

ATTORNEY GENERAL STATEMENT
SLUDGE MANAGEMENT PROGRAM
September 18, 2003

I. Introduction

Since at least 1996, the Arizona Department of Environmental Quality (ADEQ) has administered and enforced a State sludge management program based generally on the federal regulations governing land application of sewage sludge. Formerly codified at Arizona Administrative Code (A.A.C.) R18-13-1501 through R18-13-1514 and Appendix A (effective April 23, 1996), those rules were re-codified to A.A.C. title 18, chapter 9 at R18-9-901 through R18-9-914 and Appendix A, effective May 24, 2001. The re-codified rules have been further amended and incorporated into a new article 10 of A.A.C. title 18, chapter 9, designated Arizona Pollutant Discharge Elimination System: Disposal, Use, and Transportation of Biosolids. These rules became effective December 7, 2001. ADEQ amended the Article 10 rules to address inconsistencies with applicable federal regulations in 40 CFR Part 503; the rules went into effect on January 5, 2003. These rules carry out the authority reconfirmed by the Arizona Legislature to adopt by rule a permit program sufficient to allow the State of Arizona to obtain and maintain state program authority pursuant to section 402(b) of the Clean Water Act, including pretreatment and sewage sludge program requirements. See A.R.S. §§ 49-203 (A)(2), 49-255.01 (B), 49-255.03.

I hereby certify that, in my opinion, the laws of the State of Arizona provide adequate authority to carry out all tasks necessary to implement an effective sewage sludge management program as required by section 405 of the Clean Water Act (CWA), 33 U.S.C. § 1345. This opinion is based on the reasoning and assumptions set forth in the sections below.

II. The Department's Authority to Regulate Sewage Sludge Management Generally

State law provides the Arizona Department of Environmental Quality (ADEQ) with authority to regulate the storage, transportation, and use or disposal of sewage sludge by treatment works treating sewage sludge or other end users or disposers. The sections below discuss this authority in detail.

A. Authority to Regulate Persons Storing, Transporting, Using, or Disposing of Sewage Sludge

State law provides the authority to regulate persons involved in storage, transportation, and use or disposal of sewage sludge. This includes the authority to require compliance with standards issued under Section 405(d) of the CWA, as required by 40 CFR 122.1(b)(3) and 40 CFR 122.4 and/or 40 CFR 501.1(c)(1) to gain program approval.

State Statutory and Regulatory Authority:

A.R.S. §§ 49-203 (A)(2), 49-241(A), 49-255.01 (B), 49-255.03; A.A.C. R18-9-A902 (B)(7) and (C), R18-9-A905(A)(9), R18-9-1002 (A)(1) - (4) and R18-9-103.

Remarks of the Attorney General:

In conjunction with authorizing a State NPDES program to be adopted by rule, the Legislature has indicated its intent that ADEQ include provisions for a State sludge management program consistent with requirements of the CWA. Paragraph 2 of A.R.S. §49-203(A) provides in part: “The program and the rules shall be sufficient to enable this state to administer the permit program identified in section 402(b) of the clean water act including the sewage sludge requirements of section 405 of the clean water act and as prescribed by article 3.1 of this chapter.” A.R.S. § 49-255.03 provides additional specific authority for the State to “adopt rules to establish a sewage sludge program that is consistent with the requirements of §§ 402 and 405 of the clean water act.” Additionally, the statute requires that “[t]he rules adopted by the director shall provide for the regulation of all sewage sludge use or disposal practices used in this state.” A.R.S. §49-255.03 (B).

The adopted rules set forth the types of persons that are subject to standards applicable to sludge management in articles 9 and 10 of A.A.C. title 18, chapter 9. Application of permit requirements to publicly owned treatment works (POTWs) and to a treatment works treating domestic sewage (TWTDS) is specified in A.A.C. R18-9-A902 (B)(7) and (C). Subsection C of R18-9-A902 specifies that Articles 9 (AZPDES) and 10 (Biosolids) apply to “using, applying, generating, marketing, transporting and disposing of biosolids” and that an AZPDES permit may be required. R18-9-1002 (A) (1)-(4) specifies that the standards and requirements of article 10 apply to preparers, transporters, and applicators of biosolids (sewage sludge), to persons who dispose of biosolids in a sewage sludge unit or who own or lease land on which biosolids are applied or placed for disposal, and to the biosolids as well as the land where biosolids are applied or disposed in a surface disposal site. Additionally, R18-9-A905(A)(9) incorporates by reference the federal requirements for surface disposal of sewage sludge included in 40 CFR 503, Subpart C.

