

## NOTICES OF EMERGENCY RULEMAKING

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

### NOTICE OF EMERGENCY RULEMAKING

#### TITLE 9. HEALTH SERVICES

#### CHAPTER 14. DEPARTMENT OF HEALTH SERVICES LABORATORIES

[R05-335]

#### PREAMBLE

**1. Sections Affected**

R9-14-403  
R9-14-404  
Exhibit 4  
Exhibit 5  
Exhibit 6  
Exhibit 6A

**Rulemaking Action**

Amend  
Amend  
New Exhibit  
New Exhibit  
New Exhibit  
New Exhibit

**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. §§ 41-1026 and 41-1713(A)(9)  
Implementing statutes: A.R.S. §§ 28-1323, 28-1324, and 28-1325

**3. The effective date of the rules:**

September 1, 2005

The Arizona Department of Public Safety (DPS) requests an immediate effective date. The rule shall be effective immediately on filing in the Office of the Secretary of State. An immediate effective date is required to preserve the public safety. Driving Under the Influence (DUI) and Operating Under the Influence (OUI) of alcohol, with its related loss of life, serious bodily injury, and property damage, must be deterred through aggressive enforcement. Therefore, the Department of Health Services approved the RBT AZ for use in Arizona as a modern, effective breath testing device that is particularly well suited to use in boating, national parks and correction/parole environments, but this approval expires September 15, 2005. Currently, thousands of DUI/OUI alcohol tests have been performed on the RBT AZ and loss of approval would jeopardize numerous DUI/OUI convictions, leaving the Arizona Game and Fish, Bureau of Indian Affairs/Navajo Nations, Department of Corrections and the Arizona State Park Service without one of their most effective tools for DUI/OUI and alcohol enforcement. As a result, an effective date preceding September 15, 2005 is necessary.

**4. Is this rulemaking a renewal of a previous emergency rulemaking? If yes, the Register citation to previous notices of emergency rulemaking:**

This is not a renewal of a previous emergency rulemaking.

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

Name: Michelle A. Spirk  
Toxicology Technical Supervisor, Scientific Analysis Bureau  
  
Address: Arizona Department of Public Safety  
Central Regional Crime Laboratory  
2102 W. Encanto Blvd.  
Phoenix, AZ 85009

Notices of Emergency Rulemaking

Telephone: (602) 223-2792  
Fax: (602) 223-2924  
E-mail: MSpirk@azdps.gov  
Name: Todd A. Griffith  
Superintendent, Scientific Analysis Bureau  
Address: Arizona Department of Public Safety  
Central Regional Crime Laboratory  
2102 W. Encanto Blvd.  
Phoenix, AZ 85009  
Telephone: (602) 223-2494  
Fax: (602) 223-2924  
E-mail: TGriffith@azdps.gov

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

The Director of DPS was recently granted the authority pursuant to A.R.S. §§ 28-1324 and 41-1713 to adopt rules prescribing methods and procedures for the administration of breath tests to determine alcohol concentration, including the approval of quantitative breath testing devices and procedures for ensuring the accuracy of results obtained from approved breath testing devices. The purpose of the statute is to ensure the accuracy and reliability of breath testing devices and to facilitate the apprehension and prosecution of drivers who operate motor vehicles under the influence of alcohol; A.A.C. R9-14-403 and R9-14-404 implement the statute by providing devices, methods, and procedures approved by the DPS to detect the amount of alcohol in the breath of an individual. On September 15, 2003, while under the authority of the Department of Health Services (DHS), the DHS Director pursuant to A.A.C. R9-14-403(K) approved the RBT AZ as a quantitative alcohol breath testing device and approved a standard operational procedure, standard calibration check procedure, and two standard quality assurance procedures for its operation. The approval of this device expires on September 15, 2005. The purpose of this emergency rulemaking is to allow Arizona law enforcement and prosecutorial agencies to continue use of the RBT AZ and related checklists. The continual use is necessary to enforce Arizona's DUI statutes in our state parks, public lands and reservations as well as correction/probation situations requiring zero alcohol tolerance. This continuation is accomplished by adding the RBT AZ and the standard operational procedure, calibration check procedure, and standard quality assurance procedures to the existing alcohol rules, R9-14-403 and R9-14-404.

