

REFERENCE TITLE: environment; regulatory changes

State of Arizona
House of Representatives
Fiftieth Legislature
First Regular Session
2011

HB 2665

Introduced by
Representative Reeve

AN ACT

AMENDING SECTIONS 41-1009, 49-422, 49-471.01, 49-471.03 AND 49-476.01,
ARIZONA REVISED STATUTES; RELATING TO ADMINISTRATIVE PROCEDURES FOR
ENVIRONMENTAL REGULATION.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:
2 Section 1. Section 41-1009, Arizona Revised Statutes, is amended to
3 read:
4 41-1009. Inspections; applicability
5 A. An agency inspector or regulator who enters any premises of a
6 regulated person for the purpose of conducting an inspection shall:
7 1. Present photo identification on entry of the premises.
8 2. On initiation of the inspection, state the purpose of the
9 inspection and the legal authority for conducting the inspection.
10 3. Disclose any applicable inspection fees.
11 4. Afford an opportunity to have an authorized on-site representative
12 of the regulated person accompany the agency inspector or regulator on the
13 premises, except during confidential interviews.
14 5. Provide notice of the right to have **ON REQUEST**:
15 (a) Copies of any original documents taken by the agency during the
16 inspection if the agency is permitted by law to take original documents.
17 (b) A split of any samples taken during the inspection if the split of
18 any samples would not prohibit an analysis from being conducted or render an
19 analysis inconclusive.
20 (c) Copies of any analysis performed on samples taken during the
21 inspection.
22 (d) **COPIES OF ANY DOCUMENTS TO BE RELIED ON TO DETERMINE COMPLIANCE**
23 **WITH LICENSURE OR REGULATORY REQUIREMENTS IF THE AGENCY IS OTHERWISE**
24 **PERMITTED BY LAW TO DO SO.**
25 6. Inform each person whose conversation with the agency inspector or
26 regulator during the inspection is tape recorded that the conversation is
27 being tape recorded.
28 7. Inform each person interviewed during the inspection that
29 statements made by the person may be included in the inspection report.
30 B. On initiation of an inspection of any premises of a regulated
31 person, an agency inspector or regulator shall provide the following in
32 writing:
33 1. The rights described in subsection A of this section.
34 2. The name and telephone number of a contact person available to
35 answer questions regarding the inspection.
36 3. The due process rights relating to an appeal of a final decision of
37 an agency based on the results of the inspection, including the name and
38 telephone number of a person to contact within the agency and any appropriate
39 state government ombudsman.
40 C. An agency inspector or regulator shall obtain the signature of the
41 regulated person or on-site representative of the regulated person on the
42 writing prescribed in subsection B of this section indicating that the
43 regulated person or on-site representative of the regulated person has read
44 the writing prescribed in subsection B of this section and is notified of the
45 regulated person's or on-site representative of the regulated person's

1 inspection and due process rights. The agency shall maintain a copy of this
2 signature with the inspection report and shall leave a copy with the
3 regulated person or on-site representative of the regulated person. If a
4 regulated person or on-site representative of the regulated person is not at
5 the site or refuses to sign the writing prescribed in subsection B of this
6 section, the agency inspector or regulator shall note that fact on the
7 writing prescribed in subsection B of this section.

8 D. An agency that conducts an inspection shall give a copy of the
9 inspection report to the regulated person or on-site representative of the
10 regulated person either:

11 1. At the time of the inspection.

12 2. Notwithstanding any other state law, within thirty working days
13 after the inspection.

14 3. As otherwise required by federal law.

15 E. The inspection report shall contain deficiencies identified during
16 an inspection. Unless otherwise provided by law, the agency may provide the
17 regulated person an opportunity to correct the deficiencies unless the agency
18 determines that the deficiencies are:

19 1. Committed intentionally.

20 2. Not correctable within a reasonable period of time as determined by
21 the agency.

22 3. Evidence of a pattern of noncompliance.

23 4. A risk to any person, the public health, safety or welfare or the
24 environment.

25 F. If the agency allows the regulated person an opportunity to correct
26 the deficiencies pursuant to subsection E of this section, the regulated
27 person shall notify the agency when the deficiencies have been corrected.
28 Within thirty days of receipt of notification from the regulated person that
29 the deficiencies have been corrected, the agency shall determine if the
30 regulated person is in substantial compliance and notify the regulated person
31 whether or not the regulated person is in substantial compliance. If the
32 regulated person fails to correct the deficiencies or the agency determines
33 the deficiencies have not been corrected within a reasonable period of time,
34 the agency may take any enforcement action authorized by law for the
35 deficiencies.

