

ARKANSAS REGISTER

Transmittal Sheet

Use only for **FINAL** and **EMERGENCY RULES**



Secretary of State

John Thurston

500 Woodlane, Suite 026

Little Rock, Arkansas 72201-1094

(501) 682-5070

www.sos.arkansas.gov



For Office

Use Only:

Effective Date _____ Code Number _____

Name of Agency Arkansas Department of Agriculture

Department Arkansas Natural Resources Division

Contact Wade Hodge E-mail wade.hodge@agriculture.arkansas.gov Phone 501-225-1598

Statutory Authority for Promulgating Rules A.C.A. § 14-234-802 (a)&(d); 14-234-805 & 806

Rule Title: Rules Implementing Act 605 of 2021

Intended Effective Date
(Check One)

☐ Emergency (ACA 25-15-204)

☒ 10 Days After Filing (ACA 25-15-204)

☐ Other _____
(Must be more than 10 days after filing date.)

Legal Notice Published

Final Date for Public Comment

Reviewed by Legislative Council

Adopted by State Agency

Date

November 10 - 12, 2021

December 9, 2021

January 28, 2022

December 15, 2021

Electronic Copy of Rule e-mailed from: (Required under ACA 25-15-218)

Linda Luebke

linda.luebke@agriculture.arkansas.gov

January 31, 2022

Contact Person

E-mail Address

Date

CERTIFICATION OF AUTHORIZED OFFICER

I Hereby Certify That The Attached Rules Were Adopted
In Compliance with the Arkansas Administrative Act. (ACA 25-15-201 et. seq.)


Signature

501-225-1598

Phone Number

wade.hodge@agriculture.arkansas.gov

E-mail Address

Chief Counsel

Title

January 31, 2022

Date



Asa Hutchinson
Governor

ARKANSAS DEPARTMENT OF AGRICULTURE

1 Natural Resources Drive, Little Rock, AR 72205
agriculture.arkansas.gov
(501) 225-1598



Wes Ward
Secretary of Agriculture

January 31, 2022

Honorable John Thurston
Arkansas Secretary of State
State Capitol, Suite 256
500 Woodlane Street
Little Rock, Arkansas 72201-1094

Enclosed is a Transmittal Sheet and a copy of a Final Rule as listed below.

- Rules Implementing Act 605 of 2021

The Rule was approved at the Arkansas Natural Resources Commission meeting held December 15, 2021.

The rule was reviewed and approved by the Administrative Rules Subcommittee of the Arkansas Legislative Council on January 26, 2022 and the Arkansas Legislative Council on January 28, 2022.

If more information is needed, please contact me.

Sincerely,

Wade Hodge
Chief Counsel

WH:ll

Rules Implementing Act 605 of 2021

I. Purpose

1. The purpose of these rules is to:
 - a. Implement Ark. Code Ann. § 14-234-801 et. seq.;
 - b. Provide oversight of retail water providers to promote efficiency in service and stability in fiscal management;
 - c. Provide training and education to governing bodies of retail water providers; and
 - d. Provide training of local, state, and federal leaders on the issues surrounding provider personnel, finances, compliance, and environmental factors.
2. The rules shall be read in conjunction with Ark. Code Ann. § 14-234-801 et. seq.

II. Definitions

The following definitions are supplemental to the definitions in Ark. Code Ann. § 14-234-801 et. seq.:

1. “Annualized Revenue Requirement” means the projected revenue if the recommended increase, as well as all previous recommended increases, is in effect for the full 12-month period.
2. “Commission” means the Arkansas Natural Resources Commission.
3. “Debt Service Coverage Ratio” (“DSCR”) means Net Operating Income divided by Total Debt Service.
4. “Department” means the Arkansas Department of Agriculture, including the Natural Resources Division thereof.
5. “Future Capital Expenses” means the design and construction of new and replacement infrastructure, including any associated labor and fees.
6. “Major Development Project” means a project that exceeds twenty percent (20%) of gross revenues of the provider for the immediately preceding fiscal year.
7. “Non-operating Revenue” means revenue derived from sources other than water use charges.
8. “Net Operating Income” means earnings before interest, tax, depreciation, and amortization (EBITDA) less capital expenditures.
9. “Provider board” as used herein shall have the definition provided in Ark. Code Ann. § 14-234-801(b)(3).
10. “System” means:
 - a. For a provider that provides water service only, the provider’s water system.
 - b. For a provider that provides water service and sewer service, but where the water system and the sewer system are not operated as a joint and integrated undertaking (i.e., when a separate audit is prepared for water and for sewer), the provider’s water system.

