ADMINISTRATIVE RULES AND REGULATIONS SUBCOMMITTEE
OF THE
ARKANSAS LEGISLATIVE COUNCIL

Room A, MAC
Little Rock, Arkansas

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

A. Call to Order.

B. Reports of the Executive Subcommittee.

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

1. <u>DEPARTMENT OF ENVIRONMENTAL QUALITY, OFFICE OF LAND RESOURCES</u>

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

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

- Revisions to Reg.12.109 to remove the one thousand foot (1,000') limitation related to secondary containment and monitoring for all new or replaced underground storage tanks, secondary containment and monitoring for all new or replaced piping connected to any underground storage tank, and an under-

dispenser spill containment for all new or replacement motor fuel dispenser systems consistent with Act 534 of 2017;

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

- Incorporates changes to 40 C.F.R. Parts 280-281 that concern airport hydrant fuel distribution systems and field constructed tanks, which are now defined as underground storage tanks, in Reg.12.104 by changing the date that Regulation 12 incorporates federal regulations by reference; and

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

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

Charles M. Miller, Executive Director, Arkansas Environmental Federation

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

Comment: AEF's comments focus specifically on the Act 584 of 2017 provisions that eliminate the registration and fee requirements for petroleum aboveground storage tanks ("ASTs").

Additional provisions of Act 584 provided petroleum ASTs the ability to access the Arkansas Petroleum Storage Tank Trust Fund in the event such tanks opted to meet the registration/fee requirements.

Reg.12.201 Registration Requirements

(A) As provided by state and federal law and except as otherwise provided in this section, all owners and operators of storage tanks must register their tanks in accordance with this Regulation.

(B)(1) ~~No~~ An owner or operator shall not receive any regulated substance into any underground storage tank ~~for which~~ without furnishing current and proper proof of registration, ~~as provided by~~ under Reg.12.202(A), ~~has not been furnished~~ to the person selling the regulated substance.

(2) ~~No~~ A person selling any regulated substance shall not deliver, or cause to be delivered, a regulated substance into any underground storage tank for which he or she has not obtained current and proper proof of registration, ~~as provided by~~ under Reg.12.202(A), from the owner or operator.

(C) ~~The provisions of this~~ This Regulation shall not apply to aboveground tanks located on farms, if the contents ~~of which~~ are used for agricultural purposes and not held for resale.

(D) ~~The provisions of this~~ This Regulation shall not apply to aboveground tanks storing a regulated substance at a location on a transitory or temporary basis, for example, short-term use at non-permanent construction, roadway maintenance, timber harvesting, or emergency response locations.

(E) ~~The provisions of this~~ This Regulation shall not apply to storage tanks containing a *de minimis* concentration of a regulated substance.

(F)(1) An aboveground storage tank that contains petroleum may be registered under this section at the option of the owner or operator for the purpose of allowing potential eligibility for reimbursement under the Petroleum Storage Tank Trust Fund Act, Ark. Code Ann.§ 8-7-901 et seq.

(2) If an owner or operator of an aboveground storage tank that contains petroleum chooses to register the aboveground storage tank under this section, a certification of registration under Reg.12.203 must be obtained and the storage tank registration fees under Reg.12.203 must be paid.

Response: The Department agrees that the suggested change would provide helpful clarification. Reg. 12.201(F) will be changed to add a new subdivision (F)(2) as indicated above.

Steve Ferren, Executive Vice President, Arkansas Oil Marketers Association

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

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

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

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

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

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

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

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

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

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

- AOMA opposes and believes ADEQ should consider adopting language that would eliminate use of the Petroleum Equipment Institute UST Standards as either part of Regulation No. 12 or as a matter of agency policy which include:

○ PEI Recommended Practice 1200 (RP-1200) protesting an inspection of UST systems
○ PEI Recommended Practice 900 (RP-900) addressing walk-through inspections

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

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

● EPA recognized PMAA's alternative integrity test method for sumps used as secondary containment and interstitial monitoring for UST system piping as "equally protective of the environment"
○ PMAA notes that this test method can therefore be used in place of the RP-1200 containment sump test method referenced in the 2015 revisions
○ AOMA will provide ADEQ any necessary documentation regarding EPA's prior recent approval
Response: According to 40 CFR 280 of the Federal Regulations, PEI Recommended Practice 900 (RP-900) is only an option for owners and operators to use to meet the monthly walk-through inspection requirements. PEI Recommended Practice 1200 (RP-1200) is an option allowing alternatives in case codes of practice and manufacturer's requirements are not available. ADEQ acknowledges that EPA approved PMAA's low liquid level integrity test as an alternative test method for containment sumps.

Comment: Since ADEQ has delegated UST program authority the State has two compliance deadline options
○ A later compliance deadline will provide the many Arkansas service and small businesses affected by the 2015 UST revisions additional time to obtain the necessary capital and/or financing to fund the necessary improvements
○ The October 13, 2021 deadline option should be adopted by ADEQ
Response: The October 13, 2021 deadline is being adopted by ADEQ for the date of full compliance with the federal regulations. In order to meet that deadline ADEQ will require monthly walk-through inspections to be initiated by no later than October 13,

2018, and within one year, annual release detection equipment testing will need to be completed. Spill containment, liquid tight sumps (sumps installed on or after July 1, 2007), and overfill prevention devices will need to be tested before October 13, 2021.

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

First, the revisions to Regulation No. 12 that correspond to Act 534 appear to accurately track that legislation. ADEQ had previously asked for our input as to the legislative choice in terms of secondary containment. As a result, we support the relevant language.
Response: The Department acknowledges the comment.

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

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

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

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

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

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

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

We would suggest that Chapter 2 be revised to provide a grace period for filing registration paperwork. A 30-day grace period for the UST seller and buyer to submit the relevant paperwork and receive the new registration certificate should therefore be incorporated into Chapter 2. Further, penalties for failing to timely file a change of registration should not be imposed upon transportation companies or a marketer supplying the fuel in such limited circumstances. Instead, the only parties that should be penalized during this limited period would be the seller or buyer of the UST.

Response: The Department acknowledges the comment. The changes recommended in this comment were not proposed in the pending regulatory amendment and not included in the statutorily-required public notice. Therefore, this comment is beyond the scope of this rulemaking.

Comment: AOMA also would like to address three issues that may not necessarily be incorporated into Regulation No. 12. We

believe one or more other commenters are putting forth these recommendations. These issues need to be considered as ADEQ begins implementation of the 2015 UST revisions. They include:

Reuse of Water in Hydrostatic Testing

Under the topic, "UST Sump Test Water Characterization And Disposal" within the EPA "Questions and Answers About the 2015 UST Regulations – As of May 2017" ("Q&A"), EPA provides multiple references indicating the reuse of test waster is permissible. We support other commenters' recommendation of the reuse of test water to support conservation goals, reduce (potentially hazardous) waste generation, and reduce the burden of increased costs on the industry. We recommend as an option organizations work with third party service providers to develop a testing approach incorporating a "milk-run" schedule in which it would only service their organization during the milk-run; thereby, eliminating the potential for cross contamination between fuel stations from separate companies. In this approach, test water will be introduced to sumps for site testing, and at the conclusion of the test, the water will be placed into a mobile tank and transported to the next test site.

Test Water Management

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

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

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

contractor who determines when to remove the water from service should be considered the "generator" of the test water.

Alternative Test Methods

Other commenters note that in the Q&A topic "Containment Sump – Alternative Test Procedures," EPA acknowledges that requiring UST owners to test sumps at 4 inches above the highest penetration as outlined in PEI RP1200 "*may create unusual challenges and unintended consequences.*" They note that EPA provides an example of a site using liquid sensors in the sumps along with positive shutdown to illustrate an acceptable alternative test method. In this example, the agency provides guidance that an acceptable test measure would be to fill the sump to the level which would activate the sensor. AOMA also agrees with this position, and recommends ADEQ approve this test method to conserve water and significantly reduce waste.

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

AOMA recognizes that several of these comments are not germane to the proposed revisions to Regulation 12. Nevertheless, we believe that these suggested action items are time sensitive and discussions should begin in the near future on how to address these issues.

Response: The Department acknowledges the comment. This comment concerns issues that were not proposed in the pending regulatory amendment and not included in the statutorily-required public notice. Therefore, this comment is beyond the scope of this rulemaking.

Audray K. Lincoln, Region 6, Environmental Protection Agency

Comment: What are the implementation dates for your rules?

Response: Arkansas does and will continue to use the implementation dates required by the federal regulations for SPA states.

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

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

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

Comment: We find it confusing as to what Reg 12.104 means if there are not specified implementation dates for specific requirements: 12.104 "…and provided that the effective date of the provisions adopted herein by reference as provisions of this Regulation shall be the date such the provisions are specified as being effective by the Commission in its rulemaking and the effective date of the federal regulations adopted herein shall have no bearing on the effective date of any provisions of this Regulation:…"
Response: The quoted language is distinguishing between the effective date of APC&EC Reg. 12 and the federal regulations cited in Reg. 12.104. Arkansas law does not allow for the

prospective adoption of federal law or regulations. However, nothing in Reg. 12.104 restricts ADEQ from following the EPA's implementation timeline that exists in the cited federal regulations as they exist on the date the APC&EC adopts the amendments to Reg. 12.

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

Reg.12.109: In Sections (A)(1), (B)(1), and (C)(1), the proposed revisions, via footnotes, have maintained the limitation that the sections apply only to those respective tanks or fuel dispenser systems installed or replaced after July 1, 2007; however, that date limitation appears to have been specifically stricken from the respective provisions in Act 534 of 2017, §§ 1, 2, and 4. Can you reconcile this for me? **RESPONSE:** The federal regulation removed the July 1, 2007 reference. Act 534 of 2017 removed this date as well to avoid any interpretation that the state law was more stringent than the federal regulation. However, during the stakeholder meetings on the regulation, an issue was raised that the removal of the date completely from the regulation may cause confusion to the regulated community as far as establishing that an underground storage tank or piping was not in compliance with the secondary containment requirements in the regulation because the tank or piping was installed before July 1, 2007. Inspectors are trained about this and this date is included in inspection forms. In response to all of this information, the decision was made to include the date in footnotes for clarity and as historical reference to the regulated community and the public.

The proposed effective date is pending legislative review and approval.

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

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

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 8-7-802(a)(1), the Arkansas Pollution Control and Ecology Commission has the power and duty to promulgate, after notice and public hearing, and to modify, repeal, and enforce, as

necessary or appropriate to implement or effectuate the purposes and intent of Title 8, Chapter 7, Subchapter 8 of the Arkansas Code concerning regulated substance storage tanks, rules and regulations relating to an underground storage tank release detection, prevention, corrective action, and financial responsibility program as required by the federal Resource Conservation and Recovery Act of 1976 and the Energy Policy Act of 2005, Pub. L. No. 109-58. The Commission is further authorized to adopt appropriate rules and regulations not inconsistent with the Petroleum Storage Tank Trust Fund Act, codified at Ark. Code Ann. §§ 8-7-901 through 8-7-909, to carry out the intent and purposes of and to assure compliance with the Act. *See* Ark. Code Ann. § 8-7-903(b). The proposed revisions implement changes brought about by Act 257 of 2017, sponsored by Representative Matthew Shepherd, which made technical corrections to Title 8 of the Arkansas Code concerning environmental law; Act 534 of 2017, sponsored by Representative Les Eaves, which amended the law concerning underground storage tanks and secondary containment; and Act 584 of 2017, sponsored by Representative Andy Davis, which amended the law to make the registration of aboveground storage tanks optional and amended the eligibility for reimbursement from the Petroleum Storage Tank Trust Fund. Per the Department, the revisions also include changes required to comply with federal law, specifically, *Federal Register*, 80 FR 41566-41683, July 15, 2015, concerning 40 C.F.R. Parts 280-281.

D. Rules Rereferred to the Administrative Rules and Regulations Subcommittee by the Legislative Council at its meeting on June 15, 2018:

1. <u>STATE MEDICAL BOARD</u> (Kevin O'Dwyer)

a. <u>SUBJECT</u>: Regulation 2.4 – Prescribing Controlled Substances

<u>DESCRIPTION</u>: These amendments define excessive prescribing pursuant to the Center of Disease Control guidelines.