Sewage sludge treatment and use or disposal practices continue to be subject to the Aquifer Protection Permits (“APP”) program. A.R.S. § 49-241(A) and 18 A.A.C. 9, Articles 1 and 2. Subsection B of R18-9-1002 and R18-9-103 both exempt land application of biosolids from the APP program if done in a manner consistent with Article 10 (biosolids). If the land application of biosolids is not consistent with Article 10, then the activity is no longer exempt from APP. Subsection D of R18-9-1002 provides that “the Department may permit land application of biosolids in a manner that differs from the requirements in R18-9-1007 and R18-9-1008 if the land application is permitted under the aquifer protection permit program.” Additionally, subsection (E)(2) of R18-9-1002 provides that “[i]n addition to the requirements under subsection (E)(1), any person who owns or operates a biosolids surface disposal site shall apply for and obtain, a permit under [the APP program].”

Lastly, where necessary to protect public health and the environment, the Department may impose, outside of an AZPDES or APP permit, requirements in addition to or more stringent than those specified in 18 A.A.C. 9, Article 10. R18-9-1003(G).

B. Authority to Regulate Methods of Storage and Transportation of Sewage Sludge

State law authorizes the regulation of methods of sewage sludge storage and transportation, as required by 40 CFR 122.1(b)(2) and/or 40 CFR 501.1(d) to gain program approval.

State Statutory and Regulatory Authority:

A.R.S. §§ 49-203 (A)(2), 49-255.01 (B), 49-255.03, 49-761 (I); A.A.C.R18-9-1002 (A) and (C) - (E), R18-9-1011.

Remarks of the Attorney General:

The authority in A.R.S. §49-203 (A)(2) encompasses the authority to adopt all rules necessary to establish a program that is sufficient for the State to administer the NPDES program, including CWA § 405 sewage sludge requirements. Although transportation is not one of the activities listed in 40 CFR 122.1(b)(2) or 501.1(d), ADEQ has retained the transportation rule previously adopted. *See* A.A.C. R18-9-1011. Express authority for ADEQ to regulate the storage and transportation of solid waste, which includes sewage sludge, *see* A.R.S. §49-701.01, is found at A.R.S. §49-761 (I).

C. Authority to Regulate Sewage Sludge Use and Disposal Practices

State law authorizes the regulation of sewage sludge use and disposal, as required by 40 CFR 122.1(b)(2) and/or 40 CFR 501.1(d) to gain program approval.

State Statutory and Regulatory Authority:

A.R.S. §§ 49-241(A) and 49-255.03 (B); A.A.C. title 18, chapter 9, articles 1, 2 and 10.

Remarks of the Attorney General:

As noted in remarks under part A above, A.R.S. §49-255.03 (B) provides express authority to adopt rules to “provide for the regulation of all sewage sludge use or disposal practices used in this state.” Standards and requirements for allowable uses and disposal practices, including transportation of sewage sludge, are contained throughout article 10 of A.A.C. title 18, chapter 9. Land application of sewage sludge is primarily governed by 18 A.A.C. 9, Article 10 requirements. However, as mentioned above, if the land application activities do not comply with Article 10, then the activity is subject to the APP program requirements. A.A.C. R18-9-1002(D) and R18-9-103.

The Department also incorporated 40 CFR 503, Subpart C by reference in R18-9-A905(A)(9), which regulates surface disposal of sewage sludge in addition to the authorities in 18 A.A.C. 9, Article 10. In combination, these authorities impose requirements on preparers of sewage

sludge, persons who place sewage sludge on the surface disposal site, and owners or operators of surface disposal sites. Specifically authorities for each category are:

Preparers of sewage sludge for surface disposal. R18-9-1002(E)(1) requires these preparers to meet the treatment requirements in 40 CFR 503, Subpart C, and pathogen and vector attraction reduction requirements. These preparers must also apply for and obtain an APP permit pursuant to A.R.S. § 49-241(B).

Persons who place sewage sludge on a surface disposal site. These persons must comply with the requirements in 40 CFR 503, Subpart C and as appropriate R18-9-1006 and R18-9-1010.

Persons who own or operate surface disposal sites. These persons must comply with 40 CFR 503, Subpart C; ensure that the requirements in R18-9-1006 and R18-9-1010 are met; and apply for and obtain an APP permit pursuant to R18-9-1002(E)(2) and A.R.S. § 49-241(B).

A.R.S. § 49-241(B) gives the Department the authority to require an APP permit. The Department has broad authority under A.R.S. § 49-203(A)(7) to include any requirements it believes are necessary to protect public health and the environment, including the provisions required under the Biosolids program. The Department has indicated that it will include 40 CFR 503, Subpart C requirements in APP permits for any individual who prepares biosolids for disposal in a surface disposal site or who owns or operates a surface disposal site. Additionally, under the solid waste program authorities, persons who own or operate surface disposal sites must obtain approval for a solid waste facility plan pursuant to A.R.S. §§ 49-762(1), 49-762.03 and 49-762.04.

