

NOTICES OF SUPPLEMENTAL PROPOSED RULEMAKING

After an agency has filed a Notice of Proposed Rulemaking with the Secretary of State's Office for *Register* publication and filing and the agency decides that prepare a Notice of Supplemental Proposed Rulemaking for submission to the Office. The Secretary of State shall publish the Notice under the Administrative Procedure Act (A.R.S. § 411001 et seq.) publication of the Notice of Supplemental Proposed Rulemaking in the *Register* before holding any oral proceedings (A.R.S. § 411022).

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TITLE 18. ENVIRONMENTAL QUALITY

CHAPTER 1. DEPARTMENT OF ENVIRONMENTAL QUALITY

ADMINISTRATION

PREAMBLE

1. Register citation and date for the original Notice of Proposed Rulemaking:

Notice of Proposed Rulemaking: 3 A.A.R. 2363, August 29, 1997.

Notice of Public Information: 3 A.A.R. 3313, November 21, 1997.

2. Sections Affected

Rulemaking Action

Article 2	Amend
R18-1-201	Repeal
R18-1-201	New Section
R18-1-202	Repeal
R18-1-202	New Section
R18-1-203	Repeal
R18-1-203	New Section
R18-1-204	Repeal
R18-1-204	New Section
R18-1-205	Repeal
R18-1-205	New Section
R18-1-206	Repeal
R18-1-206	Repeal
R18-1-206	New Section
R18-1-207	Repeal
R18-1-207	Repeal
R18-1-207	New Section
R18-1-208	Repeal
R18-1-208	Repeal
R18-1-208	New Section
R18-1-209	Repeal
R18-1-209	Repeal
R18-1-209	New Section
R18-1-210	Repeal
R18-1-210	Repeal
R18-1-210	Amend
R18-1-211	Repeal
R18-1-211	Repeal
R18-1-211	Amend
R18-1-212	Repeal
R18-1-212	Repeal
R18-1-212	Amend
R18-1-213	Repeal
R18-1-213	Repeal
R18-1-213	Amend
R18-1-214	Repeal
R18-1-214	Repeal
R18-1-214	Amend
R18-1-215	Repeal
R18-1-215	Repeal
R18-1-215	Amend
R18-1-216	Repeal
R18-1-216	Repeal
R18-1-216	Amend
R18-1-217	Repeal
R18-1-217	Repeal
R18-1-217	Amend
R18-1-218	Repeal

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R18-1-218 Amend  
R18-1-219 Repeal

3. **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. §§ 41-1003 and 49-104(B)(4)

Implementing statute: A.R.S. §§ 41-1061 through 41-1067; 41-1074 through 41-1076; and 41-1092 through 41-1092.12

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

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

**A. Agency's Reasons for Initiating the Rule**

The purpose of this rulemaking is to conform the Department's rules governing administrative appeals to the new statutory provisions of A.R.S. §§ 41-1092 through 41-1092.12. Those statutory provisions, which control the appeal of administrative decisions, largely supersede the Department's current rules at R18-1-201 through R18-1-219.

This notice repeals R18-1-201 and R18-1-219 and renumbers R18-1-202 through R18-1-218 as sections R18-1-206 through R18-1-222, with a provision that the renumbered rules apply only to hearings that are lawfully conducted by the Department and are not required under A.R.S. § 41-1092.02 to be conducted by the Department of Administration's Office of Administrative Hearings (OAH) or another body of formal adjudication.

Additionally, this notice adds rules as new sections R18-1-201 through R18-1-205 to clarify the responsibilities of the Department under A.R.S. §§ 41-1092 through 41-1092.12. Although the OAH currently is responsible for conducting most of the appeals hearings on actions of the Department pursuant to A.R.S. §§ 41-1092 through 41-1092.12, and is in the process of developing rules that will govern the conduct of those hearings, the OAH is not responsible for initially processing notices of appeal sent to the Department, holding informal settlement conferences, reviewing decisions arrived at through formal adjudication, or entertaining motions for rehearing on decisions arrived at through formal adjudication. New sections R18-1-201 through R18-1-205 govern when and how the Department shall perform these tasks.

**B. Section-by-Section Explanation of The Rules**

**R18-1-201. Applicability**

Subsection A of this Section provides that new sections R18-1-202 through R18-1-205 apply to notices of administrative appeal filed with the Department pursuant to A.R.S. §§ 41-1092 through 41-1092.12. New sections R18-1-202 through R18-1-205 govern when and how the Department may process a notice of administrative appeal, hold an informal settlement conference, and review and rehear decisions arrived at through formal adjudication. New sections R18-1-202 through R18-1-205 do not govern the operations of the OAH in conducting formal adjudications or the operations of other agencies.

Subsection B of this Section provides that R18-1-206 through R18-1-222 (renumbered from R18-1-202 through R18-1-218) and new sections R18-1-202 and R18-1-204 apply to those formal adjudications that are lawfully conducted by the Department and that are not required to be conducted by the OAH or another body of formal adjudication. These sections apply to such formal adjudications in addition to the requirements at A.R.S. §§ 41-1061 through 41-1067.

**R18-1-202. Adjudication**

This Section provides that the Department will not schedule a hearing with OAH, hold an informal settlement conference, review a decision arrived at through formal adjudication, entertain a motion for a rehearing on a decision arrived at through formal adjudication or otherwise process a notice of administrative appeal or request for hearing if the notice of appeal or request for hearing concerns an agency decision or action that does not determine the legal rights, duties or privileges of the party filing the notice of appeal or request for hearing, unless the notice of appeal or request for hearing is made in accordance with A.R.S. § 41-1092.12 (added by Laws 1998, Chapter 85, Section 1).

Under A.R.S. § 41-1092.12, the Department must process a notice of administrative appeal concerning an agency decision or action even though the decision or action does not determine legal rights, duties or privileges if certain conditions exist: (1) the notice of appeal is filed on or after August 21, 1998 which is the effective date of Laws 1998, Chapter 85; (2) the appeal concerns an agency decision, investigation, inspection or entry of private property; (3) the party filing the appeal has already expended reasonable attorney or professional fees regarding the decision or action being appealed; (4) the decision or action being appealed is not an order, rule making activity or policy making activity; (5) the decision or action is not already administratively appealable as a contested case or appealable agency action; (6) the decision or action is not already judicially appealable; (7) the party filing the

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appeal alleges the decision or action being appealed is arbitrary, capricious, or not in accordance with the law; (8) the party files the appeal within 10 days after the agency decision or action in question in accordance with the service provisions of A.R.S. § 41-1092.04; and (9) the Department does not cease the decision or action being appealed within 10 days after receiving the notice of appeal. If all these conditions are satisfied, then the Department must schedule a hearing with OAH, hold an informal settlement conference, review a decision arrived at through formal adjudication, and entertain a motion for a rehearing on a decision arrived at through formal adjudication even though the decision or action being appealed does not determine legal rights, duties or privileges.

If all the conditions for filing an appeal under A.R.S. § 41-1092.12 are not satisfied, then the Department may apply this Section as follows:

First, an investigation, audit, examination, review or other type of information gathering does not determine the legal rights, duties or privileges of the party from whom the information is being gathered, because such activity is purely investigative and fact-finding. *Hannah v. Larche*, 363 U.S. 420, 440-41 (1960) (holding that a "purely investigative and fact-finding" activity of an agency is not an adjudication of a party's legal rights); accord *Babbitt v. Herndon*, 119 Ariz. 454, 457, 581 P.2d 688, 691 (Ariz. 1978). It is the subsequent decision to take an action based on the results of the information gathering, rather than the information gathering itself, that may determine the party's legal rights, duties or privileges. See *Corbin v. Sorich*, 125 Ariz. 331, 333 (Ariz. Ct. App. 1980) (stating an investigation itself does not adjudicate). Accordingly, the investigation of a person for possible LUST responsible party liability, for instance, is not administratively appealable as an appealable agency action under A.R.S. § 41-1092(3). Also, the performance of an audit under the Greenfields Pilot Program is not administratively appealable. And, the mere act of reviewing a preapproval, direct payment, or reimbursement application under the UST State Assurance Fund program is not administratively appealable, although an administrative decision based on that review is administratively appealable.

Second, the issuance of a complaint, summons, or similar accusation does not determine the legal rights, duties or privileges of a party. Rather, the accusation merely initiates the process whereby the rights or duties of the party subsequently may be determined. Accordingly, a complaint, summons, or similar accusation itself is not administratively appealable. This position is consistent with § 4-101(a) of the 1981 Model State Administrative Procedure Act. See § 4-101 comment ("For example, a law enforcement officer may, without 1st conducting an adjudicative proceeding, issue a 'ticket' that will lead to a proceeding before any agency or court"). This position also is consonant with the Legislature's repeal in Laws 1997, Chapter 287, Sec. 46 of former A.R.S. § 49-297, which had made administratively appealable the Department's refusal to withdraw a responsible party notice. Under the latest WQARF program amendments, the issuance of a responsible party notice is not an appealable agency action. A.R.S. § 49-298.

Third, the initiation, through the Attorney General, of a formal judicial proceeding does not determine the legal rights, duties or privileges of a party. Rather, it is the final disposition of the proceeding that determines those rights or duties. Accordingly, the initiation of a formal judicial proceeding is not administratively appealable. This result makes sense because OAH or another administrative agency may not determine the jurisdiction of the Superior Court.

Fourth, notification to a license applicant that the application is deficient or a request that the applicant submit additional application components does not determine the legal rights, duties or privileges of the applicant, because the applicant has, under R18-1-205, the option to request the Department to reconsider its notification or request. By providing the applicant with the option to request reconsideration and rely on the application components as submitted, R18-1-205 delays the determination of the applicant's rights until the time when the Department ultimately decides, based on the components submitted, to grant, conditionally grant, or deny the license. Accordingly, a notification by the Department that a license application is deficient or a request by the Department that the applicant submit additional components is not administratively appealable.

R18-1-203. Contested Case Procedures

A.R.S. §§ 41-1092.03 and 41-1092.06 impose 4 procedural requirements on the Department. First, the Department must notify a party of its right to administratively appeal an appealable agency action. Second, the Department must schedule a hearing through OAH upon receiving a notice of appeal, if the Department determines the agency action that is the subject of the notice actually determines the party's legal rights, duties or privileges or is appealable in accordance with A.R.S. § 41-1092.12. Third, the Department must notify a party that it may request an informal settlement conference on the appealable agency action if the party is administratively appealing the agency action. Fourth, the Department must convene an informal settlement conference on the appealable agency action if requested to do so by the administrative appellant.

Under the current version of A.R.S. §§ 41-1092.03 and 41-1092.06, the above 4 procedural requirements apply only to appealable agency actions and not to contested cases. A contested case is an agency action that is expressly appealable under a statute or a rule. See A.R.S. § 41-1001(5). Therefore, the above 4 procedural requirements do not apply to agency actions that are expressly appealable under a statute or a rule. If the Department does provide notice of the right to appeal a contested case, schedule a hearing on a contested case, or provide a settlement conference on a contested case, the Department does so as a matter of policy or pursuant to the statute or rule that expressly makes the agency action appealable, rather than pursuant to A.R.S. §§ 41-1092.03 and 41-1092.06 which do not apply to contested cases.

