# NOTICES OF PROPOSED RULEMAKING

Unless exempted by A.R.S. § 41-1005, each agency shall begin the rulemaking process by first submitting to the Secretary of State's Office a Notice of Rulemaking Docket Opening followed by a Notice of Proposed Rulemaking that contains the preamble and the full text of the rules. The Secretary of State's Office publishes each Notice in the next available issue of the *Register* according to the schedule of deadlines for *Register* publication. Under the Administrative Procedure Act (A.R.S. § 41-1001 et seq.), an agency must allow at least 30 days to elapse after the publication of the Notice of Proposed Rulemaking in the *Register* before beginning any proceedings for making, amending, or repealing any rule. (A.R.S. §§ 41-1013 and 41-1022)

## NOTICE OF PROPOSED RULEMAKING

### TITLE 17. TRANSPORTATION

### CHAPTER 5. DEPARTMENT OF TRANSPORTATION COMMERCIAL PROGRAMS

### PREAMBLE

**1. Sections affected:** **Rulemaking Action:**

| | |
|---|---|
| R17-5-203 | Amend |
| R17-5-210 | Amend |

**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. § 28-366

Implementing statutes: A.R.S. §§ 28-5201, 28-5204, 28-5234, and 28-5235

**3. A list of all previous notices appearing in the Register addressing the proposed rule:**

Notice of Rulemaking Docket Opening: 10 A.A.R. 2892, July 16, 2004

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

Name: Brent P. Heiss, Motor Vehicle Division Rules Analyst

Address: Administrative Rules Unit
Department of Transportation, Mail Drop 507M
3737 N. 7th St., Suite 160
Phoenix, AZ 85014-5079

Telephone: (602) 712-7941

Fax: (602) 241-1624

E-mail: bheiss@dot.state.az.us

Please visit the ADOT web site to track progress of this rule and any other agency rulemaking matters at www.dot.state.az.us/about/rules/index.htm.

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

Arizona Department of Transportation (ADOT) Motor Vehicle Division (MVD) engages in rulemaking each year to incorporate sections of the updated edition of the Code of Federal Regulations (CFR), Title 49 by reference into Arizona Motor Carrier Safety and Hazardous Materials Transportation administrative rules.

The ADOT/MVD, Motor Carrier & Tax Services program oversees various motor carrier issues including, with enforcement by the Department of Public Safety (DPS), motor carrier vehicle and commercial driver license safety issues. Annually, the Division adopts Federal changes or updates to the CFR to follow the Federal Motor Carrier Safety Administration (FMCSA) requirements for safety.

The rules in this package clarify an exemption from Federal hours of service provisions for the utility industry. Arizona Revised Statutes (A.R.S.) § 28-5234 provides under subsection (B) for a public service corporation, a political subdivision of this state that is engaged in rendering public utility service or a railroad to identify an emergency situation, which would allow it to exceed Federal hours of service requirements for drivers of commercial vehicles used only for intrastate travel. The statute requires that the company be rendering utility service and that it interact with the proper state or local official. The utility industry in Arizona has requested guidance in the implementation of these provisions as well as an exemption for intrastate travel from the new Federal hours of service requirements. This

rulemaking provides the guidance requested. This is a joint effort between ADOT, DPS and the utility industry in Arizona. This rulemaking does not arise from a five-year review.

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

Not Applicable

**7. A showing of good cause why the rule is necessary to promote a statewide interest if the rule will diminish a previous grant of authority of a political subdivision of this state:**

Not Applicable

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

The economic impact of the rulemaking is negligible for the agency. Regulated persons will however benefit from the recognition of the adverse impacts on the utility industry regarding the new Federal hours of service provisions. There will be some costs to DPS in the administration of this provision and in the creation of forms for reporting emergency situation by the public service industry. These costs are de minimus. Oversight for such issues is part of the enforcement of motor carrier issues already performed by DPS.

The President of the United States of America signed into law an exemption for utility vehicles (section 131 of the 2004 Omnibus Appropriations Act) that will expire on September 30, 2005.

There is potential that utility service would not be repaired and/or restored timely in an emergency situation if this rule is not adopted. Additionally, if this rule is not adopted, an increase in costs to the public service corporation, a political subdivision of this state that is engaged in rendering public utility service or railroad to staff for additional personnel and equipment to cover new Federal hours of service requirements would increase utility costs overall that would then be passed on to the consumer.

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

Questions concerning the economic impact statement may be directed to the officer listed in item #4.

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

| | |
|---|---|
| Date: | Wednesday, August 25, 2004 |
| Time: | 2:00 p.m. |
| Location: | Executive Hearing Office<br>3737 N. 7th St., Suite 160<br>Phoenix, AZ 85014-5079 |
| Nature: | Oral proceeding to receive public comment. |
| Closure: | The public record will close on Friday, August 27, 2004 at 4:30 p.m. |

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

None

**12. Incorporations by reference and their location in the rules:**

In R17-5-203, subsection (G);

49 CFR Parts 40, 385, 390, and 395, published October 1, 2003.

In R17-5-210, subsection (A) and (D):

49 CFR Parts 395, and 390, published October 1, 2003.

**13. The full text of the rules follows:**

**TITLE 17. TRANSPORTATION**

**CHAPTER 5. DEPARTMENT OF TRANSPORTATION**
**COMMERCIAL PROGRAMS**

**ARTICLE 2. MOTOR CARRIERS**

Section

R17-5-203. Motor Carrier Safety: 49 CFR 390 - Federal Motor Carrier Safety Regulations; General Applicability and Def-

initions; General Requirements and Information
R17-5-210. ~~Repealed~~ Motor Carrier Safety: Hours of Service Exemption; Public Service Corporation, Political Subdivision of This State That is Engaged in Rendering Public Utility Service or a Railroad

## ARTICLE 2. MOTOR CARRIERS

**R17-5-203. Motor Carrier Safety: 49 CFR 390 - Federal Motor Carrier Safety Regulations; General Applicability and Definitions; General Requirements and Information**

**A.** 49 CFR 390.3 General applicability is amended as follows:
1. Paragraph (a) is amended to read:
   Regulations incorporated in this Section are applicable to all motor carriers operating in Arizona and any vehicle owned or operated by the state, a political subdivision, or a state public authority that is used to transport a hazardous material in an amount requiring the vehicle to be marked or placarded as prescribed in R17-5-209.
2. Paragraph (b) is amended to read:
   A motor carrier driver domiciled in Arizona who operates a commercial motor vehicle defined in A.R.S. § 28-3001 shall comply with the requirements of A.R.S. Title 28, Chapter 8 and any rule made under that Chapter.
3. Paragraph (c) is amended to read:
   A motor carrier operating in Arizona in furtherance of a commercial enterprise, shall comply with the financial responsibility requirement specified in A.R.S. Title 28, Chapter 9, Article 2, and 49 CFR 387.
4. Paragraph (f)(6) is deleted.

