

**NOTICE OF EXEMPT RULEMAKING**

**TITLE 18. ENVIRONMENTAL QUALITY**

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

**PREAMBLE**

1. 

<b><u>Sections Affected</u></b>	<b><u>Rulemaking Action</u></b>
Article 4	Amended
Article 5	New Article
R18-7-501	New Section
R18-7-502	New Section
R18-7-503	New Section
R18-7-504	New Section
R18-7-505	New Section
R18-7-506	New Section
R18-7-507	New Section
  
2. **The specific authority for the rulemaking, including both the authorizing statute (general) and the statutes the rules are implementing (specific):**  
Authorizing statute: A.R.S. § 41-1003, § 49-104  
Implementing statutes: A.R.S. § 49-186, Laws 2000, Chapter 225, § 13
  
3. **The effective date of the rules:**  
The interim rules in this Notice of Exempt Rulemaking will become effective on February 9, 2001
  
4. **A list of all previous notices appearing in the Register addressing the exempt rule:**  
Notice of Rulemaking Docket Opening: 6 A.A.R. 2681, July 14, 2000.  
Notice of Proposed Rulemaking: 6 A.A.R. 4007, October 20, 2000.
  
5. **The name and address of agency personnel with whom persons may communicate regarding the rulemaking:**  
Name: Craig Salminen or Ren Willis-Frances  
Address: 3033 N. Central  
Phoenix, AZ 85012  
Telephone: 602-207-2227 or 602-207-4109  
Fax Number: 602-207-2251  
TTD Number: 602-207-4829
  
6. **An explanation of the rule, including the agency's reasons for initiating the rule, including the statutory citation to the exemption from the regular rulemaking procedures:**

**A. Authorization**

This is the final interim rule making authorized in session law at Laws 2000, Chapter 225, § 13. The session law requires the Department to adopt rules establishing the fees prescribed for the Voluntary Remediation Program in A.R.S. § 49-179. The session law exempts this interim rule making from the rule making provisions at A.R.S. Title 41, Chapter 6, Article 3, but requires the Department to publish the interim rules in the Arizona Administrative Register, provide for reasonable notice and hold at least one public hearing on the proposed interim rules. The interim rules become effective no earlier than the thirtieth day after the last public hearing.

The proposed Voluntary Remediation Program interim fee rules were filed with the Office of the Secretary of State on September 29, 2000 and published in the Arizona Administrative Register on October 20, 2000. Oral proceedings on the proposed rules were held on November 28, 2000 and November 30, 2000. Close of the comment period on the proposed rules was December 15, 2000. The interim rules are effective as of the date of publication of this Notice of Exempt Rulemaking.

Laws 2000, Chapter 225, § 13 requires the Department to file with the Secretary of State a notice of docket opening for the permanent rule making within 90 days after the filing of the final interim rules. Within 30 days of filing the notice of docket opening, the Department is required to file a notice of proposed rulemaking for the permanent rules. The interim rules published today will expire

and are automatically repealed on the date that the permanent rules become effective.

This rule making also amends 18 A.A.C. Chapter 7, Article 4 to change its title. Article 4 consists of a single rule, R18-7-401, which establishes the Greenfields pilot program fee. Article 4 is currently titled "Voluntary Remediation Program". Under this rule, Article 4 is retitled "Greenfields Pilot Program". Article 5, is titled "Voluntary Remediation Program" and establishes fees under the Voluntary Remediation Program. This amendment of Article 4 is authorized under A.R.S. § 49-186 as necessary to implement section A.R.S. § 49-179.

#### **B. Background of the Rules**

On July 18, 2000, Senate Bill 1454 (Laws 2000, Chapter 225) became effective, terminating the Department's two existing voluntary remediation programs and establishing a single new voluntary remediation program. Before enactment of Laws 2000, Chapter 225, the Department maintained a "WQARF voluntary program" and an "agency-wide voluntary program." Both programs shared a similar purpose and were administered by the same Department personnel. Both programs were funded, in part, through cost reimbursements from program participants and, in part, through allocations from the Water Quality Assurance Revolving Fund. Laws 2000, Chapter 225 effectively merges the existing voluntary remediation programs into a single program.

The new Voluntary Remediation Program provides an opportunity for property owners and other interested parties to voluntarily investigate and remediate contaminated sites and to obtain the Department's review and approval of remedial actions. The program encourages the voluntary cleanup of environmental contamination and offers its participants a stay of departmental enforcement actions, an expedited review of voluntary remedial actions, and, if remediation levels and controls meet statutory requirements, a means of obtaining a determination that the Department will not take or require further action at the site.

Under the new program, any person may request that the Department review and approve work plans for proposed remedial actions and approve remedial action work that has been previously performed. The program does not apply to certain corrective actions taken at hazardous waste sites or underground storage tank sites or to remedial actions required by the Department, a court of law, or under an administrative order. Nor does the program apply to remedial actions taken at sites that are listed on the WQARF site registry.

Laws 2000, Chapter 225 provides for benefits under the new program that were not available under the previous programs:

Expedited Review: Under Laws 2000, Chapter 225, applications are to be reviewed promptly to determine program eligibility. Applications that are not denied or found to be incomplete within 60 days after receipt are deemed to be complete. If the work described in the application is not excluded under the applicability provisions of A.R.S. § 49-172, the application will be approved. Work plans are to be reviewed expeditiously and, at the option of the applicant, may provide for review and approval of completed phases or tasks before initiation of the next phase or task. Upon an applicant's request and agreement to reimburse the Department for additional costs incurred, the Department may contract with outside parties to perform review functions within a time frame that meets the applicant's deadlines.

No Further Action Determinations: Under the previous voluntary remediation programs, letters of completion were available to verify compliance with the soil remediation standards established under 18 A.A.C. 7, but no similar vehicle was available for groundwater sites or landfills. Previous legislation did not authorize, and the Department did not issue, no further action determinations in regard to voluntary sites. Laws 2000, Chapter 225 provides authorization and a process for obtaining a determination that the Department will take no further action to remediate and will not require remediation of a site or portion of a site. The Department may rescind or amend a no further action determination under conditions specified in the statute.

Increased Community Involvement: Previously, the programs' community involvement requirements were generally defined. Under Laws 2000, Chapter 225 community involvement requirements are extensive, clearly defined and specifically tailored to the nature and scope of the remediation.

Standards for Approval of Remediation Actions: Under Laws 2000, Chapter 225, remediation levels or controls must comply with the WQARF remedy selection rules or meet alternative standards set out in A.R.S. § 49-175.

A.R.S. § 49-285(B) Approval for Cost Recovery: Under previous enabling legislation, it was not clear that Departmental approval of remedial action work performed on program sites was available for cost recovery purposes under A.R.S. § 49-285. Laws 2000, Chapter 225 provides specific authorization for obtaining this approval.

Suspensions of Enforcement Actions: Previously, suspension of enforcement actions was available only under the WQARF voluntary program. Laws 2000, Chapter 225 extends this benefit to any site or portion of a site which is described in an approved Voluntary Remediation Program work plan.

