

**ADMINISTRATIVE RULES SUBCOMMITTEE
OF THE
ARKANSAS LEGISLATIVE COUNCIL**

**Wednesday, June 19, 2019
9:00 a.m.
Room A, MAC
Little Rock, Arkansas**

- A. Call to Order.**
- B. Reports of the Executive Subcommittee.**
- C. Rules Filed Pursuant to Ark. Code Ann. § 10-3-309.**

1. ~~ARKANSAS STATE BANK DEPARTMENT~~

a. ~~47-701.9 Fiduciary Powers and State Banks~~

2. DEPARTMENT OF COMMUNITY CORRECTION (Ms. Dina Tyler)

a. SUBJECT: Community Service Program AR 8.8

DESCRIPTION: The rule titled “Community Service Program” provides Board of Corrections guidance to Arkansas Community Correction staff for providing meaningful work for offenders within established guidelines.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on April 30, 2019. No public comments were submitted to the agency. The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Board of Corrections shall promulgate policies and rules relating to the operation of community correction facilities and programs and the supervision

of eligible offenders participating therein. *See* Ark. Code Ann. § 16-93-1203; 16-93-1205.

3. **DEPARTMENT OF ENVIRONMENTAL QUALITY, WATER DIVISION** (Mr. Micheal Grappe, Mr. Allan Gates, Mr. Jordan Wimpy)

a. **SUBJECT: Regulation No. 2, Regulation Establishing Water Quality Standards for Surface Waters of the State of Arkansas – Tyson Foods, Inc., Waldron Plant**

DESCRIPTION: Tyson Foods, Inc. – Waldron Plant (“Tyson-Waldron”) operates a hatchery, feed mill, and chicken processing plant located in Waldron, Arkansas. The Tyson-Waldron facility discharges treated process wastewater through Outfall 001 into an Unnamed Tributary of the Poteau River pursuant to NPDES Permit No. AR0038482, which was issued by the Arkansas Department of Environmental Quality (“ADEQ”) and became effective October 1, 2010. The discharge enters the Unnamed Tributary and then flows to the Poteau River, which runs to and across the Arkansas state line.

Tyson-Waldron’s NPDES permit contains discharge limits for chlorides, sulfates, and total dissolved solids (“TDS”), which are based upon Arkansas water quality standards for the Poteau River and the Unnamed Tributary. Tyson-Waldron evaluated alternatives through a Section 2.306 Site Specific Study, which included field studies, toxicity testing, mass balance modeling, engineering analyses of alternatives for discharge and treatment, and an analysis of designated uses in the Poteau River and the Unnamed Tributary.

Based upon the Revised Site Specific Study, Tyson-Waldron requests the following site-specific modifications to Arkansas Pollution Control and Ecology Commission (“APC&EC”) Regulation No. 2:

- Modify the dissolved minerals water quality criteria for the Unnamed Tributary from the Tyson-Waldron outfall to the confluence with the Poteau River

chlorides from 150 mg/L to 180 mg/L
sulfates from 70 mg/L to 200 mg/L

TDS from 660 mg/L to 870 mg/L

- Modify the dissolved minerals water quality criteria for the Poteau River from the confluence with the Unnamed Tributary to Scott County Road 59

chlorides from 120 mg/L to 185 mg/L

sulfates from 60 mg/L to 200 mg/L

TDS from 500 mg/L to 786 mg/L

Tyson-Waldron's proposed site-specific modifications are supported by:

- Tyson-Waldron is not seeking a change from historical water quality conditions in the Unnamed Tributary and the Poteau River;
- Designated uses for the Unnamed Tributary and the Poteau River are being maintained;
- All stations downstream of the Tyson-Waldron discharge indicate support of a diverse macroinvertebrate community;
- All stations downstream of the Tyson-Waldron discharge indicate support of the Aquatic Life (Fishery) use according to ADEQ Assessment Criteria;
- Concentrations of dissolved minerals (chlorides, sulfates, and TDS) downstream of the Tyson-Waldron discharge are not adversely affecting the macroinvertebrate community;
- Whole effluent toxicity testing results reveal an excellent toxicity record and documents that the levels of chloride, sulfate, and TDS discharged from the Tyson-Waldron do not interfere with organism health;
- Current wastewater treatment plant operations require 100% optimization at all times to stay below permit limits, which allows for zero margin of safety in performance;
- There is no other economically feasible treatment technology for the removal of the minerals. Reverse osmosis treatment technology is available; however, it is not cost effective, it generates a concentrated waste stream that is environmentally difficult to

dispose of, it is not required to meet the designated uses, and it would produce no significant additional environmental protection;

- Proposed modifications would enable Tyson-Waldron to implement water conservation practices saving nearly 70.2MG water/year and facilitating a 10-20% reduction in nutrient loading to the Poteau River;
- 40 CFR 131.11(b)(1)(ii) provides states with the opportunity to adopt water quality standards that are “modified to reflect site-specific conditions”; and
- The basis for site-specific standards is set forth in 40 CFR 131.10(g).

