

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 Natural Resources Division

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

Statutory Authority for Promulgating Rules Ark. Code Ann. § 14-305-101 et seq; specifically § 14-305-110

Rule Title: The Unpaved Roads Program Rules

Intended Effective Date
(Check One)

Date

- | | | |
|--|---------------------------------------|-------------------------------|
| <input type="checkbox"/> Emergency (ACA 25-15-204) | Legal Notice Published | <u>December 24 - 26, 2021</u> |
| <input checked="" type="checkbox"/> 10 Days After Filing (ACA 25-15-204) | Final Date for Public Comment | <u>January 22, 2022</u> |
| <input type="checkbox"/> Other _____
(Must be more than 10 days after filing date.) | Reviewed by Legislative Council | <u>April 22, 2022</u> |
| | Adopted by State Agency | <u>December 20, 2021</u> |

Electronic Copy of Rule e-mailed from: (Required under ACA 25-15-218)
Linda Luebke linda.luebke@agriculture.arkansas.gov April 25, 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 wade.hodge@agriculture.arkansas.gov
Phone Number E-mail Address
Chief Counsel, Arkansas Department of Agriculture
Title
April 25, 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

April 25, 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.

- The Unpaved Roads Program Rules

The rule was approved by the Secretary of Agriculture, Wes Ward, on December 20, 2021.

The rule was reviewed and approved by the Administrative Rules Subcommittee of the Arkansas Legislative Council on April 20, 2022, and the Arkansas Legislative Council on April 22, 2022.

If more information is needed, please contact me.

Sincerely,

Wade Hodge
Chief Counsel

WH:ll

Enclosure

QUESTIONNAIRE FOR FILING PROPOSED RULES WITH THE
ARKANSAS LEGISLATIVE COUNCIL

DEPARTMENT/AGENCY Arkansas Department of Agriculture
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? Unpaved Roads Program Rules

- 2. What is the subject of the proposed rule? To implement the provisions of Act 901 of 2021, which transfers the responsibility of the Unpaved Roads Program from the Arkansas Natural Resources Commission to the Department of Agriculture.

- 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. The rule allows the Department to implement the provisions of Act 901 of 2021, which transfers the responsibility of the Unpaved Roads Program from the Arkansas Natural Resources Commission to the Department of Agriculture.

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. Ark. Code Ann. § 14-305-101 et seq; specifically § 14-305-110.

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: January 11, 2022

Time: 9:30 a.m.

Place: 1 Natural Resources Drive, Little Rock

-
10. When does the public comment period expire for permanent promulgation? (Must provide a date.)

January 22, 2022

11. What is the proposed effective date of this proposed rule? (Must provide a date.)

April 1, 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
DIVISION Natural Resources Division
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 Unpaved Roads Program Rules

1. Does this proposed, amended, or repealed rule have a financial impact?
 Yes _____ No X _____
 There will be no financial impact because the program is already administered by a Departmental agency. Act 901 just shifted the administrative and rulemaking responsibilities to the Department level instead of one of its commissions.
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 x _____ 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: N/A
 - (a) What is the cost to implement the federal rule or regulation?

Current Fiscal Year

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

Total _____

Next Fiscal Year

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

Total _____

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

Current Fiscal Year

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

Total _____ N/A _____

Next Fiscal Year

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

Total _____ N/A _____

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

\$ _____ N/A _____

Next Fiscal Year

\$ _____ N/A _____

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

\$ _____ N/A _____

Next Fiscal Year

\$ _____ N/A _____

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

Yes _____ No _____

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

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

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

**FINAL RULE
AGENCY NO. 209**

The Unpaved Roads Program Rules

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I. GENERAL PROVISIONS

Section 1.1 Purpose and enabling legislation.

These rules implement the Arkansas Unpaved Roads Program provided for in A.C.A. § 14-305-101 *et seq.*

Section 1.2 Definitions.