This Section goes beyond the requirements of the current version of A.R.S. §§ 41-1092.03 and 41-1092.06 by making the above 4 procedures available in all contested cases. The Department has decided to confer these procedural rights in all contested cases for 3 reasons. First, providing these rights also in contested cases avoids any confusion that may result from the operational distinction between appealable agency actions and contested cases. Second, the Department believes the Legislature may intend these rights to apply also to contested cases. See Laws 1998, Ch. 57, Sec. 60 (amending A.R.S. § 41-1092.02(D) to remove procedural distinctions between appealable agency actions and contested cases). Third, providing these rights also in contested cases is

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good public policy because it provides an opportunity for reconsideration and a settlement which avoids the necessity of a formal hearing.

This Section also covers those instances when filing time limits on notices of contested cases are not specified in A.R.S. Title 49. For example, A.R.S. § 49-142(B) provides that an order to abate an environmental nuisance is appealable "pursuant to Title 41, Chapter 6, Article 10," but fails to specify the time limit in which the party must file the notice of appeal. Moreover, the 30-day filing time limit of A.R.S. § 41-1092.03(B) does not apply to such a contested case appeal because that filing time limit applies only to appealable agency actions. This Section corrects this deficiency by imposing the same reasonable 30-day filing time limit also on notices of appeal of contested cases unless A.R.S. Title 49 provides the filing time limit. The Department believes that such a result is not inconsistent with the procedural due process objectives of A.R.S. Title 41, Chapter 6, Article 10, because the Legislature recently has been requiring notices of contested case appeal to be made pursuant to section 41-1092.03 which establishes the 30-day filing time limit for appealable agency actions. *E.g.*, Laws 1997, Ch. 287, Sec. 47 (WQARF Program Amendments to A.R.S. § 49-298(B)).

R18-1-204. Record of Administrative Appeal

The substantive requirements of this Section are relocated from R18-1-219, and amended to specify the Department shall maintain its record of an administrative appeal longer than 3 years if an appeal of the matter is still pending.

R18-1-205. Notice of Intent to Rely on License Application Components as Submitted

Subsection A of this Section requires the Department to explain the basis of its notice that a license application is missing required components or the reason for a request for additional information for the Department to reach a licensing decision. Such an explanation will provide the license applicant with the information necessary to determine whether to avail itself of the option set forth in subsection B.

Subsection B of this Section allows a license applicant to require the Department to reconsider a licensing notice of application deficiencies or a licensing request for additional information, by submitting to the Department a notice of the applicant's intent to rely on the application components as originally submitted. The availability of this option means a notice by the Department identifying application deficiencies or requesting additional information in order to process the license application does not determine the legal rights, duties or privileges of the applicant and thus is not administratively appealable under the definition of appealable agency action at A.R.S. § 41-1092(3). Under this subsection, the applicant must register its intent to rely on the application components as submitted within the time specified in the Department's notice of deficiencies or request for additional information. If the Department's notice or request does not specify the time within which the applicant must respond, then the applicant must submit the notice of intent to rely on the components as submitted within 60 days after the mailing date of the Department's notice or request.

Subsection C of this Section specifies the information the applicant must submit if notifying the Department that it intends to rely on the application components as submitted rather than respond to the Department's request for the additional components. The information specified is the minimum necessary for the Department to understand what requested or identified components the license applicant is electing not to provide and for the Department to determine whether and how it should rescind or modify its request or proceed to a licensing decision.

Subsection D of this Section allows the license applicant to submit whatever additional components or other information the applicant believes necessary to support the granting of the license, even though the applicant is electing not to provide additional components requested by the Department. The additional components or other information would have to be submitted at the same time the applicant submits the notice of intent to rely on the application components as submitted.

Subsection E of this Section presents the range of actions the Department may take in responding to a notice of intent to rely on the license application components as submitted. This list simply clarifies the choices already permitted by law. The Department may (1) rescind its request for additional components, (2) modify its request for additional components, (3) grant the license unconditionally, (4) grant the license with conditions, or (5) deny the license. Options (4) and (5) would determine the legal rights, duties or privileges of the applicant, and thus would be administratively appealable under the definition of appealable agency action at A.R.S. § 41-1092(3).

Subsection F of this Section specifies this Section does not apply to the extent that Arizona law requires different treatment of licensing notices of application deficiencies or licensing requests for additional information. For example, A.R.S. § 49-202 specifies that the person applying for section 401 certification may treat a 2nd Department request for supplemental information as a denial of the application; A.R.S. § 49-202(G) specifies that such a denial is administratively appealable. Accordingly, R18-1-205 does not apply to A.R.S. § 49-202 licensing requests for additional information that are made after the 1st request. However, R18-1-205 continues to apply to all notices that an application for 401 certification is administratively incomplete under A.R.S. § 41-1074, because administrative incompleteness notices are not qualified in A.R.S. § 49-202.

R18-1-206 through R18-1-222

These sections are renumbered from sections R18-1-202 through R18-1-218 and modified to reflect that they apply only to hearings that are required under the Arizona Revised Statutes or implementing rules to be conducted by the Department. These sections do not apply to hearings that are required to be conducted by the OAH or another body of formal adjudication pursuant to A.R.S. § 41-1092.02.

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**6. An explanation of the substantial change which resulted in this supplemental notice:**

In response to formal public comments addressing the 1st proposed rule making, the Department determined that the current rules at R18-1-202 through R18-1-218 may in the future continue to have applicability, in that hearings and other formal adjudications eventually may be required to be conducted by the Department that are not required to be conducted by the OAH or another body of formal adjudication pursuant to A.R.S. §§ 41-1092 through 41-1092.12. See Laws 1998, Ch. 57, Sec. 51 (adding A.R.S. § 41-1067 to clarify that A.R.S. Title 41, Chapter 6, Article 6 shall continue to apply to proceedings not required to be conducted pursuant to A.R.S. §§ 41-1092 through 41-1092.12).

To deal with this possibility, Sections R18-1-202 through R18-1-218 are not being repealed as was originally proposed, but are renumbered as R18-1-206 through R18-1-222 and modified to reflect that they apply only to those hearings required under affirmative law to be conducted by the Department (the modifications are indicated in the full text of these proposed rules at R18-1-206 through R18-1-222). Correspondingly, the definition of "hearing officer" at current Section R18-1-101 is not being repealed as was originally proposed, but is retained in the rules. According to the GRRRC staff, these changes constitute a substantial change under A.R.S. § 41-1025 that necessitates the filing of this Notice of Supplemental Proposed Rulemaking.

Additional rule text changes were made based on formal public comments addressing the 1st proposed rule making and comments received from the GRRRC staff. The formal comments, Department responses, and corresponding rule text changes are discussed below. Substantive changes from the originally proposed text are capitalized.

FORMAL COMMENTS, DEPARTMENT RESPONSES, AND CORRESPONDING RULE TEXT CHANGES

The Arizona Chamber of Commerce, the City of Chandler, and the law firms of Lewis & Roca and Squire, Sanders & Dempsey commented on the 1st notice of proposed rulemaking. The Chamber of Commerce and Lewis & Roca generally oppose the rulemaking. The City of Chandler supports the rulemaking, with recommendations. Squire, Sanders & Dempsey did not expressly support or oppose the rulemaking, but made recommendations.

Each of the comments is addressed below.

COMMENTS ON THE APPLICABILITY OF THE RULES

(R18-1-201)

Comment that R18-1-202 through R18-1-218 possibly may have future viability:

To deal with this possibility that formal adjudications eventually may be required to be conducted by the Department, Sections R18-1-202 through R18-1-218 are not being repealed, but are being renumbered as R18-1-206 through R18-1-222 (discussed above). New Section R18-1-201, which governs the applicability of Article 2, is revised from the originally proposed version to add a subsection (B) which states that Sections R18-1-202, R18-1-204, and R18-1-206 through R18-1-222 shall apply only to those hearings conducted by the Department that are not required to be conducted by the OAH or another body of formal adjudication. Subsection (A) is amended to make a corresponding clarification, that Sections R18-1-202 through R18-1-205 shall apply to those hearings that *are* required to be conducted by the OAH or a body of formal adjudication other than the Department.

To better accommodate these changes, originally proposed R18-1-201(B) is now located under its own Section, R18-1-202. Accordingly, originally proposed R18-1-202, R18-1-203, and R18-1-204 are now designated R18-1-203, R18-1-204, and R18-1-205, respectively (shown below).

Comment that the rules should also cross-reference Title 41, Chapter 6, Article 6:

One commenter stated that the applicability section of the rules should cross-reference to Title 41, Chapter 6, Article 6 in addition to the cross-reference to Title 41, Chapter 6, Article 10, in order to be consistent with the OAH's draft implementing rules.

The Department agrees, and has revised R18-1-201 accordingly. R18-1-201(B) now indicates that the contested case procedures specified at A.R.S. §§ 41-1061 through 41-1067 apply to those hearings lawfully conducted by the Department that are not required under A.R.S. §§ 41-1092 through 41-1092.12 to be conducted by the OAH or another body of formal adjudication.

Substantive changes from the originally proposed text:

The substantive changes from the originally proposed text are based on the above comments and responses. The substantive changes are capitalized.

**R18-1-201. Applicability**

**A. Sections R18-1-202 through R18-1-205 govern administrative appeals filed with the Department that constitute either a contested case as defined in A.R.S. § 41-1001(5) or an appealable agency action as defined in A.R.S. § 41-1092(3) AND THAT ARE REQUIRED UNDER A.R.S. § 41-1092.02 OR ANOTHER STATUTE TO BE CONDUCTED BY THE OFFICE OF ADMINISTRATIVE HEARINGS OF THE DEPARTMENT OF ADMINISTRATION OR BY A BODY OF FORMAL ADJUDICATION OTHER THAN THE DEPARTMENT.**

**B. IN ADDITION TO A.R.S. §§ 41-1061 THROUGH 41-1067, SECTIONS R18-1-202, R18-1-204, AND R18-1-206 THROUGH R18-1-222 GOVERN THE ADMINISTRATION OF CONTESTED CASE HEARINGS REQUIRED UNDER THE ARIZONA REVISED STATUTES OR IMPLEMENTING RULES TO BE CONDUCTED BY THE DEPARTMENT AND NOT REQUIRED UNDER A.R.S. § 41-1092.02 OR ANOTHER STATUTE TO BE CONDUCTED BY THE OFFICE OF ADMINIS-**

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TRATIVE HEARINGS OF THE DEPARTMENT OF ADMINISTRATION OR BY ANOTHER BODY OF FORMAL ADJUDICATION

COMMENTS ON THE IDENTIFICATION OF NONADJUDICATIVE ACTIONS

(R18-1-202)

Comment that the Department does not have jurisdiction to adopt and is premature in adopting the implementing rules:

One commenter questioned how the Department can harmonize its rules with the requirements of A.R.S. §§ 41-1092 through 41-1092.12 when "the party responsible for the administration of those statutes, OAH, has yet to formally adopt rules regarding the interpretation and implementation of the statutes." The commenter stated that any implementing rules adopted by the Department prior to the adoption of the OAH's implementing rules are premature.