PUBLIC COMMENT: A public hearing on the most recently proposed modifications was held on April 2, 2019, in Waldron, Arkansas. The public comment period expired on April 16, 2019. *Tyson-Waldron* provided the following public comment summary:

On May 9, 2013, Tyson-Waldron filed a Petition to Initiate Third-Party Rulemaking to Amend Regulation No. 2. On May 20, 2013, Tyson-Waldron filed an Amended Petition to Initiate Third-Party Rulemaking to Amend Regulation No. 2 (the “First Amended Petition”). The Arkansas Pollution Control & Ecology Commission granted Tyson-Waldron’s First Amended Petition. A public hearing was held on July 22, 2013, in Waldron, Arkansas, and the public comment period ended on August 5, 2013. ADEQ and EPA commented and expressed concerns regarding the methods and procedures utilized in the 2012 Poteau River Section 2.306 Site Specific Water Quality Study, which supported the First Amended Petition.

Following the public comment period, Tyson-Waldron worked cooperatively with the Arkansas Department of Environmental Quality to address each of the identified concerns with the site specific study. Tyson-Waldron prepared an entirely new report that utilized a different background flow, replaced default background mineral conditions with measured in-stream conditions, and relied on a different percentile to calculate proposed site specific criteria. Tyson-Waldron also commissioned an additional year of water quality and biological data collection for the Poteau River. Ultimately, after nearly five years, Tyson-Waldron submitted to ADEQ a completely revised report entitled

Poteau River Section 2.306 Site Specific Water Quality Study
(Rev. 3 December 2018).

Based on the revised 2018 report, Tyson-Waldron filed with the Commission a Second Amended Petition to Initiate Third-Party Rulemaking to Amend Regulation No. 2. The Second Amended Petition diverged significantly from the 2013 proposal and included a completely revised proposal for water quality criteria for chlorides, sulfates, and TDS, and revised stream segments for the new criteria. Tyson-Waldron requested the Commission order a new public hearing and comment period for the public to review and comment on the entirely different regulatory amendments proposed in the Second Amended Petition. A public hearing was held on April 2, 2019, in Waldron, Arkansas, and the public comment period ended on April 16, 2019.

No comments were submitted during the comment period for the amendments proposed in the Second Amended Petition to Initiate Third-Party Rulemaking to Amend Regulation No. 2. Moreover, it is not clear that comments submitted during the 2013 public comment period remain relevant to the regulatory changes proposed in the Second Amended Petition, particularly because the commenters in the 2013 comment period did not submit comments concerning the 2018 proposal. Out of an abundance of caution, however, Tyson-Waldron noted two comments from the 2013 comment period that may be relevant to the new regulatory proposal in the Second Amended Petition:

Comment No. 1 (Mary Cameron): Commenter inquired whether federal regulations allow for water quality standards as stated in the proposed amendments.

Response: Yes. Federal Regulations authorize states to establish site-specific water quality criteria. 40 CFR Part 131; APCEC Regulation No. 2, Reg. 2.306.

Comment No. 2 (Arkansas Natural Heritage Commission): Commenter noted the possible occurrence of several state species of concern in the Poteau River and stated that it would be appropriate to consider the implications of the proposed amendments to the species.

Response: The Poteau River Section 2.306 Site Specific Water Quality Study (Rev. 3 December 2018) evaluated the impact of elevated dissolved minerals on the aquatic life in the Poteau River. The 2018 report documents (i) that the Poteau River, downstream

of the Tyson-Waldron facility, supports the Aquatic Life (Fishery) use and (ii) that concentrations of dissolved minerals are not adversely affecting the relevant aquatic life community in the Poteau River.

For its public comment summary, the *Arkansas Department of Environmental Quality* submitted the following:

On May 9, 2013, the Arkansas Pollution Control and Ecology Commission granted the petition of Tyson Foods, Inc.-Waldron Plant (“Tyson Waldron”) to initiate rulemaking to amend APC&EC Regulation No. 2, Regulation Establishing Water Quality Standards for Surface Waters of the State of Arkansas. ADEQ’s August 5, 2013 comments served as ADEQ’s response to public comments received during the first round of public comments. In response to those public comments, Tyson Waldron amended its site specific water quality study, collected additional data, and moved to reinstate the rulemaking based on the results in the revised study.

