NOTICES OF FINAL RULEMAKING

The Administrative Procedure Act requires the publication of the final rules of the state's agencies. Final rules are those which have appeared in the *Register* first as proposed rules and have been through the formal rulemaking process including approval by the Governor's Regulatory Review Council or the Attorney General. The Secretary of State shall publish the notice along with the Preamble and the full text in the next available issue of the *Register* after the final rules have been submitted for filing and publication.

NOTICE OF FINAL RULEMAKING

TITLE 1. RULES AND RULEMAKING PROCESS

CHAPTER 6. GOVERNOR'S REGULATORY REVIEW COUNCIL

PREAMBLE

1. Sections Affected — **Rulemaking Action**

R1-6-101	Amend
R1-6-104	Amend
R1-6-105	Amend
R1-6-106	Amend
R1-6-107	Amend
R1-6-108	Amend
R1-6-109	Amend
R1-6-111	Amend
R1-6-112	Amend
R1-6-113	Amend
R1-6-201	Amend
R1-6-301	Amend
R1-6-302	Amend
R1-6-401	Amend

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

Authorizing statute: A.R.S. § 41-1051(E)

Implementing statutes: A.R.S. §§ 41-1051 through 41-1056.01, 41-1033, and 41-1081

3. The effective date of the rules:

December 2, 2003. Under A.R.S. § 41-1032(A)(4), the Council respectfully requests an immediate effective date. Formally implementing the nearly paperless rule-review procedure that Council has used for almost nine months will provide a benefit to the public and no penalty is associated with violation of the rules. The benefit to the public results from the time and other resources that agencies save as a result of Council's nearly paperless rule-review procedure. These resources become available to provide other services to the public.

4. A list of all previous notices appearing in the Register addressing the final rules:

Notice of Rulemaking Docket Opening: 9 A.A.R. 474, February 14, 2003

Notice of Proposed Rulemaking: 9 A.A.R. 3548, August 15, 2003

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

Name: Jeanne Hann

Address: 100 N. 15th Avenue
Phoenix, AZ 85007

Telephone: (602) 542-2006

Fax: (602) 542-1486

E-mail: Jhann@ad.state.az.us

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

The Council is updating its rules to make them consistent with statutory changes made to the Administrative Procedure Act in 2002 and with the practices of a nearly paperless rule-review process.

7. A reference to any study relevant to the rules that the agency reviewed and either relied on in its evaluation of or

justification for the rules or did not rely on in its evaluation of or justification for the rules, where the public may obtain or review each study, all data underlying each study, and any analysis of each study and other supporting material:

None

8. A showing of good cause why the rules are necessary to promote a statewide interest if the rules will diminish a previous grant of authority of a political subdivision of this state:

Not applicable

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

Changes to the Administrative Procedure Act in 2002 are reflected in this rulemaking as follows:

Deleting the requirement that a separate concise explanatory statement be submitted with a final regular rulemaking,

Requiring an agency to provide notice in its cover letter if it determines that its rule needs an immediate effect date, and

Requiring the agency head to certify in the cover letter that all studies reviewed and either relied on or not relied on in making the rule are disclosed.

The economic impact of these changes is minimal and results directly from the statutory changes.

The Council has been using a nearly paperless rule-review process for nine months. This change has a positive economic impact on agencies that submit rule-related materials for Council review and action. Agencies can potentially save the cost of producing 11 copies of each rule-related item placed on the Council's agenda. This reduces the cost of materials and time to prepare the copies. The new procedure also saves agencies the cost of having personnel make multiple trips to the Council office. Agencies may use the savings in time and materials to provide other services to members of the public. Businesses that supply paper and other materials or services used to produce copies may have decreased revenue as a result of agencies not making so many copies of their rule-related materials.

The nearly paperless rule-review process has increased costs for the Council. There was an initial cost to purchase lap-top computers and provide training for all Council members. There is a monthly cost to have the rule-related materials converted to a CD that is usable by the Council members. The business that converts the materials to a CD has increased revenue.

10. A description of the changes between the proposed rules, including supplemental notices, and final rules (if applicable:

In response to comments made by agency rulewriters, several word choice, grammar, and format changes were made. In response to a concern expressed by Council's Assistant Attorney General, R1-6-111(C)(5) and (6) were changed to require that a person submit to the Administrator of Council staff visual aids or written materials that supplement oral comments or written comments about an agency rulemaking rather than submit them directly to Council members. Council staff will forward the submitted materials to Council members, Council's Assistant Attorney General, and the agency employee identified as responsible for the rulemaking. Under A.R.S. § 41-1025(B), this change is not substantial because:

a. Persons affected by the proposed rule, those who want to make oral or written comments about an agency rulemaking, would know that the proposed rule affected their interest;

b. The subject matter of the proposed rule, submitting written materials or comments to Council, remains the same in the final rule; and

c. The effect of the final rule, a prescribed manner in which to submit written materials or comments, is the same as the effect of the proposed rule. The only change is the person to whom the materials or comments are submitted.

11. A summary of comments made regarding the rules and the agency response to them:

Written comments were received from four agencies: AHCCCS, Departments of Health Services and Environmental Quality, and the Board of Dental Examiners. An oral proceeding was held on September 18, 2003. It was attended by six persons, two of whom made public comment.

Many of the comments made were addressed when the previously mentioned word choice, grammar, and formatting changes were made. Response to the other comments is as follows:

COMMENT	ANALYSIS	RESPONSE
Should the heading to R1-6-107 be changed to include submitting approved summary rules for filing with the Office of the SOS? If everything is already submitted, clarify in R1-6-106.	R1-6-106 requires that materials for filing with the SOS be included when a final summary rule is submitted for Council's review and action. R1-6-108(A) indicates that an approved summary rule will be filed with the SOS without further action required by the rulemaking agency.	No change is necessary.
Summary rules still require a separate concise explanatory statement (A.R.S. § 41-1027(E)). Should R1-6-108(B) and (C) address the possibility that Council might require changes to the CES?	R1-6-108(B) and (C) reference R1-6-107, which deals with submitting approved regular rules to Council so it is not necessary for these subsections to reference a CES. The commenter is correct that the rules do not address the possibility that Council might require changes to the CES of a final summary rulemaking. This was done intentionally because the limited utility of the summary rulemaking procedure means that agencies seldom use it and because Council has approved every final summary rulemaking by consent, as required by A.R.S. § 41-1053(A).	No change is necessary.
In R1-6-101(B)(1), substitute “designee” for “another person directly or indirectly purporting to act on behalf or under the authority of the agency head.”	Council staff is not in position to determine whether a person who deals with the office has been designated to do so by the agency head. Rather, staff must rely on the person's representation that the person is acting on behalf or under the authority of the agency head.	No change is necessary.
R1-6-104(C) and R1-6-106(A): Does Council allow an electronic copy of materials to be submitted rather than a computer disk? Shouldn't this be clarified?	When an agency submits a final rule package in form for filing with the Office of the SOS, it must submit a computer disk containing the information required by the SOS. As written, the rules allow agencies to choose to put all parts of the rule package on a computer disk or to put on the disk only those rule-package items required by the SOS and to submit the remaining items by e-mail.	No change is needed.
R1-6-104(C): How is an agency to know whether a rule package is likely to be approved by the Council? I can't think of a time over the years that it hasn't been a coin flip even after speaking the G.R.R.C. staff.	Council staff is unable to speak for the Council members and can make no guarantees. However, staff is generally accurate in assessing whether a rule package contains issues that might lead the Council to return it. If an agency is unsure about the fate of its rule package, it can follow the procedures in R1-6-104(C)(2) and R1-6-107.	No change is needed.

R1-6-111(C)(5)(d): The rule requires that materials to supplement oral comments or written comments be submitted to the agency head. This is problematic for two reasons. First, the commenter may have trouble finding an address for the agency head. Second, submitting to the agency head will delay the materials in reaching the person responsible for the rulemaking.	This comment is correct but this part of the proposed rule was changed to require that all written materials and comments be submitted to the Administrator of Council staff. The Administrator will forward to the materials and comments to Council members, Council's Assistant Attorney General, and the agency person identified as responsible for the rulemaking.	Change made.

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

None

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

None

14. Were the rules previously made as emergency rules?

No

15. The full text of the rules follows:

TITLE 1. RULES AND RULEMAKING PROCESS

CHAPTER 6. GOVERNOR'S REGULATORY REVIEW COUNCIL

ARTICLE 1. RULES OF PROCEDURE

Section
R1-6-101. Definitions
R1-6-104. Placing a Regular Rule on the Council Agenda
R1-6-105. Submitting a Proposed Summary Rule
R1-6-106. Placing a Final Summary Rule on the Council Agenda
R1-6-107. Submitting Approved Regular Rules
R1-6-108. Filing Rules Approved by the Council
R1-6-109. Returned Rules
R1-6-111. Oral and Written Comments
R1-6-112. ~~5~~ Five-year-review Report
R1-6-113. Rescheduling a ~~5~~ Five-year-review Report

ARTICLE 2. DELEGATION AGREEMENTS

Section
R1-6-201. Appeal of a Delegation Agreement

ARTICLE 3. AGENCY PRACTICE OR SUBSTANTIVE POLICY STATEMENTS

Section
R1-6-301. Petition for Council Rulemaking or Review
R1-6-302. Appeal of an Existing Agency Practice or Substantive Policy Statement

ARTICLE 4. APPEALS OF ECONOMIC, SMALL BUSINESS, AND CONSUMER IMPACT STATEMENTS

Section
R1-6-401. Appeal of an Economic, Small Business, and Consumer Impact Statement

ARTICLE 1. RULES OF PROCEDURE

R1-6-101. Definitions

A. The definitions in A.R.S. § 41-1001 apply to this Chapter.

B. In this Chapter:

1. "Agency head" means the chief officer of an agency or another person directly or indirectly purporting to act on behalf or under the authority of the agency head.

2. "Chair" means the chairperson of the Council.
3. "Electronic copy" means a document submitted by e-mail.
~~3.~~4. "Open Meeting Law" means A.R.S. §§ 38-431 through 38-431.09.
~~4.~~5. "Regular rule" means a rule made according to A.R.S. §§ 41-1021, 41-1022 through 41-1025, 41-1028 through 41-1032, 41-1035, ~~41-1036,~~ 41-1052, and 41-1055.

R1-6-104. Placing a Regular Rule on the Council Agenda

A. To place a regular rule on the Council agenda, an agency shall deliver to the Council office ~~2~~ two rule packages prepared in the manner required by this Chapter and the rules of the Office of the Secretary of State. The agency shall ensure that each rule package contains the following items assembled in the following order:
1. Cover letter signed by the agency head specifying:
   a. The close of ~~the~~ record date;
   b. Whether definitions of terms contained in statutes or other rules and used in the ~~adopted~~ rule are attached;
   c. Whether the rulemaking relates to a ~~5~~ five-year-review report and, if applicable, the date the report was approved by the Council;
   d. Whether the ~~rulemaking~~ rule contains a new fee and, if ~~applicable~~ it does, citation of the statute expressly authorizing the new fee;
   e. Whether the ~~rulemaking~~ rule contains a fee increase~~, and~~ ;
   f. Whether an immediate effective date is requested for the rule under A.R.S. § 41-1032;
   g. A certification that the preamble discloses a reference to any study relevant to the rule that the agency reviewed and either did or did not rely on in the agency's evaluation of or justification for the rule; and
   ~~f.~~h. A list of all items enclosed.
2. Notice of Final Rulemaking, required by A.A.C. R1-1-602, including the preamble, table of contents for the ~~rule~~ rulemaking, and text of ~~the~~ each rule;
3. Economic, small business, and consumer impact statement that contains the information required by A.R.S. § 41-1055;
~~4. Concise explanatory statement that contains the information required by A.R.S. § 41-1036;~~
~~5.~~4. Copy of the existing rule if the entire existing rule is not shown as part of the revised text of a rule the agency is amending; and
~~6. Copy of the general and specific statutes authorizing the rule; and~~
~~7.~~5. Copy of definitions of terms, ~~contained in statutes or other rules,~~ used in the rule, that are defined in statute or another rule, if any.

B. In addition to the items specified in subsection (A), an agency shall submit ~~1~~ one copy of each of the following:
1. All written comments received by the agency concerning the proposed rule, if any; and
2. Materials incorporated by reference, if any.

C. After a rule is placed on the Council agenda, Council staff shall review the rule for compliance with the requirements of A.R.S. § 41-1052(C), ~~and~~ (D), and (E) and this Chapter and may suggest changes to the agency. After making any ~~changes~~ change, the agency shall submit the rule package to the Council office ~~enough copies~~ under one of the following alternatives:
1. If the agency believes it is likely that the rule package will be approved by the Council without change, it shall submit:
   a. Four paper copies of the rule-package items listed in subsections ~~(A)(1) through (A)(7),assembled in the order specified in subsection (A), to make 1 complete original rule package and 10 complete copies.~~ (A)(2) and (A)(3) assembled in the order specified in subsection (A) ;
   b. One original and three paper copies of an agency certificate prepared as provided in A.A.C. R1-1-105 except that the item in R1-1-105(B)(6) shall be omitted;
   c. Two paper copies of an agency receipt prepared as provided in A.A.C. R1-1-106; and
   d. A computer disk that contains the items listed in subsection (A) and the general and specific statutes authorizing the rule; or
   e. A computer disk that contains the item listed in subsection (A)(2) and an electronic copy of all the items listed in subsection (A) and the general and specific statutes authorizing the rule; or
2. If the agency is uncertain whether the rule package will be approved by the Council without change, it shall submit:
   a. One paper copy of the items listed in subsections (A)(2) and (A)(3); and
   b. A computer disk that contains all the items listed in subsection (A) and the general and specific statutes authorizing the rule; or
   c. An electronic copy of all the items listed in subsection (A) and the general and specific statutes authorizing the rule.

D. After a rule is placed on the Council agenda, an agency may have the rule moved to the agenda of a later meeting by having the agency head send a notice to the Chair that includes the date of the later meeting.

E. If it is necessary for a rule to be heard at more than ~~1~~ one Council meeting, the agency shall~~:~~

~~1.~~ ~~Contact~~ contact the Council ~~office~~ staff to learn which rule-package items~~, if any,~~ the agency needs to resubmit for the later meeting~~; or~~ .
~~2. Submit 1original and 10 copies of the rule package described in subsection (A) for the later meeting.~~

R1-6-105. Submitting a Proposed Summary Rule
To submit a proposed summary rule, an agency shall deliver to the Council office ~~1~~ one copy of the following items, assembled in the following order and prepared in the manner required by this Chapter and the rules of the Office of the Secretary of State:
1. Notice of Proposed Summary Rulemaking, including the preamble, table of contents for the proposed summary ~~rule~~ rulemaking, and text of the proposed summary rule filed with the Office of the Secretary of State as required by A.R.S. § 41-1027(B); and
2. Statute that repeals or supersedes the authority under which the original rule was enacted or the statute that is repeated verbatim in the original rule or proposed summary rule.

R1-6-106. Placing a Final Summary Rule on the Council Agenda
A. To place a final summary rule on the Council agenda, an agency shall deliver to the Council office ~~1 original and 10 copies of a rule package~~ the following items, prepared in the manner required by this Chapter and the rules of the Office of the Secretary of State~~.~~ :
1. The cover letter described in subsection (B)(1);
2. Four paper copies of the items listed in subsections (B)(2) through (B)(4), assembled in the order specified in subsection (B);
3. One original and three paper copies of an agency certificate prepared as provided in A.A.C. R1-1-105 except that the item in R1-1-105(B)(6) shall be omitted;
4. Two paper copies of an agency receipt prepared as provided in A.A.C. R1-1-106; and
5. A computer disk that contains all the items listed in subsection (B) and the general and specific statutes authorizing the rule; or
6. A computer disk that contains the item listed in subsection (B)(2) and an electronic copy of all the items listed in subsection (B) and the general and specific statutes authorizing the rule.

B. An agency shall ensure that the rule package contains the following items assembled in the following order:
1. Cover letter signed by the agency head specifying:
   a. The close of ~~the~~ record date;
   b. Whether the rulemaking relates to a ~~5~~ five-year-review report and, if applicable, the date the report was approved by the Council; ~~and~~
   c. Whether an immediate effective date is requested for the rule under A.R.S. § 41-1032;
   d. A certification that the preamble discloses a reference to any study relevant to the rule that the agency reviewed and either did or did not rely on in the agency's evaluation of or justification for the rule; and
   ~~c.~~e. A list of all items enclosed.
2. Notice of Final Summary Rulemaking, required by A.A.C. R1-1-801, including the preamble, table of contents for the final summary ~~rule~~ rulemaking, and text of ~~the~~ each final summary rule;
3. Economic, small business, and consumer impact statement that contains the information required by A.R.S. § 41-1055 or a statement that the rulemaking is exempt from this requirement under A.R.S. § 41-1055(D)(2); and
4. Concise explanatory statement ~~that contains the information required by A.R.S. § 41-1036; and~~
5. ~~Copy of the general and specific statutes authorizing the rule~~.

C. In addition to the ~~rule packages materials~~ items specified in subsection (B), an agency shall submit ~~1~~ one copy of all written comments received by the agency concerning the proposed summary rule.

R1-6-107. Submitting Approved Regular Rules
A. For ~~each~~ a final regular ~~or summary~~ rule placed on the Council's agenda under R1-6-104(C)(2) and approved by the Council or placed on the Council's agenda under R1-6-104(C)(1) and approved by the Council with changes, an agency shall deliver to the Council office within 14 calendar days after Council approval, unless a later date is arranged under subsection (B), the following items, prepared in the manner required by this Chapter and the rules of the Office of the Secretary of State:
1. A letter identifying each change made at the direction of the Council. If no changes were directed, no letter is required;
2. One original and ~~3~~ three paper copies of the following items assembled in the following order:
   a. Agency certificate, required by A.A.C. R1-1-105(B); and ~~either~~
   b. Items listed in R1-6-104(A)(2) ~~through R1-6-104(A)(4)~~ and (A)(3) ~~for a regular rule; or~~
   ~~c. Items listed in R1-6-106(B)(2) through R1-6-106(B)(4) for a summary rule~~;
3. ~~One original and 1 copy~~ Two copies of the receipt required by A.A.C. R1-1-106~~.~~ ; and

One computer disk that contains the item listed in R1-6-104(A)(2).

B. If an agency is unable to deliver an approved regular ~~or summary~~ rule to the Council office within the time specified in

subsection (A), the agency shall contact the Council office and arrange to submit the approved rule at a later date.

R1-6-108. Filing Rules Approved by the Council

A. If the Council approves an agency rule as submitted under R1-6-104(C)(1) or R1-6-106(A) or if the Council approves an agency rule as submitted under R1-6-104(C)(2) and the agency submits the items required by R1-6-107, the Council shall file the original and ~~2~~ two copies of the agency's items; ~~2~~ two copies of the agency receipt; and the computer disk, ~~and 1 copy of materials incorporated by reference~~ with the Office of the Secretary of State. The Council shall include a written notice ~~signed by the Chair~~ specifying the Sections approved and the date of Council approval.

B. If the Council approves a preamble, table of contents for the ~~rule~~ rulemaking, rule, or economic, small business, and consumer impact statement~~, or concise explanatory statement~~ subject to the agency making changes as directed by the Council, and the agency submits the items required by R1-6-107:

1. ~~The Chair~~ Council staff shall verify that each change required by the Council was made and file the items with the Office of the Secretary of State as prescribed in subsection (A).
2. If an agency submits a revised preamble, table of contents for the ~~rule~~ rulemaking, rule, or economic, small business, and consumer impact statement~~, or concise explanatory statement~~ that does not contain the exact words approved by the Council, ~~the Chair~~ Council staff shall notify the agency and require that the items be submitted as approved or schedule the matter for reconsideration by the Council.

C. Except as specified in subsection (B), an agency shall not make any change to a preamble, table of contents for the ~~rule~~ rulemaking, rule, economic, small business, and consumer impact statement, ~~concise explanatory statement,~~ or materials incorporated by reference after Council approval.

~~**D.** If the Council is not able to file an agency's approved rule with the Office of the Secretary of State on the day that the agency submits it, the Council office shall inform the agency of the filing date.~~

R1-6-109. Returned Rules

The Council may vote to return a preamble, table of contents for the ~~rule~~ rulemaking, rule, or economic, small business, and consumer impact statement~~, or concise explanatory statement~~ under A.R.S. § 41-1052(B), after identifying the manner in which the returned rule-package item does not meet the standards at A.R.S. § 41-1052(C) ~~and (D)~~ through (E).

1. The Council may schedule a date for resubmission in consultation with the agency representative.
2. An agency resubmitting a preamble, table of contents for the ~~rule~~ rulemaking, rule, or economic, small business, and consumer impact statement~~, or concise explanatory statement~~ to the Council shall attach to the resubmitted rule-package item a letter that:
   a. ~~Identify~~ Identifies all changes made in response to the Council's explanation for its return of the rule package item~~.~~ ,
   b. ~~Explain in writing~~ Explains how the changes ensure that the rule package item meets the standards at A.R.S. § 41-1052(C) ~~and (D);~~ through (E), and
   c. ~~Show~~ Shows that the resubmitted rule is not substantially different from the proposed rule under the standards in A.R.S. § 41-1025.
3. In accordance with R1-6-110, an agency representative shall appear at the Council meeting at which the resubmitted preamble, table of contents for the ~~rule~~ rulemaking, rule, or economic, small business, and consumer impact statement~~, or concise explanatory statement~~ is to be considered.

R1-6-111. Oral and Written Comments

A. Under A.R.S. § 41-1052~~(F)~~ (G), a person may submit written comments to the Council about an agency rulemaking.

B. A person may make oral comments about an agency rulemaking at a Council meeting.

C. A person who makes written or oral comments to the Council shall:

1. Ensure that the comments relate to a rule scheduled on the Council meeting agenda;
2. Cite the particular provision of A.R.S. § 41-1052(C) ~~or (D)~~ through (E) that is the basis for the Council's authority to consider each issue addressed;
3. State specifically how each issue relates to the particular provision cited;
4. Tell what other efforts the person made to communicate with the rulemaking agency about each issue; and
5. ~~Submit 1 original and 9 copies~~ If making oral comments, submit 10 paper copies or one electronic copy of, or a computer disk that contains, any visual aids or written materials supplementing the oral comments to the Administrator of Council staff, who shall forward a copy to each member of the Council, the Council's Assistant Attorney General, and the person identified as responsible for the agency's rulemaking; or
6. ~~Submit 1 original and 9 copies~~ If not making oral comments, submit 10 paper copies or one electronic copy of, or a computer disk that contains, any written comments ~~to the Council office and 1 copy to the rulemaking agency; and~~ to the Administrator of Council staff, who shall forward a copy to each member of the Council, the Council's Assistant Attorney General, and the person identified as responsible for the agency's rulemaking.
7. ~~If written comments are submitted to the Council and the rulemaking agency fewer than 6 days before the Council meeting, tell why the person was unable to submit the written comments earlier~~

D. If materials are submitted under subsection (C)(5) or (C)(6) fewer than six days before the Council meeting, the Council

shall consider the reason for the untimely submittal, fairness to the rulemaking agency, and the best interests of the state in determining the action to take under A.R.S. § 41-1052.

~~D.~~**E.** The Chair may limit the time allotted to each speaker and preclude repetitious comments.

R1-6-112. ~~5~~ Five-year-review Report

A. To place a ~~5~~ five-year-review report on the Council agenda, an agency shall deliver to the Council office ~~2~~ two copies of the ~~5~~ five-year-review report required by A.R.S. § 41-1056. Except as indicated in subsection (B), the agency shall separately discuss and present the following information in the ~~5~~ five-year-review report in the following order for each rule:

1. General and specific statutes authorizing the rule;
2. Objective of the rule;
3. Effectiveness of the rule in achieving the objective;
4. Consistency of the rule with state and federal statutes and rules, and a listing of the statutes or rules used in determining the consistency;
5. Agency enforcement policy, including whether the rule is currently being enforced and, if so, whether there are any problems with enforcement;
6. Agency ~~views~~ view regarding current wisdom of the rule;
7. Clarity, conciseness, and understandability of the rule;
8. Summary of the written criticisms of the rule received by the agency within the ~~5~~ five years immediately preceding the ~~5~~ five-year-review report, including letters, memoranda, reports, and written allegations made in litigation ~~and~~ or administrative proceedings in which the agency was a party that the rule is discriminatory, unfair, unclear, inconsistent with statute, or beyond the authority of the agency to enact, and the ~~conclusion~~ result of the litigation ~~and~~ or administrative proceedings;
9. Estimated economic, small business, and consumer impact of the rule as compared to the economic, small business, and consumer impact statement prepared on the last making of the rule or, if no economic, small business, and consumer impact statement was prepared on the last making of the rule, an assessment of the actual economic, small business, and consumer impact of the rule; and
10. Course of action the agency proposes to take regarding each rule, including the month and year in which the agency anticipates submitting the rules to the Council if the agency determines it is necessary to amend~~,~~ or repeal an existing rule, or to make a new rule.

B. If the information regarding any of the items listed in subsection (A) is identical for any group of rules, the agency shall discuss that information in its ~~5~~ five-year-review report only once for the group of rules.

C. An agency shall attach the following to each copy of a ~~5~~ five-year-review report:

1. Cover letter, signed by the agency head, that identifies ~~a~~:
   a. A person to contact for information regarding the report,
   b. Any rule that is not reviewed with the intention that the rule will expire under A.R.S. § 41-1056(E), and
   c. Any rule that is not reviewed because the Council rescheduled the review of the rule under A.R.S. § 41-1056(C), and
2. Copy of the rules being reviewed~~, and~~
3. ~~Copy of the general and specific authorizing statutes~~.

D. If an economic, small business, and consumer impact statement was prepared on the last making of ~~the rules~~ a rule being reviewed, an agency shall attach ~~1~~ one copy of the economic, small business, and consumer impact statement for the rule to the ~~5~~ five-year-review report.

E. After a ~~5~~ five-year-review report is placed on the Council agenda, Council staff shall review the report for compliance with the requirements of A.R.S. § 41-1056 and this Chapter and may suggest changes to the agency. After making any ~~changes~~ change, the agency shall submit to the Council office ~~1 original and 10 copies~~ one paper copy of the five-year-review report and one electronic copy of or a computer disk that contains the items listed in subsections (A) and (C) and the general and specific statutes authorizing the rules reviewed.

F. After a ~~5~~ five-year-review report is placed on the Council agenda, an agency may have the report moved to the agenda of a later meeting by having the agency head send a notice to the Chair that includes the date of the later meeting.

R1-6-113. Rescheduling a ~~5~~ Five-year-review Report

To request that a ~~5~~ five-year-review report be rescheduled under A.R.S. § 41-1056(C), an agency head shall submit a letter to the Chair not more than 90 days before the report is due that includes the following information~~;~~ :

1. The Title, Chapter, and Article of the rules for which rescheduling is sought;
2. Whether the rules were initially made or substantially revised within the last ~~2~~ two years; and
   a. If substantially revised:
      i. A description of the revisions,
      ii. Why the revisions are believed to be substantial, and
      iii. The date on which the rules were published in the *Register* by the Office of the Secretary of State; or
   b. If initially made, the date on which the rules were published in the *Register* by the Office of the Secretary of State.