R18-9-1002(G) prohibits the incineration of sewage sludge. 18 A.A.C. 9, Article 10 does not cover landfilling in a municipal solid waste landfill regulated under 40 CFR part 258, which is regulated by ADEQ's Waste Programs Division pursuant to A.R.S. §49-761 (B).

D. Emergency Response Authority

State law authorizes such action as may be necessary to abate any situation which presents, or could potentially present, an imminent danger to public health or the environment, as required by 40 CFR 123.27(a)(1) and (2) and/or 40 CFR 501.1(c)(4) and 40 CFR 501.17(a)(1) to gain program approval.

State Statutory and Regulatory Authority:

A.R.S. §§ 49-261 (A), 49-262 (A) and (B).

Remarks of the Attorney General:

These provisions of Arizona statutes provide authority for ADEQ to issue administrative orders (§ 49-261 (A)) or to seek immediate injunctive relief (§ 49-262 (A) and (B)) to abate

violations or protect the public health or environment from actual or potential endangerment. These authorities apply to acts in violation of the AZPDES program (including sewage sludge management) adopted pursuant to article 3.1 of chapter 2, A.R.S. title 49, as well as provisions relating to water quality and protection of groundwater under the aquifer protection permit program.

III. The Department's Authority to Issue Sludge Management Permits

State law provides the Department with the authority to issue and enforce permits for the use and disposal of sewage sludge. The sections below discuss this authority in detail.

A. Authority to Issue Sewage Sludge Management Permits

State law provides the authority to issue permits for the generation, use, and disposal of sewage sludge, as required by 40 CFR 122.1(b)(2) and/or 40 CFR 501.1(c)(2) to gain program approval.

State Statutory and Regulatory Authority:

A.R.S. §§ 49-203 (A)(2), 49-241(A), 49-255.01 (B); A.A.C. R18-9-103, R18-9-A902 (B)(7) and (C), and R18-9-1002.

Remarks of the Attorney General:

Sections 49-203 (A)(2) and 49-255.01 (B), A.R.S., grant broad authority to adopt rules regarding sludge management as part of the AZPDES permit program. The adopted rules include POTWs among facilities required to obtain a permit, *see* R18-9-A902 (B)(7). Two other sludge management categories may require permits: treatment works treating domestic sewage, even though there is no discharge requiring a permit, *see* R18-9-A902 (C)(1), and any category involving the use, application, generation, marketing, transportation, and disposal of sewage sludge, *see* R18-9-A902 (C)(2). Consistent with R18-9-103 and R18-9-1002(B), the land application of biosolids is subject to the permitting requirements under the APP program when the land application activities do not comply with 18 A.A.C. 9, Article 10. Thus, Arizona law provides authority consistent with the authority in 40 CFR 122.1(b)(2).

B. Authority to Require Permit Application Information

State law requires each permit applicant to submit an application containing at least that information required by 40 CFR 122.21 and 40 CFR 123.25(a)(4) to gain program approval.

State Statutory and Regulatory Authority:

A.R.S. §§ 49-203 (A)(2), 49-255.01 (B); A.A.C. R18-9-A905 (A)(1)(b).

Remarks of the Attorney General:

The authority in A.R.S. §§ 49-203 (A)(2) and 49-255.01 (B) to adopt rules to establish a permit program consistent with §§ 402(b) and 402(p) of the CWA and including requirements to control discharges consistent with CWA § 405(a) includes the authority to require permit applications that contain all necessary information. The adopted rules incorporate by reference the application information requirements in 40 CFR 122.21(f)-(k) as well as the sewage sludge management requirements of 40 CFR 122.21(q). A.A.C. R18-9-A905 (A)(1)(b).

C. Authority to Impose Permit Conditions

State law authorizes imposing conditions in sludge use and disposal permits at least to the same extent as required by 40 CFR 122.41(a)-(n) and 40 CFR 123.25(a)(12) and/or 40 CFR 501(b)(1-14) to gain program approval.

State Statutory and Regulatory Authority:

A.R.S. §§ 49-203 (A)(2), 49-255.01 (B); A.A.C. R18-9-A905 (A)(3)(a).

Remarks of the Attorney General:

The authority in A.R.S. §§ 49-203 (A)(2) and 49-255.01 (B) to adopt rules to establish a permit program consistent with §§ 402(b) and 402(p) of the CWA and including requirements to control discharges consistent with CWA § 405(a) includes the authority to impose permit conditions consistent with applicable federal regulations. The adopted rules incorporate by reference the applicable permit conditions in 40 CFR 122.41(a)(1), (b)-(n) as required in 40 CFR 123.25(a)(12). A.A.C. R18-9-A905 (A)(3)(a).