On January 25, 2019, the Arkansas Pollution Control and Ecology Commission granted the second petition of Tyson Waldron to initiate rulemaking to amend APC&EC Regulation No. 2, Regulation Establishing Water Quality Standards for Surface Waters of the State of Arkansas. A public hearing was held on April 2, 2019, at the Scott County Courthouse in Waldron, Arkansas. No public comments were made at the public hearing. The public comment period ended on April 16, 2019. No written comments were received.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: Tyson-Waldron states that the amended rule has no financial impact.

LEGAL AUTHORIZATION: This amendment to Regulation No. 2, Water Quality Standards, stems from a third-party rulemaking request made to the Arkansas Pollution Control and Ecology Commission (“Commission”) by Tyson Foods, Inc. – Waldron Plant. Arkansas Code Annotated § 8-4-202(c)(1) bestows upon any person the right to petition the Commission for the issuance, amendment, or repeal of any rule. *See also* Ark. Code Ann. § 8-4-102(6) (defining “person” as “any state agency,

municipality, governmental subdivision of the state or the United States, public or private corporation, individual, partnership, association, or other entity”). Pursuant to Ark. Code Ann. § 8-4-202(a), the Commission is given and charged with the power and duty to adopt, modify, or repeal, after notice and public hearings, rules implementing or effectuating the powers and duties of the Commission and the Arkansas Department of Environmental Quality. The Commission is further given and charged with the power and duty to promulgate rules, including water quality standards. *See* Ark. Code Ann. § 8-4-201(b)(1)(A). *See also* Ark. Code Ann. § 8-4-202(b)(3).

4. **DEPARTMENT OF FINANCE AND ADMINISTRATION, OFFICE OF STATE PROCUREMENT** (Ms. Mary Kathryn Williams, Mr. David Withrow, Mr. Edward Armstrong)

a. **SUBJECT: R8: 19-11-230 Discussions**

DESCRIPTION: Due to legislation passed during the 91st General Assembly, the rule is being amended to bring it into compliance with legislative changes made to Ark. Code Ann. § 19-11-230.

R8: 19-11-230 Discussions

- R8: 19-11-230 (a) is being added to clarify discussions may be conducted with responsible offerors during a request for proposals in order to clarify a proposal or the terms of a request for proposals, and for negotiations. Such pre-award discussions should be conducted in a manner that supports public confidence in public procurement and ensures fairness.
- R8: 19-11-230 (b) is being added to elaborate upon pre-award discussions conducted for clarifications. Namely, that clarifications can be sought in areas of ambiguity, miscommunication, or misunderstanding, but that such clarifications should be documented in the procurement file.
- R8: 19-11-230 (c) is being added to elaborate upon pre-award discussions conducted for negotiations and provide guidance on how such negotiations should be conducted.
 - Provisions for how negotiations might occur should be in the relevant request for proposals, there are no

minimum or maximum number of rounds of negotiations other than what could be set forth in a request for proposals;

- Negotiations may be conducted with a group of responsible offerors identified based on an identified competitive range or just a highest ranking responsible offeror;
- During serial negotiation with the highest ranked offeror, the procurement agency may only abandon negotiation with the highest ranked offeror if it determines, in writing and for identified cause, that the offeror is not responsible or is otherwise not reasonably susceptible of being awarded a contract;
- Negotiation may be limited to cost only and shall be documented in the procurement file.

- R8: 19-11-230 (d) is being added to define the criteria for “competitive range” namely that such criteria should be established on a rational basis, and may include price, cost of ownership, responses that provide the best value based on evaluation criteria, responses most likely to provide greater value after negotiations, and evaluation scores.

- R8: 19-11-230 (e) is being added to provide guidance on how the state may establish a minimum score requirement for offerors to be in the competitive range, such minimum score not being unreasonably high.

- R8: 19-11-230 (f) is being added to provide guidance for how the state may elect to negotiate with a single offeror versus a multi-party negotiation, elaborating on factors the state may use to reach a decision, such being:

- The expected dollar value of the award and length of contract;
- The complexity of the acquisition and the variety and complexity of offered solutions; and
- The resources available to conduct discussions versus the expected variable administrative costs of discussions;
- The impact on lead-time for award versus the need for timely delivery;
- The extent to which discussions with additional offerors would likely provide diminishing returns;

