRA) of 1976 as amended, or the Arkansas Hazardous Waste Management Act of 1979, as amended.

Rule 12.604 General Requirements

(A)(1) A person shall not test underground storage tank systems in Arkansas unless the person is or employs an individual who has been licensed by the Division to perform the testing.

(2) A person shall not exercise supervisory control over a test unless that person is licensed by the Division to perform the testing.

(B) A tester shall not perform or agree to perform a test unless he or she is licensed as an individual or has in his or her employ one or more licensed individuals who:

(1) Will exercise responsible supervisory control over any testing undertaken;

(2) Will, at a minimum, be physically present on the site during all preparations for the test and during the actual test itself;

(3) Is certified by the test method manufacturer to perform the particular test method utilized; and

(4) Has adequate knowledge of appropriate materials, technical requirements and testing procedures for the testing.

(C)(1) A tester shall not affix his or her signature or license number to certify any testing for which he or she lacks competence.

(2) A tester shall not certify to an owner or operator that a test is complete unless the test complies with this Rule.

(3) If a test is performed for an owner or operator on a contract basis, both the individual and the company for whom the individual works are responsible for the accuracy of any representations made concerning the test.

(D) The requirements of this Chapter are not intended to prohibit the employment of apprentices or helpers so long as a licensed individual exercises responsible supervisory control and is physically present on site during all preparations for the test and during the actual test itself.

(E) The requirements of this Chapter are in addition to, not in lieu of, any other licensing and registration requirements imposed by local, state, or federal laws or regulations.

(F) This Chapter does not relieve the owner or operator of any obligations or liabilities under any other applicable state and federal laws or regulations.

Rule 12.605 Surety Requirement

(A) A person shall not test any underground storage tank system unless that person or the contractor by whom he or she is employed has purchased a surety bond, letter of credit, or cash bond in the amount of at least twenty-five thousand dollars (\$25,000), which provides that the Division is the obligee or payee of the instrument, and otherwise complies with the rules promulgated under this subchapter.

(B) Persons whose testing activities are limited to their own underground storage tank systems or their employers' companies' underground storage tank systems are exempt from the surety requirement of subsection (A) of this section.

(C) If the licensee or contracting company fails to properly test any underground storage tank under state law or rule, the Director shall commence proceedings to collect on the surety bond, letter of credit or cash bond.

(D) The Division shall notify the licensee or contracting company in writing of the collection against the surety, and the licensee or contracting company shall be given an opportunity for a hearing as provided herein.

Rule 12.606 Company Licensing

(A) An applicant for a company license must meet all of the following requirements to be licensed by the Division:

(1) The applicant must file an application with the Division on a form furnished by the Division, accompanied by a non-refundable fee of three hundred dollars (\$300); (2)

The applicant, if an individual, must be at least eighteen (18) years of age;

(3) The applicant need not, for purposes of this Rule, be a resident of Arkansas;

(4) The applicant must demonstrate that:

(a) It is in good standing with all licensing authorities by whom licensing is required, given the nature and scope of its business;

(b) It holds a current contractor's license, if required by local, state, or federal laws or regulations; and

(c) It has not had a business or occupational license suspended or revoked in Arkansas or any other state, except as provided in subsection (C) of this section;

(5) At least one (1) active officer, partner, owner, or designated managerial representative of the company must pass Part One of the licensing examination described in Rule 12.511; and

(6) The applicant must attest in the application that on any job involving the testing of an underground storage tank system, a licensed individual will exercise responsible supervisory control over the work and will be physically present on the site during all preparations for the test and during the actual test itself.

(B) An application filed with the Division will remain pending for one (1) year from the date of the application. If, during that year, a license is not issued to the applicant, the applicant must file a new application, complete with the appropriate fee, to obtain a license from the Division.

(C) Notwithstanding subdivision (A)(4)(c) of this section, the Division may grant a license to an applicant who has had a business or occupational license or certificate suspended or revoked if the suspension or revocation, by reason of its date or nature or because of other considerations, is not relevant to the applicant's competence to test underground storage tank systems.