D. Authority to Modify, Transfer, Revoke, Reissue, and Terminate Permits for Cause

State law allows permits to be modified, transferred, revoked, reissued, and terminated at least to the extent required by EPA in 40 CFR 122.61; 40 CFR 122.62; 40 CFR 122.63; 40 CFR 122.64; 40 CFR 123.25(a)(21)-(25); and 40 CFR 124.5 and/or 40 CFR 501.15(c)(1)-(3) to gain program approval.

State Statutory and Regulatory Authority:

A.R.S. §§ 49-203 (A)(2), 49-255.01; A.A.C. R18-9-A905 (A)(1)(j), R18-9-B905, R18-9-B906, R18-9-C904.

Remarks of the Attorney General:

The Director has express authority under A.R.S. § 49-255.01 (C)(1) to adopt rules that provide for “issuing, authorizing, denying, modifying, suspending or revoking individual or general permits.” Authority to modify, transfer, revoke and reissue or terminate permits for cause is necessarily implied in the statutory mandate to “establish an AZPDES permit program consistent with the requirements of sections 402 (b) and 402 (p) of the Clean Water Act.” A.R.S. § 49-255.01 (B). A.A.C. R18-9-A905 (A)(1)(j) incorporates by reference the provisions of 40 CFR 122.62, relating to causes for modification and for modification or revocation and reissuance. Provisions for transfer of permits consistent with 40 CFR 122.61 are found in R18-9-B905. Additionally, R18-9-B906 addresses modification, revocation and reissuance, and termination of individual permits; subsection B of the rule includes the minor modification conditions in 40 CFR 122.63 and subsection C includes termination provisions substantially similar to those in 40 CFR 122.64.

IV. The Department’s Authority to Conduct Compliance Monitoring Activities

To ensure that proper sludge use and disposal practices are observed, compliance monitoring and enforcement activities must also be authorized and carried out. State law provides the authority for State personnel to enter private premises, to inspect and sample sludge quality, and to require self-monitoring and reporting by permit holders. The sections below discuss this authority in detail.

A. Authority to Enter and Inspect Treatment Works or Other Use and Disposal Premises

State law provides the authority to enter and inspect premises used for generation, use and/or disposal of sewage sludge, as required by EPA in 40 CFR 123.26(c) and/or 40 CFR 501.15(b)(9)(i)-(iv) and 40 CFR 501.16 to gain program approval.

State Statutory and Regulatory Authority:

A.R.S. § 49-203 (B); A.A.C. R18-9-A905 (A)(3)(a), R18-9-1015.

Remarks of the Attorney General:

The statutory entry and inspection authority in A.R.S. § 49-203 (B)(1) covers public and private property “from which a discharge has occurred, is occurring or may occur or on which any disposal, land application of sludge or treatment regulated by [chapter 2 of A.R.S. title 49] has occurred, is occurring or may be occurring” and on which required records pertaining to such facilities are kept. This broad provision allows actions as necessary to determine the applicability of, or a facility’s compliance with, chapter 2 of A.R.S. title 49, including taking samples, copying records, inspecting equipment and monitoring methods, and taking photographs. Under A.R.S. § 49-203 (B)(2), the Director of ADEQ is authorized to require any person who discharges, who is subject to pretreatment requirements, or who is subject to sewage sludge use or disposal

requirements to keep records and to install, use and maintain monitoring and sampling equipment. The adopted rules incorporate by reference applicable entry and inspection requirements in 40 CFR 122.41(i), which are substantially similar to the provisions of 40 CFR 501.15(b)(9). Additionally, R18-9-1015 provides inspection and entry authority specific to sewage sludge management activities.

B. Authority to Sample Sludge Quality

State law provides the authority to take independent, representative samples of sludge to determine its quality and to determine compliance with applicable sludge standards, as required by EPA in 40 CFR 123.26(a)-(d) and/or 40 CFR 501.15(b)(9)(iv) to gain program approval.

State Statutory and Regulatory Authority:

A.R.S. § 49-203 (B); A.A.C. R18-9-A905 (A)(3)(a), R18-9-1015.

Remarks of the Attorney General:

A.R.S. §49-203 (B) authorizes the ADEQ director or Department employees to take samples and conduct other activities as reasonably necessary to determine applicability of or compliance with the provisions of chapter 2 of A.R.S. title 49.

C. Authority to Require Self-Monitoring and Reporting

State law provides the authority to require self monitoring and reporting on use or disposal practices and sludge quality, as required by EPA in 40 CFR 122.48(b) and (c) and 40 CFR 123.25(a)(19) and/or 40 CFR 501.15(b)(10)(i)-(v) to gain program approval.

State Statutory and Regulatory Authority:

A.R.S. §49-203 (B)(2); A.A.C. R18-9-A905 (A)(3)(g).