- c. For a provider that provides water service and sewer service, and the water facilities are operated as a joint and integrated undertaking (i.e., when water and sewer are combined in a single audit), the provider's joint and integrated water and sewer system.
- 11. "Total Debt Service" means current debt obligations, including but not limited to any interest, principal, sinking fund, and lease payments due in a given year.

III. Refurbishment and Replacement Account

- 1. Refurbishment and Replacement accounts, as required under Ark. Code Ann. § 14-234-802(e), shall only be used to make repairs or to replace ~~water system~~ System appurtenances.
- 2. Providers may designate existing depreciation or replacement accounts as the Refurbishment and Replacement Account required by Ark. Code Ann. § 14-234-802(e), so long as the amount deposited therein complies with the provisions of Ark. Code Ann. § 14-234-802(e).
- 3. The calculation of the amount required to be deposited into a Refurbishment and Replacement Account pursuant to these Rules and Ark. Code Ann. § 14-234-802(e) shall be based on the gross operating revenues of a System.
- 4. The funds shall not be used for routine repairs. Expenditures of \$1,000 or less shall be considered routine repairs.
- 5. Utilization of funds from the Refurbishment and Replacement account must be approved by the Provider Board prior to its use.

IV. Rate Studies for Retail Water Providers

- 1. Retail water providers shall obtain rate studies pursuant to the requirements in Ark. Code Ann. § 14-234-802.
- 2. A provider that plans to undertake a major development project, as defined above and in Ark. Code Ann. § 14-234-802(h)(2), shall obtain a rate study or amend the provider's existing rate study before beginning the major development project to include consideration of the financial impact of the major development project on the fiscal sustainability of the provider.
- 3. Rate studies shall be based on the guidelines of the American Water Works Association and the Water Environment Federation.
 - a. The rate studies shall include:
 - i. Reports containing the following information for the current year and projections for the next five years:
 - 1. A comprehensive cost analysis, including:
 - a. Operations and maintenance (O&M) expenses;
 - b. Financing expenses, including but not limited to debt service payments, bond issuance costs, and commercial paper fees, if applicable;
 - c. Any required cash reserves unavailable to pay for expenses, including but not limited to the annual refurbishment and replacement account deposit requirement as set out in Ark. Code Ann. § 14-234-802(e);
 - d. Depreciation expenses;
 - e. Future capital expenses;
 - f. Expenses required for an annual audit or agreed-upon procedures and compilation report;

- g. Expenses required for rate studies required under Ark. Code Ann. § 14-234-802; and
 - h. Any other expenses not accounted for in paragraphs (a) through (g).
- 2. A comprehensive revenue earnings analysis, including:
 - a. Available Cash balance;
 - b. Non-rate revenue;
 - c. Rate revenue without recommended increases;
- 3. For the five projected years, recommended rate increases and the projected additional revenue derived therefrom;
- 4. Debt Service Coverage Ratios;
- 5. The number of days that the available cash balance could cover O&M expenses without additional revenue;
- 6. Annualized revenue requirement.
- ii. The provider's asset management plan, including:
 - 1. inventory of essential assets and for each essential asset, without limitation, the following information:
 - a. Asset type;
 - b. Annual maintenance costs;
 - c. Year installed;
 - d. Vendor-specified useful life, if available;
 - e. Anticipated date of replacement;
 - f. Installation or replacement cost estimate; and
 - g. Projected consequence of failure.
 - 2. The provider's plan for replacement of essential assets.
- iii. Proposed changes in rates should be based on achieving and maintaining a Debt Service Coverage Ratio of 1.1 or higher.
- iv. An explanation of the provider's chosen rate design; and
- v. Recommendations for any changes to the provider's operations, including a plan on how the changes should be implemented.
- vi. Certification by the entity performing the rate study that such study complies with Ark. Code Ann. § 14-234-801 et. seq. and these Rules.
- b. Rate studies shall be provided to the Department at the time it is provided to Arkansas Legislative Audit under Ark. Code Ann. § 14-234-802(i).
- c. The Commission may request further information necessary to determine a provider's fiscal status, and providers shall cooperate with the Commission's requests.
- d. The Commission may waive any one or more requirement in Section IV(3)(a), above, upon written request.
- 4. Rate studies for providers that operate a joint and integrated water and sewer system shall analyze the total System.
- 5. Rate studies performed shall be an objective and unbiased review of the provider's fiscal status.
- 6. The Commission will maintain a list of approved entities to conduct rate studies as required under Ark. Code Ann. § 14-234-802(f)(1). The Commission may remove an approved entity from its list of approved entities if it determines that an entity violated Arkansas law or Commission rules in performing a rate study.