**B.** 49 CFR 390.5 Definitions. The definitions listed in 49 CFR 390.5 are amended as follows:
1. If the term "Commercial Motor Vehicle" or "CMV" is used in reference to the controlled substances and alcohol use and testing requirement of 49 CFR 382, the term has the meaning prescribed in 49 CFR 382.107.
2. If the term "Commercial Motor Vehicle" or "CMV" is used in reference to the licensing requirements prescribed under A.R.S. § 28-3223, the term has the meaning prescribed under A.R.S. § 28-3001.
3. If the term "Commercial Motor Vehicle" or "CMV" is not used in reference to the controlled substances and alcohol use and testing requirement of 49 CFR 382 or the licensing requirement prescribed under A.R.S. § 28-3223, the term means a self-propelled, motor-driven vehicle or vehicle combination, used on a public highway in this state in furtherance of a commercial enterprise that:
   a. Has a gross vehicle weight rating (GVWR) as a single vehicle or a gross combination weight rating (GCWR) of 18,001 pounds or more for purposes of intrastate commerce;
   b. Transports passengers ~~for hire~~ and has a design capacity of seven or more persons; or
   c. Transports a hazardous material in an amount requiring marking or placarding as prescribed in R17-5-209;
   d. Is not an intrastate-operating tow truck that has a GVWR up to 26,000 pounds, but a tow truck operator remains subject to all other provisions prescribed under 49 CFR 391.41, 391.43, 391.45, 391.47, and 391.49; and
   e. Operates for purposes of interstate commerce with a GVWR of greater than ~~10,001~~10,000 pounds.
4. "Exempt intracity zone" is deleted and has no application in R17-5-203 through R17-5-206.
5. "For-hire motor carrier," "private motor carrier", "private motor carrier of passengers (business)," and "private motor carrier of passengers (nonbusiness)" are deleted from R17-5-203 through R17-5-206 and the term "motor carrier" is substituted.
~~6. "Gross vehicle weight rating (GVWR)" is amended by adding:~~
~~In the absence of a value specified by the manufacturer and the vehicle identification number, law enforcement shall use a vehicle's actual gross weight or declared gross weight to determine the GVWR.~~
~~7~~6. "Regional Director of Motor Carriers" means the Division Director of the Arizona Department of Transportation, Motor Vehicle Division.
~~8~~7. "Special agent" means an officer or agent of the Department of Public Safety, the Division, or a political subdivision, who is trained and certified by the Department of Public Safety to enforce Arizona's Motor Carrier Safety requirements.
~~9~~8. "State" means a state of the United States or the District of Columbia.
~~10~~9. "Tow truck," as used in the definition of emergency in 49 CFR 390.5, has the meaning prescribed under A.A.C. R13-3-101.

**C.** 49 CFR 390.15 Assistance in investigations and special studies. Paragraph (a) is amended to read:
A motor carrier shall make all records and information pertaining to an accident available to a special agent upon request or as part of any inquiry within the time the request or inquiry specifies. A motor carrier shall give a special agent all reasonable assistance in the investigation of any accident including providing a full, true, and correct answer to any question of the inquiry.

**D.** 49 CFR 390.21 Marking of CMVs. Paragraph (a) is amended to read:
This Section applies to all motor carrier vehicles operated in Arizona. A motor carrier not subject to U.S. Department of Transportation marking requirements shall mark its vehicle with the:

1. Company name, or
2. Business trade name, and
3. City and state.

**E.** 49 CFR 390.23 Relief from regulations.

1. Paragraph (a) is amended to read:
   Regulations contained in 49 CFR 390 through 397 do not apply to a motor carrier that:
   a. Is exempt from federal jurisdiction, and
   b. Operates a commercial motor vehicle used or designated to provide relief during an emergency.
2. Paragraphs (a)(1), (a)(1)(i), (a)(1)(i)(A), (a)(1)(i)(B), and (a)(1)(ii) are deleted.
3. Paragraph (a)(2)(i)(A) is amended as follows:
   a. An emergency has been declared by a federal, state, or local government official having authority to declare an emergency; ~~and~~ or
   b. An emergency situation exists pursuant to A.R.S. § 28-5234 (B) as delineated in R17-5-210.
4. Paragraph (a)(2)(i)(B) is amended as follows:
   The Arizona Department of Public Safety Commercial Vehicle Enforcement Bureau determines a local emergency exists that justifies an exemption from any or all of these Parts. If the Arizona Department of Public Safety Commercial Vehicle Enforcement Bureau determines relief from these regulations is necessary to provide vital service to the public, relief shall be granted with any restrictions the Arizona Department of Public Safety considers necessary.
5. "Interstate commerce" as used in paragraph (b) means engagement in a commercial enterprise.

**F.** 49 CFR 390.25 Extension of relief from regulations - emergencies is amended as follows:
A motor carrier seeking to extend a period of relief from these regulations shall obtain approval from the Arizona Department of Public Safety Commercial Vehicle Enforcement Bureau. The motor carrier shall give full details of the additional relief requested. The Arizona Department of Public Safety shall observe time limits for emergency relief from regulations as prescribed under 49 CFR 390.23(a), but may extend a period of relief after considering:

1. Severity of the emergency,
2. Nature of relief services to be provided by the motor carrier, and
3. Other restrictions that may be necessary.

**G.** 49 CFR 390.27 Locations of motor carrier safety service centers is amended to read:
A motor carrier requesting relief from these regulations shall contact the Arizona Department of Public Safety, Commercial Vehicle Enforcement Bureau, Telephone (602) 223-~~2522~~ 2212.