Remarks of the Attorney General:

A.R.S. § 49-203 (B)(2) gives the Director authority to adopt rules requiring “any person who [discharges] or may discharge into the waters of the state . . . and any person who is subject to . . . sewage sludge use or disposal requirements. . .to establish and maintain records, including photographs, and to install, use and maintain sampling and monitoring equipment to determine the absence or presence and nature of the discharge or indirect discharge or sewage sludge use or disposal.” The rules incorporate by reference 40 CFR 122.48, *see* A.A.C. R18-9-A905 (A)(3)(g).

V. The Department's Authority to Enforce the Sewage Sludge Management Program

The Department designated is a duly constituted body of the State's Executive Branch and has been granted enforcement powers. The sections below discuss this authority in detail.

A. Authority to Abate Violations of State Law

State law provides the authority to abate violations of State law as required by EPA in 40 CFR 123.27(a)(1) and/or 40 CFR 501.1(c)(5) and 40 CFR 501.17(a)(1) to gain program approval.

State Statutory and Regulatory Authority:

A.R.S. §§ 49-261, 49-262 (A), (B).

Remarks of the Attorney General:

The Director may either issue an administrative compliance order or seek immediate injunctive relief through the court for any violation of Arizona law, rule or permit condition, including any law, rule or permit condition relating to the sewage sludge program, or upon a finding that a person is endangering public health or the environment. Under A.R.S. § 49-261, a compliance order must include notice of a right to hearing and, if a hearing is requested, the order does not become final until conclusion of the appeal. A final order may be enforced in the Superior Court. Under § 49-262 (A), the Director alternatively may seek "a temporary restraining order, a preliminary injunction, a permanent injunction or any other relief necessary to protect the public health" for the same violations. In neither case is the Director required to revoke a permit prior to taking enforcement action. The immediacy of the injunctive relief available under Section 49-262 (A) meets the requirement set forth in 40 CFR 123.27(a)(1). In *State Board of Dental Examiners v. Hyder*, 114 Ariz. 544, 546, 562 P.2d 717, 719 (1977), the Arizona Supreme Court considered the contention that the state agency was required to prove injury or irreparable harm as a condition to a grant of injunctive relief. The Supreme Court held, "Where a state agency has been authorized to institute proceedings in equity to prevent and restrain specified violations of the law, irreparable injury need not be shown. . . . Harm is conclusively presumed from the legislative declaration." (Citations omitted.) Thus, a trial judge has no discretion to deny a request for injunction if the predicate violation is shown. Additionally, outside the AZPDES permit program, the State has authority to regulate sewage sludge under the APP program, which includes enforcement authority.

B. Authority to Assess Administrative Penalties

Not applicable - State law does not provide the authority to assess administrative penalties.

State Statutory and Regulatory Authority:

None.

Remarks of the Attorney General:

We find no indication that the CWA requires a State to have authority to assess administrative penalties in order to gain approval of its NPDES program. Our research reveals nothing in the CWA or implementing regulations that requires a State to have administrative penalty authority, and the Arizona Legislature has not enacted such authority with respect to water permits and water quality standards enforcement.

C. Authority to Seek Injunctive Relief

State law provides the authority to seek both temporary and permanent injunctive relief, as required by EPA in 40 CFR 123.27(a)(1) and (2) and/or 40 CFR 501.17(a)(1) and (2) to gain program approval.

State Statutory and Regulatory Authority:

A.R.S. § 49-262 (A), (B).

Remarks of the Attorney General:

Discussion of the authority to seek injunctive relief is included in remarks under part A of this section, regarding authority to abate violations. In addition, subsection B of A.R.S. §49-262 grants authority to seek temporary or permanent injunctive relief “or any other relief necessary to protect the public health” if the Director, a county attorney, or the Attorney General finds that a person is creating an imminent and substantial endangerment to the public health or environment because of acts performed in violation of law, rules or permits relating to, among other things, the State NPDES program.

D. Authority to Seek Civil Penalties

State law provides the authority to seek civil penalties in the amount of \$5,000 per day for each violation, as required by EPA in 40 CFR 123.27(a)(3)(i) and/or 40 CFR 501.1(c)(5) and 40 CFR 501.17(a)(3)(i) to gain program approval.

State Statutory and Regulatory Authority:

A.R.S. § 49-262 (C).

Remarks of the Attorney General:

A civil penalty not to exceed twenty-five thousand dollars (\$25,000.00) per violation per day is recoverable against any person who violates any law, rule or permit condition or who violates an order issued by the Director. A.R.S. § 49-262 (C). The Attorney General may take independent action to seek civil penalties and must file an action in Superior Court if requested to do so by the Director. *Id.*

E. Authority to Seek Criminal Penalties

State law provides the authority to seek criminal penalties in the amount of \$10,000 per day for each violation as required by EPA in 40 CFR 123.27(a)(3)(ii-iii) and/or 40 CFR 501.1(c)(5) and 40 CFR 501.17(a)(3)(ii) to gain program approval.

