

(This ADEQ document matches the official rulemaking published at 4 A.A.R. 3885)

NOTICE OF FINAL RULEMAKING

TITLE 18. ENVIRONMENTAL QUALITY

CHAPTER 7. DEPARTMENT OF ENVIRONMENTAL QUALITY

REMEDIAL ACTION

PREAMBLE

1. Sections Affected

Rulemaking Action

R18-7-401

Repeal

R18-7-401

New Section

2. The specific authority for the rulemaking, including both the authorizing statute

(general) and the statutes the rules are implementing (specific):

Authorizing legislation: A.R.S. §§ 49-104(A)(17), 49-104(B)(17), and 49-104(C), and
Laws 1997, Chapter 296

Implementing legislation: Laws 1997, Chapter 296 (portions of which are codified as
A.R.S. §§ 49-153 through 49-157)

3. The effective date of the rules:

Effective on the date filed with the Secretary of State.

4. A list of all previous notices appearing in the Register addressing the final rule:

 3 A.A.R. 1937 , July 18, 1997 (Notice of Rulemaking Docket Opening)

Vol. # Page # Issue date

 3 A.A.R. 1912 , July 18, 1997 (Notice of Proposed Exempt Rulemaking)

Vol. # Page # Issue date

 3 A.A.R. 2403 , August 29, 1997 (Notice of Final Exempt Rulemaking)

Vol. # Page # Issue date

 3 A.A.R. 2410 , August 29, 1997 (Notice of Rulemaking Docket Opening)

Vol. # Page # Issue date

 3 A.A.R. 2886 , October 17, 1997 (Notice of Proposed Permanent Rulemaking)

Vol. # Page # Issue date

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

Name: George Tsiolis or Martha Seaman

Address: 3033 North Central Avenue
 Phoenix, AZ 85012

Telephone: (602)207-2222

Fax: (602)207-2251

6. An explanation of the rule, including the agency’s reasons for initiating the rule:

The Notice of Proposed Rulemaking for this rule was published in the *Arizona Administrative Register* on October 17, 1997.

The purpose of this rule making is to implement Laws 1997, Chapter 296, which requires the Department to establish a fee to support the processing and reviewing of submittals pertaining to remedial actions performed under the Greenfields Pilot Program. The fee rule in this rule making will replace the expedited interim fee rule on the same subject which was published in the *Arizona Administrative Register* on August 29, 1997.

A. Background for This Permanent Fee Rule

In recent years, the Arizona legislature has made efforts to encourage the redevelopment of underutilized properties including properties located in urban or industrialized areas (so-called “brownfields” sites). These efforts include the authorization of risk-based soil remediation standards using non-residential exposure assumptions (Laws 1995, Chapter 232), the qualified exemption of lenders and fiduciaries from liability for WQARF and LUST sites (Laws 1996, Chapter 177), and the authorization of the Department to enter into qualified agreements with prospective purchasers of brownfields sites which provide the purchaser with a written release, covenant not to sue and immunity from contribution claims for any potential liability for existing contamination (Laws 1996, Chapter 177).

Laws 1997, Chapter 296 establishes the Greenfields Pilot Program, which is intended to

encourage the voluntary remediation of up to 100 soil-contaminated brownfields sites. The pilot program provides this encouragement by removing direct departmental involvement in the voluntary remediation in favor of a delegated approach with limited departmental oversight. Under the program, a remediation specialist certified by the Arizona Board of Technical Registration performs the remediation, ensures that applicable remedial action criteria are met, and certifies that no further remediation work is necessary at the site through the submittal to the Department of a “no further action” letter. The Department, in turn, supervises the program by verifying the specialist is eligible for participation in the program, by ascertaining that the site is eligible for remediation under the program, and by auditing a percentage of the Greenfield’s sites to determine whether the remediations are consistent with applicable remedial action criteria.

Laws 1997, Chapter 296 requires the Department to finance its involvement in the Greenfields program through the collection of a fee. Pursuant to § 11 of that law, the Department filed an expedited interim fee rule on August 6, 1997. The expedited interim fee rule, which became effective upon the date of its filing, was published in the *Arizona Administrative Register* on August 29, 1997 and will remain in effect until the permanent fee rule that is the subject of this notice becomes effective.

