

NOTICE OF FINAL RULEMAKING
TITLE 3. AGRICULTURE
CHAPTER 2. DEPARTMENT OF AGRICULTURE
ANIMAL SERVICES DIVISION

PREAMBLE

- | <u>1. Sections Affected</u> | <u>Rulemaking Action</u> |
|------------------------------------|---------------------------------|
| R3-2-901 | Amend |
| R3-2-903 | Amend |
| R3-2-906 | Amend |
| <u>R3-2-907</u> | New Section |
| <u>R3-2-908</u> | New Section |
- 2. The statutory authority for the rulemaking, including both the authorizing statute (general) and the statutes the rules are implementing (specific):**
Authorizing statute: A.R.S. § 3-107
Implementing statute: A.R.S. § 3-710
- 3. The effective date of the rules:**
October 1, 2009.
- 4. A list of all previous notices appearing in the Register addressing the final rule:**
Notice of Docket Opening: 14 A.A.R. 4265, November 14, 2008; and
Notice of Proposed Rulemaking: 14 A.A.R. 4228, November 14, 2008.
- 5. The name and address of agency personnel with whom persons may communicate regarding the rulemaking:**
Name: Dr. John Hunt, Associate Director
Address: Arizona Department of Agriculture
1688 West Adams
Phoenix, Arizona 85007
Telephone Number: (602) 542-7186
Fax Number: (602) 542-3244
E-mail: jhunt@azda.gov
- 6. An explanation of the rule, including the agency's reasons for initiating the rules:**
The Arizona Department of Agriculture is amending its rules dealing with eggs and egg products controls as well as adding new rules to implement new guidelines for the production of shell eggs in this state. These amendments are authorized under statutory provisions made under SB1373, approved during the 2008 legislative session.

Under the amendments, all caged egg-laying hens in the state will be required to be raised according to the United Egg Producers (UEP) Animal Husbandry Guidelines. These guidelines were created as best

management practices by the egg production industry to ensure the safe consumption of quality-produced eggs as well as recognizing the growing concern for animal welfare. Additionally, under the amendments, all eggs sold in this state produced by caged hens must be from hens raised according to the UEP Animal Husbandry Guidelines, and egg dealers must either display the UEP Certified logo on the cases, cartons, and containers of those eggs or annually provide the Department with a copy of the results from an independent audit that demonstrates compliance with the UEP Animal Husbandry Guidelines. An exemption from these poultry husbandry requirements applies to egg producers operating or controlling the operation of one or more egg ranches if each ranch has fewer than 20,000 egg-laying hens that produce eggs, as authorized specifically by statute. Further, under the amendments, all egg producers in Arizona must also meet the facility and sanitary operation requirements prescribed by the Regulations Governing the Voluntary Grading of Shell Eggs, 7 CFR Part 56, effective March 30, 2008.

Additional supporting amendments to prescribe definitions of terms, sampling and inspection guidelines, and violations and penalties will also be made to the rules to make them consistent with the substantive amendments.

7. A reference to any study relevant to the rules that the agency reviewed and either relied on in its evaluation of or justification for the rules or did not rely on in its evaluation of or justification for the rules, where the public may obtain or review each study, all data underlying each study, and any analysis of each study and other supporting material:

The Department obtained the following studies related to poultry husbandry during the public comment period. Copies of these studies may be obtained or reviewed at the Department by contacting the person listed in item #5 above. The Department does not have data underlying the studies or any analysis of the studies.

A. Mahe et al., *Bayesian estimation of flock-level sensitivity of detection of Salmonella spp., Enteritidis and Typhimurium according to the sampling procedure in French laying-hen houses*, 84 PREVENTIVE VETERINARY MEDICINE 11-26 (2008).

Don Bell et al., *UEP uses scientific approach in its establishment of welfare guidelines*, FEEDSTUFFS, March 15, 2004.

Farm Sanctuary, *Farm Animal Welfare: An Assessment of Product Labeling Claims, Industry Quality Assurance Guidelines and Third Party Certification Standards, Comparison of Animal Welfare Standards by Program – Egg-Laying Hens*, app. at 104.

Harriet Namata et al., *Salmonella in Belgian laying hens: An identification of risk factors*, 83 PREVENTIVE VETERINARY MEDICINE 323-36 (2008).

LayWel, *Welfare implications of changes in production systems for laying hems* (2006) (contract # SSPE-CT-2004-502315).

L.C. Snow et al., *Survey of the prevalence of Salmonella species on commercial laying farms in the United Kingdom*, 161 VETERINARY RECORD 471-76 (2007).

8. 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.