ARTICLE 2. DELEGATION AGREEMENTS

R1-6-201. Appeal of a Delegation Agreement

A. Under A.R.S. § 41-1081(F), a person who appeals an agency decision to enter into a delegation agreement shall deliver to the Council office ~~1~~ one original ~~and 8 copies of a~~ written request signed by the person submitting the appeal and eight paper copies or one electronic copy of, or a computer disk that contains, the request. The person submitting the appeal shall include the following in the request:
1. All written objections to the delegation agreement submitted to the delegating agency by the person filing the appeal;
2. The name and address of each agency and each political subdivision entering into the delegation agreement;
3. The name, address, and ~~facsimile~~ fax and telephone numbers of the person filing the appeal;
4. The name of the person being represented by the person filing the appeal;
5. The subject matter of the delegation agreement; and
6. The reasons why the person is objecting to the delegation agreement and filing the appeal.

B. ~~An~~ The head of an agency whose delegation agreement is being appealed shall deliver to the Council office ~~1~~ one original and ~~8~~ eight paper copies or one electronic copy of, or a computer disk that contains the following:
1. A memorandum that lists the date the delegating agency gave written notice of the decision to enter into the delegation agreement and the dates of all public proceedings regarding the delegation agreement;
2. The name, address, and ~~facsimile~~ fax and telephone numbers of each agency and each political subdivision contact person;
3. The delegation agreement; and
4. A written summary prepared by the agency, responding to all oral or written comments received by the agency regarding the delegation agreement.

C. The Council shall notify the delegating agency head of an appeal of a delegation agreement by 5:00 p.m. of the business day following Council ~~notification~~ receipt of the appeal. The agency head shall deliver to the Council office the information and documents listed in subsection (B) no later than 5:00 p.m. on the ~~3rd~~ third business day following notification of the appeal by the Council.

D. ~~After~~ Within 14 calendar days after an appeal is filed with the Council, the Chair shall send written notice to the person filing the appeal and the delegating agency head stating whether ~~3~~ three Council members have requested that the appeal be considered at a Council meeting. If an appeal is to be considered at a Council meeting, the notice shall include the date and time of the Council meeting.

E. After the Council approves or disapproves a delegation agreement that has been appealed, the Chair shall send a written letter to the delegating agency head and person filing the appeal that specifies the reasons for the approval or disapproval and the date of Council action.

ARTICLE 3. AGENCY PRACTICE OR SUBSTANTIVE POLICY STATEMENTS

R1-6-301. Petition for Council Rulemaking or Review

A. A person may petition the Council under A.R.S. § 41-1033(A) for a:
1. Rulemaking action relating to a Council rule, including making a new rule or amending or repealing an existing rule; or
2. Review of an existing Council practice or substantive policy statement alleged to constitute a rule.

B. To act under A.R.S. § 41-1033(A) and this Section, a person shall submit to the Council office a written petition including the following information:
1. Name, address, telephone number, and ~~facsimile~~ fax number, if any, of the person submitting the petition;
2. Name of any person represented by the person submitting the petition;
3. If requesting a rulemaking action:
   a. Statement of the rulemaking action sought, including the A.A.C. citation of all existing rules, and the specific language of a new rule or rule amendment; and
   b. Reasons for the rulemaking action, including an explanation of why an existing rule is inadequate, unreasonable, unduly burdensome, or unlawful~~.~~ ;
4. If requesting a review of an existing practice or substantive policy statement:
   a. Subject matter of the existing practice or substantive policy statement, and
   b. Reasons why the existing practice or substantive policy statement constitutes a rule~~.~~ ; and
5. Dated signature of the person submitting the petition.

C. A person may submit supporting information with a petition, including:
1. Statistical data; and
2. A list of other persons likely to be affected by the rulemaking action or the review, with an explanation of the likely effects.

D. The Council shall send the person submitting a petition a written response within 60 calendar days of the date the Council receives the petition.

R1-6-302. Appeal of an Existing Agency Practice or Substantive Policy Statement

A. A person appealing an agency's final decision regarding a petition for review of an existing agency practice or substantive policy statement filed under A.R.S. § 41-1033(B) shall deliver to the Council office ~~1~~ one original and ~~9~~ eight paper copies or one electronic copy of, or a computer disk that contains, the following:
1. A ~~written~~ request signed by the person submitting the appeal that includes the following:
   a. Name of the agency upon which the appeal is taken;
   b. Name, address, telephone number, and ~~facsimile~~ fax number, if any, of the person filing the appeal;
   c. Name of the person being represented by the person filing the appeal;
   d. Subject matter of the existing agency practice or substantive policy statement being appealed; and
   e. Reasons why the existing agency practice or substantive policy statement constitutes a rule.
2. The petition requesting a review of the agency's existing practice or substantive policy statement; and
3. The agency's written decision ~~to each petition submitted to the agency requesting a review of the agency's existing practice or substantive policy statement~~ that is being appealed.

B. The Council shall notify the affected agency head of an appeal of an existing agency practice or a substantive policy statement by 5:00 p.m. of the business day following Council receipt of the appeal. The agency shall deliver to the Council office the information and documents listed in subsection (C) no later than 5:00 p.m. on the ~~3rd~~ third business day following notification by the Council of the appeal.

C. ~~An~~ The head of an agency whose final decision is being appealed shall deliver to the Council office ~~1~~ one original and ~~9~~ eight paper copies or one electronic copy of, or a computer disk that contains, the following:
1. A memorandum that includes the following:
   a. Date the agency gave written notice of its decision under A.R.S. § 41-1033(A);
   b. Name, address, telephone number, and ~~facsimile~~ fax number, if any, of each agency contact person; and
   c. Reasons why the agency believes that the existing agency practice or substantive policy statement does not constitute a rule.
2. The existing agency practice or substantive policy statement being appealed; and
3. ~~Each~~ If a petition other than that of the appellant was filed with the agency requesting a review of the ~~agency's~~ same existing practice or substantive policy statement being appealed~~; and~~ :
   a. The other petition, and
   ~~4.~~b. The agency's written decision ~~to each~~ regarding the other petition ~~submitted to the agency requesting a review of the agency's existing practice or substantive policy statement being appealed~~.

D. Within 14 calendar days after an appeal is filed with the Council, the Chair shall send written notice to the person filing the appeal and the affected agency head stating whether ~~3~~ three Council members have requested that the appeal be considered at a Council meeting. If the appeal is to be considered at a Council meeting, the notice shall include the date and time of the Council meeting.

E. Within ~~7~~ seven calendar days after the Council decides whether the agency practice or substantive policy statement constitutes a rule, the Chair shall send a letter to the affected agency head and the person filing the appeal that specifies the decision and the reasons for and date of the Council decision.

ARTICLE 4. APPEALS OF ECONOMIC, SMALL BUSINESS, AND CONSUMER IMPACT STATEMENTS

R1-6-401. Appeal of an Economic, Small Business, and Consumer Impact Statement

A. A person appealing an agency's final decision on whether to initiate a rulemaking under A.R.S. § 41-1056.01(D), shall deliver to the Council office ~~1~~ one original and ~~9~~ eight paper copies or one electronic copy of, or a computer disk that contains, the following:
1. ~~The written~~ A request signed by the person submitting the appeal, citing the rule or rules being appealed and including the following:
   a. Name of the agency upon which the appeal is taken;
   b. Name, address, telephone number, and ~~facsimile~~ fax number, if any, of the person filing the appeal;
   c. Name of the person being represented by the person filing the appeal, if applicable;
   d. How the person filing the appeal is or may be affected by the agency's final decision made under A.R.S. § 41-1056.01(C); and
   e. Why the person appealing believes either that:
      i. Under A.R.S. § 41-1056.01(A)(1), the actual economic, small business, or consumer impact significantly exceeded the estimated impact; or
      ii. Under A.R.S. § 41-1056.01(A)(2), the actual economic, small business, or consumer impact was not estimated on adoption of the rule; and the impact imposes a significant burden on persons subject to the rule.
2. ~~The~~ A copy of the economic, small business, and consumer impact statement being addressed in the appeal; and
3. The data used by the person appealing to support the reasons listed under subsection (A)(1)(e).

B. The Council shall notify the affected agency head of an appeal of the economic impact of a rule ~~and its impact~~ by 5:00 p.m. of the business day following Council receipt of the appeal. The affected agency head shall deliver to the Council

office the information and documents listed in subsection (C) no later than 5:00 p.m. on the ~~3rd~~ third business day following notification by the Council of the appeal.

C. ~~An~~ The head of an agency whose final decision is being appealed shall deliver to the Council office ~~1~~ one original and ~~9~~ eight paper copies or one electronic copy of, or a computer disk that contains, the following:

1. A memorandum that includes the following:
   a. Date of ~~the~~ publication of the agency's final decision under A.R.S. § 41-1056.01(C);
   b. Name, address, telephone number, and ~~facsimile~~ fax number, if any, of each agency contact person;
   c. ~~If appropriate, reasons~~ Reasons why the agency believes that:
      i. The actual economic, small business, and consumer impact did not significantly exceed the estimated economic, small business, and consumer impact; or
      ii. The actual economic, small business, and consumer impact was estimated on approval of the rule and the impact does not impose a significant burden on persons subject to the rule; and
   d. ~~Final~~ A copy of final judgments, if any, issued by a court of competent jurisdiction that are based on whether the contents of the rule's economic, small business, and consumer impact statement were insufficient or inaccurate.
2. ~~The~~ A copy of the rule being appealed; and
3. The agency's written summary ~~of comments received about the rule and its impact, the agency's response to those comments, and the agency's final decision on whether to make a new rule, or amend or repeal the existing rule~~ prepared and published as required by A.R.S. § 41-1056.01(C).

D. Within 14 calendar days after an appeal is filed with the Council, the Chair shall send written notice to the person filing the appeal and the affected agency head stating whether ~~3~~ three Council members have requested that the appeal be considered at a Council meeting. If the appeal is to be considered at a Council meeting, the notice shall include the date and time of the Council meeting.

E. Within ~~7~~ seven calendar days after the Council decides whether either or both of the provisions in A.R.S. § 41-1056.01(A) are met, the Chair shall send a letter to the affected agency head and the person filing the appeal that specifies the decision, the reasons for and date of the Council decision, and the action, if any, required by the agency.

NOTICE OF FINAL RULEMAKING

TITLE 3. AGRICULTURE

CHAPTER 9. DEPARTMENT OF AGRICULTURE
AGRICULTURAL COUNCILS AND COMMISSIONS

PREAMBLE

1. Sections Affected — **Rulemaking Action**

Article 5	New Article
R3-9-501	New Section
R3-9-502	New Section
R3-9-503	New Section
R3-9-504	New Section
R3-9-505	New Section

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

Authorizing statute: A.R.S. § 3-468.02(C)(9)

Implementing statute: A.R.S. § 3-468.02

3. The effective date of the rules:

December 2, 2003. The Arizona Citrus Research Council requests an immediate effective date as provided under A.R.S. § 41-1032(A)(4). There are no penalties to which the public is subject as a result of this rulemaking.

This rulemaking provides a benefit to the public by clarifying the location of Citrus Research Council records and the process by which they may be reviewed and copied.

The Arizona Citrus Research Council is providing specific information to the regulated community with regard to Council elections, hearings, and the annual report. Implementation of this rulemaking presents the material concisely and in conformance with the current publication standards of the Office of the Secretary of State. The regulated community will benefit from immediate access to the detailed information now provided by these rules.

4. A list of all previous notices appearing in the Register addressing the final rules:

Notice of Rulemaking Docket Opening: 9 A.A.R. 1872, June 13, 2003

Notice of Proposed Rulemaking: 9 A.A.R. 3778, August 29, 2003

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

Name: Sherry D. Blatner, Rules Analyst

Address: Arizona Department of Agriculture
1688 W. Adams, Room 235
Phoenix, AZ 85007

Telephone: (602) 542-0962

Fax: (602) 542-5420

E-mail: sherry.blatner@agric.state.az.us

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

This rulemaking establishes procedures for governance of the Council as prescribed under A.R.S. § 3-468.02.

7. A reference to any study relevant to the rules that the agency reviewed and either relied on in its evaluation of or justification for the rules or did not rely on in its evaluation of or justification for the rules, where the public may obtain or review each study, all data underlying each study, and any analysis of each study and other supporting material:

None

8. A showing of good cause why the rules are necessary to promote a statewide interest if the rules will diminish a previous grant of authority of a political subdivision of this state:

Not applicable

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

A. *The Arizona Citrus Research Council and the Arizona Department of Agriculture*.

The Council and the Department will incur modest expenses related to educating the regulated community on the new Sections.

B. *Political Subdivision.*

Other than the Council and the Department, the Office of Administrative Hearings may be affected by this rulemaking if a hearing is requested.

C. *Businesses Directly Affected by the Rulemaking.*

Citrus producers, grower-shippers, and handlers are the beneficiaries of programs developed by the Council in the following areas:

- Research, development, and survey programs concerning varietal development;
- Citrus pest eradication;
- Production, harvesting, handling, and hauling from field to market; and
- Other programs deemed appropriate by the Council

The regulated community the Council serves, and their attorneys, will be beneficially affected by the use of the uniform administrative procedures of the Office of Administrative Hearings.

10. A description of the changes between the proposed rules, including supplemental notices, and final rules (if applicable):

Minor technical and grammatical changes were made in response to suggestions from Council staff. The Definitions subsection was rewritten. The statutory definition of department was used to replace the language in the proposed version of R3-9-501.

11. A summary of the comments made regarding the rules and the agency response to them:

The Council did not receive any comments on these rules.

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

None

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

None

14. Were these rules previously made as emergency rules?

No

15. The full text of the rules follows:

TITLE 3. AGRICULTURE

CHAPTER 9. DEPARTMENT OF AGRICULTURE
AGRICULTURAL COUNCILS AND COMMISSIONS

R3-9-501. Definitions
"Department" means the Arizona department of agriculture. A.R.S. § 3-468(3).

R3-9-502. Elections
A. The Council shall elect officers during the first quarter of each calendar year.
B. Officers shall continue in office until the next annual election is held.
C. An officer may be successively reelected.

R3-9-503. Hearings
A. The Council shall use the uniform administrative procedures of A.R.S. Title 41, Chapter 6, Article 10 to govern any hearing before the Council.
B. A party may file a motion for rehearing or review under A.R.S. § 41-1092.09.
C. The Council shall grant a rehearing or review of an administrative law decision for any of the following causes materially affecting the moving party's rights:
1. The decision is not justified by the evidence or is contrary to law;
2. There is newly discovered material evidence that could not with reasonable diligence have been discovered and produced at the original proceeding;
3. One or more of the following deprived the party of a fair hearing:
   a. Irregularity or abuse of discretion in the conduct of the proceeding;
   b. Misconduct of the Council, the administrative law judge, or the prevailing party; or
   c. Accident or surprise that could not have been prevented by ordinary prudence; or
4. Excessive or insufficient sanction.

D. The Council may grant a rehearing or review to any or all of the parties. The rehearing or review may cover all or part of the issues for any of the reasons stated in subsection (C). An order granting a rehearing or review shall particularly state the grounds for granting the rehearing or review, and the rehearing or review shall cover only the grounds stated.

R3-9-504. Annual Report
The Council shall prepare an annual report as prescribed under A.R.S. § 3-468.02(A)(5), by October 31.

R3-9-505. Records
The Department shall retain the Council's records as authorized by A.R.S. § 3-468.02(A)(4). A record may be reviewed at the Department's main office, Monday through Friday, except an Arizona legal holiday, during the hours of 8:00 a.m. to 5:00 p.m. A copy of a record shall be provided according to the provisions of A.R.S. § 39-121 et seq.

NOTICE OF FINAL RULEMAKING

TITLE 18. ENVIRONMENTAL QUALITY

CHAPTER 2. DEPARTMENT OF ENVIRONMENTAL QUALITY
AIR POLLUTION CONTROL

PREAMBLE

1. Sections Affected — **Rulemaking Action**
R18-2-702 — Amend

2. The statutory authority for the rulemaking, including both the authorizing statute (general) and the statutes the rules are implementing (specific):
Authorizing and implementing statutes: A.R.S. §§ 49-104(A)(11), 49-404, and 49-425

3. The effective date of the rule:
February 3, 2004

4. A list of all previous notices appearing in the Register addressing the final rule:
Notice of Rulemaking Docket Opening: 9 A.A.R. 2282, July 3, 2003

Notice of Proposed Rulemaking: 9 A.A.R. 3489, August 8, 2003

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

Name: Kevin Force, Air Quality Division

Address: ADEQ
1110 W. Washington
Phoenix, AZ 85007

Telephone: (602) 771-4480 (Any ADEQ number may be reached in state by dialing 1-800-234-5677 and asking for the seven digit extension.)

Fax: (602) 771-2366

E-mail: kf1@ev.state.az.us

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

Summary. ADEQ has finalized changes to R18-2-702 to establish a statewide 20% opacity limit for certain categories of stationary point sources. The final rule also sets forth a process by which a source may petition the Director for an alternative opacity limit. The revisions respond to the recent EPA disapproval to R18-2-702 as a revision of the Arizona State Implementation Plan (SIP).

Background. On September 23, 2002, EPA disapproved R18-2-702 as a revision of the Arizona SIP, and directed Arizona to correct deficiencies in the rule (67 FR 59546). EPA found R18-2-702 deficient in three respects: its scope of applicability, the failure of a 40% opacity limit to meet Reasonably Available Control Measures (RACM) requirements for moderate PM_{10} nonattainment areas, and the ADEQ Director's ability to adjust the opacity standard in nonattainment areas without EPA approval. EPA will impose sanctions on Arizona if the deficiencies are not corrected and approved by EPA by April 23, 2004.

No rule revisions were necessary to correct the scope of applicability (SIP relaxation) deficiency. ADEQ demonstrates in the SIP revision that R18-2-702 is not a SIP relaxation because it applies to more sources than does R9-3-501, an earlier opacity rule that is currently in the SIP. ADEQ's final amendment of R18-2-702 establishing a statewide 20% opacity standard satisfies the RACM requirement deficiency. Finally, ADEQ has made rule changes to include EPA review and approval of alternative opacity standards for sources in nonattainment areas.

Before proposing this rule, ADEQ notified and solicited comment from over 180 stakeholders and interested parties in an effort to create a rule that addresses the needs of both the general public and the regulated community. They range from state, federal, and local governments and agencies, to regulated businesses and environmental groups. Stakeholder meetings were regularly attended by 20 or more representatives from various parties. The changes to R18-2-702 are the result of this extensive cooperative effort with stakeholders and other interested parties.

Since September 23, 2002, EPA has clarified that it is only requiring R18-2-702 to meet RACM in PM_{10} nonattainment areas. Nevertheless, this final rule establishes a statewide general opacity limit of 20%, and outlines the process by which sources can receive an alternative opacity standard, subject to the Director's discretion and, in the case of nonattainment areas, the review and approval of the EPA. This final rule allows petitions for alternative limits in both attainment and nonattainment areas until May 15, 2004. This is a little more than three months from the expected effective date of the rule, February 2. The 20% standard is first effective in attainment areas on April 23, 2006. This delay should allow sources that believe they cannot meet the new standard to assemble the documentation necessary to show the need for an alternative limit, and give sources the opportunity, in their documentation, to suggest what alternative opacity limit they would be able to achieve. In order to obtain an alternative opacity limit, a source must show that it is meeting its particulate mass emission limits, while doing everything it can to meet opacity. ADEQ is committed to act upon any petition by October 15, 2004.

In order to obtain an approximate count of sources that may apply for an alternative opacity limit under the new rule, ADEQ requested any source that might petition for one to indicate so in a comment to this rule. Only one source (located in an attainment area) indicated that they might petition for an alternative limit under the new rule.

In research over the past year, ADEQ has found that 20% opacity or lower is being applied throughout the country for all types of sources. Because many of these source types (example: sand & gravel operations) operate throughout Arizona, 20% is reasonable to apply statewide in Arizona without unduly burdening the regulated community. To ADEQ's knowledge, only one source has had difficulty complying with the current 40% opacity standard, and it did apply for an alternative limit under the former rule. ADEQ expects the 20% limit to actually impact very few sources in attainment areas. Moreover, a statewide 20% opacity limit best serves the public health and welfare. Enforcement of a statewide limit would limit the problem of transport of pollutants from attainment to nonattainment areas. This is especially important for particulates, which many times pollute in nearby areas more than being transported long distances.

ADEQ also found that it would be more difficult and inefficient for both sources and regulators to keep track of the correct standards if the area covered by R18-2-702, previously subject to just a 40% standard, was divided up further into contiguous 20% and 40% areas. Maricopa County previously made the same choice as ADEQ: although the county contains a PM10 nonattainment area, county regulators have made 20% opacity the general limit throughout the entire county. (See Maricopa County Air Pollution Control Regulations, Rule 300, Section 301)

Under R18-2-325(B)(5), ADEQ will require compliance with the new opacity limits on the effective dates provided for in subsection (B) of this final rule, unless a source indicates that it may apply for an alternative opacity limit. Because some sources in attainment areas may not be as familiar with the rulemaking process as others, the final rule gives sources in attainment areas two years from the expected date of EPA approval to comply. Thus, affected sources in attainment areas planning to make any needed equipment changes will have two full business infrastructure cycles in which to obtain capital, design the changes, purchase equipment, conduct tests, and operate controls necessary to comply with the 20% limit, if they don't apply for an alternative limit. For all sources, ADEQ expects that it will eventually reopen, revoke and reissue, or renew permits that contain 40% opacity limits from the former R18-2-702 to incorporate the new 20% limit.

The statewide 20% opacity limit also serves economic equity and efficiency. ADEQ found that competition could be adversely affected by the introduction of differing opacity limits based on attainment status. Before this final rule, there was no opacity-related reason for a source to locate inside or outside of a PM_{10} nonattainment area; the standard was 40% everywhere. If ADEQ kept attainment areas at 40%, sources, particularly portable sources, would have been able to relocate just outside a nonattainment area in order to avoid any compliance costs associated with a lower opacity limit, allowing those sources to enjoy an unfair advantage over those remaining on the nonattainment side of the area.

During workshops on this rule, some sources requested that exceptions to the 20% opacity standard be written directly into R18-2-702 for certain source conditions related to startup, shutdown, and malfunction. ADEQ declined, noting that it already has rule language that covers these situations in R18-2-310, Affirmative Defenses for Excess Emissions Due to Malfunctions, Startup, and Shutdown. In addition, certain sources requested that exceptions be written into the rule for more routine opacity variations related to "load-shifting"—that is, increasing or decreasing the amount of fuel being sent into the power generating equipment in order to respond to a need for increased or decreased power. ADEQ believes that exceptions for such routine operations would defeat the purpose of having a general opacity standard, and will be better handled under the revised alternative opacity limit procedure. ADEQ expects that the alternative limits it approves under subsection (D) will only apply during those periods where the source shows it cannot meet the 20% limit, and not during the entire operating period.

Subsection-by-subsection Explanation of the Final Rule.

R18-2-702(A) This subsection clarifies those sources to which the Rule is applicable.

R18-2-702(B) This subsection establishes opacity limits and effective dates for both attainment and nonattainment areas.

R18-2-702(C) This subsection is largely unchanged; only minor changes were made to increase the rule's conciseness and understandability.

R18-2-702(D) This subsection establishes the procedure by which sources can petition the Director for an alternative opacity limit. All petitions must include a report showing that the source has exercised all practical means of reducing opacity and has utilized control technology that is reasonably available considering technical and economic feasibility.[1]

[[1]Technical and economic feasibility are two of the criteria used to determine whether a control method meets the requirements of RACM/RACT. See, 63 FR 15931-15933, (April 1, 1998) Promulgation of Federal Implementation Plan for Arizona-Phoenix Metro Area Moderate Area PM-10; Disapproval of State Implementation Plan for Arizona-Phoenix Moderate Area PM-10; Proposed Rule. See also, 59 FR 156, 157 (August 16, 1994). State Implementation Plan for Serious PM-10 Nonattainment Areas, and Attainment Date Waivers for PM-10 Nonattainment Areas Generally; Addendum to the General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990.]

R18-2-702(E) This subsection establishes how the Director may grant the alternative opacity limit for sources which meet the requirements of subsection (D), and provide for its implementation as a proposed significant permit revision.

R18-2-702(F) This subsection, subsection (H) in the prior version of the rule, has undergone minor changes to increase the rule's conciseness and understandability.

7. A reference to any study relevant to the rule that the agency reviewed and either relied on in its evaluation of or justification for the rule or did not rely on in its evaluation of or justification for the rule, where the public may obtain or review each study, all data underlying each study, and any analysis of each study and other supporting material:

"The EPA's Particulate Matter (PM) Health Effects Research Center's Program," prepared by PM Centers Program staff, January 2002

"Health Effects of Particulate Air Pollution: What Does The Science Say?" Hearing before the Committee on Science, House of Representatives, 107th Congress of the U.S., second session, May 8, 2002

STAPPA and ALAPCO, *Controlling Particulate Matter Under the Clean Air Act: A Menu of Options*, July 1996

American Lung Assoc., "Trends in Chronic Bronchitis and Emphysema: Morbidity and Mortality," Epidemiology and Statistics Unit, Research and Scientific Affairs, March 2003

Arizona Department of Health Services, "Asthma Control Program," Office of Nutrition and Chronic Disease Prevention Services, October, 2002

These documents are on file at the ADEQ library, 1110 W. Washington, Phoenix, AZ, (602) 771-2217.

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

Not applicable

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

A. Rule Identification

This rulemaking amends R18-2-702, "General Provisions," in Title 18, Chapter 2, Article 7. The rule sets a statewide 20% opacity limit for point sources that do not have an opacity limit specified elsewhere and whose emissions are not governed by federal new source performance standards (NSPS), and outlines the procedure by which a source can obtain an adjustment to its opacity standard.

B. Entities Directly Impacted

Entities directly impacted by this rulemaking include certain permitted sources, pollution control equipment vendors, contractors, consultants, lawyers, ADEQ, private persons and consumers. In the preliminary EIS, ADEQ estimated that as few as 20-30 permitted sources might be impacted, which is a small subset of permitted sources in Arizona. Since almost no sources were violating the 40% standard, based on ADEQ records, it was not readily apparent how many sources could not meet a 20% standard. It was thought that many sources were already in compliance with a 20%, or lower, opacity limit, or subject to other source-specific opacity standards. Still other sources were regulated by New Source Performance Standards, under 40 CFR, Part 60, and thus not subject to R18-2-702.

B.1 Information related to A.R.S. § 41-1055(C)

After the request for information in the preliminary EIS, and ADEQ's receipt of no further source-specific cost information, ADEQ considered whether adequate data was reasonably available under A.R.S. § 41-1055(C) to comply with the requirements of A.R.S. § 41-1055(B). Although ADEQ determined that it has adequate data to proceed with this rule, it nevertheless submits the following information under A.R.S. § 41-1055(C).

ADEQ attempted to obtain specific information about the affects of this rule on sources in at least three ways. First, it held seven pre-proposal workshops on this rule and mailed or faxed notices of these workshops to a list of about 180 stakeholders. Second, it requested in its Notice of Proposed Rulemaking that any source that thought it would be affected by this rule supply cost and impact information to ADEQ. Finally, ADEQ did a survey of its own records to estimate how many permitted sources could be affected. It should be noted that ADEQ's permit database could not be used directly to report on the desired information, since permits are not indexed according to whether or not they are subject to R18-2-702, or for that matter, any rule. Under its records survey, ADEQ:

1. Determined that sources in the following categories could be subject to the R18-2-702 opacity limit: mines, lime plants, crushing and screening, asphalt batch plants, and concrete batch plants.