B. Specific Explanation of This Permanent Rule

Laws 1997, Chapter 296, § 10(A) establishes a Greenfields program fund that is to be financed through legislative appropriations and from the fee that is the subject of this permanent rule making. Section 10(B) identifies the legislative appropriations as being \$170,000 from the general

fund into the Greenfields fund through fiscal year 1999. Section 10(E) requires the fee to be sufficient to finance the cost of implementing and administering the Greenfields Pilot Program. Based on the language of these provisions, the Department has determined that the initial \$170,000 are for start-up development of the Greenfields program, but that the fee must cover the cost of implementing the program site-by-site.

Development of the program will include formulating procedures for ensuring the specialists and sites are eligible for participation in the Greenfields program, and for selecting remedial actions for auditing by the Department based upon the type of site and the level of contamination.

Development also includes devising standard certification forms, reporting forms, and notification forms to be used during a Greenfields remediation. Finally, development includes the rule making necessary to implement the Greenfields program.

Implementing the program site-by-site consists largely of departmental reaction to actions taken by the property owner and certified remediation specialist. At least fifteen days prior to the performance of the voluntary remediation, the property owner and remediation specialist must submit an application to the Department which shows that the specialist is properly certified by the Board of Technical Registration and has adequate financial assurance based on the proposed scope of work. The application must also certify that the site in question has soil contamination that has not impacted groundwater and is one of the first 100 Greenfields sites. The property owner or specialist also must notify the public of the proposed remediation, and submit a copy of the notice to the Department. The Department must process and review these submittals. If the

Department determines that the specialist is qualified to perform the remediation and that the site is eligible for remediation under the Greenfields program, then the Department must notify the property owner or specialist not less than fifteen days after receiving the copy of the public notice that the specialist may begin the remediation. The Department must also identify which state environmental permits or approvals the property owner is not required to obtain during the performance of the remediation.

Following the performance of the remediation, the specialist must submit a “no further action” letter to the Department, a copy of the remediation report, and corresponding laboratory data packages. The Department must process and review this submittal. The specialist also must submit the Greenfields fee at this time, which the Department must process into the Greenfields program fund. Based on its review of the submittals, the Department must determine whether to conduct an audit of the remediation, and if necessary must perform the audit within 180 days.

The audit may include field inspection and soil sampling. The purpose of the audit is to determine whether the remediation was consistent with applicable remedial action criteria, as well as gather information generally to determine the efficacy of the pilot program. Based on the results of the audit, the Department may have to record a notice of revocation of the specialist’s “no further action” letter and, if so, notify the Board of Technical Registration of the deficiencies in the remediation.

The Department has determined the fee for participating in the Greenfields Pilot Program will be \$2,200 per site. This fee is near the lower end of the range of fees charged by other states for

participation in programs similar to the Greenfields program. The Department's assumptions behind the calculation of this fee and the reason for selecting one flat fee are presented in the summary of economic, small business, and consumer impacts, below.

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 summary of the economic, small business, and consumer impact:**

Summary

Laws 1997, Chapter 296 requires the Department to finance its involvement in the Greenfields Pilot Program through the collection of a fee. The Department's involvement in the program consists of reviewing and processing Greenfields submittals and performing an audit on a portion of the Greenfields sites. The Department has determined that the cost of these activities is \$2,200 per site. The Department shall recover this cost by charging an equivalent fee of \$2,200 per Greenfields site, because charging one flat fee that spreads the cost of the site audits among all the sites will provide predictability which is necessary to encourage voluntary remediations of soil-contaminated brownfields sites. The alternative, which involves recovering the costs of performing a site audit only from those sites actually being audited, up to six months after the specialist's submission of the "no further action" letter, would result in an unplanned-for additional, significant financial burden on those persons who are audited. The financial

unpredictability in such an approach could discourage persons and small businesses in particular from performing a voluntary remediation under the Greenfields program.