State Statutory and Regulatory Authority:

A.R.S. §§ 49-263, 49-263.01 and 49-263.02.

Remarks of the Attorney General:

Criminal provisions applicable to AZPDES violations are found in both title 49 and title 13, A.R.S. Pursuant to A.R.S. §49-263.02, it is unlawful for any person engaged in generation, treatment, transportation, disposal, application and management of sewage sludge, with criminal negligence, to:

1. apply sewage sludge in violation of applicable rules;
2. violate any applicable standard or limitation;
3. violate any condition of a permit or other authorization granted under the sewage sludge program;
4. fail to comply with any applicable filing or reporting requirement;
5. alter, modify or destroy any required monitoring device or method in order to render the device or method inaccurate; or
6. fail to maintain, operate or repair any required monitoring device in order to render the device inaccurate, or fail to install any monitoring device required in a permit.

A criminally negligent violation of the above is a Class 1 misdemeanor while a knowing violation of items 5 or 6 above or a knowing discharge without a permit or appropriate authority under article 3.1 of chapter 2, title 49, A.R.S. is a class 5 felony. A.R.S. §49-263.02 (C). Each day of violation constitutes a separate offense. A.R.S. §49-263.02 (D).

This criminal penalty scheme subjects any corporation, association, labor union or other legal entity to a penalty of up to \$20,000 per day per violation for any violation that constitutes a class 1 misdemeanor and up to one million dollars per day per violation for any violation that constitutes a class 5 felony. A.R.S. § 13-803. An individual is subject to a penalty of up to \$2,500 per day per violation for any violation that constitutes a class 1 misdemeanor and up to \$150,000 per day per violation for any violation that constitutes a class 5 felony. A.R.S. §§ 13-801 and 13-802. However, any amount imposed is increased by 80% by a number of statutory surcharges. See A.R.S. § 13-801.

In addition, if the land application of biosolids (sewage sludge) is not consistent with 18 A.A.C. 9, Article 10, then the activity is subject to the APP program because the exemption does not apply. See R18-9-103 and R18-9-1002 and A.R.S. § 49-241(B)(4). Therefore, the preparer or land applier would be subject to penalties under A.R.S. § 49-263. Thus, for example, a criminal negligence or knowing violation of A.R.S. §49-263 (A) is either a class 6 or a class 5 felony, respectively, with maximum penalties of \$1,000,000 for enterprise or \$150,000 for an individual for each violation.

The owner or operator of the surface disposal site and the preparer of sludge for disposal in a surface disposal site must ensure that the 40 CFR 503, Subpart C requirements are met and also apply for and obtain an APP for the site. If the owner or operator of the surface disposal site or the preparer of sewage sludge for disposal in a surface disposal site criminally violates the treatment requirements in R18-9-1002(E)(1), the violator would be subject to penalties under A.R.S. 49-263.02. Additionally, if a surface disposal activity (including both disposal and preparation for disposal) violated any applicable biosolids requirements of 40 CFR 503 Subpart C included in an APP permit, the permittee would be subject to the criminal penalty provisions of A.R.S. § 49-263. Because the Department commits to including the requirements of 40 CFR 503, Subpart C in APPs for individuals involved with surface disposal activity, the potential penalties associated with these provisions match the federal levels.

Thus, the State has available to it the required criminal penalty amounts for biosolids violations by both enterprises and individuals. The State has the discretion to charge criminal violations under A.R.S. § 49-263.02 (biosolids criminal provisions), and A.R.S. § 49-263 (APP criminal provisions). For an enterprise, under A.R.S. § 49-263.02, the maximum penalty for a criminal violation classified as a felony is \$1 million and for a violation classified as a Class 1 misdemeanor is \$20,000 per day. For an individual, under A.R.S. § 49-263.02, the maximum penalty for a criminal violation classified as a felony is \$150,000 and for criminally negligent violation, classified as a Class 1 misdemeanor, the maximum penalty is \$2500 per day. However, in accordance with the approach discussed above, an individual who, with criminal negligence violates a biosolids program requirement, could be subject to penalties pursuant to A.R.S. § 49-263, under which a criminally negligent violation is a class 6 felony, for which the maximum penalty for an individual is \$150,000. Under A.R.S. § 49-263, a criminally negligent violation may subject an enterprise to a maximum penalty of \$1 million.