2. Examined some sources in each of these source categories (both manually, by reading the file, and with software, where possible) to attempt to determine how many sources in each category were, in fact, subject to R18-2-702. In this step, sources that were Title V for fee purposes were excluded, since they would be subject to NSPS and not subject to R18-2-702. This resulted in a spreadsheet with seven stationary and 264 portable sources permitted by ADEQ that probably have R18-2-702 in their permit.

3. Attempted to determine how many of the remaining sources would operate only in attainment areas, since the sources that did not would have to comply with 20% in nonattainment or maintenance areas anyway. ADEQ estimated that a only about one-third of the portable sources probably operate only in attainment areas. In other words, about two-thirds probably obtained their permit from ADEQ because they might operate both in and outside of Maricopa county (a nonattainment area for particulates) or both in and outside of the Tucson area (a maintenance area for particulates).

4. Estimated that the following sources from the original source categories probably had R18-2-702 in their permit and would possibly operate only in attainment areas: eight asphalt batch plants, 28 concrete batch plants, 55 crushing and screening plants, one lime plant, and five mine or mill sites.

Although any of these sources, or others, such as sand-blasting operations, or oil- or coal-fired generators, may be affected by this rule, with 1 exception, described in some detail below, ADEQ remains unaware of specific impacts affecting any these sources. Based on the above information, ADEQ continues to believe that a very small number of sources will be impacted.

It should be noted that some sources potentially impacted by R18-2-702 may be required to undertake particulate or opacity limiting control measures if Arizona has to implement control strategies necessary to comply with federal regulations on regional haze (see 40 CFR 308 and 309), or mercury (see EPA's Regulatory Agenda, May 27, 2003,

Sequence Number 3050). Under R18-2-702, sources affected by either of these federal regulations might only be required to move a little sooner to effect changes that could be required anyway.

C. Probable Costs and Benefits

1) Potential Costs and Benefits to ADEQ and the state of Arizona

The impact of R18-2-702 to ADEQ will be minimal. Although the Permits Section of the Air Quality Division will eventually have to revise certain permits to incorporate the 20% opacity limit, ADEQ does not anticipate any need for additional employees or resources. However, if ADEQ does not correct the R18-2-702 deficiencies so that EPA can approve the rule by April 23, 2004, Arizona will be subject to sanctions under § 179 of the Clean Air Act (CAA). Sanctions include loss of highway funds and stricter emission offset requirements for major sources. In addition, under § 110(c) of the CAA, EPA would then need to promulgate a Federal Implementation Plan no later than October 23, 2004.

2) Potential Costs and Benefits to the General Public and Consumers

ADEQ does not anticipate that the general public will experience any costs as a result of the rule, outside of a minor increase in costs for those goods and services that might be affected by the lower opacity limit. ADEQ has already estimated that only a few sources, and therefore any goods and services they offer, might be affected by the rule.

The most obvious benefit arising from promulgation of this rule is reduction of the harmful effects of air pollution, most notably particulates. Improvement in air quality, through the reduction of airborne particulates, will generate cost-saving benefits by avoiding adverse health effects, such as emergency room visits, hospital admissions, acute pediatric bronchitis, chronic adult bronchitis, acute respiratory symptom days, and even premature death. Additionally, a statewide opacity limit of 20% will improve the general quality of life for Arizona's citizens, particularly those residing near sources, by increasing visibility and enhancing the public's enjoyment of Arizona's abundant natural beauty and resources.

Potential benefits arising from a more stringent opacity standard can be inferred from data associated with the reduction of any airborne particulate matter, whether it be in nonattainment, attainment, or unclassifiable areas. Epidemiological evidence shows that particulates have negative health impacts in a variety of ways, including: increased mortality and morbidity; more frequent hospital admissions, emergency room and clinician visits; increased need and demand for medication; and lost time from work and school. There is also increasing evidence that ambient air pollution can precipitate acute cardiac episodes, such as angina pectoris, cardiac arrhythmia, and myocardial infraction, although the majority of particulate matter-related deaths are attributed to cardiovascular disease ("The EPA's Particulate Matter (PM) Health Effects Research Center's Program," prepared by PM Centers Program staff, January 2002).

New evidence also links exposure to ambient PM concentrations to airway inflammation that in turn produces systemic effects, such as acute phase response with increased blood viscosity and coagulability, as well as increased risk of myocardial infraction in patients with coronary artery disease. Chronic effects of repeated airway inflammation may also cause airway remodeling, leading to irreversible lung disease. Individuals with asthma and chronic obstructive pulmonary disease may be at even higher risk from repeated exposure to particulates ("The EPA's Particulate Matter (PM) Health Effects Research Center's Program," *supra*).

The Health Effects Institute, confirmed the existence of a link between particulate matter and human disease and death. The data revealed that long-term average mortality rates, even after accounting for the effects of other health effects, were 17-26% higher in cities with higher levels of airborne particulate matter ("Health Effects of Particulate Air Pollution: What Does The Science Say?" Hearing before the Committee on Science, House of Representatives, 107th Congress of the U.S., second session, May 8, 2002). Data further reveal that every 10-microgram increase in fine particulates per cubic meter produces a 6% increase in the risk of death by cardiopulmonary disease, and an 8% increase for lung cancer. Even very low concentrations of PM can increase the risk of early death, particularly in elderly populations with preexisting cardiopulmonary disease (STAPPA and ALAPCO, *Controlling Particulate Matter Under the Clean Air Act: A Menu of Options*, July 1996).

In 2002 alone, chronic obstructive pulmonary disease cost the U.S. more than $32 million, a sum not including costs attributable to asthma (American Lung Assoc., "Trends in Chronic Bronchitis and Emphysema: Morbidity and Mortality," Epidemiology and Statistics Unit, Research and Scientific Affairs, March 2003). In Arizona, deaths attributable to asthma have equaled or exceeded national rates from 1991-1998. In 1998, some 316,200 Arizonans suffered breathing discomfort or asthma related stress (Arizona Department of Health Services, "Asthma Control Program," Office of Nutrition and Chronic Disease Prevention Services, October, 2002). Thus, ADEQ expects a statewide reduction in the opacity limit to create commensurate costs-saving benefits to the general public by reducing these emissions-related health problems and their concurrent lost revenues.

3) Potential Costs and Benefits to the Regulated Community

Although each regulated facility is unique, the general costs of compliance associated with the new rule are similar and may include: new equipment or modification of existing equipment, adjustment or enhancement of operations and maintenance; replacement or modification of processes and designs; and indirect and administrative costs. Source-specific compliance costs are highly variable, depending on such factors as source category, technology,

equipment age, fuel type, facility size, operating capacity, etc. These costs might only include consideration of a single control technology, or might require a combination of controls and modifications. In addition to initial costs incurred for installation of pollution controls, sources would also need to consider ongoing costs for operation and maintenance of control equipment.

During the stakeholder process and public comment period on this rule, ADEQ received information about the rule's potential cost from just one source. This source is an older coal-fired electric power plant located in an attainment area for particulates. The source indicated that its continuous opacity meter recorded opacity greater than 20% for approximately 5.5% of its 2002 operating hours. The source submitted a cost of approximately $11 million for design and construction of a baghouse to comply with the 20% opacity limit. This cost was developed as part of its long-range forecast for EPA's Regional Haze and mercury MACT regulations. Although it is only a single source, this potential cost demonstrates the value of a provision for an alternative opacity limit. The source is investigating the possibility of petitioning for an alternative limit, although it is possible that the baghouse would enable it meet the federal air pollution requirements.

One possible reason for the lack of source-specific cost information mentioned above, is that, for some sources, operational modifications are possible to meet the 20% standard that would result in only minimal costs. The use of additional volumes of water to comply with the 20% opacity limit could be relatively minimal, estimated at $2.00 per 1000 gallons for nonpotable water or $5.00 per 1000 gallons for municipal water. The cost could vary based on source, location and annual usage requirements.

Compliance with the new opacity standard could also be rewarded with a variety of offsetting financial benefits. Such benefits might include lower operation and maintenance costs, as a result of updated and more efficient equipment, fewer lost man-hours and lower health care costs arising from a decrease in pollution-exacerbated illness, and more production, since a 40% opacity reading can mean that much product lost to the ambient air at the emissions point.

D. Small Business Analysis

Several small business categories were represented during the stakeholder process for the proposed rule. ADEQ has not identified all small businesses that could be affected by this rulemaking, however, those who did participate did not express any reservations about compliance with a 20% opacity limit. ADEQ has considered a variety of methods to reduce the impact of this rule on small businesses, including five methods prescribed by A.R.S. § 41-1035: establish less stringent compliance or reporting requirements; establish less stringent schedules or deadlines for compliance or reporting requirements; consolidate or simplify the rulemaking's reporting requirements; establish performance requirements to replace design or operational standards; or exempt them from some or all of the rule requirements. For the reasons stated in item #6 of the preamble, and due to the inherent difficulty in identifying all sources which are small businesses, including the possibility that such status may change from year to year, ADEQ has determined that it is not feasible to apply a separate opacity standard to small businesses.

10. A description of the changes between the proposed rule, including supplemental notices, and final rule (if applicable):

In response to comments, ADEQ has made the following changes to the proposed rule:

1. Removed proposed subsection (I) and the reference to it in subsection (B). See comment 6 in item #11 of this NFRM for further explanation. Proposed subsection (I) is shown below stricken.
2. Changed the deadline for submission of a petition for an alternative opacity limit in both attainment and nonattainment areas from April 15, 2004 to May 15, 2004 to account for a one month delay in the rule becoming effective. See discussion in item #6 of this NFRM.
3. Replaced "the" with "any" in the language that was proposed (D)(3), and is now (D)(1)(a). See comment 16 in item #11 of this NFRM.
4. Clarified references to compliance schedules in language that was in proposed subsections (D)(2) and (3), and is now in subsections (E)(3) and (4). See comment 15 in item #11 of this NFRM.

In addition, other language was changed to make the rule more clear, concise and understandable. In particular, former subsections (D) and (F) have been reorganized and combined into (D), and former subsections (E) and (G) have been combined into (E). To show this reorganization, the final rule is set out below without reference to the former rule:

R18-2-702. General Provisions

A. The provisions of this Article shall only apply to a source that is all of the following:

1. An existing source as defined in R18-2-101;
2. A point source. For purposes of this Section "point source" means a source of air contaminants that has an identifiable plume or emissions point; and
3. A stationary source, as defined in R18-2-101.

B. Except as otherwise provided in this Chapter relating to specific types of sources, the opacity of any plume or effluent, from a source described in subsection (A), as determined by Reference Method 9 in 40 CFR 60, Appendix A, shall not be:

1. Greater than 20% in an area that is nonattainment or maintenance for any particulate matter standard, unless an alternative opacity limit is approved by the Director and the Administrator as provided in subsection (D) and (E), after February 2, 2004;
2. Greater than 40% in an area that is attainment or unclassifiable for each particulate matter standard; and
3. After April 23, 2006, greater than 20% in any area that is attainment or unclassifiable for each particulate matter standard except as provided in subsections (D) and (E).

C. If the presence of uncombined water is the only reason for an exceedance of any visible emissions requirement in this Article, the exceedance shall not constitute a violation of the applicable opacity limit.

D. A person owning or operating a source may petition the Director for an alternative applicable opacity limit. The petition shall be submitted to ADEQ by May 15, 2004.

1. The petition shall contain:
   a. Documentation that the affected facility and any associated air pollution control equipment are incapable of being adjusted or operated to meet the applicable opacity standard. This includes:
      i. Relevant information on the process operating conditions and the control devices operating conditions during the opacity or stack tests;
      ii. A detailed statement or report demonstrating that the source investigated all practicable means of reducing opacity and utilized control technology that is reasonably available considering technical and economic feasibility; and
      iii. An explanation why the source cannot meet the present opacity limit although it is in compliance with the applicable particulate mass emission rule.
   b. If there is an opacity monitor, any certification and audit reports required by all applicable subparts in 40 CFR 60 and in Appendix B, Performance Specification 1.
   c. A verification by a responsible official of the source of the truth, accuracy, and completeness of the petition. This certification shall state that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete.
2. If the unit for which the alternative opacity standard is being applied is subject to a stack test, the petition shall also include:
   a. Documentation that the source conducted concurrent EPA Reference Method stack testing and visible emissions readings or is utilizing a continuous opacity monitor. The particulate mass emission test results shall clearly demonstrate compliance with the applicable particulate mass emission limitation by being at least 10% below that limit. For multiple units that are normally operated together and whose emissions vent through a single stack, the source shall conduct simultaneous particulate testing of each unit. Each control device shall be in good operating condition and operated consistent with good practices for minimizing emissions.
   b. Evidence that the source conducted the stack tests according to R18-2-312, and that they were witnessed by the Director or the Director's agent or representative.
   c. Evidence that the affected facility and any associated air pollution control equipment were operated and maintained to the maximum extent practicable to minimize the opacity of emissions during the stack tests.
3. If the source for which the alternative opacity standard is being applied is located in a nonattainment area, the petitioner shall include all the information listed in subsections (D)(1) and (D)(2), and in addition:
   a. In subsection (D)(1)(a)(ii), the detailed statement or report shall demonstrate that the alternative opacity limit fulfills the Clean Air Act requirement for reasonably available control technology; and
   b. In subsection (D)(2)(b), the stack tests shall be conducted with an opportunity for the Administrator or the Administrator's agent or representative to be present.

E. If the Director receives a petition under subsection (D) the Director shall approve or deny the petition as provided below by October 15, 2004:

1. If the petition is approved under subsection (D)(1) or (D)(2), the Director shall include an alternative opacity limit in a proposed significant permit revision for the source under R18-2-320 and R18-2-330. The proposed alternative opacity limit shall be set at a value that has been demonstrated during, and not extrapolated from, testing, except that an alternative opacity limit under this Section shall not be greater than 40%. For multiple units that are normally operated together and whose emissions vent through a single stack, any new alterna-

tive opacity limit shall reflect the opacity level at the common stack exit, and not individual in-duct opacity levels.

2. If the petition is approved under subsection (D)(3), the Director shall include an alternative opacity limit in a proposed revision to the applicable implementation plan, and submit the proposed revision to EPA for review and approval. The proposed alternative opacity limit shall be set at a value that has been demonstrated during, and not extrapolated from, testing, except that the alternative opacity limit shall not be greater than 40%.

3. If the petition is denied, the source shall either comply with the 20% opacity limit or apply for a significant permit revision to incorporate a compliance schedule under R18-2-309(5)(c)(iii) by April 23, 2006.

4. A source does not have to petition for an alternative opacity limit under subsection (D) to enter into a revised compliance schedule under R18-2-309(5)(c).

F. The Director, Administrator, source owner or operator, inspector or other interested party shall determine the process weight rate, as used in this Article, as follows:

1. For continuous or long run, steady-state process sources, the process weight rate is the total process weight for the entire period of continuous operation, or for a typical portion of that period, divided by the number of hours of the period, or portion of hours of that period.

2. For cyclical or batch process sources, the process weight rate is the total process weight for a period which covers a complete operation or an integral number of cycles, divided by the hours of actual process operation during the period.

Proposed subsection (I) was removed from the final rule and is shown below:

~~**I.** For excepted sources, opacity may exceed the applicable limits established in subsection (B) for up to one hour during the start up of switching to or back from an emergency fuel; however, opacity shall not exceed 40% for any six (6) minute averaging period in this one hour period, provided the Director finds that the owner or operator has, to the extent practicable, maintained and operated the source of emissions in a manner consistent with good air pollution control practices for minimizing emissions. The one hour period shall begin at the moment of startup of fuel switching. For the purposes of this subsection:~~

~~1. Excepted sources shall include only the following for which construction commenced prior to May 10, 1996:~~

~~a. Electric utility steam generating units or cogeneration steam generating units used to generate electric power that has a heat input of equal to or greater than 100 million (MM) Btu/hour (29 megawatts); and~~

~~b. Electric utility stationary gas turbines with a heat input at peak load equal to or greater than 10 MM Btu/hour (2.9 MW) based upon the lower heating value of the fuel.~~

~~2. "Fuel switching" means the act of changing from one type of fuel to a different type of fuel.~~

~~3. "Emergency fuel" means fuel fired only during circumstances such as natural gas emergency, natural gas curtailment, or breakdown of delivery system such as an unavoidable interruption of supply that makes it impossible to fire natural gas in the unit. Fuel is not considered emergency fuel if it is used to avoid either peak demand charges or high gas prices during on-peak price periods or due to a voluntary reduction in natural gas usage by the power company.~~

~~4. "Natural gas curtailment" means an interruption in natural gas service, such that the daily fuel needs of a combustion unit cannot be met with natural gas available due to one of the following reasons, beyond the control of the owner or operator:~~

~~a. An unforeseeable failure or malfunction, not resulting from an intentional act or omission that the governing state, federal or local agency finds to be due to an act of gross negligence on the part of the owner or operator;~~

~~b. A natural disaster;~~

~~c. The natural gas is curtailed pursuant to governing state, federal or local agency rules or orders; or~~

~~d. The serving natural gas supplier provides notice to the owner or operator, that, with forecasted natural gas supplies and demands, natural gas service is expected to be curtailed pursuant to governing state, federal or local agency rules or orders.~~

~~5. Determination of whether good air control practices are being used shall be based on information provided to the Director upon request, which may include, but is not limited to, the following:~~

~~a. Monitoring results;~~

~~b. Opacity observations;~~

~~c. Review of operating and maintenance procedures; and~~

~~d. Inspection of the source.~~

11. A summary of the comments made regarding the rule and the agency response to them:

Comment #1: One commenter opposes the 20% opacity limit; the majority of ginned cotton already meets the lower opacity level, but the commenter is concerned with the 15% of ground harvested cotton that is ginned annually. They state that individual ginners, and the cotton industry generally, will be subjected to financial hardship as a result of the lower standard, and new testing and reporting requirements.

Response #1: Subsection (B) of the proposed R18-2-702 limits applicability of the rule to those sources not subject to an opacity standard otherwise provided in Chapter 2 of the Arizona Administrative Code. Cotton gins are subject to an opacity limit of 40% under R18-2-729, "Standards of Performance for Cotton Gins". Therefore, they are not covered by the requirements of R18-2-702.

Comment #2: Several commenters assert that the imposition of the 20% opacity limit in attainment areas is not required by the Clean Air Act, Arizona law, or the EPA.

Response #2: While 20% opacity in attainment areas is not specifically required, it is authorized. ADEQ has made a policy determination that the 20% opacity limit in attainment areas is necessary to prevent the air quality in those areas from deteriorating and, eventually, losing their attainment designation. Designating an area as attainment for a particular pollutant does not relieve ADEQ of its continuing responsibility to protect air quality in those areas. A.R.S. § 49-425(A) provides "The director shall adopt such rules as he determines are necessary and feasible to reduce the release into the atmosphere of air contaminants originating within the territorial limits of the state or any portion thereof and shall adopt, modify, and amend reasonable standards for the quality of, and emissions into, the ambient air of the state for the prevention, control and abatement of air pollution. Additional standards shall be established for particulate matter emissions, sulfur dioxide emissions, and other air contaminant emissions determined to be necessary and feasible for the prevention, control and abatement of air pollution. In fixing such ambient air quality standards, emission standards or standards of performance, the director shall give consideration but shall not be limited to the relevant factors prescribed by the clean air act." (Emphasis added)

Comment #3: Two commenters state that accepting ADEQ's justifications for applying the same opacity standard to both attainment and nonattainment areas "will blur the important distinction between attainment and nonattainment areas." "[T]he very definition of attainment and unclassified areas suggests that a reduction in an emission standard is unnecessary because the area is already in compliance with National Ambient Air Quality Standards (NAAQS), both health and welfare based."

Response #3: Under § 110(a)(1) of the CAA, states are required to submit "a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State." As such, ADEQ is responsible for the protection of air quality in attainment areas, as well as the improvement of air quality in nonattainment areas. A designation as attainment many years ago by definition does not mean further safeguards may not be necessary to protect public health today. As such, ADEQ may determine that an emission standard or control measure is required in attainment areas even though that standard or control measure is also used in nonattainment areas. Under A.R.S. § 41-1024(D) an agency may use its own experience, technical competence, specialized knowledge and judgement in developing rules. See also A.R.S. § 49-425(A), quoted above.

Comment #4: Three commenters claim that ADEQ's concern over transport of pollutants from attainment to nonattainment areas is unnecessary because "designation of a nonattainment area already includes consideration of pollutant transport."

Response #4: ADEQ recognizes that under CAA § 107(d)(1)(A), at the time of nonattainment area designation, states submitted to EPA "any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the...standard for the pollutant." Thus, the current boundaries are in a sense, a snapshot in time, drawn in approximately 1988. Considerable growth has occurred in Arizona since that time. In setting 20% opacity in all areas, ADEQ is taking this growth in population and in both portable and stationary sources into account. Moreover, to fulfill its obligation to make certain that air quality in attainment areas is protected, and that these areas retain their designation as attainment, ADEQ has determined that a statewide 20% opacity limit is necessary as a matter of policy, particularly when dealing with the issue of portable sources. A 20% opacity standard in both nonattainment and attainment areas would discourage relocation of portable sources that can damage attainment status and damage air quality. It is far easier, more efficient and more effective to regulate an area than it is to regulate particular sources, especially when those sources are difficult to locate as a result of their temporary nature.

Comment #5: Three commenters assert that "a reduced opacity standard in attainment areas imposes costs without justification" and that, therefore, the proposed rule "does not comply with the Administrative Procedures Act."

Response #5: ADEQ stated in its preliminary economic impact statement that "very few sources" would be impacted by this rulemaking. ADEQ specifically requested in the preliminary EIS that potentially impacted sources submit cost information. No source responded to the preliminary EIS with cost information. Even the principal commenters on this issue submitted no information to ADEQ about any increased costs. Therefore, ADEQ finds there is no basis for changing its original cost analysis. In addition, ADEQ has added information to the EIS related to the benefits of reducing emissions of particulate matter.

Comment #6: One commenter refers to subsection (I) of the proposed R18-2-702, which provides for an exemption to the 20% opacity standard in cases of emergency fuel-switching. Commenter worked closely with Maricopa County and EPA to develop this exemption in county rules, and requested its inclusion in the statewide rule. However, commenter "does not believe that references to emergency fuel are appropriate in this rule, and...request(s) that the rule be modified to provide the exemption generally for fuel switching. ADEQ does not provide for burning oil, and therefore the references to emergency fuel are inappropriate."

Response #6: Because EPA has not yet acted on the Maricopa County rule, and because there is a lack of consensus on this issue that may jeopardize approval of R18-2-702, ADEQ has decided to remove proposed subsection (I) from the final rule. The issue needs further study and may be reconsidered at a later date.

Comment #7: A commenter stated that "[t]he proposed revision does not adequately address the disapproval by the Environmental Protection Agency as discussed in 65 FR 79037 and 67 FR 59456. The proposed rule contains the same applicability deficiency as addressed in 67 FR 59456.

Response #7: ADEQ has researched source categories potentially subject to R18-2-702. All PM10 sources in Arizona are subject to either R18-2-702, NSPS or source-specific opacity standards. ADEQ thinks, as a matter of policy, that it is most appropriate at this time to address only the general standard covered by the proposed rule, and required for EPA approval of the SIP, rather than revise source-specific opacity standards. There is a two year window for compliance with the 20% standard within the rule; other rulemakings for source-specific opacity standards may be considered for the future in that time.

Comment #8: Three commenters dispute ADEQ's claim that it will be "difficult and inefficient for both sources and regulators to keep track of the correct standards if the state were divided up further into an interlocking patchwork of contiguous 20% and 40% areas." 9 Ariz. Admin Reg., at 3490. Arizona is already divided up into an interlocking patchwork of contiguous areas known as attainment and nonattainment areas. Having a reduced opacity standard for nonattainment areas and keeping the 40% standard for attainment areas would not further divide the state; it would simply use existing boundaries."

Response #8: Bifurcation of R18-2-702 would create unnecessary administrative barriers and complications. ADEQ has determined that it would be more difficult and less efficient for both sources and regulators to keep track of the correct opacity standard if the twelve-county territory covered by R18-2-702, previously all subject to 40%, was divided up into a patchwork of 20% and 40% areas. Maricopa County has already made the same determination: although the county contains a PM10 nonattainment area, county regulators have made 20% the general opacity limit throughout the entire county. Furthermore, ADEQ has determined, as a matter of policy, that a statewide opacity limit of 20% will both help preserve the status of those areas already designated as attainment and help nonattainment areas achieve attainment. By regulating all areas equally, rather than regulating specific sources, ADEQ can avoid the problem of trying to track hard-to-find portable sources; sources which might otherwise be encouraged to locate in attainment areas in order to avoid the stricter limits applied in nonattainment areas.

Comment #9: Two commenters declared their support for the reduction "of the opacity standard for nonattainment areas consistent with federal guidelines. . . . In the proposed disapproval notice, EPA refers to 'PM-10 Guideline Document' (EPA-425/ro93-008) as support for its position that Rule 702 does not meet RACM/RACT requirements. 65 Fed. Reg. at 79038. The 'PM-10 Guideline Document' does not support EPA's nationwide approach, but outlines a RACM/RACT determination procedure using an area-by-area approach."

Response #9: EPA has asserted that a 20% opacity standard is reasonably available across the country (65 Fed. Reg. 79037, 79038 (December 18, 2000)) and is appropriate in Arizona. ADEQ agrees that a 20% standard is RACM/RACT for nonattainment areas in Arizona and that such a standard is consistent with applicable federal guidelines.

Comment #10: Two commenters maintain that "EPA was mistaken in its disapproval of the Arizona AOS procedure" in nonattainment areas for lack of EPA review. They assert that "EPA approval of an AOS is not required if the procedure that a state follows includes criteria that would lead to the same emission limit that EPA would establish. 67 Fed. Reg. 71515, 71517 (December 2, 2002)." They cite the case of an Ohio rule (R3745-17-07) where EPA Region 5 has proposed approval of an AOS process without provision for EPA review, where that process was substantially similar to the EPA AOS process at 40 CFR 60.11(e). Commenter maintains that Arizona's AOS procedure is likewise similar to EPA process.

Response #10: Approval of the cited Ohio rule has not been made final by EPA Region 5. That rule apparently includes application of detailed procedures in the Ohio EPA, Division of Air Pollution Control documents entitled, Engineering Guide #13, and Engineering Guide #15, to determine the actual numerical value of the visible emission limit. R18-2-702 contains no such detailed procedures nor does it incorporate any by reference. Finally, Arizona must seek approval from Region 9, not Region 5.

Comment #11: Two commenters claim that Arizona's procedure for obtaining an alternative opacity standard in attainment areas contains an unjustifiable sunset provision "that is inconsistent with its overall regulatory scheme." Specifically, Arizona incorporated by reference the federal NSPS scheme for alternative opacity standards at 40 CFR 60.11(e) which contains no such sunset provision.