**R17-5-210. ~~Repealed~~ Motor Carrier Safety: Hours of Service Exemption; Public Service Corporation, Political Subdivision of This State That is Engaged in Rendering Public Utility Service or a Railroad.**

**A.** For intrastate travel only, the regulations of 49 CFR 395.0(b) regarding federal hours of service effective June 27, 2003, shall not apply from the effective date of this rule though June 26, 2006 to a public service corporation, a political subdivision of this state that is engaged in rendering public utility service or a railroad.

**B.** For intrastate travel only, a public service corporation, a political subdivision of this state that is engaged in rendering utility service or a railroad shall follow the federal hours of service provisions effective prior to June 27, 2003 only through June 26, 2006.

**C.** Intrastate Emergency Provisions. A public service corporation, a political subdivision of this state that is engaged in rendering public utility service or a railroad shall notify the Commercial Vehicle Enforcement Bureau through the, Arizona Department of Public Safety Duty Office that an emergency situation pursuant to A.R.S. § 28-5234 (B) exists, and shall notify the Arizona Department of Public Safety on a form provided by the Arizona Department of Public Safety by fax transmission to (602) 223-2929 immediately, but in no case longer than three hours from the time the public service corporation, the political subdivision of this state that is engaged in rendering public utility service or the railroad has determined that an emergency situation exists. The information to be provided includes:

1. Date;
2. Time;
3. Emergency Statement/Description;
4. Location of the event (both general and specific);
5. Projected duration of the event;
6. Authorized party/parties signature(s) for determining that an emergency exists;
7. Name and contact number of responsible party or parties in the field, and
8. A utility's self generated Emergency ID/tracking number.

**D.** Supporting documentation shall be maintained by a public service corporation, a political subdivision of this state that is engaged in rendering public utility service or a railroad, for no less than three years from the date of the emergency situation and shall be made available to a Special Agent, as defined in R17-5-203, upon request. Supporting documentation shall include;

1. A schedule of drivers involved in the emergency situation;

2. The duration of the emergency,
3. The off duty time for the affected drivers provided after the emergency situation concludes, and
4. Any United States Department of Transportation recordable accidents, as defined in 49 CFR 390.15 during the emergency.

**E.** Upon termination of the emergency, including transportation to and from the principal place of business, the driver shall not drive a commercial motor vehicle unless the driver remains off duty pursuant to 49 CFR 395, in compliance with subsection B of this rule.

# NOTICE OF PROPOSED RULEMAKING

## TITLE 18. ENVIRONMENTAL QUALITY

## CHAPTER 7. DEPARTMENT OF ENVIRONMENTAL QUALITY REMEDIAL ACTION

## PREAMBLE

| **1. Sections Affected** | **Rulemaking Action** |
|---|---|
| R18-7-301 | Amend |

**2. The statutory authority for the rulemaking, including both the authorizing statute (general) and the statutes the rule is implementing (specific):**

Authorizing statutes: A.R.S. §§ 41-1003 and 49-104

Implementing statute: A.R.S. § 49-285.01

**3. A list of all previous notices appearing in the Register addressing the proposed rule:**

Notice of Rulemaking Docket Opening: 9 A.A.R. 2121, June 27, 2003

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

| | |
|---|---|
| Name: | Barbara Stewart |
| Address: | 1110 W. Washington St.<br>Phoenix, AZ 85007 |
| Telephone: | (602) 771-4125 |
| Fax: | (602) 771-4246 |
| E-mail: | stewart.barbara@ev.state.az.us |

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

A.R.S. § 49-285.01 authorizes the Arizona Department of Environmental Quality (Department) to enter into an agreement with a prospective purchaser of a facility, wherein the Department will provide a written release and covenant not to sue for existing contamination at the facility. In many cases, the threat of environmental liability and uncertainty associated with environmental contamination has discouraged redevelopment of former industrial sites. Arizona has joined a growing number of states in seeking creative approaches to facilitate the redevelopment of these sites, and this statute is one of the tools established toward this end.

A.R.S. § 49-285.01 authorizes the Department to charge a reasonable fee for the preparation and execution of a prospective purchaser agreement (PPA), and authorizes the adoption of rules to implement that section. The original fee rule became effective in 1997.

In August 2002, pursuant to A.R.S. § 41-1056, the Department reviewed the PPA fee rule. As a part of the five-year review of the rule, the Department's Financial Services Section provided records of the work hours charged to the PPA accounting code. An examination of those records provided the evidence that the $900 fee usually does not cover the cost of doing the work. This review revealed that there are several ways in which the current fee, and likewise the fee rule, are inadequate.

Increased Costs of Higher Salaries

One reason for the shortfall is the economics of doing business: salaries are higher, personnel with the higher salaries are doing more of the work than anticipated, and the Attorney General's Office (AGO) costs are higher. The initial fee was intended to cover the PPA costs of thirty hours. The present salaries are such that thirty hours for any of the positions identified as doing the work would cost more than $900. The people actually doing the work do not match the list of anticipated personnel that was used in calculating the fee in the original rule. People doing the bulk of the work are technical, rather than administrative, and technical salaries are higher than administrative salaries. Also, an inter-

nal shifting of workload at the Department brought the AGO into the procedure for all PPAs rather than just a few. Under an inter-agency agreement, the Department reimburses the AGO for its costs on Department projects.

Summarized below is a comparison of staff time and costs. The first set of costs reflect those that formed the basis for the fee amount in this proposed rule amendment. The second set of costs are those used in the calculation of the original PPA fee.