The Department agrees that the OAH has a large share of responsibility for implementing A.R.S. §§ 41-1092 through 41-1092.12. However, the OAH is not the only party that is responsible for implementing those statutes. Specifically, A.R.S. §§ 41-1092.03 and 41-1092.06 impose 4 requirements only on the Department. First, the Department must notify a party of its right to administratively appeal an administrative decision of the Department. Second, the Department must schedule a hearing through OAH upon receiving a cognizable notice of administrative appeal from a party. Third, the Department must notify the party that it may request an informal settlement conference concerning the substance of the appeal. Fourth, the Department must convene an informal settlement conference if requested to do so by the administrative appellant. Additionally, A.R.S. §§ 41-1092.08 and 41-1092.09 impose upon the Department the responsibility of reviewing decisions arrived at through formal adjudication before the OAH and of entertaining motions for rehearing on those decisions. The OAH does not have jurisdiction and is not responsible for deciding when and how all these tasks must be performed.

These implementing rules, which govern when and how the Department will perform these tasks, are not premature because they are necessary to address issues not resolved on the face of A.R.S. §§ 41-1092 through 41-1092.11 which were enacted over a year ago and A.R.S. §41-1092.12 which was enacted this year. For instance, the statutes do not identify when an action of the Department rises to the level of administrative adjudication of legal rights, duties, or privileges. The Department needs to adopt rules identifying what actions of the Department do not constitute administrative adjudication, so as to provide general notice to potential appellants of when certain appeals are not yet mature and cognizable, and thereby avoid the administrative burden and expenses associated with the filing of premature administrative appeals. These burdens and expenses currently are borne by the Department, the Office of the Attorney General, and the OAH judges and staff, as well as by the party filing the premature appeal.

Comment on possible inconsistencies between the Department's and the OAH's implementing rules:

One commenter asked whether reliance upon the Department's rules may result in inconsistencies between the Department's rules and the OAH's rules which have yet to be adopted.

The Department responds that inconsistencies should not arise. First, the OAH does not have the jurisdiction or responsibility to adopt rules dealing with the issues that are addressed in this rulemaking. Second, the Department has been closely tracking the development of the OAH's implementing rules and has been in communication with the Director of the OAH concerning the OAH's rulemaking. Based on its review of the OAH's draft rules and discussions with the Director of the OAH concerning the OAH's rulemaking, the Department has determined that the OAH's implementing rules will concern only those activities specified in A.R.S. §§ 41-1092 through 41-1092.12 that are within the purview of the OAH, and not the Department, specifically concerning the administration and conduct of appeals hearings before the OAH.

Comments that it is not appropriate for the Department to use rulemaking to identify actions that are not adjudicative:

One commenter stated it is not appropriate for the Department to use rulemaking to clarify certain agency actions that do not determine legal rights, duties or privileges. The commenter made 9 points in support of this statement. Each of these points is considered in turn.

(1) The commenter stated that A.R.S. §§ 41-1092 through 41-1092.12 do not expressly or implicitly confer upon the Department the authority to re-define the term "appealable agency action."

The Department agrees. This rulemaking does not attempt to re-define the term "appealable agency action," because that term is already defined at A.R.S. § 41-1092(3) to include certain agency actions that determine the legal rights, duties, or privileges of a party. However, the definition of "appealable agency action" and the definition of "contested case" at A.R.S. § 41-1001(5) do not provide any guidance concerning when an agency action does not yet rise to the level of a determination of legal rights, duties, or privileges.

It is intuitive that not all agency actions determine legal rights. Moreover, there is a considerable body of case law identifying those actions that do not determine legal rights. This rulemaking merely collects that law and places it in rules so as to provide general notice to the potential administrative appellant of when certain appeals are not yet mature and cognizable. In adopting these rules, the Department hopes to avoid the administrative burden and expenses associated with the filing of premature administrative appeals that are currently borne by the Department, the Office of the Attorney General, and the OAH judges and staff, as well as by the party filing the premature appeal.

(2) The commenter added that A.R.S. §§ 41-1092 through 41-1092.12 do not contemplate that the Department may act as a "gate-keeper" in screening out premature appeals based on there not having been an adjudication of legal rights. The commenter stated the statutes authorize the administrative appellant and the OAH, but not the Department, to determine whether its legal

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rights have been determined. According to the commenter, the only discretion afforded the Department is the ability to deny a claim which is beyond the statutory deadline.

The Department respectfully disagrees. For example, A.R.S. §§ 41-1092.08 and 41-1092.09 afford Director the discretion of whether to accept, modify, or reject a recommended decision of an administrative law judge, and whether to grant an opportunity for rehearing and review of a final administrative decision. Moreover, A.R.S. § 41-1092.03 imposes upon the Department the obligation to notify a party if an action of the Department is appealable and schedule through the OAH a hearing on an appealable agency action, which requires the Department to consider in the 1st instance whether an action actually constitutes an appealable agency action. The statute certainly does not contemplate that the Department shall coordinate an OAH hearing for an action that is not an appealable agency action or a contested case, merely because the appellant asserts its rights have been determined.

This understanding that it is the Department's obligation to consider in the 1st instance whether the agency action actually is adjudicative is supported by the fact that notices of appeal are required to be submitted to the agency whose action is the subject of the appeal, rather than directly to the OAH. See A.R.S. § 41-1092.03(B). If the legislature had not intended the Department or sister agencies to consider in the 1st instance whether an administrative appeal is cognizable, then the legislature would have required that a notice of appeal be submitted directly to the OAH for a purely clerical processing of the notice and automatic scheduling of a hearing. Under such an alternative approach, the question of whether a fact-finding activity is adjudicative, for instance, would be dealt with repeatedly in a piecemeal case-by-case fashion involving personnel of the Office of the Attorney General, the Department, and the OAH reviewing motions to dismiss for failure to state a cognizable claim. The Department contends such an alternative approach would be wasteful, as it is already well-established law that mere fact-finding activities do not determine legal rights, and the Director would have the obligation to find in accordance with this law anyway during agency head review of the administrative law judge's recommended decision.

(3) The commenter added that depriving a party of a statutorily established right to contest an agency action that determines its legal rights, duties or privileges is contrary to a formal opinion of the Office of the Attorney General. The Office of the Attorney General has determined that "when a right is granted by a statute the agency administering such statute may not by regulation add to the conditions of that right a condition not stated in the statute, nor may it bar from that right a person included within the terms of the statute." Ariz. Op. Att'y Gen. No. 71-23 (L). The commenter stated the Department's rulemaking is contrary to this opinion, because it bars from the right to appeal those parties that may fit within the definition of "appealable agency action."

The Department agrees that it may not add a condition not stated in a statute. However, in administering a statute, the Department is obligated to interpret portions of the statute that are not in themselves self-administering. In this case, the statute defines "appealable agency action," but does not define what actions determine the legal rights, duties, or privileges of a party. This lack of further definition is understandable, because it would be extremely difficult to try to define in statute all the actions of an agency that determine legal rights. However, it is quite simple to identify which actions do *not* determine legal rights, where the identification derives directly from controlling law. In this instance, the law is clear, that mere fact-finding, accusation, and the filing of a civil suit do not determine legal rights. See, e.g., Ariz. Op. Atty. Gen. No. 178-80 (1978) ("The investigative process has no effect on protected rights.") Therefore, such actions do not fit within the definition of "appealable agency action." Additionally, a licensing notice of administrative deficiencies or a request for additional information accompanied by general notice under R18-1-205 that the applicant may elect not to comply with the request certainly does not determine the license applicant's legal rights and thus does not constitute an appealable agency action.

(4) The commenter added that since the Superior Court has no authority to make a determination of whether an issue is appealable, neither does the Department.

The Department does not understand the analogy. If the commenter means the Superior Court does not have the authority to determine whether a final administrative decision is appealable to the Superior Court, then the Department disagrees. The Superior Court may grant a motion to dismiss a judicial appeal of a final administrative decision if the court concludes the appeal is not cognizable under the law. If the commenter means the Superior Court does not have the authority to determine whether a case it has decided is appealable to the Court of Appeals, then the Department generally agrees with the statement but disagrees that it applies to this rulemaking because the Department is not deciding the case when it concludes a fact-finding activity is not adjudicative; rather, it is simply not processing the notice of appeal under A.R.S. § 41-1092.03 because it does not yet concern an appealable agency action or contested case under the law. If the administrative appellant wishes to reargue well-established law, it may do so before the courts.

(5) The commenter added that Hanna v. Larche, 363 U.S. 420 (1960), "addressed the minimum administrative action necessary to trigger the protections of the due process clause of the United States Constitution." According to the commenter, since the definition of "appealable agency action" goes beyond what hearing rights are required to trigger due process protections, Hanna does not apply.

The Department agrees that Hanna deals with the question of whether a purely investigative and fact-finding activity triggers the requirement of an opportunity for a formal adjudicatory hearing. For an agency action to necessitate the opportunity for a formal adjudicatory hearing, the action must determine the legal rights, duties, or privileges of the party, *and* either a statute or the constitution must require the opportunity for the hearing. If a statute does not expressly require the opportunity for a hearing, then the issue becomes whether the legal right, duty, or privilege *that is being determined* rises to the level of a constitutionally protected interest such as life, liberty, or property. If the right being determined rises to the level of a constitutionally protected interest, then the next issue is what process is due, *i.e.*, whether a formal adjudicatory hearing is necessary or whether something less formal will provide adequate due process. Matthews v. Eldridge, 424 U.S. 319 (1976).

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However, the 1st question in every instance is whether a right actually is being determined. Hanna v. Larche focused on this question, and determined that "(1) investigating written, sworn allegations . . . (2) studying and collecting information . . . [or] (3) reporting . . . its activities, findings, and recommendations . . . does not adjudicate." 363 U.S. at 440-441. Therefore, Hanna applies, in that it supports the Department's position that purely fact-finding activities do not determine legal rights.

(6) The commenter added that the Supreme Court limited the scope of Hanna in Jenkins v. McKeithen, 395 U.S. 411 (1969), based on the following from Jenkins: "Were the Civil Rights Commission exercising an accusatory function, were its duty to find that named individuals were responsible for wrongful deprivation of voting rights and to advertise such a finding or to serve as part of the process of criminal prosecution, the rigorous protections relevant to criminal prosecutions might well be the controlling starting point for assessing the protection which the Commission's procedure provides." Id. at 428.