36 G. IF THE AGENCY DOES NOT ALLOW THE REGULATED PERSON AN OPPORTUNITY TO
37 CORRECT DEFICIENCIES PURSUANT TO SUBSECTION E OF THIS SECTION, ON THE REQUEST
38 OF THE REGULATED PERSON, THE AGENCY SHALL PROVIDE A WRITTEN EXPLANATION OF
39 THE REASON THAT AN OPPORTUNITY TO CORRECT WAS NOT ALLOWED.

40 ~~G.~~ H. An agency decision pursuant to subsection E or F of this
41 section is not an appealable agency action.

42 ~~H.~~ I. At least once every month after the commencement of the
43 inspection an agency shall provide a regulated person with an update on the
44 status of any agency action resulting from an inspection of the regulated
45 person. An agency is not required to provide an update after the regulated

1 person is notified that no agency action will result from the agency
2 inspection or after the completion of agency action resulting from the agency
3 inspection.

4 J. IF, AS A RESULT OF AN INSPECTION OR ANY OTHER INVESTIGATION, AN
5 AGENCY ALLEGES THAT A REGULATED PERSON IS NOT IN COMPLIANCE WITH LICENSURE OR
6 OTHER APPLICABLE REGULATORY REQUIREMENTS, THE AGENCY SHALL PROVIDE WRITTEN
7 NOTICE OF THAT ALLEGATION TO THE REGULATED PERSON. THE NOTICE SHALL CONTAIN
8 THE FOLLOWING INFORMATION:

9 1. A CITATION TO THE STATUTE, REGULATION, LICENSE OR PERMIT CONDITION
10 ON WHICH THE ALLEGATION OF NONCOMPLIANCE IS BASED, INCLUDING THE SPECIFIC
11 LANGUAGE IN THE STATUTE, REGULATION, LICENSE OR PERMIT CONDITION THAT IS
12 ALLEGED TO BE VIOLATED.

13 2. IDENTIFICATION OF ANY DOCUMENTS RELIED ON AS A BASIS FOR THE
14 ALLEGATION OF NONCOMPLIANCE.

15 3. AN EXPLANATION STATED WITH REASONABLE SPECIFICITY OF THE REGULATORY
16 AND FACTUAL BASIS FOR THE ALLEGATION OF NONCOMPLIANCE.

17 4. INSTRUCTIONS FOR OBTAINING A TIMELY OPPORTUNITY TO DISCUSS THE
18 ALLEGED VIOLATION WITH THE AGENCY.

19 K. SUBSECTION J OF THIS SECTION DOES NOT APPLY TO AN ACTION TAKEN
20 PURSUANT TO SECTION 11-871, 11-876, 11-877, 49-457.01, 49-457.03 OR
21 49-474.01.

22 ~~I.~~ L. This section does not authorize an inspection or any other act
23 that is not otherwise authorized by law.

24 ~~J.~~ M. EXCEPT AS OTHERWISE PROVIDED IN SUBSECTION K OF THIS SECTION,
25 this section applies only to inspections necessary for the issuance of a
26 license or to determine compliance with licensure OR OTHER REGULATORY
27 requirements APPLICABLE TO A LICENSEE. This section does not apply:

28 1. To criminal investigations, investigations under tribal state
29 gaming compacts and undercover investigations that are generally or
30 specifically authorized by law.

31 2. If the inspector or regulator has reasonable suspicion to believe
32 that the regulated person may be engaged in criminal activity.

33 3. To the Arizona peace officer standards and training board
34 established by section 41-1821.

35 ~~K.~~ N. If an inspector or regulator gathers evidence in violation of
36 this section, the violation ~~shall not~~ MAY be a basis to exclude the evidence
37 in a civil or administrative proceeding, ~~if the penalty sought is the denial,~~
38 ~~suspension or revocation of the regulated person's license or a civil penalty~~
39 ~~of more than one thousand dollars~~ AT THE DISCRETION OF THE TRIER OF FACT.