**C. Declaration of Environmental Use Restriction**

Laws 2000, Chapter 225 amends A.R.S. Title 49, Chapter 1, Article 4 to eliminate the Voluntary Environmental Mitigation Use Restriction (VEMUR) and to replace it with a Declaration of Environmental Use Restriction (DEUR). The DEUR is a covenant granted by a property owner that remediates contaminated soil to non-residential soil levels, or to prevent or reduce exposure to contaminants through the use of engineering controls or institutional controls. The DEUR is recorded in the county recorder's office of each county in which the property lies and, once recorded, becomes an encumbrance on the property's legal title. A DEUR ensures that future owners, as well as current owners, have notice of and responsibility for the remediation level or control mechanism that applies to the property. Once recorded, a DEUR remains on record until the Department, at the request of the property owner, determines that the release of the DEUR is appropriate and records a notice, in each county where the property is located, releasing the property.

Although the DEUR established by Laws 2000, Chapter 225 is a tool available to participants in the Voluntary Remediation Program, this rule making does not adopt rules to implement the DEUR. A DEUR fee rule will be proposed at a later date in a separate rule making. The Department may propose other rules implementing the DEUR, as needed.

**D: Program Funding:**

The new Voluntary Remediation Program is funded with monies drawn from the Voluntary Remediation Fund established in A.R.S. § 49-187. Although the statute lists gifts, grants, donations and legislative appropriations as potential sources of Voluntary Remediation Fund monies, the program will be principally financed by program fees that reimburse the Department for costs incurred in administering the program. Laws 2000, Chapter 225 provides for an application fee to be submitted with each program application and for the reimbursement of reasonable and necessary costs at a rate based on estimated direct and indirect costs of conducting the program. The amount of the application fee and the cost reimbursement rate are to be established in rule. Until July 1, 2004 the program will be supported, in part, by an annual allocation of no more than \$350,000.00 from the Water Quality Assurance Revolving Fund. If, after June, 30, 2004, program fees and reimbursements are not sufficient to sustain the program, the Department shall either discontinue the program or obtain alternate program funding.

**E. Today's Rule Making**

Today's rule making implements the reimbursement provisions of A.R.S. § 49-179. A.R.S. § 49-179 requires that the Department establish by rule a nonrefundable application fee and an hourly fee to reimburse the Department for time spent by employees on program activities. The hourly reimbursement rate is to be based on estimated direct and indirect costs to the Department of conducting these activities. The statute also authorizes the recovery of the costs of goods and services incurred by the Department to carry out program activities, including costs under contracts with outside consultants to provide technical review or to oversee work performed under an approved work plan.

A.R.S. § 49-179 authorizes the Department to require participants to pay advance deposits to be applied against the Department's reimbursable costs. The Department is required to support its claims for reimbursement with documentation consistent with generally accepted accounting principles. At the time of termination or withdrawal from the program, applicants are required to reimburse the Department for its costs incurred.

Laws 2000, Chapter 225, § 13 also authorizes the adoption of fee rules required under A.R.S. § 49-152(H) and A.R.S. § 49-158(E), relating to the Declaration of Environmental Use Restrictions (DEUR). DEUR fee rules are not adopted in this rule making but will be proposed at a later date in a separate rule making.

**F. Section-by-Section Analysis**

R18-7-501. Definitions This section defines terms used in the rule. The definition of "applicant" as "a person who participates in the Voluntary Remediation Program" is consistent with the use of the term in the underlying statute. In both the statute and these rules a participant is an "applicant" from the time that a program application is submitted until the time that the applicant's participation in the program ends.

R18-7-502. Application Fee A.R.S. § 49-179(A) requires that a nonrefundable application fee accompany each program application. In these rules, the application fee is a tool to ensure that the Department recovers the costs of reviewing an application; requesting any necessary additional information; determining the applicant's eligibility to participate in the program; and providing other application-related services, as needed. R18-7-502 establishes an application fee of \$2,000.00.

Under R18-7-502, the applicant pays the application fee when the application is submitted. The application is not complete until the fee is submitted or, in the case of a small business requesting the accommodation provided under R18-7-502(D), until the Department and the applicant agree upon a payment schedule. The Department will not review the application until the application is complete.

As required under A.R.S. § 49-179(A), the application fee is nonrefundable. Applicants, whether their applications are approved or denied, will not receive a refund of all or any part of the application fee. Application fees will not be refunded to applicants that withdraw or are terminated from the program. Applicants paying application fees in installments under R18-7-502(D), whose applications are denied or who withdraw prior to satisfying their payment arrangements, are liable for any unpaid installments.

To the extent possible, given the statutory requirement of a nonrefundable application fee, this rule making does not establish program fees that exceed the Department's costs incurred in providing program services. Under R18-7-507, at the time that the applicant's participation in the program ceases, the Department will perform an account reconciliation to determine the total of the reimbursable costs incurred by the Department in relation to the applicant's site and the total amounts submitted or paid by the applicant during the course of the project. The total of submissions and payments will include the application fee. If the reconciliation shows that the costs exceeded the submissions and payments, the applicant will be responsible for paying the difference. If, however, the reconciliation shows that the submissions and payments exceeded the costs, the Department will return the difference, but only to the extent that the Department's total costs equal or exceed the statutory application fee amount of \$2,000.00. Thus, although the application fee will never be refunded, it will serve as a credit against costs to the extent allowable under the statute. A more complete explanation and examples of the final reconciliation process are included in the explanation of R18-7-507.

The Department's decision to limit program fees to recovery of program costs is intended to reflect the intent, if not the specific language, of A.R.S. § 49-179. A.R.S. § 49-179(A) authorizes the Department to charge a nonrefundable application fee. A.R.S. § 49-179(B) authorizes a fee that reimburses the Department for its program costs. In theory, the Department could charge both fees. Arguably, this approach would enhance the sustainability of the program. The approach would also increase program costs for most participants and could result in the collection of fees that exceed the Department's goal of achieving a sustainable program. It is the Department's view that the Legislature intended that the Department recover its costs to achieve a self-sustaining program, not realize a profit.

In the process of drafting these rules, the Department considered application fee amounts ranging from \$1,500.00 to \$3,000.00. Based on the Department's prior experience, an application fee amount of \$2,000.00 will be sufficient to ensure that application-related costs are recovered in all cases, but will not be excessive. In most instances (those in which the Department's reimbursable costs equal or exceed \$2,000.00), the application fee amount will be credited, ultimately, against the reimbursable costs incurred. These costs will include the actual costs of the application-related services provided. In these instances, the applicant will reimburse the Department for actual costs incurred and the application fee amount will only impact the applicant's cash-flow. The Department anticipates that it will rarely incur total project costs of less than \$2,000.00. In those instances, the application fee amount will function as a flat fee based on the Department's best estimate of the amount necessary to ensure the recovery of all application-related costs.

The Department also considered the option of establishing a "two-tiered" application fee. This approach would have required that applications involving the remediation of groundwater, as opposed to soil sites and landfills, be subject to a higher application fee amount. Program management has noted that groundwater sites historically require a greater expenditure of Department resources. This suggests that fairness might require that groundwater sites pay a proportionally higher application fee. Under the rules, however, most program participants will reimburse the Department for its expenditure of resources under the hourly reimbursement rate established in R18-7-504. Therefore, a "two-tiered" application fee is not justified by considerations of fairness. In this rule making, the application fee is a uniform single amount for all sites.