- A. “Best management practices” means practices for the construction and maintenance of unpaved roads that are broadly accepted by road engineers and maintenance professionals as the most effective approaches to managing unpaved roads that minimize sediment impacts to adjacent water bodies and aquatic habitats. Best management practices include the Environmentally Sensitive Road Maintenance for Dirt and Gravel Roads guidance issued by the United States Department of Agriculture Forest Service.
- B. “Department” means the Arkansas Department of Agriculture.
- C. “Unpaved road” means a surface of natural material or crushed aggregate that has not been incorporated into a bound layer using asphalt, oil, or other such binder. Roads with driving surface aggregate shall be considered unpaved for purposes of the program.

II. ELIGIBILITY, APPLICATION, AND SELECTION

Section 2.1 Eligibility.

- A. Counties are eligible to apply for grants for program funding for county-owned and maintained roads in Arkansas that are open to public vehicle travel.
- B. If different entities own the unpaved road right-of-way and the property on which the unpaved road traverses, only the entity that owns, manages, and maintains the road right-of-way is eligible to apply for program funding, unless the property is managed for the public trust.
- C. Privately owned roads, including those open to public use, and those owned by associations, private conservancies, non-profit companies, and other non-public entities, are not eligible to apply for program funding.

D. Eligible unpaved roads include only roads open to public motor vehicle travel for a minimum of eight (8) consecutive weeks annually.

E. All applicants must complete training held by the Department in best management practices and maintain certification as provided in these rules before becoming eligible to apply for project funding. Training certification is valid for a period of five years.

F. Projects are eligible for funding only if the projects meet the requirements of A.C.A. § 14-305-101 et seq. and these rules.

Section 2.2 Grant Applications.

A. All applications for program funding must be received on the application packet form approved by the Department, and the application must include the following information in addition to the information required under Ark. Code Ann. § 14-305-105(b):

1. A work plan, which consists of a detailed hand-drawn or digitally produced sketch of the proposed project, with a plan view of the road with all planned features including but not limited to any pipes, aggregate, underdrain, and surface features;
2. The name of the waterbody impacted by the project;
3. All General Contracts associated with the project; and
4. The applicant's signature.

B. All applicants shall be notified in writing of the Department's funding decision.

Section 2.3 Project Funding and Expenses.

A. Projects shall be funded in accordance with Ark. Code Ann. § 14-305-106.

B. Applicants may apply for the full or partial costs of materials, equipment, and labor required for implementation of the grant project, up to seventy-five thousand dollars (\$75,000.00). The following expenses may be included for consideration of project funding:

1. Material expenses including, but not limited to, pipe, stone, fill, fabric, and aggregate.
 2. Equipment expenses for the use of equipment that is owned by the applicant;
 - a. Reimbursement of applicant-owned equipment costs may be considered for project funding if:
 - i. The expense is less than or equal to the current Federal Emergency Management Agency (FEMA) Schedule of Equipment rates as published by FEMA;
 - or
 - ii. The expense is supported by a legitimate quote or invoice acceptable to the Department.
 3. The cost of contractual labor must be equal to Davis-Bacon Act wage determinations unless sufficient documentation is provided to the Department to justify another amount.
 4. Equipment expenses for the use of equipment that that is rented or leased by the applicant;
 - a. Reimbursement for the cost of rented or leased by an applicant may be considered for project funding if:
 - i. The equipment rented or leased was necessary to complete the project for which the applicant applied; and
 - ii. The equipment rented or leased was only used on the project for which it was rented or leased.
 5. Expenses for work performed by contractors or subcontractors. However, the funding shall be paid to the grant recipient and not directly to the grant recipient's sub-contractors;
 6. Expenses for engineering, permitting, or other similar consultant costs, not to exceed ten percent (10%) of the total grant amount between the Department and the grant recipient.
- C. Grant funds shall not be used to purchase or maintain equipment.

D. Grantee's salaries and other associated personnel expenses are not eligible for funding.

Section 2.4 Combined Funds.