The Department agrees with this statement. Once the Department makes an administrative decision that individuals are responsible for a violation of the law under A.R.S. Title 49, then that finding constitutes an appealable agency action or contested case subject to the requirements of A.R.S. §§ 41-1092 through 41-1092.12. However, short of such a finding, the investigation by itself does not constitute an appealable agency action. Likewise, the mere accusation or filing of a civil suit does not constitute an appealable agency action; consistent with Jenkins, it is only the process of actually following through on the accusation before an administrative or judicial body of adjudication that merits an assessment of what procedural process is due.

(7) The commenter added that Hanna has been criticized and distinguished in numerous federal court opinions, making for unclear understanding of the law, and that absent clear understanding, the Department's identification of nonadjudicatory actions through rulemaking is ultra vires.

The Department is unaware of federal court opinions criticizing the holding in Hanna that mere fact-finding does not adjudicate. The Department is aware of Arizona case law supporting this holding in Hanna. See Babbitt v. Herndon, 119 Ariz. 454, 457, 581 P.2d 688, 691 (Ariz. 1978) (agreeing with Hanna that fact-finding, including the issuance of a subpoena, is nonadjudicatory); Corbin v. Sorich, 125 Ariz. 331, 333 (Ariz. Ct. App. 1980) (stating an investigation itself does not adjudicate). The Department has an obligation to apply Arizona state law. Through this rulemaking, the Department is providing general notice to potential administrative appellants regarding which activities of the Department do not under the law determine their legal rights, duties, or privileges and therefore shall not be treated as administratively appealable.

(8) The commenter added that if the Department's rulemaking is utilized, it may result in non-uniform application of the law. According to the commenter, such non-uniform application would be contrary to the purpose of the OAH's creation, which is to create 1 uniform means of resolving administrative claims.

The Department responds that it is the responsibility of state government to apply the law of the land. It is well-established law that mere fact-finding activities, accusations, and the initiation of civil suits are not in themselves determinative of legal rights, duties, or privileges. The Department anticipates that its sister agencies shall faithfully apply this law, if not by rule, then by policy. Moreover, if the Department were not to adopt these rules, then it would apply this law as policy, 1st through the filing of motions to dismiss for failure to state a cognizable claim submitted to the administrative law judge, and 2nd upon agency head review of the recommended decision. Either way, the result would be the same, in that the Department would not revise its mere decisions to investigate, accuse, or file suit based on the administrative appeal. However, by adopting these rules, the Department will help avoid the extra burdens and expenses associated with the filing of premature appeals, including those borne by the administrative appellant. The Department points out that the majority of administrative appellants are not represented by counsel and need general notice about the law in the manner provided in this rulemaking.

(9) The commenter added if there are procedural steps the Department will follow regarding the submission of documents under A.R.S. §§ 41-1092 through 41-1092.12, then the Department should specify these steps in the rule.

The Department responds that the procedural steps within the administrative purview of the Department are adequately spelled out in the statutes, *i.e.*, the statutes are self-implementing in this respect and do not need a clarifying rulemaking. See A.R.S. §§ 41-1092.03 through 41-1092.06, 41-1092.08, and 41-1092.09.

Comment that it is appropriate for the Department to use rulemaking to identify actions that are not adjudicative:

One commenter supports the Department's position of identifying by rule the types of decision and actions that are not adjudicative and therefore not administratively appealable. According to the commenter, making such an identification through rule will provide clear guidance to the regulated community. Failure to make such an identification through rule would delay the discussion and result in a piecemeal treatment of the issue during the Department's agency head review of OAH's recommended decisions.

The Department agrees.

Substantive changes from the originally proposed text:

There are no substantive changes from the originally proposed text based on the above comments and responses. For organizational reasons discussed above, the text is relocated from originally proposed R18-1-201(B).

The originally proposed text is modified to reflect the decision not to repeal the substance of R18-1-206 through R18-1-222, discussed above. This modification is capitalized.

R18-1-202. Adjudication

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Except as provided in A.R.S. § 41-1092.12, the Department shall not process a notice of administrative appeal in the manner prescribed in A.R.S. §§ 41-1092.03 through 41-1092.06, 41-1092.08, and 41-1092.09 OR IN THE MANNER PRESCRIBED IN R18-1-206 THROUGH R18-1-222 if the decision or action that is the subject of the notice does not determine the legal rights, duties, or privileges of the party filing the notice. The following decisions and actions by the Department do not determine the legal rights, duties, or privileges of a party:

1. A decision to perform or not to perform an investigation, audit, review, examination, or other type of information gathering, and the act of information gathering;
2. A decision to issue or not to issue a complaint, summons, or similar accusation, and the issuance of an accusation;
3. A decision to initiate or not to initiate, through the Attorney General, a formal judicial proceeding, and the initiation of a formal judicial proceeding;
4. Submission of 1 or both of the following to a license applicant, in accordance with R18-1-205:
  - a. A notice that a license application is incomplete or deficient;
  - b. A request that the license applicant submit to the Department additional license application components or information.

COMMENTS ON CONTESTED CASE PROCEDURES

(R18-1-203)

There were no comments concerning the Department's application of appealable agency action procedures to contested cases in situations where A.R.S. Title 49 does not provide otherwise.

Substantive changes from the originally proposed text:

There are no substantive changes from the originally proposed text. For organizational reasons discussed above, the text is relocated from originally proposed R18-1-202.

Based on the GRRC staff comments, the Section is divided into 2 subsections to better clarify which time limits control the filing of notices of administrative appeal (capitalized).

**R18-1-203. Contested Case Procedures**

**A. SUBJECT TO THE PROVISIONS OF A.R.S. §§ 41-1092.01 AND 41-1092.02 AND EXCEPT AS PROVIDED IN SUBSECTION (B), THE DEPARTMENT SHALL APPLY THE NOTICE AND INFORMAL SETTLEMENT CONFERENCE PROVISIONS OF A.R.S. §§ 41-1092.03 AND 41-1092.06 TO CONTESTED CASES.**

**B. IF A.R.S. TITLE 49 PROVIDES A TIME LIMIT ON THE FILING OF A NOTICE OF ADMINISTRATIVE APPEAL, THEN THE PERSON FILING THE NOTICE OF ADMINISTRATIVE APPEAL SHALL COMPLY WITH THAT FILING TIME LIMIT.**

COMMENTS ON MAINTAINING A RECORD OF ADMINISTRATIVE APPEAL

(R18-1-204)

Comment that the rule is unclear as to what records will be maintained:

One commenter stated that the rule is unclear regarding precisely what records will be maintained, such as the record before the appeal, the record of appeal, the record of the OAH hearing, or all of these records.

It is the intention of the Department to maintain records of the proceeding, which shall include those portions of the record before the appeal that were utilized by the administrative law judge in arriving at a recommended decision, as well as those records submitted to the Department by the OAH that pertain to the appeal. The originally proposed rule is revised to reflect this intention.

Comment that the Department does not have jurisdiction to maintain the record:

One commenter stated the OAH is the agency which has control of the record of the hearing, and that until the OAH adopts its implementing rules, it is premature to assert that the Department shall preserve the record.

The originally proposed rule is revised to reflect the Department shall maintain a record of the administrative appeal.

Comment that a 3-year limitation upon the preservation of a record may not be sufficient:

One commenter stated the Department's record should be maintained beyond 3 years if an appeal of the matter is still pending.

The originally proposed rule is revised to reflect the Department shall maintain its record of the appeal for 3 years unless an appeal of the matter is still pending.

Substantive changes from the originally proposed text:

*Arizona Administrative Register*  
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The substantive changes from the originally proposed text are based on the above comments and responses. The substantive changes are capitalized. For organizational reasons discussed above, the text is relocated from originally proposed R18-1-203.

R18-1-204. Record of Administrative Appeal

The Department shall preserve A record OF AN ADMINISTRATIVE APPEAL of a contested case or appealable agency action for a period of 3 years commencing on the date the notice of appeal is filed with the Department OR DURING THE TIME AN APPEAL OF THE MATTER IS STILL PENDING, WHICHEVER IS LONGER. If not made confidential by law, the Department shall make the record available for public inspection upon request.

COMMENTS ON NOTICES OF INTENT TO RELY ON LICENSE APPLICATION COMPONENTS AS SUBMITTED

(R18-1-205)

Comment as to why the rule is not being placed with the Licensing Time-frames rules:

One commenter inquired as to why the Department is not placing the substance of this Section in the Department's unitary rulemaking on licensing time-frames.

The Department responds that this Section applies to all license applications, not just those subject to time-frames requirements.

Comments that upon receipt of a notice of intent to rely on components as submitted, the Department should accelerate to a final licensing decision:

Two commenters were concerned that the Department might delay a licensing decision until the end of the applicable licensing time-frame, and then deny the license based solely on the applicant's submittal early in the time-frame of a notice of intent to rely on the application components as submitted. The commenter stated the rule should contain a requirement that if the Department denies a license based on refusal of the applicant to provide the requested administrative completeness or substantive review components, then it should do so within a short time after receiving the applicant's notice of intent to rely on the components as submitted.

The Department responds that it sometimes is uncertain whether the refusal of an applicant to provide the missing or requested components must result in denial of the license, until later in the time-frame when the Department has evaluated the totality of information necessary to reach an informed decision. Sometimes, the information that may alleviate the need for the missing information is obtained during public hearings and through public comments that by definition are part of the substantive review time-frame which occurs after the administrative completeness review time-frame. See A.R.S. § 41-1072(3). Requiring the Department to accelerate to a denial of the license in all instances would preclude the ability of the Department to consider information obtained during substantive review that might alleviate the need for the requested information.

Additionally, the Department often continues to work with the applicant even after receiving notification that the applicant will not provide the requested information, in an effort to arrive at alternative bases or conditions for granting the license, particularly in the areas of RCRA, NPDES, and Aquifer Protection permitting. Requiring the Department to decide to deny the license shortly after receiving the applicant's notice of intent to rely on application components as submitted would preclude the Department from working with the applicant to find alternative means by which the Department may grant or conditionally grant the license.

Finally, requiring the Department to accelerate to a denial of the license in all instances may preclude the ability of the applicant to preserve the interim status of a permit or maintain the enforcement shield conferred upon the applicant during licensing discussions with the Department.

For these reasons, the originally proposed rule does not contain a uniform acceleration clause. However, the Department agrees that it should deny a license as soon as it determines that the applicant's failure to provide the missing or requested components makes it impossible for the Department to approve or conditionally approve the license.

Comment that the rule should make a meeting available upon request of the applicant to discuss technical disagreements over the application:

One commenter recommended that the rule should include a provision that the Department, upon the request of the applicant, shall hold a meeting to discuss disagreements over the Department's notice of application deficiencies or request for additional information. The commenter stated that such a provision would provide a dispute resolution rule that would be applicable to all licensing.