Part of the reason for transferring the alcohol rules to DPS is the great familiarity that DPS has with the Criminal Justice System and complex arena of DUI/OUI enforcement and prosecution. Following the transfer, DPS began to discuss and plan for the next alcohol rulemaking process. However, as a new regulatory agency, we determined that the best course of action was to move forward cautiously and with full consideration of all participant interests. DPS was also responsible for the challenging task of administering the existing rules that now included the processing of some 6,000 newly introduced Intoxilyzer 8000 Operator and Quality Assurance Specialist permits, using a new magnetic card technology, and mounting two highly successful statewide Blood Alcohol Analyst proficiency test challenges. Because of these issues, DPS has begun the procedure for emergency rulemaking as outlined in A.A.C. R1-1-701, and is in compliance with those requirements for filing the Notice of Emergency Rulemaking. There are no additional breath testing devices that will require approval via the emergency rulemaking procedure.

**7. 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

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

The approval of this rule would not have an economic, small business, or consumer impact. However, the economic impact of not approving this emergency rule will be substantial. The RBT AZ has been utilized by law enforcement for approximately two years, and jurisdictions that currently use the RBT AZ would bear the costs involved in purchasing new instruments, training personnel on the new instruments, and preparing the new instruments for use. Failure to approve this emergency rule will also impact the public, who will be required to subsidize costs incurred by the jurisdictions.

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

Not applicable

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

DPS is not incorporating by reference any, all, or part of any code, standard, or rule.

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

The statewide impact of failure to grant this emergency rulemaking will significantly affect public health, safety and welfare. The statewide impact includes: (1) the inability to as effectively enforce Arizona DUI/OUI laws and deter impaired drivers; (2) placing numerous DUI/OUI cases in jeopardy; (3) leaving some Arizona law enforcement agencies with no approved alcohol breath testing device; (4) creating a several month window with reduced DUI/OUI enforcement as impacted agencies purchase new breath test instruments and hundreds of officers are retrained to operate this device; (5) numerous legal challenges regarding past and future use of the RBT AZ; and (6) false and misguided perceptions that the RBT AZ is an unreliable instrument.

The RBT AZ is the breath testing device selected by some agencies for Arizona DUI/OUI enforcement. The RBT AZ has been selected by these agencies as the best instrument to meet their specialized needs of cost-effective OUI enforcement for boating, off-road vehicles, reservation and correction/probation alcohol enforcement. Therefore, the RBT AZ was approved by the Department of Health Services. There are now more than 85 of these devices in the field throughout the state with hundreds of Arizona trained Operators and Quality Assurance Specialists. These Operators and Quality Assurance Specialists include Arizona Game and Fish, Arizona State Parks, the Navajo Nation, Arizona Department of Corrections and Probation/Parole. Thousands of DUI/OUI cases have been performed on this device. Some cases have been adjudicated and some are still pending final adjudication. The RBT AZ also offers the highly desirable mobile or point-of-contact DUI testing in which the DUI/OUI suspect can have his alcohol concentration checked immediately instead of being transported to an instrument located at a substation, which may be 30 minutes away to two hours away in rural Arizona or in boating and off-road situations.

This breath test device is significant in enforcing Arizona DUI/OUI laws and deterring impaired driving. Continuation of the use of the RBT AZ in Arizona, through this emergency rulemaking, is significant to public safety, health, and welfare and allows saved lives, lessened bodily injury, and reduced property damage from DUI/OUI drivers.

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

August 30, 2005

The Attorney General is requested to complete approval and file this emergency rulemaking with the Secretary of State prior to September 15, 2005.

**13. The full text of the rules follows:**

**TITLE 9. HEALTH SERVICES**

**CHAPTER 14. DEPARTMENT OF HEALTH SERVICES  
LABORATORIES**

**ARTICLE 4. DETERMINATION OF ALCOHOL CONCENTRATION**

Section

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

R9-14-404. Testing Procedures

Exhibit 4. Standard Operational Procedure – RBT AZ – Duplicate Test

Exhibit 5. Standard Quality Assurance Procedures – RBT AZ – Standard Calibration Check Procedure

Exhibit 6. Standard Quality Assurance Procedures – RBT AZ

Exhibit 6A. Standard Quality Assurance Procedures – RBT AZ – Calibration

**ARTICLE 4. DETERMINATION OF ALCOHOL CONCENTRATION**

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

- A. No change
- B. No change
- C. No change
- D. No change
- E. No change
- F. No change

