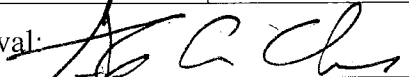


A.R.S. § 41-1091(B) substantive policy statement:

“This substantive policy statement is advisory only. A substantive policy statement does not include internal procedural documents that only affect the internal procedures of the agency and does not impose additional requirements or penalties on regulated parties or include confidential information or rules made in accordance with the Arizona administrative procedure act. If you believe that this substantive policy statement does impose additional requirements or penalties on regulated parties you may petition the agency under Arizona Revised Statutes section 41-1033 for a review of the statement.”

Name of Policy:  <b>INFORMAL RESOLUTION OF TECHNICAL DISPUTES</b>	Document No.	3011.000
	Revision No.	
	Effective Date	6-30-2004
	Approval:	

1.0 Purpose

This substantive policy statement informs the general public of ADEQ’s current approach to, or opinion of, the requirements of Arizona statute (A.R.S.) Title 49, Chapter 2, Articles 1, 2, 3, 3.1, and 8; A.R.S. §§ 41-1075(B), 41-1092(3), 49-104(A)(1), and 41-2501 et. seq.; Arizona Administrative Code (A.A.C.) Title 18, Chapter 9; A.A.C. R18-1-510; and R2-7-101, et. seq.

Throughout the phases of negotiating a water quality permit, the ADEQ permitting team and the permit applicant sometimes reach an impasse in resolving certain technical issues while reviewing applications. If the two parties cannot reach agreement in an expeditious manner, the issue may remain unresolved for inordinate amounts of time. In the past, no independent panel was available to review technical decisions made during the application review process. This policy defines an expedited, informal process to resolve such disputes that arise when ADEQ makes a technical determination that the applicant disagrees with. The process is voluntary and will be followed only when both parties agree to the process outlined here.

2.0 Revision History

Date	Rev. No.	Change	Ref. Section
		New policy drafted	Not Applicable

3.0 Persons Affected

3.1 Water Permits Section management and staff and stakeholders who receive water quality permits issued by the Water Permits Section of the Water Quality Division.

#### 4.0 Policy

- 4.1 When resolution of technical issues reaches an impasse between ADEQ and a permit applicant, the applicant is free to request a review of the disputed technical issue(s) by an independent third party.
- 4.2 This policy provides the applicant with two options for obtaining a review by an independent third party. Under Option 1, the Water Quality Division (WQD) Director issues a written decision. Under Option 2, the independent third party consists of a panel of one or three technical professionals. The technical dispute panel, as it is known, renders an opinion that serves as the final recommendation to the WQD Director on the matter.
- 4.3 The dispute resolution process begins only after the technical issue has received due consideration first by the ADEQ permitting staff, followed by the supervisor of the permitting unit, and lastly by the Manager of the Water Permits Section.
- 4.4 The applicant may request a third party consideration of a technical issue only after ADEQ has sent a formal written response to the applicant. Agreeing that an issue is subject to this policy requires the parties to agree to suspend licensing time-frames, where applicable.
- 4.5 The technical dispute resolution process can only occur during the time the permit application is subject to technical review in the substantive review phase of licensing time-frames. The Department's notice of intent to issue or deny the permit marks the end of the technical review phase after which the Department will not honor any requests under the technical dispute resolution process. The licensing time frames may be suspended to allow the dispute resolution process as a result of the Department's Comprehensive Request for Additional Information (A.A.C. R18-1-504(C)). If the technical dispute does not arise during the period that the Department has suspended time frames, both parties must mutually agree to enter either a "LTF Supplemental Request Agreement" (A.A.C. R18-1-509) or a "LTF Extension Agreement" (A.A.C. R18-1-510) to allow time within the applicable time frames to resolve the technical dispute.
- 4.6 A Request for Issue Resolution concerning a permitting project that is subject to licensing time-frames must be received and date stamped by ADEQ at least 7 business days prior to the end of the technical review in the substantive review phase of licensing time-frames.
- 4.7 The technical dispute resolution process is also applicable to permitting projects not subject to licensing time-frames during the technical review phase. No special time frame agreements between ADEQ and the applicant are required. In the case where a permitting project is not subject to licensing time-frames, a Request for Issue Resolution must be received and date stamped by ADEQ at least 7 business days prior to the beginning of the 30-day public comment period.
- 4.8 Technical disputes handled by the panel are limited to the following broad scientific

disciplines or technical areas and any related sub-disciplines:

1. Civil and environmental engineering
2. Geology
3. Hydrology and hydrogeology
4. Soil science
5. Mathematics, statistics, computer modeling
6. Chemistry
7. Toxicology
8. Biology

4.9 Under these broad scientific disciplines, the types of technical issues subject to consideration by this policy could include, but are not limited to:

1. Model selection, development, calibration and interpretation (e.g., fate and transport, attenuation, absorption, adsorption, etc.)
2. Adequacy of site characterization
3. Level of detail required in a technical submittal to the Department
4. Amount of background data necessary to form a technical judgment
5. Statistical evaluation of data
6. Selection and specifications for proper monitoring instrumentation, including number and location of monitoring points
7. Engineering designs and technical basis for BADCT
8. Existence and boundaries of passive containment systems
9. Technical aspects of a facility that effect its general permit or exempt status
10. Placement and construction of monitoring wells
11. Technical decisions underlying remedial action and mitigation measure decisions (A.R.S. § 49-243(L) and (M))
12. Other permit determinations, including discharge or effluent limitations, alert or assessment levels, and closure, post-closure and contingency plan technical requirements

4.10 The informal technical appeals process described in this policy should be completed as expeditiously as possible and in no event exceed 90 days. This maintains the effectiveness of the process and prevents undue delays in permitting. The policy is intended for use only in those rare instances when permit negotiations become protracted or reach an impasse after all avenues for internal resolution through the normal negotiating process have been exhausted.

## 5.0 Definitions

- 5.1 “Qualified professional” means a person who, with respect to the area of science identified in the request for issue resolution, is possessed of an academic degree from an accredited program at a four-year institution or international equivalent and has at least four years of professional experience applying the area of science identified in the request for issue resolution.
- 5.2 “Request for Issue Resolution” means a letter addressed to the ADEQ project manager,

with the words “Request for Issue Resolution” and the facility name as it appears on the permit application, in the subject heading.

## 6.0 Responsibility

- 6.1 The responsibility of informing permit applicants of this policy, complying with the policy and ensuring that it is carried out consistently, rests with all Water Permits Section personnel and their supervisors who manage or issue permits in the Water Permits Section. Furthermore, Water Permits Section personnel have the responsibility of informing AZPDES permit applicants that the U.S. Environmental Protection Agency makes the final determination on all AZPDES permits issued in Arizona and it may reverse a decision reached under this policy’s procedures.
- 6.2 The applicant and ADEQ will each bear their own costs in the informal technical appeals process, regardless of the outcome. For ADEQ, non-billable time (pertaining to a water quality protection service as defined in A.A.C. R18-14-101(8)) on the disputed issue, is triggered by the receipt of a “Request for Issue Resolution.” Billing resumes when the Division Director issues a written decision in Step 2 of the Procedures. All other matters on the permitting project not related to this issue remain billable.
- 6.3 If the applicant and ADEQ agree, the cost of the independent panel member can be equally shared up to a \$1000 cap. The applicant may exercise the option to bear the entire cost of the independent panel member. ADEQ must comply with A.R.S. § 41-2501 et. seq. and A.A.C. R2-7-101, et. seq., commonly known as the state procurement code.

## 7.0 Procedures

- 7.1 Every attempt must be made first to try to resolve a technical issue through the normal negotiating process. The dispute resolution process can only begin after the technical issue has received due consideration by the appropriate Water Permits Section staff in the following order:
  1. ADEQ permitting staff
  2. Supervisor of the permitting unit
  3. Section Manager

Each side must present to the other, the technical arguments to justify its position. Only if this effort fails to resolve the issue will the informal technical dispute resolution process be used.

- 7.2 **Due consideration under the normal negotiating process:** before ADEQ will accept an applicant’s request to begin the technical dispute resolution process, a person must first elevate a technical issue within the Department by following the procedures listed below:
  1. ADEQ project manager / technical staff put a technical decision in writing and send it to the applicant. At this point the applicant must decide either:

- a. To accept ADEQ's determination; or
  - b. Answer with an alternate proposal and explain, based on technical grounds, why the ADEQ determination is unacceptable;
2. If the two groups (ADEQ permit team and applicant's team) cannot resolve the issue, the two sides must meet with the Unit Supervisor, and/or the Section Manager, either of whom can mediate the issue, and try to find resolution;
3. If the Unit Supervisor/Section Manager meeting concludes without a resolution satisfactory to both parties, the applicant may choose one of the following two options:
- a. Option 1. Request a review in writing by WQD Director.
    - i. The applicant will provide ADEQ management with the written preliminary technical decision and will also provide a written explanation of the applicant's position. The applicant may request that a meeting be held to discuss the issue among all interested parties (ADEQ management, ADEQ technical staff, and the applicant). If requested, the meeting will be held within 7 business days of ADEQ's receipt of the request;
    - ii. The WQD Director will render a written decision within 7 business days of receipt of the initial request, if no meeting is requested, or within 7 business days from the meeting between ADEQ and the applicant;
    - iii. The finding of the WQD Director is final and cannot be reviewed by the technical dispute panel in option 2. The Director's written interim determination is not an appealable agency action but the final permit decision is appealable. See A.R.S. Title 49, Chapter 2, Article 7 (the Aquifer Protection Permit appeal process).
  - b. Option 2. Invoke the technical dispute resolution process by filing a "Request for Issue Resolution." This request starts the technical dispute resolution process. At a minimum, the Request for Issue Resolution must:
    - i. Describe the scientific/technical issue that the person disagrees with
    - ii. Identify the area of scientific expertise needed
    - iii. Request a meeting with the technical dispute panel (if desired)