**Table 1. Comparison of Staff Time and Costs.**

| STAFF | RATE | HOURS | TOTAL |
|---|---|---|---|
| **New Costs** | | | |
| Section Manager | $92.98 | 5 | $464.90 |
| Unit Supervisor | $80.44 | 4 | $321.76 |
| Hydrologist/Project Manager | $59.49 | 10 | $594.90 |
| Legal Assistant | $50.26 | 10 | $502.60 |
| Assistant Attorney General | $65.00 | 5 | $325.00 |
| *TOTAL* | | *34* | *$2,209.16* |
| | | | |
| **Old Costs** | | | |
| Section Manager | $38.92 | 2 | $77.84 |
| Unit Supervisor | $35.72 | 4 | $142.88 |
| Hydrologist III | $30.97 | 8 | $247.76 |
| Project Manager | $29.57 | 8 | $236.56 |
| Legal Assistant III | $25.24 | 6 | $151.44 |
| Program and Project Specialist II (public noticing) | $24.18 | 2 | $48.36 |
| *TOTAL* | | *30* | *$904.84* |

**Increased Costs of Addressing Different Kinds of Sites**

Another reason for the shortfall between the current fee and actual costs is that, at the time the original fee was promulgated, the bulk of PPA applications were from sites that were on the Water Quality Assurance Revolving Fund (WQARF) priority list, and now, most are for sites that are NOT on the WQARF registry (which has replaced the priority list). A.R.S. § 49-285.01(A)(1) authorizes the Department to enter into PPA agreements for sites both on the registry and not on the registry, and to charge a fee for all PPAs.

A major reason why most PPA sites are not on the WQARF registry is that recent WQARF sites have smaller boundaries. At the time the PPA statute became law, the size of the sites on the WQARF priority list were large. For example, the East Central Phoenix Site was bounded on the north by Camelback Road, on the east by 48th Street, on the south by Thomas Road, and on the west by 24$^{th}$ Street. From Camelback Road to Thomas Road is two miles. As anticipated, originally most of the PPAs were for property within a WQARF site.

Then, the approach to defining site boundaries was refined. In 1996 the legislature established a groundwater task force to study WQARF and make recommendations. In 1997, Senate Bill 1452 was enacted. The legislative intent as stated, was to be a comprehensive revision of the water quality assurance revolving fund program. The revision followed the groundwater task force recommendations. The bill replaced the priority list system with the site registry, instituted a proportionate liability system to replace joint and several liability, and provided for site prioritization with a greater emphasis on risk for the registry sites. The statute also required that the priority list sites be evaluated using the evaluation and eligibility model within one year before being placed on the registry list. As a result of the foregoing changes in the statute, most of the large study areas dwindled into facilities or groups of facilities.

Thus, the non-WQARF site PPAs currently constitute approximately 80 percent of the PPA applications. The change in type of site covered by the PPAs has also affected the amount of time required for technical reviews of PPA applications. Since there is no existing in-house site file of information for non-WQARF sites, additional time is necessary for the review of a non-WQARF site application.

This technical application review is required in order to determine if the statutory requirement -- that the Department has been provided sufficient information to reasonably identify the extent of the contamination at the facility -- has been satisfied. A typical application for a non-WQARF site supplies what are referred to by guidelines of ASTM International, formerly the American Society for Testing and Materials, as both Phase I and Phase II environmental site assessment reports. A Phase I report consists of a compilation of existing documents and studies, while a Phase II report involves additional sampling and other investigation beyond existing studies. These reports must be reviewed by a technical expert. Since the Department began delineating WQARF sites as smaller areas, as described above, only one non-WQARF site PPA has been completed within the 30-hour limit reflected in the current fee rules. That site was formerly administered under the federal Resource Conservation and Recovery Act and was reviewed by a hydrologist who was already familiar with the contaminants at the site.

Initial PPA Charge

To adequately take account of these increased costs, the proposed amendment to the rule changes the initial charge to $2,200 for sites that are on the WQARF registry, established and maintained pursuant to A.R.S. § 49-287.01. To adequately take account of the increased time and costs required for non-WQARF sites (calculated as an additional 15 hours of hydrologist's time, at an estimated cost of $900), a proposed provision has been added to make the initial charge $3,100 for a non-WQARF site application.

Change in Calculation Method Beyond Initial Charge

The current rule requirement, that thirty hours is a cut-off point and anything over that amount of time must be approved in advance, is difficult to administer. Specifically, it is not administratively feasible for the Department to determine in real time when that cut-off point has been reached. Since time sheets are submitted every two weeks, tracking the work hours of a group of people who are working on different parts of the application at the same time, in increments of less than two weeks, is extremely difficult. A hydrologist might spend 20 to 30 hours during a time sheet period to review detailed technical reports while the legal assistant is reviewing ownership issues and sufficiency of the public benefit during the same period. Furthermore, the work is such that it is usual for a professional to take the necessary time to review a document adequately in its entirety, without stopping in mid-review at some artificial point in time.

To address the infeasibility of identifying the exact time when costs are about to exceed the initial charge, the amendment to the rule proposes agreement by the applicant at the time of application to pay necessary costs above those covered by the initial charge, if incurred. This additional charge would be calculated at the rate of $65 per hour for Department staff, and for the time of an Assistant Attorney General (AG).

The Department calculated its hourly rate for Department staff by determining the number of billable hours per year attributable to staff engaged in PPA work. As with certain other Department fee rules, such as for the Aquifer Protection Permit fee, or for the declaration of environmental use restriction (DEUR) fee, the Department assumes that staff work 62 percent of total hours (2080 hours per year) on site-specific tasks, or 1290 billable hours per year. Thus, the annual rate was divided by 1290. The single hourly rate ($65) charged for Department staff time needed beyond the initial charge, was calculated using an average of different staff rates, weighted according to the hours reflected in Table 1. Even under the amended rule, the Department is mindful that the charge would not account for substantial overhead costs. However, the Department is prepared to absorb these additional costs and not charge them as part of the PPA fee.

Pursuant to an interagency agreement, the Department must pay the AGO for attorneys' time spent on the Department's PPAs. The Department projected the hourly rate for AGO time, based on past and current billing rates.

Non-Refundable Consent Decree Charge

Another cost that has not been covered by the current rule is the time spent negotiating a consent decree, which is provided for in A.R.S. § 49-285.01. Because no charge has been established for this aspect of a PPA, under the current rule the cost of time spent on this activity has not been recovered when negotiations were terminated for some reason before a document has been signed. The Department incurs charges from the AGO of about $6,000 in time spent on typical consent decrees, if work on them reaches conclusion. Situations where consent decree negotiations are terminated earlier impose less, but nevertheless some, costs for the Department. Therefore, the Department proposes to collect a reasonable charge when a consent decree is requested, to recover minimum costs that it incurs in each case.