Response #11: ADEQ has little control over individual EPA regulations, and it is Arizona's policy to incorporate NSPS regulations as a whole, including 40 CFR 60.11(e), to receive delegation. In its own rules, however, and with

its limited resources, ADEQ has determined that it is better for public health and welfare to limit time during which an alternative opacity standard might be available. ADEQ believes that existing sources, which are those subject to R18-2-702, should know their opacity limit and be able to comply with it in a timely manner, while new, non-NSPS sources can construct their facilities in such a way that they comply, at the outset of operations, with the proposed 20% opacity standard. ADEQ considered, and rejected as being too onerous, the other alternative of requiring 20% opacity for all areas upon the effective date of the rule. The sunset provision is the best way of requiring sources to either make these timely adjustments to their operations or initiate the appropriate alternative procedures, such as applying for an alternative opacity standard or a compliance schedule, without requiring immediate compliance with the 20% standard.

Comment #12: Two commenters assert that ADEQ has imposed a ceiling of 40% on alternative opacity limits in attainment areas while no such ceiling exists in nonattainment areas.

Response #12: 40% is the currently approved SIP opacity limit for all areas of the state covered by R18-2-702. ADEQ believes that all sources are capable of meeting 40%. Prior to this final rule, no source received, and only one petitioned for, an alternative opacity standard greater than 40%.

Comment #13: One commenter objected to the establishment of an alternative opacity standard to sources such as coal-fired generating plants at only set times. Specifically, under subsection (D), an alternative opacity standard would be applied to a source only during particular events such as load shifting. At other times, the source would be subject to the normal opacity standard of 20%. Commenter maintains "that it would be extremely difficult, administratively and practically, for a source to be subject to two separate opacity standards."

Response #13: ADEQ recognizes that there will be events where it is impossible for certain sources such as coal-fired generating facilities to operate at the lower opacity standard. Application of the alternative standard is appropriate during those periods. At other times, if the source exceeds the general opacity standard, the appropriate manner of addressing the exceedance is to submit an excess emissions report. It would be counterproductive for ADEQ to allow an alternative standard for all operating hours because of the perceived difficulties in defining those hours where it would be justified. ADEQ remains committed to working with any source that believes it requires an alternative opacity standard.

Comment #14: A commenter states that "retrofitting air pollution control equipment on large existing sources takes a minimum of three years to complete." They cannot comply with the 20% opacity standard by the April 2006 deadline, and "propose that ADEQ establish a second compliance deadline of April 23, 2007 for large sources."

Response #14: ADEQ recognizes that some sources may have difficulty complying with the proposed 20% standard by the 2006 deadline. However, ADEQ believes that the appropriate course of action for such sources is incorporation of a compliance schedule under R18-2-702(E) and R18-2-309.

Comment #15: One commenter believed "under the proposed rule language, sources may not seek a compliance schedule unless they first seek an alternative opacity limit." They conclude that if they are not granted an alternative opacity limit they will have to seek a consent order in early 2004 to allow them time to install the control equipment necessary to comply with the 20% standard.

Response #15: Sources may <u>already</u> apply for a compliance schedule under R18-2-309. R18-2-702 does nothing to change that fact. ADEQ has added language to the proposed rule, in subsection (E), clarifying this point.

Comment #16: Two commenters are "concerned with an ambiguity that exists in the new AOS procedures" of R18-2-702, subsection (D). Specifically, proposed (D)(3) "requires 'evidence that the affected facility and the associated air pollution control equipment were operated and maintained to the maximum extent practicable to minimize the opacity of emissions during the stack tests.'" Similarly, (D)(4) "'requires documentation that the affected facility and associated air pollution control equipment were incapable of being adjusted or operated to meet the applicable opacity standard.'" Commenters ask if associated air pollution control equipment means that if a facility has air pollution control equipment then documentation is required for both the facility and the air pollution control equipment. If, however, a facility has no air pollution control equipment, documentation is required only for the facility.

Response #16: ADEQ has inserted the word "any" into the language that was proposed in subsections (D)(3) and (D)(4), making them read, "documentation that the affected facility and *any* associated air pollution control equipment..." (emphasis added). ADEQ believes this will clear up any potential ambiguity regarding this issue.

Comment #17: One commenter is concerned that they will not be able to sufficiently upgrade certain aspects of their coal handling operations to comply with the proposed 20% opacity standard. They state that, if they are unable to find a solution to this problem, they will petition the state to retain a 40% opacity limitation in those areas.

Response #17: ADEQ believes that a petition for an alternative opacity standard, or an application for a compliance schedule may be the appropriate course of action for this commenter.

Comment #18: One commenter states that there appears to have been published notice only of the Proposed Rulemaking and not of the SIP revision, and that there was no opportunity for public comment.

Response #18: Notice of the SIP revision, along with notice of the Proposed Rulemaking, was published in the August 8, 2003 edition of *The Arizona Republic*, a newspaper of general circulation throughout the state, pursuant to

40 CFR 51.102. Copies of the SIP revision were made available for public review on August 8, 2003 at the ADEQ library, First Floor 1110 W. Washington St., Phoenix, AZ, and are on the ADEQ website at http://www.adeq.state.az.us/environ/air/plan/sip.html#correct.

Comment #19: One commenter states that if the alternative opacity petition process for nonattainment areas is subject to EPA review, and the entire rule is being submitted for EPA approval as a SIP revision in order to be federally enforceable, then the corresponding alternative opacity process for attainment areas sought to be likewise subject to EPA review. Without EPA review, they assert, the alternative opacity process for attainment areas will not be adequately federally enforceable. Commenter believes that if ADEQ does not wish to submit attainment area alternative opacity standards for EPA review, then two separate rules should be written for attainment and nonattainment areas, with only the nonattainment rule being submitted as a SIP revision.

Response #19: ADEQ believes that it is unnecessary to sever the rule in order to make both attainment and nonattainment portions of the rule adequately enforceable. The rule ensures that the applicable current SIP is protected by limiting attainment area alternative opacity standards to 40%; an alternative opacity standard greater than 40% could be considered a relaxation of the SIP. Some attainment area rules must also be submitted to EPA as SIP revisions, whether they include provisions for EPA review, or not.

Comment #20: Two commenters assert that the definition of stationary sources makes clear that the proposed rule does not apply to non-stationary sources, i.e. mobile sources, nonroad engines, and portable sources.

Response #20: ADEQ believes that commenter's statement regarding the relationship of the definitions of stationary and portable sources is incorrect, and that R18-2-702 does apply to portable sources.

According to R18-2-101(88), "portable source" means any building, structure, facility or installation subject to regulation pursuant to A.R.S. § 49-426 which emits or may emit any air pollutant and is capable of being operated at more than one location. R18-2-101(111) states that "stationary source" means any building, structure, facility or installation subject to regulation pursuant to A.R.S. § 49-426(A) which emits or may emit any air pollutant. "Building, structure or facility" means all of the pollutant-emitting activities belonging to the same industrial grouping, located on one or more contiguous or adjacent properties, and under common control of the same person or persons. Comparing the two definitions, the definition of portable source is the same as the first line of the definition of stationary source, except that stationary sources are subject only to A.R.S. § 49-426(A), whereas portable sources are subject to the entire section of A.R.S. § 49-426. Thus, portable source means any stationary source that is capable of being operated in more than one location, as well as any source subject to A.R.S. § 49-426; contrary to commenter's assertion, the definition of stationary source is not exclusive of, but inclusive of, the definition of portable sources. Therefore, R18-2-702 is applicable to portable sources that are regulated by rules under Article 7 that do not specify an opacity standard.

Comment #21: One commenter at the public hearing asked if the rule had an exclusion for sources that were specifically listed in Article 6 (Emissions from Existing and New Nonpoint Sources.) He also asked if crushers are specifically covered under Article 6.

Response #21: R18-2-702(A) limits application of the rule to existing, stationary point sources. Subsection (B) exempts from the rule those sources which are subject to an opacity standard provided elsewhere in Chapter 2 of the Arizona Administrative Code. Crushers are not specifically listed in Article 6, which regulates only nonpoint sources. As crushers have an identifiable emission plume, they should be considered a point source, and would therefore be subject to the General Opacity Standard of R18-2-702.

During the workshops on this rule, specific discussions took place regarding the relationship of "point" and "nonpoint" sources to fugitive emissions. It was pointed out during those discussions that point sources can have fugitive emissions, and that nonpoint sources (lacking an identifiable plume or emissions point) always have fugitive emissions.

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

Not applicable

13. Incorporations by reference and their location in the rule:

Not applicable

14. Was this rule previously made as an emergency rule?

No

15. The full text of the rule follows:

TITLE 18. ENVIRONMENTAL QUALITY

CHAPTER 2. DEPARTMENT OF ENVIRONMENTAL QUALITY
AIR POLLUTION CONTROL

ARTICLE 7. EXISTING STATIONARY SOURCE PERFORMANCE STANDARDS

Section
R18-2-702. General Provisions

ARTICLE 7. EXISTING STATIONARY SOURCE PERFORMANCE STANDARDS

R18-2-702. General Provisions

A. The provisions of this Article shall only apply to ~~existing sources~~ a source that is all of the following:
1. An existing source, as defined in R18-2-101;
2. A point source. For the purposes of this Section, "point source" means a source of air contaminants that has an identifiable plume or emissions point; and
3. A stationary source, as defined in R18-2-101.

B. Except as otherwise provided in this ~~Article~~ Chapter relating to specific types of sources, the opacity of any plume or effluent, from a source described in subsection (A), as determined by Reference Method 9 in 40 CFR 60, Appendix A, shall not be:
~~1. Shall not be greater than 40% and~~
1. Greater than 20% in an area that is nonattainment or maintenance for any particulate matter standard, unless an alternative opacity limit is approved by the Director and the Administrator as provided in subsection (D) and (E), after February 2, 2004;
~~2. Shall be determined by reference Method 9 in 40 CFR 60, Appendix A~~.
2. Greater than 40% in an area that is attainment or unclassifiable for each particulate matter standard; and
3. After April 23, 2006, greater than 20% in any area that is attainment or unclassifiable for each particulate matter standard except as provided in subsections (D) and (E).

C. ~~Where~~ If the presence of uncombined water is the only reason for ~~the~~ an exceedance of any visible emissions requirement~~s~~ in this Article, ~~such~~ the exceedance shall not constitute a violation of the applicable opacity limit.

D. A person owning or operating ~~an air pollution~~ a source may ~~ask~~ petition the Director for ~~a determination on meeting the requirements of the~~ an alternative applicable opacity ~~standard~~ limit. The petition shall be submitted to ADEQ by May 15, 2004.
~~1. The owner or operator shall submit the written reports of the results of the performance tests, the opacity observation results, and observer certification.~~
1. The petition shall contain:
   a. Documentation that the affected facility and any associated air pollution control equipment are incapable of being adjusted or operated to meet the applicable opacity standard. This includes:
      i. Relevant information on the process operating conditions and the control devices operating conditions during the opacity or stack tests;
      ii. A detailed statement or report demonstrating that the source investigated all practicable means of reducing opacity and utilized control technology that is reasonably available considering technical and economic feasibility; and
      iii. An explanation why the source cannot meet the present opacity limit although it is in compliance with the applicable particulate mass emission rule.
   b. If there is an opacity monitor, any certification and audit reports required by all applicable subparts in 40 CFR 60 and in Appendix B, Performance Specification 1.
   c. A verification by a responsible official of the source of the truth, accuracy, and completeness of the petition. This certification shall state that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete.
~~2. If the Director finds that the facility is in compliance with all applicable standards for the performance test and still fails to meet the applicable opacity standard, he shall notify the owner or operator of the finding.~~
2. If the unit for which the alternative opacity standard is being applied is subject to a stack test, the petition shall also include:
   a. Documentation that the source conducted concurrent EPA Reference Method stack testing and visible emissions readings or is utilizing a continuous opacity monitor. The particulate mass emission test results shall clearly demonstrate compliance with the applicable particulate mass emission limitation by being at least 10% below that limit. For multiple units that are normally operated together and whose emissions vent through a single stack, the source shall conduct simultaneous particulate testing of each unit. Each control device shall be in good operating condition and operated consistent with good practices for minimizing emissions.

b. Evidence that the source conducted the stack tests according to R18-2-312, and that they were witnessed by the Director or the Director's agent or representative.
c. Evidence that the affected facility and any associated air pollution control equipment were operated and maintained to the maximum extent practicable to minimize the opacity of emissions during the stack tests.

~~3. The owner or operator may petition the Director within 10 days of receipt of notification, asking the Director to make an appropriate adjustment to the opacity standard for the facility.~~

3. If the source for which the alternative opacity standard is being applied is located in a nonattainment area, the petitioner shall include all the information listed in subsections (D)(1) and (D)(2), and in addition:
a. In subsection (D)(1)(a)(ii), the detailed statement or report shall demonstrate that the alternative opacity limit fulfills the Clean Air Act requirement for reasonably available control technology; and
b. In subsection (D)(2)(b), the stack tests shall be conducted with an opportunity for the Administrator or the Administrator's agent or representative to be present.

~~4. The Director shall grant the petition after public notice and opportunity for public hearing takes place and upon a demonstration by the owner or operator that:~~
~~a. The affected facility and the associated air pollution control equipment were operated and maintained in a manner to minimize the opacity of emissions during the performance test.~~
~~b. The performance tests were performed under the conditions established by the Director.~~
~~c. The affected facility and associated air pollution control equipment were incapable of being adjusted or operated to meet the applicable opacity requirement.~~

~~5. The Director shall establish an opacity standard for the affected facility based on the determination made in subsection (D)(4). The opacity standard shall be set at a level indicated by the performance and opacity tests, providing that the source will be able to meet the mass or concentration standard and the opacity standard at all times. Such opacity standard shall be incorporated as a condition of the permit for the affected facility.~~

~~6. The Director shall publish the opacity standard once in 1 or more newspapers of general circulation in the county or counties concerned.~~

~~**E.** The process weight utilized in this Article shall be determined as follows:~~
~~1. For continuous or long run, steady state process sources, the process weight shall be the total process weight for the entire period of continuous operation of for a typical portion thereof, divided by the number of hours of such period or portion thereof.~~
~~2. For cyclical or batch process sources, the process weight rate shall be the total process weight for a period which covers a complete operation or in integral number of cycles, divided by the hours of actual process operation during such period.~~

E. If the Director receives a petition under subsection (D) the Director shall approve or deny the petition as provided below by October 15, 2004:
1. If the petition is approved under subsection (D)(1) or (D)(2), the Director shall include an alternative opacity limit in a proposed significant permit revision for the source under R18-2-320 and R18-2-330. The proposed alternative opacity limit shall be set at a value that has been demonstrated during, and not extrapolated from, testing, except that an alternative opacity limit under this Section shall not be greater than 40%. For multiple units that are normally operated together and whose emissions vent through a single stack, any new alternative opacity limit shall reflect the opacity level at the common stack exit, and not individual in-duct opacity levels.
2. If the petition is approved under subsection (D)(3), the Director shall include an alternative opacity limit in a proposed revision to the applicable implementation plan, and submit the proposed revision to EPA for review and approval. The proposed alternative opacity limit shall be set at a value that has been demonstrated during, and not extrapolated from, testing, except that the alternative opacity limit shall not be greater than 40%.
3. If the petition is denied, the source shall either comply with the 20% opacity limit or apply for a significant permit revision to incorporate a compliance schedule under R18-2-309(5)(c)(iii) by April 23, 2006.
4. A source does not have to petition for an alternative opacity limit under subsection (D) to enter into a revised compliance schedule under R18-2-309(5)(c).

F. The Director, Administrator, source owner or operator, inspector or other interested party shall determine the process weight rate, as used in this Article, as follows:
1. For continuous or long run, steady-state process sources, the process weight rate is the total process weight for the entire period of continuous operation, or for a typical portion of that period, divided by the number of hours of the period, or portion of hours of that period.
2. For cyclical or batch process sources, the process weight rate is the total process weight for a period which covers a complete operation or an integral number of cycles, divided by the hours of actual process operation during the period.

NOTICE OF FINAL RULEMAKING

TITLE 18. ENVIRONMENTAL QUALITY

CHAPTER 9. DEPARTMENT OF ENVIRONMENTAL QUALITY
WATER POLLUTION CONTROL

PREAMBLE

1. Sections Affected — **Rulemaking Action**

R18-9-A901	Amend
R18-9-A902	Amend
R18-9-A905	Amend
R18-9-A907	Amend
R18-9-C901	Amend
R18-9-C905	New Section
Article 9, Part D	New Part
R18-9-D901	New Section
R18-9-D902	New Section
R18-9-D903	New Section
R18-9-D904	New Section
R18-9-D905	New Section

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

Authorizing statutes: A.R.S. §§ 49-203 and 49-255.01(B)

Implementing statute: A.R.S. § 49-255.01

3. The effective date of the rules:

February 2, 2004

4. A list of all previous notices appearing in the Register addressing the proposed rules:

Notice of Rulemaking Docket Opening: 9 A.A.R. 4014, September 12, 2003

Notice of Proposed Rulemaking: 9 A.A.R. 3927, September 12, 2003

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

Name: Jane DeRose-Bamman

Address: ADEQ
1110 W. Washington
Phoenix, AZ 85007

Telephone: (602) 771-4374

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

This rulemaking amends *Arizona Administrative Code* (A.A.C.) Title 18, Chapter 9, Article 9, to conform with revisions to the federal National Pollutant Discharge Elimination System (NPDES) program. Since December 2002, the Arizona Department of Environmental Quality (Department) has administered the Arizona Pollutant Discharge Elimination System (AZPDES) program as an approved NPDES program for discharges to surface waters within Arizona, but not in Indian Country. In response to revisions that the Environmental Protection Agency (EPA) makes to the NPDES program and to maintain adequate permit and enforcement authority, the Department must make changes to its AZPDES program. (See 40 Code of Federal Regulations (CFR) 123.62(e))

The revisions in this rulemaking address the February 12, 2003 revisions to EPA regulations governing the Animal Feeding Operation/Concentrated Animal Feeding Operation (AFO/CAFO) industry. The Department is obligated to make the rule changes within one year of the date that the federal regulations are promulgated or by February 12, 2004.

In addition, this rulemaking updates the regulations that are incorporated by reference, incorporates 40 CFR 136 by reference for analytical test procedures and makes minor changes to other parts of the rule.

A Section-by-Section analysis of the revisions follows:

R18-9-A901. Definitions

Definitions for "animal confinement area," "CAFO," "land application area," "large concentrated animal feeding operation," "manure," "manure storage area," "medium concentrated animal feeding operation," "process wastewater," "production area," "raw materials storage area," and "waste containment area" have been added in response to the revised CAFO regulation. The EPA's definition of "production area" includes the terms "animal confinement area," "manure storage area," "raw materials storage area," and "waste containment area." In this rulemaking, ADEQ chose to define these terms separately for clarity.

The definition for "animal unit" was deleted from the rule because the term is no longer used. The term "concentrated animal feeding operation" was changed to "CAFO" and the definition was revised to conform to the first part of the definition at 40 CFR 122.23(b)(2).

The definition of "discharge of a pollutant" and "new discharger" were amended to replace the term "indirect discharger" with "industrial user." The current language of the definitions matches the federal definitions at 40 CFR 122.2. 40 CFR 122.2 also includes a definition of "indirect discharger." AZPDES statutes define the term "indirect discharge" and "industrial user" (A.R.S. § 49-255(3) and (4)), not "indirect discharger." The definition at A.R.S. § 49-255(3) matches the federal definition of "indirect discharge" at 40 CFR 403.3(g). The definition at A.R.S. § 49-255(4) matches the federal definition of "industrial user" at 40 CFR 403.3(h). The intent is to focus on the entity that discharges pollutants to publicly owned treatment works, thus the term "industrial user" is the proper term. For the term "discharge of a pollutant," the exclusion in A.A.C. R18-9-A901(9)(b) does not apply to sources of pollutants to a municipal separate storm sewer system (MS4).

The definition of "individual permit" was amended to reflect the fact that an individual permit may also include an AZPDES permit for an MS4. An MS4 is not a single point source or a single facility.

The definition of "small municipal separate storm sewer system" was amended to correct the citation within A.A.C. R18-9-A901(35)(b). The citation should have been A.A.C. R18-9-A902(D)(2) instead of A.A.C. R18-9-C902(A)(1)(g) to comply with 40 CFR 122.26(a)(1)(v).

Minor corrections were made to the definitions of "animal feeding operation," "draft permit," "large municipal separate storm sewer system," and "medium municipal separate storm sewer system." Specifically, the Department removed a comma from the definition of "animal feeding operation" to conform with the federal definition, removed the word "or" after "issue" in the definition of "draft permit" and revised the citations within the definitions of "large municipal separate storm sewer system" and "medium municipal separate storm sewer system" due to renumbering of the definitions.

R18-9-A902. AZPDES Permit Transition, Applicability, and Exclusions

Subsection (B)(2) was deleted. The language contained in that subsection was moved to the new Section R18-9-D901, CAFO Designations.

Subsection (B)(9)(a) (proposed as subsection (B)(8)(a)) was amended to add a reference to the definition of the term "stormwater discharge associated with industrial activity" defined at 40 CFR 122.26(b)(14), which is incorporated by reference in A.A.C. R18-9-A905(A)(1)(d). In addition, to link the "no exposure exclusion" more closely with this provision, the Department has moved the language in subsection (H)(1) to this subsection. The language in subsection (H)(2) is not needed because it is defined in 40 CFR 122.26(g), which is incorporated by reference in A.A.C. R18-9-A905(A)(1)(d).

Subsections (B)(9)(c) and (B)(9)(d) (proposed as subsections (B)(8)(c) and (B)(8)(d)) were combined. Part of the text in subsection (B)(9)(d) (proposed as subsection (B)(8)(d)) was deleted to eliminate unnecessary language because the March 10, 2003 deadline has passed.

Subsection (D)(1) was amended to state that the Department may designate a small MS4 that has a population density less than 1,000 people or a population of less than 10,000 as specified in 40 CFR 123.35.

Subsection (D)(3) was added so that there is a clear link to the language in 40 CFR 123.35(b)(4). The Department's authority to designate small MS4s in this manner is currently based on the language in A.A.C. R18-9-A902(D)(1).

Subsection (E) was amended to explicitly state that the Department may designate a small MS4 in response to a petition. The petition may be submitted based on 40 CFR 122.26(b)(16) and 40 CFR 122.26(b)(4) which are incorporated by reference in A.A.C. R18-9-A905(A)(1)(d). The Department will make a final decision on the petitions as described in 40 CFR 122.26(f)(5) (incorporated by reference in A.A.C. R18-9-A905(A)(1)(d)).

Subsection (F) was deleted to eliminate unnecessary language now that the deadline for phasing in requirements for small MS4 has passed. ADEQ did not use a phase-in approach for small MS4s.

Subsection (H) was deleted because the provisions were addressed in other parts of the rule. The text of subsection (H)(1) was moved to subsection (B)(8)(a). The text of subsection (H)(2) is not needed because those terms are defined in 40 CFR 122.26(g), which is incorporated by reference at A.A.C. R18-9-A905(A)(1)(d).

R18-9-A905. AZPDES Program Standards.

Subsection (A) has been amended to incorporate by reference the July 1, 2003 version of the applicable federal regulations listed in A.A.C. R18-9-A905(A). The EPA has made several revisions to the applicable federal regulations

since July 1, 2001 and therefore the Department reference needs to be updated. Table 1 contains the regulations that are incorporated by reference in this subsection and were revised by the EPA since July 1, 2001.

Table 1
NPDES Regulations Revised since July 1, 2001 that are incorporated by reference in the AZPDES Rules (A.A.C. R18-9-A905)

Citation from Code of Federal Regulations	Topic	Federal Register Citation
40 CFR 122.21(i) - revised.	Application requirements for CAFOs.	68 **FR** 7716, February 12, 2003
40 CFR 122.21(r) - added.	Application requirements for new facilities with cooling water intake structures.	66 **FR** 65337, December 18, 2001
40 CFR 122.26(e)(8) - revised (date).	Postpone deadline for stormwater permit coverage for oil and gas construction activity that disturbs one to five acres of land.	68 **FR** 11325, March 10, 2003
40 CFR 122.42(e) - revised.	Permit conditions for CAFOs.	68 **FR** 7716, February 12, 2003
40 CFR 122.44(b)(3) - added.	Permit conditions for new facilities with cooling water intake structures.	66 **FR** 65337, December 18, 2001
40 CFR 125 - revised.	Requirements for new facilities with cooling water intake structures.	66 **FR** 65337, December 18, 2001 and 68 **FR** 36749, June 19, 2003
40 CFR 136.3, Table IA - revised.	List of Approved Biological Methods	67 **FR** 69952, November 19, 2002
40 CFR 412 - revised.	CAFO effluent limitations guidelines.	68 **FR** 7716, February 12, 2003
40 CFR 420 - revised.	Iron and Steel Manufacturing effluent limitations guidelines.	67 **FR** 64215, October 17, 2002
40 CFR 430 - revised.	Pulp, Paper, and Paperboard effluent limitations guidelines.	67 **FR** 58990, September 19, 2002
40 CFR 434 - revised.	Coal Mining effluent limitations guide lines.	67 **FR** 3370, January 23, 2002
40 CFR 438 - added.	Metal Products and Machinery effluent limitations guidelines.	68 **FR** 25686, May 13, 2003
40 CFR 439 - revised.	Pharmaceutical Manufacturing effluent limitations guidelines.	68 **FR** 12265, March 13, 2003 amended by 68 **FR** 34831, June 11, 2003

Subsection (A)(4) has been amended to include a reference to Subpart I of 40 CFR 125 that was promulgated by the EPA on December 18, 2001.

Subsection (A)(7) has been added to incorporate the list of approved test procedures specified in the federal regulations under 40 CFR 136. The specific reasons for including this reference in rule are described with the changes for subsection (B).

The remaining subsections within subsection (A) were renumbered to conform.

Subsection (B) has been amended to specify which test procedures must be used for monitoring requirements within the AZPDES program. The current language references 9 A.A.C. 14, Article 6. This Article is developed by the Arizona Department of Health Services (ADHS), which is responsible for approving laboratory test procedures and licensure procedures. 9 A.A.C. 14, Article 6 contains a listing of the approved test procedures for all media programs (air, solid waste, drinking water, wastewater, hazardous waste) and processes for approving alternative test procedures.

The NPDES regulations governing test procedures are described at 40 CFR 136. Federal provisions that are currently incorporated by reference in the AZPDES rules require that 40 CFR 136 approved test procedures are used. 40 CFR 122.41(j)(4), which is incorporated by reference at A.A.C. R18-9-A905(A)(3)(a), requires:

"(j) Monitoring and records...

(4) Monitoring results must be conducted according to test procedures approved under 40 CFR part 136 or, in the case of sludge use or disposal, approved under 40 CFR part 136 unless otherwise specified in 40 CFR part 503, unless other test procedures have been specified in the permit."

In addition, 40 CFR 122.44(i)(1)(iv), which is incorporated by reference at A.A.C. R18-9-A905(A)(3)(d), requires:

"(i) Monitoring requirements. In addition to § 122.48, the following monitoring requirements:

(1) To assure compliance with permit limitations, requirements to monitor:...

(iv) According to test procedures approved under 40 CFR part 136 for the analyses of pollutants having approved methods under that part, and according to a test procedure specified in the permit for pollutants with no approved methods."