<u>PUBLIC COMMENT</u>: Public hearings were held on February 1, 2018 and April 5, 2018. The public comment period expired on April 5, 2018. The board submitted the following public comment summary:

On February 1, 2018, the following submitted comments:

1. Dr. Carlos Roman spoke for the proposed regulation.
2. Rick Smith, M.D., spoke for the proposed regulation that education hours for doctors are needed.
3. David Wroten spoke for the proposed regulation.
4. Scott Pace spoke for the proposed regulation.
5. Joe Phillips spoke against the proposed regulation – fear of doctor limiting his prescribing.
6. Ed Bullington spoke against the proposed regulation – fear of doctors limiting his prescribing.
7. Leo Hausser spoke to amend "K."
8. Kirk Maymard spoke against the proposed regulation – fear of doctor limiting his prescribing.
9. Dr. Katy Chenanlt spoke for the proposed regulation to amend "E."
10. Dr. Masil George spoke to amend "E."
11. Dr. John Georee spoke for the proposed regulation to amend "E."
12. Dr. Daniel Judkins spoke for the proposed regulation to amend "E."

On April 5, 2018, the following submitted comments:

1. Joe Phillips spoke against the proposed regulation needing clarification.
2. Debbie Wood spoke against the proposed regulation as she feels the regulation is aiding prescribing doctors.
3. Jeffrey Wood spoke against the proposed regulation as he feels the regulation is aiding prescribing doctors.
4. Heather Pomplan spoke against the proposed regulation as she doesn't like the documentation; James Smith spoke against the limitations of the proposed regulation.
5. Maria Hill spoke against the proposed regulation as she believes there should be no limit.
6. James Spencer spoke against reducing the amount of pain medication a doctor can prescribe.
7. Dr. Ellen Stradola spoke against any limitations on the proposed regulations.
8. John Kireley spoke against the Pharmacy Board.
9. Kathryn Horton spoke against the 50 MME level.
10. Casey Cole spoke against 50 MME level.
11. Roberta Moreland spoke against the proposed regulation for fear of doctors limiting her prescription

12. Lisa O'Cain spoke against the proposed regulation because it doesn't deal with the drug addicts.
13. Henry Grainer spoke for the proposed regulation, concerned about the documentation requirements.
14. "R.S." spoke against the proposed regulation because the prescribing limit is too limiting.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Arkansas State Medical Board shall make and adopt all rules and regulations not inconsistent with state and federal law and those that are necessary or convenient to perform the duties and to transact the business required by law. Ark. Code Ann. § 17-95-303(1). The board is authorized to promulgate and put into effect such rules and regulations as are necessary to carry out the purposes of the Arkansas Medical Practices Act, § 17-95-201 *et seq.*, § 17-95-301 *et seq.*, and § 17-95-401 *et seq.*, and the intentions expressed therein. Ark. Code Ann. § 17-95-303(2).

The Arkansas State Medical Board's Regulation 2 concerns the revocation and suspension of a licensee to practice medicine if the holder has been guilty of gross negligence or gross malpractice. The board may revoke an existing license, impose penalties as listed in § 17-95-410, or refuse to issue a license in the event the holder or applicant has committed any of the acts or offenses defined in § 17-95-409 to be unprofessional conduct. *See* Ark. Code Ann. § 17-95-409(a)(1). Among other acts, "unprofessional conduct" is defined as specifically including gross negligence or ignorant malpractice (§ 17-95-409(a)(2)(G)) or violating a rule of the board (§ 17-95-409(a)(2)(P)).

E. Rules Deferred from the May 15th Meeting.

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

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

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

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

The Department stated that this change does not require CMS approval. The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Department is authorized to "make rules and regulations and take actions as are necessary or desirable to carry out the provisions of this chapter [Public Assistance] and that are not inconsistent therewith." Arkansas Code Annotated § 20-76-201 (12). Arkansas Code § 20-77-107 specifically authorizes the department to "establish and maintain an indigent medical care program." The Department is authorized to promulgate rules as necessary to conform to federal rules that affect its programs as necessary to receive any federal funds. *See* Ark. Code Ann. § 25-10-129(b) (Supp. 2017).

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

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

1. CAPITOL ZONING DISTRICT COMMISSION (Boyd Maher)

a. SUBJECT: Allow for Increased Setback Reductions on Undersize Lots

DESCRIPTION: This new language would allow the commission to approve a reduction in the setback (the distance between a building and a property line) for new construction on lots less than 4,500 square feet.

The language adopted by the Commission represents a compromise position, wherein the proposed rule is limited in its application to only those lots that were created before July 1, 2018. This will allow existing small lots the additional consideration for reduced setbacks, without the potential incentive to create new undersize lots.

PUBLIC COMMENT: A public hearing was held on April 19, 2018. The public comment period expired on May 14, 2018. While the Commission did not receive any written comments, nor did anyone speak at the public hearing, the Commission placed it before its standing advisory committees for feedback.

The Design Review Committee was generally supportive, but was concerned that the proposed language could serve to incentivize the creation of undersized parcels. Members suggested additional language to clarify that the 50% setback reduction would only affect properties platted before the creation of the Capitol Zoning District.

Members of the Capitol Area Advisory Committee were generally opposed and were concerned with new structures being built too close to the street. Members expressed that the current rule is sufficient, and voted 6-3 to recommend **not adopting** the proposed changes.

The Governor's Mansion Area Advisory Committee voted 9-5 to recommend **adoption** of the rule. Members in support stated that the proposed rule would offer flexibility and promote infill. Members opposed expressed concerns that the proposed rule would allow a disparity of setbacks on a given city block, where

some structures would have a shallower setback and others would be deeper.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated §§ 22-3-302 and 303, the Capitol Zoning District Commission is charged with the authority to promote the general welfare of the state with respect to the State Capitol as well as the area surrounding the Governor's mansion. The Capitol Zoning District Commission has the authority to prescribe such rules and regulations concerning the exercise of its functions and duties as it shall deem proper. *See* Ark. Code Ann. § 22-3-307.

2. ARKANSAS COMMUNITY CORRECTION (Dina Tyler)

a. SUBJECT: Resident Visitation

DESCRIPTION: These changes are amendments to the Resident Visitation Administrative Regulation. Definitions are removed, and where appropriate, the policy describes actions necessary for the resident visitation process. Amendments are made concerning data the department maintains, and visitation conditions and restrictions are clarified. Video visitation is allowed.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on May 18, 2018. No public comments were submitted. The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no cost to the state to implement the rule.

Any member of the public may apply to visit a resident at an estimated cost of $35.00. This expense would be the cost of mailing an application and transportation to a community correction center.

LEGAL AUTHORIZATION: The Board of Corrections shall promulgate policies, rules, and regulations 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 EDUCATION (Lori Freno, item a; Mary Claire Hyatt, item b; and Jennifer Dedman, item c)

a. SUBJECT: Eligibility and Financial Incentives for National Board for Professional Teaching Standards Candidacy and Certification

DESCRIPTION: These rules apply to the payment of costs, support, and incentive bonuses under Ark. Code Ann. §§ 6-17-412 and 6-17-413, as amended by Act 937 of 2017.

Generally, the definitions are revised to more closely reflect statutory language and other changes are made to reorganize the rules and provide greater clarity. The substantive changes are highlighted below. *Italicized language indicates changes following public comment.*

Section 3.00 – Definitions

Sections 3.6, 3.7, 3.8, 3.10, and 3.11 are included from Act 937.

Section 3.9 is added to define what is meant by beginning the "process of initial certification" as that term is used in 4.5.1.1, 5.1, 5.2, and on Chart 1.

Section 4.00 – Selection Process for Payment for NBPTS Candidacy

Section 4.3 - Clarifies the payment of component costs for selected candidates.

Section 4.4 - Allows a candidate who is self-funded initially to apply for participation.

Sections 4.5, 4.6 - These sections are moved to this location from former Section 6, and reworded for clarity.

Section 5.00 – Payment of Incentive Bonuses

This section implements Act 937. Old language that is superseded by Act 937 is removed.

Section 5.1 is revised to refer to initial certification for clarification.

Following public comment, Sections 5.1, 5.1.1.2, 5.1.2, 5.1.3, and 5.1.4 were revised to more closely align the language of the rule to the language of Act 937. Similar changes were made to 5.2.

Section 5.9 adds a provision for a traveling teacher that may work in multiple schools meeting different criteria for high poverty school, high poverty school in a high poverty district, and high poverty charter school.

Section 6.00 – Support Program for Teachers Selected to Participate in NBPTS Candidacy

[Provisions of former Section 6 are moved to new Section 4.5]

The changes in this section are made for clarity.

Section 7.00 – Monitoring for NBPTS Program Participation

The changes in this section are made for clarity.

[Former Section 8.2 provisions are moved to new Section 5.5]

Section 8.00 – Funding Limitations

The changes in Section 8.1 are technical only.

Section 8.2 is added to restate former provision 9.2.

Chart 1 – This chart is added to provide a visual aid for the payment of bonuses under Act 937.

PUBLIC COMMENT: This rule was reviewed and approved by the Executive Subcommittee at its meeting of March 5, 2018, for emergency promulgation. With respect to permanent promulgation, a public hearing was held on January 10, 2018. The public comment period expired on January 17, 2018. After the public comment period, substantive changes were made. A second public hearing was held on March 19, 2018, and the second public

comment period expired on April 13, 2018. The Department provided the following summary of the public comments that it received and its responses thereto:

Jamie Burris
Date Received: 12/20/17
Comment: Good morning, I am writing in regards to the comments that are up for public review regarding National Board Certification. I am not sure what the difference is in building level and district level leaders are. It appears to me that both should be in classrooms and interacting with students. Why would only building level leaders receive the incentive? Do we not want to attract the most effective leaders at all levels? Would district level leaders not have a chance to make an even greater impact than those that are in just one building? How is that different from district level instructional facilitators? I am not sure that this is the direction that we need to take.
Agency Response: Thank you for your comment. District-level administrators provide services across the district, while building-level administrators (principals, assistant principals, etc.) provide services to a specific school. The Department is actively working to attract effective leaders and teachers to the education profession. However, the rules implement the law as written.

Karleen Sheets, Assistant Superintendent, Jonesboro Public Schools
Date Received: 12/26/17
Comment: Please be sure to include PreK teachers hired by school districts who have PreK classrooms. We have highly qualified, NBC teachers in our preK classrooms who are employees of Jonesboro Public Schools. "Public School" means a school serving students in any of grades K-12 that is assigned a local education agency (LEA) number by the ADE.
Agency Response: Thank you for your comment. The Department has in the past included pre-K teachers who teach at a school that is operated by a school district. Not including "Pre-K" in this definition was an oversight and has been corrected in the rules.

Michael Taylor
Date Received: 1/1/18
Comment: I would ask that the Board of Education consider the following when deciding upon the rules governing NBPTS financial incentives.

As a special education administrator for a large school district in Arkansas, I spend countless hours in classrooms coaching teachers and working with general and special educators to improve the programming for students with mild, moderate and severe disabilities. I am grateful for this opportunity to cause change. I began the process of becoming an NBCT teacher to grow professionally and to inspire the many special educators I supervise to do the same. A lot of time and energy went in to becoming a special education administrator (or administrator in general) and NBCT and I was looking forward to being rewarded financially for my hard work by being able to pay off the money I borrowed to get my doctorate. I was so dedicated to this process that I borrowed a classroom as an administrator to become a NBCT.

Principals, assistant principals and instructional coaches have important roles in schools. However, if the premise for providing them with the incentive is that they spend 70% +/- of their time impacting student learning, etc., it is a misguided decision to exclude special education administrators.

Here are my concerns: As a special education administrator, I have the option of leaving my current position to pursue a general education administration position (i.e. principal, etc.) in order to receive a $5k to $10k annual bonus. However, special education continues to be a shortage area in our state. I am dedicated to my students with disabilities and their families. However, how many NBCT-educators would choose to pursue becoming special education administrators when they would lose/never gain any financial incentive? Like principals and assistant principals, we are continually engaged at school, student and teacher levels, helping to improve instructional and community outcomes for our students and families.

Please consider these comments as you move forward with the public hearing.
Agency Response: The Department appreciates your commitment to special education. However, the rules reflect what the law provides.

Clara Carroll, Ed.D., NBCT, Associate Dean, Cannon-Clary College of Education, Professor of Education, Harding University
Date Received: 1/5/18

Comment: I strongly support the proposed Arkansas Department of Education Rules Governing Eligibility and Financial Incentives for National Board for Professional Teaching Standards Candidacy and Certification.
Agency Response: Thank you for your comment. The Department appreciates the commitment of all NBCTs to Arkansas students and to their profession.