The proposed rule would establish a non-refundable charge for a consent decree, with the provision that payment for the remainder of the consent decree cost, if any, be included within the consent decree. It is proposed that the initial, non-refundable consent decree charge be $500.

Consultation with External Stakeholders

Prior to publishing this notice of proposed rulemaking, the Department shared a draft with external stakeholders. None of the stakeholders suggested a change to the draft.

**6. A reference to any study relevant to the rule that the agency reviewed and either proposes to rely on in its evaluation of or justification for the proposed rule or proposes not to rely on in its evaluation of or justification for the rule, where the public may obtain or review each study, all data underlying each study, and any analysis of each**

**study and other supporting material:**

None

**7. A showing of good cause why the rule is necessary to promote a statewide interest if the rule will diminish a previous grant of authority of a political subdivision of this state:**

Not applicable, because this rule will not diminish a previous grant of authority of a political subdivision of this state.

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

Under A.R.S. § 49-285.01, the PPA is an instrument whereby the prospective purchaser obtains an assurance, through a release and covenant not to sue, that the purchaser will not be liable to the State for cleanup of the existing contamination on the site. The PPA is entered into voluntarily by a party who is not responsible for the site contamination and the Department, to facilitate the purchase of the contaminated property. The subject site may include all or part of a WQARF site, under A.R.S. Title 49, Chapter 2, Article 5, or it may involve property that is not a WQARF site.

The Department may provide to a prospective purchaser of a facility a written release and a covenant not to sue for any potential liability for existing contamination under WQARF or the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) if (a) the facility is identified on the WQARF registry or the Department has been provided sufficient information to reasonably identify the extent of the contamination at the facility; (b) the person is not currently liable for an existing or threatened release of a hazardous substance at the facility; and (c) the proposed redevelopment or reuse of the facility will not contribute to or exacerbate existing known contamination or unreasonably interfere with remedial measures necessary at the facility or cause the contamination to present a substantial health risk to the public.

The agreement must provide a substantial public benefit that may include any of the following: (a) substantial funding or other resources to perform or facilitate remedial measures at the facility pursuant to WQARF; (b) the performance of substantial remedial measures at the facility; (c) productive reuse of a vacant or abandoned industrial or commercial facility; (d) development of a facility by a governmental entity or nonprofit organization to address an important public purpose; or (e) creation of conservation or recreation areas. The purchaser will also provide, when appropriate, access to the facility for the Department and others, access to business records concerning contaminants, and a covenant not to sue the state.

Costs and Benefits Not Fully Quantifiable

As explained in the Economic Impact Statement (EIS), the Department believes that this rule amendment's benefits outweigh its costs. This EIS is intended to fulfill the legal requirement for the current rulemaking. To the extent that the increased fee allows ADEQ to continue its PPA program, the costs and benefits of the PPA program are costs and benefits of the increased fee. For this reason, the EIS discusses the impact of PPAs, although the initial PPA rulemaking also included an EIS that addressed the costs and benefits of PPAs. In addition, the EIS discusses the impact of the fee increase amendment itself, as the subject of this rulemaking.

It is not possible to quantitatively estimate the costs and benefits of this amendment, or PPAs in general, for taxing subdivisions of the State. The value of PPA-facilitated transactions depends on such unpredictable variables as site selection, real estate market, availability of investment monies and willingness to incur risk. The EIS will show that increased tax revenues are probable, as a result of increased development facilitated by PPAs. Without projecting the value of PPA-facilitated transactions, it is impossible to predict the magnitude of tax revenue increase. Other less quantifiable benefits are also likely. The EIS qualitatively describes the costs and benefits to subdivisions of the State, and attempts to weigh their relative value to determine if the benefits are likely to outweigh the costs.

It is not possible to quantitatively estimate the costs and benefits of this amendment, or PPAs in general, for the general public. Many of the costs and benefits of PPA-facilitated development are non-tangible or non-quantifiable. One of the more easily quantified variables is the value of the services resulting from increased tax revenues. However, even if the magnitude of probable tax revenue increases could be estimated, it is impossible to predict how a municipality may use the tax revenues, and therefore, how much the general public might benefit. The EIS qualitatively describes the costs and benefits to the general public, and attempts to weigh their relative value to determine if the benefits are likely to outweigh the costs.

A quantitative cost-benefit analysis is not possible for prospective purchasers. This is because the value of a PPA-facilitated transaction is tied to land value, and the value of contaminated property is difficult to assess. The EIS presents research findings to support the foregoing statement, and to provide a qualitative assessment of costs and benefits for prospective purchasers.

A.R.S. § 41-1055(B) REQUIREMENTS FOR AN EIS

B (2) PERSONS DIRECTLY AFFECTED BY THE RULE

Persons directly affected by the rule are:

1. State agencies involved in preparing PPAs
2. Political subdivisions of the State

3. Prospective purchasers of WQARF Registry List and other sites
4. Newspapers of general circulation in the county where the property is located
5. The general public
6. Responsible parties as defined under A.R.S. § 49-283.

B (3) COST-BENEFIT ANALYSIS

B(3)(a)(1) COSTS TO THE IMPLEMENTING AGENCY – One-time costs to the Department for this amendment include the cost of the rulemaking process, and the initial costs of adjusting accounting and billing procedures to reflect the new rates. The Department does not track the time it takes for individual rulemakings. The Department estimates that the cost for staff time to promulgate a typical rule could range from $4,001 to $15,672. A typical rule is one such as this rule, which is non-controversial, of average complexity, and follows the standard rulemaking process. This range does not include non-staff costs such as copies, supplies, postage, transportation to meetings, or phone calls, nor does it include non-Department costs, such as the costs to the Governor's Regulatory Review Council and the Secretary of State.

The Department estimates it will take an Information Technology Specialist III (grade C3) approximately 160 hours to program the billing software needed to implement this rulemaking. The mid-range hourly cost for a grade C3 is approximately $69.00 per billable hour. The approximate cost for 160 hours is $11,040.

After the changes are made, there may be some additional costs associated with increased questions from potential applicants regarding the PPA. The Department cannot predict the number of inquiries that may be received, or the staff position that might be required to answer a question. Therefore, the Department cannot estimate the potential costs of such inquiries.