Therefore to the extent that the test procedures approved under A.A.C. R9-14-612 are also approved under 40 CFR 136, the current approach is consistent. The Department acknowledges that A.A.C. R9-14-612 incorporates most of the 40 CFR 136 test procedures. However, at this time, the universe of test procedures approved under A.A.C. R9-14-612 does not entirely overlap with test procedures approved under 40 CFR 136. To make this rule consistent with the federal regulation, the Department has incorporated 40 CFR 136 by reference in subsection (A) and modified subsection (B) to state that a person shall use a test procedure approved under 40 CFR 136 with some exceptions.

Subsection (B) was revised to indicate the prioritization scheme for which analytical test procedures should be used. The first priority is any test procedure specified in an AZPDES permit. A permittee must comply with all permit conditions, thus if the Department specified a test procedure for the analysis of a pollutant in the permit, the permittee must follow that requirement. The Department has the authority to specify, within an AZPDES permit, the use of a test procedure based 40 CFR 122.41(j)(4) that is incorporated by reference at A.A.C. R18-9-A905(A)(3)(a). If the Department specifies a particular test procedure in the permit that is not within 40 CFR 136, the Department will explain the use of the test procedure in the public notice for the draft permit.

Subsections (B)(1) through (B)(4) deal with the situations where a test procedure is not specified in a permit. If the Department does not specify a test procedure for a pollutant within the permit, a person shall use a test procedure listed in or approved under 40 CFR 136 (Subsections (B)(1) and (B)(2)) or a modified 40 CFR 136 method approved by ADHS (Subsection (B)(3)). If no methods are listed for a pollutant in Subsections (B)(1) through (B)(3), then the permittee shall analyze a pollutant using a test procedure listed in A.A.C. R9-14-612 or approved under A.A.C. R9-14-610(B). These test procedures will not have to be specified in the permit.

For any test procedure not listed in A.A.C. R9-14-612, A.A.C. R9-14-610(B) specifies the process for a laboratory to petition the ADHS for approval of a different test procedure required by the EPA or ADEQ. To provide as much time as possible for all people involved with the ADHS test procedure approval process, the Department routinely provides the permittee with notice about the requirement during the informal pre-public notice review stage and also officially during the formal comment period. This time period (more than six weeks) should give laboratories enough time to petition ADHS.

The Department wishes to stress that the appropriate test procedures for whole effluent toxicity (WET) testing are the EPA test procedures promulgated at 67 **FR** 69952, November 19, 2002. The 2002 version of the WET methods are specified in the July 1, 2003 version of 40 CFR 136. The ADHS rules at A.A.C. R9-14-612 do not reflect the current EPA WET methods, therefore, through the incorporation of the July 1, 2003 version of 40 CFR 136, the Department explicitly requires that the updated WET procedures be used.

The Department has adopted these rules based on the authorities in A.R.S. §§ 49-203 and 49-255.01. According to A.R.S. § 49-255.01(C)(2) and (C)(4), the rules adopted by the Directors shall provide for:

2. Establishment of permit conditions, discharge limitations and standards of performance as prescribed by Section 49-203, Subsection A, Paragraph 7...

4. Other provisions necessary for maintaining state program authority under Section 402(b) of the clean water act.

A.R.S. § 49-203(A)(7) states that the Director shall:

Adopt, by rule or as permit conditions, such discharge limitations, and such other standards and conditions as are reasonable and necessary to carry out the permit programs and regulatory duties described in paragraphs 2 through 5 of this subsection.

A.R.S. § 49-203(A)(2) states that the Director shall:

Adopt, by rule, a permit program that is consistent with but no more stringent than the requirements of the clean water act for the point source discharge of any pollutant or combination of pollutants into navigable waters. The program and the rules shall be sufficient to enable this state to administer the permit program identified in section 402(b) of the clean water act and as prescribed by article 3.1 of this chapter.

The Department has the authority and the obligation to develop rules that are sufficient to adopt permit conditions and other conditions to enable this state to administer the permit program.

Section 304(h) requires the EPA to "promulgate guidelines establishing test procedures for the analysis of pollutants that shall include the factors which must be provided for...permit applications pursuant to section 402 of this Act." In addition, the EPA made these test procedures applicable to monitoring and reporting of NPDES permits (40 CFR 122.21, 122.41, 122.44, and 123.25).

The Department acknowledges that the ADHS has the authority to specify test procedures and to license laboratories. The Department is not duplicating this authority. Instead, the Department is implementing restrictions on which test procedures may be used under the AZPDES program to maintain consistency with the federal program. This position is supported by language in A.R.S. § 36-495.01(B) which states:

(B)...The rules shall be developed in cooperation with the director of the department of environmental quality and shall be consistent with title 49 and rules administered or enforced by the director of environmental quality.

In summary, the Department has the authority to require the use of these test procedures for the following reasons:

1. 40 CFR 136 test procedures are the preferred test procedures for NPDES compliance.

2. The ADHS rules contain references to outdated test procedures.

3. ADHS has specified a process within its rules to deal with test procedures that may be required by the EPA or ADEQ. A.A.C. R9-14-610(B) allows a licensee to petition ADHS to approve the use of a new alternate method or a method alternation if "a different method or method alteration is required or authorized by an EPA or ADEQ statute or rule,..." Once approved, the approved different method becomes an approved method under A.A.C. R9-14-612.

4. The AZPDES program must be consistent with, but no more stringent than, the Clean Water Act. The EPA requires approved state NPDES program to adopt these updated methodologies to maintain consistency with the federal NPDES program.

R18-9-A907. Public Notice.

Subsection (A)(1)(g) has been amended to require that the Department include a statement about the thermal component of the discharge in a public notice only when the source is subject to Section 316(a) of the CWA.

Subsection (A)(1)(h) has been amended to include language to be consistent with 40 CFR 124.10(d)(ix). That section of federal regulation was promulgated as part of the rulemaking for 40 CFR 125, Subpart I for Cooling Water Intake Structures (66 FR 65338, December 18, 2001).

R18-9-C901. General Permit Issuance.

Subsection (C)(1)(f) has been amended to replace "concentrated animal feeding operation" with "CAFO" to conform to its use in the rest of the rulemaking.

Subsection (C)(1)(h) has been amended to remove unnecessary language because the deadline for submission of a Notice of Intent (NOI) is specified in the general permit. The provision originally applied to discharges from small construction activity because a discharge associated with large construction activity is covered under A.A.C. R18-9-C901(C)(1)(e) "stormwater discharges associated with industrial activity" as defined in 40 CFR 122.26(b)(14)(x). Although this connection for large construction activity is consistent with the federal program, it is not immediately clear that large construction activities are also covered by this subsection. Therefore, for clarification, the Department deleted the word "small" in this subsection so that the provision explicitly covers discharges from both large and small construction activities.

Subsection (D)(6) was added to require the applicant to submit the "latitude and longitude of the facility" when applying for coverage under a general permit. This type of information is needed for the Department's application database. In most cases, the Department will require the latitude and longitude of the discharge outfall or outfalls. In some cases, the Department may require the latitude and longitude of the center of the operation. The Department will specify the requirements within each general permit.

Subsection (D)(7) was added to require CAFOs to submit the information specified in 40 CFR 122.21(i)(1) and a topographic map. This revision complies with 40 CFR 122.28(b)(2)(ii).

R18-9-C905. General Permit Modification and Revocation and Reissuance

Subsection (A) was added to highlight the Department's authority to modify or revoke and reissue a general permit. These processes are governed by 40 CFR 122.62(a) and (b), which are incorporated by reference in A.A.C. R18-9-A905(A)(1)(j).

Subsection (B) was added to describe the process the Department must follow to modify or revoke and reissue a general permit. The Department must follow the public notice provisions in A.A.C. R18-9-A907(B) and the public participation/EPA review provisions in A.A.C. R18-9-A908.

Part D. Animal Feeding Operations and Concentrated Animal Feeding Operations. Part D was added to 18 A.A.C. 9, Article 9 to comply with the revised regulations for AFOs and CAFOs at 40 CFR 122.23. This Part applies to CAFOs that operate even if there is no discharge from the operation. Based on the EPA regulations in effect before April 14, 2003, an operation did not meet the definition of a CAFO unless it met the numbers and had the potential to

discharge in response to storm events that were less than the 25-year, 24-hour storm. The revisions to the EPA program took away this exclusion and thus all operations that meet the new definition of CAFO have a duty to comply with these requirements.

In accordance with 40 CFR 123.36 and 40 CFR 412(c)(2), the Department will specify the technical standards within the individual or general permit for CAFOs instead of within this rulemaking. The Department intends to use the applicable portions of the United States Department of Agriculture (USDA) Natural Resources Conservation Service (NRCS) Field Office Technical Guide (FOTG) as the technical standards required by 40 CFR 123.36 and 40 CFR 412.4(c)(2).

R18-9-D901. CAFO Designations.

Subsections (A) through (D) were added to comply with 40 CFR 122.23(b)(2), 122.23(c)(1)(i), 122.23(c)(2), and 122.23(c)(3). This language exists currently in A.A.C. R18-9-A902(B)(2). In designating an AFO as a CAFO, the Department must follow the provisions in A.A.C. R18-9-D901. The Department must consider the factors listed in A.A.C. R18-9-D901(B) to determine whether an AFO with less than the number of animals listed in the definition of "medium CAFO" is a significant contributor of pollutants to a navigable water. In addition, A.A.C. R18-9-D901(D) prohibits the Department from designating an AFO as a CAFO unless pollutants are discharged:

"1. Into a navigable water through a manmade ditch, flushing system, or other similar manmade device; or

2. Directly into a navigable water that originates outside of and passes over, across, or through the animal feeding operation or otherwise comes into direct contact with the animals confined in the operation."

To avoid confusion, the Department wishes to clarify that "navigable water" means *the waters of the United States as defined by ' 502(7) of the clean water act (33 United States Code ' 1362(7)*. (A.R.S. § 49-201(21)). Section 502(7) of the CWA defines "navigable waters" as the "waters of the United States, including the territorial seas." The Arizona Attorney General Statement for the AZPDES program (signed July 11, 2002, page 26) explains: "Since 'waters of the United States' is defined not in the federal statute but in the implementing federal regulations, *see* 40 CFR 122.2, the State law definition is interpreted to encompass the substance of the federal regulatory definition. An example of this interpretation is found in the ADEQ rules that establish water quality standards for surface waters." A.A.C. R18-11-101(43) includes the following definition:

"'Surface water' means a water of the United States and includes the following:

a. All waters which are currently used, were used in the past, or may be susceptible to use in interstate of foreign commerce;

b. All interstate waters, including interstate wetlands;

c. All other waters such as intrastate lakes, reservoirs, natural ponds, rivers, streams (including intermittent and ephemeral streams), creeks, washes, draws, mudflats, sandflats, wetlands, sloughs, backwaters, prairie potholes, wet meadows, or playa lakes, the use, degradation or destruction of which would affect or could affect interstate or foreign commerce, including any such waters:

i. Which are or could be used by interstate or foreign travelers for recreational or other purposes:

ii. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

iii. Which are used or could be used for industrial purposes by industries in interstate or foreign commerce;

d. All impoundments of waters otherwise defined as surface waters under this definition;

e. Tributaries of surface waters identified in paragraphs (a) through (d) of this definition; and

f. Wetlands adjacent to surface waters identified in paragraphs (a) through (e) of this definition."

The Department will determine if an AFO is a "significant contributor of pollutants to a navigable water" on a case-by-case basis, consistent with the federal program. To designate an AFO as a significant contributor, the Department will evaluate, at a minimum, the factors listed in A.A.C. R18-9-D901(B)(1) through A.A.C. R18-9-D901(B)(5). The Department will evaluate the amount of pollutants from the operation, the amount of pollutants from other operations and the site-specific characteristics of the navigable water including its designated use.

Subsection (E) was added to require that, when the Department designates an AFO as a CAFO, the Department will notify the owner or operator, in writing, of the designation.

R18-9-D902. AZPDES Permit Coverage Requirements.

Subsections (A) and (B) were added to comply with 40 CFR 122.23(d). Any AFO that meets the definition of a "CAFO" under A.A.C. R18-9-A901(6) must comply with the requirements in this Part. If an AFO is designated as a CAFO under A.A.C. R18-9-D901, the owner or operator must apply for permit coverage, either under an individual or a general permit, by the deadline specified in A.A.C. R18-9-D904(A). If a general permit is not available, the CAFO must apply for an individual permit by the applicable deadline. The Department anticipates that it will develop a new general permit for CAFOs shortly after this rulemaking is promulgated.

Subsection (C) was added to comply with 40 CFR 122.23(e). The provision requires that a CAFO must obtain permit coverage for a discharge of manure, litter, or process wastewater to land areas under the CAFO's control unless the discharge can meet the definition of an "agricultural stormwater discharge." A definition for "agricultural stormwater discharge" is included in the provision. In some cases, the manure, litter, or process wastewater from the CAFO will be land applied off of the CAFO site, possibly outside of the control of the CAFO. The Department expects that the owner or operator of the CAFO will include, in its nutrient management plan, an evaluation of all the manure, litter, or process wastewater produced by the CAFO that will be disposed or used. In addition, the Department wants to remind the CAFO owner or operator that the application of a material considered to be a nitrogen fertilizer is subject to an agricultural general permit under the Aquifer Protection Permit (APP) program (R18-9-402, APP General Permits: Nitrogen Fertilizers). The CAFO must comply with A.A.C. R18-9-403, APP General Permits: Concentrated Animal Feeding Operations.

R18-9-D903. No Potential to Discharge Determination for Large CAFOs.

This Section was added to comply with 40 CFR 122.23(f). The EPA provided a means for a large CAFO to demonstrate that the operation has no potential to discharge. If a large CAFO successfully demonstrates that the operation has no potential for discharge, then the person who owns or operates that operation does not need to apply for coverage under an AZPDES permit.

If the Department determines that the information from a large CAFO did not demonstrate that the operation has "no potential to discharge," the Department will provide the owner or operator of the large CAFO with a notice of the determination. The owner or operator of the large CAFO must apply for or seek coverage under an AZPDES permit within 30 days of the Department determination.

If a large CAFO for which the Department determined has "no potential to discharge" ceases operations, the large CAFO is still responsible for ensuring that any manure, litter, or process wastewater that was generated by the operation is not discharged to a navigable water after the operation ceases. In other words, the owner or operator of the CAFO must close the facility in such a way that there will be no discharge of manure, litter, or process wastewater generated by the CAFO. If there is a potential to discharge after the operation ceases, the person who owns or operates the facility must apply for permit coverage at that time.

R18-9-D904. AZPDES Permit Coverage Deadlines.

This Section was added to comply with 40 CFR 122.23(g) and (h). The EPA regulation revisions for CAFOs were promulgated on February 12, 2003 and became effective on April 14, 2003. Thus, EPA deadlines are based on the April 14, 2003 effective date of the regulation. The Department anticipates that the AZPDES rule revisions will become effective on February 2, 2004, nearly eight months after the EPA regulation. The Department finds it confusing to reference the April 14, 2003 deadline throughout this Section of the AZPDES rules. To reduce the confusion and to maintain consistency with the federal deadlines, the Department formatted the requirements as follows:

- Subsection (A)(1) addresses the permit coverage deadline for an AFO existing before April 14, 2003.
- Subsection (A)(2) addresses the permit coverage deadline for an AFO constructed after April 14, 2003 that meets the definition of a CAFO.
- Subsection (A)(3) addresses the permit coverage deadline for a designated CAFOs.

Furthermore, the Department uses the effective date of the rule as the reference point for the new definition of CAFO instead of April 14, 2003. The Department has analyzed this change and added additional language in some subsections so that rule is almost the same as the federal regulations. Because of the gap in implementation, it is impossible for the Department to duplicate the federal deadline requirements.

Subsection (A)(1)(a) states that the owner or operator of an AFO existing before April 14, 2003 and defined as a CAFO before that time must maintain permit coverage for the operation. The EPA did not grant additional time for seeking permit coverage for those operations that were subject to the federal program before April 14, 2003. These types of operations that existed in Arizona should have sought coverage under the existing general permit for CAFOs (AZG800000) or submitted an application for an individual permit. ADEQ proposes similar language. The EPA definition of a CAFO that applied before April 14, 2003 from 40 CFR Part 122, Appendix B was:

> "An animal feeding operation is a concentrated animal feeding operation for purposes of ' 122.23 if either of the following criteria are met.
>
> (a) More than the numbers of animals specified in any of the following categories are confined:
>
> (1) 1,000 slaughter and feeder cattle,
>
> (2) 700 mature dairy cattle (whether milked or dry cows),
>
> (3) 2,500 swine each weighing over 25 kilograms (approximately 55 pounds),
>
> (4) 500 horses,
>
> (5) 10,000 sheep or lambs,
>
> (6) 55,000 turkeys,

(7) 100,000 laying hens or broilers (if the facility has continuous overflow watering),

(8) 30,000 laying hens or broilers (if the facility has a liquid manure system),

(9) 5,000 ducks, or

(10) 1,000 animal units; or

(b) More than the following number and types of animals are confined:

(1) 300 slaughter or feeder cattle,

(2) 200 mature dairy cattle (whether milked or dry cows),

(3) 750 swine each weighing over 25 kilograms (approximately 55 pounds),

(4) 150 horses,

(5) 3,000 sheep or lambs,

(6) 16,500 turkeys,

(7) 30,000 laying hens or broilers (if the facility has continuous overflow watering),

(8) 9,000 laying hens or broilers (if the facility has a liquid manure handling system),

(9) 1,500 ducks, or

(10) 300 animal units;

and either one of the following conditions are met: pollutants are discharged into navigable waters through a manmade ditch, flushing system or other similar man-made device; or pollutants are discharged directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

Provided, however, that no animal feeding operation is a concentrated animal feeding operation as defined above if such animal feeding operation discharges only in the event of a 25 year, 24-hour storm event."

Before April 14, 2003, under the EPA program, if an operation met the numbers in (a) or the numbers and condition of (b), and had proper containment to handle the flow so that there would be no discharge from storm events up to the 25-year, 24-hour storm event, then the operation DID NOT meet the definition of CAFO and didn't need to be covered by the permit. If the numbers were met and the operation did not have structures in place to contain flow from storm events up to the 25-year, 24-hour storm, then the operation was subject to the regulations and should have applied for permit coverage. At 68 **FR** 7205, February 12, 2003, the EPA states:

"In particular, EPA notes that those operations that previously met the criteria for being a CAFO, but who erroneously claimed the 25-year, 24-hour storm exemption and avoided applying for an NPDES permit on that basis, continue to be in violation of the regulations and need to immediately apply for NPDES permit coverage. Today's rule also does not extend the date by which operations that have previously been designated as a CAFO should have applied for an NPDES permit."

When the Department develops a new general permit for CAFOs, the owner or operator of the CAFO subject to the existing general permit may apply for coverage under the new general permit, but the owner or operator must ensure there is continual permit coverage for the operation.

The Department realizes that there may be some AFOs that existed before April 14, 2003 but will become a CAFO between April 14, 2003 and the effective date of this rule revision (e.g. increase in the number of animals without proper containment for events up to the 25-year, 24-hour storm event). Those operations are subject to the current rules and must apply for permit coverage. According to Section III.B.3. of the existing CAFO general permit, the completed NOI (and other pertinent information) is due 90 days before the operation becomes a CAFO. The Department expects that the owner or operator for those operations will seek coverage under the existing general permit or apply for an individual permit using AZPDES application Forms 1 and 2B in accordance with 40 CFR 122.21. The language in subsection (A)(1)(a) is consistent with 40 CFR 122.23(g)(1).

Subsection (A)(1)(b) covers any AFO operating before April 14, 2003 but not defined as a CAFO until the AZPDES rules are revised. The Department proposes that the owner or operator for these operations submit a permit application by a deadline specified by the permitting authority, but no later than February 13, 2006. The Department will specify the deadline for permit application submission for this category of CAFOs in a general permit. The Department may notify each CAFO subject to this part individually by letter. This provision is consistent with 40 CFR 122.23(g)(2). This deadline is only available if the operation operated before April 14, 2003.

Subsection (A)(1)(c) covers an AFO existing before April 14, 2003 that changed operations after April 14, 2003 so that the operation becomes a CAFO. If the revised operation meets the definition of CAFO existing before the AZPDES rules are revised, the operation is subject to the current requirements and the owner or operator must apply for or seek coverage within 90 days of the operational change. If the change does not make the operation a CAFO as defined before the AZPDES rules are revised, but meets the new definition of a CAFO, the owner or operator has

until April 13, 2006 to seek permit coverage under a general permit or submit an application for an individual permit. The language in this subsection is consistent with 40 CFR 122.23(g)(3)(ii).

Subsection (A)(1)(d) addresses an AFO existing before April 14, 2003 that constructs new facilities at its operation and the new facilities meet the definition of new source. This is an inferred category due to the definition of new source, because some modifications at existing facilities are treated as a new source under 40 CFR 122.29(b)(3), which is incorporated by reference in A.A.C. R18-9-A905(A)(e), instead of a modification of an existing facility. For facilities that qualify as new sources, the permit application is due at least 180 days before the new source operations commence. The Department acknowledges that, although categorized as a "new source" under the federal program, some new sources might not receive the same designation under the state program when the AZPDES regulations are modified to match the federal definition. For example, the owner or operator of an AFO (existing before April 14, 2003) decides on May 1, 2003 to add more animals to the operation, to construct additional facilities to handle the wastes from the expanded operations, and to commence operation by December 1, 2003. The expanded portion meets the definition of a new source. The federal program requires that the application be submitted at least 180 days before new source operations commence or by June 1, 2003. If that facility commences operations in December 2003, after the Department modifies its rules, the facility may be treated as a CAFO meeting the new definition of CAFO and is subject to subsection (A)(1)(b) - required to submit an application by the date specified by the Director when in actuality it should have applied for permit coverage at least six months before operations started. To ensure that these facilities are treated the same as envisioned under the federal regulations, the Department has added language to address the deadline for the permit application for those facilities that are new sources under the federal program, but potentially not new sources under the AZPDES program. The Department will require permit applications within 30 days of the effective date of the rule revision for operations that fall into that category. At this point, the Department is aware of two facilities that commenced construction after April 13, 2003. The Department believes that requiring the application within 30 days of the effective date of the rules for operations where the calculated 180-day application date was before the effective date of the rule provides adequate notice and enough time for the owner or operator of the operation to submit the application. This provision is based on 40 CFR 122.23(g)(4).

Subsection (A)(2) addresses CAFOs constructed after April 14, 2003 including those that are subject to the effluent guidelines in 40 CFR 412. The owner or operator for these facilities must submit an application or seek permit coverage at least 180 days before the operation commences. For those operations where the rules become effective after the calculated 180-day deadline for the operation, the application is due within 30 days of the effective date of the rule (March 3, 2004). An additional statement has been added to address the gap between the date of the federal regulation and the state rule revisions. This provision is based on 40 CFR 122.23(g)(3)(i) and (g)(4).

Subsection (A)(3) addresses the permit coverage deadline for a designated CAFO. This provision is consistent with 40 CFR 122.23(g)(5).

Subsection (C) addresses when permit coverage is no longer needed. Note that permit coverage must be maintained if there is a potential to discharge any manure, litter, or associated process wastewater that was generated while the operation was a CAFO even if the facility ceases operations or it no longer meets the definition of a CAFO. Before applying for termination of coverage of an AZPDES permit, the permittee must demonstrate that there is no potential for a discharge of remaining manure, litter, or process wastewater.

R18-9-D905. Closure Requirements.

This Section was added to describe what the Department expects to see in a demonstration described in A.A.C. R18-9-D904(C)(2)(b) and to state that the person who owns or operates a CAFO is responsible for ensuring that manure, litter, or process wastewater generated during the operation are not discharged to a navigable water after the operation ceases. This Section applies to any CAFO including large CAFOs that met the "no potential to discharge" (NPTD) determination under (A.A.C. R18-9-D903) for the entire period of operation. The Department needs verification that there will be no discharge of any manure, litter, or process wastewater that may remain on the site after the CAFO operation ceases.

Subsection (A) requires the owner/operator to develop a closure plan and submit it to the Department for approval. For a Large CAFO that was exempt from the general permit because it qualified for a NPTD determination, the Department will not receive a Notice of Termination (NOT) for that facility. NOTs generally require up-to-date information about the operation, at the time of closure. This type of information about the operation would be important for the Department to evaluate at closure whether or not the facility was covered by a general permit. Therefore the Department has created provision A.A.C. R18-9-D905(A)(2)(a) so that a Large CAFO that met the NPTD determination will submit information that is equivalent to the information required in the NOT for an operation covered by a general permit.

Subsection (B) requires the owner/operator to notify the Department that the closure plan was fully implemented within 30 days of the date and before redevelopment. This time is needed so that the Department can inspect the facility before non-CAFO related changes are made to the site. (For example, earth is moved or concrete is poured that didn't relate to the closing of the CAFO operation.)

7. A reference to any study relevant to the rules that the agency reviewed and either relied on in its evaluation of or justification for the rules or did not to rely on in its evaluation of or justification for the rules, where the public may

obtain or review each study, all data underlying each study, and any analysis of each study and other supporting material:

None

8. A showing of good cause why the rules are necessary to promote a statewide interest if the rules will diminish a previous grant of authority of a political subdivision of this state:

Not applicable

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

To analyze the impact of this rulemaking, the Department categorized the types of revisions into the following categories:

a. Updates to the rule to conform with changes to the federal regulations;

b. Closure requirement for CAFOs;

c. Incorporating 40 CFR 136 by reference in lieu of 9 A.A.C. 14, Article 6 for analytical test procedures; and

d. Minor technical corrections.

Updates to the rule to conform with changes to the federal regulations.

In response to revisions that the EPA makes to the NPDES program and to maintain adequate permit and enforcement authority, the Department must make changes to its AZPDES program as required by 40 CFR 123.62(e). These changes are imposed on the regulated community whether or not the Department is the program authority. The EPA analyzed the economic impact of these changes in all the rulemakings cited in Table 1. The Department believes that there is no additional economic impact beyond what is calculated in the federal rulemaking actions for changes pertaining to the CAFO regulations in A.A.C. R18-9-A901, R18-9-A902(B), R18-9-C901, R18-9-D901, R18-9-D902, R18-9-D903, and R18-9-D904 or to the other regulations updated by this rulemaking in A.A.C. R18-9-A905.

Closure requirements for CAFOs

Pertaining to the requirements for CAFOs in Arizona, the Department is currently aware of approximately 121 facilities subject to the revised CAFO requirements. Of the 121 facilities, 100 facilities were subject to the previous version of the CAFO requirements; 19 facilities existed before April 14, 2003 and meet the new definition of CAFO; and two operations meet the new definition of CAFO and the construction for these operations commenced between April 14, 2003 and February 2, 2004. Under A.A.C. R18-9-D904(A)(1)(d) and R18-9-D904(A)(2), the two operations for which construction commenced between April 2003 and February 2004, are required to submit applications within 30 days of the effective date of the rule, instead on the effective date of the rulemaking. This additional time is a benefit to the owner or operators of these operations with a minor economic benefit.