Casey Beavers
Date: February 28, 2018
Comment: With regards to the financial incentives for the National Board Professional Teaching Standards, I have concerns about the financial incentives for a high poverty district versus high poverty school. I teach in a school that qualifies for both of them. However, if a teacher teaches in a district that is a high poverty district, but for instance, they teach at the high school which is not a high poverty school, they will not receive the same incentive as a teacher in the same district that teaches at a middle school or elementary that does qualify. Over the course of the years of payment, they will be impacting the same students, no matter the school they are teaching in. I understand the concern for our larger schools in the state. To penalize those teachers that teach at a school where the paperwork just may not have been filled out by enough students for the school lunch program is basically saying that those teachers aren't as qualified as teachers in the same district but a qualified school.

My opinion is to drop the high poverty school clause and reward all teachers that get NBPT certified in a high poverty district.
Agency Response: Act 937 of 2017 enacted the high poverty school requirements.

Dr. Uma Garimella, Director, UCA STEM Institute
Date Received: March 21, 2018
Comment: On page ADE 255-2 and ADE 255-3, bullet 3.4.1. include STEM centers along with educational cooperatives. This is because STEM Centers employees' educational background, experiences, and responsibilities are equal to or even higher than the employees of educational service cooperatives.

Original document
3.4.1 Employment by educational services cooperative when the teacher provides direct student services for a collaborative of

school districts in public school building and other instructional settings throughout the Cooperative area; and

Amendment
3.4.1 Employment by educational services cooperative and STEM Center when the teacher provides direct student services for a collaborative of school districts in public school building and other instructional settings throughout the Cooperative and STEM Center area; and

[Note by ADE: Dr. Garimella also submitted this comment at the public hearing held on March 19, 2018.]
Agency Response: At this time, the law does not provide authority for the inclusion of STEM Centers.

Corey Adaire
Date Received: March 14, 2018
Comment: I was reading through the new rules proposed for NBCTs and I noticed the proposed definition of a classroom teacher included co-op employees, but not STEM centers. There are 13 STEM Centers across the state, and each has at least 2 ADE grant-funded specialists, it does not seem fair to allow one group of specialists, funded by the same grant to be allowed to receive the National Board bonuses, and not allow another one. They are funded by the same grant and do the same type of work. Wondering if there's anything you folks can do about this? Section in reference is on pages 2 & 3. See clips attached.

[Note by ADE: Clips are of Sections 3.4.1, 3.42, 3.5.1, and 3.5.2 but are not attached here.]
Agency Response: At this time, the law does not provide authority for the inclusion of STEM Centers.

Kent Layton
Date Received: March 19, 2018
Comment: Language in the proposed rules fails to recognize STEM Education Centers. There are specialists at these Centers, and although the rules include a provision for Education Service Cooperatives, it does not provide a like provision for STEM Education Centers.
[Note by ADE: From public hearing held on March 19, 2018]
Agency Response: At this time, the law does not provide authority for the inclusion of STEM Centers.

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

(1) Section 4.3.1.1 – I am curious as to why the rule excludes from payment by the Department the application fee, retake fees, and renewal fees, when Ark. Code Ann. § 6-17-413(a)(1)(A) provides that the Department "shall pay the full amount of the participation fee"? **RESPONSE:** Due to the limited state funds available (and after federal funding was no longer available), the ADE only paid for the costs incurred once the applicant has been initially accepted into the program – that is, fees for the submission of the components to NBPTS. The ADE gives priority to the payment of bonuses, and to pay all of the other fees would limit the number of NBCTs we are able to fund and increase collection activity for those who are paid for the additional fees but are either not accepted by NBPTS or are not able to complete certification.

(2) Section 5.1.1.2 – Was there a reason the Department did not include the language from Ark. Code Ann. § 6-17-413(a)(3)(A)(iv)(*b*), on which it appears this section is based, that limits the payment of the bonus to these individuals "if funds are available after payments are made to those eligible under subdivisions (a)(3)(A)(iv)(*a*) and (a)(3)(B)(i)"? *See* Ark. Code Ann. § 6-17-413(a)(3)(A)(iv)(*b*)(*2*)(*A*). **RESPONSE:** The language of Section 8.1 limiting all payments under these rules is sufficient, as the funding seldom covers all participation. However, we will add a Section 8.2 to address this.

(3) Section 5.1.1.3.1 – I am curious as to where the requirement of certification on or after August 1, 2009, comes for those employed full-time as a classroom teacher, building-level principal, or building-level assistant principal who moved into the state on or after January 1, 2017, as it does not appear that the statute on which this section is premised, Ark. Code Ann. § 6-17-413(a)(3)(B)(i), as amended by Act 937 of 2017, § 2, contains that requirement? (It seems like the 2009 certification is limited to those employed full-time as a teacher in an accredited teacher preparation program under either Ark. Code Ann. § 6-17-413(a)(3)(A)(iv)(*b*) and § 6-17-413(a)(3)(B)(ii), as amended by Act 937 of 2017, § 2.) **RESPONSE:** This has been corrected.

(4) Section 5.1.1.3.2 – Along the same lines as question (2) above, was there a reason that the "if funds are available after payments are made to those eligible under subdivisions (a)(3)(A)(iv)(*a*) and

(a)(3)(B)(i)" language from Ark. Code Ann. § 6-17-413(a)(3)(B)(ii), as amended by Act 937 of 2017, § 2, upon which this section appears to be premised, was not included?
RESPONSE: See Response to the question about 5.1.1.2 above.

(5) Section 5.1.2 – I may have missed it, but I didn't see any reference for the bonus, in the case of a recertification obtained before January 1, 2018, "for the life of the recertification," as found in Ark. Code Ann. § 6-17-413(a)(3)(A), as amended by Act 937 of 2017, § 1. Was there a reason for the omission?
RESPONSE: This has been corrected.

(6) Sections 5.1.2, 5.1.3, and 5.1.4 – I am curious as to the basis for the Department's extension of the inclusion of the open-enrollment and high-poverty provisions that are found in subsection (e) of Ark. Code Ann. § 6-17-413, as amended by Act 937 of 2017, § 3, and are specifically applicable to those who began and received certification on or after January 1, 2018, to those individuals who obtained certification or recertification before January 1, 2018, found in subsection (a)(3)(A), as amended by Act 937 of 2017, § 1.
RESPONSE: NBCTs who are currently receiving bonuses (pre-January 2018) may want to move to a high poverty school in a high poverty school district or a high poverty charter school. To exclude them from the opportunity to do so seems unfair and inconsistent with the intent of Act 937 to provide students in these schools with greater access to NBCTs. To your question (10) below Act 937 seems to contemplate this possibility, as there is no other explanation in the law for the addition of Ark. Code Ann. § 6-17-413(e)(3)(F).

(7) Sections 5.2, 5.2.1, 5.2.2, 5.2.3 – Aren't these individuals subject to the requirement that they be "employed full-time"?
RESPONSE: This has been corrected.

(8) Section 5.2.2 – Was there a reason the language "that is not in a high poverty district" as found in Ark. Code Ann. § 6-17-413(e)(2)(B), as amended by Act 937 of 2017, § 3, on which it appears the section is premised, was not included? **RESPONSE:** This has been corrected.

(9) Sections 5.2.2 and 5.2.3 – Should the term "school" precede "years"? **RESPONSE:** This has been corrected.

(10) Can you explain to me how an individual could qualify for the bonus under both the pre-January 1, 2018 (Section 5.1) and post-January 1, 2018 provisions (Section 5.2)? **RESPONSE:** Although the ADE does not see that scenario specifically expressed in the law, we believe it follows the intent of the law it for existing NBCTs (Section 5.1) to be able to move to a high poverty school in a high poverty school district or a high poverty charter school to receive a higher bonus under the provisions of Section 5.2.

Following the substantive changes that were made after the first public comment period, Ms. Miller-Rice asked the following questions:

(1) Section 5.1 – I'm so sorry, but I'm still having trouble tracking the sections to the corresponding subsections of Ark. Code Ann. § 6-17-413. I'll try to set out my questions as best I can:

(a) Section 5.1.1.2 – If I'm not mistaken, this section is based on Ark. Code Ann. § 6-17-413(a)(3)(A)(iv)(*b*); therefore, its only date restrictions appear to be: (1) to have begun certification or received certification or recertification before 1.1.18; and (2) per subsection (*b*)(*2*)(*A*), hold certification on or after 8.1.09. I do not see in the statute the requirement that was added to the 2d revision that the individual have moved into the state before 1.1.17, and the 2009 restriction is being reflected as stricken, despite being in the statute. (I think this section was correct in the initial version? Maybe the changes were accidentally made to this section instead of the other?) **RESPONSE:** Changes were made that addressed the issues raised.

(b) Section 5.1.1.3 – This section appears to apply the 8.1.09 restriction to both sections 5.1.1.3.1 and 5.1.1.3.2; however, section 5.1.1.3.1 appears to be based on Ark. Code Ann. § 6-17-413(a)(3)(B)(i), which does not contain the 8.1.09 restriction. Section 5.1.1.3.2, however, appears to be based on Ark. Code Ann. § 6-17-413(a)(3)(B)(ii), which does contain the 8.1.09 restriction.
RESPONSE: Changes were made that addressed the issues raised.

(2) Section 8.2 – I could be mistaken, but as I read Ark. Code Ann. § 6-17-413, it seems to provide that bonuses shall be paid to those under sections 5.1.1.2 (Ark. Code Ann. § 6-17-413(a)(3)(A)(*b*)) and 5.1.1.3.2 (Ark. Code Ann. § 6-17-413(a)(3)(B)(ii)), *if* funds are available after payments are made to those eligible under sections

5.1.1.1 (Ark. Code Ann. § 6-17-413(a)(3)(A)(iv)(*a*)) and 5.1.1.3.1 (Ark. Code Ann. § 6-17-413(a)(3)(B)(i))?
RESPONSE: Changes were made that addressed the issues raised.

(3) Section 5.1.2, as it might apply to someone who had previously received the bonus for ten years and then was recertified prior to 1.1.18 – Is it the intention of the rule that "but for no more than ten (10) school years" would preclude that recertified teacher from receiving the bonus for the life of the recertification because s/he had already received ten years' worth of bonuses? **RESPONSE:** The person who recertifies before 1/1/18 will receive the bonus for the life of the recertification, up to 10 years. Time is not deducted for the bonus years before the recertification. The ten years is counted from the year of the recertification obtained before January 1, 2018, as indicated on Chart 1 attached to the rules.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The agency states that it is difficult to assess the fiscal impact of this amendment because the bonuses have been restructured, submitting that:

1. Some National Board Certified Teachers (NBCTs) who are at the end of their 10 year (certification or recertification) will no longer receive their $5,000 annual bonus.

2. Some NBCTs will receive a $5,000 bonus through the end of their 10 years (although if they move to a high-poverty school in a high-poverty district or a high-poverty charter school, they may receive the $10,000 bonus to the end of their 10 years).

3. New NBCTs will come under the new structure for:

- $2,500 for five years if they are in a school that is NOT a high-poverty school or high-poverty charter school;

- $5,000 for five years if they are in a high-poverty school (that is not in a high-poverty district); or

- $10,000 for ten years if they are in a high-poverty school in a high-poverty district or high-poverty charter school.

LEGAL AUTHORIZATION: The proposed rule changes include revisions made in light of Act 937 of 2017, sponsored by Senator Alan Clark, which served to target and enhance incentive bonuses for teachers employed in high-poverty schools who obtain National Board for Professional Teaching Standards Certification; modified the eligibility criteria and codified the amount of incentive bonuses for current recipients; and repealed unfunded incentive bonuses. Pursuant to Arkansas Code Annotated § 6-17-413(a)(2)(A), the State Board of Education ("State Board") shall promulgate rules and regulations for the selection process of teacher participants in the program of the National Board for Professional Teaching Standards ("National Board"). The State Board is further authorized to promulgate rules and regulations to establish a support program for teachers selected to participate in the program of the National Board. *See* Ark. Code Ann. § 6-17-413(a)(4).

b. SUBJECT: Arkansas Mandatory Attendance Requirements for Students in Grades Nine through Twelve Repeal

DESCRIPTION: Act 867 of 2017 repealed the law which these rules were based on making these rules no longer necessary.

PUBLIC COMMENT: A public hearing was held on April 19, 2018. The public comment period expired on May 15, 2018. The Department received no public comments.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The instant rules are being proposed for repeal in light of Act 867 of 2017, sponsored by Representative James Sturch, which amended provisions of the Arkansas Code concerning public school student attendance. Specifically, Act 867, § 1, repealed Arkansas Code Annotated § 6-18-211, which had provided, in relevant part, that the State Board of Education, no later than January 30, 2004, shall promulgate regulations that require students in grades nine through twelve (9 – 12) to enroll in no less than three hundred fifty (350) minutes of planned instruction time each day as a requirement for graduation and that further allow local school district boards of directors to develop certain policies set forth in the statute.

c. **SUBJECT: Parental Involvement Plans and Family and Community Engagement**

DESCRIPTION: The proposed rule incorporates changes from Act 936 of 2017 concerning Parental Involvement Plans. The rule title has been changed to add Family and Community Engagement to reflect ESSA terminology. Act 936 required minor changes to the rule to reflect other changes in terminology. The rule replaces "school improvement" and "academic distress" with Level 4 Directed Support and Level 5 Intensive Support. Other changes include the replacement of references to No Child Left Behind with references to ESSA and the removal of outdated references to ACTAAP.

