NOTICES OF EMERGENCY RULEMAKING

Under the Administrative Procedure Act, an agency may determine that adoption, amendment, or repeal of a rule is necessary for immediate preservation of the public health, safety or welfare and the notice and public participation requirements are impracticable. Under this determination, the agency may adopt the rule as an emergency and submit it to the Attorney General for review. The Attorney General approves the rule and then files it with the Secretary of State. The rule takes effect upon filing with the Secretary of State and remains in effect for 180 days. An emergency rule may be renewed for 1 or 2 180-day periods if the requirements of A.R.S. § 41-1026 are met. If the emergency rule is not renewed or the rule is not permanently adopted by the end of the 180-day period, the emergency rule expires and the text of the rule returns to its former language, if any.

NOTICE OF EMERGENCY RULEMAKING

TITLE 9. HEALTH SERVICES

CHAPTER 14. DEPARTMENT OF HEALTH SERVICES LABORATORIES

PREAMBLE

1. Sections Affected — **Rulemaking Action**

R9-14-403	Amend
R9-14-404	Amend
Exhibit P-EN	New Exhibit
Exhibit PP-EN	New Exhibit
Exhibit Q-EN	New Exhibit
Exhibit QQ-EN	New Exhibit
Exhibit WWW-EN	New Exhibit

2. The specific authority for the rulemaking, including both the authorizing statute (general) and the statutes the rules are implementing (specific):

Authorizing statutes: A.R.S. §§ 36-136(A)(7), 36-136(F), and 41-1026

Implementing statutes: A.R.S. §§ 28-1323 and 28-1324

3. The effective date of the rules:

May 24, 2001

4. Is this rulemaking a renewal of a previous emergency rulemaking?

No

5. The name and address of agency personnel with whom persons may communicate regarding the rule:

Name: Gary Shipley, Program Manager

Address: Arizona Department of Health Services
Office of Laboratory Licensure and Certification
1740 West Adams Street
Phoenix, AZ 85007

Telephone: (602) 364-0749

Fax: (602) 364-0759

E-mail: gshiple@hs.state.az.us

or

Name: Kathleen Phillips, Rules Administrator

Address: Arizona Department of Health Services

Office of Administrative Rules
1740 West Adams, Room 102
Phoenix, AZ 85007

Telephone: (602) 542-1264

Fax: (602) 542-1090

E-mail: kphilli@hs.state.az.us

6. An explanation of the rule, including the agency's reasons for initiating the rule:

A.R.S. § 38-1324 requires the Department to adopt rules prescribing methods and procedures for the administration of breath tests to determine alcohol concentration of motor vehicle drivers, including the approval of quantitative breath-testing devices and procedures for ensuring the accuracy of results obtained from approved breath-testing devices. The purpose of the statute is to ensure the accuracy and reliability of breath testing devices and to facilitate the apprehension and prosecution of drivers who are operating a motor vehicle under the influence of alcohol. The rules in R9-14-403 and R9-14-404 implement the statute by providing devices, methods, and procedures approved by the Department to detect the presence of alcohol in motor vehicle drivers. On May 26, 1999, under the authority of A.A.C. R9-14-403(K), the Director approved the Intoxilyzer 5000EN as a quantitative alcohol breath-testing device and approved a standard operational procedure, two standard calibration check procedures, and two standard quality assurance procedures for its operation. The Director's approval of the Intoxilyzer 5000EN and the procedures for its use expires on May 26, 2001. An emergency rulemaking is necessary to prevent the expiration of the Director's approval of the use of the Intoxilyzer 5000EN by adding:

1. The Intoxilyzer 5000EN to R9-14-403(G),
2. The procedures for its use to the Exhibits in 9 A.A.C. 14, Article 4, and
3. The appropriate references to those procedures in R9-14-404.