In addition, the Department specified requirements for a closure plan under A.A.C. R18-9-D905 that are not explicitly required in the revised federal AFO/CAFO program. The closure plan requirement is based on the federal language in 40 CFR 122.23(h) that is translated to A.A.C. R18-9-D904(C)(2)(b). This provision requires an owner or operator of an operation, when the operation ceases or when the operation no longer is defined as a CAFO, to demonstrate that "there is no potential for a discharge of remaining manure, litter, or associated process wastewater (other than agricultural stormwater from land application areas) that was generated while the operation was a CAFO." For operations that cease, A.A.C. R18-9-D905 requires the owner or operator to submit basic information about the closure of the operation, including information about the site, the amount of wastes to be removed, method for treating remaining wastes or to control the discharge. The Section also requires the owner or operator of an operation that has closed to provide the Department with notice that the closure plan has been fully implemented within 30 days of completion of the plan and prior to redevelopment. The Department estimates that these requirements will have a minor economic impact on the regulated operations because this Section defines what the Department expects to see (what the EPA expected to see) in the demonstration under A.A.C. R18-9-D904(C)(2)(b) and that the owner or operator of the CAFO should have this information readily available.

Incorporating 40 CFR 136 by reference in lieu of 9 A.A.C. 14, Article 6 for analytical test procedures

The Department estimates that the incorporation of the test methods listed in or approved under 40 CFR 136 in lieu of the ADHS rules should have a minor economic impact. The revisions to A.A.C. R18-9-A905(B) requiring the use of 40 CFR 136 test methods is a minor change with no economic impact because this requirement was technically already a part of the program based on the regulations that were incorporated by reference. (Permittees already had to use test methods that were approved under 40 CFR 136 and the ADHS rules to be in compliance with the permits.) The only potential area for a slight impact would be from the incorporation by reference of the revised test methods for WET. These revised methods were ratified by the EPA in November 2002 and were THE EPA test methods for WET at the time that the AZPDES program was approved (December 5, 2002).

The AZPDES rules (adopted in 2001) had incorporated the ADHS rules at 9 A.A.C. 14, Article 6 to prescribe appropriate test procedures. A.A.C. R9-14-610(A) lists the older WET methods as Key Resources:

M1. Environmental Monitoring Systems Laboratory-Cincinnati, EPA, Pub. No. EPA/600/4-90/027F, Methods for Measuring the Acute Toxicity of Effluents and Receiving Waters to Freshwater and Marine Organisms (4th ed. August 1993).

N1. Environmental Monitoring Systems Laboratory-Cincinnati, EPA, Pub. No. EPA-600-4-91-002, Short-term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Water to Freshwater organisms (3rd ed. July 1994).

Due to EPA's November 19, 2002 rulemaking, the methods specified for WET in A.A.C. R9-14-610 are outdated and no longer appropriate for testing under the NPDES program. The Department must utilize the EPA promulgated methods to be consistent with the federal NPDES program. Because the new test methods must be used for WET and the AZPDES rules currently specify the use of the old EPA WET test methods (through the incorporation of the ADHS rules), the Department estimated the economic impact from requiring the revised WET methods based on the incremental differences between the older EPA methods and the revised methods.

According to the EPA discussion on costs found at 67 **FR** 69962, November 19, 2002, the major differences between the old and new methods fall into four categories:

(1) The requirement for blocking by known parentage in the Ceriodaphnia dubia Survival and Reproduction Test;

(2) The requirement to review test results for concentration-response relationships;

(3) The incorporation of mandatory variability criteria for certain test methods when NPDES permits require sublethal WET testing endpoints expressed using hypothesis testing; and

(4) The increase in the minimum number of replicates for the Fathead Minnow Larval Survival and Growth Test, Selenastrum capricornutum Growth Test, Sheepshead Minnow Larval Survival and Growth Test, Inland Silverside Larval Survival and Growth Test, and Sea Urchin Fertilization Test.

The EPA stated that the overall cost increases due to these changes will be minor and that the potential benefits of these modifications outweigh the incremental costs. The EPA estimated that the total cost of these modifications for all permittees across the United States would be less than five million dollars per year for all tests. The EPA believes that these costs also would be alleviated by a potential reduction in costs for retesting and additional investigations (e.g., toxicity identification evaluations). The EPA also stated that the modifications should result in improved test performance and increased confidence in the reliability of testing results. In addition, at Part VII.C of 67 **FR** 69969, November 19, 2002, the EPA Administrator certified that the ratification of the modifications to the WET test methods would "not have a significant economic impact on a substantial number of small entities. Additionally, EPA stated: A... EPA estimates that the average incremental cost per permit per year for today's method revisions is $276. Because monitoring frequency is typically less frequent for small entities than large entities, EPA expects the average incremental cost per permit per year to be even less than $276 for small entities."

Currently, 164 facilities operate under individual AZPDES permits and more than 5000 subject to general AZPDES permits. At this point, the Department does not require WET testing for any of the general permitted facilities, therefore the WET testing requirement may impact only individual permitted facilities or approximately 3% of the permitted facilities in Arizona. The Department categorizes facilities as "major" or "minor" based on such factors as the type of operation and amount of discharge. The State considers 46 to be "major" facilities and 118 to be "minor" facilities.

The Department has continued an EPA practice to require WET testing at least annually for the major discharges. Depending on the amount discharged and the frequency of discharges, WET testing may be required for major facilities on a quarterly or monthly basis. For minor facilities, the Department may require one WET test in a five year period. ($6500 for minors) Using the EPA estimate of approximately $276 per WET test and assuming that the major facilities are evenly distributed between the ones which monitor annually, quarterly and monthly, the Department estimates the annual economic impact from requiring the use of the new WET methods to be:

Monitoring Frequency	**Estimated Economic Impact**
Annual monitoring [(46 majors x $276 x 1 test/year)/3]:	$4,232
Quarterly monitoring [(46 majors x $276 x 4 tests/year)/3]:	$16,928
Monthly monitoring [46 majors x $276 x 12 tests/year)/3]:	$50,784
Monitoring once during permit term [118 minors x 276)/5]:	$6,514
Total Annual cost:	$78,458

The Department concludes based on the EPA estimate and the number of potentially impacted permittees that the incorporation of the updated WET test methods and 40 CFR 136 by reference will have an insignificant economic impact.

Additionally, the Department would like to note that the ADHS has already approved the use of the updated methods for use in Arizona. (See a February 28, 2003 ADHS Director's Approval that is attached to the Economic Impact

Statement.) Also, the Department has requested that ADHS replace the reference to the outdated WET methods in A.A.C. R9-14-610 with a reference to the updated WET methods.

Minor technical corrections

Pertaining to the changes to provisions, not related to updated federal regulations, in A.A.C. R18-9-A901, R18-9-A902, R18-9-C901, and R18-9-C905, the Department believes there will be no economic impact from these changes because they are consistent with the current implementation of the program.

Conclusion

Overall, the incremental impacts from incorporating these changes into the AZPDES rules are minor. The benefits to making these changes are moderate because the Department will be able to continue to administer the AZPDES program without dealing with legal suits that may come forward if the Department does not adopt the federal requirements in a timely manner.

Impact of rules affecting small businesses (A.R.S. § 41-1035.)

The Department evaluated the rulemaking according to the following criteria:

1. Establish less stringent compliance or reporting requirements in the rule for small businesses.

As the manager of an approved state NPDES program, the Department must adopt rules that are consistent with federal requirements and therefore cannot adopt rules specifying additional less stringent compliance or reporting requirements for small businesses.

2. Establish less stringent schedules or deadlines in the rule for compliance or reporting requirements for small businesses.

As the manager of an approved state NPDES program, the Department must adopt rules that are consistent with federal requirements and therefore cannot adopt rules specifying additional less stringent schedules or deadlines for small businesses.

3. Consolidate or simplify the rule's compliance or reporting requirements for small businesses.

As the manager of an approved state NPDES program, the Department must adopt rules that are consistent with federal requirements and therefore cannot consolidate or simplify the rule's compliance or reporting requirements for small businesses. The amount of monitoring and reporting depends on the type of discharge and the discharge location, not necessarily on the size of the business.

4. Establish performance standards for small businesses to replace design or operational standards in the rule.

As the manager of an approved state NPDES program, the Department must adopt rules that are consistent with federal requirements and therefore cannot adopt rules specifying performance standards for small businesses instead of design or operational standards. The federal CAFO provisions do not impose technical standards (effluent limitations guidelines at 40 CFR 412) for small or medium CAFOs. The Department also does not require that small or medium CAFOs meet the effluent limitations guidelines at 40 CFR 412.

5. Exempt small businesses from any or all requirements of the rule.

As the manager of an approved state NPDES program, the Department must adopt rules that are consistent with federal requirements and therefore cannot adopt rules specifying additional exemptions for small businesses. The federal CAFO provisions do provide "exemptions" for animal feeding operations including operations that meet the number of animals specified in the definitions for small or medium CAFO but do not have a discharge. The AZPDES program incorporates those same exemptions.

10. A description of the changes between the proposed rules, including supplemental notices, and final rules (if applicable):

Rulemaking changes made as a result of responses to comments, a summary of the principal comments and the agency response to them are described in item #11. Minor grammatical, formatting, and other changes suggested by the Governor's Regulatory Review Council have been made throughout the rule package and have not been addressed in items #10 or #11.

R18-9-A901. Definitions

The Department revised the definition of "new discharger" to conform with the changes to "discharge of a pollutant":

24. "New discharger" includes an ~~indirect discharger~~industrial user and means any building, structure, facility, or installation:

a. From which there is or may be a discharge of pollutants;

b. That did not commence the discharge of pollutants at a particular site before August 13, 1979;

c. That is not a new source; and

d. That has never received a finally effective NPDES or AZPDES permit for discharges at that site.

Also, the Department revised the definitions of "medium concentrated animal feeding operation," "process wastewater," and "production area," for clarity:

19. "Medium concentrated animal feeding operation" means an animal feeding operation in which:

a. The type and number of animals that it stables or confines falls within any of the following ranges:

i. 200 to 699 mature dairy cows, whether milked or dry;

ii. 300 to 999 veal calves;

iii. 300 to 999 cattle other than mature dairy cows or veal calves. Cattle includes ~~but is not limited to~~ heifers, steers, bulls, and cow and calf pairs;

iv. 750 to 2,499 swine each weighing 55 pounds or more;

v. 3,000 to 9,999 swine each weighing less than 55 pounds;

vi. 150 to 499 horses;

vii. 3,000 to 9,999 sheep or lambs;

viii. 16,500 to 54,999 turkeys;

ix. 9,000 to 29,999 laying hens or broilers, if the animal feeding operation uses a liquid manure handling system;

x. 37,500 to 124,999 chickens (other than laying hens), if the animal feeding operation uses other than a liquid manure handling system;

xi. 25,000 to 81,999 laying hens, if the animal feeding operation uses other than a liquid manure handling system;

xii. 10,000 to 29,999 ducks, ~~(~~if the animal feeding operation uses other than a liquid manure handling system~~)~~; or

xiii. 1,500 to 4,999 ducks, ~~(~~if the animal feeding operation uses a liquid manure handling system~~)~~; and

b. Either one of the following conditions are met:

i. Pollutants are discharged into a navigable water through a man-made ditch, flushing system, or other similar man-made device; or

ii. Pollutants are discharged directly into a navigable water that originates outside of and passes over, across, or through the ~~facility~~animal feeding operation or otherwise comes into direct contact with the animals confined in the operation.

29. "Process wastewater," for purposes of Article 9, Part D, means any water that comes into contact with a raw material, product, or byproduct including manure, litter, feed, milk, eggs, or bedding and water directly or indirectly used in the operation of an animal feeding operation for any or all of the following:

a. ~~spillage~~Spillage or overflow from animal or poultry watering systems;

b. ~~washing~~Washing, cleaning, or flushing pens, barns, manure pits, or other animal feeding operation facilities;

c. ~~direct~~Direct contact swimming, washing, or spray cooling of animals; or

d. ~~dust~~Dust control. ~~Process wastewater includes any water that comes into contact with a raw material, product, or byproduct including manure, litter, feed, milk, eggs, or bedding.~~

32. ~~For purposes of Article 9, Part D, "production~~ "Production area," for purposes of Article 9, Part D, means ~~that part of an animal feeding operation that includes~~ the animal confinement area, ~~the~~ manure storage area, ~~the~~ raw materials storage area, and ~~the~~ waste containment areas of an animal feeding operation. ~~Also included in the definition of production~~ Production area includes ~~is~~ any egg washing or egg processing facility and any area used in the storage, handling, treatment, or disposal of animal mortalities.

R18-9-A902. AZPDES Permit Transition, Applicability, and Exclusions

The Department revised the proposed language at R18-9-A902(A)(8) for clarity:

8. Stormwater discharges:

a. Associated with industrial activity as defined under 40 CFR 122.26(b)(14), ~~which is~~ incorporated by reference in R18-9-A905(A)(1)(d). The Department shall not consider a discharge to be a discharge associated with industrial activity if the ~~Discharges~~discharge is composed entirely of stormwater and meets the conditions of no exposure as defined under 40 CFR 122.26(g), incorporated by reference in R18-9-A905(A)(1)(d)~~are not considered discharges associated with an industrial activity if the conditions of no~~

~~*exposure as defined under 40 CFR 122.26(g), which is incorporated by reference in R18-9-A905(A)(1)(d), are met;*~~

R18-9-D901. CAFO Designations

The Department revised R18-9-D901(D) for clarity:

D. The Director shall not designate an animal feeding operation having less than the number of animals established in R18-9-A901(19)(a) as a CAFO unless a pollutant is discharged:

1. *Into a navigable water through a manmade ditch, flushing system, or other similar manmade device; or*
2. *Directly into a navigable water that originates outside of ~~the facility~~ and passes over, across, or through the ~~facility~~animal feeding operation or otherwise comes into direct contact with the animals confined in the operation.*

R18-9-D902. AZPDES Permit Coverage Requirements

The Department revised R18-9-D902(B) for clarity:

B. If a person who owns or operates a large CAFO receives a ~~notification of a determination of~~ no potential to discharge determination under R18-9-D903, coverage under an AZPDES permit described in this Part is not required.

R18-9-D903. No Potential To Discharge Determination for Large CAFOs.

The Department revised R18-9-D903 for clarity:

A. For purposes of this Section, "no potential to discharge" means that there is no potential for any CAFO manure, litter, or process wastewater to enter into a navigable water under any circumstance or climatic condition.

B. Any person who owns or operates a large CAFO and has not had a discharge within the previous five years may request a ~~determination of~~ no potential to discharge determination by submitting to the Department:

1. *The information specified in 40 CFR 122.21(f) and 40 CFR 122.21(i)(1)(i) through (ix) on a form obtained from the Department, by the applicable date specified in R18-9-D904(A); and*
2. *Any additional information requested by the Director to supplement the request or requested through an ~~on-site~~ onsite inspection of the CAFO.*

C. Process for making a no potential to discharge determination.

1. Upon receiving a request under subsection (B)~~, and if the CAFO has not had a discharge within the five years before the date of the request, the Director may make a case-specific determination that a large CAFO has no potential to discharge pollutants to a navigable water. The~~ the Director shall consider:

~~1.~~a. The potential for discharges from both the production area and any land application area, and

~~2.~~b. Any record of prior discharges by the CAFO.

~~*D. Process for making a no potential to discharge determination.*~~

~~1.~~2. ~~Before making a final decision to grant a no potential to discharge determination, the Director shall issue a notice to the public stating that a no potential to discharge request has been received.~~ The Director shall issue a public notice that ~~shall include~~ includes:

a. A statement that a no potential to discharge request has been received;

b. ~~a~~A fact sheet, when applicable~~, and the following information:~~;

~~a.~~c. A brief description of the type of facility or activity that is the subject of the no potential to discharge determination;

~~b.~~d. A brief summary of the factual basis, upon which the request is based, for granting the no potential to discharge determination; and

~~c.~~e. A description of the procedures for reaching a final decision on the no potential to discharge determination.

~~2~~3. The Director shall base the decision to grant a no potential to discharge determination on the administrative record, which includes all information submitted in support of a no potential to discharge determination and any other supporting data gathered by the Director.

~~3~~4. The Director shall notify the owner or operator of the large CAFO of the final determination within 90 days of receiving the request.

~~E~~D. If the Director denies the no potential to discharge determination request, the person who owns or operates the CAFO shall seek coverage under an AZPDES permit within 30 days after the denial.

~~F~~E. A no potential to discharge determination does not relieve the CAFO from the consequences of a discharge. An unpermitted CAFO discharging a pollutant into a navigable water is in violation of the Clean Water Act even if the

Director issued a no potential to discharge determination for the facility. If the Director issued a determination of no potential to discharge to a CAFO facility but the owner or operator anticipates a change in circumstances that could create the potential for a discharge, the owner or operator shall contact the Director and apply for and obtain permit authorization before the change of circumstances.

~~G~~F. When the Director issues a determination of no potential to discharge, the Director retains the authority to subsequently require AZPDES permit coverage if:

1. *Circumstances at the facility change;*
2. *New information becomes available; or*
3. *The Director determines, through other means, that the CAFO has a potential to discharge.*

R18-9-D904.AZPDES Permit Coverage Deadlines

The Department revised R18-9-D904(A) and R18-9-D904(B) for clarity:

A. Any person who owns or operates a CAFO shall apply for or seek coverage under an AZPDES permit and shall comply with all applicable AZPDES requirements, including the duty to maintain permit coverage under subsection (C).

1. *~~An owner or operator of an animal~~ Permit coverage deadline for an animal feeding operation operating before April 14, 2003~~:~~.*
   a. *~~And~~An owner or operator of an animal feeding operation that operated before April 14, 2003 and was defined as a CAFO before ~~[insert effective date of the rule revision]~~February 2, 2004 shall apply for or seek permit coverage or maintain permit coverage and comply with the conditions of the applicable AZPDES permit;*
   b. *~~But~~An owner or operator of an animal feeding operation that operated before April 14, 2003 and was not defined as a CAFO until ~~[insert effective date of the rule revision]~~February 2, 2004 shall apply for or seek permit coverage by a date specified by the Director, but no later than February 13, 2006;*
   c. *~~But~~An owner or operator of an animal feeding operation that operated before April 14, 2003 who changes~~changing~~ the operation on or after ~~[insert effective date of the rule revision]~~February 2, 2004, resulting in the operation being defined as a CAFO, shall apply for or seek permit coverage as soon as possible, but no later than 90 days after the operational change. If the operational change will not make the operation a CAFO as defined before ~~[insert effective date of the rule revision]~~February 2, 2004, the owner or operator may take until April 13, 2006 or 90 days after the operation is defined as a CAFO, whichever is later, to apply for or seek permit coverage;*
   d. *~~But~~An owner or operator of an animal feeding operation that operated before April 14, 2003 who constructs~~constructing~~ additional facilities on or after ~~[insert effective date of the rule revision]~~February 2, 2004, resulting in the operation being defined as a CAFO that is a new source, shall apply for or seek permit coverage at least 180 days before the new source portion of the CAFO commences operation. If the calculated 180-day deadline ~~occurred~~occurs before ~~[insert effective date of the rule revision]~~February 2, 2004 and the operation ~~was~~is not subject to this Article before ~~[insert effective date of the rule revision]~~February 2, 2004, the owner or operator shall apply for or seek permit coverage no later than ~~[insert date 30 days from the effective date of this rule revision]~~March 3, 2004.*
2. *Permit coverage deadline for an animal feeding operation operating on or after April 14, 2003. An owner or operator who started construction of a CAFO on or after April 14, 2003, including a CAFO subject to the effluent limitations guidelines in 40 CFR 412, shall apply for or seek permit coverage at least 180 days before the CAFO commences operation. If the calculated 180-day deadline ~~occurred~~occurs before ~~[insert effective date of the rule revision]~~February 2, 2004 and the operation ~~was~~is not subject to this Article before ~~[insert effective date of the rule revision]~~February 2, 2004, the owner or operator shall apply for or seek permit coverage no later than ~~[insert date 30 days from the effective date of this rule revision]~~March 3, 2004.*
3. *Permit coverage deadline for a designated CAFO. Any person who owns or operates a CAFO designated under R18-9-D901(B) shall apply for or seek permit coverage no later than 90 days after receiving a designation notice.*

B. Unless specified under R18-9-D903(E) and (F), the Director shall not require permit coverage ~~is not required~~ for a CAFO that the Director determined under R18-9-D903 to have no potential to discharge. If circumstances change at a CAFO that has received a no potential to discharge determination and the CAFO now has a potential to discharge, the person who owns or operates the CAFO shall notify the Director within 30 days after the change in circumstances and apply for or seek coverage under an AZPDES permit.

11. A summary of the comments made regarding the rule and the agency response to them:

Four written sets of comments were received during the comment period. No comments were received during the oral proceeding. All comments focused on the proposed changes to the analytical test procedures specified in R18-9-A905.

Comment: The proposed language in A.A.C. R18-9-A905(B) may prohibit the use of EPA approved "alternate test procedures" or "method alterations" because those procedures or methods are not specified in 40 CFR 136. Revise the language as follows:

"B. Except as provided in subsection (C), a person shall analyze a pollutant using:

1. A test procedure listed in 40 CFR 136;

2. An alternate test procedure approved by the EPA as provided in 40 CFR 136;

3. A test procedure listed in 40 CFR 136, with modifications allowed by the EPA and approved as a method alteration by the Arizona Department of Health Services under R9-14-610(B);

4. If no test procedure for the pollutant is listed in 40 CFR 136, a test procedure listed in A.A.C. R9-14-612; or

5. A test procedure for the pollutant specified by the Director in an AZPDES permit."

Designate the proposed language in A.A.C. R18-9-A905(B)(3) in a new subsection (C).

Response: The Department considers "alternate test procedures" and "method alterations" approved by the EPA to be approved under 40 CFR 136 even though those test procedures are not specifically listed in the regulation. The Department accepts the suggestions with slight modifications, to stress that a permittee should first use a test procedure specified within an AZPDES permit for a pollutant. If the Department has not specified a test procedure within an AZPDES permit, then a permittee may select a test procedure that is listed in or approved under 40 CFR 136 or a modified 40 CFR 136 test procedure that the ADHS approved as a method alternation under A.A.C. R9-14-610(B). If a test procedure for a pollutant is not specified under the previous categories, then a permittee may use a test method listed in A.A.C. R9-14-612 or approved under A.A.C. R9-14-610(B).

The Department has deleted the proposed R18-9-A905(B)(3) relating to the WET methods because those methods are specified under 40 CFR 136. Furthermore, because the updated methods are both in 40 CFR 136 and now in ADEQ rule, a licensee may petition ADHS under A.A.C. R9-14-610(B)(1) to use the 2002 WET methods instead of the older methods specified in the ADHS rules. In fact, ADHS issued a director's approval for the use of the chronic WET test methods in February 2003. Therefore some of the updated EPA WET methods are already approved for use in Arizona.

The language in A.A.C. R18-9-A905(B) is revised as follows:

B. A person shall ~~use the test procedures under 9 A.A.C. 14, Article 6 for the analysis of pollutants.~~ analyze a pollutant using a test procedure for the pollutant specified by the Director in an AZPDES permit. If the Director does not specify a test procedure for a pollutant in an AZPDES permit, a person shall analyze the pollutant using:

1. A test procedure listed in 40 CFR 136, which is incorporated by reference in Subsection (A)(7);

2. An alternate test procedure approved by the EPA as provided in 40 CFR 136;

3. A test procedure listed in 40 CFR 136, with modifications allowed by the EPA and approved as a method alteration by the Arizona Department of Health Services under A.A.C. R9-14-610(B); or.

4. If a test procedure for a pollutant is not available under subsection (B)(1), a test procedure listed in A.A.C. R9-14-612 or approved under A.A.C. R9-14-610(B).

Based on the ADHS and ADEQ rules, a permittee must use a laboratory licensed to perform a method that is approved under both 40 CFR 136 and A.A.C. R9-14-612. Pursuant to A.A.C. R9-14-612(A), any wastewater method approved under A.A.C. R9-14-610(B) is considered an approved wastewater method.

Comment: The Department received comments from three entities stating that ADEQ does not have the authority to require the use of a test procedure that has not been approved by the ADHS. This rule requires the use of EPA approved test procedures instead of test procedures approved by ADHS. Within the State of Arizona only ADHS has been granted the authority by the Arizona Legislature (ARS 36-495.01) to approve methodologies for test procedures and license laboratories. Therefore, ADEQ in order to administer the AZPDES program, must only require the use of test methods within AZPDES permits that have first been approved by ADHS. The fact that ADEQ's AZPDES program must be consistent with the federal NPDES program is irrelevant to whether ADEQ has the authority to require the use of tests that have not been approved by ADHS. There is no restriction on ADEQ to petition ADHS to revise and approve any test procedure that the Department wishes to include in its regulatory programs before ADEQ places that test procedure within a permit, or requires the use of a test procedure by regulation. This is the appropriate process for ADEQ to use to give the citizens of Arizona and the regulated community an opportunity to fully participate in the process of determining whether a proposed test method is accurate and precise. The public participation process, which is mandated by state statute and regulation, also gives interested parties the opportunity to appeal the promulgation of new test methodologies. This proposed regulation would short circuit this critical process by mandating the use of test methodologies not first approved by ADHS. The proposed regulation would also require that if a test

procedure is approved by EPA under 40 CFR Part 136 that ADEQ can require the use of the test procedure within a permit even through the test procedure has not been approved by ADHS. This rule would effectively eliminate the exclusive authority of ADHS to approve test methods to be used within Arizona and instead grant that authority to the federal government.

Response: As mentioned above, in February 2003, ADHS issued a director's approval for the chronic WET test methods. Therefore, at least a portion of the updated methods are approved for use in Arizona by ADHS.

Even if ADHS had not issued the approval, the Department disagrees with the comments. As described in the preamble discussion regarding the revisions to A.A.C. R18-9-A905, the Department has the authority and the obligation as an approved state NPDES program to develop rules that are sufficient to adopt permit conditions and other conditions to enable this state to administer the permit program. (See A.R.S. §§ 49-203(A)(2), 49-203(A)(7), 49-255.01(C)(2) and (C)(4).) The Department acknowledges that the ADHS has the authority to specify test procedures and to license laboratories verifying that the laboratory is properly equipped and calibrated to perform certain test procedures. The Department is not proposing to duplicate the ADHS authority. Instead, the Department is implementing restrictions on which test procedures may be used under the AZPDES program to maintain consistency with the federal program. This position is supported by language in A.R.S. § 36-495.01(B) that states:

(B)...The rules shall be developed in cooperation with the director of the department of environmental quality and shall be consistent with title 49 and rules administered or enforced by the director of environmental quality.

The ADHS rules acknowledge the authority for the EPA and ADEQ to specify different methods not listed in ADHS rules as evidenced by the process described at A.A.C. R9-14-610(B) that allows a licensee to petition ADHS to approve the use of a new alternate method or a method alternation if "a different method or method alteration is required or authorized by an EPA or ADEQ statute or rule,..." Once ADHS provides a "director's approval" for the method, the method becomes an approved method under A.A.C. R9-14-612. ADHS still maintains its approval role. ADHS has approved other methods in this fashion in the past.

This rulemaking does not attempt to override ADHS' approval authority. As mentioned above, the permittee must ensure that the laboratory and the method used meet ADEQ requirements and ADHS requirements. In the end, all test procedures used in Arizona for compliance with an AZPDES permit must meet ADHS requirements.