Changes made following public comment include:

Title – The date is amended to change "2017" to "2018."

Section 1.00 – Regulatory Authority – Section 1.01 is amended to add "and Family and Community Engagement" to the title of the rule.

Section 2.00 – Definitions – Section 2.06, containing the definition of "Title I Public School or Public School District" is removed due to the removal of all mentions of Title I in the rule, formerly located at Section 3.04 of the rule.

Section 3.00 – Parental Involvement Plans. Sections 3.01.1 and 3.02.1 were amended to pluralize "businesses" and "industries." Sections 3.01.2.1 through 3.01.2.4.1 were renumbered to correct the numbering of the subsections. The sections had mistakenly been left as subsections of 3.01.3 instead of reflecting the change to section 3.01.2.

PUBLIC COMMENT: A public hearing was held on April 19, 2018. The public comment period expired on May 15, 2018. The Department provided the following summary of the public comments that it received and its responses thereto:

Lucas Harder, Arkansas School Boards Association
Comment: 1.01: The title above includes "and family and community engagement" so I would recommend including it here as well for consistency.
Agency Response: Comment considered and this change has been made.

Comment: 2.0~~5~~6: Due to the planned repeal of 3.04 through 3.04.4, this definition should be removed since Title I will no longer be mentioned in the rules.
Agency Response: Comment considered and this change has been made.

Comment: 3.01.3.1 through 3.01.3.~~5~~4.1: These should all be under 3.01.2 instead since the previous 3.01.2 was repealed and 3.01.3 was moved to 3.01.2.
Agency Response: Comment considered. The numbers have been corrected.

Comment: 3.01.~~3~~2.3: I would recommend amending this language to read "electronic filing process in an electronic format approved by the Department" rather than listing the specific formats so that in the unlikely event that another format is produced that would work better with the electronic system it would not take an amendment to the rules in order to use the new format.
Agency Response: Comment considered. No change made.

Comment: 3.02.2: "Level" is missing from "school-level improvement plan."
Agency Response: Comment considered. No change made.

Jennifer Wells, Arkansas Public School Resource Center
Comment: Title: Insert "2018" and delete "2017."
Agency Response: Comment considered. Change made.

Comment: Sec 1.01: Add language to reflect the changes made in the title section ("and Family and Community Engagement.").
Agency Response: Comment considered and this change has been made.

Comment: Sec. 2.03: Parental Involvement incorporates and encompasses references to "Family and Community Engagement and Supports," as set forth in the Every Student Succeeds Act, 20 U.S.C. Ch. 70.

Agency Response: Comment considered. No change made.

Comment: Sec. 2.03: Why use both "incorporate" and "encompass"? The use of the word "incorporate" should be sufficient.
Agency Response: Comment considered. No change made.

Comment: Secs. 2.04 and 2.05: Open-enrollment public charter schools are included in the definitions of both "Public School" in 2.04 and "Public School District" in 2.05 (as outlined in Ark. Code Ann. § 6-15-2903). It is unworkable for the term to be both. But, because Ark. Code Ann. § 6-15-2903 defines the term "open-enrollment charter school" by referencing the definition in Ark. Code Ann. § 6-23-103, and open-enrollment charter school may be defined simply as a public school and not also as a public school district. Ark. Code Ann. § 6-23-103: (10)(A) "Open-enrollment public charter school" means a public school that: (i) Is operating under the terms of a charter granted by the authorizer on the application of an eligible entity; (ii) May draw its students from any public school district in this state; and (iii) Is a local educational agency under the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301 et seq., as it existed on April 19, 2009. See also, the definition of public charter school in the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 7221i, defining the term as a school, and not as a district.
Agency Response: Comment considered. No change made.

Comment: Secs. 2.04 and 2.05: Why is Ark. Code Ann. § 6-15-501 being deleted? There appears to be no change in the statute since 2007.
Agency Response: Comment considered. No change made.

Comment: Sec. 2.06: Cite "20 U.S.C. § 6301."
Agency Response: Comment considered. No change made. There is no Section 2.06 in the Rule. Unable to determine the intent of the comment or locate the appropriate section by context.

Comment: Sec. 3.01.1 Collaboration with parents may be accomplished through a coalition of parents, representatives of agencies, institutions, businesses, and industries.
Agency Response: Comment considered. This change has been made.

Comment: Sec. 3.02.1 Collaboration with parents may be accomplished through a coalition of parents, representatives of agencies, institutions, businesses, and industries.
Agency Response: Comment considered. This change has been made.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Changes to the instant rules were made in light of Act 936 of 2017, sponsored by Senator Jane English, which amended provisions of the Arkansas Code concerning public school education. Arkansas law requires that the Department of Education ("Department") shall review each school district's parental involvement plan; determine whether the plan is in compliance with the provisions of Title 6, Chapter 15, Subchapter 17 of the Arkansas Code, concerning parental involvement plans; and indicate on the school's performance report whether or not the school district is in compliance with the subchapter. *See* Ark. Code Ann. § 6-15-1704(b)(1)(A)(i)–(iii). Periodically on a rotating schedule, the Department shall monitor each school district's plan to: (1) evaluate whether the school district is implementing its plan and the implementation's effectiveness; and (2) assess the areas in which a school district needs to revise its plan or its implementation of the plan. *See* Ark. Code Ann. § 6-15-1704(b)(1)(B)(i)–(ii). Further, the Department shall place priority for the monitoring on school districts that have been identified as being in Level 4 – Directed Support or Level 5 – Intensive Support, and by January 1 of each year, the Department shall provide any recommendations in writing to a school district concerning areas of noncompliance with Ark. Code Ann. §§ 6-15-1701 through 6-15-1703 or as a result of the Department's monitoring. *See* Ark. Code Ann.§ 6-15-1704(b)(1)(C)(i)–(ii), (b)(2)(A)–(B). Finally, the Department shall allow the school district an opportunity to implement the Department's recommendations. *See* Ark. Code Ann. § 6-15-1704(b)(3). Pursuant to Ark. Code Ann. § 6-15-1704(b)(4), the State Board of Education shall incorporate the provisions of subsection (b) of the statute, concerning the Department's duties, into its rules for parental involvement plans.

4. DEPARTMENT OF ENVIRONMENTAL QUALITY, OFFICE OF LAND RESOURCES

a. SUBJECT: Regulation 36: Tire Accountability Program

DESCRIPTION: The Arkansas Department of Environmental Quality (ADEQ) proposes this rulemaking before the Arkansas Pollution Control and Ecology Commission (Commission) for permanent amendments to emergency Regulation No. 36 (Used Tire Recycling and Accountability Program). The proposed amendments simplify the name of the program to the Tire Accountability Program (TAP); provide comprehensive program administration information in compliance with Act 317 of 2017, the Used Tire Recycling and Accountability Act, Ark. Code Ann. § 8-9-401 *et seq.,* to include provisions for permitting, licensing, enforcement, and beneficial uses; remove preliminary implementation dates and deadlines that reference 2017; add references to new or renamed forms; and make minor revisions to include correcting typographical, grammatical, formatting, and stylistic errors throughout the emergency regulation. Act 317 of 2017 also establishes the Commission's authority for the rulemaking.

In addition to the changes described above made throughout the emergency Regulation 36, a summary of proposed changes by chapter include:

Chapter 1: General Provisions – Changes made to this chapter include:
- Reg. 36.101 was changed by adding subsection (C);
- Reg. 36.102 was changed by adding subsection (A);
- Reg. 36.106 entitled "Open Burning Prohibited" was stricken;
- Reg. 36.107 entitled "Continuation of Permitting, Licensing, and Enforcement Authority" under Regulation No. 14 was stricken because it will no longer be necessary after this permanent rulemaking is effective;
- New Reg. 36.106 was added concerning inter-district used tire programs; and
- New Reg. 36.107 was added concerning market development.

Chapter 2: Definitions – Changes to the definition of e-manifest were made.

New Chapter 3: Used-Tire Programs – Added to provide information related to the administration of used-tire programs.

Chapter 4: Used-Tire Program Accountability and Business Plans – Reg. 36.403 was changed by striking subsection (B).

New Chapter 5: Performance and Efficiency Evaluations – Added for administrative guidance.

Chapter 6: E-Manifest System – The current "Chapter 4: E-Manifest System" has been renumbered as Chapter 6 with additional changes to Reg. 36.602, 36.605, and Reg. 36.606.

Chapter 7: Tire Generators – The current "Chapter 5: Tire Generators" has been renumbered as Chapter 7 with additions to Reg. 36.704(7).

Chapter 8: Rim Removal Fees – The current "Chapter 6: Rim Removal Fees" has been renumbered as Chapter 8.

Chapter 9: Commercial Generators and Commercial Generator Fees – The current "Chapter 7: Commercial Generators and Commercial Generator Fees" has been renumbered as Chapter 9.

Chapter 10: Persons Who Import Used Tires and Import Fees – The current "Chapter 8: Persons Who Import Used Tires and Import Fees" has been renumbered as Chapter 10.

Chapter 11: Disbursements from the Used Tire Recycling Fund – The current "Chapter 9: Disbursements from the Used Tire Recycling Fund" has been renumbered as Chapter 11.

New Chapter 12: Beneficial Use – Sourced from Regulation No. 14 and revised for compliance with the changes in Act 317 of 2017.

New Chapter 13: Waste Tire Sites – Sourced from Regulation No. 14 and revised for compliance with the changes in Act 317 of 2017.

New Chapter 14: Landfilling of Waste Tires – Sourced from Regulation No. 14 and revised for compliance with the changes in Act 317 of 2017.

New Chapter 15: Tire Collection Centers – Sourced from Regulation No. 14 and revised for compliance with the changes in Act 317 of 2017.

New Chapter 16: Tire Processing Facilities – Sourced from Regulation No. 14 and revised for compliance with the changes in Act 317 of 2017.

New Chapter 17: Repealer, Severability, and Effective Dates – Standard language included in most permanent regulations.

PUBLIC COMMENT: This rule was reviewed and approved by the Executive Subcommittee at its meeting of March 5, 2018, for emergency promulgation. With respect to permanent promulgation, a public hearing was held on February 27, 2018. The public comment period expired on March 15, 2018. The Department provided the following summary of the public comments that it received and its responses thereto:

Melinda Caldwell, Director, Ozark Mountain Solid Waste District

Comment 1 Please receive these comments concerning Regulation No. 36. Consideration is appreciated in the following language change in the areas of the proposed Regulation No. 36 as listed below:

"Use the manifest system developed by ADEQ and certify each tire removed from the rim and replaced with a new or used tire was assessed a rim removal fee."

APC&EC Regulation No. 36.704(6)
APC&EC Regulation No. 36.705(A)(5)
APC&EC Regulation No. 36.706(6)
APC&EC Regulation No. 36.707(C)
APC&EC Regulation No. 36.708(6)
APC&EC Regulation No. 36.710(6)
Response: ADEQ agrees and has made the changes to the Revised Markup Draft that was suggested for all the Reg. 36 cites listed above in a manner that is consistent with the defined terminology in Chapter 2.

Craig Douglass, Executive Director, Regional Recycling & Waste Reduction District

Comment 2 Please accept this letter as a request for consideration to revise Regulation No. 36, specifically 36.114 Administrative Incentive Grants, subsection (B).

Our particular interest is in the area market and economic stimulus incentives. This regulation states that the Director has discretion on the use of Used Tire Recycling Fund monies for the provision of grants for market and economic stimulus incentives, and that those grants are limited to applications from an eligible used-tire program, local government, or state agency, board or commission. We would respectfully request that an additional category of eligible applicants be considered:

(4) An Arkansas non-profit corporation whose mission is dedicated to recycling-related programs.

Our reasoning is this. In the course of developing more cohesive, inter-related and effective recycling programs for the state of Arkansas, we have recognized the need for research, education, program testing, promotion and inter-district implementation. In order to develop programs with the greatest opportunity to positively impact the entire state, and the statewide protection of the public health and environment, the recruitment of and support by private industry is essential. This recognition further incorporates environmental programs, particularly recycling and the beneficial use of recyclable material, into an overall economic development strategy, rather than simply a regulatory one.