The Department agrees that the rule approaches being a complete mechanism for informally resolving technical disagreements, in that technical disagreements with the Department tend to be addressed following the Department's issuance of a formal written notice of application deficiencies or request for additional information. For instance, if the applicant is requesting approval of a remedial investigation under A.R.S. § 49-285(B), the Department may respond with a written notice under R18-1-205(A) including an explanation of why the Department needs the missing information to approve the remedial investigation. Under R18-1-205(B), (C), and (D), the applicant can respond to the Department's notice by submitting to the Department a notice of intent to rely on the application components as submitted including an explanation of the applicant's disagreement over the Department's notice, and possibly including other information that may form an alternative basis for the Department to approve the investigation. Under R18-1-205(E), the Department considers the applicant's notice and any counterproposal, and may continue the iterative process by modifying its request and resubmitting it to the applicant under R18-1-205(A); alternatively, the Department may

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conclude the iterative process and proceed to a licensing decision which would be administratively appealable. Amending the rule to provide for a meeting to discuss the Department's requests and the applicant's responses may better facilitate informal resolution of the underlying technical disagreements concerning the § 49-285(B) request.

A uniform rule requiring a meeting upon request would not, however, be appropriate to other licensing activities. For example, such a rule would not be appropriate to the reviewing of applications for vehicle inspection compliance certification under A.R.S. § 49-542 and R18-2-1006, because the Department makes the decision whether to grant or deny the certification within a few minutes while the vehicle is at the inspection location; in 1996, the Department received approximately 1,400,000 applications for this license and issued approximately 980,000 certifications. Given the short licensing time-frame (5-10 minutes) and the volume of applications, it would be impracticable to subject the inspection process to a general rule that requires the Department to hold a meeting to resolve disagreements upon the applicant's request before the Department decides to issue or deny the certification.

Additionally, amending the rule to require a meeting upon request would not ensure that informal resolution of disagreements will occur in every instance of licensing because the Department's exercise of R18-1-205 is discretionary. Neither the licensing time-frames statutes nor R18-1-205 require the Department in every case of licensing to notify the applicant that the application is incomplete or that additional information is needed to reach an informed licensing decision; rather, providing such notice or request is elective. See A.R.S. §§ 41-1074 and 41-1075. In those licensing categories or instances where it is not appropriate or useful to provide the applicant with the opportunity to amend an application, the Department may decide not to implement R18-1-205. In such cases, the applicant would not be able to rely on R18-1-205 as a vehicle for resolving technical disagreements over the application.

For these reasons, the Department concludes that R18-1-205 is not the appropriate place for requiring the Department to grant informal meetings to resolve disagreements upon request. A mechanism for resolving technical disagreements is best imposed on a program-specific basis in the statutes or rules that govern the particular program.

Comment that the rule is in conflict with A.R.S. § 49-202:

One commenter stated that the rule governing notices of intent to rely on application components as submitted is in conflict with A.R.S. § 49-202. That statute allows a party to treat a 2nd request for supplemental information as a denial of section 401 certification which constitutes a contested case administratively appealable under A.R.S. § 49-202(G).

The Department agrees. R18-1-205 is revised to include a subsection (F) which makes an exception for statutes such as A.R.S. § 49-202. In the case of A.R.S. § 49-202 specifically, R18-1-205 shall continue to apply to all notices by the Department that an application for 401 certification is missing required administrative completeness components, as well as to the Department's 1st request for supplemental information on the application.

Comment that the rule should require the Department to explain its requests for missing license application components or additional information:

One commenter expressed concern that it is difficult for a license applicant to make an informed decision on whether to rely on license application components as submitted rather than respond to the Department's request for the missing or additional information, unless the Department explains why it is requesting the additional or missing information.

The Department agrees. The rule is revised to require the Department to include a brief explanation with its notice of missing application components or request for additional information.

Substantive changes from the originally proposed text:

The substantive changes from the originally proposed text are based on the above comments and responses. The substantive changes are capitalized. For organizational reasons discussed above, the text is relocated from originally proposed R18-1-204.

Based on comments received from the GRRC staff, the substance of originally proposed subsection (F) is now relocated to subsection (B) (also capitalized).

R18-1-205. Notice of Intent to Rely on License Application Components as Submitted

A. IF THE DEPARTMENT SUBMITS TO A LICENSE APPLICANT A NOTICE THAT THE APPLICATION IS MISSING REQUIRED COMPONENTS, IS SUBSTANTIVELY DEFICIENT, OR IS OTHERWISE DEFICIENT, OR SUBMITS TO A LICENSE APPLICANT A REQUEST FOR ADDITIONAL INFORMATION TO ENABLE THE DEPARTMENT TO REACH A DECISION TO GRANT THE LICENSE, THEN THE DEPARTMENT SHALL INCLUDE A BRIEF EXPLANATION OF THE BASIS OF OR REASON FOR THE NOTICE OR REQUEST.

B. If a license applicant receives a notice from the Department that the application is lacking application components, is substantively deficient, or is otherwise deficient, or receives from the Department a request for additional information, the applicant, in lieu of submitting some or all of the components or information identified by the Department, may submit to the Department a written notice of intent to rely on the application components as submitted. THE APPLICANT SHALL SUBMIT THE NOTICE OF INTENT TO RELY ON THE APPLICATION COMPONENTS AS SUBMITTED WITHIN THE TIME SPECIFIED IN THE DEPARTMENT'S NOTICE OF DEFICIENCIES OR REQUEST FOR ADDITIONAL INFORMATION. IF THE DEPARTMENT'S NOTICE OF DEFICIENCIES OR REQUEST FOR ADDITIONAL INFORMATION DOES NOT SPECIFY A TIME, THEN THE APPLICANT SHALL SUBMIT THE NOTICE OF INTENT TO RELY ON THE APPLICATION COMPONENTS AS SUBMITTED WITHIN 60 DAYS AFTER THE MAILING DATE OF THE DEPARTMENT'S NOTICE OF DEFICIEN-

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CIES OR REQUEST FOR ADDITIONAL INFORMATION.

C. A notice of intent to rely on the application components as submitted shall include the following:

1. Name of the applicant.
2. License application number or other identification.
3. Date of the Department notice or request in question.
4. Identification of the application component or components objected to with reasons for the objection or objections, and.
5. A statement that the applicant intends to rely on the application components as submitted as the basis upon which the Department may determine whether to grant or deny the license.

D. A license applicant may submit additional license application components or other information at the same time the applicant submits a notice of intent to rely on the application components as submitted.

E. The Department, after receiving a notice of intent to rely on the license application components as submitted, shall do 1 of the following:

1. Rescind its request for the application component or components objected to in the notice;
2. Modify its request for the application component or components objected to in the notice;
3. Grant the license unconditionally, meaning that the Department did not add conditions not requested by the applicant;
4. Grant the license with conditions, meaning that the Department added conditions not requested by the applicant; or,
5. Deny the license.

F. TO THE EXTENT THAT A LICENSING PROVISION OF THE ARIZONA REVISED STATUTES REQUIRES DIFFERENT TREATMENT OF LICENSING NOTIFICATIONS OF APPLICATION DEFICIENCIES OR LICENSING REQUESTS FOR ADDITIONAL INFORMATION, THIS SECTION DOES NOT APPLY.

COMMENTS ON THE ECONOMIC IMPACT OF THE RULES

Once commenter stated that the economic impact of the rule would be substantially adverse, because it would restrict a person's right to file an administrative appeal. According to the commenter, rather than getting a relatively inexpensive hearing at the OAH, the party would be required to file suit on the action in Superior Court.

The Department respectfully disagrees. The rules do not restrict a person's right to file an administrative appeal. Rather, the law already restricts the right to administratively appeal purely fact-finding activities, accusations, and the initiation of civil and criminal proceedings in the Superior Court. The rules do no more than provide general notice of what the law already provides. Additionally, the rules correctly state a licensing notice of administrative deficiencies or a licensing request for additional information accompanied by general notice under R18-1-205 does not constitute administratively appealable adjudication, because under R18-1-205 the applicant may elect not to comply with the notice or request. Therefore, the rules do not of themselves restrict the right to file administrative appeals.

The Department points out, moreover, that administrative appeals are not relatively inexpensive. Each notice of administrative appeal filed with the Department requires at a minimum labor and material costs associated with (1) a Department clerk processing the notice of appeal; (2) the Department's Office of Administrative Counsel reviewing the substance of the appeal and coordinating the case with the Office of the Attorney General; (3) the Office of the Attorney General filing papers with the OAH, including motions to dismiss, motions for summary judgement, and replies concerning those motions; (4) the Office of the Attorney General and the applicable program staff of the Department appearing at the OAH hearing; (5) the OAH staff processing a request for a hearing; (6) the OAH administrative law judge and staff convening the hearing; (7) the OAH administrative law judge recommending a decision to the Director; (8) a clerk of the Department reviewing the case and briefing the Director on the issues; (9) the Director reviewing the case and deciding whether to accept, modify, or reject the recommended decision and issuing the final order; (10) the Department's Office of Administrative Counsel staff distributing copies of the order on all parties and to the OAH; and (11) the Department maintaining a record of its involvement in the administrative appeal.

The sole purpose of the R18-1-202 is to avoid incurring the above expenses on premature administrative appeals, by provide general notice of what actions of the Department do not yet constitute an adjudication under the law. Additionally, providing such information through this rulemaking shall benefit the potential administrative appellant by helping the potential appellant avoid the expenses of filing a noncognizable appeal.

Therefore, with respect to the comment, the overall economic impact of this rulemaking is positive.

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.

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

This rulemaking clarifies the applicability of existing administrative appeals rules (at R18-1-206 through R18-1-222) to actions of the Department, confers additional due process rights on contested case appellants, and provides general notice of what actions of the Department do not determine legal rights, duties or privileges and thus are not ripe for appeal under the law. The overall economic impact of this rulemaking is positive.

Persons who wish to communicate with the Department about the economic impacts of this rulemaking may do so by contacting George Tsiolis at (602)207-2222.

**a. Identification of persons who will be directly affected by, bear the costs of, or directly benefit from the rulemaking:**

This rulemaking directly impacts the potential administrative appellant, the Department, the Office of Administrative Hearings (OAH), and the Office of the Attorney General (OAG). The potential administrative appellant may be a political subdivision, a business, or a natural person.

**b. Cost-benefit analysis:**

The benefits of this rulemaking outweigh the costs. The estimated costs are based on the USAS billing system.

(1) The probable costs and benefits to the Department -- The cost of this rulemaking is the cost of amending form notices of appealable agency action to indicate that the procedural rights that apply to appealable agency actions shall, under the rule, also apply to contested cases. The estimated annual costs of revising and updating these notices is as follows:

Costs associated with revising and updating form notices of appeal:

Administrative counsel	2 hour	70/hr	\$140
Policy advisor (attorney)	8 hours	40/hr	\$320
TOTAL			\$460/YR

The benefits to the Department consist of savings associated with making settlement conferences available also in contested cases, which will reduce the number of cases that require agency head review of OAH recommended decisions. The benefits also consist of savings associated with not having to process premature administrative appeals, resulting from the general notice provided in this rulemaking that fact-finding, accusing, and filing suit do not form the basis of a cognizable appeal.