The rule provides for an accommodation for small businesses for which the advance payment of a \$2,000.00 application fee may present a hardship. Although A.R.S. § 49-179(A) precludes the Department from waiving the application fee, the rule allows for small businesses, as defined under A.R.S. § 41-1001, to negotiate a schedule for payment of the application fee over time. For all other applicants the entire application fee will be due at the time that the application is submitted.

R18-7-503. Deposit A.R.S. § 49-179(C) authorizes the Department to require an applicant to pay advance deposits to be applied against the Department's reimbursable costs. Under R18-7-503, the Department will establish a deposit account for each remediation project. At the time that an approved applicant submits a work plan or a request for a no further action determination, the applicant will submit an initial deposit in the amount of \$4,000.00. This amount is based on the historic average cost of oversight under the Voluntary Remediation Program adjusted to reflect the increase in the hourly reimbursement rate. As costs are incurred and charged against the applicant's deposit account, the Department may require the applicant to submit additional deposits of \$4,000.00 or less to cover the additional anticipated costs of program services. Applicants will be required to maintain an account balance sufficient to cover anticipated program costs or face the risk of suspension of program services and termination from the program. At any time that participation in the program ends due to completion of the remediation, termination, or withdrawal, the Department will perform an account reconciliation and issue a final statement that includes a final amount due to or from the applicant. Amounts due from the applicant are payable within 30 days. Amounts due to the applicant will be returned to the applicant.

The Department recognizes that its advance deposit process requires program participants to pay for services before these services are provided. One purpose of this advance payment requirement is to eliminate the costs that would result from late-payment and non-payment of amounts due. Although A.R.S. § 49-179 does not preclude reimbursement of these costs from program participants, recovery of late-payment and non-payment costs under the hourly reimbursement rate would place an unfair burden on the participants who pay their bills in a timely manner. Another purpose served by the advance deposit requirement is to ensure that the Department has the money necessary to operate the program.

R18-7-504. Voluntary Remediation Program Fees R18-7-504(A) implements the provisions of A.R.S. § 49-179(B) and A.R.S. § 49-179(C) relating to reimbursement of program costs under the hourly reimbursement rate established in R18-7-505. This subsection also provides a non-exclusive list of program costs that are reimbursable at the hourly rate.

R18-5-504(B) implements the provisions of A.R.S. § 49-179(C) relating to reimbursement of the cost of goods and services contracted by the Department and the provisions of A.R.S. § 49-179(D) relating to reimbursement of the costs of work performed under contracts. This subsection also includes a non-exclusive list of these goods and services.

R18-7-505. Hourly Reimbursement Rate

This section establishes an hourly reimbursement rate of \$110.00 per hour. This rate was obtained by dividing the projected reimbursable costs for fiscal years 2001-2004 by the number of hours projected for providing program services in fiscal year 2001-2004 under the current program staffing. The results were rounded to the nearest whole dollar. These calculations assume annual increases in program salaries of approximately 2% and an increase in program applications from 25 in FY 2001 to 31 in FY 2004. The formula for determining the rate is discussed in greater detail in the Economic Impact Statement required under question 9, below.

R18-7-506. Voluntary Remediation Program Accounting A.R.S. § 49-179 requires that the Department provide applicants with documentation supporting its claims for reimbursement consistent with generally accepted accounting principles. The Department will provide program participants with a quarterly statement itemizing reimbursable costs.

R18-7-507. Account Reconciliation

Upon completion of the remediation project or upon termination or withdrawal from the program, the Department will determine the total amount of site-specific reimbursable costs incurred by the Department during the course of the project and the total amount submitted as deposits by the applicant and applied by the Department to the applicant's site-specific deposit account during the course of the project, plus the amount paid by the applicant as an application fee. The Department will prepare, and fax or mail to the applicant, a final statement which will show the reimbursable costs, the total of the amounts submitted and paid, and the final amount due to or from the applicant.

If the final statement shows that the amounts submitted or paid during the course of the project are less than the Department's reimbursable costs, the applicant will pay the difference between the costs incurred and the amounts submitted or paid. If the final statement shows that the amounts submitted or paid during the course of the project are more than the Department's reimbursable costs and the Department's reimbursable costs exceed the nonrefundable application fee amount of \$2,000.00, the Department shall return to the applicant the difference between the amounts submitted or paid and the costs incurred. If the final statement shows that the amounts submitted or paid during the course of the project are more than the Department's reimbursable costs and the Department's reimbursable costs total \$2,000.00 or less, the Department shall retain the applicant's nonrefundable application fee of \$2,000.00 and return to the applicant the amount of any deposits submitted. The Department may withhold any program approval or no further action determination until the applicant has paid any amount due and payable under the final statement.

The following examples are intended to demonstrate the final reconciliation process:

*Example 1.* The applicant pays the application fee of \$2,000.00 as required and submits a work plan and an initial deposit of \$4,000.00. Three months later, the project manager requests and the applicant submits an additional deposit of \$3,000.00. The amount of the additional deposit is based on the project manager's estimate of the costs that will be incurred in completing the remediation project. Two months later, the applicant completes the remediation work described in the work plan and submits a request for a no further action determination. The Department reviews and approves the no further action determination request. The reimbursable costs incurred during course of the project total \$7,500.00

The Department will perform a final reconciliation of total costs (\$7,500.00) and total amounts submitted or paid (\$9,000.00) and will issue a final statement showing an amount due to the applicant of \$1,500.00. This amount will be returned to the applicant and the Department will issue its no further action determination.

*Example 2.* The same facts as in example 1, except that reimbursable costs incurred during course of the project total \$10,000.00

The Department will perform a final reconciliation showing total costs of (\$10,000.00) and total amounts submitted or paid (\$9,000.00) and will issue a final statement showing an amount due from the applicant of \$1,000.00. This amount must be paid within 30 days. The Department will issue its no further action determination upon receipt of the total amount due.

*Example 3.* The applicant pays the application fee of \$2,000.00 as required and submits a work plan and an initial deposit of \$4,000.00. 1 month later, the applicant withdraws from the program. The reimbursable costs incurred during course of the project total \$2,500.00

The Department will perform a final reconciliation of total costs (\$2,500.00) and total amounts submitted or paid (\$6,000.00) and will issue a final statement showing an amount due to the applicant of \$3,500.00. This amount will be returned to the applicant. Because the applicant withdrew from the project, it is unlikely that a no further action determination would be appropriate.

*Example 4.* The same facts as in example 3, except that reimbursable costs incurred during course of the project total \$1,500.00

The Department will perform a final reconciliation of total costs (\$1,500.00) and total amounts paid or submitted (\$6,000.00) and will issue a final statement showing an amount due to the applicant of \$4,000.00. Since the reimbursable costs are less than the required \$2,000.00 application fee, the amount returned to the applicant will be the difference between the amounts submitted or paid and \$2,000.00.

*Example 5.* The applicant pays the application fee of \$2,000.00 as required and withdraws from the program. The reimbursable costs incurred during course of the project total \$1,500.00

The Department will perform a final reconciliation of total costs (\$1,500.00) and total amounts paid or submitted (\$2,000.00) and will issue a final statement showing that no amount is due to or from the applicant.

7. **A reference to any study that the agency relied on in its evaluation of or justification for the rule and where the public may obtain or review the study, all data underlying each study, any analysis of the study and other supporting material.**  
None.