We believe that allowing Arkansas non-profit corporations whose mission incorporates the opportunity for the above strategy could be helpful. And we recommend this category of possible applicants to you for the development of effective and efficient market and economic stimulus incentives.

Response: Reg. 36.1114(B) concerns eligible applicants for Administrative and Incentive Grants. Effective January 1, 2018, Ark. Code Ann. § 8-9-405(a) requires ADEQ to establish a Program to reimburse used-tire programs (UTPs). The Used Tire Recycling and Accountability Act, Ark. Code Ann. § 8-9-401 et seq., only allows ADEQ to disburse moneys to used-tire programs. The moneys collected for the Tire Accountability Program are deposited in the Used Tire Recycling Fund, and the use of those

funds are restricted by law under Ark. Code Ann. § 19-5-1147(c). Reg. 36.1114(B) defines those eligible for an abatement aid grant or market and economic stimulus incentive grant to include an eligible UTP, a local government, or a state agency, board, or commission. Reg. 36.1115(B) does make reference to the applicant or their contractor. Reg. 36, as proposed, allows a UTP to solicit the assistance of a contractor that could be a non-profit organization.

Wendy Bland, Executive Director, Benton County Solid Waste District

The Benton County Regional Solid Waste Management District appreciates the opportunity to submit the following comments on the proposed revision to Regulation No. 36.

Comment 3 Regarding 36.107, the BCRSWMD requests that PC&E consider adding language requiring ADEQ Tire Accountability Program staff to prepare and publish a quarterly report indicating the Department's efforts made in developing market opportunities for recycling and beneficial use. This is a critical activity and we would like to see accountability for the Department's role in this activity.
Response: ADEQ agrees the efforts to develop market opportunities for recycling and beneficial use are critical to the overall success of the program. ADEQ is developing a statewide marketing plan to supplement the Arkansas Economic Development Commission (AEDC) review of Arkansas Tire Management District Used Tire Processing dated September 21, 2017. This statewide marketing plan is to serve as a tool to the UTPs to assist with compliance of Reg. 36.107. Ark. Code Ann. § 8-9-405(h) requires ADEQ to develop market opportunities for beneficial use of used tire material and educate the public on the Program. Ark. Code Ann. § 8-9-401(c)(3) states the primary goal of the UTP is to recycle or put to beneficial use as many used tires as possible.

Comment 4 Regarding 36.1110(B), requires a Reimbursement Request form to be submitted by the UTPs within 5 days after end of quarter. We request PC&E consider removing all reference to a Reimbursement Request form. We feel there is no reason for a separate form as all required information could be provided on the Quarterly Report form.

Response: The Reimbursement Request form referenced in Reg. 36.1110(B) is the Quarterly Report form TAP-9. A reference to the Quarterly Report form TAP-9 is being added to Reg. 36.1110(B) to clarify there is only one report form required to be submitted by the UTP for reimbursement. The Quarterly Report will be due within thirty (30) calendar days ~~of~~ after the last day of each quarter.

Reg. 36.1110(B)(1) has been amended to read "A used-tire program shall submit to ADEQ a Quarterly Report no later than thirty (30) calendar days after the last day of each calendar quarter on Form TAP-9 to include:
(a) A statement that all information has been submitted to the e-manifest system or an explanation of any discrepancy reports related to e-manifest system data; and
(b) If applicable, documentation that supports its explanation of any discrepancy report during that calendar quarter."

Reg. 36.1110(C) has been amended to read "ADEQ shall evaluate the Quarterly Reports and may use any of the following additional sources to determine Level One funding reimbursements to eligible used-tire programs:
(1) Data from the e-manifest system including the quantity of used tires managed and any data related to the verification of the claimed quantity of used tires managed;
(2) Quarterly progress reports;
(3) Approved business plan rates;
(4) Total reimbursement requests from all used-tire programs; and
(5) Total available funding for quarterly disbursements."

Comment 5 Regarding 36.1301, we request PC&E consider adding a subsection (C) to include critical prohibitions similar to that found in Reg. 14.702 related to improper management of used or waste tires.
Response: Critical prohibitions for waste tire sites have been added to Reg. 36.1301 similar to those found in Reg. 14.702. The following has been added as Reg. 36.1301(C): "A person shall not transport, transfer, store, collect, recycle, or otherwise manage used tires, processed tires, or residuals in any manner that:
(1) Creates a nuisance;
(2) Breeds or harbors mosquitos, snakes, insects, rodents, or other disease-causing vectors;

(3) Causes a discharge of any constituent derived from used tires into the air or waters of the State unless permitted otherwise by ADEQ; or
(4) Creates other hazards to public health, safety, or the environment as determined by ADEQ."

Comment 6 The BCRSWMD believes that ADEQ is over-stepping their authority by requiring a Professional Engineer to sign off on the Collection Center Permit application (TAP-6). This is not mandated in the proposed Regulation 36 nor in the law. We request that PC&E amend 36.1503(A) to define the minimum requirements for obtaining a collection center permit. We further request that separate categories and requirements be defined for a collection center versus only a collection trailer.

We deeply appreciate the Commission and ADEQ's consideration of these comments and suggested revisions.
Response: Form TAP-6 has been amended to reflect that the Professional Engineer certification is required for tire processing facilities when the tire collection center's tire storage area is outside on the ground or a concrete pad and not in a building. The intent for requiring an engineering certification under these circumstances is to ensure there is appropriately designed storm water run-on and run-off measures in place.

Reg. 36.1502 defines the criteria and entities that need a tire collection center general permit.

Reg. 36.1508 covers the storage, technical, and operational criteria of tire collection centers whether the tires are collected and stored in a trailer, concrete pad, or another approved storage area.

Wendy Bland, President, Arkansas Association of Regional Solid Waste Management Districts

The Arkansas Association of Regional Solid Waste Management Districts appreciates the opportunity to comment on the proposed Revision to Regulation No. 36.

We would like the PC&E Commission to know that all of the 18 Solid Waste Districts, and subsequent Used Tire Programs, are united in the common goal of trying to make this legislation into a successful used tire program for the state. We share ADEQ's desire to create and maintain a positive working relationship. We

look forward to continuing to work with the Commission and ADEQ to operate an efficient and cost effective tire collection and processing program.

Comment 7 We would like to express our concern that the Commission allowed ADEQ staff to adopt, through a 2nd Emergency Rulemaking process, the proposed final version of Regulation 36. In essence, this immediately implemented all the requirements contained in the proposed final Regulation 36 before any public comments were considered. While ADEQ did facilitate a stakeholder process during fall 2017 for development of an initial version of Regulation 36, the final draft contains many changes, insertions and deletions which differ significantly from the version of the Regulation which was presented to stakeholders.

It is vitally important that, in the future, the department consult the districts regarding any proposed change to current solid waste regulations and laws prior to beginning rulemaking or legislation. The 18 solid waste districts and our mayors and judges fulfill the work of the solid waste system in this state. District personnel have operational experience and real-world knowledge. We are ready and willing to offer our expertise to create and operate the most efficient system.

It is also important to understand that, as a united group of districts, we must ensure that the needs and the best interests of our constituents and elected officials are considered. Therefore, if we feel that the needs of our citizens are not being met, we will not hesitate to work with our mayors and judges, their associations and the legislature to effect the necessary change.
Response: The Department acknowledges the comment.

Comment 8 Regarding 36.107, the Association requests that PC&E consider adding language requiring ADEQ Tire Accountability Program staff to prepare and publish a quarterly report indicating the Department's efforts made in developing market opportunities for recycling and beneficial use. This is a critical activity and we would like to see accountability for the Department's role in this activity.
Response: ADEQ agrees the efforts to develop market opportunities for recycling and beneficial use are critical to the overall success of the program. ADEQ is developing a statewide marketing plan to supplement the Arkansas Economic Development Commission (AEDC) review of Arkansas Tire

Management District Used Tire Processing dated September 21, 2017. This statewide marketing plan is to serve as a tool to the UTPs to assist with compliance of Reg. 36.107. Ark. Code Ann. § 8-9-405(h) requires ADEQ to develop market opportunities for beneficial use of used tire material and educate the public on the Program. Ark. Code Ann. § 8-9-401(c)(3) states the primary goal of the UTP is to recycle or put to beneficial use as many used tires as possible.

Comment 9 Regarding 36.307(A), this regulation states that a UTP is subject to penalties for noncompliance including (1) failure to submit a business plan on or before December 31, 2018. However, all UTPs have already submitted and been granted conditional approval of the business plans. Future business plans would only be required under specific circumstances described in Chapter 4 and would not be required on the proposed date. We request that PC&E remove the date of December 31, 2018, to allow this section to apply to future revisions and plans that may be submitted. We suggest replacing with "as required in Chapter 4 of this Regulation."
Response: Reg. 36.307(A)(1) has been amended to read "Failure to submit a business plan as required in Chapter 4 of this regulation."

Comment 10 Regarding 36.307(A)(13), a requirement has been added for Used Tire Programs (UTPs) to provide a Disclosure Statement. However, the disclosure statement is not required of government agencies. The Association requests that PC&E strikes 36.307(A)(13) since this applies only to UTPs.
Response: Reg. 36.307(A)(13) has been deleted since the disclosure statement is not required to be submitted by the UTPs. The remaining items in Reg. 36.307(A) have been renumbered accordingly.

Comment 11 Regarding 36.308(A), refer to comment above pertaining to 36.307(A). We request removing the dates to allow this section to apply to future revisions and plans that may be submitted.
Response: All dates have been removed in Reg. 36.308 to reflect a regulatory requirement pertaining to penalties that could be imposed if a UTP fails to submit a revised business plan.

Comment 12 Regarding 36.401, this section refers to Initial Business Plans and includes a date that has passed as well. We

suggest removing 36.401 in entirety. We request moving the requirements for District Board approval of business plans to 36.404(A).
Response: Reg. 36.401 has been amended by removing the dates and listing of specific calendar years. Reg. 36.401 now reads "A used-tire program that receives funding from the Used Tire Recycling Fund shall have an ADEQ-approved business plan that establishes its current operation expenses and proposed future operation plans. This business plan must be approved by the used-tire program's board before submittal to ADEQ."

Comment 13 Regarding 36.1110(B), requires a Reimbursement Request form to be submitted by the UTPs within 5 days after end of quarter. First, we request PC&E consider removing all reference to a Reimbursement Request form. ADEQ Tire Accountability Program staff have indicated that they consider the Quarterly Report form to be the same as the Reimbursement Request form. We feel there is no reason for a separate form as all required information could be provided on the Quarterly Report form.

If PC&E determines that a separate Reimbursement Request form is necessary, we request that PC&E consider amending both 36.1110(B)(1) and (2) to state that the Reimbursement Request form will be submitted within 30 days after the end of the quarter.
Response: See response to Comment 4 above.

Comment 14 36.1113(C) states that the Reimbursement Request will not be considered by ADEQ until the Quarterly Report is filed within 30 days after end of quarter.
Response: See response to Comment 4 above.

Comment 15 Regarding 36.1301, we request PC&E consider adding a subsection (C) to include critical prohibitions similar to that found in Reg. 14.702 related to improper management of used or waste tires.
Response: See response to Comment 5 above.

Comment 16 Regarding 36.1501(A), the regulation proposes that every collection center must be access-controlled and "only allow entry through specific points by authorized personnel." In the September 2017 PC&E-adopted version of Regulation 36, there was an additional allowance for "Open collection center" which is a location where used tires are collected without the requirement of being attended by authorized personnel. It was the understanding

of the UTPs that this dual system would remain in effect in the final regulation.

Several UTPs currently have un-manned collection trailers strategically placed around their Districts for the convenient collection of used tires from their citizens. As a result, the affected UTPs did not include the extra costs of staffing every collection center in their submitted business plans. Many of these collection centers are in very remote locations and will require significant man-hours to adequately provide convenient collection from the citizens of that area.

The Association requests that PC&E consider a delay in implementing the requirement for Access Control on each location until 2019. This will allow time for the UTPs to amend their business plans as necessary to allow time for ADEQ staff to review and approve the revised plans. We also request that the ADEQ Director be allowed to extend the implementation deadline in the event that adequate funds are not available for increased business plan rates.