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

The Department believes the rulemaking will have a moderate economic impact on the Department, as well as on some caged-facility egg producers that sell shell eggs in Arizona and retailers that sell these eggs. The Department will assume responsibility for enforcement and inspection of the production, labeling, and sanitation requirements, which will be added to the duties of the Department's egg inspectors. The rulemaking will also require large caged-facility shell egg producers to either become UEP Certified and identify their product as such or evidence that they satisfy the UEP Animal Husbandry Guidelines (UEP Guidelines) by submitting to the Department independent audits in order to sell in Arizona. The Department does not believe the rulemaking will significantly affect caged-facility egg producers in this state, since all applicable producers are already UEP certified, and will therefore not affect employment or state revenue. The rulemaking will also have a minimal effect on affiliates of local egg producers, particularly egg packaging manufacturers that will have to include certification information on their packaging. Alterations to packaging do not require substantial modifications to packaging equipment and can be altered with relative ease and minimal cost.

The Department is unsure of how many large out-of-state caged-facility egg producers who currently sell shell eggs in Arizona are not presently meeting the UEP Guidelines. An informal survey of retailers performed by the Department indicated that compliance with the UEP logo requirement ranged from 0% to 100% at various retailers with respect to the brands of eggs that would be subject to the new rule. Many of these eggs may be from UEP certified companies that are not currently using the UEP certified logo on their packaging. The cost of adding the logo or submitting audit results to the Department is minimal. These eggs may also be from companies who meet the UEP Guidelines, but have elected not to be UEP certified. The cost for these non-certified companies to undergo an independent audit, if they are not already doing so, is also minimal. There would be a substantial economic impact on any out-of-state company subject to the rulemaking that could no longer sell shell eggs in Arizona as a result of not meeting the UEP Guidelines. The Department is aware of at least one large out-of-state company likely to be subject to the rulemaking that is not currently UEP certified, but believes that company has hens raised according to the UEP Guidelines from which it can sell eggs in this state. There would also be a corresponding substantial economic impact for companies meeting the UEP Guidelines that increase shell egg sales in Arizona to buyers who previously purchased from companies that do not meet the requirements of the UEP Guidelines. Nonetheless, the Department believes there are no less intrusive or less costly methods of achieving the objectives of the rulemaking and holds that the benefits of the rulemaking outweigh any costs.

The rulemaking also requires egg producers to comply with federal sanitary standards when processing their eggs. The processing of eggs involves grading, washing, and candling. The incorporated federal standards do not cover mere production of eggs. Arizona's statutes allow egg producers to sell "nest run eggs," that is unprocessed eggs, if the producer sells 25 cases (750 dozen) of eggs or less each year. So the sanitary standards are not applicable to small egg producers that only sell nest run eggs, and thus there is no economic impact for those producers. Presently, there is only one egg producer in Arizona that processes its eggs; all the other egg producers sell unprocessed nest run eggs. That one egg producer is already part of a USDA program that requires it to comply with 7 CFR 56, so any economic impact on the Department or that producer from this rule is minimal. The purpose of the rule is to ensure that any new egg producer in Arizona that processes its eggs (sells more than 25 cases) meets the federal processing standards, whether or not the producer participates in the USDA program.

The rulemaking will not affect state public or private employment, small businesses, or the state's general fund.

10. A description of the changes between the proposed rules, including supplemental notices and final rules (if applicable):

The Department has modified R3-4-907(B) to allow egg producers more flexibility in evidencing compliance with the UEP Guidelines. In the proposed rule, an out-of-state producer needed to become UEP Certified, which evidenced compliance with the UEP Guidelines, and use the UEP logo. The purpose of using the logo was for the Department to verify that the company was UEP Certified. In the final rule, an out-of-state producer still has to comply with the UEP Guidelines, but has the option of proving compliance by either becoming UEP Certified and using the UEP logo or providing the Department with annual compliance audits performed by independent third parties. The Department believes this alleviates some of the burden placed on out-of-state producers without resulting in greater or additional penalties for violation, and thus does not constitute a substantive change. The Department has also made a few changes in word choice to the rule language in R3-4-907 not intended to change the rule meaning in any way.

11. A summary of the comments made regarding the rule and the agency response to them:

The Department received over 1,000 written comments and 7 oral comments regarding this rulemaking. Due to the large number of comments, the Department has chosen to categorize and group identical and similar comments for response.