Rule 12.607 Individual Licensing

(A) An applicant for an individual license must meet all of the following requirements to receive a license from the Division:

(1) The applicant must file an application with the Division on a form furnished by the

Division, accompanied by a non-refundable fee of one hundred fifty dollars (\$150);

(2) The applicant must be an individual and must be at least eighteen (18) years of age;

(3) The applicant need not, for the purposes of this Rule, be a resident of Arkansas;

(4) The applicant must demonstrate that he or she is in good standing with all licensing authorities by whom licensing is required, given the nature and scope of the applicant's work, and that he or she has not had a business or occupational license or certificate suspended or revoked in Arkansas or any other state, except as provided in subsection (C) of this section;

(5) The applicant must meet the experience requirements of Rule 12.609;

(6) The applicant must provide the Division with certification by the manufacturer of the testing method to be used by the applicant that the method will meet the federal performance standard as stated in 40 C.F.R. §§ 280.43(c) and 280.44(b);

(7) At the time application for the license is made, the applicant must provide the Division with certification from the manufacturer of the test method to be used by the applicant that the applicant has received training, been examined, and satisfactorily shown proficiency in the use of the chosen testing method; and

(8) The applicant must pass Part One of the licensing examination described in Rule 12.511.

(B) An application filed with the Division will remain pending for one year (1) from the date of the application. If, during that year, a license is not issued to the applicant, the applicant must file a new application, complete with the appropriate fee, to obtain a license from the Division.

(C) Notwithstanding subdivision (A)(4) of this section, the Division may grant a license to an applicant who has had a business or occupational license or certificate suspended or revoked if the suspension or revocation, by reason of its date or nature or because of other considerations, is not relevant to the applicant's competence to test underground storage tank systems.

(D)(1) If an individual chooses a test method that is different from that for which he or she is licensed, the individual must provide proof to the Division that he or she has met the requirements of subdivisions (A)(6) and (A)(7) of this section for the chosen method. Upon receipt of adequate documentation, the Division shall update its file on that license to reflect the change in method.

(2) The requirements of subdivision (D)(1) of this section must be met before the individual performs any testing as a licensed tester using a method different from that for which the existing license was issued.

(3) If the change in test method is made before the expiration of the existing license, no additional fee is required to update that license.

Rule 12.608 Company/Individual Licensing

A person who is seeking to be both the company and the sole licensed individual exercising supervisory control, as required by Rule 12.606(A)(6), under that company's license need only pay the company licensing fee required by Rule 12.606(A)(1). The person must meet all of the requirements for an individual license set forth in Rule 12.607 except for the fee requirement of Rule 12.607(A)(1).

Rule 12.609 Experience Requirements

To qualify for an individual license under Rule 12.607, an applicant must demonstrate that he or she has had, within the three (3) years immediately prior to making the application, one (1) year of field experience in testing.

Rule 12.610 Renewal of Licenses, Lapsed Licenses, and Reinstatement

(A) Any license issued under Rule 12.606 or Rule 12.607 must be renewed every two (2) years.

(B)(1) At least thirty (30) days before the expiration date of a license, the Division shall mail a renewal application form to the licensee, at the licensee's address of record with the Division.

(2) The licensee shall renew the license on a timely basis regardless of whether an application form has been received from the Division. A form may be requested from the Division if it has not been received by mail.

(C) To qualify for renewal, a licensed company must:

(1) Apply for renewal on a form furnished by the Division and accompanied by a non-refundable fee of three hundred dollars (\$300); and

(2) Attest in its renewal application that on any job involving the testing of an underground storage tank system, a licensed individual will exercise responsible supervisory control over the work and will be physically present on the site during all preparations for the test and during the actual test itself.

(D) To qualify for renewal, a licensed individual must:

(1) Apply for renewal on a form furnished by the Division accompanied by a non-refundable fee of one hundred fifty dollars (\$150);

(2) Demonstrate that he or she has completed at least three (3) tests during the two-year period preceding the renewal application; and

(3) Demonstrate that he or she has completed continuing education in the test method chosen for use by that individual and received recertification by the manufacturer of the test method.