Response: During the process of developing the draft of final proposed Reg. 36, it was determined that since the Used Tire Recycling and Accountability Act, Ark. Code Ann. § 8-9-401 et seq., requires shipments of tires to tire collection centers to be manifested as a measure of accountability, tire collection centers needed to be access-controlled. However, Reg. 36.1501(B), as proposed, does contain an allowance for a UTP board to request a one-time exception to ADEQ granting them the ability to establish an open-collection center for special non-profit or household collection events. Reg. 36.1501(B) is being amended to read "A board may establish annually a one-time event for a temporary open-collection center for non-profit or household collection events. Any additional events the board wants to establish that same calendar year must be approved by the Director. The approved length of time to operate a temporary open-collection center will be determined on a case-by-case basis."

ADEQ acknowledges many of the UTPs' tire collection centers are located in rural areas. ADEQ also acknowledges access-controlled tire collection centers require personnel to man these locations which incur personnel expenses. For this reason, ADEQ encourages the districts to coordinate with available manned county facilities as a viable location for the required access-controlled tire collection centers. ADEQ has only issued

conditional approval of the current business plan rates and conducted outreach to UTPs expressing to them if they needed to make amendments to their business plans due to regulatory requirements such as this, they could propose amendments to ADEQ. As a matter of record, several UTPs have already taken these measures and received adjusted business plan rates.

Ark. Code Ann. § 8-9-407(a)(3) requires the use of manifests to report all information related to the collection, transportation, distribution, and recycling or disposal of recyclable tires, waste tires, and used tires culled for resale by tire collection centers and the need for accountability for accurate reimbursement.

Comment 17 36.1506(B)(2) requires a weekly inspection of every collection center. Many of these collection centers are operated on behalf of the UTPs by counties and/or cities or are in very remote locations. The requirement for weekly inspections will cause a hardship for many UTPs. We request that PC&E consider amending 36.1506(B)(2) to require a monthly inspection of the collection centers.
Response: Reg. 36.1506(B)(2) has been changed to require monthly inspections of the tire collection centers.

Comment 18 Regarding 36.1610, there is a requirement that all Tire Processing Facilities now submit a Disclosure Statement. However, many of the Tire Processing Facilities are owned and operated by a Used Tire Program, which is a government entity and not required to file Disclosure Statements. We request that PC&E consider amending 36.1610 to add the words "unless exempt."
Response: Reg. 36.1610 has been amended to read: (A) Except as provided under subsection (B) of this section, the applicant shall file a disclosure statement at the time the application is submitted.
(B) The following entities are exempt from filing a disclosure statement under this section:
(1) The federal government;
(2) Other state government agencies, boards, and commissions;
(3) Local governments including counties, cities, and municipalities; and
(4) Regional solid waste districts authorized under the laws of the State of Arkansas.

Comment 19 The Association believes that ADEQ is over-stepping their authority by requiring a Professional Engineer to

sign off on the Collection Center Permit application (TAP-6). This is not mandated in the proposed Regulation 36 nor in the law. We request that PC&E amend 36.1503(A) to define the minimum requirements for obtaining a collection center permit. We further request that separate categories and requirements be defined for a collection center building versus only a collection trailer.

We deeply appreciate the Commission and ADEQ's consideration of these comments and suggested revisions.
Response: See response to Comment 6 above.

Jan Smith, Executive Director, White River Regional Solid Waste Management District

The White River Regional Solid Waste Management District is submitting the following comments regarding Regulation 36. We support the comments provided by the Arkansas Association of Regional Solid Waste Management Districts that were submitted March 14th. There are specific comments that we want to include.

Comment 20 Regulation 1501(A) We were told at stakeholder meetings by ADEQ personnel that open collection centers would be allowed. In rural Arkansas these are standard methods of collection. The purpose of collection centers is to collect waste tires so that they are not dumped along the roadside, in ditches and ravines, or left in unattended areas. They have served our District well over the past twenty five years. They have helped us prevent illegal dumping and other problems within our counties. We have 54 26-foot long open trailers that are placed in convenient places for the collection of waste tires. Some serve local dealers only, others are at designated collection sites, and others are dropped at locations upon request for short time periods. The cost of creating access-controlled sites with entry through specific points by authorized personnel will increase our costs significantly, encourage illegal dumping and create additional problems for the used tire program. We have proven situations where access-controlled sites do not solve any accountability issues or prohibit access. One access-controlled site we currently have in Batesville at a local tire dealer has illustrated that this does not work. The site has an 8 foot fence around the trailer which is locked. At night the site is either accessed by climbing the fence, by cutting the fence or just leaving tires piled up outside the fence. They will back a truck up to the fence and climb from the bed of the truck into the fenced area to the trailer. This is not an isolated site but is located

at an intersection of the main highway through town and another highway. We request that we be allowed to continue our sites that work well for us. If people want access they will get access.

In our most rural counties we have minimal choices for access controlled sites. We have handled some of the cases by taking a trailer to a specific tire dealer for several days and allowing tires to be collected until the trailer is full. These pick up events might happen once or twice a year. There is not enough business to create the need for full time trailer to be sited. Our collection program has evolved over time and the decisions used are based on best practices learned for that county.
Response: See response to Comment 16 above.

Comment 21 Regulation 36.1501(B) The Used Tire Program Board should not be required to petition ADEQ to conduct a temporary open-collection center for events. County collections and other type collection events should be at the discretion of the Board. This adds a time consideration and burden on the UTP.
Response: The Used Tire Recycling and Accountability Act, Ark. Code Ann. § 8-9-401 et seq., requires ADEQ to establish a program that is accountable and sustainable. Reg. 36.1501(B) is being amended to read "A board may establish annually a one-time event for a temporary open-collection center for non-profit or household collection events. Any additional events the board wants to establish that same calendar year must be approved by the Director. The approved length of time to operate a temporary open-collection center will be determined on a case-by-case basis."

Comment 22 Regulation 36.1506(B)(2) Since our collection sites are served by a 26-foot long trailer the need for weekly inspections is excessive. We request that it be revised to address the type of site. If the site is only a trailer the site should be inspected less frequently such as quarterly. We do not have collection sites where tires are stacked on the ground. We also request a minimum tire number be included before a collection center permit is required as it was in Regulation 14. When the collection site is only one trailer with a maximum capacity of 400 tires, it is a burden to have a permit.
Response: Reg. 36.1506(B)(2) has been amended to require monthly inspections of the tire collection centers. Ark. Code Ann. § 8-9-405 does not include a minimum tire quantity before a tire collection center permit would be required. Reg. 36.1508 contains provisions for a permitted tire collection center to collect a

maximum of five thousand (5,000) loose tires or a maximum of ten thousand (10,000) compacted and baled tires at each permitted site.

Comment 23 Regulation 3.1508 A storm water permit should not be required for an open-top container or trailer. Tarping the trailer or putting it under a structure is a burdensome requirement when tires are designed to be out in the weather. Water touching waste tires is not an environmental hazard.

We appreciate your consideration of our comments in addition to the comments submitted by the Arkansas Association of Regional Solid Waste Management Districts.
Response: Reg. 36.1508(B)(1)(d)(ii), as proposed, reads "if an open-top container or trailer is used as a tire storage area at a tire collection center, a storm water permit will not be required if the container or trailer is covered with a tarp or placed under some type of constructed cover during inclement weather or when the business is closed."

Accumulated water in a trailer or open-top container of tires could create a breeding ground for vector-type diseases.

Reg. 36.1508(B)(1)(c) has been amended to read "Storm water control methods shall comply with all applicable federal and state laws, regulations, rules, and permits." This criterion applies to sections such as Reg. 36.1508(B)(1)(d)(iii) which has been amended to read "If the tire storage area is open, uncovered, or not enclosed on all sides of the container or trailer, a storm water permit may be required unless written notice is received from the Department that a permit is not required."

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

(1) Reg. 36.302 – Regulation 36.302 appears to be premised upon the provisions of Arkansas Code Annotated § 8-9-405(b), but the regulation appears to lack the provision of Ark. Code Ann. § 8-9-405(b)(10). That said, similar language to that omitted is found in Reg. 36.1501(A). Is that the reason the language was not included in Reg. 36.302? **RESPONSE:** Yes, 8-9-405(b)(10) is referring to Tire Collection Centers. Thus, the provisions of 8-9-405(b)(10) were listed in Chapter 15 of proposed Regulation No. 36.

(2) Reg. 36.305 – It appears that Arkansas Code Annotated § 8-9-414(b)(7) allows the Commission to establish the number of tires that each individual who is a resident of a regional solid waste management district may discard monthly without a fee, but provides that the maximum number of tires under this provision "shall not be more than four (4) tires per month." Ark. Code Ann. § 8-9-414(b)(7)(B). Regulation 36.305, however, appears to allow a used-tire program to accept more than four (4) used tires of any size per month without an additional fee under certain circumstances. Can you reconcile this for me? **RESPONSE:** Regulation No. 36.305 does contain a provision to allow a used-tire program to accept more than the four (4) used tires of any size each month without an additional fee under certain circumstances. Those circumstances are defined in Regulation No. 36.305(B). Arkansas Code Annotated § 8-9-414(b)(7)(A) is referring to a resident. Because the premises of Act 317 is to also encourage voluntary recycling, reuse, and long-term sustainability, a provision is proposed in Regulation No. 36.305(B) allowing volunteer group activities or government entities to be able to bring "clean up" tires to their district in a quantity greater than four (4). In turn, the Department will disburse funds to the district under an approved business plan rate provided the District does not charge a fee. This also lends support of getting tires removed from unwanted locations and limiting risk of potential exposure to the surrounding communities.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact. Any implementation cost for the rule is funded by tire fees that are required to be collected under Act 317 of 2017, the Used Tire Recycling and Accountability Act, Ark. Code Ann. § 8-9-401 et seq., and are collected as special revenue. Available funding for the program is limited to the special revenues collected.

LEGAL AUTHORIZATION: The instant rulemaking continues the implementation of Act 317 of 2017, sponsored by Representative Lanny Fite, which created the Used Tire Recycling and Accountability Program. Pursuant to Arkansas Code Annotated § 8-9-414(a), as amended by Act 317, § 1, the Arkansas Pollution Control and Ecology Commission ("Commission") shall promulgate regulations to carry out the intent and purposes of the Used Tire Recycling and Accountability Act ("Act"), codified at

Ark. Code Ann. §§ 8-9-401 through 8-9-415, as amended by Act 317, § 1. The regulations shall: (1) provide for the administration of permits for tire processing facilities, tire collection centers, commercial generators, and any other person or entity that collects, receives, processes, recycles, or disposes of used tires regulated under the Act with the maximum permit fee not to exceed two hundred fifty dollars ($250) annually;[1] (2) establish standards for tire processing facilities, tire collection centers, tire transporters, and beneficial use projects; (3) establish procedures for administering reimbursements to used tire programs under Ark. Code Ann. § 8-9-405; (4) unless otherwise provided by law, authorize the final disposition of waste tires at a permitted solid waste disposal facility if the waste tires have been cut into sufficiently small parts for proper disposal and in compliance with the Act and all other applicable provisions in Title 8 of the Arkansas Code; (5) establish procedures for administering the electronic uniform used tire manifest system; (6) establish accountability procedures for the sustainability of used tire programs operated under the Act; and (7) establish the number of tires that each individual who is a resident of a regional solid waste management district may discard monthly without a fee.[2] *See* Ark. Code Ann. § 8-9-414(b)(1)–(7), as amended by Act 317, § 1. The Commission may: (1) develop an alternative tire transporter licensing program to be administered by used tire programs, regional solid waste management boards, or both; (2) promulgate regulations that are necessary to administer the fees and reimbursement rates for services provided under the Act by the used tire programs; and (3) clarify and add definitions for sizes of tires using technical information and specifications. *See* Ark. Code Ann. § 8-9-414(c)(1)–(3), as amended by Act 317, § 1. The Commission shall additionally encourage the establishment of voluntary tire collection centers where used tires generated in Arkansas can be deposited, which shall include without limitation tire retailers, tire processing facilities, and solid waste disposal facilities, but shall not include the collection of tires generated by a tire manufacturer. *See* Ark. Code Ann. § 8-9-414(d)(1)–(3), as amended by Act 317, § 1. Finally, the Commission shall not prohibit the disposal of waste tires in landfills or monofills for

[1] The maximum permit fee shall not apply to tire transporters. *See* Ark. Code Ann. § 8-9-414(b)(1)(B), as amended by Act 317, § 1.

[2] The maximum number of tires under this provision shall not be more than four (4) tires per month. *See* Ark. Code Ann. § 8-9-414(b)(7)(B), as amended by Act 317, § 1.

three (3) years from August 1, 2017. *See* Ark. Code Ann. § 8-9-414(e), as amended by Act 317, § 1.