Comments Supporting the Rulemaking

The Department received an oral comment in support of the rulemaking from a representative of one of the state's egg producers. The commenter approved of the difference in treatment between large producers and small producers. The commenter also spoke in favor of standards for the types of cleaning agents and sanitation and the ability of the Department to enforce these standards. The commenter also supported the use of the UEP Guidelines as addressing animal welfare issues. The commenter stated the rulemaking provides

the animals with freedom from hunger and thirst by granting access to fresh water and diet to maintain full health and vigor; freedom from discomfort by providing an appropriate environment, including shelter and a comfortable resting area; freedom from pain, injury, and disease by prevention or rapid diagnosis and treatment; freedom to express normal behavior by providing sufficient space and proper facilities in company of the animals' own kind; and freedom from fear and stress by ensuring conditions and treatment which avoid needless suffering. The commenter also stated the UEP Guidelines benefit hens by providing them space to walk, sit down, stretch, and extend their wings without physical discomfort, as well as shelter from environmental stress and predators; individual monitoring; and access to food and water at all times, including when molting. The commenter further stated the UEP Guidelines require that transportation, handling, and beak trimming, if performed, be done only by trained staff in a manner to minimize stress and that they require a company to have a standard operating procedure dealing with emergency depopulation in the event of a TB outbreak or other disaster. The commenter additionally stated that compliance with UEP Guidelines is documented and verified by independent third parties and that all employees and principals must be trained and sign statements affirming their strict adherence to these standards.

The Department received written and oral comments from an attorney representing one of the state's egg producers in support of the rulemaking. The commenter stated that Arizona is the first state to adopt a comprehensive set of standards for poultry husbandry at the legislative level and will hopefully be the first at the administrative level. The commenter pointed out that the UEP does not require a producer to be a member of the organization to be allowed to adopt the guidelines and use the logo. The commenter also stated the rulemaking fulfills the intent of the governor and the legislature expressed by the passing and signing of SB1373. The commenter stated that the UEP standards were established from recommendations made by an independent scientific advisory committee charged with reviewing all scientific literature on animal well-being for egg-laying hens and that these program standards are the strictest in the industry. The commenter also stated that UEP certified companies are subject to audits performed by USDA or Validus, an independent certification company. The commenter also stated the UEP Certified program for cage production provides assurance that hens receive adequate space, nutritious food, clean water, proper lighting, and fresh air daily; improves the flock's livability and egg production rates; and has been recognized by the USDA, the FDA, and the FTC as a model from which to create animal welfare programs.

The Department received an oral comment in support of the rulemaking from the Vice President of Sales and Marketing of one of the state's egg producers. The commenter stated that his company believes in providing consumers with choices between high-end and thus higher priced food and more affordable products for economically disadvantaged families. The commenter explained that at this time his company is the only commercial egg producer in the state, but that if other egg producing companies decide to place facilities within the state, the rulemaking would put all producers on an equal footing.

Agency Response: The Department appreciates the support given by these individuals and agrees that prescribing guidelines for eggs produced and sold in the state takes steps to ensure the welfare of egg-laying hens and ensures that local producers are competitive in the marketplace as well.

Comments Opposing the Rulemaking: Cage-Free Advocates

The Department received identical written comments from 1,096 individuals. The comments were sent by residents using an independent third-party website that allowed individuals to add their name and address to a form letter, which was then sent on their behalf to the Department by e-mail. (Based upon the date the comments began arriving, the Department has determined that the website became active on December 12, 2008.) The letter stated that the UEP guidelines permit abusive practices, particularly the use of battery cages, that have been scientifically proven to be inhumane. The letter also stated that the UEP guidelines fail to meet the behavioral and physical health needs of hens and disregard increasing public concern for animal welfare, as demonstrated by consumer polling, market changes, the passing of California's Prevention of Farm Animal Cruelty Act, the phasing out of battery cages in the European Union, and Arizona's own 2006 voter approval of Proposition 204 to phase out the use of gestation crates and veal crates. The letter stated additionally that the severe spatial restrictions authorized under UEP guidelines prevent hens from expressing basic behavior and performing normal physical activities, leading to physical health problems. The letter stated in sum that Arizona should mandate a higher level of care for egg-laying hens and, at a minimum, prohibit use of battery cages.

The Department received an additional 160 e-mail comments from residents in opposition to the rulemaking. Some of these commenters used the same third-party website to submit a form letter, however, these comments substantially varied from the base form letter. These commenters expressed additional concern over the Department's rulemaking from religious viewpoints, standards of justice and humanity, and/or personal ethics.

The Department received 8 comments from individuals that could not be readily identified as Arizona residents. These commenters all expressed strong, and at times vitriolic, opposition to the rulemaking because they believe the UEP allows inhumane practices.