(E) Any license that is not renewed prior to its expiration date shall be considered lapsed and shall not be used in the solicitation or performance of any test.

(F)(1) A license should be renewed prior to its expiration but may be renewed up to two (2) months after the date of expiration if the following requirements are met:

(a) A late fee of twenty-five dollars (\$25) in addition to the renewal fee must be paid; and

(b) The requirements for renewal must be satisfied.

(2) Licenses that have not been renewed within two (2) months after the date of expiration shall be considered lapsed and invalid and applications for renewal will not be accepted after that time.

(3) Any individual or company whose license has lapsed as provided in subdivision (F)(2) of this section must submit an application for a new license under Rule 12.606 or Rule 12.607, comply with the requirements therein, and if the applicant is a person, comply with Ark. Code Ann. § 17-1-107.

Rule 12.611 Reciprocity and Provisional Certificate

The Division shall issue a license to test underground storage systems to an applicant who holds a comparable license that is substantially similar to practice in the field of his or her occupation in another state, territory, or district in the United States. The applicant must demonstrate that he or she holds a similar license in good standing, has not had a license revoked for bad faith or violation of law, rule, or ethics, is not holding a suspended or probationary license, is sufficiently competent in his or her field, and pays any fee required by this rule. The applicant for a reciprocal license must also comply with continuing education and training requirements, and all bonding, financial security, and insurance requirements, applicable to maintain a license.

If the applicant presents evidence of a current and active occupational license that is substantially similar to practice the field of his or her occupation in another state, territory, or district of the United States, and pays the necessary fee, the Division will issue a temporary or provisional license. The temporary or provisional license will be effective for at least ninety (90) days, or until the Division makes a decision on the application for license, unless the Division determines that the applicant does not meet the requirements for reciprocity under this section, in which case the provisional or temporary license shall be revoked.

If the state, territory, or district from which the applicant has previously resided and worked does not issue the same or substantially similar license, the Division shall require testing to demonstrate competency in the field and at least three (3) letters of recommendation.

Rule 12.612 Denial of Licenses

(A) A license required by this Chapter shall not be issued or renewed if the applicant for issuance or renewal fails to meet any of the applicable licensing requirements.

(B)(1) The Division shall, by certified mail with return receipt requested, give written notice to the applicant of its decision to deny the issuance or renewal of a license.

(2) The notice of denial shall state:

(a) The specific reasons for the denial;

(b) That to appeal the denial, the applicant must submit a written request for a meeting with the Director to review the Division's decision; and

(c) That the request for a meeting with the Director must be received by the Division no later than ten (10) days following the applicant's receipt of the notice of denial.

(C)(1) An applicant shall be afforded an opportunity to appeal to the Director a decision of the Division to deny the license.

(2)(a) To appeal the Division's decision to deny the license, an applicant must submit to the Director a written request for a meeting to review the Division's decision.

(b) The request must be received by the Director no later than ten (10) days following

the applicant's receipt of the notice described in subsection (B) of this section.

- (c) If no request is received by the Director within the time specified in subdivision (C)(2)(b) of this section, the decision of the Division shall be final and may not be appealed.

(3) The Director or his or her designee shall arrange a meeting to discuss the denial of the license within fifteen (15) days of the Director's receipt of the applicant's request under subdivisions (C)(2)(a) and (b) of this section.

(D)(1) Following a meeting held under subdivision (C)(3) of this section, the Director shall issue a written decision to issue or deny the license in accordance with Rule No. 8 (Administrative Procedures).

(2) The decision of the Director shall be final; however, it may be appealed to the Commission by filing a Request for Commission Review and Adjudicatory Hearing in accordance with Rule No. 8.

(E) During the pendency of an appeal under this section, the denial of a license shall stand.

Rule 12.613 Division Approval of Training and Continuing Education

(A)(1) The types of training and continuing education required by this Chapter that may be eligible for approval include instructional courses, seminars or conferences sponsored by the Division, the Environmental Protection Agency, educational institutions, independent professional or trade associations, manufacturers, or firms engaged in underground storage tank system testing.