40 ~~L.~~ O. Failure of an agency, board or commission employee to comply
41 with this section:

42 1. Constitutes cause for disciplinary action or dismissal ~~pursuant to~~
43 ~~section 41-770~~ OF AN EMPLOYEE.

44 2. Shall be considered by the judge and administrative law judge as
45 grounds for reduction of any fine or civil penalty.

1 ~~M.~~ P. An agency may make rules to implement subsection A, paragraph 5
2 of this section.

3 ~~N.~~ Q. Nothing in this section shall be used to exclude evidence in a
4 criminal proceeding.

5 Sec. 2. Section 49-422, Arizona Revised Statutes, is amended to read:
6 49-422. Powers and duties

7 A. In addition to any other powers vested in it by law, the department
8 may:

9 1. Accept, receive and administer grants or other funds or gifts from
10 public and private agencies, including the federal government, to carry out
11 any of the purposes of this chapter. All monies resulting therefrom shall be
12 deposited, pursuant to sections 35-146 and 35-147, in the account of the
13 department.

14 2. Secure necessary scientific, technical, administrative and
15 operational services, including laboratory facilities, by contract or
16 otherwise to carry out the purposes of this chapter.

17 3. Require, as specified in subsections B and C of this section, any
18 source of air contaminants to monitor, sample or perform other studies to
19 quantify emissions of air contaminants or levels of air pollution that may
20 reasonably be attributable to that source, if the director either:

21 (a) Determines that monitoring, sampling or other studies are
22 necessary to determine the effects of the source on levels of air pollution.

23 (b) Has reasonable cause to believe a violation of this chapter, rules
24 adopted pursuant to this chapter or a permit issued pursuant to this chapter
25 has been committed.

26 (c) Determines that those studies or data are necessary to accomplish
27 the purposes of this chapter, and that the monitoring, sampling or other
28 studies by the source are necessary in order to assess the impact of the
29 source on the emission of air contaminants.

30 B. The director shall adopt rules requiring sources of air
31 contaminants to monitor, sample or otherwise quantify their emissions of air
32 pollution that may reasonably be attributable to such sources for air
33 contaminants for which ambient air quality standards or emission standards or
34 design, equipment, work practice or operational standards have been adopted
35 pursuant to section 49-424 or section 49-425, subsection A. In the
36 development of the rules, the director shall consider the cost and
37 effectiveness of the monitoring, sampling or other studies.

38 C. For those sources of air contaminants for which rules are not
39 required to be adopted pursuant to subsection B of this section, the director
40 may require a source of air contaminants, by permit or order, to perform
41 monitoring, sampling or other quantification of its emissions or air
42 pollution that may reasonably be attributed to such a source. Before
43 requiring such monitoring, sampling or other quantification by permit or
44 order, the director shall consider the relative cost and accuracy of any
45 alternatives that may be reasonable under the circumstances such as emission

1 factors, modeling, mass balance analyses or emissions projections. The
2 director may require such monitoring, sampling or other quantification by
3 permit or order if the director determines in writing that all of the
4 following conditions are met:

5 1. The actual or potential emissions or air pollution may adversely
6 affect public health or the environment.

7 2. A monitoring, sampling or quantification method is technically
8 feasible for the subject contaminant and the source.

9 3. An adequate scientific basis for the monitoring, sampling or
10 quantification method exists.

11 4. The monitoring, sampling or quantification method is reasonably
12 accurate.

13 5. The cost of the method is reasonable in light of the use to be made
14 of the data.

15 D. IN DETERMINING THE FREQUENCY AND DURATION OF MONITORING, SAMPLING
16 OR QUANTIFICATION OF EMISSIONS UNDER SUBSECTIONS B AND C OF THIS SECTION, THE
17 DIRECTOR SHALL CONSIDER THE FIVE FACTORS PRESCRIBED IN SUBSECTION C OF THIS
18 SECTION AND THE LEVEL OF EMISSIONS FROM THE SOURCE.

19 ~~D.~~ E. Orders issued and permit conditions imposed pursuant to this
20 section may be appealed as ~~an~~ appealable agency ~~action~~ ACTIONS pursuant to
21 title 41, chapter 6, article 10.