V. Determinations of Fiscal Distress

1. A Provider will be in Fiscal Distress if the Provider:
 - a. Fails to obtain a rate study as required;
 - b. Fails to implement the rates contained in the completed rate study required within one (1) or two (2) years as provided under ACA 14-234-802(c)(2)(B)(ii)-(iii); or
 - c. Fails to maintain a Debt Service Coverage Ratio of 1.05 or higher.
2. A Provider may be determined to be in fiscal distress if the Provider:
 - a. Does not comply with the training required by Ark. Code Ann. § 14-234-805 and Section VII, below;
 - b. Fails to file with Arkansas Legislative Audit an audit report or agreed-upon procedures and compilation report required by Ark. Code Ann. § 14-234-120;
 - c. Fails to maintain unincumbered cash or cash equivalents in an amount equal to one-twelfth of the total expenses from the most recent fiscal year;
 - d. Fails to adopt budget before the beginning of a new fiscal year providing for sufficient revenues to meet or exceed anticipated expenses during that fiscal year;
 - e. Fails to make all required payments due to the United States Treasury – Internal Revenue Service, Arkansas Department of Finance and Admission, or Arkansas Department of Health;
 - f. Fails to make any bond, loan, or lease payment; or
 - g. Fails to comply with an administrative order of the US Environmental Protection Agency, Arkansas Department of Health or Arkansas Division of Environmental Quality concerning operation and maintenance of the system.
3. Providers determined to be in fiscal distress shall submit to the Department an improvement plan as required in Ark. Code Ann. § 14-234-802(k) detailing in writing the provider's plan to resolve the violation or violations of rule or law or the provider's plan to resolve its fiscal insufficiency that caused it to be considered in fiscal distress.
4. A provider will be determined by the Commission to no longer be in fiscal distress if:
 - a. The provider resolves the violation of rule or law that caused it to be considered in fiscal distress and obtains written verification from the Commission that the violation has been resolved; or
 - b. The provider implements a change of rates that is shown by the study to resolve the provider's fiscal insufficiency.

VI. Miscellaneous

1. A provider seeking approval from the Commission under Ark. Code Ann. § 14-234-802(g) shall demonstrate its fiscal sustainability by submitting to the Commission a business plan demonstrating its technical, financial, and managerial capacity.
2. Pursuant to provisions relating to Commission intervention under the conditions provided for in Ark. Code Ann. § 14-234-804(d), upon request of a municipal provider or a customer or unserved customer of a municipal provider, the Department will assist in the resolution of the issue or issues if the party or parties involved demonstrate that all parties involved made a good faith effort to resolve the issue or issues.

- a. Such intervention may include without limitation negotiation or mediation with the party or parties involved.
- b. If the Department determines that a party is not acting in good faith, the Department may end its intervention.

VII. Training

1. The Advisory Training Board created under Ark. Code Ann. § 14-234-805 shall develop the training protocol for provider board members, including training protocol for rate studies performed under the guidelines of the American Water Works Association and the Water Environment Federation.
2. By December 31, 2022, a majority of the members of provider boards shall receive a minimum of eight hours of provider training.
3. If a change in membership of a provider board causes the provider board to have less than a majority of members who have undergone provider training, enough members of the provider board shall receive provider training within one year of the change in membership such that a majority of the board has received training.
4. Each provider board shall report the following information annually, by January 31, to the Department:
 - a. the names and contact information of each member on the provider board;
 - b. an identification of which members have obtained eight hours of provider training; and
 - c. an identification of which members have served on the board for more than ten (10) years and are exempt from the training requirement pursuant to Ark. Code Ann. § 14-234-805(a)(3).

QUESTIONNAIRE FOR FILING PROPOSED RULES WITH THE
ARKANSAS LEGISLATIVE COUNCIL

DEPARTMENT/AGENCY Arkansas Department of Agriculture/Natural Resources Commission
DIVISION Natural Resources
DIVISION DIRECTOR Chris Colclasure
CONTACT PERSON Wade Hodge
ADDRESS #1 Natural Resources Drive, Little Rock AR 72205
PHONE NO. 501-219-6361 **FAX NO.** _____
E-MAIL wade.hodge@agriculture.arkansas.gov
NAME OF PRESENTER AT COMMITTEE MEETING Chris Colclasure
PRESENTER E-MAIL chris.colclasure@agriculture.arkansas.gov