The Department received a written comment opposing the rulemaking sent on behalf of the 4400 resident members of the organization Farm Sanctuary. The commenter urged the Department to adopt standards that mandate a higher level of care for laying hens than the UEP guidelines prescribe. The commenter stated the UEP standards are widely recognized as being insufficient at meeting basic requirements for responsible animal husbandry and were drafted by large industrial egg producers to support cruel factory farming conditions. The commenter stated these conditions include: cramming hens into wire cages that only provide each bird the same space as a sheet of letter-sized paper, denying hens fresh air and sunlight, denying hens the

ability to express their natural behavior, warehousing up to 100,000 hens at a time in a single building, exposing birds to toxic ammonia fumes due to inadequate housing and manure management systems, and nonexistent veterinary care for birds whose ailments are easily overlooked. The commenter further stated that Arizonans would likely oppose intensive confinement based on the support of Proposition 204 in 2006 and concluded that Arizona should mandate a higher level of care for laying hens by following California's lead and consider abolishing battery cages as the standard for the egg industry.

The Department received 3 other written comments from individuals who oppose the rulemaking. These commenters stated that they felt the UEP guidelines were inhumane, the general public desires more humane standards for raising animals as demonstrated by the passage of Proposition 204 in 2006, and the Department should strongly consider abolishing battery cages for egg-laying hens.

The Department received written and oral comments in opposition to the rulemaking on behalf of the Humane Society of the United States. The written comment was a joint letter from the Humane Society and the Animal Defense League of Arizona. (The letter included opposition to the rulemaking on various legal grounds, which are addressed separately below under the heading: Comments Opposing the Rulemaking: Legal Challenges.) The commenter stated the fundamental shortfall of the UEP guidelines is the continued allowance and use of battery cages because these enclosures have been condemned in scientific literature and severely restrict movement, preventing hens from performing natural behavior. The commenter stated that important behavioral activities restricted or denied in battery cages include nesting, perching and roosting, scratching and foraging, dustbathing, or stretching and wing-flapping and set forth problems associated with those restrictions or denials. The commenter stated the UEP guidelines are based on scientific studies of mortality and productivity, but ignore the scientific evidence that demonstrates battery cages are simply inappropriate environments or that productivity is only one measure of animal health. The commenter cited for support findings of LayWel, a collaborative research effort in Europe, the phasing out of cages in the European Union, and the passage of Proposition 2 in California. The commenter implored the Department to ban the use of battery cages and to lead the charge in the use of alternative methods of egg production, such as cage-free barn and aviary housing systems.

The Department received written and oral comments from a representative of the Arizona Chapter of the Humane Society of the United States. The written comment consisted of the joint letter from the national Humane Society and Animal Defense League of Arizona described above. The commenter expressed concern that the UEP guidelines are inadequate, pointing out lawsuits filed against the UEP for false advertising regarding animal welfare, supported by a ruling by the Better Business Bureau that reaffirmed the claim, and a previous fine of \$100,000 against the UEP imposed by the State Attorney General's Office of 16 states and Washington, DC, to settle 18 claims of false advertising. The commenter stated the UEP Guidelines only require 67 square inches of space per hen, which is too small for the hens to spread their wings, walk, or

exhibit other natural behaviors. The commenter also stated that productivity is not necessarily an indicator of animal health, as a bird with broken legs will continue to lay eggs. The commenter stated that public opinion is opposed to the environmental stress of battery cages, as shown by the recent voter approval of Proposition 2 in California and the voter approval of Proposition 204 in Arizona (in 2006).

The Department received an oral comment from a representative of the Animal Defense League of Arizona, in addition to the joint letter from the Animal Defense League and Humane Society described above. The commenter expressed concern about the enforcement of the proposed guidelines. The commenter stated that she has investigated the treatment of other types of farm animals at livestock auctions and found numerous incidents of animal cruelty at facilities that supposedly adhered to humane guidelines; thus, just as government guidelines do not prevent abuse, UEP certification does not prevent inhumane conditions in industrial egg facilities. The commenter provided evidence of video footage demonstrating cases of abuse at known UEP representatives, which the commenter felt raised concerns that the rules might not be well-enforced. The commenter also stated the UEP guidelines are not consistent with public opinion on the treatment of animals as evidenced by the passage of Proposition 204 in Arizona and Proposition 2 in California. ADLA was responsible for the organization of Prop 204, which in 2006, outlawed gestation and veal crates in Arizona. The commenter expressed that the Department should take a progressive leadership role and implement laws that phase out battery cages.