22 ~~E.~~ F. On request of the on-scene commander or the department of
23 health services, the department of environmental quality shall assist at a
24 significant chemical or other toxic fire event, excluding chemical or nuclear
25 warfare or biological agents, and shall provide the following services if
26 funding is available and if the director, in the director's professional
27 capacity, determines the department's provision of services is necessary to
28 protect human health and the environment:

29 1. Collect air samples for likely contaminants resulting from the
30 fire. The department of environmental quality shall coordinate sampling
31 locations, times and pollutants to be sampled with the department of health
32 services and other appropriate health and emergency response officials.

33 2. Maintain an hourly plume report that includes meteorological
34 conditions that affect dispersal of smoke.

35 3. In consultation with the department of health services and the
36 on-scene coordinator, prepare a report that includes test results of any
37 sampling, including the sampling rationale and protocol and chain of custody
38 report using applicable environmental protection agency standards. The
39 report shall also include, to the extent practicable, a smoke dispersion map
40 with detail adequate to determine possible areas of impact at the level of
41 detail practicable and a listing of likely releases of any chemical that is
42 categorized by the United States environmental protection agency as a
43 hazardous air pollutant and the corresponding environmental protection agency
44 description of possible health effects of the chemical based on a reliable
45 inventory of hazardous materials at the site or facility.

1 ~~4. For the purposes of this section, "chemical or other toxic fire~~
2 ~~event" means a fire at a building that is required to be tracked in the~~
3 ~~municipal hazardous material tracking process program pursuant to section~~
4 ~~26-343.01.~~

5 Sec. 3. Section 49-471.01, Arizona Revised Statutes, is amended to
6 read:

7 49-471.01. Regulatory bill of rights

8 A. To ensure fair and open regulation under this article by counties,
9 a person:

10 1. Is eligible for reimbursement of fees and other expenses if the
11 person **SUBSTANTIALLY** prevails by adjudication on the merits against a county
12 in a court proceeding ~~regarding a county decision as provided in section~~
13 ~~12-348~~ **OR AN ADMINISTRATIVE APPEAL BROUGHT PURSUANT TO THIS ARTICLE.**

14 2. Is entitled to have a county not charge the person a fee unless the
15 fee for the specific activity is expressly authorized as provided in section
16 49-471.02.

17 3. Is entitled to receive the information and notice regarding
18 inspections prescribed in section 49-471.03.

19 4. May review the full text or summary of all rule or ordinance making
20 activity and the summary of substantive policy statements in the register as
21 provided in sections 49-471.04, 49-471.08, 49-471.09 and 49-471.11.

22 5. May participate in the rule or ordinance making process as provided
23 in this article, including providing written or oral comments on proposed
24 rules or ordinances as provided in sections 49-471.06 and 49-471.08, and
25 having the control officer adequately address those comments as provided in
26 sections 49-471.07 and 49-471.08.

27 6. May allege that an existing county agency practice or substantive
28 policy statement constitutes a rule or ordinance and have that county agency
29 practice or substantive policy statement declared void because the practice
30 or substantive policy statement constitutes a rule or ordinance as an
31 appealable agency action under section 49-471.15 or as provided in sections
32 49-471.12 and 49-497.

33 7. Is entitled to have the control officer not base a permitting
34 decision under this article in whole or in part on conditions or requirements
35 that are not specifically authorized by a provision of this state's law as
36 provided in section 49-471.10, subsection C.

37 8. Is entitled to have the control officer identify the legal
38 authority for each condition in a permit issued under this article as
39 provided in section 49-471.10, subsection C.

40 9. Is entitled to have a county not make a rule or ordinance under a
41 general grant of rule or ordinance making authority to supplement a more
42 specific grant of rule or ordinance making authority as provided in section
43 49-471.10, subsection D.

1 10. May inspect all rules or ordinances and substantive policy
2 statements of a county, including a directory of documents, in the office of
3 the county control officer as provided in section 49-471.11.

4 11. May have the control officer approve or deny the person's permit
5 application within a predetermined period of time as provided in section
6 49-471.13.

7 12. May have appealable agency actions heard by a hearing board or
8 administrative law judge as provided in section 49-471.15.

9 13. May have administrative appeal hearings governed by uniform
10 administrative procedures as set forth in section 49-496 for appeals to the
11 hearing board and title 41, chapter 6, article 10 for appeals to an
12 administrative law judge as provided in SECTION 49-471.15.