- The disparity in pricing between the lowest priced offeror and the other offerors;
 - The disparity in pricing between the highest rated offeror and the other offerors.
- R8: 19-11-230 (g) is being added to establish the rules by which the state may conduct best and final offer (BAFO) negotiations if deemed advantageous to the state. Specifically:
 - The state shall determine which responsible offerors are within the competitive range according to the terms of the request for proposals
 - The state may only restrict the BAFO negotiations to a single offeror or engage in a multi-party BAFO negotiations as provided in the request for proposals and consistent with Arkansas Procurement Law, including these rules;
 - BAFO negotiation shall only be conducted with responsible offerors;
 - The content of the BAFO request may come from questions proposed by the procurement official or the evaluation committee;
 - The state may request that an offeror readdress important aspects of the proposal;
 - The procurement officer shall dispatch the BAFO request stating the elements to be covered and defining the date and time the BAFO must be returned;
 - All communication to and from offerors regarding the BAFO request shall be coordinated by the procurement officer;
 - All responses to the BAFO request must be submitted timely to the procurement officer in order to be considered;
 - Only the original proposal or one properly clarified, revised through negotiation, or submitted as a best and final offer may be considered for evaluation;
 - A BAFO request to multiple offerors shall not identify either the current rank of any of the offerors or any identifiable information derived from a proposal.
 - R8: 19-11-230 (h) is being added to provide guidance for the state on conducting target price BAFO, including determining the proposed pricing, comparing pricing against benchmarks, utilizing market analysis, evaluating the reasonableness of target

pricing, sending a request for revised pricing, and determining if improved pricing resulted.

PUBLIC COMMENT: The public comment period expired on March 22, 2019, and a public hearing was held on March 25, 2019. The agency received no comments. The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

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

Per the agency, this rule change was made to bring the rule into compliance with legislative changes made to Arkansas Code Annotated § 19-11-230(e), concerning competitive sealed proposals, which was amended by Act 696 of 2017, sponsored by Senator Bart Hester.

5. **DEPARTMENT OF HEALTH, CENTER FOR LOCAL PUBLIC HEALTH/ENVIRONMENTAL HEALTH PROTECTION** (Ms. Laura Shue)

a. **SUBJECT: Rules and Regulations Pertaining to Food Service Establishments**

DESCRIPTION: The purpose of this rule is to safeguard public health and provide to consumers food that is safe, unadulterated, and honestly presented. The goal is to provide safe food, prevent illness, and ensure honest presentation of food to the public.

This rule establishes definitions; sets standards for management and personnel, food operations, and equipment and facilities; and provides for food establishment plan review, permit issuance, inspection, and employee restriction.

PUBLIC COMMENT: A public hearing was held on November 16, 2018. The public comment period expired on November 16, 2018. The Department did not receive any public comments. The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The proposed rule requires a certified manager to be employed by the establishment. The agency reported that the food-certified-manager requirement adds minimal cost to the operation of a food service establishment. Several nationally recognized online and in-person trainings are available for less than \$200 for each certification. These certifications are renewable on a three-to-five year cycle.

LEGAL AUTHORIZATION: The State Board of Health is authorized to make all necessary and reasonable rules and regulations of a general nature for the protection of public health and safety and the general amelioration of the sanitary and hygienic conditions within the state. *See* Ark. Code Ann. § 20-7-109(a)(1). The Board is authorized to promulgate rules for the efficient enforcement of the Food, Drug, and Cosmetic Act. *See* Ark. Code Ann. § 20-56-219. Additionally, the Director of the Department of Health has the power and authority to prevent the proliferation of infections and contagious and communicable diseases resulting from unsanitary food-service operations. *See* Ark. Code Ann. § 20-57-203.

b. SUBJECT: Onsite Wastewater Rules and Regulations

DESCRIPTION: The Onsite Wastewater rule's stated purpose is to establish minimum standards for the design and construction of onsite wastewater "septic" systems in suitable soils for the renovation of wastewater and the return of the renovated wastewater into the hydrologic cycle. The rule details the various system designs, soil criteria, construction, subdivision requirements, product requirements, installation, and maintenance of the system types.

PUBLIC COMMENT: A public hearing was held on November 16, 2018. The public comment period expired on November 16, 2018. The proposed effective date is pending legislative review and approval. The Department provided the following summary of the comments that it received and its responses thereto:

Tim Tyler- Comments

1. Section 2.4 Bedrock: Backhoe, Mini-X. Can be dug with a spade or hand digging. Not as good as a backhoe. Spades are not practical small shelf of bedrock. Needs to be standard equipment and not anything special.

ADH Reply: No change.

2. Appendix B- Recreational Vehicle Park: Reduced the water. Left it the same. Needs to be corrected. Don't see the reduction in the draft. 65 Gallons.

ADH Reply: Change will be made.

3. Footnotes: Taking out the designers. This needs to be left in. Many times establishments such as a Mexican restaurant should be able to pull data other similar and use that data to help establish or any commercial est. We as designers ought to be able to pull similar data.

ADH Reply: Experience in this area has shown major inconsistencies in data. Therefore the determination was made to remove the wording.

Larry T. West, Ph.D., AR Registered Professional Soil Classifier, DOH Designated Representative- Email comments received

1. Section 7.3.2.1: I fully support recognition of soil with high clay content (>40%) and with low shrink-swell in the moderate hydraulic conductivity class. Because of their parent material and stage of soil development, red soils (Munsell hue of 5YR or redder) developed from residual limestone and chert parent materials in the Ozark Highlands uniformly have low shrink-swell and will move water at an acceptable rate for installation of an onsite system drainfield. Their blanket inclusion in the moderate hydraulic conductivity class is proper.