The economic impact of this final rule making is positive. The benefits of the program's facilitation through the charging of the fee outweigh the cost of the fee, because the program provides an avenue to redevelopment and economic revitalization of a property that is expected to be faster and less costly than already-existing routes to remediation which involve more extensive departmental oversight and review.

a. Identification of persons who will be directly affected by, bear the costs of or directly benefit from the rule making

1. Owners of the brownfields site -- These persons include individuals, private businesses, municipalities, and other political subdivisions of the State who desire to remediate a brownfields soil-contaminated site using a certified remediation specialist under the Greenfields Pilot Program. These persons will benefit from the rule making, because it provides an avenue toward obtaining a "no further action" letter that is potentially faster, involves less departmental oversight, and therefore involves less departmental review cost as compared to performing the remediation under A.R.S. §§ 49-282.05(B) or 49-285(B).

2. State agencies that are involved in the implementation of the program -- The Department will assign staff to react to actions taken and submittals received from the certified remediation specialist, as described in Section 6 above. The Office of Administrative Hearings

and the Attorney General's Office may be involved in challenges to actions taken by the Department pursuant to the Greenfields program, such as a challenge to the Department's revocation of a "no further action" letter based on a site audit.

3. Responsible parties as defined under A.R.S. § 49-283 -- These parties are persons who are responsible for the existing soil contamination at the brownfields site that is being remediated under the Greenfields Pilot Program. The extent of these persons' liability will be determined in part based on the remediation costs incurred by the property owner.

4. Newspapers of general circulation in the county where the brownfields site being remediated under the Greenfields Pilot Program is located -- These entities will benefit from the requirement that the remediation specialist publish a notice of the planned remediation in their newspapers.

5. General public -- Members of the general public will receive a substantial benefit from this rule making's facilitation of the redevelopment of soil-contaminated brownfields sites that are currently vacant, abandoned, or otherwise not realizing their full economic potential. Members of the public residing or working in the area of such sites will particularly benefit from the economic revitalization of the sites, from economic and quality-of-life standpoints. Taxpayers will benefit because facilitating private remediations under the Greenfields program will diminish the taxpayers' burden associated with public-financed remediations.

b. Cost-benefit analysis

This cost-benefit analysis necessarily examines the costs and benefits of the program being financed by the fee that is the subject of this rule making, in addition to the costs and benefits of the fee itself.

1. Implementing agency -- The costs to the Department, the implementing agency, will be the costs of reacting and responding to submittals from the property owner and certified remediation specialist, the performance of audits on a portion of the sites remediated under the Greenfields program, and interaction with the Bureau of Technical Registration. The costs for implementing the Greenfields program are estimated as follows:

TABLE 1 - ESTIMATED TOTAL COSTS TO IMPLEMENT THE PROGRAM

| | <u>Cost per Site</u> | <u>Extension</u> |
|--|-----------------------|------------------|
| 100 Sites - Review and Processing | \$ 509 (see Table 2) | \$ 50,900 |
| 15 Audits by ADEQ, no Samples | \$2,461 (see Table 3) | \$ 36,915 |
| 10 Audits w/Contractor CRS, no Samples | \$3,363 (see Table 3) | \$ 33,360 |
| 10 Audits by ADEQ, w/Samples | \$6,552 (see Table 4) | \$ 65,520 |
| 5 Audits w/Contractor CRS, w/Samples | \$8,356 (see Table 4) | <u>\$ 41,780</u> |
| | ESTIMATED TOTAL | \$228,745 |

ESTIMATED TOTAL AVERAGED PER SITE \$ **2,200**

CRS = certified remediation specialist

TABLE 2 - ESTIMATED COST TO REVIEW AND PROCESS SUBMITTALS PER SITE

(NOT INCLUDING A SITE AUDIT)

| <u>Staff</u> | <u>Rate</u> | <u>Hours</u> | <u>Extension</u> |
|------------------|-------------|--------------|------------------|
| Section Manager | \$59 | 0.25 | \$ 15 |
| Unit Manager | \$54 | 1.0 | \$ 54 |
| Project Manager | \$45 | 8.0 | \$ 360 |
| Clerk Typist III | \$20 | <u>4.0</u> | <u>\$ 80</u> |
| ESTIMATED TOTALS | | 13.25 | \$ 509 |

Hourly Rates are based on 66% utilization for manager/technical personnel and 72% for clerical as Laws 1997, Chapter 296 requires implementation of the program to be self-financed.