Because a number of jurisdictions (law enforcement agencies and political subdivisions of the state) are currently using the Intoxilyzer 5000EN to perform alcohol breath-testing for evidentiary purposes, it is imperative that the expiration of its approval be prevented. The expiration of the Director's approval of the Intoxilyzer 5000EN will significantly impair the ability of jurisdictions in the state to prosecute drivers who are operating a motor vehicle while under the influence of alcohol.

7. A showing of good cause why the rule is necessary to promote a statewide interest if the repeal of the rule will diminish a previous grant of authority of a political subdivision of this state:

Not applicable

8. The summary of the economic, small business, and consumer impact statement:

The economic impact of this rulemaking is minimal to moderate. Adding the Intoxilyzer 5000EN to the list of approved quantitative breath-testing devices in R9-14-403(G), adding the Exhibits for its use to 9 A.A.C. 14, Article 4, and adding the appropriate references to the Exhibits to R9-14-404 will maintain the status quo. The Department will bear a minimal-to-moderate cost from the rulemaking process, as will the Office of the Attorney General and the Office of the Secretary of State.

The economic impact of not making this emergency rule will be substantial to those jurisdictions that currently use the Intoxilyzer 5000EN, because they will bear the costs involved in purchasing new instruments, training personnel on the instruments, and preparing the instruments for use. Failing to make this emergency rule will also impact the public, who will be required to subsidize these costs incurred by the jurisdictions.

9. Any other matters prescribed by statute that are applicable to the specific agency or to any specific rule or class of rules:

Not applicable

10. Incorporations by reference and their location in the rules:

Not applicable

11. An explanation of the situation justifying the rule's adoption as an emergency rule:

A rule amending R9-14-403, R9-14-404, and adding Exhibits P-EN, PP-EN, Q-EN, QQ-EN, and WWW-EN to include approval of the Intoxilyzer 5000EN is necessary as an emergency measure to protect the public heath, safety and welfare, and to avoid serious prejudice to the interest of the parties concerned. Under the current rule in R9-14-403(K), the approval of the Intoxilyzer 5000EN will expire May 26, 2001.

If the approval expires, state jurisdictions that currently use the Intoxilyzer 5000EN for breath testing will have to replace the Intoxilyzer 5000ENs with approved quantitative breath-testing devices or make alternate arrangements.

During the time it takes to purchase new instruments, train personnel on the instruments, and prepare the instruments for use, the jurisdictions' ability to conduct breath testing will be limited, allowing drunk drivers to continue driving. The public's health, safety, and welfare will be jeopardized because allowing drunk drivers to continue driving increases the potential to the public for injury or death.

Furthermore, expiration of the approval of the Intoxilyzer 5000EN will substantially prejudice the interest of jurisdictions using the device. At least three different jurisdictions in the state currently use the Intoxilyzer 5000EN to perform breath testing. One of these jurisdictions prosecutes approximately 12,000 DUI cases annually, and 60% of those cases are based on results from the Intoxilyzer 5000EN. Two jurisdictions use the Intoxilyzer 5000EN exclusively. These two jurisdictions prosecute between 500 and 1,000 drunk driving cases each year based on results from the Intoxilyzer 5000EN.

Jurisdictions will be required to replace their Intoxilyzer 5000ENs with approved quantitative breath-testing devices or route all breath-testing subjects to other jurisdictions for breath testing. Purchasing new approved quantitative breath-testing devices will result in substantial expense to these jurisdictions. It is estimated that each replacement quantitative breath-testing device, along with the accessories necessary to use it, will cost $6,000 to $10,000. Added to this is the cost of training personnel to use the instrument, and the time it takes to prepare the instrument for use. Routing subjects to other jurisdictions for breath testing will result in significant delays in taking the test due to the travel time involved and the increase in subjects per device at the jurisdictions where the breath testing will be completed. Because delays in breath testing decrease the evidentiary value of the breath tests in prosecutions of drunk drivers, fewer drunk drivers will be prosecuted.

For the above reasons, the Department believes that this emergency rulemaking is justified under A.R.S. § 41-1026(A) as necessary to:

1. Protect the public health, safety, or welfare; and
2. Avoid serious prejudice to the interest of the parties concerned.