Comment: Two commentors stated that the proposed WET test has not been fully evaluated by ADHS, ADEQ, or the scientific community as to the validity of the test's method for producing results based upon technically sound science in Arizona's arid environment. Biomonitoring must be relevant to that which is being tested. In the whole effluent toxicity tests proposed under A.A.C. R18-9-A905(B), if required, a permittee must monitor for acute and chronic toxicity in wastewater via EPA methods (EPA-821-R-02-012 and EPA-821-R-02-013). The Department's mandate to use those methods is not relevant to its intended purpose. Arizona's arid environment differs so greatly from the environments for which the proposed WET test methods were developed that the validity of the test results are highly questionable. The commentors request that the Department withdraw the mandatory imposition of the WET test methods on wastewater discharges and any other WET methods under 40 CFR 136 in A.A.C. R18-9-A905(B) until such time as ADEQ and ADHS can properly consider the legal and technical issues surrounding these test methods as they apply to Arizona's arid environment.

One commentor also stated that the proposed WET test methods mandated under A.A.C. R18-9-A905(B) are being litigated at the federal level. Concerned stakeholders in the Western Coalition of Arid States (WESTCAS) have joined in suit to contest the validity of federally proposed WET test methods in large part due to the lack of verification of accurate test results in arid west environments. In addition, the commentor incorporated by reference the comments from the WET Coalition submitted to the EPA on EPA's proposal to ratify or withdraw WET test methods in January 2002. The overall concern of the WET Coalition in commenting on WET testing is that the regulated community's right to due process might be infringed upon by test methods that have not been fully validated nor their performance characteristics considered in the regulatory process. The commentor mirrors the WET Coalition's due process concerns in the instant rulemaking.

Response: First, in response to whether the WET methods have been evaluated as to the validity of the methods for Arizona's arid environment, ADHS rules (A.A.C. R9-14-610(A)) currently include EPA methods for WET testing as approved methods. (See Key References M1 and N1 - listed in this rulemaking's Economic Impact Statement). ADHS specified those test methods under 9 A.A.C. 14, Article 6, effective December 15, 2000. In 2000, ADHS deemed those methods as valid for use in Arizona. The older methods are very similar to October 2002 revised WET methods. In addition, ADHS issued a director's approval for an Arizona laboratory to use some of the newer WET test methods in February 2003. Therefore ADHS has made a statement that at least part of those newer methods may be used for analyzing WET in Arizona wastewaters.

Nonetheless, EPA is the authority for appropriate NPDES test procedures, including those used to measure toxicity in effluent. In the revised methods, EPA has evaluated the validity of all aspects of the test methods. The EPA decided that these test procedures are valid and necessary. The EPA made several changes to the methods to address the concerns of the Western Coalition of Arid States. The Department believes that new test are valid for use in Arizona and that the issue is the implementation of the test methods in AZPDES permits. The Department is working with stakeholders to develop a WET Implementation strategy that will address implementation issues including responses to failures and frequency of validation testing.

Second, in response to the incorporation of the WET Coalition comments as part of the comments on this rulemaking, the Department did not receive a copy of the comments as referenced in the letter. Even so, it is not the Department's responsibility to argue the test methodologies, procedures, and accuracy; that is the EPA's responsibility to evaluate. Based on the most recent information, the EPA considers the WET test methods to be acceptable and reproducible tests with failure rates that are not disparate to those seen in chemical testing methods. In ratifying the new WET methods (October 2002), the EPA reaffirmed the conclusion expressed in the 1995 WET rule, that these methods are applicable for use in NPDES permits. In accordance with the EPA's recent Report to Congress on the Availability, Adequacy, and Comparability of Testing Procedures, the EPA confirmed that these methods are repeatable and reproducible, available and applicable, and representative. The EPA based these conclusions on the results of the peer-reviewed WET Interlaboratory Variability Study.

Third, the WET Coalition comments were provided to the EPA, in January 2002, in response to a proposed EPA rulemaking. The EPA considered the comments, developed the final WET methods, and promulgated the final methods on November 19, 2002. The final methods include modifications based on the WET Coalition and other comments. The updated methods are effective and are specified in 40 CFR 136. As noted in Section I.A. of 67 FR 69952, November 19, 2002: "If EPA has "approved" (i.e., promulgated through rulemaking) standardized test procedures for a given pollutant, the NPDES permitting authority must specify one of the approved testing procedures or an EPA-approved alternate test procedure for the measurements required under the permit." The 2002 WET test methods are the only approved test methods for WET in 40 CFR 136. The Department must use those methods as part of its approved AZPDES program. If a permittee believes an adaptation of a new WET method is more appropriate for analyzing WET in its discharge, the permittee may apply to the Department to use an alternative test procedure under 40 CFR 136.4.

Comment: Two commentors stated that ADEQ failed to conduct an economic impact analysis for the WET test provisions of this rulemaking. This is the first rulemaking by ADEQ requiring the use of WET testing and therefore this is the first opportunity for the Department to conduct an economic impact analysis of this test procedure. There will be two major types of economic impacts as a result of this rulemaking. The cost of performing the test itself will result in tens of thousands of dollars per year in testing costs alone. With regard to requiring additional treatment that may well be unrelated to toxicity within the receiving stream due to inherent flaws of the WET test procedures, millions of dollars in capital and operation and maintenance costs may be mandated. These WET tests, which are being adopted by ADEQ, are not currently found within most of the wastewater permits in Arizona. Once these proposed WET tests are placed within all wastewater permits as a result of promulgation of this regulation, the statewide economic impact will increase substantially.

The commentor estimates additional monitoring, discharge limitations, permit requirements, plant modifications, etc., associated with the unproven application of WET testing in Arizona will create a huge economic burden on WWTP discharges. Indeed, if WET test methods that have not been validated and adapted to Arizona's arid environmental are incorporated into the AZPDES program, false positive permit discharge violations are very likely to occur. Thus there is a very high potential that large monetary and resource burdens will be inappropriately imposed upon WWTP discharges in Arizona.

Since the Department's incorporation of WET testing into a permit will significantly impact the regulated community, consideration should be given to ensuring the accuracy of the tests imposed upon permittees. In addition, the EIS submitted in this rulemaking must consider the limitations of the test methods as proposed in A.A.C. R18-9-A905(B) and must further calculate the probability of the error rate associated with our arid environment on the test methods as well as the subsequent monetary and resource impact associated with the erroneous test results.

Response: The Department disagrees with the commentors' statements about the economic impact from incorporating the new WET methods into rule. Contrary to one of the commentor's statement, this is NOT the first rulemaking where WET testing is incorporated into the AZPDES rule. The current version of the rule incorporates the test procedures specified in ADHS rules at 9 A.A.C. 14, Article 6, that include older versions of the EPA WET test methods at A.A.C. R9-14-610(A). (See Key References M1 and N1). The Department (and the previous permitting authority, EPA) does not impose WET testing requirements in all AZPDES permits. For permits where the Department (or EPA) has required testing for WET, the permittee already had to follow the EPA WET test methods specified in the ADHS rule. The only potential economic impact from this change would be an incremental difference between the use of the methods specified in ADHS rules and the revised EPA methods. The revised methods include additional or modified conditions to satisfy WET Coalition (including WESTCAS) concerns about the validity in arid environments. The additional costs that the commentor mentioned are not applicable. These costs mentioned could have been incurred based on the existing authority to impose WET testing requirements in AZPDES permits.

Again, the costs for testing or compliance activities (if applicable) are NOT new costs. These costs existed (had the potential to exist for a permittee) before the Department took over the program. AZPDES permittees in Arizona had to use WET methods before the Department proposed to incorporate 40 CFR 136 explicitly into the AZPDES rules. The Department stresses that the economic impact is small due to this change because the changes between the old versions of the WET methods and the 2002 version of the WET method are minimal and should provide a benefit for testing in arid environments.

Comment: Two commentors stated that the Department improperly noticed stakeholders of the application of the

proposed rulemaking to WWTPs. Stakeholders were not properly noticed that the scope of this rulemaking applied to WWTPs. In paragraph five of the preamble to this rulemaking, the official explanation of the rules, including the agency's reasons for initiating the rules, the Department specifically states that the "revisions in this rulemaking address the February 12, 2003 revisions to EPA regulations governing the Animal Feeding Operation (sic) (AFO/CAFO) industry." The Department goes on to state that this rulemaking updates the regulations that incorporated by reference and makes minor changes to the other parts of the rules. The Notice of Proposed Rulemaking for the AFO/CAFO AZPDES program fails to properly notice stakeholders, including political subdivision WWTP permittees, of the direct application that this rulemaking will have on their programs. The proposed rulemaking will have an economic and resource impact that is anything but a minor change in the rules to WWTPs and political subdivisions.

Response: The Department understands that the introductory text to the preamble of the proposed rulemaking did not spell out that the WET requirements from 40 CFR 136 would be incorporated by reference. However, the Department believes that the notice was adequate. The Department described the reasons for the proposed changes in detail under A.A.C. R18-9-A905 of the preamble. In addition, the Department e-mailed preliminary drafts of the rule at the end of July and a pre-publication version of the Notice of Proposed Rulemaking on September 4, 2003 to the AZPDES stakeholder groups.

Pertaining to the commentors' concerns about limiting this to wastewater treatment plants, the commentors misinterpreted the language. Although the Department used the language: "If a person is required to monitor for toxicity of wastewater, that person shall measure the toxicity using the following:..." The Department was using the term "wastewater" generically; any discharge under an AZPDES permit is considered a discharge of wastewater. Thus the requirement to use the WET test methods (proposed at A.A.C. R18-9-A905(B)(3)) would apply to all dischargers (industrial and municipal) not just for municipal wastewater treatment plants. The term "wastewater" was used in the ADHS "Wastewater Sample Methods" (A.A.C. R9-14-612) to describe the test procedures that must be followed to analyze process wastewater.

Because the WET methods are included in the July 1, 2003 version of 40 CFR 136, which is being incorporated by reference, the Department will delete the language specifically mentioning the 2002 WET test methods. This change should avoid future confusion. Even without the specific language regarding the updated WET test methods, the Department may require any permittee to monitor its effluent using the WET test methods specified in 40 CFR 136 as a condition of an AZPDES permit.

Comment: Two commentors stated that the general application of the WET test procedures to all discharges of wastewater regardless of designated use of the receiving water is arbitrary and capricious. Currently the narrative toxicity policy adopted by ADEQ and approved by the EPA does not require biomonitoring to be used to determine toxicity to all types of designated uses. The commentors believe that other valid methods exist that can be used to determine toxicity. However, requiring wastewater discharges to uniformly use this procedure may be inconsistent with the state's interim whole effluent toxicity implementation guidelines and is not supported by any data that demonstrates that it is a relevant test for all of Arizona's designated uses. There is no water quality standard that currently requires biomonitoring to be used to designate toxicity in the receiving water. Therefore the commentors request that ADEQ demonstrates the relevance of this test to determine toxicity of a wastewater discharge within a designated use before requiring its use to measure wastewater toxicity.

Response: The commentors have misunderstood the meaning of the proposed language in A.A.C. R18-9-A905(B)(3). That language provides a clear statement to permittees that a particular method must be used **if** that permittee is required through an AZPDES permit condition, to monitor the effluent for WET. This is consistent with specifying the appropriate test procedures for other parameters such as metals. This rule only specifies the method; it does not require a discharger to monitor for WET (or for all other parameters for which there is an approved test procedure). The need to monitor and the frequency of monitoring is determined by other rules and considerations. The Department agrees that some of these procedures belong in implementation guidance and has already initiated a process with stakeholder input to develop guidelines relating to the use of WET testing.

The fact that the Department has specified a preferred test method in rule does not automatically impose requirements on a permittee.

Comment: The proposed regulation requires the use of WET testing for wastewater discharges to waters of the State but does not require the use of WET testing on other types of point source discharges to waters of the State. There is no rationale basis for distinguishing between wastewater discharges and other types of point source discharges in interpreting the no toxics in toxic amounts provisions of Arizona surface water quality standards (A.A.C. R18-11-108(A)(5)).

Response: The Department intended that the language in the proposed A.A.C. R18-9-A905(B)(3) apply to all discharges, not just to municipal wastewater treatment plants. The language has been removed, as it is unnecessary.

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

None

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

R18-9-A905(A)(1)(a)
40 CFR 122.7, July 1, 2003 edition
R18-9-A905(A)(1)(b)
40 CFR 122.21, except (a) through (e) and (l), July 1, 2003 edition
R18-9-A905(A)(1)(c)
40 CFR 122.22, July 1, 2003 edition
R18-9-A905(A)(1)(d)
40 CFR 122.26, except 40 CFR 122.26(c)(2) and 40 CFR 122.26(e)(2), July 1, 2003 edition
R18-9-A905(A)(1)(e)
40 CFR 122.29, July 1, 2003 edition
R18-9-A905(A)(1)(f)
40 CFR 122.32, July 1, 2003 edition
R18-9-A905(A)(1)(g)
40 CFR 122.33, July 1, 2003 edition
R18-9-A905(A)(1)(h)
40 CFR 122.34, July 1, 2003 edition
R18-9-A905(A)(1)(i)
40 CFR 122.35, July 1, 2003 edition
R18-9-A905(A)(1)(j)
40 CFR 122.62(a) and (b), July 1, 2003 edition
R18-9-A905(A)(2)(a)
40 CFR 124.8, except 40 CFR 124.8(b)(3), July 1, 2003 edition
R18-9-A905(A)(2)(b)
40 CFR 124.56, July 1, 2003 edition
R18-9-A905(A)(3)(a)
40 CFR 122.41except 40 CFR 122.41(a)(2) and (a)(3), July 1, 2003 edition
R18-9-A905(A)(3)(b)
40 CFR 122.42, July 1, 2003 edition
R18-9-A905(A)(3)(c)
40 CFR 122.43, July 1, 2003 edition
R18-9-A905(A)(3)(d)
40 CFR 122.44, July 1, 2003 edition
R18-9-A905(A)(3)(e)
40 CFR 122.45, July 1, 2003 edition
R18-9-A905(A)(3)(f)
40 CFR 122.47, July 1, 2003 edition
R18-9-A905(A)(3)(g)
40 CFR 122.48, July 1, 2003 edition
R18-9-A905(A)(3)(h)
40 CFR 122.50, July 1, 2003 edition
R18-9-A905(A)(4)
40 CFR 125, Subparts A, B, D, H, and I, July 1, 2003 edition
R18-9-A905(A)(5)
40 CFR 129, July 1, 2003 edition

R18-9-A905(A)(6)

40 CFR 133, July 1, 2003 edition

R18-9-A905(A)(7)

40 CFR 136, July 1, 2003 edition

R18-9-A905(A)(8)(a)

40 CFR 401, July 1, 2003 edition

R18-9-A905(A)(8)(b)

40 CFR 403 and Appendices A, D, E, and G, July 1, 2003 edition

R18-9-A905(A)(9)
40 CFR 405 through 40 CFR 471, July 1, 2003 edition

R18-9-A905(A)(10)

40 CFR 503, Subpart C, July 1, 2003 edition

14. Was this rule previously made as an emergency rule?

No

15. The full text of the rules follows:

TITLE 18. ENVIRONMENTAL QUALITY

CHAPTER 9. DEPARTMENT OF ENVIRONMENTAL QUALITY
WATER POLLUTION CONTROL

ARTICLE 9. ARIZONA POLLUTANT DISCHARGE ELIMINATION SYSTEM

PART A. GENERAL REQUIREMENTS

Section
R18-9-A901. Definitions
R18-9-A902. AZPDES Permit Transition, Applicability, and Exclusions
R18-9-A905. AZPDES Program Standards
R18-9-A907. Public Notice

PART C. GENERAL PERMITS

Section
R18-9-C901. General Permit Issuance
R18-9-C905. General Permit Modification and Revocation and Reissuance

PART D. ANIMAL FEEDING OPERATIONS AND CONCENTRATED ANIMAL FEEDING OPERATIONS

Section
R18-9-D901. CAFO Designations
R18-9-D902. AZPDES Permit Coverage Requirements
R18-9-D903. No Potential To Discharge Determinations for Large CAFOs
R18-9-D904. AZPDES Permit Coverage Deadlines
R18-9-D905. Closure Requirements

ARTICLE 9. ARIZONA POLLUTANT DISCHARGE ELIMINATION SYSTEM

PART A. GENERAL REQUIREMENTS

R18-9-A901. Definitions

In addition to the definitions in A.R.S. §§ 49-201 and 49-255, the following terms apply to this Article:

1. "Animal confinement area" means any part of an animal feeding operation where animals are restricted or confined including open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milkrooms, milking centers, cowyards, barnyards, medication pens, walkers, animal walkways, and stables.

~~1.~~2. "Animal feeding operation" means a lot or facility (other than an aquatic animal production facility) where the following conditions are met:

   a. Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and
   b. Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over

any portion of the lot or facility.

~~2. "Animal unit" means a unit of measurement for any animal feeding operation calculated by adding the following numbers: the number of slaughter and feeder cattle multiplied by 1.0, plus the number of mature dairy cattle multiplied by 1.4, plus the number of swine weighing over 25 kilograms (approximately 55 pounds) multiplied by 0.4, plus the number of sheep multiplied by 0.1, plus the number of horses multiplied by 2.0.~~

3. "Aquaculture project" means a defined managed water area that uses discharges of pollutants into that designated project area for the maintenance or production of harvestable freshwater plants or animals. For purposes of this definition, "designated project area" means the portion or portions of the navigable waters within which the permittee or permit applicant plans to confine the cultivated species using a method or plan of operation, including physical confinement, that on the basis of reliable scientific evidence, is expected to ensure that specific individual organisms comprising an aquaculture crop will enjoy increased growth attributable to the discharge of pollutants, and be harvested within a defined geographic area.
4. "Border area" means 100 kilometers north and south of the Arizona-Sonora, Mexico border.
5. "Bypass" means the intentional diversion of waste streams from any portion of a treatment facility.

~~6. "Concentrated animal feeding operation" means an animal feeding operation that meets the following criteria:~~

~~a. More than the number of animals specified in any of the following categories are confined:~~
~~i. 1,000 slaughter and feeder cattle,~~
~~ii. 700 mature dairy cattle (whether milked or dry cows),~~
~~iii. 2,500 swine each weighing more than 25 kilograms (approximately 55 pounds),~~
~~iv. 500 horses,~~
~~v. 10,000 sheep or lambs,~~
~~vi. 55,000 turkeys,~~
~~vii. 100,000 laying hens or broilers (if the facility has continuous overflow watering),~~
~~viii. 30,000 laying hens or broilers (if the facility has a liquid manure system),~~
~~ix. 5,000 ducks, or~~
~~x. 1,000 animal units; or~~

~~b. More than the following number and types of animals are confined:~~
~~i. 300 slaughter or feeder cattle,~~
~~ii. 200 mature dairy cattle (whether milked or dry cows),~~
~~iii. 750 swine each weighing more than 25 kilograms (approximately 55 pounds),~~
~~iv. 150 horses,~~
~~v. 3,000 sheep or lambs,~~
~~vi. 16,500 turkeys,~~
~~vii. 30,000 laying hens or broilers (if the facility has continuous overflow watering),~~
~~viii. 9,000 laying hens or broilers (if the facility has a liquid manure handling system),~~
~~ix. 1,500 ducks, or~~
~~x. 300 animal units; and~~
~~xi. Either one of the following conditions is met: pollutants are discharged into navigable waters through a manmade ditch, flushing system, or other similar manmade device; or pollutants are discharged directly into waters of the United States that originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.~~

~~c. An animal feeding operation is not a concentrated animal feeding operation if the animal feeding operation discharges only in the event of a 25-year, 24-hour storm event.~~

6. "CAFO" means any large concentrated animal feeding operation, medium concentrated animal feeding operation, or animal feeding operation designated under R18-9-D901.
7. "Concentrated aquatic animal production facility" means a hatchery, fish farm, or other facility that contains, grows, or holds aquatic animals in either of the following categories:
   a. Cold-water aquatic animals. Cold-water fish species or other cold-water aquatic animals (including the *Salmonidae* family of fish) in a pond, raceway, or other similar structure that discharges at least 30 days per year, but does not include:
      i. A facility that produces less than 9,090 harvest weight kilograms (approximately 20,000 pounds) of aquatic animals per year; and
      ii. A facility that feeds the aquatic animals less than 2,272 kilograms (approximately 5,000 pounds) of food during the calendar month of maximum feeding.
   b. Warm-water aquatic animals. Warm-water fish species or other warm-water aquatic animals (including the *Ameiuride*, *Centrarchidae*, and *Cyprinidae* families of fish) in a pond, raceway, or other similar structure that discharges at least 30 days per year, but does not include:
      i. A closed pond that discharges only during periods of excess runoff; or
      ii. A facility that produces less than 45,454 harvest weight kilograms (approximately 100,000 pounds) of

aquatic animals per year.

8. "Daily discharge" means the discharge of a pollutant measured during a calendar day or any 24-hour period that reasonably represents the calendar day for purposes of sampling. For pollutants with limitations expressed in units of mass, the daily discharge is calculated as the total mass of the pollutant discharged over the day. For pollutants with limitations expressed in other units of measurement, the daily discharge is calculated as the average measurement of the pollutant over the day.
9. "Discharge of a pollutant" means any addition of any pollutant or combination of pollutants to a navigable water from any point source.
   a. The term includes the addition of any pollutant into a navigable water from:
      i. A treatment works treating domestic sewage;
      ii. Surface runoff that is collected or channeled by man;
      iii. A discharge through a pipe, sewer, or other conveyance owned by a state, municipality, or other person that does not lead to a treatment works; and
      iv. A discharge through a pipe, sewer, or other conveyance, leading into a privately owned treatment works.
   b. The term does not include an addition of a pollutant by any ~~indirect discharger~~ industrial user as defined in A.R.S. § 49-255(4).
10. "Draft permit" means a document indicating the Director's tentative decision to issue ~~or~~, deny, modify, revoke and reissue, terminate, or reissue a permit.
   a. A notice of intent to terminate a permit is a type of draft permit unless the entire discharge is permanently terminated by elimination of the flow or by connection to a POTW, but not by land application or disposal into a well.
   b. A notice of intent to deny a permit is a type of draft permit.
   c. A proposed permit or a denial of a request for modification, revocation and reissuance, or termination of a permit, are not draft permits.
11. "EPA" means the U.S. Environmental Protection Agency.
12. "General permit" means an AZPDES permit issued under 18 A.A.C. 9, Article 9, authorizing a category of discharges within a geographical area.
13. "Individual permit" means an AZPDES permit for a single point source, ~~or~~ a single facility, or a municipal separate storm sewer system.
14. "Land application area," for purposes of Article 9, Part D, means land under the control of an animal feeding operation owner or operator, whether it is owned, rented, or leased, to which manure, litter, or process wastewater from the production area is or may be applied.
15. "Large concentrated animal feeding operation" means an animal feeding operation that stables or confines at least the number of animals specified in any of the following categories:
   a. 700 mature dairy cows, whether milked or dry;
   b. 1,000 veal calves;
   c. 1,000 cattle other than mature dairy cows or veal calves. Cattle includes heifers, steers, bulls, and cow and calf pairs;
   d. 2,500 swine each weighing 55 pounds or more;
   e. 10,000 swine each weighing less than 55 pounds;
   f. 500 horses;
   g. 10,000 sheep or lambs;
   h. 55,000 turkeys;
   i. 30,000 laying hens or broilers, if the animal feeding operation uses a liquid manure handling system;
   j. 125,000 chickens (other than laying hens), if the animal feeding operation uses other than a liquid manure handling system;
   k. 82,000 laying hens, if the animal feeding operation uses other than a liquid manure handling system;
   l. 30,000 ducks, if the animal feeding operation uses other than a liquid manure handling system; or
   m. 5,000 ducks, if the animal feeding operation uses a liquid manure handling system.

~~14.~~16. "Large municipal separate storm sewer system" means a municipal separate storm sewer that is either:
   a. Located in an incorporated area with a population of 250,000 or more as determined by the 1990 Decennial Census by the Bureau of the Census;
   b. Located in a county with an unincorporated urbanized area with a population of 250,000 or more, according to the 1990 Decennial Census by the Bureau of Census, but not a municipal separate storm sewer that is located in an incorporated place, township, or town within the county; or
   c. Owned or operated by a municipality other than those described in subsections (~~14~~16)(a) and (~~14~~16)(b) and that are designated by the Director under R18-9-A902(D)(2) as part of the large municipal separate storm sewer system.
17. "Manure" means any waste or material mixed with waste from an animal including manure, bedding, compost and raw materials, or other materials commingled with manure or set aside for disposal.

18. "Manure storage area" means any part of an animal feeding operation where manure is stored or retained including lagoons, run-off ponds, storage sheds, stockpiles, under-house or pit storages, liquid impoundments, static piles, and composting piles.
19. "Medium concentrated animal feeding operation" means an animal feeding operation in which:
    a. The type and number of animals that it stables or confines falls within any of the following ranges:
        i. 200 to 699 mature dairy cows, whether milked or dry;
        ii. 300 to 999 veal calves;
        iii. 300 to 999 cattle other than mature dairy cows or veal calves. Cattle includes heifers, steers, bulls, and cow and calf pairs;
        iv. 750 to 2,499 swine each weighing 55 pounds or more;
        v. 3,000 to 9,999 swine each weighing less than 55 pounds;
        vi. 150 to 499 horses;
        vii. 3,000 to 9,999 sheep or lambs;
        viii. 16,500 to 54,999 turkeys;
        ix. 9,000 to 29,999 laying hens or broilers, if the animal feeding operation uses a liquid manure handling system;
        x. 37,500 to 124,999 chickens (other than laying hens), if the animal feeding operation uses other than a liquid manure handling system;
        xi. 25,000 to 81,999 laying hens, if the animal feeding operation uses other than a liquid manure handling system;
        xii. 10,000 to 29,999 ducks, if the animal feeding operation uses other than a liquid manure handling system; or
        xiii. 1,500 to 4,999 ducks, if the animal feeding operation uses a liquid manure handling system; and
    b. Either one of the following conditions are met:
        i. Pollutants are discharged into a navigable water through a man-made ditch, flushing system, or other similar man-made device; or
        ii. Pollutants are discharged directly into a navigable water that originates outside of and passes over, across, or through the animal feeding operation or otherwise comes into direct contact with the animals confined in the operation.

~~15.~~20. "Medium municipal separate storm sewer system" means a municipal separate storm sewer that is either:
    a. Located in an incorporated area with a population of 100,000 or more but less than 250,000, as determined by the 1990 Decennial Census by the Bureau of the Census; or
    b. Located in a county with an unincorporated urbanized area with a population of 100,000 or more but less than 250,000 as determined by the 1990 Decennial Census by the Bureau of the Census; or
    c. Owned or operated by a municipality other than those described in subsections (~~15~~20)(a) and (~~15~~20)(b) and that are designated by the Director under R18-9-A902(D)(2) as part of the medium municipal separate storm sewer system.

~~16.~~21. "MS4" means municipal separate storm sewer system.

~~17.~~22. "Municipal separate storm sewer" means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels, and storm drains):
    a. Owned or operated by a state, city, town county, district, association, or other public body (created by or pursuant to state law) having jurisdiction over disposal of sewage, industrial wastes, stormwater, or other wastes, including special districts under state law such as a sewer district, flood control district or drainage district, or similar entity, or a designated and approved management agency under section 208 of the Clean Water Act (33 U.S.C. 1288) that discharges to waters of the United States;
    b. Designed or used for collecting or conveying stormwater;
    c. That is not a combined sewer; and
    d. That is not part of a POTW.