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

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

### **Background**

The Voluntary Remediation Program (VRP) was officially established by statute in 1997. The VRP consisted of two components: 1) the Water Quality Assurance Revolving Fund (WQARF) VRP, and 2) the Agency-wide VRP. The Department established both voluntary programs to allow owners of soil and/or groundwater contaminated sites to obtain an expedited review of their remediation plans as well as a Letter of Completion for contaminants investigated and cleaned up at a site. Although ADEQ charged fees for some of its program costs, collected fees did not match billed statements, and other funding sources (primarily WQARF monies and EPA grants) were used to subsidize the program.

Remediation under the two programs also offered different benefits to the site owners. Stakeholders determined that the two programs should be aligned, and only one VRP established, so that all voluntary sites would be able to obtain essentially the same benefits.

After an extensive stakeholder process, the Department proposed new legislation and the State Legislature approved S.B.1454 in April 2000.

S.B. 1454 established a comprehensive VRP that would allow a participant to remediate to an acceptable level. This enables the Department to ensure that a cleanup is carried out, and to issue a no further action (NFA) determination for the site. The Department makes an NFA determination after it approves an applicant's report, which must describe implementation of the prescriptive criteria identified in A.R.S. § § 49-181(A). Different remediation strategies may be utilized to eliminate or reduce the contamination to risk levels, as defined in the proposed WQARF Remedy Selection Rules, or the alternatives identified in A.R.S. § § 49-175(B). S.B.1454 allows options for utilizing Soil Remediation Standards, identifies the acceptable risks at landfills not subject to these standards, and the criteria that must be met for both surface water and groundwater contaminated sites. Thus, participation in the VRP enables a participant to select remediation levels or controls for a site that are consistent with the proposed WQARF Remedy Selection Rules or the alternatives identified in A.R.S. § § 49-175(B).

After remediation, the property may be put to the type of use deemed most economically beneficial by the owner and market forces. Thus, VRP participation accords the owner the potential for realizing substantial financial benefits, as is the case when the property is developed to its "highest and best use." Appraisers and other real estate professionals use the term "highest and best use" to identify that land use which is likely to bring the property owner(s) the most economic returns for a given set of conditions (including legal and financial feasibility) pertaining to the development of a specific property.

S.B.1454 also mandated ADEQ to promulgate a rule to charge fees based upon the estimated direct and indirect costs for running the program. ADEQ interprets the statutory language to mean authority to charge fees for all program (both site-specific and non-site specific) costs. This is consistent with the Department's practice in other programs with similar statutory authority. Project oversight is carried out by the Voluntary Sites Unit (VSU) staffed by three full-time equivalent (FTE) employees: one unit supervisor and two project managers. A third project manager position has been authorized, but will remain vacant unless an increased workload justifies filling it. Staff work for these three consists of reviewing, approving, denying or requesting modifications to work plans. The Department is currently charging program participants an average hourly rate of \$42, and the rate has varied between \$35 and \$48 since the program began in 1996.

WQARF budget allocations have subsidized VRP project management, and EPA grants paid for program development. S.B.1454 authorized a transfer from WQARF of up to \$350,000 per fiscal year into a newly created Voluntary Remediation Fund (VRF) until July 1, 2004. By that date, fees and reimbursements collected must be sufficient to sustain the VRP. Since the money transfer from WQARF to VRF is limited to fiscal year ending 2004, the fees to be charged must cover all of ADEQ's costs for program implementation, and ensure that billing practices yield an adequate revenue stream to maintain efficient and uninterrupted service. Consequently, ADEQ is proposing a new VRP fee structure. Once the new VRP fee rules become effective, all VRP applicants who join the program will be assessed the new fees. Fees consist of an application fee, a deposit and a new hourly reimbursement rate sufficient to make the program fully self-supporting by July 1, 2004.

#### **Executive Summary**

This rule will allow ADEQ to assess and collect fees for its review and approval of VRP applications, work plans and reports submitted by applicants. **SB 1454 authorized the Department to recover all its costs, both direct and indirect, for running the program.** Since the program's inception in 1996, fee revenues have covered only a portion of the total program budget, and subsidies from other funding sources have been used to defray a substantial portion of program costs. The legislation mandated that all subsidies must cease by June 30, 2004; thus, ADEQ proposes a new fee structure for full cost recovery. The new fee structure consists of an application fee, and a deposit amount from which is extracted an hourly rate charge for site-specific work carried out by VRP staff.

#### **New Fee Structure**

When a person files a new application to participate in the VRP, ADEQ will charge a **non-refundable application fee of \$2,000.** The application fee enables the Department to recover costs associated with the process of determining the applicant's eligibility for participation in the program, its pre-application costs, as well as indirect costs such as those incurred when responding to the public's request for information about the program. After ADEQ's acceptance of the application, the applicant will pay a deposit in the amount of **\$4,000** for VRP services to be rendered by ADEQ staff. The deposit amount is less than the average amount paid to ADEQ by VRP site owners in the past for closed (soil only) sites. The Department will charge a reimbursement rate of **\$110 per hour**, and draw on the deposit amount as ADEQ work is carried out. As work proceeds and the deposit amount is depleted, ADEQ will bill the applicant for an additional deposit whenever the balance of the site-specific account falls below \$1,000, and the Department estimates that the reimbursable costs will exceed the amount available in the deposit account. The deposit amount represents slightly more than 36 hours of billable work. The additional deposit will be due 30 days after being notified by ADEQ. If not received within 30 days, ADEQ will send a second notification, informing the applicant that if the deposit is not received within an additional 60 days of the second notification, the site may be terminated from the VRP. This is to ensure that there will be uninterrupted service at a site. All monies received will be deposited into the Voluntary Remediation Fund (VRF).

After remediation is completed and the site is closed (but before the **No Further Action** determination is issued), ADEQ will either bill the applicant for any amounts outstanding, or refund any project-specific deposit amount that was not utilized. ADEQ's billable hours will be charged against the deposit amount at the time of account reconciliation. The Department will provide a detailed description of the billed amounts, so that the applicant is fully informed of how the money was spent. Apart from project-specific ADEQ staff technical plan review, inspections and program oversight, billed amounts will cover other applicable expenses such as laboratory analysis charges, any contract work performed and public involvement costs, including facility rental and public notice advertising. Outside consultants are likely to be hired when the applicant establishes a tight deadline for the review of the work plan. Contract work done by outside consultants will be charged, as long as the applicant agrees to the contract rate, and to reimburse ADEQ for the work they perform.

#### **WQARF Transition Funding**

On July 1, 2000 (the start of fiscal year ending 2001) \$350,000 was transferred from WQARF into the VRF as provided by A.R.S. § 49-187 (A)(5), to provide the initial “seed money” to operate the program. The process will be repeated for fiscal years ending 2002 through 2004. The VRF will be reviewed at the start of each fiscal year, and any shortfall between the existing fund balance and \$350,000 will be transferred from WQARF on that date, until July 1, 2003. During this period, the Department will use application fees, deposits and other reimbursements (as specified above) from the VRF to demonstrate financial sustainability of the new program. Under optimum conditions, the goal is to refrain from transferring any money from WQARF. However, ADEQ recognizes that there could be funding gaps due to transitioning active sites into the new program and unanticipated budget issues.