12. The date of the Attorney General's approval of the emergency rule:

May 24, 2001

13. The full text of the rules follows:

TITLE 9. HEALTH SERVICES

CHAPTER 14. DEPARTMENT OF HEALTH SERVICES - LABORATORIES

ARTICLE 4. DETERMINATION OF ALCOHOL CONCENTRATION

Section

R9-14-403. Breath-testing and Collection Devices

R9-14-404. Testing Procedures

Exh. P-EN. Standard Quality Assurance Procedures, Intoxilyzer Model 5000 EN - Standard Calibration Check Procedure

Exh. PP-EN. Standard Quality Assurance Procedures, Intoxilyzer Model 5000 EN - Standard Calibration Check Procedure

Exh. Q-EN.

Exh. QQ-EN. Standard Quality Assurance Procedures, Intoxilyzer Model 5000 EN - Standard Quality Assurance Procedure

Exh. WWW-EN. Standard Operational Procedure, Intoxilyzer Model 5000 - Duplicate Test

ARTICLE 4. DETERMINATION OF ALCOHOL CONCENTRATION

R9-14-403. Breath-testing and Collection Devices

A. No change
B. No change
C. No change
D. No change
E. No change
F. No change
G. The following quantitative breath-testing and collection devices are approved by the Director:

Model	Manufacturer
Breathalyzer 900/900A	Smith and Wesson Co.
Alco-Sensor III	Intoximeters, Inc.
Intoxilyzer Models 4011A	CMI, Inc./Federal Signal
Modified and 4011AS Modified with or without Beam Attenuator	
Intoxilyzer Models 4011A	CMI, Inc./Federal Signal
Modified and 4011AS Modified with Sample Preservation Modification with or without Beam Attenuator	
Intoxilyzer Model 5000	CMI, Inc./Federal Signal
Intoxilyzer Model 5000 with or without Vapor Recirculation and with or without Keyboard	CMI, Inc.
Intoximeter Model 3000	Intoximeters, Inc.
Mark IV GCI	Intoximeters, Inc.
GCI Field Collection Unit	Intoximeters, Inc.
PST-10 Silica Gel Tube (also known as SM-10 Silica Gel Tube)	Luckey Laboratories, Inc./U.S. Alcohol Testing of America, Inc.
RBT IV (Alco Sensor IV with a RBT IV printer microprocessor)	Intoximeters, Inc.
Toxtrap Silica Gel Tube	Toxtrap, Inc./ Federal Signal
Intoxilyzer Model 5000EN	CMI, Inc.

H. No change
I. No change
J. No change
K. No change

R9-14-404. Testing Procedures

A. Law enforcement agencies or individuals acting independently of such agencies who conduct alcohol concentration determinations by means of breath-testing devices shall implement a quality assurance program conducted by a quality assurance specialist. This quality assurance program shall include:
1. Criteria for insuring the proper operation of devices by testing device controls and indicators to ensure that they are functioning as required by the Department quality assurance procedure for the devices. The examinations shall be performed and recorded within 90 days of each other following the appropriate Department quality assurance procedure set forth in Exhibits F, H, J, M, Q, Q-EN, QQ, QQ-EN, T, V, and Z or as approved by the Director in accordance with R9-14-403(K).
2. Calibration checks of breath-testing devices which shall be performed and recorded in accordance with the requirements of the appropriate Department quality assurance procedure set forth in Exhibits F, J, L, P, P-EN, PP, PP-EN, S, V, and Y or as approved by the Director in accordance with R9-14-403(K).
3. No change
4. No change
5. No change
6. No change

B. Operator permit holders shall utilize the operator procedure approved by the Department for the device being operated in performing tests and collecting samples for the determination of alcohol concentration, as contained in Exhibits E, EE, G,

I, II, K, KK, N, NN, O, OO, OOO, R, RR, U, UU, W, WW, WWW, WWW-EN, and X or as approved by the Director in accordance with R9-14-403(K).