TABLE 3 - ESTIMATED COST TO PERFORM A FIELD AUDIT

WITHOUT FIELD VERIFICATION (SAMPLES)

| <u>Staff</u> | <u>Rate</u> | <u>Hours</u> | <u>Extension</u> | Unit |
|-------------------------------|-------------|--------------|-------------------|------|
| Section Manager | \$59 | 1.5 | \$ 89 | |
| Manager | \$54 | 6.0 | \$ 324 | |
| Hydrologist IV(CRS) | \$56 | 8.0 | \$ 448 | |
| Hydrologist III | \$50 | 8.0 | \$ 400 | |
| Project Manager | \$45 | 24.0 | \$ 1,080 | |
| Clerk Typist III | \$20 | <u>6.0</u> | <u>\$ 120</u> | |
| ESTIMATED TOTALS | | 53.5 | \$ 2,461 | |
| (Substituting Contractor CRS) | | (57.5) | (\$ 3,363) | |

CRS = certified remediation specialist

Hourly Rates are based on 66% utilization for manager/technical personnel and 72% for clerical as Laws 1997, Chapter 296 requires implementation of the program to be self-financed.

TABLE 4 - ESTIMATED COST TO PERFORM A FIELD AUDIT
WITH FIELD VERIFICATION (SAMPLES)

| <u>Staff</u> | <u>Rate</u> | <u>Hours</u> | <u>Extension</u> |
|--|-------------|--------------|-------------------|
| Section Manager | \$59 | 2.0 | \$ 118 |
| Unit Manager | \$54 | 8.0 | \$ 432 |
| Hydrologist IV(CRS) | \$56 | 16.0 | \$ 896 |
| Hydrologist III | \$50 | 24.0 | \$ 1,200 |
| Project Manager | \$45 | 32.0 | \$ 1,440 |
| Clerk Typist III | \$20 | <u>8.0</u> | <u>\$ 160</u> |
| ESTIMATED LABOR TOTALS | | 90.0 | \$ 4,246 |
| Analytical: 4 samples for metals, PCBs, VOCs | | | \$ 2,180 |
| Travel & Per Diem | | | <u>\$ 126</u> |
| ESTIMATED TOTAL | | | \$ 6,552 |
| (Substituting Contractor CRS) | | (98.0) | (\$ 8,356) |

CRS = certified remediation specialist

Hourly Rates are based on 66% utilization for manager/technical personnel and 72% for clerical as Laws 1997, Chapter 296 requires implementation of the program to be self-financed.

The Department has elected to recover the estimated per-site cost of \$2,200 through an equivalent flat review fee of \$2,200 for each Greenfields site remediation. The one-flat-fee approach was selected over approaches that involve site-specific billing based on unit rates, because those approaches do not provide the predictability that is necessary to encourage voluntary remediations of soil-contaminated brownfields sites.

For instance, the Department examined the possibility of charging a flat fee for the administrative work associated with reviewing an initial Greenfields submittal to determine the eligibility of the site and the specialist, reviewing the public notice of planned remediation, notifying the specialist that it may begin the remediation, identifying which other approvals or permits the property owner will not be required to obtain, and reviewing and processing the “no further action” letter and supportive documentation; and charging only those sites audited for the actual costs of the audit using unit rates for staff-time, sampling equipment, and laboratory analyses. Using this approach to financing the program would have meant charging a flat fee to all participating property owners, and then, up to six months later surprising some of the owners with a notice that the Department has decided to audit their site and will be requiring the owner to pay an additional \$ 3,000 or more for an audit without field verification, or an additional \$ 7,000 or more for an audit with field verification. Such an approach is not only unpredictable, in that it would result in an unplanned-for additional, significant financial burden on the property owner, but also may give rise to the appearance of unfairness to the owner of the site selected for the audit. The property owner likely would challenge the audit based on a feeling of unfair surprise and a desire to avoid the additional cost. In general, any approach that does not inform the property owner of

its liability to the Department up-front may discourage smaller businesses from performing a voluntary remediation under the Greenfields program. For these reasons, the Department shall charge an up-front, predictable, flat review fee of \$ 2,200 which spreads the projected cost of audits over all of the property owners participating in the Greenfields program.