Typically, the Department's involvement in processing a notice of administrative appeal consists of the following tasks: (1) the Department's hearing administrator and clerk review the request for a hearing and direct the request to the applicable program; (2) a Department staff attorney reviews the substance of the request and coordinates the case with the OAG; (3) the applicable program personnel appear as witnesses at the hearing; (4) the Department policy advisor (attorney) reviews the case and briefs the Administrative Counsel and the Director on the issues; (5) the Director reviews the case and decides whether to accept, modify, or reject the recommended decision of the OAH administrative law judge; (6) the Department's hearing administrator and clerk distribute copies of the final administrative decision on all parties and maintain a record of the request for a minimum of 3 years.

In the 1997 calendar year, the Department received 109 requests for a hearing. Of those 109 requests, 22 were actually processed for hearing before the OAH. The remaining 87 requests were either resolved through informal settlement conference or were dismissed for failure to state a cognizable claim. The Department conservatively estimates that an additional 3 requests could have been settled had the informal settlement conference provision of A.R.S. § 41-1092.06 also applied to contested cases, which would have resulted in a final administrative decision not requiring agency head review. Additionally, the Department estimates that 5 of the request were dismissed because they failed to state a cognizable claim. Accordingly, the Department estimates the following minimum annual savings will result from the rulemaking, based on the Department not having to perform tasks identified above:

Savings associated with obtaining 3 additional settlements:

Director	1 hour	100/hr	\$100
Administrative counsel	2 hours	70/hr	\$140
Policy advisor (attorney)	16 hours	40/hr	\$640
Hearing administrator	1 hour	35/hr	\$35
Clerk	.5 hours	20/hr	\$10
TOTAL			\$925 X 3 = \$2,775/YR

(Assumes the time required by program staff to act as witnesses at a hearing is the same as the time necessary to participate in an informal settlement conference.)

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Savings associated with not having to process 5 noncognizable appeals:

Director	1 hour	100/hr	\$100
Administrative counsel	2 hours	70/hr	\$140
Policy advisor (attorney)	16 hours	40/hr	\$640
Hearing administrator	2 hours	35/hr	\$70
Clerk	1 hour	20/hr	\$20
Project manager witness	6 hours	50/hr	\$300
Engineer witness	6 hours	45/hr	\$270
TOTAL			\$1,540 X 5 = \$7,700/YR

(2) The probable costs and benefits to the OAH -- The rulemaking does not impose costs on the OAH.

The rulemaking would benefit the OAH in that it would relieve the OAH of having to hear an estimated 8 additional appeals. The savings are estimated as follows:

Savings associated with obtaining 3 additional settlements:

Administrative law judge	6 hours	60/hr	\$360
OAH clerk	2 hours	20/hr	\$40
TOTAL			\$400 X 3 = \$1,200/YR

Savings associated with not having to process 5 noncognizable appeals:

Administrative law judge	6 hours	60/hr	\$360
OAH clerk	2 hours	20/hr	\$40
TOTAL			\$400 X 5 = \$2,000/YR

(3) The probable costs and benefits to the Office of the Attorney General -- The rulemaking does not impose costs on the OAG.

The rulemaking would benefit the OAG in that it would relieve the OAG of having to represent the Department in an estimated 8 additional appeals, estimated as follows:

Savings associated with obtaining 3 additional settlements:

Assistant attorney general	16 hours	70/hr	\$1,120
OAG clerk	2 hours	20/hr	\$40
TOTAL			\$1,160 X 3 = \$3,480/YR

(The savings derive from not having to prepare motions for a hearing and not having to represent the Department at a hearing.)

Savings associated with not having to represent the ADEQ in 5 noncognizable appeals:

Assistant attorney general	40 hours	70/hr	\$2,800
OAH clerk	2 hours	20/hr	\$40
TOTAL			\$2,840 X 5 = \$14,200/YR

(The savings derive from not having to provide the Department with any representation.)

(4) The probable costs and benefits to the potential administrative appellant -- The potential administrative appellant may be a political subdivision, a business, or a natural person.

The rulemaking does not impose costs on the potential administrative appellant, because the rulemaking is not creating or removing legal rights, duties or privileges under the law. Rather, the rulemaking merely clarifies existing law which the Department is obligated to follow whether through rulemaking or as a matter of policy.

The benefits to the potential administrative appellant consist of clarifying for the potential appellant the applicability of existing rules (at R18-1-206 through R18-1-222) to actions of the Department, providing the appellant with the option to settle a contested case as under A.R.S. § 41-1092.06, and providing the potential appellant with general clarification of when it would be cost-ineffective to prepare and file an appeal that must be dismissed as noncognizable.

The Department has no data with which to estimate the typical cost of preparing and filing an appeal that would be either settled or dismissed as noncognizable. For the purposes of this cost-benefit analysis, the Department assigns a conservative savings of \$400 in preparing and filing a request for a hearing, which assumes the potential appellant is not represented by counsel. Assum-

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ing, as above, that 3 contested case appeals would be settled informally and that 5 noncognizable appeals would be avoided, the Department estimates the following total savings would accrue to potential appellants: \$400 X 8 = \$3,200/YR.

c. General description of the probable impact on private and public employment:

The probable impact on private and public employment would be positive, to the extent that the savings described above would be available for hiring and maintaining personnel.

d. Statement of the probable impact on small businesses and consumers:

The probable impact on small businesses is the same as for other potential administrative appellants, which is positive. The probable impact on consumers would be positive to the extent that the savings described above would be available to consumers in the form of lower prices on consumer goods and services provided by the potential administrative appellant.

e. Statement of the probable effect on state revenues:

The probable effect on state revenues would be positive, to the extent that the agencies' savings described above would be available for other uses.

f. Description of less intrusive and less costly alternatives, if any:

The Department is not aware of any less intrusive or less costly alternatives that would clarify the applicability of R18-1-206 through R18-1-222 to actions of the Department, confer appealable agency action rights also upon contested case appellants, or clarify existing law concerning the point at which an appeal becomes cognizable.

9. The name and address of agency personnel with whom persons may communicate regarding the accuracy of the economic, small business, and consumer impact statement:

Name: George Tsiolis  
Address: Department of Environmental Quality  
3033 North Central Avenue  
Phoenix, Arizona 85012  
Telephone: (602) 207-2222  
Fax: (602) 207-2251  
TDD: (602) 207-4829

10. The time, place, and nature of the proceedings for the adoption, amendment, or repeal of the rule or, if no proceeding is scheduled, where, when, and how person may request an oral proceeding on the proposed rule:

The public comment period for these proposed rules begins with the date this notice is published in the Arizona Register and ends on Friday, November 13, 1998. Persons interested in submitting written comments on these proposed rules should mail them or fax them to George Tsiolis, identified above, no later than 5 p.m. on Friday, October 23, 1998.

The Department will hold oral proceedings on this notice of supplemental proposed rulemaking as follows:

Date: Tuesday, November 10, 1998  
Time: 9 a.m.  
Location: ADEQ Room # 1706  
3033 North Central Avenue  
Phoenix, Arizona

The Department is committed to complying with the Americans with Disabilities Act. If any individual with a disability needs special accommodation, please call (602) 207-4795. Persons interested in presenting verbal comments, submitting written comments, or obtaining more information on the proposed rule may do so at the proceedings. The Department will respond to these comments in the notice of final rulemaking.

11. Any other matters prescribed by statute that are applicable to the specific agency or to any specific rule or class of rules:  
Not applicable.

12. Incorporations by reference and their location in the rules:  
None.

13. The full text of the changes follows:

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TITLE 18. ENVIRONMENTAL QUALITY

CHAPTER 1. DEPARTMENT OF ENVIRONMENTAL QUALITY

ADMINISTRATION

~~ARTICLE 2. PRACTICE AND PROCEDURE - CONTESTED CASES ADMINISTRATIVE APPEALS~~

Section

- ~~R18-1-201. Contested case hearing~~
- ~~R18-1-201. Applicability~~
- ~~R18-1-202. Initiation of proceedings and notice~~
- ~~R18-1-202. Adjudication~~
- ~~R18-1-202. Hearing officer~~
- ~~R18-1-203. Contested Case Procedures~~
- ~~R18-1-204. Procedures for motions~~
- ~~R18-1-204. Record of Administrative Appeal~~
- ~~R18-1-205. Motions for more definite statement~~
- ~~R18-1-205. Notice of Intent to Rely on License Application Components as Submitted~~
- ~~R18-1-206. Service of documents other than subpoenas~~
- ~~R18-1-206. Initiation of Hearings before the Department; Notice~~
- ~~R18-1-207. Filing; formalities~~
- ~~R18-1-207. Hearing Officer~~
- ~~R18-1-208. Computation of time~~
- ~~R18-1-208. Procedures for Motions~~
- ~~R18-1-209. Appearance and practice before the Department~~
- ~~R18-1-209. Motions for More Definite Statement~~
- ~~R18-1-210. Intervention~~
- ~~R18-1-210. Service of Documents Other Than Subpoenas~~
- ~~R18-1-211. Conferences~~
- ~~R18-1-211. Filing; Formalities~~
- ~~R18-1-212. Continuances~~
- ~~R18-1-212. Computation of Time~~
- ~~R18-1-213. Communications regarding matters related to a contested case~~
- ~~R18-1-213. Appearance and Practice before the Department~~
- ~~R18-1-214. Reserved~~
- ~~R18-1-214. Intervention~~
- ~~R18-1-215. Evidence~~
- ~~R18-1-215. Conferences~~
- ~~R18-1-216. Subpoenas~~
- ~~R18-1-216. Continuances~~
- ~~R18-1-217. Decisions and orders~~
- ~~R18-1-217. Communications Regarding Matters Related to a Contested Case~~
- ~~R18-1-218. Rehearing or review of decision~~
- ~~R18-1-218. Reserved~~
- ~~R18-1-219. Record~~
- ~~R18-1-219. Evidence~~
- ~~R18-1-220. Subpoenas~~
- ~~R18-1-221. Decisions and Orders~~
- ~~R18-1-222. Rehearing or Review of Decision~~

~~ARTICLE 2. PRACTICE AND PROCEDURE - CONTESTED CASES ADMINISTRATIVE APPEALS~~

~~R18-1-201. Contested case hearings~~

~~This Article shall govern contested case hearings held before the Department in all proceedings in which the legal rights, duties or privileges of a person are required by Title 49 of the Arizona~~

~~Revised Statutes; by Title 41, Chapter 6, Article 6 of the Arizona Revised Statutes; or by rule, to be determined after an opportunity for a hearing. These rules of practice are not applicable to:~~

- ~~1. Oral proceedings held during rule making as described in Article 3.~~
- ~~2. General public hearings held pursuant to Article 4.~~
- ~~3. Hearings before the Air Pollution Control Hearing Board.~~
- ~~4. Hearings before the Water Quality Appeals Board, pursuant to A.R.S. §49-323.~~
- ~~5. Hearings before an administrative law judge in the Arizona Department of Administration, pursuant to A.R.S. § 49-321.~~
- ~~6. Personnel matters, or resolution of disputes involving contracts, held before the Department of Administration.~~