13 14. Is entitled to request the control officer to waive overly
14 burdensome permit procedures and requirements for sources that are not
15 required to obtain a title V permit as provided in section 49-480,
16 subsection M.

17 15. Is entitled to obtain judicial review of decisions by the hearing
18 board, THE administrative law judge or the control officer in appropriate
19 cases as provided in sections 49-497, 49-497.01 and 49-497.02.

20 16. Is entitled, with the county's concurrence, to enter settlement
21 agreements with the county to resolve compliance matters without the need for
22 an order, action in court or allegation or finding of violation as provided
23 in section 49-511.

24 B. The reference to rights in subsection A of this section does not
25 grant any additional rights that are not prescribed in the other sections of
26 this article.

27 Sec. 4. Section 49-471.03, Arizona Revised Statutes, is amended to
28 read:

29 49-471.03. Inspections

30 The control officer shall ~~follow the protocols and allow permittees~~
31 ~~opportunities to correct deficiencies found during inspections in a manner~~
32 ~~substantially identical to~~ COMPLY WITH section 41-1009, except that section
33 41-1009, subsection ~~0~~, paragraph 1 does not apply.

34 Sec. 5. Section 49-476.01, Arizona Revised Statutes, is amended to
35 read:

36 49-476.01. Monitoring

37 A. The control officer may require, as specified in subsections B and
38 C of this section, any source of air contaminants to monitor, sample or
39 perform other studies to quantify emissions of air contaminants or levels of
40 air pollution that may reasonably be attributable to that source, if the
41 control officer either:

42 1. Determines that monitoring, sampling or other studies are necessary
43 to determine the effects of the facility on levels of air pollution.

1 2. Has reasonable cause to believe a violation of this article, rules
2 adopted pursuant to this article or a permit issued pursuant to this article
3 has been committed.

4 3. Determines that those studies or data are necessary to accomplish
5 the purposes of this article, and that the monitoring, sampling or other
6 studies by the source are necessary in order to assess the impact of the
7 source on the emission of air contaminants.

8 B. The board of supervisors shall adopt rules requiring sources of air
9 contaminants to monitor, sample or otherwise quantify their emissions or air
10 pollution ~~which~~ THAT may reasonably be attributable to such sources for air
11 contaminants for which ambient air quality standards or emission standards or
12 design, equipment, work practice or operational standards have been adopted
13 pursuant to section 49-424 or section 49-425, subsection A. In the
14 development of the rules, the board shall consider the cost and effectiveness
15 of the monitoring, sampling or other studies.

16 C. For those sources of air contaminants for which rules are not
17 required to be adopted pursuant to subsection B of this section, the control
18 officer may require a source of air contaminants, by permit or order, to
19 perform monitoring, sampling or other quantification of its emissions or air
20 pollution that may reasonably be attributed to such a source. Before
21 requiring such monitoring, sampling or other quantification by permit or
22 order, the control officer shall consider the relative cost and accuracy of
23 any alternatives ~~which~~ THAT may be reasonable under the circumstances such as
24 emission factors, modeling, mass balance analyses or emissions projections.
25 The control officer may require such monitoring, sampling or other
26 quantification by permit or order if the control officer determines in
27 writing that all of the following conditions are met:

28 1. The actual or potential emissions of air pollution may adversely
29 affect public health or the environment.

30 2. An adequate scientific basis for the monitoring, sampling or
31 quantification method exists.

32 3. The monitoring, sampling or quantification method is technically
33 feasible for the subject contaminant and the source.

34 4. The monitoring, sampling or quantification method is reasonably
35 accurate.

36 5. The cost of the method is reasonable in light of the use to be made
37 of the data.

38 D. IN DETERMINING THE FREQUENCY AND DURATION OF MONITORING, SAMPLING
39 OR QUANTIFICATION OF EMISSIONS UNDER SUBSECTION B AND C OF THIS SECTION, THE
40 CONTROL OFFICER SHALL CONSIDER THE FIVE FACTORS PRESCRIBED IN SUBSECTION C OF
41 THIS SECTION AND THE LEVEL OF EMISSIONS FROM THE SOURCE.

42 ~~D.~~ E. Orders issued or permit conditions imposed pursuant to this
43 section shall be appealable to the hearing board in the same manner as that
44 prescribed for orders of abatement in ~~sections 49-489 and~~ SECTION 49-490 and
45 for permit conditions in section 49-482.