C. No change

Exh. P-EN. Standard Quality Assurance Procedures, Intoxilyzer Model 5000 EN - Standard Calibration Check Procedure

EXHIBIT P-EN
THIS REPORT PREPARED PURSUANT TO DUTY IMPOSED BY A.A.C. R9-14-404(A)

ARIZONA DEPARTMENT OF HEALTH SERVICES

STANDARD QUALITY ASSURANCE PROCEDURES
INTOXILYZER MODEL 5000EN

STANDARD CALIBRATION CHECK PROCEDURE

AGENCY_____DATE_____TIME_____
INTOXILYZER SERIAL NO._____LOCATION_____
Q A SPECIALIST_____
(Print Name)

( ) 1. a. Ensure dry gas tank is attached to instrument and contains a known alcohol standard, _____ AC.
OR
b. Pour a standard alcohol solution of known value, _____ AC, into a clean dry simulator and assemble the simulator. Insure that a tight seal has been made. Turn on the simulator and allow temperature to reach 34 C +/- 0.2 C.
( ) 2. Intoxilyzer 5000EN display reads "PUSH BUTTON ... ".
( ) 3. Ensure Intoxilyzer 5000EN calibration standard is set for "G" for gas or "W" for wetbath.
( ) 4. Type "C" and ENTER on keyboard
( ) 5. If display reads "INSERT CARD", do so.
( ) 6. Air blank completed
( ) 7. Calibration check completed. Test results 0._____AC.
( ) 8. Air blank completed.
( ) 9. When display reads "TEST COMPLETE"' remove printed record. Attach the record to the completed checklist.
( ) 10. Type "Q" and ENTER on the keyboard.

SIGNATURE_____

DHS/BLS/Form C144

Exh. PP-EN. Standard Quality Assurance Procedures, Intoxilyzer Model 5000 EN - Standard Calibration Check Procedure

EXHIBIT PP-EN
THIS REPORT PREPARED PURSUANT TO DUTY IMPOSED BY A.A.C. R9-14-404(A)

ARIZONA DEPARTMENT OF HEALTH SERVICES

STANDARD QUALITY ASSURANCE PROCEDURES
INTOXILYZER MODEL 5000EN

STANDARD CALIBRATION CHECK PROCEDURE

1. a. Ensure dry gas tank is attached to instrument and contains a known alcohol standard.
   OR
   b. Pour a standard alcohol solution of known value into a clean dry simulator and assemble the simulator. Insure that a tight seal has been made. Turn on the simulator and allow temperature to reach 34 C +/- 0.2 C.
2. Intoxilyzer 5000EN display reads "PUSH BUTTON ... ".
3. Ensure Intoxilyzer 5000EN calibration standard is set for "G" for gas or "W" for wetbath.
4. Type "C" and ENTER on keyboard
5. Air blank completed
6. Calibration check completed.
7. Air blank completed.
8. When display reads "TEST COMPLETE", type "Q" and ENTER on the keyboard.

DHS/BLS/Form C145

Exh. Q-EN. Standard Quality Assurance Procedures, Intoxilyzer 5000EN - Standard Quality Assurance Procedure

EXHIBIT Q-EN
THIS REPORT PREPARED PURSUANT TO DUTY IMPOSED BY A.A.C. R9-14-404(A)

ARIZONA DEPARTMENT OF HEALTH SERVICES

STANDARD QUALITY ASSURANCE PROCEDURES
INTOXILYZER 5000EN

STANDARD QUALITY ASSURANCE PROCEDURE

AGENCY_____ DATE_____ TIME _____
INTOXILYZER SERIAL NO._____ LOCATION_____
Q A SPECIALIST _____
(Print Name)

( ) 1. Display reads "PUSH BUTTON ...".