Agency Response: The Department understands and respects the passion and viewpoints of the individuals who submitted these comments. The Department believes that it shares a common interest with these individuals to ensure welfare of cage-raised egg-laying hens by prescribing requirements for egg production where currently none exist. (However, the Department cannot make responses to the personal ethical views these individuals may have regarding cage-raised hens.) The UEP guidelines prescribe procedures for the raising, care, and health of hens and the sanitation of facilities, while still allowing egg producers in Arizona to continue to do business. Nationally, approximately 95% of all egg-laying hens are raised in cages. If the Department were to eliminate hen cages, as desired by each of these commenters, it would not only eliminate local employment and reduce the state's tax base, it would also make the state less competitive in producing its own goods. The rulemaking will not affect the commercial availability of eggs produced from cage-free facilities.

Comments Opposing the Rulemaking: Legal Challenges

As stated above, the Department received a joint letter from the Humane Society of the United States and the Animal Defense League of Arizona that raised legal objections to the rulemaking. An attorney also provided oral comments on behalf of the Animal Defense League of Arizona raising substantially similar concerns.

One comment was that the Legislature did not want the Department to adopt the UEP Guidelines since the Legislature itself was aware of those guidelines and did not specifically direct the Department to adopt those particular guidelines. The Department responds that this comment does not reflect the legislative intent. The Senate Fact Sheet for SB1373 points out that egg producers could voluntarily follow the UEP Guidelines concerning poultry husbandry, but that the Department had no authority to regulate poultry husbandry without SB1373. In other words, the legislative history explained that the purpose of SB1373 was to give the Department authority to require adherence to poultry husbandry standards, such as the UEP Guidelines, which were only voluntary without this rulemaking. The Department has acted according to legislative intent with this rulemaking.

Another comment was that it is unlawful for the Department to codify the UEP Guidelines since that action allegedly sub-delegates the Department's duties to UEP and permits UEP to define the State's rules. The Department responds that it has not delegated its rulemaking authority to UEP. The Department is adopting the 2008 Edition of the UEP Guidelines that were already in existence when the rulemaking began. Subsequent changes to the UEP Guidelines will not become part of the Department's regulations unless the Department chooses to undertake a separate, future rulemaking to effect those changes. A.R.S. § 41-1028(E). Further, the Department has the discretion to decide (and did decide) that the UEP Guidelines are appropriate to adopt into Arizona law and is not required, as has been implied, to set unique standards.

Another comment was that the Department cannot incorporate the UEP Guidelines by reference pursuant to A.R.S. § 41-1028(A) because they are voluntary and therefore not a "code, standard, rule or regulation." The Department responds that the UEP Guidelines fall under the definition of code, standard, rule or regulation and are subject to incorporation by reference. Moreover, the purpose of A.R.S. § 41-1028 is to allow incorporation by reference in rulemaking where incorporation of the actual text would be "unduly cumbersome, expensive or otherwise inexpedient" while assuring that the public can have access to the material incorporated by reference. The length of the UEP Guidelines and the national recognition of UEP justify incorporation by reference, rather than a word-for-word incorporation of the actual text of the UEP Guidelines, especially since the UEP Guidelines are accessible by the public through the Department, UEP, and the internet.

Another comment suggested that the UEP Guidelines are not a substitute for enforceable rules. The Department responds that the following approval of this rulemaking, the UEP Guidelines will be enforceable rules, thus satisfying the Department's requirement to adopt rules.

Another comment was that the rulemaking improperly requires egg producers to join UEP. The Department responds that an egg producer is not required to join UEP in order to follow the UEP Guidelines, to become a UEP Certified company, or to use the UEP Certified logo and that therefore the rulemaking does not in fact

require egg producers to join UEP. UEP has assured the Department that any producer it certifies has the option of whether to join UEP. Currently, there are 124 UEP certified organization members and 32 certified non-members.

Another comment was that the UEP Guidelines are not lawful, which comment is based on the fact that the Justice Department is investigating “the possibility of anti-competitive practices” by UEP members and the existence of allegedly twenty private class action lawsuits alleging price fixing and anti-competitive conduct by UEP and some of its members. The essence of the allegations is that the UEP and some of its members conspired to keep production levels down in order to reap higher profits. One of the alleged methods for keeping production levels down was using the UEP Guidelines as a pretext to increase cage size for the welfare of the animals, which reduced the number of cages, which in turn reduced the number of producing hens, and then conspiring not to add additional cages so as to keep production at a set level. The Department responds that the UEP Guidelines do not prevent egg producers from adding additional hens to their production flock and do not require or encourage egg producers to engage in illegal conduct. Moreover, the Department is not aware of any of the allegations resulting in a finding of illegal conduct and more specifically, the Department is not aware of any finding that the UEP Guidelines are illegal. Nor is the Department aware of any investigation into or court action concerning the lawfulness of the UEP Guidelines themselves.