There are no incremental benefits to the Department as a result of this rule. Fees to be paid by the certified remediation specialist or its employer are merely to reimburse the Department for the above costs; no profit margins are contemplated.

2. Other agencies directly affected by the rule making -- An administrative appeal by the participating property owner concerning an action taken by the Department pursuant to the Greenfields program, including a decision to perform an audit or revoke a “no further action” letter, could result in costs to the Office of Administrative Hearings for convening the formal adjudication on the procedural or substantive validity of the appeal, and costs to the Attorney General’s Office for representing the Department in the matter. These costs would, as usual, be covered by the respective budgets of those offices. These costs do not result from the charging of the fee itself.

There are no incremental benefits to the Office of Administrative Hearings and the Attorney General’s Office as a result of this rule.

3. Political subdivision of this state directly affected by the rule making -- If a

political subdivision of this state desires to perform a remediation under this program, then its costs and benefits deriving from this rule making will be those costs and benefits discussed for private persons who are directly affected by the rule making, below.

4. Businesses directly affected by the rule making -- If a business desires to perform a remediation under this program, then its costs and benefits deriving from this rule making will be those costs and benefits discussed for private persons who are directly affected by the rule making, below.

Newspapers will be not be impacted by this rule; rather, newspapers will be impacted by the requirement in Laws 1997, Chapter 296 to publish the notice of planned remediation in the county where the brownfields site in question is located. There are no costs to these newspapers resulting from this rule making. Newspapers will derive the benefit from charging a fee for publishing the notice.

5. Private persons and consumers who are directly affected by the rule making -- The cost to persons who are directly affected by the fee will be the cost of the fee itself. This fee should be outweighed by the benefit of being able to elect to perform a voluntary remediation through the use of a certified remediation specialist with minimal departmental oversight and less departmental review cost as compared to performing the remediation under A.R.S. §§ 49-282.05(B) or 49-285(B).

Consumers probably will not be directly affected by the charging of the fee. Consumers may be indirectly affected, as businesses performing a Greenfields remediation likely will pass the cost of the remediation, including the cost of the fee, onto persons consuming the business' products and utilizing the business' services. The indirect benefit to consumers, which is a cleaner environment and improved quality of life, will outweigh the disbursed impact felt as a result of the fee.

c. Probable impact on private and public employment

1. Businesses directly affected by the rule making -- There is little impact on private employment at businesses directly affected by the rule making. Presumably, a business would have to divert \$2,200 of its revenues to finance its involvement in the Greenfields program; however, a business would already have made the decision to expend substantial amounts of money, which might otherwise be used to compensate its employees, in the remediation of a brownfields site, so that the additional cost of the Greenfields fee would be relatively minimal.

2. Agencies directly affected by the -- There is no impact on public employment in the agencies affected by this rule making. As previously indicated, the Department is required to finance its involvement through the collection of the fee; therefore, there are no additional costs to the Department that would divert revenues used to compensate its employees. Any impact of the Greenfields program on the Office of Administrative Hearings or the Attorney General's Office, discussed above, is the result of Laws 1997, Chapter 296, and not the fee used to finance implementation of the program established by that law.