- iv. Summarize the nature of and why the applicant believes there is a misinterpretation of scientific facts or an error in judgment
- v. Make any relevant citations from the scientific literature justifying the position
- vi. Propose a resolution to the dispute
- vii. Include the applicant's signature on the letter; if the applicant is unable to sign, provide evidence of the applicant's approval to file the notice

7.3 The technical dispute resolution process has two steps. ADEQ and the applicant may, by mutual agreement, waive certain requirements discussed in the steps below.

7.3.1 Step 1 - Review of the ADEQ program's technical decision by an independent technical panel.

1. Technical review panel.

ADEQ and the applicant may, by mutual agreement, decide to have the ADEQ program's written technical decision reviewed by an independent technical panel. The applicant must respond in writing with a "Request for Issue Resolution" within 7 business days of receipt of the program's written decision. The applicant's issue resolution request should be addressed to the unit supervisor of the appropriate permitting unit. ADEQ will only accept a letter from the permit applicant or his consultant.

2. The applicant and ADEQ will mutually agree to extend any applicable licensing time frames, pursuant to A.R.S. § 41-1075(B).

3. Panel selection.

- a. The applicant and ADEQ will, by mutual agreement, select a panel of 1 or 3 members of qualified professionals. In the case of a one-person panel, ADEQ and the applicant must mutually agree to the nominee. If either side prefers more than a single-person panel, the panel shall consist of 3 individuals (one chosen by ADEQ, one chosen by the applicant, and one mutually agreed upon). Panel members should be selected to achieve an objective approach to solving the dispute. For example, ADEQ is not limited in the choice of its representative on the panel, except that the person must be from outside of the program that has the disputed technical issue. Likewise, the applicant's panel member must not be a member of the same consulting firm working on the permit or an employee of the applicant who is currently or has directly worked on the project in the past.
- b. Selection of panelist(s) is to be completed within 7 business days

of receipt of written notice by ADEQ or the applicant that the other party wishes independent technical review of an ADEQ technical decision.

4. ADEQ and the applicant will provide written statements of their respective positions to the panel within 10 business days of completion of the panel's selection. A copy of ADEQ's initial written decision shall also be provided to the panel within the same time period.
5. Groundrules for meeting with the panel.
  - a. If requested by ADEQ or the applicant, a joint presentation before the panel will be held. Each side will have a maximum of 1 hour to present their respective positions. The panel will have an additional 1 hour to ask questions. Presentations are informal and are not restricted by any formal rules. Technical experts who have been involved in the permit negotiations may participate. Attorneys will not participate in the presentations. Neither side can raise issues or arguments not previously provided to the panel in writing. Nor can the applicant raise new issues not previously discussed during technical negotiations. Each side shall provide to the other at least 2 business days prior to the presentation copies of all written materials to be used at the presentation.
  - b. More than one issue may be reviewed by an independent technical panel simultaneously. In this case, the length of the joint presentation, as well as the deadlines provided above, may be extended by mutual written agreement.
6. The panel provides a written recommendation to WQD Director and the applicant within 10 business days of the joint presentation. The panel may adopt as its recommendation, ADEQ's position, the applicant's position, or another position.

#### 7.3.2 Step 2 – Consideration of the panel's recommendation by ADEQ

1. The WQD Director will determine whether or not to accept the panel's recommendation and will put the decision in a memo to the ADEQ project manager. This determination will ordinarily be made within 7 business days of receipt of the panel's recommendation. A copy of the memo will also be mailed to the applicant. The WQD Director is not bound to accept the panel's recommendation. Refusal to do so is not immediately appealable to the Office of Administrative Hearings or a court. Also, the WQD Director's finding constitutes a written interim determination and is not an appealable agency action. The WQD Director's final permit decision is appealable. See A.R.S. Title 49, Chapter 2, Article 7 (the Aquifer Protection Permit appeal process).

2. The panel's recommendation, and a summary of whether ADEQ chose to accept that recommendation (including, if applicable, a copy of ADEQ's explanation for not accepting the panel's recommendation), is made part of the record for ADEQ's final decision, and may be referenced in any appeal of that decision.

8.0 Additional Documentation

No documentation required.