DIAGNOSTIC TESTS
( ) 1. Display test check. Keyboard menu selection "V".
( ) 2. Clock time check. Keyboard menu selection "E".
( ) 3. Date check. Keyboard menu selection "E".
( ) 4. Barometric sensor check. Keyboard menu selection "G".
OPERATIONAL TESTS
( ) 1. Alcohol-free subject test result 0._____AC.
( ) 2. Error recognition logic system functioning.
Invalid test printed.
( ) 3. Proper sample recognition system.
Invalid sample printed.
Deficient sample printed.
( ) 4. Calibration standard 0._____AC. Result 0._____AC.

Instrument operating properly and accurately. YES_____ NO_____

COMMENTS_____
_____
_____
_____
_____

SIGNATURE_____

DHS/BLS/Form C146

Exh. QQ-EN. Standard Quality Assurance Procedures, Intoxilyzer Model 5000 EN - Standard Quality Assurance Procedure

EXHIBIT QQ-EN
THIS REPORT PREPARED PURSUANT TO DUTY IMPOSED BY A.A.C. R9-14-404(A)

ARIZONA DEPARTMENT OF HEALTH SERVICES

STANDARD QUALITY ASSURANCE PROCEDURES
INTOXILYZER 5000EN

STANDARD QUALITY ASSURANCE PROCEDURE

1. Display reads "PUSH BUTTON ...".

DIAGNOSTIC TESTS
1. Display test check. Keyboard menu selection "V".
2. Clock time check. Keyboard menu selection "E".
3. Date check. Keyboard menu selection "E".
4. Barometric sensor check. Keyboard menu selection "G".

OPERATIONAL TESTS
1. Alcohol-free subject test result.
2. Error recognition logic system functioning.
   Invalid test displayed.
3. Proper sample recognition system.
   Invalid sample displayed.
   Deficient sample displayed.
4. Known alcohol standard.

Instrument operating properly and accurately. Enter "P" or "F".

DHS/BLS/Form C147

Exh. WWW-EN.Standard Operational Procedure, Intoxilyzer Model 5000 - Duplicate Test

EXHIBIT WWW-EN
OPERATIONAL CHECKLIST

ARIZONA DEPARTMENT OF HEALTH SERVICES

STANDARD OPERATIONAL PROCEDURE
INTOXILYZER MODEL 5000

DUPLICATE TEST

AGENCY_____
NAME OF SUBJECT_____DATE_____
INSTRUMENT SERIAL NO._____LOCATION OF TEST _____
OPERATOR_____
TEST RESULTS 0._____AC TIME_____
0._____ _____
0._____ _____

Immediately preceding the administration of the tests, the subject underwent a 15-minute deprivation period from_____to_____by_____.

( ) 1. Display reads "PUSH BUTTON TO START TEST" or "PRESS START TEST BUTTON TO START NEXT TEST". Ensure breath tube is warm to touch.
( ) 2. Press Start Test button.
( ) 3. If display reads "INSERT CARD", do so.
( ) 4. Input information in response to display.
( ) 5. Air blank completed.
( ) 6. If display reads "IS SIMULATOR SOLUTION TEMPERATURE 34 C +/- 0.2 C?", check temperature using thermometer, type Y or N; verify reference standard check completed.
( ) 7. Insert mouthpiece into breath tube. Have subject blow as long as possible. Record AC result above.
( ) 8. Air blank completed.
( ) 9. a. If display reads "WAIT", go to step 11.
OR
b. If display reads "TEST COMPLETE", go to step 10.
OR
c. If display reads "IS SIMULATOR SOLUTION TEMPERATURE 34 C+/- 0.2 C?",check temperature using thermometer, type Y or N; verify reference standard check completed, go to step 10.
( ) 10. When display reads "TEST COMPLETE", remove test record.
( ) 11. Repeat steps 1 through 9, as necessary (see note below)

Note: Duplicate tests shall be administered at intervals of not less than 5 minutes nor more than 10 minutes apart. Two consecutive tests shall agree within 0.020 alcohol concentration.

DHS/BLS/Form C148