~~R18-1-201. Applicability~~

- ~~A. Sections R18-1-202 through R18-1-205 govern administrative appeals filed with the Department that constitute either a contested case as defined in A.R.S. § 41-1001(S) or an appealable agency action as defined in A.R.S. § 41-1092(3) and that are required under A.R.S. § 41-1092.02 or another statute to be conducted by the Office of Administrative Hearings of the Department of Administration or by a body of formal adjudication other than the Department.~~
- ~~B. In addition to A.R.S. §§ 41-1061 through 41-1067, sections R18-1-202, R18-1-204, and R18-1-206 through R18-1-222 govern the administration of contested case hearings required under the Arizona Revised Statutes or implementing rules to be conducted by the Department and not required under A.R.S. § 41-1092.02 or another statute to be conducted by the Office of Administrative Hearings of the Department of Administration or by another body of formal adjudication.~~

~~R18-1-202. Initiation of proceedings and notice~~

- ~~A. A contested case may be initiated only by the Department or by a person whose legal rights, duties, or privileges are required by Title 49 of the Arizona Revised Statutes; by Title 41, Chapter 6, Article 6 of the Arizona Revised Statutes; or by rule, to be determined after an opportunity for a hearing.~~
- ~~B. A contested case shall be initiated in the manner provided by the statute or rule authorizing the hearing:
  - ~~1. When a contested case hearing is initiated by a request for hearing served upon the Department, the request for hearing shall specifically cite:
    - ~~a. The specific actions of the Department which are the basis of the hearing request.~~
    - ~~b. The statute or rule requiring the Department to grant that person a hearing.~~~~
  - ~~2. Whenever a contested case hearing is initiated by the Department, a copy of the notice of proceedings shall be served by the Director on the parties named therein. The notice shall be in accordance with the provisions of A.R.S. §41-1061.B. The notice shall be signed by the Director.~~~~

~~R18-1-202. Adjudication~~

~~Except as provided in A.R.S. § 41-1092.12, the Department shall not process a notice of administrative appeal in the manner pre-~~

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scribed in A.R.S. §§ 41-1092.03 through 41-1092.06, 41-1092.08, and 41-1092.09 or in the manner prescribed in R18-1-206 through R18-1-222 if the decision or action that is the subject of the notice does not determine the legal rights, duties or privileges of the party filing the notice. The following decisions and actions by the Department do not determine the legal rights, duties or privileges of a party:

1. A decision to perform or not to perform an investigation, audit, review, examination, or other type of information gathering, and the act of information gathering;
2. A decision to issue or not to issue a complaint, summons, or similar accusation, and the issuance of an accusation;
3. A decision to initiate or not to initiate, through the attorney general, a formal judicial proceeding, and the initiation of a formal judicial proceeding;
4. Submission of 1 or both of the following to a license applicant, in accordance with R18-1-205:
  - a. A notice that a license application is incomplete or deficient;
  - b. A request that the license applicant submit to the Department additional license application components or information.

**R18-1-203. Hearing officer**

- A. All contested case hearings under this Article shall be presided over by a hearing officer appointed by the Director.
- B. The hearing officer shall have the following qualifications:
  1. Be a graduate of a law school provisionally or fully approved by the American Bar Association at the time of the hearing officer's graduation.
  2. Be free of any conflict of interest regarding the matter to be considered.
- C. The hearing officer shall have the following duties:
  1. Regulate the course of the contested case hearing.
  2. Rule upon procedural matters incidental to the contested case hearing.
  3. Make findings of fact, conclusions of law and recommendations thereon to be submitted to the Director for decision.
- D. The hearing officer, as well as all parties, may question witnesses.

**R18-1-203. Contested Case Procedures**

- A. Subject to the provisions of A.R.S. §§ 41-1092.01 and 41-1092.02 and except as provided in subsection (B), the Department shall apply the notice and informal settlement conference provisions of A.R.S. §§ 41-1092.03 and 41-1092.06 to contested cases.
- B. If A.R.S. Title 49 provides a time limit on the filing of a notice of administrative appeal, then the person filing the notice of administrative appeal shall comply with that filing time limit.

**R18-1-204. Procedures for motions**

- A. ~~Motions calling for determination of any matter of law shall be filed with the hearing officer in writing. However, such motions may be made orally during a contested case hearing.~~
- B. ~~In the case of prehearing motions, any party may file a response within ten days after service of such motion, and shall serve the response upon the moving party.~~
- C. ~~The moving party shall have ten days after service of a response to file a reply to that response. These time limits for prehearing motions, responses and replies may be shortened or extended by the hearing officer.~~

- D. ~~Prehearing motions shall be considered on the written materials submitted by the parties. No oral argument shall be heard on such matters filed prior to the commencement of the contested case hearing unless the hearing officer so directs.~~
- E. ~~All motions and objections made during the course of the contested case hearing shall be made to the hearing officer who shall rule thereon or take them under advisement for later determination. Objections to the admission or exclusion of evidence shall be made on the record, shall be brief, and shall state the grounds for the objection.~~

**R18-1-204. Record of Administrative Appeal**

The Department shall preserve a record of an administrative appeal of a contested case or appealable agency action for a period of 3 years commencing on the date the notice of appeal is filed with the Department or during the time an appeal of the matter is still pending, whichever is longer. If not made confidential by law, the Department shall make the record available for public inspection upon request.

**R18-1-205. Motions for more definite statement**

~~Within ten days of service of a notice as provided by R18-1-202, any person served with the notice may file a motion with the hearing officer for a more definite statement of the matters stated therein. Such motion shall state the reasons why the notice should be clarified or provide more detail. If the motion is granted by the hearing officer, the order granting such motion shall set the time period in which the more definite statement shall be filed.~~

**R18-1-205. Notice of Intent to Rely on License Application Components as Submitted**

- A. If the Department submits to a license applicant a notice that the application is missing required components, is substantially deficient or is otherwise deficient, or submits to a license applicant a request for additional information to enable the Department to reach a decision to grant the license, then the Department shall include a brief explanation of the basis of or reason for the notice or request.
- B. If a license applicant receives a notice from the Department that the application is lacking application components, is substantially deficient, or is otherwise deficient, or receives from the Department a request for additional information, the applicant, in lieu of submitting some or all of the components or information identified by the Department, may submit to the Department a written notice of intent to rely on the application components as submitted. The applicant shall submit the notice of intent to rely on the application components as submitted within the time specified in the Department's notice of deficiencies or request for additional information. If the Department's notice of deficiencies or request for additional information does not specify a time, then the applicant shall submit the notice of intent to rely on the application components as submitted within 60 days after the mailing date of the Department's notice of deficiencies or request for additional information.
- C. A notice of intent to rely on the application components as submitted shall include the following:
  1. Name of the applicant,
  2. License application number or other identification,
  3. Date of the Department notice or request in question.

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- 4. Identification of the application component or components objected to with reasons for the objection or objections, and
  - 5. A statement that the applicant intends to rely on the application components as submitted as the basis upon which the Department may determine whether to grant or deny the license.
- D.** A license applicant may submit additional license application components or other information at the same time the applicant submits a notice of intent to rely on the application components as submitted.
- E.** The Department, after receiving a notice of intent to rely on the license application components as submitted, shall do 1 of the following:
- 1. Rescind its request for the application component or components objected to in the notice;
  - 2. Modify its request for the application component or components objected to in the notice;
  - 3. Grant the license unconditionally, meaning that the Department did not add conditions not requested by the applicant;
  - 4. Grant the license with conditions, meaning that the Department added conditions not requested by the applicant; or,
  - 5. Deny the license.
- F.** To the extent that a licensing provision of the Arizona Revised Statutes requires different treatment of licensing notifications of application deficiencies or licensing requests for additional information, this Section does not apply.

**R18-1-206. Initiation of Hearings before the Department; Notice**

- A.** A contested case hearing lawfully before the Department shall be initiated in the manner provided by the statute or rule authorizing the hearing. For the purposes of this Article, a contested case hearing is lawfully before the Department if the Arizona Revised Statutes or implementing rules require the hearing to be conducted by the Department and not by another body of formal adjudication.
- B.** When the contested case hearing is initiated by a request for hearing served upon the Department, the request for hearing shall specifically cite:
- 1. The specific actions of the Department which are the basis of the hearing request.
  - 2. The statute or rule requiring the Department to grant that person a hearing.
- C.** When the contested case hearing is initiated by the Department, a copy of the notice of hearings shall be served by the Director on the parties named therein. The notice shall be in accordance with the provisions of A.R.S. § 41-1061(B). The notice shall be signed by the Director.

**R18-1-207. Hearing Officer**

- A.** All contested case hearings lawfully before the Department shall be presided over by a hearing officer appointed by the Director.
- B.** The hearing officer shall have the following qualifications:
- 1. Be a graduate of a law school provisionally or fully approved by the American Bar Association at the time of the hearing officer's graduation.
  - 2. Be free of any conflict of interest regarding the matter to be considered.

- C.** The hearing officer shall have the following duties:
- 1. Regulate the course of the contested case hearing.
  - 2. Rule upon procedural matters incidental to the contested case hearing.
  - 3. Make findings of fact, conclusions of law and recommendations thereon to be submitted to the Director for decision.
- D.** The hearing officer, as well as all parties, may question witnesses.

**R18-1-208. Procedures for Motions**

- A.** During a contested case hearing lawfully before the Department, motions calling for the formal determination of any matter of law by the Department shall be filed in writing with the hearing officer. However, such motions may be made orally during the contested case hearing.
- B.** In the case of prehearing motions, any party may file a response within 10 days after service of such motion, and shall serve the response upon the moving party.
- C.** The moving party shall have 10 days after service of a response to file a reply to that response. These time limits for prehearing motions, responses and replies may be shortened or extended by the hearing officer.
- D.** Prehearing motions shall be considered on the written materials submitted by the parties. No oral argument shall be heard on such matters filed prior to the commencement of the contested case hearing unless the hearing officer so directs.
- E.** All motions and objections made during the course of the contested case hearing shall be made to the hearing officer who shall rule thereon or take them under advisement for later determination. Objections to the admission or exclusion of evidence shall be made on the record, shall be brief, and shall state the grounds for the objection.

**R18-1-209. Motions for More Definite Statement**

Within 10 days of service of a notice as provided by R18-1-206, any person served with the notice may file a motion with the hearing officer for a more definite statement of the matters stated therein. Such motion shall state the reasons why the notice should be clarified or provide more detail. If the motion is granted by the hearing officer, the order granting such motion shall set the time period in which the more definite statement shall be filed.