Finally, in addition to the criminal penalty provisions specific to the biosolids and APP programs, Arizona has criminal penalty provisions applicable to false statements. A.R.S. § 13-2311 covers any oral or written falsehood made to ADEQ and provides in relevant part:

Notwithstanding any provision of the law to the contrary, in any matter related to the business conducted by any department or agency of this state . . . , any person who, pursuant to a scheme or artifice to defraud or deceive, knowingly falsifies, conceals or covers up a material fact by any trick, scheme or device or makes or uses any false writing or document knowing such writing or document contains any false, fictitious or fraudulent statement or entry is guilty of a class 5 felony.

A.R.S. § 39-161 states that a person who offers to be filed, registered or recorded in a public office in this state an instrument he knows to be false or forged is guilty of a class 6 felony.

Based on all of the authorities discussed above, it is clear that the State's overall penalty scheme meets the Clean Water Act requirements.

F. Affirmative defense to civil enforcement action, A.R.S. §49-262 (F) and (G)

The affirmative defense in A.R.S. §49-262 (F) and (G) provides as follows:

F. Except as applied to permits issued or authorized pursuant to article 3.1 of this chapter, it shall be an affirmative defense to civil liability under this section and § 49-261 for causing or contributing to a violation of a water quality standard established pursuant to this chapter, or a violation of a permit condition prohibiting a violation of an aquifer water quality standard or limitation at the point of compliance or a surface water quality standard if the release that caused or contributed to the violation came from a facility owned or operated by a party that has either:

1. Undertaken a remedial or response action approved by the director or the administrator under this title or CERCLA in response to the release of a hazardous substance, pollutant or contaminant that caused or contributed to the violation of article 2 of this chapter and is in compliance with that remedial or response action.

2. Otherwise resolved its liability for the release of a hazardous substance that caused or contributed to the violation of article 2 of this chapter in whole or in part by the execution of a settlement agreement or consent decree with the director or administrator under this article, CERCLA or any other environmental law and is in compliance with that settlement agreement or consent decree.

G. Subsection F of this section does not prevent the director from taking an appropriate enforcement action to address the release of a hazardous substance, pollutant or contaminant or the violation of a permit condition before or as an element of an approved remedial or response action, settlement agreement or consent decree.

The affirmative defense narrowly shields a violator who is taking remedial action or corrective action under a plan approved by ADEQ or EPA or a settlement agreement or consent decree with ADEQ or EPA from incurring additional daily liability with respect to a water quality standards violation during the period of the agreed action to correct the noncompliance. Ariz. Laws 2002, Chapter 232, § 1 amended this provision by adding the introductory phrase excluding permits issued or authorized under the AZPDES program and subsection G. Since the holder of an AZPDES permit is not eligible for the affirmative defense, it is not applicable to an enforcement action against a preparer of sewage sludge or against any other person covered by a general or individual permit under the AZPDES program. The remaining question is whether the provision could have the effect of making the enforcement provisions in A.R.S. §§ 49-261 and 49-262 less stringent than required under the federal law with respect to land application and surface disposal sites.

The affirmative defense is applicable only if the violator is performing in compliance with the approved plan or settlement agreement or consent decree, and only for the particular release addressed by the approved plan or settlement agreement or consent decree. The 2002 amendment makes clear that the affirmative defense does not preclude the imposition of injunctive relief or civil penalties for the initial release, nor does it exempt a non-permitted discharge from the requirement to obtain a permit or from enforcement. That the release that caused or contributed to a violation of water quality standards is being addressed through an approved plan or settlement indicates that ADEQ or EPA has evaluated the circumstances and determined the appropriate method or program, including whether penalties should be assessed. Since the affirmative defense precludes continuing liability for “the release . . . that caused or contributed to the violation,” ADEQ could take a separate enforcement action for a second discharge involving sewage sludge at the same facility, regardless of the intervening time between the two discharges. Thus, if a land applier has entered into a consent agreement with ADEQ to resolve a violation of water quality standards caused by over application of sewage sludge at a site, and the land applier subsequently over applies at the same site, the second instance would be construed as a second release (not the release addressed by the consent agreement) and would be subject to enforcement. Additionally, the affirmative defense provides no shield for violations of sewage sludge statutes or rules that do not constitute violations of water quality standards or of a permit condition prohibiting a violation of a water quality standard. Thus, other regulatory prohibitions and requirements do not fall within the ambit of the defense.

The affirmative defense applies only to enforcement actions brought under A.R.S. §§ 49-261 and 262; it does not apply to enforcement brought under any other provision of federal or state law. There is no case law interpreting this provision and no history of this provision being raised in any ADEQ enforcement action under §§ 49-261 or 49-262. Based on our narrow interpretation of A.R.S.

§ 49-262 (F) and (G), in our judgment it would not prevent ADEQ from taking enforcement actions that would be available under the federal program.