**Notices of Emergency Rulemaking**

**G.** The following quantitative breath-testing and collection devices are approved by the Director:

<b>Model</b>	<b>Manufacturer</b>
Breathalyzer 900/900A	Smith and Wesson Co.
Alco-Sensor III	Intoximeters, Inc.
Intoxilyzer Models 4011A	CMI, Inc./Federal Signal
Modified and 4011AS Modified with or without Beam Attenuator	
Intoxilyzer Models 4011A	CMI, Inc./Federal Signal
Modified and 4011AS Modified with Sample Preservation Modification with or without Beam Attenuator	
Intoxilyzer Model 5000	CMI, Inc./Federal Signal
Intoxilyzer Model 5000 with or without Vapor Recirculation and with or without Keyboard	CMI, Inc.
Intoximeter Model 3000	Intoximeters, Inc.
Mark IV GCI	Intoximeters, Inc.
GCI Field Collection Unit	Intoximeters, Inc.
PST-10 Silica Gel Tube (also known as SM-10 Silica Gel Tube)	Luckey Laboratories, Inc./ U.S. Alcohol Testing of America, Inc.
RBT IV (Alco Sensor IV with a RBT IV printer microprocessor)	Intoximeters, Inc.
<u>RBT AZ</u> (Alco Sensor AZ/RBT AZ)	<u>Intoximeters, Inc.</u>
Toxtrap Silica Gel Tube	Toxtrap, Inc./ Federal Signal
Intoxilyzer Model 5000EN	CMI, Inc.
Intoxilyzer 8000	CMI, Inc.

**H.** No change

**I.** No change

**J.** No change

**K.** No change

**R9-14-404. Testing Procedures**

**A.** Law enforcement agencies or individuals acting independently of such agencies who conduct alcohol concentration determinations by means of breath-testing devices shall implement a quality assurance program conducted by a quality assurance specialist. This quality assurance program shall include:

1. Criteria for ensuring the proper operation of devices by testing device controls and indicators to ensure that they are functioning as required by the Department quality assurance procedures for the devices. The procedures shall be performed and recorded within 90 days of each other following the appropriate Department quality assurance procedure set forth in Exhibits F, H, J, M, Q, Q-EN, QQ, QQ-EN, T, V, Z, 6 and 6A, 3 and 3A or as approved by the Director according to R9-14-403(K).
2. Calibration checks of breath-testing devices that shall be performed and recorded according to the requirements of the appropriate Department quality assurance procedure set forth in Exhibits F, J, L, P, P-EN, PP, PP-EN, S, V, Y, 5, 2 and 2A or as approved by the Director according to R9-14-403(K).
3. No change
4. No change
5. No change

- 6. No change
- B.** Operator permit holders shall utilize the operator procedure approved by the Department for the device being operated in performing tests and collecting samples for the determination of alcohol concentration, as contained in Exhibits E, EE, G, I, II, K, KK, N, NN, O, OO, OOO, R, RR, U, UU, W, WW, WWW, WWW-EN, X, 4, and 1 or as approved by the Director according to R9-14-403(K).
- C.** No change

Notices of Emergency Rulemaking

EXHIBIT 4
OPERATIONAL CHECKLIST

ARIZONA DEPARTMENT OF PUBLIC SAFETY

STANDARD OPERATIONAL PROCEDURE
INTOXIMETER RBT AZ

DUPLICATE TEST

AGENCY
NAME OF SUBJECT DATE
RBT AZ SERIAL NO. ALCO-SENSOR AZ SERIAL NO.
OPERATOR LOCATION OF TEST

TEST RESULTS 0. AC TIME
0. AC TIME
0. AC TIME

Immediately preceding the administration of the tests the subject underwent a 15-minute deprivation period
From to by

- ( ) 1. Depress RBT AZ ON button.
( ) 2. Depress zero set button, select subject or quick test.
( ) 3. Follow RBT AZ and AS AZ display instructions.
( ) 4. Enter case # &/or DL # if required.
( ) 5. Device temperature registers between 10° C and 40° C.
( ) 6.
A. If quick test, go to step 7.
B. If subject test, repeat steps 3-6 for duplicate test.
C. If the second subject test is not within 0.020 of the first test, repeat steps 3-6.
D. If the second subject test is within 0.020 of the first test, go to step 7.
E. If the third subject test, go to step 7.
( ) 7. Remove test record when printout is complete.
( ) 8. Turn off RBT IV AZ.