INSTRUCTIONS

- A. Please make copies of this form for future use.**
- B. Please answer each question completely using layman terms. You may use additional sheets, if necessary.**
- C. If you have a method of indexing your rules, please give the proposed citation after “Short Title of this Rule” below.**
- D. Submit two (2) copies of this questionnaire and financial impact statement attached to the front of two (2) copies of the proposed rule and required documents. Mail or deliver to:**

Jessica C. Whittaker
Administrative Rules Review Section
Arkansas Legislative Council
Bureau of Legislative Research
One Capitol Mall, 5th Floor
Little Rock, AR 72201

- 1. What is the short title of this rule? Rules Implementing Act 605 of 2021
- 2. What is the subject of the proposed rule? To provide for water provider boards to obtain and implement rates studies; for training for board members; for the Natural Resources Commission to determine providers in fiscal distress.
- 3. Is this rule required to comply with a federal statute, rule, or regulation? Yes _____ No x _____
If yes, please provide the federal rule, regulation, and/or statute citation.
- 4. Was this rule filed under the emergency provisions of the Administrative Procedure Act? Yes _____ No x _____
If yes, what is the effective date of the emergency rule? _____
When does the emergency rule expire? _____

Will this emergency rule be promulgated under the permanent provisions of the Administrative Procedure Act? Yes _____ No _____

5. Is this a new rule? Yes ☒ No ☐ If yes, please provide a brief summary explaining the rule. See attached summary.

Does this repeal an existing rule? Yes ☐ No ☒ If yes, a copy of the repealed rule is to be included with your completed questionnaire. If it is being replaced with a new rule, please provide a summary of the rule giving an explanation of what the rule does.

Is this an amendment to an existing rule? Yes ☐ No ☒ If yes, please attach a mark-up showing the changes in the existing rule and a summary of the substantive changes. **Note: The summary should explain what the amendment does.**

6. Cite the state law that grants the authority for this proposed rule? If codified, please give the Arkansas Code citation. A.C.A. § 14-234-802 (a)&(d); 14-234-805 & 806
7. What is the purpose of this proposed rule? Why is it necessary? See attached summary
8. Please provide the address where this rule is publicly accessible in electronic form via the Internet as required by Arkansas Code § 25-19-108(b). www.agriculture.arkansas.gov
9. Will a public hearing be held on this proposed rule? Yes ☒ No ☐
If yes, please complete the following:
Date: Dec. 15, 2021
Time: 9:30am
Place: 1 Natural Resources Drive
10. When does the public comment period expire for permanent promulgation? (Must provide a date.)
December 9
11. What is the proposed effective date of this proposed rule? (Must provide a date.)
February 2, 2022
12. Please provide a copy of the notice required under Ark. Code Ann. § 25-15-204(a), and proof of the publication of said notice.
13. Please provide proof of filing the rule with the Secretary of State as required pursuant to Ark. Code Ann. § 25-15-204(e).

14. Please give the names of persons, groups, or organizations that you expect to comment on these rules? Please provide their position (for or against) if known.

FINANCIAL IMPACT STATEMENT

PLEASE ANSWER ALL QUESTIONS COMPLETELY

DEPARTMENT Arkansas Department of Agriculture/Natural Resources Commission

DIVISION Natural Resources

PERSON COMPLETING THIS STATEMENT Wade Hodge

TELEPHONE NO. 501-219-6361 **FAX NO.** _____

EMAIL: wade.hodge@agriculture.arkansas.gov

To comply with Ark. Code Ann. § 25-15-204(e), please complete the following Financial Impact Statement and file two copies with the questionnaire and proposed rules.

SHORT TITLE OF THIS RULE Ruels Implementing Act 605 of 2021

1. Does this proposed, amended, or repealed rule have a financial impact?
Yes X No
The financial impact will be the cost of rate studies, implementation of rates studies, and cost of required training.
2. Is the rule based on the best reasonably obtainable scientific, technical, economic, or other evidence and information available concerning the need for, consequences of, and alternatives to the rule?
Yes xx No
3. In consideration of the alternatives to this rule, was this rule determined by the agency to be the least costly rule considered? Yes x No

If an agency is proposing a more costly rule, please state the following:

- (a) How the additional benefits of the more costly rule justify its additional cost;
 - (b) The reason for adoption of the more costly rule;
 - (c) Whether the more costly rule is based on the interests of public health, safety, or welfare, and if so, please explain; and
 - (d) Whether the reason is within the scope of the agency's statutory authority, and if so, please explain.
4. If the purpose of this rule is to implement a federal rule or regulation, please state the following:
 - (a) What is the cost to implement the federal rule or regulation?