VI. The Department's Other Miscellaneous Authorities

State law provides the Department with the authority to provide the public with access to information on sludge practices throughout the State and on the compliance status of individual persons. State law also requires that Department personnel be free from conflicts of interest with permit holders or applicants. The sections below discuss this authority in detail:

A. Authority for Public Access to Information

State law provides the authority to grant public access to sludge use and disposal information to the extent required by EPA in 40 CFR 123.25(a)(3) and 40 CFR 122.7 and/or 40 CFR 501.15(a)(1) to gain program approval.

State Statutory and Regulatory Authority:

A.R.S. §49-205

Remarks of the Attorney General:

A.R.S. §49-205 makes any information obtained under the chapter or prepared by ADEQ under the chapter a public record available to the public, except for trade secrets, income tax returns, and information that the Attorney General determines should not be released during a criminal investigation or civil action in Superior Court. Under subsections B and C of Section 49-205, confidentiality may not be claimed for permit applications or effluent discharge data, including the presence of a pollutant and the nature and quantity of any discharge. Subsection C (1) requires public availability for “[i]nformation required to be submitted in a permit application,” which is deemed consistent with the requirements of 40 CFR 501.15(a)(1)(ii). Sewage sludge data would be included either in data relating to a discharge, *see* A.R.S. §49-205 (B)(2) and (C)(2) and (3), or in data relating to the existence or level of a concentration of a pollutant in the environment, *see Id.* at (B)(3).

Arizona law has a strong presumption of public availability with respect to records in the possession of State agencies. *Carlson v. Pima County*, 141 Ariz. 487, 491, 687 P.2d 1242, 1246 (1984) (“all records required to be kept under A.R.S. § 39-121.01 (B) are presumed open to the public for inspection as public records.”) Section 39-121.01 (B) requires public bodies and officers to maintain records that are “reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities which are supported by funds from the state or any political subdivision of the state.” The combination of the Arizona public records law and A.R.S. §49-205 means that ADEQ must maintain all records and other information obtained

pursuant to the AZPDES program and must make such records and information available to the public, except as otherwise provided by statute.

B. Authority Prohibiting Conflict of Interest

State law prohibits Department personnel from having any conflict of interest with permittees or applicants as required by EPA in 40 CFR 123.25(c) and/or 40 CFR 501.15(f) to gain program approval.

State Statutory and Regulatory Authority:

A.R.S. §§ 49-322, 49-323.

Remarks of the Attorney General:

Arizona law provides for a Water Quality Appeals Board to hear appeals “from any grant, denial, modification or revocation of any individual permit issued under [chapter 2 of A.R.S. title 49].” A.R.S. §49-323 (A). As amended by Ariz. Laws 2001, Ch. 357, § 10, membership on the board is limited in accordance with federal guidelines, *see* A.R.S. §49-322 (B). Prior to the 2001 amendment, a person employed by a local or county agency was permitted to serve on the board.

VII. State Delegation to Local Agency (Part 501 State Programs Only)

State law provides for the delegation of program responsibilities by a State agency to a local agency provided that the conditions required by EPA in 40 CFR 501.1(i) are met.

State Statutory and Regulatory Authority:

A.R.S. §49-107.

Remarks of the Attorney General:

Pursuant to A.R.S. §49-107 (A), the Director may delegate program “functions, powers or duties which the Director believes can be competently, efficiently and properly performed by the local agency if the local agency accepts the delegation and agrees to perform the delegated functions, powers and duties according to the standards of performance required by law and prescribed by the Director.” This provision gives the Director the necessary discretion to evaluate competency based on the conditions specified in 40 CFR 501.1(i). However, ADEQ has indicated that it has no present plans to delegate any aspect of the sludge management program.

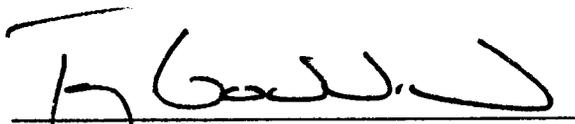
VIII. Certification of Effectiveness of the Law and Regulations

I, the undersigned, certify that all of the laws and regulations discussed in Sections I through VII of this document have been duly adopted according to the legislative and rulemaking procedures prescribed under State law, and that those laws and regulations are now effective and enforceable or will be as of the date of program approval.

Summary

It is my considered opinion that the statutes and regulations of the State provide the Arizona Department of Environmental Quality with adequate authority to administer a State Sewage Sludge Management Program which is at least as stringent as the program administered by EPA; that all of the State statutes and regulations cited herein are fully effective and enforceable; that there are no judicial precedents which substantially restrict the Department's exercise of this authority; and that this authority is sufficient to receive program approval by the EPA.

CERTIFIED on this 26 day of September 2003, in the City of Phoenix, State of Arizona.


TERRY GODDARD
ATTORNEY GENERAL OF ARIZONA