Another comment was that the Department is improperly delegating enforcement of the rule to UEP. The Department responds that UEP Certified companies are required to undergo and pass an annual audit conducted to ensure compliance with the UEP Guidelines. This audit is performed by USDA or Validus, an independent certification company. A company’s use of the UEP Certified logo is contingent on remaining a UEP Certified company, and thus passing the annual compliance audit. Under the rulemaking, companies that do not become UEP Certified must still pass an annual compliance audit and submit proof to the Department. Accordingly, the Department plans to enforce this rulemaking by ensuring that companies subject to the rulemaking either use the UEP Certified logo, which signifies compliance with the UEP Guidelines as of the most recent independent audit, or demonstrate compliance with the UEP Guidelines by sending the Department a copy of the audit. In either case, the companies are subject to an independent audit of their activities.

Comment Opposing the Rulemaking: Other

The Department received a written letter from an out-of-state egg producer after the close of the public comment period. This company was referenced in the notice of proposed rulemaking as the “large out-of-state company likely to be subject to the rulemaking that is not currently UEP certified,” so the Department has elected to formally respond to the company’s comments here. The commenter stated that it is the fourth largest egg and egg product producer in the nation and supplies eggs to retail and foodservice establishments

in Arizona. The commenter stated that it is committed to independent third party verification of its animal husbandry practices and was the first company certified under the USDA/AMS Process Verification Program. The commenter stated that this animal welfare program is superior to others. The commenter expressed eight points of opposition to the rulemaking and offered alternative animal husbandry guidelines.

The commenter referenced pending lawsuits against the UEP alleging illegal price fixing and stated that the rulemaking would require participation in a legally-challenged program. The Department responds that the rulemaking does not require or encourage companies to engage in illegal price fixing or even join UEP. Additionally, the UEP has notified the Department that one of the lawsuits against the UEP has been dismissed. The UEP takes no position on the rule itself.

The commenter also referenced a lawsuit brought by the Humane Society of the United States against the New Jersey Department of Agriculture over regulations that allegedly condone inhumane treatment of certain farm animals and expressed concern that the Humane Society would also sue the Department if it proceeds with this rulemaking. The Department responds that it cannot control whether an organization will sue to stop the rulemaking and that it believes the rulemaking falls within the statutory authorization and legislative intent.

The commenter stated that the rulemaking will not prevent a voter initiative from changing the standards for poultry husbandry to prohibit the use of cages, describing Proposition 2 in California as an example and that therefore the rulemaking is arbitrary and capricious in violation of the Administrative Procedures Act. The Department responds that it is presently subject to the legislation in effect and is putting forward the current rulemaking to comply with that legislation. If Arizona law changes, the Department will make any necessary rule modifications at that time. The rulemaking is not arbitrary or capricious.

The commenter stated that the rulemaking sets an exclusive standard for poultry husbandry rather than a minimum standard, thus restricting companies adhering to superior standards, which makes the rulemaking arbitrary and capricious in violation of the Administrative Procedures Act. The Department responds that the incorporated UEP Guidelines are minimum standards and that any company that meets or exceeds the UEP Guidelines can satisfy the rule. The rulemaking is not arbitrary or capricious.

The commenter expressed concern that the rulemaking violates the Due Process clause in the 5th and 14th Amendments of the United States Constitution because it apparently did not have actual notice of the rulemaking until after the close of the public comment period and that a 60 day comment period should have been provided instead of 33 days. The Department responds that the commenter's points have been summarized and responded to herein, thus satisfying the commenter's due process concerns. The Department

further responds that it followed Arizona law in providing the public with notice and an opportunity to be heard, and thus complied with the requirements of due process.

The commenter stated that the rulemaking would have a substantial economic impact in that it would prevent companies using a superior animal welfare program from selling eggs into the state, limit competition, and increase consumer prices. The commenter stated that administrative cost of having all Arizona sellers be UEP Certified is about \$135,000 and that every one cent increase in cost of a dozen eggs would cost consumers about \$1.3 million annually. The Department responds that companies following animal welfare programs that exceed the UEP Guidelines are not precluded by this rulemaking from selling eggs in Arizona. Moreover, while UEP Certified status is an option for companies, it is not a requirement under this rulemaking. Further, the majority of companies is already UEP Certified and will not incur additional costs as a result of this rulemaking. The Department agrees that there would be a substantial economic impact on any company currently selling eggs in Arizona that could no longer sell eggs in this state.