I suggest, however, that "residual" limestone and chert be specified in the statement. Red soils developed from colluvial limestone or chert may or may not have low shrink-swell and an acceptable moderate hydraulic conductivity, but rather may limit vertical water/effluent movement.

Additionally, red soils with high clay content in other regions of the State and that have developed from other parent materials also may have low shrink-swell and should be included in the moderate hydraulic conductivity class upon submission of appropriate documentation. All red clayey soils outside the Ozark Highlands do not have low shrink-swell, however, and thus, should

not be included in the blanket red soil inclusion outlined in this section.

To recognize that red, clayey soils with low shrink-swell occur outside the Ozark Highlands, I suggest a provision be added to Section 7.3.2.1 that would allow a Designated Representative who is also a registered Soil Classifier to present data from soil samples analyzed by a reputable laboratory or otherwise collected by acceptable methods to indicate the soil at the site has low shrink-swell and should be assigned a moderate hydraulic conductivity. There are laboratory and field measurements that can be used to indicate a soil's shrink-swell potential and hydraulic conductivity that are relatively low cost and that can be generated relatively quickly. Specific data and limits could be identified with input from Soil Scientists at universities in the State, Federal and State Agency Soil Scientists, Soil Classifiers, and Designated Representatives and included in Appendix I.

ADH Reply: After direct discussion with Dr. West on this letter, the additional modifier of "residual" will be added to the section.

Excerpt from above letter: "I suggest, however, that "residual" limestone and chert be specified in the statement. Red soils developed from colluvial limestone or chert may or may not have low shrink-swell and an acceptable moderate hydraulic conductivity, but rather may limit vertical water/effluent movement."

Comments received from Lex Dobbins, Peggy and Don Daley unrelated to the initial proposed changes were also considered.

1. Mr. Lex Dobbins's comment was to remove and simplify the lost storage formula.

ADH Reply: Appendix G was removed and direction was added in Section 8.6.1 and 8.6.2.

2. Peggy and Don Daley requested reduced sizing for pretreated effluent.

ADH Reply: The comment was considered, but no change was made.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Arkansas Code Annotated § 20-7-109 provides that the State Board of Health may promulgate rules to protect the public health and safety. Additionally, Arkansas Code Annotated § 14-236-107 grants the Department rulemaking authority regarding onsite wastewater systems “in order that the wastes from the systems will not pollute any potable water supply, or source of water used for public or domestic supply purposes, or for recreational purposes, or other waters of this state, and will not give rise to a public health hazard by being accessible to insects, rodents, or other possible carriers which may come into contact with food or potable water, or by being accessible to human beings, and will not constitute a nuisance due to odor or unsightly appearance[.]” Ark. Code Ann. § 14-236-107(b)(1).

6. **DEPARTMENT OF HEALTH, PHARMACY SERVICES AND DRUG CONTROL (Ms. Laura Shue)**

a. **SUBJECT: List of Controlled Substances**

DESCRIPTION: The proposed listed amendments update the List of Controlled Substances to include these drugs. Items one through nine are additions made to the controlled substance list per Emergency Rule. The following items listed will include Emergency Rule additions and listed substances by current rule making procedure.

1. 25B-NBOH. 2-[[[2-(4-bromo-2,5-dimethoxyphenyl)ethyl]amino]methyl]-phenol. Page 5, (47). Felisia Lackey, Chief Forensic Chemist-Drug Section, Arkansas State Crime Laboratory, requested that this hallucinogenic substance with no recognized medical use be included into Schedule I. Page 5, (47).
2. 25I-NBOH. 2-[[[2-(4-iodo-2,5-dimethoxyphenyl)ethyl]amino]methyl]-phenol, Page 5, (48). Felisia Lackey, Chief Forensic Chemist-Drug Section, Arkansas State Crime Laboratory, requested that this hallucinogenic substance with no recognized medical use be included into Schedule I. Page 5, (48).
3. 5-Fluoro-ADB. methyl 2-(1-(5-fluoropentyl)-1H-indazole-3-carboxamido)- 3,3-dimethylbutanoate. Page 21, (K)(xviii). Felisia Lackey, Chief Forensic Chemist-Drug Section, Arkansas

State Crime Laboratory, requested that this synthetic cannabinoid with no recognized medical use be included into Schedule VI. Page 21, (K), (xviii).