**The Voluntary Sites Unit**

The VRP is administered by the Waste Programs Division’s Voluntary Sites Unit (VSU). The three FTEs’ time is allocated to project-specific and non-project specific work activities. The ADEQ Office of Fiscal Services uses the terms “billable” and “non-billable” hours to refer to project-specific and non-project specific work activities. Billable hours pertain to activities that are directly attributable to a specific site; non-billable hours, to other necessary activities such as staff meetings, training, coordination with other ADEQ programs, meetings with other VRP applicants, drafting of policies, procedures and guidance documents, and staff leave time.

The Waste Programs Division has determined that the three FTEs will be able to collectively allocate 2,400 billable hours per year to the program, calculated on the basis of 960 each for the two project managers and 480 hours of the Unit Manager’s time. The block of billable hours represents 38.5% of total annual work hours available (6,240 or 2,080 per FTE). Two other staff members in the VSU are engaged in program development, but their salaries are currently being paid from an EPA VCP Core Grant, and their work is therefore not included in the calculated hourly rate.

The projected VSU budget for the fiscal year ending June 30, 2001 is \$257,420. The aggregated sum for FYE 2001 through 2004 is \$1,060,665. Not included in the budget is a series of site-specific non-personnel cost items which are billed directly to the applicants as “pass through” costs. (Please see Appendix A for a narrative description of the budget items, and for an identification of what are direct and indirect costs.) The annual budget amount and the planned annual allocation of project-specific hours are the two variables used for calculating the VRP fee hourly rate. The aggregated VSU budget amount divided by 9,600 hours (2,400 hours per year) yields \$110 per hour (rounded to the nearest dollar). **This rate represents a shift from a heavily subsidized to a totally unsubsidized fee rate**, and will enable the Department to recover all of its costs, assuming the VSU will be able to carry out full utilization of the program’s projected block of billable hours. If the incoming workload is more than the unit can reasonably handle, a new project manager will be hired, but the Department does not anticipate that this will happen during the current fiscal year.

A fee increase from the average \$42 per hour to \$110 constitutes an hourly rate increase of 162%. The necessity for a fee increase of such magnitude, and the billing methods the Department plans to implement, are dictated by the statutory mandate to make the program fully self-sufficient.

**The Current VRP Program**

The current program began in 1996, although relatively good cost recovery data have been collected only since 1998. Table 1 below shows the VSU budget for fiscal years ending 1998 through 2000 broken down by personnel services, employee-related expenses and indirect costs. The VRP revenues collected for the corresponding years is also shown, indicating that as of the end of June, 2000, the Department has been able to recover only 20.5% of its budgetary costs. The problem of cost recovery is shown by the fact that only 20% of program costs in the past were reimbursed by VRP participants, and about 80% had to be covered by authorized subsidies. ADEQ’s unreimbursed expenditures during the last three years are indicated in Table 1 as the **deficit**. The size of the deficit helps to explain the percent increase in the proposed fee rate.

Table 1.				
ADEQ Voluntary Site Unit Budget				
Fiscal Years 1998-2000				
	1998	1999	2000	Total:
Personnel Services	\$120,600	\$126,400	\$132,700	\$379,700
ERE*	\$25,300	\$26,500	\$27,900	\$79,700
Indirect	\$71,900	\$75,400	\$82,300	\$229,600
Total:	\$217,800	\$228,300	\$242,900	\$689,000



Revenue Collected	\$29,652	\$41,974	\$69,717	\$141,343
Deficit	\$188,148	\$186,326	\$173,183	\$547,657
% of Budget:	86.39%	81.61%	71.30%	79.49%
*Employee Related Expenses				

Table 1 also enables the calculation of the percent change in the VSU's budget: between FYE 1998-99, it was +4.8%; and between 1999-2000, +6.4%. The expected change between 2000-2001 is +3.3%. Revenues collected have steadily increased during the period, but the deficit levels as a percent of the budget have remained high.

Two other things might be inferred from Table 1:

1. The cost recovery data from 1998 to 2000 pertain to 32 sites (an average of \$4,400 per site), although ADEQ work has been expended for 45 closed sites. Even when site owners have paid their bills, these were not always paid in full; and the Department continues to spend resources for some cases including those involving litigation. The cost recovery record provides ample justification for the Department to charge the proposed deposit fee.
2. The data also yield an estimated 4,204 (or an average of 1,401 hours per year) expended by VSU staff on billable activities. This represents a utilization rate of 58.4% of the total block of billable hours that the VSU has committed to. This utilization rate could be reflective of the voluntary nature of the program, which means that a much higher utilization rate will need to be carried out if the VRP is to become financially viable. This should not be difficult to achieve inasmuch as there are 45 active sites, and the Unit Manager has estimated between 30 and 35 new applicants per year for the program. Table 2 below shows where the active sites are located. It indicates that VRP sites are predominantly in urban areas. The urban counties of Maricopa and Pima have 62.2% of the sites, and the rural counties have 37.8%.

		%
Apache	0	
Cochise	2	4.4%
Coconino	0	
Gila	1	2.2%
Graham	0	
Greenlee	2	4.4%
La Paz	1	2.2%
Maricopa	18	40.0%
Mohave	0	
Navajo	2	4.4%
Pima	10	22.2%
Pinal	4	8.9%
Santa Cruz	0	
Yavapai	2	4.4%
Yuma	3	6.7%
Total:	45	100.0%

### Proposed Hourly Rate

By proposing an hourly rate of \$110, the Department intends to recover all of its reasonable direct and indirect costs. Since the statutory mandate is for the program to be fully self-supporting, this rate may be adjusted after the transition period ends on June 30, 2004. Between now and then, ADEQ will track the data needed to review the annual budget, the block of billable hours and the cost recovery rates.

The Voluntary Remediation Fund will be managed by ADEQ as a revolving fund, i.e., any amounts leftover in the fund at the end of one fiscal year will be carried over into the next year during the transition period, to cover the VRP's expenditures, and will not revert to any other ADEQ or state fund.

**Costs and Benefits to Parties That Will Be Impacted By This Rule**

1. ADEQ is the implementing agency for this rule. By increasing its fee rate, ADEQ will be able to charge for the full costs of administering the program. The revenues to the Department are therefore expected to increase, but only for cost recovery purposes. There will be no impacts to other state agencies.

2. All new VRP Applicants and Active Site Owners after the effective date of this rule --

Applicants may be private or public sector landowners. Political subdivisions of the State (counties or municipalities and other government entities) that own contaminated sites and apply to participate in the VRP will pay the same fees as private landowners. Table 3 below lists the major industrial classifications of active site owners. It shows that most of the active sites are farms and railroad facilities (classified as TPUs). Of the 6 government sites, two are owned by the federal government; two, by municipalities; and the other two, by quasi-government entities or districts. Active site owners will pay the same reimbursement fee rates that will be charged all new VRP applicants after the effective date of this rule.

Table 3. Active Sites by Census Standard Industrial Classification (SIC)		
		%
Agriculture	12	26.7%
Mining	3	6.7%
Construction		
Manufacturing	8	17.8%
TPU *	15	33.3%
Wholesale Trade		
Retail Trade		
FIRE **		
Services	1	2.2%
Government	6	13.3%
Total:	45	100.0%
* Transportation & Public Utilities		
** Finance, Insurance & Real Estate		

The proposed rule will increase the burden on VRP participants who will be paying the full (i.e., unsubsidized) costs of the program. But it should be argued that they also reap the main economic benefits of the rule. Among these benefits are those conferred by the NFA.