~~18.~~23. "Municipal separate storm sewer system" means all separate storm sewers defined as "large," "medium," or "small" municipal separate storm sewer systems or any municipal separate storm sewers on a system-wide or jurisdiction-wide basis as determined by the Director under R18-9-C902(A)(1)(g)(i) through R18-9-C902(A)(1)(g)(iv).

~~19.~~24. "New discharger" includes an ~~indirect discharger~~industrial user and means any building, structure, facility, or installation:
    a. From which there is or may be a discharge of pollutants;
    b. That did not commence the discharge of pollutants at a particular site before August 13, 1979;
    c. That is not a new source; and
    d. That has never received a finally effective NPDES or AZPDES permit for discharges at that site.

~~20.~~25. "New source" means any building, structure, facility, or installation from which there is or may be a discharge of pollutants, the construction of which commenced:
    a. After the promulgation of standards of performance under section 306 of the Clean Water Act (33 U.S.C. 1316)

that are applicable to the source, or

b. After the proposal of standards of performance in accordance with section 306 of the Clean Water Act (33 U.S.C. 1316) that are applicable to the source, but only if the standards are promulgated under section 306 (33 U.S.C. 1316) within 120 days of their proposal.

~~21.~~26. "NPDES" means the National Pollutant Discharge Elimination System, which is the national program for issuing, modifying, revoking, reissuing, terminating, monitoring, and enforcing permits, and imposing and enforcing pretreatment and biosolids requirements under sections 307 (33 U.S.C. 1317), 318 (33 U.S.C. 1328), 402 (33 U.S.C. 1342), and 405 (33 U.S.C. 1345) of the Clean Water Act.

~~22.~~27. "Pollutant" means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2014 et seq.)), heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water. It does not mean:

a. Sewage from vessels; or

b. Water, gas, or other material that is injected into a well to facilitate production of oil or gas, or water derived in association with oil and gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of this state, and if the state determines that the injection or disposal will not result in the degradation of ground or surface water resources. (40 CFR 122.2)

~~23.~~28. "POTW" means a publicly owned treatment works.

29. "Process wastewater," for purposes of Article 9, Part D, means any water that comes into contact with a raw material, product, or byproduct including manure, litter, feed, milk, eggs, or bedding and water directly or indirectly used in the operation of an animal feeding operation for any or all of the following:

a. Spillage or overflow from animal or poultry watering systems;

b. Washing, cleaning, or flushing pens, barns, manure pits, or other animal feeding operation facilities;

c. Direct contact swimming, washing, or spray cooling of animals; or

d. Dust control.

~~24.~~30. "Proposed permit" means an AZPDES permit prepared after the close of the public comment period (including EPA review), and any applicable public hearing and administrative appeal, but before final issuance by the Director. A proposed permit is not a draft permit.

~~25.~~31. "Pretreatment" means the reduction of the amount of pollutants, the elimination of pollutants, or the alteration of the nature of pollutant properties in wastewater before or instead of discharging or otherwise introducing the pollutants into a POTW.

32. "Production area," for purposes of Article 9, Part D, means the animal confinement area, manure storage area, raw materials storage area, and waste containment areas. Production area includes any egg washing or egg processing facility and any area used in the storage, handling, treatment, or disposal of animal mortalities.

33. "Raw materials storage area" means the part of an animal feeding operation where raw materials are stored including feed silos, silage bunkers, and bedding materials.

~~26.~~34. "Silviculture point source" means any discernible, confined, and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities that are operated in connection with silvicultural activities and from which pollutants are discharged into navigable waters. The term does not include nonpoint source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff. For purposes of this definition:

a. "Log sorting and log storage facilities" means facilities whose discharge results from the holding of unprocessed wood, for example, logs or round wood with or without bark held in self-contained bodies of water or stored on land if water is applied intentionally on the logs.

b. "Rock crushing and gravel washing facilities" mean facilities that process crushed and broken stone, gravel, and riprap.

~~27.~~35. "Small municipal separate storm sewer system" means a separate storm sewer that is:

a. Owned or operated by the United States, a state, city, town, county, district, association, or other public body (created by or pursuant to state law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under state law such as a sewer district, flood control district or drainage district, or similar entity, an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the Clean Water Act (33 U.S.C. 1288) that discharge to navigable waters.

b. Not defined as a "large" or "medium" municipal separate storm sewer system or designated under ~~R18-9-C902(A)(1)(g)~~R18-9-A902(D)(2).

c. Similar to municipal separate storm sewer systems such as systems at military bases, large hospital or prison complexes, universities, and highways and other thoroughfares. The term does not include a separate storm sewer in a very discrete area such as an individual building.

~~28.~~36. "Stormwater" means stormwater runoff, snow melt runoff, and surface runoff and drainage.

~~29.~~37. "Treatment works treating domestic sewage" means a POTW or any other sewage sludge or waste water treatment device or system, regardless of ownership (including federal facilities), used in the storage, treatment, recycling, and reclamation of municipal or domestic sewage, including land dedicated for the disposal of sewage sludge. This definition does not include septic tanks or similar devices. For purposes of this definition, "domestic sewage" includes waste and wastewater from humans or household operations that are discharged to or otherwise enter a treatment works.

38. "Waste containment area" means any part of an animal feeding operation where waste is stored or contained including settling basins and areas within berms and diversions that separate uncontaminated stormwater.

R18-9-A902. AZPDES Permit Transition, Applicability, and Exclusions

A. No change

B. Article 9 of this Chapter applies to any 'discharge of a pollutant.' Examples of categories that result in a 'discharge of a pollutant' and may require an AZPDES permit include:

1. ~~Concentrated animal feeding operations~~CAFOs;
2. ~~Case-by-case designation of a concentrated animal feeding operation;~~
   a. ~~The Director may designate an animal feeding operation as a concentrated animal feeding operation upon determining that it is a significant contributor of pollution to a navigable water. The Director shall consider the following factors when making this determination:~~
      i. ~~The size of the animal feeding operation and the amount of wastes reaching waters of the United States;~~
      ii. ~~The location of the animal feeding operation relative to waters of the United States;~~
      iii. ~~The means of conveyance of animal wastes and process waste waters into waters of the United States;~~
      iv. ~~The slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes and process waste waters into waters of the United States; and~~
      v. ~~Any other relevant factor;~~
   b. ~~The Director shall not designate an animal feeding operation with less than the number of animals established in R18-9-A901(6) as a concentrated animal feeding operation unless:~~
      i. ~~Pollutants are discharged into navigable waters through a manmade ditch, flushing system, or other similar manmade device; or~~
      ii. ~~Pollutants are discharged directly into navigable waters that originate outside of the facility and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation;~~
   c. ~~A permit application is not required from a concentrated animal feeding operation designated under subsection (B)(2) until the Director conducts an onsite inspection of the operation and determines that the operation should and could be regulated under the AZPDES permit program; and~~
   d. ~~Two or more animal feeding operations under common ownership are considered a single animal feeding operation if they adjoin each other or if they use a common area or system for the disposal of wastes;~~
3. ~~3.~~2. Concentrated aquatic animal production facilities;
4. ~~4.~~3. Case-by-case designation of concentrated aquatic animal production facilities;
   a. The Director may designate any warm- or cold-water aquatic animal production facility as a concentrated aquatic animal production facility upon determining that it is a significant contributor of pollution to navigable waters. The Director shall consider the following factors when making this determination:
      i. The location and quality of the receiving waters of the United States;
      ii. The holding, feeding, and production capacities of the facility;
      iii. The quantity and nature of the pollutants reaching navigable waters; and
      iv. Any other relevant factor;
   b. A permit application is not required from a concentrated aquatic animal production facility designated under subsection ~~(B)(4)(a)~~ (B)(3)(a) until the Director conducts an onsite inspection of the facility and determines that the facility should and could be regulated under the AZPDES permit program;
5. ~~5.~~4. Aquaculture projects;
6. ~~6.~~5. Manufacturing, commercial, mining, and silviculture point sources;
7. ~~7.~~6. POTWs;
8. ~~8.~~7. New sources and new dischargers;
9. ~~9.~~8. Stormwater discharges:
   a. Associated with industrial activity as defined under 40 CFR 122.26(b)(14), incorporated by reference in R18-9-A905(A)(1)(d). The Department shall not consider a discharge to be a discharge associated with industrial activity if the discharge is composed entirely of stormwater and meets the conditions of no exposure as defined under 40 CFR 122.26(g), incorporated by reference in R18-9-A905(A)(1)(d);
   b. From a large, medium, or small MS4;
   c. From a construction activity, including clearing, grading, and excavation, that results in the disturbance of ~~except operations that result in the disturbance of less than five acres of total land area, unless the disturbance of less than five acres of total land area is a part of a larger common plan of development or sale that will ultimately dis-~~

~~turb five acres or more;~~;

~~d.~~ ~~By March 10, 2003, from a small construction activity:~~

i. ~~Including the discharge of stormwater from construction activities including clearing, grading, and excavating that result in land disturbance of~~ Equal to or greater than one acre ~~and less then five acres~~ or;

ii. ~~Including the disturbance of less~~ Less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one ~~and less than five acres~~ acre; but

iii. Not including routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility;

~~e.~~d. Any discharge that the Director determines contributes to a violation of a water quality standard or is a significant contributor of pollutants to a navigable water, which may include a discharge from a conveyance or system of conveyances (including roads with drainage systems and municipal streets) used for collecting and conveying stormwater runoff or a system of discharges from municipal separate storm sewers.

C. No change

D. Director designation of MS4s.

1. The Director may designate and require any small ~~MS4s~~MS4 located outside of an urbanized area ~~serving a population density of at least 1,000 people per square mile and a population of at least 10,000 (other than those described in 40 CFR 122.32(a)(1) and covered under the AZPDES stormwater permit program)~~ to obtain an AZPDES stormwater permit. The Director shall base this designation on whether a stormwater discharge results in or has the potential to result in an exceedance of a water quality standard, including impairment of a designated use, or another significant water quality impact, including a habitat or biological impact.
   a. When deciding whether to designate a small MS4, the Director shall consider the following criteria:
      i. Discharges to sensitive waters,
      ii. Areas with high growth or growth potential,
      iii. Areas with a high population density,
      iv. Areas that are contiguous to an urbanized area,
      v. Small MS4s that cause a significant contribution of pollutants to a navigable water,
      vi. Small MS4s that do not have effective programs to protect water quality, and
      vii. Any other relevant criteria.
   b. The same requirements for small MS4s designated under 40 CFR 122.32(a)(1) apply to permits for designated MS4s not waived under R18-9-B901(A)(3).
2. The Director may designate an MS4 as part of a large or medium system due to the interrelationship between the discharges from a designated storm sewer and the discharges from a municipal separate storm sewer described under R18-9-A901(~~14~~16)(a) and (~~14~~16)(b), or R18-9-A901(~~15~~20)(a) or (~~15~~20)(b), as applicable. In making this determination, the Director shall consider the following factors:
   a. Physical interconnections between the municipal separate storm sewers;
   b. The location of discharges from the designated municipal separate storm sewer relative to discharges from municipal separate storm sewers described in R18-9-A901(~~14~~16)(a) and R18-9-A901(~~15~~20)(a);
   c. The quantity and nature of pollutants discharged to a navigable water;
   d. The nature of the receiving waters; and
   e. Any other relevant factor.
3. The Director shall designate a small MS4 that is physically interconnected with a MS4 that is regulated by the AZPDES program if the small MS4 substantially contributes to the pollutant loading of the regulated MS4.

E. Petitions. The Director may, upon a petition, designate as a large ~~or,~~ medium or small MS4, a municipal separate storm sewer located within the boundaries of a region defined by a stormwater management regional authority based on a jurisdictional, watershed, or other appropriate basis that includes one or more of the systems described in R18-9-A901(~~14~~16) ~~or,~~ R18-9-A901(~~15~~20) or R18-9-A901(35), as applicable.

~~**F.** Phase-ins.~~

~~1. The Director may phase-in permit coverage for a small MS4 serving a jurisdiction with a population of less than 10,000 if a phasing schedule is developed and implemented for approximately 20 percent annually of all small MS4s that qualify for the phased-in coverage.~~

~~a. If the phasing schedule is not yet approved for permit coverage, the Director shall, by December 9, 2002, determine whether to issue an AZPDES permit or allow a waiver under R18-9-B901(A)(3) for each eligible MS4.~~

~~b. All regulated MS4s shall have coverage under an AZPDES permit no later than March 8, 2007.~~

~~2. The Director may provide a waiver under R18-9-B901(A)(3) for any municipal separate storm sewage system operating under a phase-in plan.~~

~~G.~~**F.** No change

~~**H.** Conditional no exposure exclusion.~~

~~1. Discharges composed entirely of stormwater are not considered stormwater discharges associated with an industrial~~

~~activity if there is no exposure, and the discharger satisfies the conditions under 40 CFR 122.26(g), which is incorporated by reference in R18-9-A905(A)(1)(d).~~

~~2. For purposes of this subsection:~~

~~a. "No exposure" means that all industrial materials and activities are protected by a storm resistant shelter to prevent exposure to rain, snow, snowmelt, and runoff.~~

~~b. "Industrial materials or activities" include material handling equipment or activities, industrial machinery, raw materials, intermediate products, by-products, final products, or waste products.~~

~~c. "Material handling activities" include storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product, or waste product.~~

R18-9-A905. AZPDES Program Standards

A. Except for subsection (A)(~~10~~11), the following 40 CFR sections and appendices, July 1, ~~2001~~ 2003 edition, as they apply to the NPDES program, are incorporated by reference, do not include any later amendments or editions of the incorporated matter, and are on file with the Department ~~and the Office of the Secretary of State~~:

1. No change
2. No change
3. No change
4. Criteria and standards for the national pollutant discharge elimination system. 40 CFR 125, subparts A, B, D, ~~and~~ H, and I.
5. No change
6. No change
7. Guidelines for establishing test procedures for the analysis of pollutants, 40 CFR 136.

~~7.~~8. No change

~~8.~~9. No change

~~9.~~10. No change

~~10.~~11. No change

B. A person shall ~~use the test procedures under 9 A.A.C. 14, Article 6 for the analysis of pollutants.~~ analyze a pollutant using a test procedure for the pollutant specified by the Director in an AZPDES permit. If the Director does not specify a test procedure for a pollutant in an AZPDES permit, a person shall analyze the pollutant using:

1. A test procedure listed in 40 CFR 136, which is incorporated by reference in Subsection (A)(7);
2. An alternate test procedure approved by the EPA as provided in 40 CFR 136;
3. A test procedure listed in 40 CFR 136, with modifications allowed by the EPA and approved as a method alteration by the Arizona Department of Health Services under A.A.C. R9-14-610(B); or
4. If a test procedure for a pollutant is not available under subsection (B)(1) through (B)(3), a test procedure listed in A.A.C. R9-14-612 or approved under A.A.C. R9-14-610(B).

R18-9-A907. Public Notice

A. Individual permits.

1. The Director shall publish a notice that a draft individual permit has been prepared, or a permit application has been tentatively denied, in one or more newspapers of general circulation where the facility is located. The notice shall contain:
   a. The name and address of the Department;
   b. The name and address of the permittee or permit applicant and if different, the name of the facility or activity regulated by the permit;
   c. A brief description of the business conducted at the facility or activity described in the permit application;
   d. The name, address, and telephone number of a person from whom an interested person may obtain further information, including copies of the draft permit, fact sheet, and application;
   e. A brief description of the comment procedures, the time and place of any hearing, including a statement of procedures to request a hearing (unless a hearing has already been scheduled), and any other procedure by which the public may participate in the final permit decision;
   f. A general description of the location of each existing or proposed discharge point and the name of the receiving water;
   g. For sources subject to section 316(a) of the Clean Water Act, a ~~A~~ statement that the thermal component of the discharge is subject to effluent limitations under the Clean Water Act, section 301 (33 U.S.C. 1311) or 306 (33 U.S.C. 1316) and a brief description, including a quantitative statement, of the thermal effluent limitations proposed under section 301 (33 U.S.C. 1311) or 306 (33 U.S.C. 1316); ~~and~~
   h. Requirements applicable to cooling water intake structures at new facilities subject to 40 CFR 125, subpart I; and
   ~~h.~~i. Any additional information considered necessary to the permit decision.
2. No change
3. No change

B. No change

PART C. GENERAL PERMITS

R18-9-C901. General Permit Issuance

A. No change
B. No change
C. Exemption from filing a Notice of Intent.
1. The following dischargers are not exempt from submitting a Notice of Intent:
   a. A discharge from a POTW;
   b. A combined sewer overflow;
   c. A MS4;
   d. A primary industrial facility;
   e. A stormwater discharge associated with industrial activity;
   f. A ~~concentrated animal feeding operation~~ CAFO;
   g. A treatment works treating domestic sewage; and
   h. A stormwater discharge associated with ~~small~~ construction activity. ~~Any person discharging on or after March 10, 2003 shall submit a Notice of Intent at least 90 days before the activity to obtain authorization under a general permit, and 180 days before the activity to obtain an individual permit unless the discharge is authorized by another permit.~~
2. No change
3. No change

D. Notice of Intent. The Director shall specify the contents of the Notice of Intent in the general permit and the applicant shall submit information sufficient to establish coverage under the general permit, including, at a minimum:
1. The name, position, address, and telephone number of the owner of the facility;
2. The name, position, address, and telephone number of the operator of the facility, if different from subsection (D)(1);
3. The name and address of the facility;
4. The type and location of the discharge;
5. The receiving streams;
6. The latitude and longitude of the facility;
7. For a CAFO, the information specified in 40 CFR 122.21(i)(1) and a topographic map;
~~6.~~8. The signature of the certifying official required under 40 CFR 122.22; and
~~7.~~9. Any other information necessary to determine eligibility for the AZPDES general permit.

E. No change
F. No change

R18-9-C905. General Permit Modification and Revocation and Reissuance

A. The Director may modify or revoke a general permit issued under R18-9-A907(B), R18-9-A908, and R18-9-C901 if one or more of the causes listed under 40 CFR 122.62(a) or (b) exists.
B. The Director shall follow the procedures specified in R18-9-A907(B) and R18-9-A908 to modify or revoke and reissue a general permit.

PART D. ANIMAL FEEDING OPERATIONS AND CONCENTRATED ANIMAL FEEDING OPERATIONS

R18-9-D901. CAFO Designations

A. Two or more animal feeding operations under common ownership are considered a single animal feeding operation if they adjoin each other or if they use a common area or system for the disposal of wastes.
B. The Director shall designate an animal feeding operation as a CAFO if the animal feeding operation significantly contributes a pollutant to a navigable water. The Director shall consider the following factors when making this determination:
1. The size of the animal feeding operation and the amount of wastes reaching a navigable water;
2. The location of the animal feeding operation relative to a navigable water;
3. The means of conveyance of animal wastes and process wastewaters into a navigable water;
4. The slope, vegetation, rainfall, and any other factor affecting the likelihood or frequency of discharge of animal wastes and process wastewaters into a navigable water; and
5. Any other relevant factor.

C. The Director shall conduct an onsite inspection of the animal feeding operation before the making a designation under subsection (B).
D. The Director shall not designate an animal feeding operation having less than the number of animals established in R18-9-A901(19)(a) as a CAFO unless a pollutant is discharged:
1. Into a navigable water through a manmade ditch, flushing system, or other similar manmade device; or
2. Directly into a navigable water that originates outside of and passes over, across, or through the animal feeding operation or otherwise comes into direct contact with the animals confined in the operation.

E. If the Director makes a designation under subsection (B), the Director shall notify the owner or operator of the operation, in writing, of the designation.

R18-9-D902. AZPDES Permit Coverage Requirements

A. Any person who owns or operates a CAFO, except as provided in subsections (B) and (C), shall submit an application for an individual permit under R18-9-B901(B) or seek coverage under a general permit under R18-9-C901(B) within the applicable deadline specified in R18-9-D904(A).

B. If a person who owns or operates a large CAFO receives a no potential to discharge determination under R18-9-D903, coverage under an AZPDES permit described in this Part is not required.

C. The discharge of manure, litter, or process wastewater to a navigable water from a CAFO as a result of the application of manure, litter, or process wastewater by the CAFO to land areas under its control is subject to AZPDES permit requirements, except where it is an agricultural stormwater discharge as provided in section 502(14) of the Clean Water Act (33 U.S.C. 1362(14)). For purposes of this Section, an "agricultural stormwater discharge" means a precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO when the person who owns or operates the CAFO has applied the manure, litter, or process wastewater according to site-specific nutrient management practices to ensure appropriate agricultural use of the nutrients in the manure, litter, or process wastewater, as specified under 40 CFR 122.42(e)(1)(vi) through (ix).

R18-9-D903. No Potential To Discharge Determinations for Large CAFOs

A. For purposes of this Section, "no potential to discharge" means that there is no potential for any CAFO manure, litter, or process wastewater to enter into a navigable water under any circumstance or climatic condition.

B. Any person who owns or operates a large CAFO and has not had a discharge within the previous five years may request a no potential to discharge determination by submitting to the Department:
1. The information specified in 40 CFR 122.21(f) and 40 CFR 122.21(i)(1)(i) through (ix) on a form obtained from the Department, by the applicable date specified in R18-9-D904(A); and
2. Any additional information requested by the Director to supplement the request or requested through an onsite inspection of the CAFO.

C. Process for making a no potential to discharge determination.
1. Upon receiving a request under subsection (B), the Director shall consider:
   a. The potential for discharges from both the production area and any land application area, and
   b. Any record of prior discharges by the CAFO.
2. The Director shall issue a public notice that includes:
   a. A statement that a no potential to discharge request has been received;
   b. A fact sheet, when applicable;
   c. A brief description of the type of facility or activity that is the subject of the no potential to discharge determination;
   d. A brief summary of the factual basis, upon which the request is based, for granting the no potential to discharge determination; and
   e. A description of the procedures for reaching a final decision on the no potential to discharge determination.
3. The Director shall base the decision to grant a no potential to discharge determination on the administrative record, which includes all information submitted in support of a no potential to discharge determination and any other supporting data gathered by the Director.
4. The Director shall notify the owner or operator of the large CAFO of the final determination within 90 days of receiving the request.

D. If the Director determines that the operation has the potential to discharge, the person who owns or operates the CAFO shall seek coverage under an AZPDES permit within 30 days after the determination of potential to discharge.

E. A no potential to discharge determination does not relieve the CAFO from the consequences of a discharge. An unpermitted CAFO discharging a pollutant into a navigable water is in violation of the Clean Water Act even if the Director issues a no potential to discharge determination for the facility. If the Director issues a determination of no potential to discharge to a CAFO facility but the owner or operator anticipates a change in circumstances that could create the potential for a discharge, the owner or operator shall contact the Director and apply for and obtain permit authorization before the change of circumstances.

F. When the Director issues a determination of no potential to discharge, the Director retains the authority to subsequently require AZPDES permit coverage if:
1. Circumstances at the facility change;
2. New information becomes available; or
3. The Director determines, through other means, that the CAFO has a potential to discharge.

R18-9-D904. AZPDES Permit Coverage Deadlines

A. Any person who owns or operates a CAFO shall apply for or seek coverage under an AZPDES permit and shall comply with all applicable AZPDES requirements, including the duty to maintain permit coverage under subsection (C).
1. Permit coverage deadline for an animal feeding operation operating before April 14, 2003.

a. An owner or operator of an animal feeding operation that operated before April 14, 2003 and was defined as a CAFO before February 2, 2004 shall apply for or seek permit coverage or maintain permit coverage and comply with the conditions of the applicable AZPDES permit;
b. An owner or operator of an animal feeding operation that operated before April 14, 2003 and was not defined as a CAFO until February 2, 2004 shall apply for or seek permit coverage by a date specified by the Director, but no later than February 13, 2006;
c. An owner or operator of an animal feeding operation that operated before April 14, 2003 who changes the operation on or after February 2, 2004, resulting in the operation being defined as a CAFO, shall apply for or seek permit coverage as soon as possible, but no later than 90 days after the operational change. If the operational change will not make the operation a CAFO as defined before February 2, 2004, the owner or operator may take until April 13, 2006 or 90 days after the operation is defined as a CAFO, whichever is later, to apply for or seek permit coverage;
d. An owner or operator of an animal feeding operation that operated before April 14, 2003 who constructs additional facilities on or after February 2, 2004, resulting in the operation being defined as a CAFO that is a new source, shall apply for or seek permit coverage at least 180 days before the new source portion of the CAFO commences operation. If the calculated 180-day deadline occurs before February 2, 2004 and the operation is not subject to this Article before February 2, 2004, the owner or operator shall apply for or seek permit coverage no later than March 3, 2004.

2. Permit coverage deadline for an animal feeding operation operating on or after April 14, 2003. An owner or operator who started construction of a CAFO on or after April 14, 2003, including a CAFO subject to the effluent limitations guidelines in 40 CFR 412, shall apply for or seek permit coverage at least 180 days before the CAFO commences operation. If the calculated 180-day deadline occurs before February 2, 2004 and the operation is not subject to this Article before February 2, 2004, the owner or operator shall apply for or seek permit coverage no later than March 3, 2004.
3. Permit coverage deadline for a designated CAFO. Any person who owns or operates a CAFO designated under R18-9-D901(B) shall apply for or seek permit coverage no later than 90 days after receiving a designation notice.

B. Unless specified under R18-9-D903(E) and (F), the Director shall not require permit coverage for a CAFO that the Director determines under R18-9-D903 to have no potential to discharge. If circumstances change at a CAFO that has a no potential to discharge determination and the CAFO now has a potential to discharge, the person who owns or operates the CAFO shall notify the Director within 30 days after the change in circumstances and apply for or seek coverage under an AZPDES permit.

C. Duty to maintain permit coverage.
1. The permittee shall:
   a. If covered by an individual AZPDES permit, submit an application to renew the permit no later than 180 days before the expiration of the permit under R18-9-B904(B); or
   b. If covered by a general AZPDES permit, comply with R18-9-C903(B).
2. Continued permit coverage or reapplication for a permit is not required if:
   a. The facility ceases operation or is no longer a CAFO; and
   b. The permittee demonstrates to the Director that there is no potential for a discharge of remaining manure, litter, or associated process wastewater (other than agricultural stormwater from land application areas) that was generated while the operation was a CAFO.

R18-9-D905. Closure Requirements

A. Closure.
1. A person who owns or operates a CAFO shall notify the Department of the person's intent to cease operations without resuming an activity for which the facility was designed or operated.
2. A person who owns or operates a CAFO shall submit a closure plan to the Department for approval 90 days before ceasing operation. The closure plan shall describe:
   a. For operations that met the "no potential to discharge" under R18-9-D903, facility-related information based on the Notice of Termination form for the applicable general permit;
   b. The approximate quantity of manure, process wastewater, and other materials and contaminants to be removed from the facility;
   c. The destination of the materials to be removed from the facility and documentation that the destination is approved to accept the materials;
   d. The method to treat any material remaining at the facility;
   e. The method to control the discharge of pollutants from the facility;
   f. Any limitations on future land or water use created as a result of the facility's operations or closure activities;
   g. A schedule for implementing the closure plan; and
   h. Any other relevant information the Department determines necessary.

B. The owner or operator shall provide the Department with written notice that a closure plan has been fully implemented within 30 calendar days of completion and before redevelopment.