4. 5-Fluoro-MDMB-PICA. methyl 2-(1-(5-fluoropentyl)-1H-indole-3-carboxamido)-3,3-dimethylbutanoate. Page 21, (K), (xix). Felisia Lackey, Chief Forensic Chemist-Drug Section, Arkansas State Crime Laboratory, requested that this synthetic cannabinoid with no recognized medical use be included into Schedule VI. Page 21, (K), (xix).

5. MDMB-CHMICA. methyl 2-(1-(cyclohexylmethyl)-1H-indole-3-carboxamido)-3,3-dimethylbutanoate. Page 21, (K)(xx). Felisia Lackey, Chief Forensic Chemist-Drug Section, Arkansas State Crime Laboratory, requested that this synthetic cannabinoid with no recognized medical use be included into Schedule VI. Page 21, (K), (xx).

6. FUB-AMB. methyl 2-(1-(4-fluorobenzyl)-1H-indazole-3-carboxamido)-3-methylbutanoate. Page 21, (K), (xxi). Felisia Lackey, Chief Forensic Chemist-Drug Section, Arkansas State Crime Laboratory, requested that this synthetic cannabinoid with no recognized medical use be included into Schedule VI. Page 21, (K), (xxi).

7. MDMB-FUBINACA. methyl 2-(1-(4-fluorobenzyl)-1H-indazole-3-carboxamido)-3,3-dimethylbutanoate. Page 21, (K)(xxii). Felisia Lackey, Chief Forensic Chemist-Drug Section, Arkansas State Crime Laboratory, requested that this synthetic cannabinoid with no recognized medical use be included into Schedule VI. Page 21, (K), (xxii).

8. The addition of a section in Schedule V titled Other Substances page 17, (f). To incorporate the addition of a new Schedule V substance by DEA.

9. A drug product in finished dosage formulation that has been approved by the U.S. Food and Drug Administration that contains cannabidiol (2-[1R-3-methyl-6R-(1-methylethenyl)-2-cyclohexen-1-yl]-5-pentyl-1,3-benzenediol) derived from cannabis and no more than 0.1 percent (w/w) residual tetrahydrocannabinols. Page 17, (f), (1). To follow DEA scheduling, this drug would be included as Schedule V. Page 17, (f), (1).

10. AB-PINACA. N-(1 -amino-3-methyl-1-oxobutan-2-yl)-1-pentyl-1H-indazole-3-carboxamide. Page 21, (K)(xxiii). The DEA has scheduled this synthetic cannabinoid because it has no recognized medical use. This drug would be included as Schedule VI. Page 21, (K), (xxiii).
11. AB-CHMINACA. N-(1 -amino-3-methyl- 1-oxobutan-2-yl)-1- (cyclohexylmethyl)-1H-indazole-3-carboxamide. Page 21, (K), (xxiv). The DEA has scheduled this synthetic cannabinoid because it has no recognized medical use. This drug would be included as Schedule VI. Page 21, (K), (xxiv).
12. THJ-2201. [1-(5-fluoropentyl)-1H-indazol-3-yl](naphthalen-1-yl) methanone. Page 18, (B), (xvi). The DEA has scheduled this synthetic cannabinoid because it has no recognized medical use. This drug would be included as Schedule VI. Page 18, (B), (xvi).
13. Dronabinol in an oral solution in a drug product approved for marketing by the U.S. Food and Drug Administration; [(-)-delta-9-trans-tetrahydrocannabinol (delta-9-THC)], Page 9, (f), (2). To follow DEA scheduling, this drug would be included as Schedule II. Page 9, (f), (2).
14. 25E-NBOMe. 2-(4-ethyl-2,5-dimethoxyphenyl)-N-[(2-methoxyphenyl)methyl]ethanamine. Page 5, (49). Felisia Lackey, Chief Forensic Chemist-Drug Section, Arkansas State Crime Laboratory, requested that this hallucinogenic substance with no recognized medical use be included into Schedule I. Page 5, (49).
15. 25H-NBOMe. 2-(2,5-dimethoxyphenyl)-N-[(2-methoxyphenyl) methyl]ethanamine, Page 5, (50). Felisia Lackey, Chief Forensic Chemist- Drug Section, Arkansas State Crime Laboratory, requested that this hallucinogenic substance with no recognized medical use be included into Schedule I. Page 5, (50).
16. 25C-NBOH. 2-(((2-(4-chloro-2,5-dimethoxyphenyl)ethyl]amino]methyl]-phenol. Page 5, (51). Felisia Lackey, Chief Forensic Chemist-Drug Section, Arkansas State Crime Laboratory, requested that this hallucinogenic substance with no recognized medical use be included into Schedule I. Page 5, (51).

17. 25H-NBOH. 2-[[[2-(2,5-dimethoxyphenyl)ethyl]amino]methyl]-phenol, Page 5, (52). Felisia Lackey, Chief Forensic Chemist-Drug Section, Arkansas State Crime Laboratory, requested that this hallucinogenic substance with no recognized medical use be included into Schedule I. Page 5, (52).