3. Private sector consulting companies with expertise in environmental remediation – These companies will benefit if their services are utilized, since VRP applicants or site owners hire them to develop remedial action plans and carry out remediation work. According to the 1997 US Economic Census, there were 5,528 establishments in Arizona providing administrative and support, and waste management and remediation services under the new North American Industrial Classification System (NAICS) which replaced the former SIC. (Business owners may own more than one establishment.) These establishments are located mainly in Maricopa and Pima (87.3%).

The more highly specialized work of environmental remediation is carried out by a smaller subset (225) of these companies. In 1997, they had combined revenues totaling more than \$335 million, employed 3,227 people and had annual payroll expenditures of more than \$88 million. In the last fiscal year, ADEQ had 19 contractors listed in its Arizona Superfund Response Action Contract (ASRAC). Contractors develop and implement WQARF remedial action plans. The same contractors may be used by VRP site owners. The Price Schedule Matrix for remediation of pollutants (ADEQ Contract No. 99-0017) shows contractor average hourly rate charges for three types of services: professional personnel (levels I through VI); field services (levels I through managerial); and

support services (levels I through III). What the site owners pay for work done represents fees for all three types of services rendered.

Levels	Professional	Field Services	Support Services	
I		\$54	\$39	\$34
II		\$62	\$47	\$43
III		\$72	\$54	\$50
IV/Field Mgr.		\$84	\$64	
V	\$101			
VI	\$115			

The costs of remediating a site vary with site conditions, the types of contaminants found, the clean up levels chosen and the kinds of professional and other services required to do the job. These costs, which are borne by the site owners, represent income to private contractors. Obviously, the fewer hours used to clean up a site, the lower the costs, all other things being equal.

4. VRP Site Owners whose remediation is completed – Site owners stand to gain many benefits from the VRP, not the least of which are the advantages of an NFA.

a) Benefits of an NFA – An NFA determination means that no further action shall be taken by ADEQ to remediate or require remediation of the site, unless rescinded or amended. By contrast, a Letter of Completion (LOC) under the current rules is available only for soil contaminated sites, and has not been issued for sites where groundwater contamination has occurred. The LOC verifies that soil remediation standards have been met, and remediation to acceptable levels for the identified contaminants has been achieved. However, the LOC is not intended to “close out” a site from further program requirements, although the Department may use the LOC as a basis for closing the site. The NFA is therefore a more definitive statement that a participant has fulfilled the requirements for cleanup.

b) Benefits accruing to site owners who are able to dispose of their properties according to the site’s “highest and best use” – When the owners of a remediated site are legally able to dispose of their property according to its highest and best use, they have the potential to gain tremendous economic benefits. Sometimes, contaminated site owners prefer to sell rather than cleanup the property; and when they do, it is often at highly discounted values. Purchasers are often land developers who undertake the cleanup process and assume the risks. The following two cases (all parties were given fictitious names) provide details pertaining to past VRP participants. They illustrate the possibilities for what economic benefits may be gained from the time and money invested in VRP remediation.

**1. The “ABC Dump” –**

Among the closed sites that were remediated under the existing VRP is the ABC Dump. This property is located in the City of Avondale, in the vicinity of an area bounded by Thomas, Indian School and Dysart Roads. In 1998, DEF Co. bought a parcel of land consisting of 92.47 acres from GHI Co. which had owned it since the 1930’s. This parcel was part of a larger assemblage of acres (217.8 in total) that comprised the JKL Project. The purchased parcel contained a landfill with lead found in two locations, as well as inert (i.e., non-toxic) materials such as construction debris, ash (from rubbish burning on the site), broken glass and sand found in five pits. The contamination was contained within 54.79 acres (59.3% of the parcel). GHI had used the property as a farm for growing experimental crops, and portions of the site were utilized as a dump for disposing household refuse. The trash was often burned in open pits that created problems for the owner and residents living in close proximity to the site. A map of the parcel indicated that most of the area surrounding it consisted of residential properties, and that there was a strong possibility that the site would also be zoned for residential purposes, if no legal restrictions existed.

Because GHI wanted to avoid the responsibility and liability for this type of contamination, the company agreed to relinquish title to the property to the DEF for an amount agreed to by both parties that included the cost to remediate. The total cost was \$800,000, which included remediation costs agreed to by both seller and buyer, consultant fees and cost overruns. Thus, in effect, DEF “purchased” the property for \$8,651 per acre.

DEF hired MNO Consultants, Inc., a private engineering consulting company based in Tempe, to develop a remediation strategy for the property. ADEQ asked MNO to test for the leachability of the lead found on the site, and to calculate an alternative groundwater

protection level (GPL) based on technical guidance documents used by ADEQ staff. The concentration of lead found on the property was 600 parts per million (PPM). Remediation involved, among other things, excavating lead found in the soil on different parts of the property, and disposing of the material into one consolidation pit found on 2.5 acres. The soil remediation level (SRL) standards for lead, also known as the generic or “off-the-shelf” soil cleanup standards, are 400 PPM for residential land, and 2,000 PPM for non-residential land. If the contamination happens to pose a threat to groundwater, the GPL standard requires that lead on the site must not exceed 290 PPM after remediation. An alternative GPL may be calculated based on site-specific conditions. The GPL value takes into account the conditions governing the likelihood that the contaminant would migrate to groundwater. MNO determined that the alternative GPL value for lead on the site was 7,300 PPM, and that therefore, conditions did not pose any threat to groundwater.

Because the portion of the 92.47-acre parcel containing the consolidation pit could not be used for residential purposes, ADEQ asked DEF to apply for a voluntary environment mitigation use restriction (VEMUR) pertaining to the 2.5 acres. (S.B.1454 has eliminated the VEMUR for soil cleanups and replaced it with a Declaration of Environmental Use Restriction or DEUR, to be recorded as a restrictive covenant by a property owner who remediates to non-residential uses or chooses to use an institutional or engineering control.) The property owner filed the VEMUR with the Maricopa County Recorder’s Office on December 15, 1998. There has been some discussion about the possibility of building a fire station on the 2.5 acre site. The remaining 89.97 acres of the parcel do not carry the restrictions, and therefore, development for residential purposes is permissible if the property owner chooses to do so.

To try to get a sense of what the remediated site could be worth today, taking into account current market conditions as well as hypothetical conditions pertaining to the zoning and subsequent development of the property, ADEQ consulted a team of real estate appraisers and consultants based in Phoenix. They provided data for five possible “comparables” located in the southwest area of Maricopa County. The data are found in Table 5 below (data were transmitted to ADEQ on 6/22/00).