Current Fiscal Year

General Revenue _____
Federal Funds _____

Next Fiscal Year

General Revenue _____
Federal Funds _____

Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total _____

Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total _____

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

Current Fiscal Year

Next Fiscal Year

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

Total _____ Unknown _____

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

Total _____ Unknown _____

5. What is the total estimated cost by fiscal year to any private individual, entity and business subject to the proposed, amended, or repealed rule? Identify the entity(ies) subject to the proposed rule and explain how they are affected. N/A

Current Fiscal Year

Next Fiscal Year

\$ _____ N/A _____

\$ _____ N/A _____

Financial impact is unknown at this time and will depend on the the costs of rate studies. Some rate studies can be obtained at no cost, or covered by grant funds. Since the law just became effective in July 2021 there is not enough historical data upon which to base an estimate.

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

Current Fiscal Year

Next Fiscal Year

\$ _____ N/A _____

\$ _____ N/A _____

Unknown, see above. _____

7. With respect to the agency's answers to Questions #5 and #6 above, is there a new or increased cost or obligation of at least one hundred thousand dollars (\$100,000) per year to a private

individual, private entity, private business, state government, county government, municipal government, or to two (2) or more of those entities combined?

Yes _____ No x

If YES, the agency is required by Ark. Code Ann. § 25-15-204(e)(4) to file written findings at the time of filing the financial impact statement. The written findings shall be filed simultaneously

with the financial impact statement and shall include, without limitation, the following:

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



Asa Hutchinson
Governor

ARKANSAS DEPARTMENT OF AGRICULTURE

1 Natural Resources Drive, Little Rock, AR 72205
agriculture.arkansas.gov
(501) 225-1598



Wes Ward
Secretary of Agriculture

November 8, 2021

Proposed Rule Regarding Retail Water Providers

Purpose:

The purpose of this memorandum is to analyze a proposed rule for the Natural Resources Commission (Commission) to promulgate governing retail water providers as required by Act 605 of the 2021 General Assembly ("The Act" or "Act 605").

Background:

In this year's General Assembly, the Arkansas Legislature passed Act 605, regarding the regulation of retail water providers. Act 605 tasks retail water providers with additional responsibilities in managing and operating water systems. The responsibilities include preparation of a rate study every five years and the requirement that a majority of provider board members obtain eight hours of training. This is "one time" training; there is no direction in the Act that the training should be required annually or otherwise renewed. The Act requires the Commission to determine whether water providers are in fiscal distress and promulgate rules regarding the required training and the contents of the rate studies. If a provider is determined to be in fiscal distress, the provider is then required to develop an improvement plan with specific actions to correct its financial, technical, and managerial deficiencies.

Act 605 requires the Commission to file the final rules implementing the Act with the Secretary of State on or before January 1, 2022, or "as soon as practicable after (legislative) approval." The Commission approved the proposed rules at a special called meeting on October 20, 2021.

Key Points: Act 605 requires:

- Commission rules to outline training for water providers board members and contents of rate studies
- The Commission to determine providers boards in fiscal distress and monitor those boards
- The Commission to consult with an advisory board for development of training
- Provider boards to conduct a rate study every five years
- The Commission to promulgate rule by January 1, 2022, or as soon as practicable after legislative approval

Discussion:

The proposed rules for rate studies are based on the guidelines of the American Water Works Association and the Water Environment Federation, as Act 605 requires. The proposed rules require water providers to obtain the required training and to prepare rate studies designed to determine whether the provider's current rates are adequate to cover the provider's costs of operations and maintenance.

The rules for rate studies require the use of a ratio known as a debt service coverage ratio (DSCR) as a benchmarking tool to determine the provider's fiscal status. The DSCR compares the provider's operating income to its debt service, which provides a measure of whether the provider can produce enough cash to cover its debt obligations. A DSCR of 1.0 means an entity has exactly enough money from operating revenues to pay off its annual debt service once it has paid all operating expenses. The rules require that

a provider maintain at least a 1.05 DSCR to provide a small but necessary margin between income and debt service. Providers that fail to maintain a 1.05 DSCR are found to be in fiscal distress.

The DSCR provides an efficient and proven way to analyze the fiscal health of water providers. That benefits the Department of Agriculture (Department) because it creates uniformity in the information required of providers, which allows the Department to more effectively review the fiscal status of water providers, no matter their varying sizes or location throughout the state.

In the meantime, staff will organize meetings with the advisory training board and develop contents of the required training. Information regarding the training can be placed on the Department website.