The Department's costs for PPAs include staff time required to administer and provide a technical review of the agreement. The Superfund Programs Section of the Department's Waste Programs Division has determined that it will take approximately 29 hours of staff time plus 5 hours of AGO time to put together a typical PPA based upon the model agreement for a property within a WQARF site. These costs, which are already being accrued, were used to calculate the new fee. They are costs of this amendment because the fee increase supports the ongoing operation of the PPA program.

The initial charge, which is rounded from $2,209.16 to $2200, is intended to pay the costs for 29 hours of Department staff time and 5 hours of AG time, which is anticipated to be adequate for a typical WQARF site PPA based on the model agreement. Non-WQARF sites will be assessed an additional non-refundable $900 initial charge (rounded from $892.35) to pay for the 15 additional hours hydrologists spend reviewing site documents presented to define the extent of contamination. This additional time for non-WQARF sites will be needed because there is less prior analysis completed than for WQARF sites. The rates used to calculate the initial charge were based on the average of staff time and salaries of the positions typically assigned to do the work (the total cost includes employee benefits and indirect costs). Time spent on the application beyond the initial 29 hours (or 44 hours for non-WQARF sites) for Department personnel and 5 hours for an Assistant AG will be billed at the rate of $65 per hour (rounded from $64.97). The cost information was supplied by the Department's Financial Services Section for Department costs, and by the AGO regarding the projected amount that agency will bill to the Department.

BENEFITS TO THE DEPARTMENT -- The Department has no incremental economic benefits as a result of this rule. The applicant pays the fee calculated to reimburse the Department for its costs; no profit margins are included. The fee does provide the Department with funds needed to pay for the PPA administration and processing, part of which cost the Department is currently absorbing. The new fee will give the Department more money for resources it needs to fulfill its mission. Non-economic benefits to the Department result because this fee increase supports the PPA program which supports the Department's mission.

B(3)(a)(2) COSTS TO THE AGO -- There are no incremental costs to the AGO as a result of this amendment, since, under an Inter-agency Service Agreement (ISA), the Department must reimburse the AGO at the rate in the ISA, whether or not the PPA fee increases.

BENEFITS TO THE AGO -- There are no incremental economic benefits to the AGO, since the rate used by the AGO as agreed to in the ISA does not include a profit margin. The AGO realizes non-economic benefits by fulfilling its mission.

B (3)(b) COSTS TO POLITICAL SUBDIVISIONS -- If any agency or political subdivision of the State applies for a PPA, the applicant will have to pay all applicable charges; there is no provision in law to waive or discount charges for agencies or political subdivisions of the State.

BENEFITS TO POLITICAL SUBDIVISIONS – The public benefit associated with a PPA is an important part of the PPA statute. The statute specifically lists five possibilities: funding, remediation, productive reuse of vacant or abandoned property, a facility for a public purpose, or creation of a conservation or recreation area. Benefits to an agency or political subdivision of the State that applies for a PPA depend on the reasons for the PPA. If the PPA will enable site development to address an important public purpose, the benefits accrue from achieving that purpose.

The EIS discusses the likely change in property value from using a PPA. These benefits and drawbacks are equally applicable to public and private entities who use a PPA as part of a site development strategy. As such, the discussion is located in the next section that addresses the costs and benefits to private entities.

To the extent that PPAs facilitate development, municipalities and subdivisions benefit from increased revenues. Municipalities and taxing subdivisions of the State benefit from PPA-facilitated development by gaining property and transaction taxes. With greater tax revenues, municipalities and subdivisions will be more able to fund critical services.

At the same time, the costs of emergency services are expected to drop as blight is reduced. Most contaminated sites are located in industrial areas. Since PPAs are used for land transactions, many of which are preludes to development, PPA-facilitated transactions are most likely to apply to under-used properties, which have a potential for providing a higher income than they currently do. Many could be vacant and blighted, serving as a venue for crime and an environmental hazard beyond that posed by the contamination, due to debris and disrepair. Using private enterprise to address such sites reduces the need for emergency services, without imposing additional costs on a municipality. Developing an under-used site may increase the need for some public services, such as street lamps and road repair. The costs associated with the increased service demand are expected to be more than offset by the savings associated with the reduced need for emergency services.

B(3)(c)(l) COSTS TO APPLICANT PRIVATE BUSINESSES -- The economic benefits of a PPA may outweigh the costs for some sites, but for others, the costs may exceed the benefits. Many variables could impact this balance, including the property's characteristics and location, its proposed use and the business acumen of the prospective purchaser. Projecting the costs and benefits of a PPA for even one transaction is very difficult, since many of these features are beyond the Department's control and ability to predict. Projecting the aggregate costs and benefits for future PPAs is impracticable. However, the Appraisal Foundation Advisory Opinion 9 (AO-9) (2003) points out that "liabilities and potential liabilities for site cleanup" is one consideration in appraising property value for contaminated sites, suggesting that reducing those liabilities might increase property value.

In the continuum from contaminated properties that are not cleaned up or re-developed to those for which remediation is achieved by complete removal of the contamination, sites re-developed with a PPA would seem to occupy a mid-point. On the one hand, there is more certainty conveyed by the PPA with regard to the liability for future remediation costs. On the other hand, the site still has contamination in place that may or may not be addressed after the property is developed.

Private businesses will apply for a PPA if it appears that the PPA's economic benefits will exceed its costs. The set cost of a PPA is the initial charge. Other costs required to comply with the rules and statute are per-hour charges for Department and AGO staff time beyond the time covered by the initial charge, and the charge for the public notice. The amount of this latter cost depends on the specific newspaper involved. Additional costs not included in the fee are the costs incurred by the prospective purchaser in negotiating a PPA, (e.g. attorney costs) and potential property value diminution.

Regarding the potential cost of property value diminution, one can refer to the research literature. Some research could suggest that the PPA execution process itself may lead to property value diminution. Conversely, a PPA usually is executed after information already has become known about contamination on the property, therefore, such diminution, if it occurred, often is not attributable to the PPA.