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

**EXHIBIT 5**

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

**ARIZONA DEPARTMENT OF PUBLIC SAFETY**

**STANDARD QUALITY ASSURANCE PROCEDURES**  
**INTOXIMETER RBT AZ**

**STANDARD CALIBRATION CHECK PROCEDURE**

AGENCY \_\_\_\_\_ DATE \_\_\_\_\_  
RBT AZ SERIAL NO. \_\_\_\_\_ ALCO-SENSOR AZ SERIAL NO. \_\_\_\_\_  
QA SPECIALIST \_\_\_\_\_ LOCATION \_\_\_\_\_  
(Print Name)

- ( ) 1. Have a standard alcohol source of known value ready.  
This may be a simulator (at 34° C ± 0.2° C) or a dry gas alcohol standard. Standard value: 0. \_\_\_\_\_ AC.
- ( ) 2. Depress RBT AZ ON button. Depress Time button.  
Enter PIN #. Depress zero button.
- ( ) 3. Follow RBT AZ and AS AZ display instructions.
- ( ) 4. Device temperature registers between 10° C and 40° C.
- ( ) 5. When AS AZ display reads "CHEK", introduce standard for 7 seconds; depress the MANUAL button on the AS AZ at 5 seconds (while continuing to introduce the standard for another 2 seconds.)
- ( ) 6. Test results 0. \_\_\_\_\_ AC.
- ( ) 7. Remove test record when printout is complete.
- ( ) 8. Turn off RBT AZ.

COMMENTS \_\_\_\_\_  
\_\_\_\_\_

SIGNATURE \_\_\_\_\_

EXHIBIT 6

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

ARIZONA DEPARTMENT OF PUBLIC SAFETY

STANDARD QUALITY ASSURANCE PROCEDURE  
INTOXIMETER RBT AZ

AGENCY \_\_\_\_\_ DATE \_\_\_\_\_  
RBT AZ SERIAL NO. \_\_\_\_\_ ALCO-SENSOR AZ SERIAL NO. \_\_\_\_\_  
QA SPECIALIST \_\_\_\_\_ LOCATION \_\_\_\_\_  
(Print Name)

- ( ) 1. Have a standard alcohol source of known value ready.  
This may be a simulator (at 34° C ± 0.2° C) or a dry gas alcohol standard. Standard value: 0. \_\_\_\_\_ AC.
- ( ) 2. Depress RBT AZ ON button. Depress Time button.  
Enter PIN #. Depress zero button.
- ( ) 3. Follow RBT AZ and AS AZ display instructions.
- ( ) 4. Device temperature registers between 10° C and 40° C.
- ( ) 5. When AS AZ display reads "CHEK", introduce standard for 7 seconds; depress the MANUAL button on the AS AZ at 5 seconds (while continuing to introduce the standard for another 2 seconds.)
- ( ) 6. Test results 0. \_\_\_\_\_ AC.
- ( ) 7. Remove test record when printout is complete.
- ( ) 8. Turn off RBT AZ.

\_\_\_\_\_ Date and time correct.  
\_\_\_\_\_ Alcohol-free subject test result 0. \_\_\_\_\_ AC.  
\_\_\_\_\_ Proper sample recognition system.  
\_\_\_\_\_ Fuel cell response time for a standard solution.  
\_\_\_\_\_ Standard value: \_\_\_\_\_ AC. Time: \_\_\_\_\_ sec.  
\_\_\_\_\_ Controls, displays, and printer worked correctly during the above quality assurance procedures.

COMMENTS \_\_\_\_\_

SIGNATURE \_\_\_\_\_



**EXHIBIT 6A**

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

**ARIZONA DEPARTMENT OF PUBLIC SAFETY**

**STANDARD QUALITY ASSURANCE PROCEDURE**

**INTOXIMETER RBT AZ**

**CALIBRATION**

AGENCY \_\_\_\_\_ DATE \_\_\_\_\_  
RBT AZ SERIAL NO. \_\_\_\_\_ ALCO-SENSOR AZ SERIAL NO. \_\_\_\_\_  
QA SPECIALIST \_\_\_\_\_ LOCATION \_\_\_\_\_  
(Print Name)

- ( ) 1. Have a standard alcohol source of known value ready.  
This may be a simulator (at 34° C ± 0.2° C) or a dry gas alcohol standard. Standard value: 0. \_\_\_\_\_ AC.
- ( ) 2. Depress RBT AZ ON button.
- ( ) 3. Depress Time button, enter PIN #, depress #1 button.
- ( ) 4. Follow RBT AZ and AS AZ display instructions.
- ( ) 5. Device temperature registers between 23° C and 27° C.
- ( ) 6. After a blank reading of 0.000 is displayed and the standard value is displayed, depress F3.
- ( ) 7. When AS AZ display flashes "CAL", introduce standard for 7 seconds; depress the MANUAL button on the AS AZ at 5 seconds (while continuing to introduce the standard for another 2 seconds.)
- ( ) 8. Remove test record when printout is complete.
- ( ) 9. Run a calibration check on the Standard Calibration Check Procedure. Test results: \_\_\_\_\_ AC.

COMMENTS \_\_\_\_\_

SIGNATURE \_\_\_\_\_