Location	Gross Acres	Land Use	Sale Price	Price Per Acre	Recording Date
1. Goodyear AZ	188.660	SFR	\$4,026,258	\$21,341.34	8/11/99
2. Litchfield Park AZ	343.910	SFR	\$13,068,580	\$38,000.00	1/05/00
3. Tolleson AZ	309.330	S-1	\$6,117,000	\$19,775.00	7/13/99
4. Tolleson AZ	156.025	SFR	\$4,680,000	\$29,995.19	10/13/99
5. Phoenix AZ	156.025	SFR	\$4,560,548	\$29,229.60	1/21/00
Average:	230.790		\$6,490,477	\$27,668.23	

Table 5 indicates that the sale of comparables ranged from a low of \$19,775 to a high of \$38,000 per acre, with an average of \$27,668 per acre. If the average figure is applied to the acreage of the DEF parcel that does not have a VEMUR, if no other restrictions apply, and assuming further that the property is zoned and developed as residential, then the property could be worth somewhere in the vicinity of \$2.5 million. If the property was purchased and remediated in 1998 at a cost of \$8,651 per acre, and sold for (a hypothetical) \$27,668 per acre in the year 2000, this would mean an estimated increase in property value of about 220% over a two-year period. Real estate appreciation rates of this kind are hardly surprising, because the Phoenix Metropolitan Area has been exhibiting what many analysts have termed “stellar” demographic and employment growth for the better part of the 20<sup>th</sup> century’s last decade.

It is widely known that, for a variety of reasons, the Metropolitan Phoenix growth rates have exceeded that of the national average. Although the estimate of \$27,668 per acre may appear high in relation to what, in effect, was paid for title to the property, this could be an underestimate. The comparable in Table 5 with the highest price per acre (\$38,000) is in Litchfield Park located NE of Dysart and Indian School Roads. As such, it is the comparable closest to the DEF property.

This is not to imply that the parcel owned by DEF is worth the value indicated above. It has to be pointed out that only qualified appraisers, using the acceptable tools of their trade, may attach a dollar value to a specific parcel (although anyone is free to give an opinion concerning land value). Furthermore, the appraised value of any specific parcel may be heavily influenced by any number of factors pertaining to the property, change with the passage of time, or a shift in general or specific economic conditions. Neither does this analysis imply that remediation alone causes the property value of any subject parcel to skyrocket. But it should be clear that, without remediation, a contaminated property would be regarded as “untouchable” by most developers and financiers. What

this analysis illustrates, is that environmental (including voluntary) remediation can bring the owner/s of a contaminated site a lot of potential benefits, if legal and economic conditions are right, and if prevailing market conditions are favorable.

## **2. PQR Corporate Park**

This property consists of 160 acres developed in the 1950's by a company to manufacture wired circuit boards for the emerging electronics industry. The company conducted photographic etching of circuit boards on site, with the use of solvents and cleaners. Another company bought the plant and business, and added buildings and facilities for printed circuit boards and early multi-layered board and chip production. Ownership changed hands from STU Companies to VWX Company. During three decades of operation, many chemicals, metals and other contaminants were released during the manufacturing process. Heavy metals concentrations contaminated the groundwater, which posed the biggest environmental challenge for the site owners. A description of the contamination follows:

- \* Trichloroethylene (TCE) in the groundwater aquifer under the site which migrated and was subsequently detected in potable water wells.
- \* Soil contamination of cadmium that exceeded residential levels from a 1960's evaporation pond used to distill heavy metal particles from treated industrial waste effluent.
- \* PCB containing cooling oils used in large capacity electrical transformers that distributed power throughout the facility.
- \* Asbestos-containing floor tiles, insulation and roofing materials used in the construction of the building from the 1950's through the 1970's.
- \* Industrial wastewater treatment soil contamination from decommissioned underground storage tanks and equipment.
- \* Hydrocarbon vapors trapped in the soil at the wastewater treatment and other points on site.
- \* Short and long-term storage of solvents and etching materials used in the manufacturing process on site.

ZZZ, Inc., a redevelopment company, purchased the property in two separate acquisitions over two years following an 18-month due diligence and inspection time line that served to educate the purchasing company about all the environmental issues. The industrial site was designated a "brownfield", a term used by EPA to describe contaminated commercial or industrial properties. The site, located in North Phoenix, was believed to be one of Arizona's largest brownfields, and became a participant in ADEQ's Voluntary Remediation Program. ZZZ understood that, despite the numerous environmental problems, tremendous opportunities existed for new construction and renewed development, once remediation took place.

The company hired engineering consultants to develop and carry out a remediation plan that would protect the public and provide long-term multi-uses for the property. Total project costs are estimated at more than \$190 million. Of that amount, remediation costs (spread out over ten years) were estimated at \$8 million, which includes the construction of a groundwater treatment facility for \$3.5 million, PCB and asbestos removal for \$1.5 million, and engineering/consultants' fees of \$750,000. Groundwater treatment operation and maintenance is expected to cost \$10 million spread out over 25 years. When queried about the returns to investment anticipated by the current property owners, a ZZZ spokesman did not give a dollar value, but used the words "substantial" and "considerable".

The project has become a catalyst for economic growth in an area that suffered economic decline during the early 1980's. What ZZZ experienced in this case shows why the public participation requirements are important. A lot of work had to be carried out by the land development company to overcome a neighborhood association's initial concerns and skepticism over environmental contamination. The neighborhood association hired its own consultant to conduct soil testing at that portion of the site that was designated residential. And the apartment lender then required additional testing.

The Phoenix City Council subsequently approved the project redevelopment plans in 1998, and PQR Corporate Park is today the site of an electronics retail store, a disc brake manufacturing facility, a phone center, a fast food restaurant, and a 520-unit luxury apartment complex. Other types of mixed uses are planned, including a six-story hotel. The businesses on site now employ over 1,500 employees, and at full occupancy, an additional 3,000 personnel are anticipated to be employed. ZZZ applied for, and received recognition in a nationwide brownfield contest.

In order to get some indication of what the redevelopment market is doing, ADEQ interviewed private sector real estate analysts who are (or have been) involved in real estate transactions, many of which involve land that has been contaminated and subsequently cleaned up. A financial analyst with a land development company (XYZ Investments) stated that land value of contaminated properties that have been cleaned up can increase anywhere from 50 to well over 100 percent, depending on the size of the property, the nature of the contaminants and the cost to clean up. While the required levels of investment can be high, the returns can also be considerable. A financial analyst with the YYY Bank Real Estate Division stated that it is typical for investors in the industry to see a 10 to 12% unleveraged return on costs, and an 18 to 25% return on equity. He emphasized that loans are generally not approved unless there is clear evidence that remediation has occurred. These levels of returns to investment are measured over the long-term, and exceed those of many other types of investment.

### **Impacts on Arizona Taxpayers**

Although the VRP program is changing from a heavily subsidized to a fully unsubsidized program, the cost burden on taxpayers at large will essentially remain the same. Site owners will now pay for the full costs of remediation, and the financial burden on the WQARF as a fund will be diminished. However, the money saved will remain in WQARF, and will continue to be allocated for this fund's purposes.

### **Benefits to Consumers, Residents and the Public at Large**

Remediation constitutes the elimination or reduction of contaminants in the environment that are known threats to public health. There are clear health benefits that the public enjoys when remediation occurs, including the possible reduction of human exposure to contaminants in the environment that play a significant role in human diseases, like those of known carcinogens. But apart from the public health benefits, owners of sites whose remediation is completed are able to either develop or sell their properties according to their "highest and best use," as dictated by market forces. As illustrated above, this can result in tremendous financial returns to property owners, and spur development, business investment and job creation. The costs of remediation should therefore be regarded as an investment in public health and disease prevention for the long-term, as well as an investment in the land with a view toward maximizing the owners' property values. While, at this stage, the benefits to public health of environmental remediation cannot be quantified in dollar terms, it is generally accepted that the cost to cure common, rare as well as chronic diseases vastly outweigh the cost of prevention in many instances, especially if variables such as escalating health care costs, and the cost of human pain and suffering are factored into the analysis.