(2) Course content must be reasonably related to work performed by persons testing underground storage tank systems.

(B) Evidence of participation by the individual must be furnished to the Division by the organization sponsoring the approved training or continuing education.

Rule 12.614 Violations

(A)(1) The Division may undertake investigations it deems necessary to ensure compliance with this Chapter.

(2)(a) The Division may take actions it deems necessary to ensure compliance with this Chapter, including issuing compliance orders, assessing penalties, and revoking or suspending licenses.

(b) The Division may, to effectuate the actions described in subdivision (A)(2)(a) of this section, commence civil or administrative actions under Arkansas law or Chapter 9 of this Rule.

(B) The Division may suspend or revoke the license for an individual or contractor upon grounds that the individual or contractor:

- (1) Exercised fraud, misrepresentation or deception in obtaining a license;
- (2) Exhibited gross incompetence in the performance of a test;
- (3) Was derelict in the performance of a duty as a licensed individual or company; or
- (4) Knowingly violated any provision of this Rule.

CHAPTER 7: OPERATOR TRAINING

Rule 12.701 Purpose

The purpose of this Chapter is to provide for the training or certification of persons operating and maintaining underground storage tank systems that contain regulated substances to assure that the systems are operated and maintained in a manner that will protect the public health and the lands and waters of the State of Arkansas.

Rule 12.702 Definitions

The following definitions, in addition to the definitions in Chapter 1, apply to this Chapter:

(A) **“Operator”** means any person in control of, or having responsibility for, the daily operation of the underground storage tank system. This term shall not include contractors or consultants performing compliance monitoring, testing, emergency response, or other services on an underground storage tank system for a tank owner or operator.

(1) **“Class A Operator”** means any operator having primary responsibility for onsite operation and maintenance of underground storage tank systems.

(2) **“Class B Operator”** means any operator having daily onsite responsibility for the operation and maintenance of underground storage tank systems.

(3) **“Class C Operator”** means a daily, onsite employee having primary responsibility for addressing emergencies presented by a spill or release from an underground storage tank system.

(B) **“Unmanned facility”** means any facility that does not have an operator onsite during operation of the underground storage tank system.

Rule 12.703 Applicability

(A) This Chapter applies to all persons who are responsible for operating or maintaining underground storage tank systems in Arkansas as defined in Rule 12.702.

(B) This Chapter does not relieve the owner or operator, as defined in 40 C.F.R. § 280 and this Rule, from any legal responsibility mandated by federal and state underground storage tank laws and regulations.

Rule 12.704 General Requirements

(A)(1) By August 8, 2012, each facility with an underground storage tank system must have a Class A, Class B, and Class C operator designated for that facility who has been trained or certified in accordance with the requirements of this Chapter.

(2) Separate individuals may be designated for each class of operator, or one (1) individual may be designated to more than one (1) operator class provided he or she is trained in accordance with Division requirements for the class or classes designated.

(3) At least one (1) Class C operator must be present onsite during all hours of operation of an underground storage tank facility with the exception of:

- (a) Unmanned facilities with an emergency generator tank(s) only; or
- (b) Unmanned facilities that meet the compliance requirements of the Arkansas State Fire Code.

(B) The Division may accept Class A or Class B operator certification from another state with an EPA-recognized operator training program.

(C) An owner or operator must maintain records documenting the training or certification for all Class A, Class B, and Class C operators at the underground storage tank facility, immediately available for inspection by the Division, or at a readily available alternative location and shall provide the records for inspection to the Division upon request.

(D) If the Division determines an underground storage tank facility has been identified as ineligible for fuel delivery under this Rule, both the designated Class A operator and the designated Class B operator for that facility must complete Division-provided retraining and be recertified within forty-five (45) days of the facility being identified as ineligible for fuel delivery.

(E) Certification required by this Chapter may be denied by the Division if the individual fails to meet any of the applicable operator training or certification requirements.

(F) A denial of certification will be considered a final decision of the Director for purposes of appeal.