**R18-1-206 R18-1-210. Service of Documents Other Than Subpoenas**

- A.** Service of documents under these rules R18-1-206 through R18-1-222, except subpoenas, shall be made by personal service on, or by mail addressed to, the Department, the party, and the party's attorney, if the name and address of the party's attorney has been provided to the Department at the time of the preparation of such documents. Service shall be deemed made at the time of personal service of the document or upon deposit of the document in the United States mails, postage prepaid, in a sealed envelope, and addressed to the person being served, at the last known address of record in the Department.
- B.** Proof of service shall be made by filing with the Director a statement in writing that service has been made, stating whether service was made in person or by mail, and signed by the party or the party's attorney. Such statement may be included with the document filed.

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**R18-1-207 R18-1-211. Filing; Formalities**

- A. All documents required to be filed in any a contested case hearing lawfully before the Department shall be filed with the Department within the time limit, if any, for such filing, and service thereof shall be made simultaneously on all other parties to the contested case. Filing shall be deemed to have been made when a document is received by the Department.
- B. A docket of all contested eases case hearings lawfully before the Department shall be maintained by the Department and each contested case shall be assigned a number.
- C. The originals of all pleadings shall be filed. All documents filed shall contain the address and telephone number of the filing party or party's attorney.
- D. Except as otherwise provided by this Article, orders shall only be signed by the Director.

**R18-1-208 R18-1-212. Computation of Time**

- A. When a document required under R18-1-206 through R18-1-222 is served by mail, any limitation on the time in which a response may be made thereto shall be increased by 5 days, or by 7 days for parties residing outside of Arizona state borders.
- B. In computing any period of time prescribed or allowed by these Rules R18-1-206 through R18-1-222, the day of the act, event, or default, after which the designated period of time begins is not to be included. The last day of the period so computed is to be included, unless it is Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is neither Saturday, Sunday, nor a holiday. Intermediate Saturdays, Sundays and holidays shall be included in the computation.

**R18-1-209 R18-1-213. Appearance and Practice before the Department**

- A. An individual may appear in person at a contested case hearing in person lawfully before the Department. A corporation, partnership or other entity may appear through a duly authorized representative. The Department may appear through the Attorney General.
- B. Whether or not participating in person, any party may be advised or represented at the party's own expense by attorney.
- C. When an attorney other than the Attorney General appears before the hearing officer, the names and addresses of the attorney and attorney's client shall be provided to the hearing officer.

**R18-1-210 R18-1-214. Intervention**

- A. A person seeking to intervene in any contested case hearing lawfully before the Department shall file a petition for intervention, in accordance with this Section, specifying why the petitioner should be allowed to intervene.
- B. Requirements for petitions for intervention are as follows:
  1. A petition shall be filed with the Department and served upon all parties at least 15 days prior to the hearing.
  2. A petition shall demonstrate that the petitioner's legal rights, duties privileges, immunities, or other legal interests may be substantially affected by the contested case.
  3. Any party may file a response to the petition for intervention within 5 days of service of the petition upon the party.
- C. The hearing officer shall consider the following in deciding on the petition:

1. Whether the proposed petition for intervention is in the interests of justice;
  2. Whether it may unduly delay or prejudice the contested case hearing;
  3. Whether the applicant's interest is represented by any other party to the contested case.
- D. The hearing officer shall decide on the petition for intervention at least 3 days prior to the hearing date, and shall promptly notify the petitioner and all parties of the decision. The hearing officer may continue a contested case hearing or provide for a prehearing conference, or both, if a petition for intervention is filed so that a party may have sufficient time to prepare for the hearing or to file a response to the petition.

**R18-1-211 R18-1-215. Conferences**

- A. Upon a motion by a party or on the initiative of the Director or the hearing officer, the hearing officer may order a prehearing conference on a contested case hearing lawfully before the Department. The hearing officer shall give all parties and the Attorney General written notice of any prehearing conference. At a prehearing conference, any actions that will secure the just, speedy and inexpensive determination of the case may be considered, including the following:
  1. Formulation, reduction or simplification of the issues.
  2. Disposition of preliminary legal issues, including ruling on any prehearing motions.
  3. Stipulations to facts and legal conclusions.
  4. Stipulations to the admission of certain evidence.
  5. Identification of evidence and disposition of any question about the authenticity of that evidence.
  6. Identification of witnesses.
  7. Resolution of the case without a hearing.
- B. During or after a the prehearing conference, the hearing officer may issue appropriate orders in accordance with Subsection (A) of this Section.
- C. The action taken by the hearing officer during or after a the prehearing conference shall be made a part of the record and shall control the subsequent course of the hearings.

**R18-1-212 R18-1-216. Continuances**

- A. The hearing officer may order a continuance or grant a recess during a contested case hearing lawfully before the Department.
- B. Any party may file a motion for a continuance. For consideration, the motion shall be filed at least 15 days prior to the date set for hearing. The motion shall state the need for the requested postponement.
- C. As soon as practicable after receiving a motion for a continuance, an order shall be issued granting or denying the motion and briefly stating the reasons for the order.

**R18-1-213 R18-1-217. Communications Regarding Matters Related to a Contested Case**

- A. During a contested case hearing lawfully before the Department, a party or person directly or indirectly affected by the outcome of a the contested case shall not make or knowingly cause to be made an oral or written communication regarding any matter related to that contested case, to the Director, the hearing officer, or other Department employee or consultant who is, or may reasonably be expected to be, involved in the decision of the contested case.

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- B. During a the contested case hearing, the Director, the hearing officer, or other Department employee, shall not make or knowingly cause to be made an oral or written communication regarding any matter related to that contested case, to a party or a person who may be directly or indirectly affected by the outcome of the contested case.
- C. Any person who receives an oral or written communication prohibited by this Section shall file a notice of the communication with the Department and serve a copy on the hearing officer, the Attorney General and all parties to the contested case. The notice shall include a copy of the communication, if written, or a summary of the communication, if oral.
- D. Upon receipt of a notice described in subsection (C), the hearing officer shall give all other parties reasonable opportunity to respond to the communication.
- E. This Section shall not apply to the following:
  1. Communications, including motions, made on the record during the course of the contested case hearing.
  2. Communications made in writing, if a copy of the communication is promptly served on the hearing officer, the Attorney General, and all parties to the contested case.
  3. Oral communications made after notice of those communications is given to all parties and the Attorney General.

**R18-1-214 R18-1-218. Reserved**

**R18-1-215 R18-1-219. Evidence**

All witnesses at a contested case hearing lawfully before the Department shall testify under oath or affirmation. All parties shall have the right to present such oral or documentary evidence and to conduct such cross-examination as may be required for a full and true disclosure of the facts. The hearing officer shall receive relevant, probative and material evidence, rule upon offers of proof, and exclude all evidence the hearing officer has determined to be irrelevant, immaterial or unduly repetitious.

**R18-1-216 R18-1-220. Subpoenas**

- A. Subpoenas shall be issued by the hearing officer to require the attendance and testimony of witnesses and parties and the production of reports, papers, contracts, books, accounts, documents and testimony or other evidence at a contested case hearing lawfully before the Department ~~which are~~ as relevant, material and noncumulative either:
  1. At the hearing officer's discretion; or
  2. Upon request of a party, as long as the request complies with subsection (C) (B).
- B. To be considered, any request for a subpoena shall be in writing, shall be filed at least 10 days prior to the date set for hearing absent accident or surprise which could not have been prevented by ordinary prudence, and shall clearly identify the person or documents to be subpoenaed.
- C. The person to whom a subpoena is directed shall comply with its provisions unless, prior to the date set for the contested case hearing, a written request to quash or modify such subpoena is filed with the Department. To be considered, the request shall briefly but thoroughly state the reasons therefor.
- D. Subpoenas shall be personally served. Service of each subpoena is the responsibility of the party requesting the subpoena.

**R18-1-217 R18-1-221. Decisions and Orders**

- A. Within 60 days after the conclusion of a contested case hearing lawfully before the Department, the Director shall issue a decision in writing and serve a copy of the decision by mail to all parties to the case or their attorneys. Final decisions shall state separately findings of fact and conclusions of law. These shall be based on evidence presented at the contested case hearing and on matters that were officially noticed.
- B. Decisions entered by the Director may be released for publication, except where confidential treatment is authorized by the Director.
- C. If no rehearing or review is requested or appeal taken within the time provided therefor, the decision shall become ~~final~~ the final administrative decision.

**R18-1-218 R18-1-222. Rehearing or Review of Decision**

- A. Except as provided in Subsection (G), any party in a contested case hearing lawfully before the Department may file with the Director, not later than 15 days after service of a the decision made under R18-1-221, a written motion for rehearing or review of the decision, specifying the particular grounds therefor. For purposes of this subsection, a decision shall be deemed to have been served when personally delivered or indicated received by certified mail to the party at the party's last known residence or place of business.
- B. A response to a motion for rehearing may be filed by any other party within 10 days after service of such motion upon the party. The Director may require the filing of written briefs upon the issues raised in the motion and may provide for oral argument. The Director shall decide whether to grant a motion for rehearing or review of a the decision within 30 days after the motion is filed.
- C. A rehearing or review of ~~a~~ the decision may be granted by the Director for any of the following causes affecting the moving party's rights:
  1. Irregularity in the conduct of the contested case by the Department or the hearing officer or the prevailing party, or any abuse of discretion, whereby the moving party was deprived of a fair hearing.
  2. Misconduct of the Department or its hearing officer, or the prevailing party.
  3. Accident or surprise which could not have been prevented by ordinary prudence.
  4. Newly discovered material evidence which could not with reasonable diligence have been discovered and produced at the original contested case hearing.
  5. That the decision is not justified by the evidence or is contrary to law.
- D. The Director may affirm or modify the decision or grant a rehearing to any of the parties, and on all or part of the issues, for any of the reasons set forth in subsection (C). After giving the parties or their counsel notice and an opportunity to be heard, the Director may grant a rehearing for a reason not stated in the motion. The order shall specify the grounds on which the rehearing is granted, and the rehearing shall cover only those matters so specified.
- E. Not later than 15 days after a decision is issued, the Director may, independently, order a rehearing or review of the decision for any of the reasons set forth in subsection (C). The order granting such a rehearing shall specify the grounds therefor.

**Notices of Supplemental Proposed Rulemaking**

- F. When a motion for rehearing is based upon affidavits, they shall be served with the motion. An opposing party may, within 10 days after such service, serve opposing affidavits. The period may be extended for an additional period not exceeding 20 days by the Director for good cause shown or by written stipulation of the parties. Reply affidavits may be permitted by the Director.
- G. If in a particular decision the Director makes specific findings that the immediate effectiveness of such decision is necessary for the preservation of the public peace, health and safety, and

that a rehearing or review of the decision is impracticable, unnecessary or contrary to the public interest, the decision may be issued as a final administrative decision without an opportunity for rehearing.

**~~R18-1-219-Record~~**

~~The record of each contested case proceeding shall contain the information prescribed in A.R.S. §41-1061.E, and shall be located in the Department. The record shall be preserved for a period of three years, and, if not confidential by law, shall be made available for examination upon request.~~