A. Program funds may be combined with other funding sources to pay for a project. Program funds may only be used on the program project. If program funds are combined with other funding sources, the grant recipient must maintain an accounting acceptable to the Department of which funds were spent on which portions of the project, and the accounting must be provided to the Department at the Department's request and in accordance with Section 3.5(E).

B. Project funds shall not be combined with other funding sources that have requirements that are in conflict with best management practices.

C. Projects may be completed in stages where program funds are used to complete a particular phase of the project and other funding sources are used to fund different stages of a project.

III. PROJECT ADMINISTRATION

Section 3.1 Unpaved Roads Program Stakeholder Advisory Committee.

A. The Department shall form a committee to serve the Department in an advisory role. The committee shall:

1. Review and rank grant applications and provide evaluations to the Department; and
2. Provide technical expertise in the subject matters of unpaved roads including but not limited to, construction methods and technologies, sediment abatement methods, conservation of land, soil, and water, watershed management, road system assessment, fisheries, and aquatic biology.

Section 3.2 Grant Funding, Project Monitoring, and Reporting.

- A. When an entity is selected for grant funding, the recipient and the Department shall enter into an agreement regarding the terms and conditions of the project and the disbursement of grant funds to the recipient.
- B. The Department shall monitor projects funded by the program to ensure compliance with the purpose of the project and the program, and grant recipients shall cooperate with the Department.
- C. Grant applicants and recipients are subject to audits and inspections by the department at any time from the grant application process up to three (3) years following the closure of the project.
- D. Grant recipients shall notify the Department of the occurrence of anything that may affect the grant recipient's ability to complete the project in the time allotted in Ark. Code Ann. § 14-305-107.
- E. For good cause shown, the Department may allow one (1) extension not to exceed one (1) year for a grant recipient that is unable to complete its unpaved road project within the period stated in Ark. Code Ann. § 14-305-107.

Section 3.3 Grant Changes and Amendments.

- A. If unforeseen circumstances arise and so require, the Department may, at its discretion, make changes to the scope of the project that affect the requested funds or completion timeframe of the grant project.
- B. Before any project may be materially modified by a grant recipient, the Department must approve any proposed changes.
- C. The Department may approve project modifications if the modification does not result in a failure to meet any of the selection criteria from Ark. Code Ann. § 14-305-105 which initially qualified the project for funding under the program.
- D. If an approved modification results in a reduction of the total project costs and excess funding, the Department will de-obligate the excess grant monies.

Section 3.4 Enforcement Provisions.

- A. The Department may attempt to resolve compliance issues by instituting corrective action, including but not limited to a warning letter against a grant recipient who fails to comply with any of the terms agreed upon in the grant agreement.
- B. The Department, after unsuccessfully attempting to resolve compliance issues through a corrective action, may withhold, reduce, or de-obligate the grant recipient's program grant monies.
- C. The Department may take other action as appropriate to recapture program grant monies expended in contravention to these rules.

Section 3.5 Completion of unpaved road projects.

- A. Grant recipients shall comply with the project completion requirements of Ark. Code Ann. § 14-305-107.
- B. Upon completion of the project, the grant recipient shall notify the Department and schedule a final inspection of the project.
- C. A final inspection must be completed after project completion.
- D. The final inspection must include the grant recipient and the Department, or the Department's designee, and the parties must verify:
 - 1. The project is completed in accordance with the program standards and to the satisfaction of the Department;
 - 2. All work elements classified as "in-kind services" are also completed in accordance with program standards and to the satisfaction of the Department; and
 - 3. That work elements proposed in the work plan have been properly installed.
- E. Upon completion of the project, the grant recipient shall provide the Department a final financial report including the separate accounting of grant funds required in Ark. Code Ann. § 14-305-107 and a financial report inclusive of grant and non-grant funds.

- F. Projects are not closed until the Department issues a closure letter.
- G. Grant recipients shall comply with the record retention requirements in Ark. Code Ann. § 14-305-108.