Rule 12.705 Class A Operator Certification

(A) At a minimum, a Class A operator must be certified by the Division in the following areas:

(1) A general knowledge of applicable federal and state underground storage tank system requirements for operation, maintenance, and recordkeeping including, but not limited to:

- (a) Release prevention;
- (b) Release detection;
- (c) Emergency response; and
- (d) Product compatibility;

(2) Financial responsibility requirements;

(3) Notification requirements;

(4) Release and suspected release reporting requirements;

(5) Temporary and permanent closure requirements; and

(6) Operator training requirements.

(B) After August 8, 2012, Class A operators must be certified within thirty (30) days after assuming operation and maintenance responsibilities for an underground storage tank system.

Rule 12.706 Class B Operator Certification

(A) At a minimum, a Class B operator must be certified by the Division in the following

areas and demonstrate an in-depth knowledge of underground storage tank system requirements for day-to-day operation, maintenance, and recordkeeping including, but not limited to:

- (1) Release prevention;
- (2) Release detection;
- (3) Components of underground storage tank systems;
- (4) Materials of underground storage tank system components;
- (5) Emergency response;
- (6) Product compatibility;
- (7) Reporting and recordkeeping requirements; and
- (8) Class C operator training requirements.

(B) After August 8, 2012, Class B operators must be certified within thirty (30) days after assuming operation and maintenance responsibilities for an underground storage tank system.

Rule 12.707 Class C Operator Training

(A) At a minimum, a Class C operator must be trained in:

- (1) Delivery controls and monitoring of the dispensing or sale of regulated substances;
- (2) Initial response to alarms or releases; and
- (3) Appropriate actions to be taken in response to spills or releases from an underground storage tank system.

(B)(1) A Class C operator must be trained by a Division-certified Class A or Class B operator, and the training must be specific to the facility at which the Class C operator is employed.

(2) Training for Class C operators must be documented on forms provided by the Division.

(C) An up-to-date list of trained Class C operators and training documentation must be maintained on site at the facility or at a readily available alternative site for inspection by the Division upon request.

(D) Class C operators must be trained before assuming responsibility for responding to emergencies.

(E) Division-certified Class A and Class B operators meet the training requirements of a Class C operator.

Rule 12.708 Operator Examination

(A) To be certified as a Class A or Class B operator under Rule 12.705 or Rule 12.706, an individual shall pass a written examination given by the Division, covering the requirements of those sections, with a score of seventy percent (70%) or higher.

(B) To take the exam to be certified as a Class A or Class B operator under this Rule, an individual must be at least eighteen (18) years of age.

(C) At least one (1) week prior to the date of examination, a registration form along with a non-refundable examination fee of twenty-five dollars (\$25) for each examination taken must be received by the Division.

(D) Any individual taking a Class A or Class B operator exam must, at the time of the exam, declare on forms provided by the Division, the facility identification number of each underground storage tank facility for which the individual will be the designated Class A or Class B operator.

Rule 12.709 Violations

(A)(1) The Division may undertake investigations it deems necessary to ensure compliance with this Chapter.

(2)(a) The Division may take actions it deems necessary to ensure compliance with this Chapter, including issuing enforcement actions, assessing penalties, and revoking certifications.

(b) The Division may, to effectuate the actions described in subdivision (A)(2)(a) of this section, commence civil or administrative actions under Arkansas law or Chapter 9 of this Rule.

(B) The Rule may revoke the certification for an individual upon grounds that the individual:

(1) Exercised fraud, misrepresentation or deception in obtaining certification;

(2) Exercised fraud, misrepresentation or deception in the training, certification or documentation of training for other operators as defined in this Chapter;

(3) Exhibited gross negligence regarding the operation, maintenance, or recordkeeping of an underground storage tank facility or Class C operator training requirements.

Rule 12.710 Disclosure Exemption

Any certification required by this Chapter is exempt from the disclosure requirements of Ark. Code Ann. § 8-1-106 and Rule No. 8.

CHAPTER 8: CONFIDENTIALITY

Rule 12.801 Requests for Confidentiality

(A)(1) Any information submitted to the Division may be claimed as confidential.