Jackson (2003) provides a formula for property value diminution of a contaminated property, as presented in Figure 1. The **"**cost effects**"** associated with a PPA include the cost for site characterization, and may include the costs of ongoing monitoring or treatment that might be conducted on property which is the subject of a PPA. **"**Cost effects**"** will vary depending on the complexity of the site, type of contamination and size of the release, and cannot be estimated with certainty.

Figure 1.

| |
|---|
| Property Value Diminution = |
| Cost Effects (Remediation and Related Costs) + |
| Use Effects (Effects on Site Usability) + |
| Risk Effects (Environmental Risk/Stigma) |

"Use effects" are the opportunity costs of restricted use of the site, as noted in AO-9 (referenced above). One "use effect" includes the loss of potential uses of the property due to remedial action requirements such as maintenance of

a well or cap or a use restriction covenant. A PPA may be viewed as increasing potential use over a contaminated site, or as restricting property use when compared to a site that no longer has any contamination at all.

The "risk effects" consist of environmental risk and stigma. Since one component of environmental risk is liability for cleanup, and the PPA reduces that liability, the PPA reduces environmental risk. In Jackson's model, reducing environmental risk should reduce property diminution. Estimating the effects of cost, use and risk is difficult and often requires specialized valuation methods and techniques that are beyond the capabilities of the Department.

BENEFITS TO APPLICANT PRIVATE BUSINESSES – The Department believes that, in the aggregate, benefits of this amendment, and of PPAs in general, outweigh the costs. Cleaning up contaminated sites is typically very expensive, several millions of dollars in some cases. The cost of developing property is likewise relatively expensive, when compared to the costs of a PPA. Even at the proposed increased rates, the charges the applicant pays for a PPA are small when compared to the overall project budget or to the potential cost of WQARF liability for cleanup costs. Because the PPA is entirely voluntary, the prospective purchaser must weigh the charges and other costs of a PPA against the projected benefits of a project when making business decisions.

The major benefit a prospective purchaser derives from a PPA is the reduced liability for future cleanup costs, and any resulting economic benefits. According to Jackson (2001b), these benefits are most pronounced for commercial and industrial properties, rather than for residential properties. Since most PPAs are for commercial and industrial properties, the EIS is based on an analysis of the research related to commercial and industrial properties. The effects for residential properties are assumed to be similar in direction, but less in magnitude.

Benefits to a seller or a potential purchaser might include increased property market value. For a potential purchaser, benefits might be reduced transaction and borrowing costs and increased property income. These benefits are for a site as compared to its previous, uncharacterized and undeveloped state. The Department believes it is logical to assume that a property with a PPA is increased in value over an unremediated site, but decreased compared to a site with complete removal of the contaminant.

In balancing costs and benefits of PPAs, the Department relies on the business community, and its decisions as governed by market influences. The Department assumes that if PPAs make investment worthwhile, then purchasers will negotiate PPAs. Pointing to the twenty-three PPAs that the Department has signed since 1996, it appears that the benefits of a PPA outweighed the costs, at least for those parties and at the previous fee.

B (3)(c)(2) COSTS TO NEWSPAPERS -- Newspapers will be impacted by this rule because the statute requires that a legal notice be published in a newspaper of county-wide circulation where the site is located. There are no costs to newspapers required by this rule.

BENEFITS TO NEWSPAPERS -- Newspapers will benefit from revenues received for publishing legal public notices. Publication charges vary from newspaper to newspaper. Charges are typically based on how many lines or column inches of copy are required.

The Department projects that the next five years will see the same number of PPA applications each year as there have been to date. The Department further assumes that the PPA sites will have the same geographic distribution as the applications received to date. Based on these assumptions, ADEQ projects there will be 35 sites in Maricopa County, 7 in Pima County, and 3 in other counties. Approximately 45 notices are expected over the next five years, resulting in estimated revenues ranging between about $1,900 and $38,000, depending primarily on which paper would be used for the public notices in Maricopa County.

B (4) IMPACTS ON PUBLIC AND PRIVATE EMPLOYMENT

There are no impacts on public or private employment anticipated by this amendment; the amendment itself will not create new jobs or destroy existing ones. However, to the extent that a PPA accelerates the return to productive use of a site which is now under-used, employment opportunities would be generated for the Arizona labor force. This is because private businesses could be set up on these sites. This would be an intended and beneficial consequence of this rule. Any new jobs created by businesses that may be established, expanded or relocated will be the result of private business decisions. The rule facilitates the acquisition of a previously contaminated site, presumably to return the property to its full economic use. Aside from the employment benefits, other benefits in the form of income taxes to be paid by the employees, property taxes, sales, unemployment and other taxes to be paid by the employer will accrue to various levels of government. These benefits might increase funds available for taxing entities to hire staff, thereby indirectly improving employment opportunities. Existing Department and AGO staff will handle the processing of PPAs; therefore, no new public sector employment positions are anticipated as a direct result of this amendment.

B (5) IMPACTS ON SMALL BUSINESSES

B (5)(a) SMALL BUSINESSES SUBJECT TO THE RULE-- Some of the applicants could be small business owners. There are no differential impacts on small or big businesses, therefore, the Department has not tried to determine the number of PPA applicants, newspapers, and other entities affected by the rule, that might be small businesses. The PPA is purely voluntary. There is no requirement for a business to obtain a PPA. If a business cannot afford the charges, it will choose, as a business decision, not to apply for a PPA.

The charges are expected to be a small part of development costs. The Department does not expect the incremental increase in costs due to the charges, even at increased rates, will be a determining factor in the decision of whether to develop a site. In general, if a business (small or otherwise) can afford to purchase and develop a contaminated site, it can afford the increase in charges from this amendment.

B (5)(b) ADMINISTRATIVE COSTS -- There are no administrative costs to small and other businesses except the charges.

B (5)(c) REDUCTION OF IMPACT ON SMALL BUSINESSES -- The voluntary nature of the PPA makes reduction of impact on small businesses unnecessary.