The commenter also stated that there would be a substantial economic impact on companies in the Midwest using cages that provide 64 square inches per hen, rather than the 67 square inches required under the UEP Guidelines. The commenter explained that removing a hen from each cage to meet the space requirement would cost a production complex with 800,000 hens a reduction of 160,000 hens and lost production capacity exceeding \$2 million. The Department responds that if a company from the Midwest using cages with only 64 square inches of space per hen sells the eggs produced by those hens in Arizona then there would likely be a substantial economic impact on that company. The Department believes that the commenter is currently able to use only hens in cages with at least 67 square inches of space to supply its Arizona buyers with eggs in accordance with the rulemaking and that independent from this rulemaking, the commenter has already started the process of eliminating its existing cages that only provide 64 square inches per hen.

The commenter disagreed with the statement in the preamble that says, “Nonetheless, the Department believes there are no [less intrusive or less costly] alternative methods of achieving the objectives of the proposed rulemaking and holds that the benefits of the rulemaking outweigh any costs.” The commenter created and proposed an Arizona Egg Industry Code of Conduct as an alternative to the UEP Guidelines. The proposal contained many similarities to the UEP Guidelines, though the commenter believed that the proposal would attract less opposition from cage-free advocates than the UEP Guidelines. The Department responds that the UEP Guidelines are a recognized industry standard that cover substantially the same conduct laid out in the commenter’s proposed code of conduct, that the majority of egg producers are in compliance with the UEP Guidelines already, and that implementation and enforcement of the existing UEP Guidelines is more practical than implementation and enforcement of a new and very general code of conduct. Based on the comments received to this rulemaking, the Department believes any rulemaking that allows hens to be raised in cages will bring opposition from cage-free advocates.

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

None

13. Incorporations by reference and their location in the rules:

Under R3-2-901, the definition for “United Egg Producers Animal Husbandry Guidelines” is incorporated from the United Egg Producers Guidelines for U.S. Egg Laying Flocks, 2008 Edition.

R3-2-908 incorporates the facility and sanitary operation standards prescribed by the Regulations Governing the Voluntary Grading of Shell Eggs, 7 CFR Part 56, effective March 30, 2008.

14. Was this rule previously made as an emergency rule:

No

15. The full text of the rule follows:

TITLE 3. AGRICULTURE

CHAPTER 2. DEPARTMENT OF AGRICULTURE

ANIMAL SERVICES DIVISION

ARTICLE 9. EGG AND EGG PRODUCTS CONTROL

Section

- R3-2-901. Definitions
- R3-2-903. Sampling: Schedule and Methods for Evidence
- R3-2-906. Violations and Penalties
- R3-2-907. Poultry Husbandry; Standards for Production of Eggs
- R3-2-908. Sanitary Standards; Egg Processing

ARTICLE 9. EGG AND EGG PRODUCTS CONTROL

R3-2-901. Definitions

In addition to the definitions provided in A.R.S. §§ 3-701, 3-702, 3-703 and 3-704, the following shall apply to this Article:

- 1. "Lot" means any quantity of two or more eggs.
- 2. "Spot-check" sample means any sample less than a representative sample described in the chart in R3-2-903(B).

"United Egg Producers Animal Husbandry Guidelines" means the United Egg Producers Animal Husbandry Guidelines for U.S. Egg Laying Flocks, 2008 Edition. This material is incorporated by reference, does not include any later amendments or editions, and is available for inspection at the Department of Agriculture, 1688 W Adams St, Phoenix AZ 85007, or the United Egg Producers at 1720 Windward Concourse Ste 230, Alpharetta GA 30005.

"United Egg Producers Certified" means a company that has achieved United Egg Producers Certified status pursuant to the requirements prescribed by the United Egg Producers Animal Husbandry Guidelines.

"United Egg Producers Certified logo" means the official symbol and accompanying language used to identify eggs produced by United Egg Producers Certified companies.

R3-2-903. Sampling: Schedule and Methods for Evidence

- A. An inspector may conduct random spot-check sampling of a lot of eggs to determine whether the lot meets minimum quality and weight standards and is in compliance with R3-2-907(B).
- B. Representative egg sampling, under A.R.S. § 3-710(G), shall be based on the following table. A lot that does not meet minimum quality or weight standards or is not in compliance with R3-2-907(B) shall receive a warning notice hold tag.