18. N -Ethylpentylone. 1-(1,3-benzodioxol-5-yl)-2-(ethylamino)-pentan-1-one. Page 7, (11), (b), (18). Felisia Lackey, Chief Forensic Chemist-Drug Section, Arkansas State Crime Laboratory, requested that this stimulant substance with no recognized medical use be included into Schedule I. Page 7, (11), (b), (18).

19. Two items with typos marked for clean-up.

- Page 20, I, (ix).
- Page 21, (K) (xvi).

PUBLIC COMMENT: A portion of this rule was reviewed and approved by the Executive Subcommittee at its meeting on April 8, 2019, for emergency promulgation. With respect to permanent promulgation, a public hearing was held on January 16, 2019. The public comment period expired on January 16, 2019. The Department received no public comments. The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: This rule has no financial impact.

LEGAL AUTHORIZATION: The Director of the Department of Health shall administer the Uniform Controlled Substances Act, Arkansas Code Annotated § 5-64-101 et seq., and may add a substance to or delete or reschedule any substance enumerated in a schedule under the procedures of the Arkansas Administrative Procedure Act, § 25-15-201 et seq. *See* Ark. Code Ann. § 5-64-201(a)(1)(A)(i). In making a determination regarding a substance, the director shall consider the following: (1) the actual or relative potential for abuse; (2) the scientific evidence of its pharmacological effect, if known; (3) the state of current scientific knowledge regarding the substance; (4) the history and current pattern of abuse; (5) the scope, duration and significance of abuse; (6) the risk to public health; (7) the potential of the substance to produce psychic or physiological dependence liability; and (8) whether the substance is an immediate precursor of a substance already controlled under the Uniform Controlled Substances Act. *See* Ark. Code Ann. § 5-64-201(a)(2).

7. **DEPARTMENT OF HUMAN SERVICES, MEDICAL SERVICES**
(Ms. Janet Mann)

a. **SUBJECT: Private Duty Nursing (PDN) Rate Calculation**
SPA #2018-015

DESCRIPTION:

- A 1993 Consent Decree in the case, *Arkansas Medical Society, et. al v. Department of Human Services*, requires reimbursement for Private Duty Nursing to be adjusted annually based upon market forces as they impact on access.
- Arkansas Medicaid will increase maximum reimbursement rates for Private Duty Nursing (PDN), Registered Nurse (RN) services, and RN supervisory visits from \$54.00 to \$56.00 per hour; and Licensed Practical Nurse (LPN) services will increase from \$37.00 to \$38.00 per hour.
- The new maximum reimbursement rates are based on market analysis.
- These reimbursement changes are necessary to ensure access of Private Duty Nursing services for Arkansas Medicaid beneficiaries.

PUBLIC COMMENT: The public comment period expired on January 25, 2019. The Department did not hold a public hearing. It also received no public comments. The proposed effective date is pending legislative review and approval.

Per the agency, CMS approval is required for the state plan amendment, and that approval was granted on February 27, 2019.

FINANCIAL IMPACT: The financial impact for the current fiscal year is \$213,680 (\$62,822 in general revenue and \$150,858 in federal funds); and for the next fiscal year, the financial impact is \$427,359 (\$123,122 in general revenue and \$304,237 in federal funds).

Since there is 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, the agency provided the following information:

(1) a statement of the rule's basis and purpose;

This rule's basis and purpose is to increase private duty nursing program reimbursement rates so that the transfer of patients from inpatient hospital stay care to the less costly home based private duty nursing program care is accomplished more timely.

(2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute;

Increasing reimbursement rates for these services will allow private duty nursing providers to attract and retain RN and LPN staff necessary to provide less costly home based private duty nursing services when compared with the more costly inpatient hospital care. Attracting new RN and LPN staff and retaining current staff is necessary in order to fulfill the demand and access or these services.

(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;

Reimbursement rates for these services were last increased in 2015. Current access to these services for all qualifying beneficiaries may not always be available if rates are not increased.

(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;

The alternatives to private duty nursing service are not less costly.

(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;

No alternatives are proposed at this time.

(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

The State is under a Consent Decree obligation to meet with the private duty nursing provider association and arrive at mutually agreed upon reimbursement changes for these services.

(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.