B (5)(d) COSTS AND BENEFITS TO PRIVATE PERSONS -- A city or other political subdivision that applies for a PPA could possibly pass on the costs of charges to its residents. It is also possible that these costs could be readily absorbed by its existing budget. Either way, local taxpayers will pay. Another potential cost is the public health risk associated with possibly leaving contamination in the environment. The Department believes that generally this risk is low, because site conditions and contaminant characteristics are reviewed before the Department issues a PPA, which review is intended to establish that public health will not be threatened. The Department reviews each PPA on a case-by-case basis to assure that the public benefits outweigh the costs. The Department believes these potential costs are minimal when considered in relation to the benefits that could result.

Private persons could realize a substantial benefit from the facilitation of a process whereby a contaminated property is brought back to full economic use. Redevelopment benefits the local community by reducing environmental hazards, creating new business opportunities and reducing blight. Contaminated sites may be located near potential markets and labor, in which case their redevelopment may be less expensive than developing previously undeveloped land because roads and infrastructure are already in place.

Because the PPA applicants will pay charges to cover some of the costs that the Department has been absorbing, the taxpaying public will experience a diminished burden of providing services that will benefit specific groups. Even under the amended rule, the Department is mindful that the fee would not account for substantial overhead costs. However, the Department is prepared to absorb these additional costs and not charge them as part of the PPA fee.

B (6) PROBABLE EFFECTS ON STATE REVENUES

No new State revenues are projected. Charges to be paid to the Department are intended for cost recovery.

B (7) LESS INTRUSIVE OR LESS COSTLY ALTERNATIVES

The statute permits the Department to charge “a reasonable fee” for providing the service. No less intrusive or less costly alternatives were authorized or contemplated by the Department.

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

Name: Ren Willis-Frances

Address: 1110 W. Washington St.
Phoenix, AZ 85007

Telephone: (602) 771-4109

Fax: (602) 771-2302

E-mail: willis-frances.ren@ev.state.az.us

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

Date: August 25, 2004

Time: 1:00 p.m.

Location: Arizona Department of Environmental Quality
1110 W. Washington St., Room 145
Phoenix, AZ 85007

Written comments will be accepted through August 26, 2004, at 5:00 p.m. Written comments should be addressed to:

Name: Barbara Stewart

Address: 1110 W. Washington St.
Phoenix, AZ 85007

Telephone: (602) 771-4185

Fax: (602) 771-4246

E-mail: stewart.barbara@ev.state.az.us

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

None

**12. Incorporations by reference and their location in the rule:**

None

**13. The full text of the rule follows:**

**TITLE 18. ENVIRONMENTAL QUALITY**

**CHAPTER 7. DEPARTMENT OF ENVIRONMENTAL QUALITY REMEDIAL ACTION**

**ARTICLE 3. PROSPECTIVE PURCHASER AGREEMENT**

Section
R18-7-301. Prospective Purchaser Agreement Fees

**ARTICLE 3. PROSPECTIVE PURCHASER AGREEMENT**

**R18-7-301. Prospective Purchaser Agreement Fees**

**A.** ~~A person entering into~~ An applicant for a prospective purchaser agreement with the Department pursuant to A.R.S. § 49-285.01 shall pay to the Department the ~~fees~~ fee prescribed in this Article. The fee is nonrefundable once an application is accepted by the Department.

**B.** ~~A person~~ An applicant for a prospective purchaser agreement shall remit a review fee for each prospective purchaser agreement application submitted for review. The review fee shall consist of all of the following:

1. An initial ~~fee~~ charge as prescribed in subsection (C);
2. An hourly ~~fee~~ charge, if the conditions of subsection (D) apply;
3. The publication costs for the legal notice as prescribed in subsection (E); and
4. A consent decree charge, if any, as prescribed in subsection (G).

**C.** The Department shall ~~charge~~ collect an initial ~~fee~~ charge of ~~$900~~ $2,200 for an application for a prospective purchaser agreement requiring minimal review for property within a site that is listed in the Water Quality Assurance Revolving Fund (WQARF) registry pursuant to A.R.S. § 49-287.01. For property that is not on the WQARF registry, an initial charge of $3,100 is required for an application for the prospective purchaser agreement. The initial ~~fee~~ charge covers direct and indirect Departmental ~~technical review time~~ costs and direct and indirect Department of Law ~~administrative~~ costs for an Assistant Attorney General. ~~A~~ An application for a prospective purchaser agreement requiring minimal review is one ~~which~~ that requires ~~30~~ 29 or fewer hours of review time spent by the Department for a WQARF site or 44 or fewer hours for a non-WQARF site, and 5 or fewer hours by an Assistant Attorney General.

**D.** In addition to the initial ~~fee~~ charge described ~~above~~ in subsection (C), the ~~Department~~ applicant shall ~~charge a fee of $30 per hour~~ pay an hourly charge for ~~its review of~~ reviewing a prospective purchaser agreement ~~which~~ that requires more than ~~30~~ the hours ~~of~~ for Departmental and Assistant Attorney General review ~~and shall charge a legal review fee for any prospective purchaser agreement which requires legal review by the Attorney General.~~ specified in subsection (C). The additional charge is $65 per hour for Department staff time and Assistant Attorney General time. ~~The Department shall notify the applicant of any estimated hours over those necessary for the initial review, and whether any legal review is required. The Department shall obtain written authorization from the applicant before expending any billable hours in excess of 30.~~

**E.** The Department shall publish a legal notice announcing an opportunity for public comment on the prospective purchaser agreement. The legal notice shall include a general description of the contents of the agreement; the location where information regarding the agreement can be obtained; the name and address of the Departmental contact where comments may be sent; and the time and date that the comment period closes. The cost of publishing the legal notice shall be paid by the applicant for a prospective purchaser agreement.

**F.** The initial ~~fee~~ charge described in subsection (C) is due when the applicant submits the prospective purchaser agreement ~~is submitted for review~~ application to the Department. The publication cost, described in subsection (E), and any hourly ~~fees~~ charge, described in subsection (D), are due within 30 days of ~~billing~~ the date the invoice is sent by the Department. Review fees are payable to the state of Arizona by company, cashier or certified check, money order, or another method approved by the Department, and shall be paid in full before a prospective purchaser agreement is executed.

**G.** A charge in the amount of $500 shall accompany a request for a consent decree based upon an executed prospective purchaser agreement. If costs for the consent decree exceed $500, the terms of the consent decree shall address the remainder of the costs.