(2) Any claim must be asserted at the time of submission.

(3) No information shall be eligible for protection as confidential information under Rule 12.805 unless it is submitted in accordance with this Chapter.

(B) If no claim of confidentiality is made at the time of submission, the Division may make the information available to the public without further notice.

(C) If a claim of confidentiality is asserted at the time of submission, the Director or his or her designee shall make a determination of eligibility for protection as confidential information in accordance with Rule 12.803.

Rule 12.802 Submission Procedures

(A) Any person claiming information as confidential under Rule 12.801 shall:

(1) Clearly mark each page containing information with the word “CONFIDENTIAL”; and

(2) Submit an affidavit setting forth the reasons that the person believes the information is entitled to protection as a trade secret.

(B)(1) Any information submitted to the Division for which a claim of confidentiality is made shall be submitted in a sealed envelope marked “CONFIDENTIAL” and addressed to the Director.

(2) The information shall be submitted in two separate parts as follows:

(a) The first part shall contain all information that is not deemed by the submitter to be confidential and shall include appropriate cross references to the second part; and

(b) The second part shall contain data, words, phrases, paragraphs or pages and appropriate affidavits containing or relating to the information that is claimed to be confidential.

Rule 12.803 Prerequisites for Protection

(A) No information shall be protected as confidential unless:

(1) It is submitted in accordance with this Chapter; and

(2) The Director finds the information would constitute a trade secret under Arkansas law.

(B) If the Director determines information that is properly submitted constitutes a trade secret, then the information shall be kept confidential in accordance with Rule 12.805.

Rule 12.804 Acceptability of Information

(A) The Director or his or her designee shall give written notice to any person submitting information for which confidentiality is claimed of his or her decision on whether the information has been accepted as confidential.

(B) All information that the Director or his or her designee determines is entitled to protection shall be marked with the term "ACCEPTED" and shall be protected in accordance with Rule 12.805.

(C)(1) If the Director or his or her designee finds the information submitted does not meet the requirements of Rule 12.803, he or she shall promptly notify the person submitting the information of this finding. The Director or his or her designee shall give the person reasonable opportunity to further justify his or her claim that the information deserves protection as a trade secret or to limit the scope of information for which the request for protection is made.

(2) If the person fails to satisfactorily demonstrate to the Director or the Director's designee that the information submitted meets the criteria of Rule 12.803, the information shall be marked with the term "REJECTED" and promptly returned to the person submitting the information.

Rule 12.805 Security

(A)(1) All information accepted by the Director as confidential shall be stored in locked filing cabinets.

(2) A person shall not have access to confidential information unless the person requires access to carry out his or her responsibilities under the Regulated Substance Storage Tank program, the Petroleum Storage Tank Trust Fund Act, or this Rule.

(B) A person shall not disclose any confidential information except in accordance with applicable state law.

CHAPTER 9: ENFORCEMENT AND ADMINISTRATIVE PROCEDURES

Rule 12.901 Enforcement

(A) Violation of any provision of this Rule, or of any order issued by the Division pursuant thereto, shall be considered a violation of this Rule and shall be subject to the penalty provisions of the Regulated Substance Storage Tank program.

(B) Rule No. 7 (Civil Penalties) shall apply to enforcement actions taken under this Rule.

Rule 12.902 Administrative Procedures

Rule No. 8 (Administrative Procedures) shall apply to administrative licensing, operator training and certification, or enforcement actions taken under this Rule. Additionally, all administrative hearings and appeals arising under this Rule shall be conducted in accordance with the procedures described in Ark. Code Ann. § 8-7-804 and Rule No. 8.

CHAPTER 10: SEVERABILITY AND EFFECTIVE DATE

Rule 12.1001 Severability

The provisions of this rule are severable. If any part of this rule is declared invalid or unenforceable by a court, the remainder of the rule will continue to be valid and enforceable.

Rule 12.1002 Effective Date

This Rule is effective ten (10) days after filing with the Secretary of State, the State Library, and the Bureau of Legislative Research.