5. DEPARTMENT OF HUMAN SERVICES, COUNTY OPERATIONS (Mary Franklin)

a. SUBJECT: Amendment of SNAP 1622.20 Regarding Drug Disqualifications in SNAP

DESCRIPTION: The proposed rule change will allow individuals with a felony drug conviction to participate in the SNAP Program pursuant to Act 566 of 2017.

PUBLIC COMMENT: The Department did not hold a public hearing. The public comment period ended on June 2, 2018. The Department received no public comments.

The proposed effective date is August 1, 2018.

FINANCIAL IMPACT: The impact on federal funds for the current fiscal year is $195,741 and $2,348,892 for the next fiscal year. There is no state impact to implement this rule.

LEGAL AUTHORIZATION: The Department is authorized to "make rules and regulations and take actions as are necessary or desirable to carry out the provisions of this chapter [Public Assistance] and that are not inconsistent therewith." Arkansas Code Annotated § 20-76-201 (12). DHS is also authorized to promulgate rules as necessary to conform to federal rules that affect its programs as necessary to receive any federal funds. *See* Ark. Code Ann. § 25-10-129(b).

Act 566 of 2017, sponsored by Representative John Walker, created the Helping Our People Excel (H.O.P.E.) Act. The Act eliminated state or federal felony drug convictions as disqualifications for SNAP program eligibility by opting out of Section 115 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). *See* Ark. Code Ann. § 20-76-409. Section 115 of PRWORA disqualified applicants with a felony drug conviction from participating in SNAP. Federal law allows State legislatures to opt out of the drug conviction disqualification. *See* 7 C.F.R. §273.11(m).

b. SUBJECT: TEA Policy 2230 Drug-Related Convictions

DESCRIPTION: Arkansas elected to opt out of section 1155 of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, which disqualifies Transitional Employment Assistance (TEA) applicants and recipients from participation in the TEA and other Temporary Assistance to Needy Families (TANF)-funded programs due to certain drug-related felonies.
References to drug-related offenses have been removed from the TEA manual. TEA 2201 – "Felony Drug Conviction" has been removed from the list. TEA 2230 – The Drug-Related Convictions section has been removed from policy.

PUBLIC COMMENT: The Department did not hold a public hearing. The public comment period ended on June 2, 2018. The Department received no public comments.

The proposed effective date is August 1, 2018.

FINANCIAL IMPACT: The financial impact for the next fiscal year will be $134,641.23 ($5,594.62 in general revenue and $129,046.61 in federal funds).

LEGAL AUTHORIZATION: The Department is authorized to "make rules and regulations and take actions as are necessary or desirable to carry out the provisions of this chapter [Public Assistance] and that are not inconsistent therewith." Arkansas Code Annotated § 20-76-201 (12). DHS is also authorized to promulgate rules as necessary to conform to federal rules that affect its programs as necessary to receive any federal funds. *See* Ark. Code Ann. § 25-10-129(b).

Act 566 of 2017, sponsored by Representative John Walker, created the Helping Our People Excel (H.O.P.E.) Act. The Act eliminated state or federal felony drug convictions as disqualifications for TEA program eligibility by opting out of Section 115 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). *See* Ark. Code Ann. § 20-76-409. Section 115 of PRWORA disqualified applicants with a felony drug conviction from participating in TEA. Federal law allows State legislatures to opt out of the drug conviction disqualification. *See* 7 C.F.R. § 273.11(m).

c. SUBJECT: Arkansas Works Program Updates

DESCRIPTION: This revises Medical Services policy to comply with the Arkansas Works Waiver by reinstating the original eligibility income limit for the program to 138% of the federal poverty level, removing references to employer sponsored insurance, and adding extenuating circumstances as a good cause exemption for the work and community engagement requirement.

Additionally, new language provides for possible consequences of repayment, disqualification, and prosecution for fraud if a recipient provides false or incomplete information. If a case is selected for a Quality Assurance Review, additional verification from a recipient may be required.

PUBLIC COMMENT: The Department did not hold a public hearing. The public comment period ended on May 22, 2018. The Department received no public comments.

While CMS did not approve the proposed income eligibility cap at 100 percent of the Federal Poverty Level, other aspects of the Arkansas Works Waiver amendment were approved in March of 2018. The emergency rule was approved by the Executive Committee on April 19, 2018, with an effective date of May 1, 2018.

The proposed effective date for permanent promulgation is August 1, 2018.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Department is authorized to "make rules and regulations and take actions as are necessary or desirable to carry out the provisions of this chapter [Public Assistance] and that are not inconsistent therewith." Arkansas Code Annotated § 20-76-201 (12). DHS is also authorized to promulgate rules as necessary to conform to federal rules that affect its programs as necessary to receive any federal funds. *See* Ark. Code Ann. § 25-10-129(b).

Part of the proposed amendments to existing rules is specifically authorized by Act 6 of the first Extraordinary Session of the 91st General Assembly and Arkansas Works Section 1115 Demonstration #11-W-00287/6, submitted in 2017. The Arkansas

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

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

a. SUBJECT: Section I-2-18; Billing

DESCRIPTION: New Medicaid billing software is designed to make capitation payments prospectively with an annual reconciliation feature. This differs from how providers were previously paid retrospectively. Generally, capitation payments are fixed, pre-arranged payments received by a physician, clinic, or hospital per patient. Payments will remain the same, but the scheduled payment dates have changed.

PUBLIC COMMENT: The Department did not hold a public hearing. The public comment period ended on June 12, 2018. The Department received no public comments.

The proposed effective date is August 1, 2018.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Department is authorized to "make rules and regulations and take actions as are necessary or desirable to carry out the provisions of this chapter [Public Assistance] and that are not inconsistent therewith." Arkansas Code Annotated § 20-76-201 (12). DHS is also authorized to promulgate rules as necessary to conform to federal rules that affect its programs as necessary to receive any federal funds. *See* Ark. Code Ann. § 25-10-129(b).

b. SUBJECT: State Plan Amendment #2018-005; Outpatient Hospital Services for Border Hospitals

DESCRIPTION: The purpose of the proposed rule is to provide special consideration to border city university-affiliated pediatric teaching hospitals regarding outpatient hospital access payments due to the higher costs typically associated with such hospitals.

Effective for claims with dates of service on or after January 1, 2018, outpatient hospital facility services provided to patients under the age of 21 at border city university-affiliated pediatric teaching hospitals will be reimbursed based on reasonable costs with interim payments and a year-end cost settlement. The State will utilize cost data in a manner approved by CMS consistent with the method used for identifying cost for the private hospital access payments.

Arkansas Medicaid will use the lesser of the reasonable costs or customary charges to establish cost settlements. Except for graduate medical education costs, the cost settlements will be calculated using the methods and standards used by the Medicare Program.

PUBLIC COMMENT: The Department did not hold a public hearing. The public comment period ended on June 15, 2018. The Department received no public comments.

CMS approved the changes. The proposed effective date is August 1, 2018.

FINANCIAL IMPACT: The cost to implement this rule in the next fiscal year is $3,223,502 ($947,710 in general revenue and $2,275,792 in federal funds).

Since the increased cost is at least $100,000 per year to a private individual, private entity, private business, state government, county government, municipal government, or to two or more of those entities combined, the agency provided the following additional information:

(1) a statement of the rule's basis and purpose;
This rule's basis and purpose is to increase access to care for Medicaid patients.

(2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute; **To provide access and an alternative for children services that may or may not be available currently at affiliated pediatric teaching hospital.**

(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; **This rule would decrease the single case agreements as the state would have an alternative pediatric teaching hospital available.**

(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; **There are no alternatives to 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; **Not Applicable**

(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; **Not Applicable**

(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 costs.**

LEGAL AUTHORIZATION: The Department is authorized to "make rules and regulations and take actions as are necessary or desirable to carry out the provisions of this chapter [Public Assistance] and that are not inconsistent therewith." Arkansas Code Annotated § 20-76-201 (12). The Department is also authorized to promulgate rules as necessary to conform to federal rules that affect its programs as necessary to receive any federal funds. *See* Ark. Code Ann. § 25-10-129(b).

c. **<u>SUBJECT</u>: Section 1-1-18; Section III-1-18; Outpatient Behavioral Health Services-2-18; Federally Qualified Health Clinic-1-18; Hospital-1-18; Physician-1-18; Rural Health-1-18; and State Plan Amendment-2018-002 - Telemedicine**

<u>DESCRIPTION</u>: In accordance with Act 203 of 2017, the originating site for telemedicine services will be covered for Arkansas Medicaid beneficiaries. This will not affect current benefit limits.

Effective August 1, 2018, Arkansas Medicaid will cover the originating site facility fee for Telemedicine Services retroactively for dates of service on or after April 10, 2018.

<u>PUBLIC COMMENT</u>: The Department held a public hearing on April 30, 2018. The public comment period ended on May 9, 2018. In May, the Department received public comments from two organizations, including the following:

On behalf of the **Developmental Disabilities Provider Association (DDPA)** and the **Arkansas Medical Society**, Robert Wright, an attorney from Mitchell, Blackstock, Ivers, Sneddon, PLLC, sent letters on May 8, 2018, regarding the proposed rules to implement the state's telemedicine statute into Medicaid. He noted that the statute required that all payers reimburse telemedicine as they would the same service face-to-face, effective January 1, 2018, and that DDPA is fully supportive of the responsible use of Telemedicine in the Medicaid program.

A. All of the changes in the manuals show an effective date of July 1, 2018. The State Plan Amendment is dated January 1, 2018. The transmittal letters say the manuals have been updated effective July 1, 2018, for dates of service on or after January 1, 2018. Given these different dates, we are seeking clarification on how all of the manual provisions and state plan amendment fit together. Are we correct that if a telemedicine service was provided on March 1, 2018, (or any date between January 1, 2018, and June 30, 2018) in accordance with the provisions in Section I of the manual, that service will be paid if submitted to Medicaid on or after July 1, 2018?

B. Another area requiring clarification is the requirement for the originating site (the site where the patient is physically located during a telemedicine encounter). State statute does not limit the

location of the origination site. It simply states that a health benefit plan must pay a fee to an originating site that is operated by a healthcare professional or a licensed healthcare entity if the professional or entity are authorized to bill the health plan directly. However, the statute does not require that the originating site be such a facility. It could be a school, for example. In that case, because the school cannot bill the health plan, the health plan is not required to pay a facility fee to the originating site.

Section 105.190 of the proposed manual release is not clear but seems to require the originating site to be the office of a healthcare professional or a healthcare entity enrolled in Medicaid. Proposed Section 305.000 says in the third paragraph: "The originating site must be operated by a healthcare professional or licensed healthcare entity authorized to bill Medicaid directly for healthcare services to facilitate a high-quality interaction, including both telecommunication and clinical aspects of the telemedicine visits."

It appears that the proposed manual release has gone further than the law authorizes, perhaps unintentionally, when it requires health plans to pay for telemedicine services. The statute certainly allows the originating site to be the office of a healthcare professional or a healthcare entity, but it does not require it. We would request that the proposed manual release be changed to be consistent with state law by not restricting the originating site to the office of a healthcare professional or a healthcare entity that is able to bill the Medicaid program.

AGENCY RESPONSE:

A. With regard to a clarification on the effective date of the service, the dates of service will be retroactive to January 1, 2018, as this was necessary to meet the requirements of the Act.

B. With regard to the concern about the requirements of the originating site, DHS considered it before filing the final rule. No changes were made because for billing purposes, all originating sites must be Medicaid-enrolled providers.

Laura Kehler Shue, an attorney with the Bureau of Legislative, asked a follow-up question to DHS's response. There is still a concern that the response is not clarifying or addressing the specific "originating site" issue that Robert Wright raised in his letters with regard to the Provider Manual, particularly, Section 105.190 and the third paragraph in Section 305.000 Telemedicine Billing Guidelines. He asserts that the rule language appears to go

further than Act 203 allows by requiring that the originating site "be operated by a healthcare professional or licensed healthcare entity" and "to facilitate a high-quality interaction, including both telecommunication and clinical aspects of the telemedicine visits." As the definition of "originating site" in Ark. Code Ann. § 23-79-1601 no longer requires "offices of a healthcare profession or a licensed healthcare entity," is there any specific response to the concern about this language that some may argue is extraneous and perhaps adding a higher standard than the law in Act 203 requires?

AGENCY RESPONSE: The language for Section 105.190 Telemedicine was taken directly from Act 203 as illustrated below. As DHS reimburses Medicaid providers and a provider must be authorized to bill Medicaid in order to be reimbursed by Medicaid, when composing policy 105.190 we substituted "Arkansas Medicaid" for "health benefit plan."