Minimum Number of Cases and Cartons Comprising a Representative Sample			
Lot size of cartons	Minimum eggs for inspection	Lot size of 30 doz. per case	Minimum cases for inspection ¹
1 – 4 cartons	All	1 case	1 case
5 - 30 cartons inclusive	50	2 - 10 cases inclusive	2 cases
31 - 120 cartons inclusive	100	11 - 25 cases inclusive	3 cases
120 - 210 cartons inclusive	200	26 - 50 cases inclusive	4 cases
211 - 315 cartons inclusive	300	51 - 100 cases inclusive	5 cases
		101 - 200 cases inclusive	8 cases
		201 - 300 cases inclusive	11 cases
		301 - 400 cases inclusive	13 cases

		401 - 500 cases inclusive	14 cases
		501 - 600 cases inclusive	16 cases
		For each additional 50 cases or fraction of a case in excess of 600 cases	1 case
¹ An inspector shall take 100 eggs from each case for inspection.			

1. An inspector may draw additional samples to determine whether the lot meets the minimum requirements.
2. When loose eggs are out of the case, the sample shall be based on a carton.
3. Eggs shall be sampled on a 30-dozen-case basis. When eggs are packed in other lot quantities, an inspector shall convert the quantity of eggs to the equivalent 30-dozen-case basis to establish the official sample size.

R3-2-906. Violations and Penalties

A. A dealer, producer-dealer, manufacturer, producer, or retailer, at each individual location, is subject to the penalties in subsection (B) for any of the following violations:

1. Category A:
 - a. Making a false or misleading statement relating to advertising or selling eggs and egg products;
 - b. Acting as a dealer, producer-dealer, producer, or manufacturer without a valid license;
 - c. Selling shell eggs with an incorrect or incomplete expiration date, or without an expiration date;
 - d. Selling grade AA or grade A eggs after the expiration date on the carton, case, or container, unless the eggs are exempt under A.R.S. § 3-715(K);
 - e. Failing to maintain records and reports required by this Article;
 - f. Failing to label a carton, case, or container with one size, one grade, ~~and~~ one brand name, or, if applicable under R3-2-907(B), the United Egg Producer Certified logo;
 - g. Moving eggs or an egg case, carton, or container with a warning tag or notice, or removing a warning tag or notice without permission from the Director;
 - h. Refusing to submit egg or egg product, an egg case, carton, container, subcontainer, lot, load, or display of eggs to inspection; or
 - i. Refusing to stop, at the request of an authorized representative of the Department, any vehicle transporting eggs or egg products.
 - j. Selling eggs that have not been produced in accordance with the standards prescribed under R3-2-907(B).
 - k. Failing to raise egg-laying hens in this state in accordance with the standards prescribed under R3-2-907(A).
2. Category B:
 - a. Extending the expiration date of shell eggs as defined in A.R.S. § 3-701(10); or
 - b. Advertising, representing, or selling out-of-state eggs as local eggs.
3. Category C:

- a. Failing to ensure that shell eggs for human consumption are kept refrigerated at an ambient temperature not higher than 45° F;
 - b. Failing to ensure that frozen egg products for human consumption, labeled for storage at 0° F or below, are kept under refrigeration at a temperature of 0° F or lower; or
 - c. Failing to ensure that liquid egg products for human consumption are kept refrigerated at a temperature not higher than 40° F.
- B. Any violation of this Article or of 3 A.R.S. 5, Article 1 not listed in subsection (A) is subject to a Category A civil penalty.
- C. Under A.R.S. § 3-739, the civil penalty for a violation of subsection (A) is:

Number of Violations	Category A	Category B	Category C
1	Warning	Warning	Warning
2	\$50	\$50	\$100
3	\$100	\$100	\$200
4		\$150	\$400
5		\$200	\$500
6		\$250	
7		\$300	

R3-2-907. Poultry Husbandry; Standards for Production of Eggs

- A. All egg-laying hens in this state shall be raised according to United Egg Producers Animal Husbandry Guidelines.
- B. All eggs sold in this state produced by hens shall be from hens raised according to the United Egg Producers Animal Husbandry Guidelines. All eggs shall display the United Egg Producers Certified logo on their cases, cartons, and containers, or the egg dealer shall annually provide the Department with a copy of a current independent third-party audit that demonstrates that the eggs were produced by hens raised according to UEP Animal Husbandry Guidelines.
- C. This rule does not apply to egg producers operating or controlling the operation of one or more egg ranches each having fewer than twenty-thousand egg-laying hens producing eggs and also does not apply to any hens that are raised cage-free or any eggs produced by hens that are raised cage-free.

R3-2-908. Sanitary Standards; Egg Processing

All egg producers in this state shall meet the facility and sanitary operation requirements prescribed by the Regulations Governing the Voluntary Grading of Shell Eggs, 7 CFR Part 56, effective March 30, 2008. This material is incorporated by reference, does not include any later editions, and is available for inspection at the Department of Agriculture, 1688 W Adams St, Phoenix AZ 85007.