3. Political subdivisions directly affected by the rule making -- There is little impact on political subdivisions directly affected by the rule making. Presumably, a political subdivision that desires to perform a remediation under the Greenfields program would have to divert \$2,200 of its revenues to finance its involvement in the Greenfields program; however, an entity would already have made the decision to expend substantial amounts of money, which might otherwise be used to compensate its employees, in the remediation of a brownfields site, so that the additional cost of the Greenfields fee would be relatively minimal.

d. Probable impact on small businesses and reduction of impact:

1. Identification of small businesses subject to the rule making -- Small businesses subject to the fee would be those that elect to undertake a voluntary remediation under the Greenfields program. Having made the decision to engage in a possibly costly voluntary remediation, it is likely that a small business will benefit from the rule making, because the rule making enables the business to perform the remediation through the use of a certified specialist with minimal departmental oversight and with less review cost as compared to performing the remediation under A.R.S. §§ 49-282.05(B) or 49-285(B).

2. Administrative and other costs required for compliance with the rule making -- The only costs required for compliance with this fee rule is the paying of the fee which is necessary to finance the sought-after program.

3. Description of methods the agency may use to reduce the impact on small

businesses (A.R.S. § 41-1035 analysis) -- Laws 1997, Chapter 296 requires the Department to recoup all of its costs of implementing the Greenfields Pilot Program through the collection of the fee. The Department, therefore, does not have the discretion to exempt small business who wish to participate in the program from having to pay a fee. In order to lessen the impact to small business, however, the Department has elected to charge one flat fee for every Greenfields site, which spreads the cost of performing audits on a portion of those sites over all of the sites. This approach, as indicated above, will eliminate the possibility of an unexpected additional, significant financial burden on small businesses whose sites have been selected for an audit.

e. Statement of the probable effect on state revenues

There may be a positive effect on the general fund, as any money received through collection of the fee that is not utilized in the implementation of the Greenfields program must be returned to the general fund on an annual basis.

f. Description of any less intrusive or less costly alternative methods of achieving the purpose of the rule making

The purpose of the rule making is to finance the implementation of the Greenfields Pilot Program through the collection of a reasonable fee, as required under Laws 1997, Chapter 296. For reasons discussed above, the Department believes that the least costly alternative of achieving this purpose is to average the cost of implementing the program, including performing the required audits on a percentage of the sites, over all of the sites that may be remediated under the program. This approach will eliminate the possibility of an unexpected additional, significant

financial burden on persons whose sites are selected for an audit.

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

The only change between the proposed rules and these final rules is the reference to the codified portions of Laws 1997, Chapter 296, which are now at A.R.S. §§ 49-153 through 49-157.

10. A summary of the principal comments and the agency response to them:

No comments.

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

Not applicable.

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

None.

13. Was the rule previously adopted as an emergency rule?

No. The rule was previously adopted as an expedited interim rule, in accordance with

Laws 1997, Chapter 296, Section 11, at:

3 A.A.R. 2403, August 29, 1997

Vol. # Page # Issue date

14. The full text of the rules follows:

TITLE 18. ENVIRONMENTAL QUALITY

CHAPTER 7. DEPARTMENT OF ENVIRONMENTAL QUALITY

REMEDIAL ACTION

ARTICLE 4. VOLUNTARY REMEDIATION PROGRAM

Section

R18-7-401. ~~Greenfields Pilot Program Fee~~ Greenfields Pilot Program Fee

TITLE 18. ENVIRONMENTAL QUALITY

CHAPTER 7. DEPARTMENT OF ENVIRONMENTAL QUALITY

REMEDIAL ACTION

ARTICLE 4. VOLUNTARY REMEDIATION PROGRAM

~~R18-7-401. Greenfields Pilot Program Fee~~

- ~~A. A certified remediation specialist who participates in the Greenfields Pilot Program pursuant to Laws 1997, Chapter 296, and who submits the documentation that states that no further action is required to remediate the known releases on the site shall remit the review fee required under subsection B together with the documentation.~~
- ~~B. The Department shall charge a flat fee of \$2,200 per accepted site participating in the Greenfields Pilot Program.~~

R18-7-401. Greenfields Pilot Program Fee

- A. A certified remediation specialist who participates in the Greenfields Pilot Program pursuant to A.R.S. §§ 49-153 through 49-157 and who submits the documentation that states that no further action is required to remediate the known releases on the site shall remit the review fee required under subsection B together with the documentation.
- B. The Department shall charge a flat fee of \$2,200 per accepted site participating in the Greenfields Pilot Program.