The agency monitors State and Federal rules and policies for opportunities to reduce and control cost.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 20-76-201, DHS shall administer assigned forms of public assistance, supervise agencies and institutions caring for dependent or aged adults or adults with mental or physical disabilities, and administer other welfare activities or services that may be vested in it. *See Ark. Code Ann. § 20-76-201(1).* DHS shall also make rules and regulations and take actions as are necessary or desirable to carry out the provisions of Title 20, Chapter 76, Public Assistance Generally, of the Arkansas Code. *See Ark. Code Ann. § 20-76-201(12).* Additionally, Arkansas Code Annotated § 20-77-107(a)(1) specifically authorizes DHS to “establish and maintain an indigent medical care program.” DHS and its various divisions also are authorized to promulgate rules, as necessary to conform to federal statutes, rules, and regulations as may now or in the future affect programs administered or funded by or through the department or its various divisions, as necessary to receive any federal funds which may now or in the future be available to the department or its various divisions. *See Ark. Code Ann. § 25-10-129(b).*

8. **DEPARTMENT OF HUMAN SERVICES, YOUTH SERVICES** (Mr. Marq Golden, Ms. Kara Benca)

a. **SUBJECT:** Division of Youth Services Operations Manual

DESCRIPTION: The repeal of promulgated rules concerning the Division of Youth Services (DYS) under the Act 781 process resulted in the need for DHS to draft new, updated rules. It was necessary to establish formal procedures for the creation, revision, and dissemination of DHS's mission and core values. These policies are necessary as part of DHS's accreditation under the American Correctional Association (ACA). It is necessary to set expectations for employee and client behavior on topics such as facility operations, services, health, and safety regulations, as well as encourage efficiency. The manual includes the following sections: Administration and Management, Physical Plant, Facility Operations, Facility Services, and Juvenile Services.

PUBLIC COMMENT: A public hearing was held on May 1, 2019. The public comment period expired on May 13, 2019. The agency received no public comments. The proposed effective date is July 1, 2019.

FINANCIAL IMPACT: The agency reports that the expected financial impact is \$10,600.00 for the current fiscal year and \$10,600.00 for the next fiscal year. This is the estimated cost to print posters on Access to Healthcare to place in the facilities as specified in the policy.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 9-28-203(d)(1), DHS shall promulgate rules as necessary to administer youth services under Title 9, Chapter 18, Subchapter 2 of the Arkansas Code.

9. **ARKANSAS MINORITY HEALTH COMMISSION (Ms. ShaRhonda Love)**

a. **SUBJECT: AMHC Bylaws**

DESCRIPTION: The Arkansas Minority Health Commission (AMHC) bylaws are established to regulate the agency in accordance with Act 574 of 2009. The bylaws provide commission purposes, powers, mission, vision, membership, terms, and roles.

PUBLIC COMMENT: A public hearing was held on April 19, 2019, and the public comment period expired on that date. No

public comments were submitted to the agency. The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Arkansas Minority Health Commission may provide by appropriate adoption of bylaws and rules for the time, place, and manner of calling its meetings. Ark. Code Ann. § 20-2-102(d)(2).

10. DEPARTMENT OF PARKS AND TOURISM (Mr. Grady Spann)

a. SUBJECT: CY2019 Arkansas State Parks Fees and Rates

DESCRIPTION: The regulation provides for new services and adjustments in fees and rates at various Arkansas State Park locations. The additional and/or adjustments include: camping and rental facility options; pavilions and meeting rooms; cabins and lodge rooms; marina and boat rental fees; interpretive services; swimming; and miscellaneous equipment rental.

PUBLIC COMMENT: A public hearing was held on March 21, 2019, and the public comment period expired on that date. No public comments were submitted to the agency. The proposed effective date is July 1, 2019.

FINANCIAL IMPACT: The following chart indicates the dollar increase of CY 2019 fees over the CY 2018 fees:

Lodging	\$516,725.27
Camping	\$254,780.00
Meeting Rooms and Pavilions	\$ 16,443.75
Marina Slip Rental and Boat Rental	\$ 2,135.00
Interpretive Tours	\$ -
Golf	\$ -
Museum	\$ -
Miscellaneous Rental Equipment	\$ -
Swimming	\$ -
Entrance Fees	\$ -
Total	\$790,084.02

LEGAL AUTHORIZATION: The State Parks, Recreation, and Travel Commission is authorized and directed to prescribe and collect reasonable fees, rates, tolls, and charges for the services, facilities, and commodities rendered by the properties and equipment of the state parks system. Ark. Code Ann. § 22-4-305(a).

11. **ARKANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM** (Mr. Jay Wills, Ms. Jessica Middleton)

a. **SUBJECT:** Age of Members – How Established

DESCRIPTION: This rule permits an APERS member to establish his or her age by presenting a valid Arkansas enhanced security driver license.

PUBLIC COMMENT: A public hearing was held on February 22, 2019. The public comment period expired that same day. The System received no public comments.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The agency states that the amended rule has no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 24-4-105(b)(1), the Board of Trustees of the Arkansas Public Employees’ Retirement System (“System”) shall make all rules as it shall deem necessary from time to time in the transaction of its business and in administering the System.

D. **Adjournment.**