Section 105.190 Telemedicine
Payment will include a reasonable facility fee to the originating site operated by a licensed or certified healthcare professional or licensed or certified healthcare entity if the professional or entity is authorized to bill Arkansas Medicaid directly for healthcare services.

23-79-1602. Coverage for Telemedicine
(d)(1) A health benefit plan shall provide a reasonable facility fee to an originating site operated by a healthcare professional or a licensed healthcare entity if the healthcare professional or licensed healthcare entity is authorized to bill the health benefit plan directly for healthcare services.

DHS will not be changing this portion of policy based on Mr. Wright's comment.

The proposed effective date of the rule is August 1, 2018. DHS originally intended for the proposed rules to be effective on July 1, 2018, while allowing providers to retroactively bill back to January 1, 2018. CMS initially had concerns about the retroactive effective date, but providers will be allowed to bill retroactively back to April 10, 2018.

FINANCIAL IMPACT: The estimated additional cost to implement the rule is $110,831 for the current fiscal year ($32,606

in general revenue and $78,225 in federal funds) and $499,424 for the next fiscal year ($146,831 in general revenue and $352,593 in federal funds).

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

The Telemedicine Act, Act 203 of 2017, sponsored by Senator Cecile Bledsoe, amended the definition of "telemedicine" and "originating site," addressed requirements of a professional relationship when using telemedicine, added standards, and addressed insurance coverage. "Originating Site" is defined as a site at which a patient is located at the time healthcare services are provided to him or her by means of telemedicine. *See* Ark. Code Ann. § 17-80-402(3) and § 23-79-1601(4). The effective date of the insurance coverage portion of the Act is January 1, 2018.

7. NORTHEAST ARKANSAS REGIONAL SOLID WASTE MANAGEMENT DISTRICT (Robert Thompson and Jason Wolfenbarger)

a. SUBJECT: Northeast Arkansas Regional Solid Waste Management District Rules and Regulations

DESCRIPTION: The purpose of the proposed rules and regulations by the NEARSWMD is to set forth the schedule of fees for the hauling and disposal of solid waste, to describe the makeup of the board, and to limit waste transfers outside the district, within the state of Arkansas. The subjects and issues involved in the district's rules and regulations include the following: Practices and Procedures of the District, Certificates of Need, Waste Tire Program, Waste Hauler Program, Solid Waste Facilities, Solid Waste Assessment, Waste Transfer, and Illegal Dumps Program.

The only landfill in the district is operated by the district itself, and not by a private entity. These proposed rules establish reasonable fees for the hauling and disposal of solid waste, provide a reasonable plan of licensing to waste haulers, and allow for the financial viability of the district. Private waste haulers will be required to comply with the regulations and pay fees for vehicles

and disposal of solid waste. The proposed rules apply to all professional solid waste haulers but do not impose different standards or fees for waste haulers of different sites. There are currently six private waste haulers operating within the four counties that makeup the district.

Under the proposed rules and regulations, professional waste haulers must pay a fee to NEARSWMD of $30 per vehicle per year. Fees are assessed for waste generated in the district or generated outside the district and transported to the district. These fees include $11.75 per yard for all loose solid waste, $12.50 per yard for all compacted solid waste, and $34 per yard for all "special waste," including polluted or contaminated soil, sludge, or other polluted or contaminated materials. These rules are similar to rules and regulations of other regional solid waste management districts throughout Arkansas, and they should be easily implemented by small businesses.

PUBLIC COMMENT: The Board did not hold a public hearing. The public comment period expired on June 11, 2018. The Board received no comments.

Laura Kehler Shue, a Legislative Attorney with the Bureau of Legislative Research, asked the following questions:

1. In the "**Waste Hauler's License**" section, a fee is referenced on page 12, is this the "reasonable licensing fee" authorized by Ark. Code Ann. § 8-6-721 (f)?
2. Near the bottom of page 12, the section provides, "Any person with a Solid Waste Hauler' License must pay the license before December 1 of the year for which the license is issued." Should it read, "…must pay the license fee…?"
3. On page 14, **§7.04, Fees**, a hauler shall pay a $30 fee per vehicle. Is this assessed per year as referenced on page 12?
4. In the "**Solid Waste Assessment**" section, on page 17, upon which statutory or regulatory authority are you basing the fee amounts of $11.75 per yard for loose, $12.50 per yard for compacted and $34 per yard for special waste? Is this found in PC and E's Regulations, or is it the same type of fee in Ark. Code Ann. § 8-6-714? (allowing for a fee of no more than two dollars ($2.00) per ton of solid waste related to the movement or disposal of solid waste within the district, including without limitation fees and charges related to the district's direct involvement with

disposal or treatment; or that support the district's management of the solid waste needs of the district).

DISTRICT RESPONSE:

1. Yes
2. Yes
3. Yes
4. The District relies on the authority of Ark. Code Ann. § 8-6-711 to operate and maintain the landfill. ADEQ must approve the district's plan, and the fees were included with the approved plan pursuant to Pollution Control and Ecology Commission Regulations.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: These rules include fees for waste haulers and waste disposal at the landfill operated by the district. The rules do not provide for fee increases from current fees charged by the district, so there should be no increased costs.

LEGAL AUTHORIZATION: A regional solid waste management board has the power to adopt rules under the Administrative Procedure Act as are reasonably necessary to assure public notice and participation in any findings or rulings of the board and to administer the duties of the board. *See* Ark. Code Ann. § 8-6-704 (a)(6). The regional board has the power to carry out all other powers and duties conferred by the solid waste disposal statutes. *See* Ark. Code Ann. § 8-6-704 (a)(12). The regional board may impose more stringent standards for a license to haul solid waste than the minimum standards set by the Pollution Control and Ecology Commission. *See* Ark. Code Ann. § 8-6-721 (e). The licensing standards include financial responsibility, s*ee* Ark. Code Ann. § 8-6-721 (d), and may include a reasonable licensing fee, which is authorized by Ark. Code Ann. § 8-6-721 (f). The misdemeanor criminal penalty for violating the statutory law or any solid waste hauler regulation is authorized by Ark. Code Ann. § 8-6-722.

The Pollution Control and Ecology Commission's Regulation No. 9 provides limits for solid waste permit fees. Regulation No. 22 provides that all operations at a landfill shall be in accordance with a permit, approved plans, and operating plan and narrative and all other applicable regulations. Regulation No. 11 allows collection

of Solid Waste Disposal Fees for waste received at a landfill. The District Board also relies on its approved plan for operations and states that the assessment fee is authorized by Ark. Code Ann. § 8-6-711, under which a district solid waste management system is authorized to own, acquire, construct, reconstruct, extend, equip, improve, operate, maintain, sell, lease, contract concerning, or otherwise deal in facilities of any nature necessary or desirable for the control, collection, removal, reduction, disposal, treatment, or other handling of solid waste.

A regional solid waste management board may fix, charge, and collect rents, fees, and charges of no more than two dollars ($2.00) per ton of solid waste, or if weight tickets are not available, the fee shall be calculated on a volume basis related to the movement or disposal of solid waste within the district, including without limitation fees and charges related to the district's direct involvement with the district's disposal or treatment; or that support the district's management of the solid waste needs of the district. *See* Ark. Code Ann. § 8-6-714.

8. <u>STATE BOARD OF PHARMACY</u> (Dr. Brenda McCrady)

a. <u>SUBJECT</u>: Regulation 5: Long-Term Care Facilities

<u>DESCRIPTION</u>: These changes update language regarding destruction of unused drugs for long-term care facilities to remove outdated language, update emergency kit guidelines for use in long-term care, and establish a list of emergency medications that can be used in Crisis Stabilization Units.

<u>PUBLIC COMMENT</u>: A public hearing was held on June 6, 2018, and the public comment period expired on that date. Public comments were as follows:

<u>Summary of Verbal Comments Against</u>:
There were no comments against this proposed regulation change.

<u>Summary of Verbal Comments For:</u>
John Rocchio – Director, Pharmacy Regulatory Affairs
Delivered letter with comments on proposed regulation changes and also verbally reiterated those comments. They were in support of the regulation changes with one suggestion to remove references to the classifications of medications that can be utilized in

Emergency Kits in LTC and leave those decisions up to the pharmacy and the facility director.

The Board accepted the written and verbal comments and responded in kind to these comments by explaining that this change is doing exactly what is being asked by opening up the ability for the Board and facilities as well as their supplying pharmacies to manage this list in a less prescriptive manner to better meet the needs of patients in Long Term Care.

The Board would also note that the absence of further comments is likely due to the work done in preparing these proposed changes consisting of meetings with industry representatives multiple times to develop the rule in a cooperative manner with representatives from Long Term Care facilities as well as consultant pharmacies specializing in LTC matters.

Jessica Sutton, an attorney for the Bureau of Legislative Research, asked the following question: The new language refers to "guidelines" that the Board will set for the specific quantities of the approved medications that will be reviewed biennially or periodically. Are these guidelines going to be published somewhere? Are they going to be promulgated? **RESPONSE:** We have them for publication and have worked with the industry to develop lists that will be presented with the regulation discussion.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Arkansas State Board of Pharmacy is authorized to make "reasonable rules and regulations, not inconsistent with law, to carry out the purposes and intentions of this chapter [Ark. Code Ann. § 17-92-101 et seq.] and the pharmacy laws of this state that the board deems necessary to preserve and protect the public health." Ark. Code Ann. § 17-92-205(a)(1).

b. SUBJECT: Regulation 8: Wholesale Distribution

DESCRIPTION: The proposed changes clarifies language in Regulation 8 to match statutory language in § 17-92-108 and it allows an outsourcing facility to operate under a single permit if they do not provide medications directly to patients.

PUBLIC COMMENT: A public hearing was held on June 6, 2018, and the public comment period expired on that date. The Board did not receive any verbal or written comments for or against this proposed change. According to the Board, this is likely due to the fact that the Board sought feedback from involved industry when developing these proposed changes.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Arkansas State Board of Pharmacy is authorized to make "reasonable rules and regulations, not inconsistent with law, to carry out the purposes and intentions of this chapter [Ark. Code Ann. § 17-92-101 et seq.] and the pharmacy laws of this state that the board deems necessary to preserve and protect the public health." Ark. Code Ann. § 17-92-205(a)(1).

9. PULASKI COUNTY REGIONAL SOLID WASTE MANAGEMENT DISTRICT (Craig Douglass)

a. SUBJECT: Regulation 4: Hauler Licensing

DESCRIPTION: The Pulaski County Regional Solid Waste Management District proposes amendments to the district's Regulation 4 governing hauler licensing. The amendments are necessary to make Regulation 4 consistent with Regulation 22 of the Arkansas Pollution Control and Ecology Commission. The amendments regard penalties for failure to obtain a license for the hauling of solid waste in Pulaski County and for failure to comply with the regulation. In addition, the amended regulation further defines the duties and responsibilities of haulers of solid waste in Pulaski County and of permitted landfills in Pulaski County.

PUBLIC COMMENT: The Board did not hold a public hearing. The public comment period expired on June 15, 2018. The Board received no comments.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: Solid waste haulers correctly participating in the hauler license program already endure an existing financial impact based on their number of vehicles licensed and the cubic yard size of those vehicles. That aspect of Reg. 4 will not change. In other words, there is no new financial impact for those that have properly participated in the program to continue participation as normal. However, an added financial impact of revising the regulation is effective for **ANY** participant that does not renew by March 1 (all hauler licenses expire on December 31 every year). A 20% penalty will be added to their license amount after March 1, again varying from vendor to vendor based on number and cubic yard size of vehicles licensed.

The only other financial impact that can occur is for haulers that have never participated in the program. It can be considered a financial impact for them to comply with Reg. 4 as required by § 8-6-721.

LEGAL AUTHORIZATION: A regional solid waste management board has the power to adopt rules under the Administrative Procedure Act as are reasonably necessary to assure public notice and participation in any findings or rulings of the board and to administer the duties of the board. *See* Ark. Code Ann. § 8-6-704 (a)(6). The regional board has the power to carry out all other powers and duties conferred by the solid waste disposal statutes. *See* Ark. Code Ann. § 8-6-704 (a)(12).

The regional board may impose more stringent standards for a license to haul solid waste than the minimum standards set by the Pollution Control and Ecology Commission. *See* Ark. Code Ann. § 8-6-721 (e). The licensing standards include financial responsibility, s*ee* Ark. Code Ann. § 8-6-721 (d), and may include a reasonable licensing fee, which is authorized by Ark. Code Ann. § 8-6-721 (f). The misdemeanor criminal penalty for violating the statutory law or any solid waste hauler regulation is authorized by Ark. Code Ann. § 8-6-722.

G. Adjournment.