### **Probable Impacts to Public and Private Employment**

The aspects of this rule which allows the Department full cost recovery will not have a huge impact on either public or private employment. ADEQ intends to hire another VSU project manager only if the number of incoming applications is such that an additional FTE is needed. But, as noted in the PQR Corporate Park example cited above, redevelopment opportunities with huge employment impacts are possible within selected sites in the VRP. These opportunities would not occur without remediation to acceptable levels. If a large number of property owners choose to participate in the VRP, some consulting companies that are contracted to do the cleanup may hire new staff. But this is difficult to predict, given that the program is voluntary. The impacts on private employers will probably not change much, and will depend on how quickly the site owners want their properties to be cleaned up in order to obtain an NFA. This will depend mainly on factors such as market conditions, the property owner's desired rate of return, the availability of competing land parcels and whether or not the site is in the path of imminent development.

### **Probable Impacts on Small Businesses**

VRP participation is voluntary, and as such, owners are not compelled to apply for inclusion in the program. Site owners are being encouraged to join, and those who do will probably do so irrespective of the new VRP hourly reimbursement rate. It would be administratively difficult for the Department to promulgate a rule that has financial requirements for small businesses that are different from those that do not meet the statutory definition of "small business". However, the rule does make accommodations for small businesses by allowing them to pay the application fee in installments under an agreement with ADEQ. Thus, small businesses are given a less stringent payment schedule if they need more time to make payments for participation in the program.

### **Probable Effect on State Revenues**

The legislative intent was to end all subsidies to VRP and to make the program fully self-supporting. Thus, the property owners who participate in the program will be paying its full costs, and the Department's revenues will increase. The subsidies from WQARF are anticipated to decrease accordingly, which means that there will be more money available for WQARF implementation. WQARF revenues come from thirteen sources authorized by statute, including monies appropriated by the Arizona legislature.

### **Less Intrusive and Less Costly Alternative Methods of Achieving the Purpose of the Proposed Rule**

Because of what S.B. 1454 mandated, and in view of the voluntary nature of the program, ADEQ did not consider a less intrusive and less costly alternative of achieving the purpose of the proposed rule.

### **APPENDIX A – Description of the Voluntary Remediation Program Budget**

S.B.1454 granted ADEQ the authority to recover all its direct and indirect costs for running the VRP. Billable and non-billable costs are used interchangeably to refer to project-specific and non-project specific costs. Direct costs are billed directly to the owner of a specific site, and indirect costs are factored into the Voluntary Site Unit budget during each budget cycle so that the hourly reimbursement rate can be calculated. The following describes what budget items constitute direct and indirect costs.

1. Direct Costs -- These are costs that are incurred by ADEQ that relate to a specific site. These consist of personnel costs which are salaries of VSU staff, plus employee related expenses (ERE). In addition, there are non-personnel costs directly billed to the client.

(A) Salaries for the VSU staff consist of those for a Unit Manager (Grade 22), a Hydrologist III (Grade 21) and an Environmental

Program Specialist (Grade 20). Employee related expenses are: worker's compensation, unemployment, FICA, health insurance, dental insurance, and life insurance. Annual ERE is calculated as a percentage of annual salaries and is fixed for each budget cycle by the State Office of Strategic Planning and Budget (OSPB) and the Joint Legislative Budget Committee (JLBC). For the current fiscal year, the ERE rate is 23.03% of annual salary. Personnel working less than 19 hours per week are not covered by health insurance, dental insurance or life insurance.

(B) Non-Personnel costs that are billed directly to the client are site-specific costs that may or may not be incurred, depending on the circumstances of each VRP case. These are also known as variable costs, which are for services that are passed through to the client, but only if they are incurred. These may consist of Attorney General fees, outside contractors' work for expedited review or risk assessment review, laboratory analyses, public notice fees (including advertising) and travel costs. These are explained as follows:

- ! Risk assessment is required to assure that risk-based remediation targets are safe concentrations, at the expected level of human exposure.
- ! Expedited review by an outside contractor is allowed if the client requests it, and agrees to pay the cost of the outside contractor.
- ! The attorney general may be asked for an interpretation related to a specific site, or to address a dispute between the department and the client.
- ! Split samples for laboratory analyses may be taken by the department and analyzed to verify the client's findings.
- ! Public notice is required when a cleanup level that is above residential levels is proposed.
- ! Travel costs, such as transportation and hotel expenses for a specific site are also billed directly to the client, and are included in this category.

2. Indirect costs are all other program costs, including agency overhead costs, that can not be ascribed to a specific site. Expenses that are not directly billed, but that must be recovered, include costs for public outreach and advertising, staff training, Code of Federal Regulations publications, in-state travel, medical monitoring, replacement of personal computers and operating supplies (for postage, photographs, etc.). These are also known as other operating expenses (OOE).

The Indirect Rate, which ADEQ negotiates at regular intervals with the Environmental Protection Agency, is calculated during budget deliberations on the basis of the combined staff salaries plus ERE. The indirect rate is used to cover agency overhead costs that include computer maintenance, office rent, utilities, copy machine contract, phone service, and agency activities such as planning, billing (including cost recovery), and payroll. The current agency indirect rate is 51.60% of the combined salary plus ERE of ADEQ staff.

Medical monitoring is required by OSHA for any person who spends more than a certain amount of time each year on potentially-contaminated sites. Generally medical monitoring consists of blood chemical analysis and a physical stress (treadmill) test.

The VRP budget for a fiscal year includes direct cost items for 1(A) and all indirect costs indicated in 2 above. Direct cost items in 1 (B) are not included in the budget, but are passed through to the clients directly.

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

Non-substantial grammatical, editorial and format changes were made to improve clarity and conciseness.

R18-7-503(A) Delete the word "eligible" which serves no purpose in this subsection. Only an eligible applicant will submit a work plan under A.R.S. § 49-175 or a report under A.R.S. § 49-181.

R18-7-504(A) Delete the word "technical" from the characterization of Voluntary Remediation Program staff. Program staff consists of project managers and a unit manager. Program staff is not divided into "technical" and "non-technical" staff.

R18-7-504(A)(1) Add the phrases "or the applicant" and "submitted by the applicant" to clarify the intent of the rule that all time spent by program staff reviewing applications, including review of modifications requested by the Department or by the applicant and review of additional information submitted by the applicant, is reimbursable under R18-7-504. The statutory references contained in the proposed rule were unnecessary and were omitted in the interest of maintaining readability of the rule.

R18-7-504(A)(2) Add the phrase "by the applicant or the Department" to clarify the intent of the rule that all time spent by program staff reviewing work plans, including modifications requested by the Department or by the applicant is reimbursable under R18-7-504.

R18-7-504(A)(3) Add the phrase "under A.R.S. § 49-175 or" to conform the rule to the underlying statutory scheme. A schedule

of progress reports is submitted by applicants as a part of the work plan described in A.R.S. § 49-175. Under A.R.S. § 49-177 the Department may require reporting and under A.R.S. § 49-180, the Department may request modifications of the work plan based on progress reports submitted by the applicant.

R18-7-504(A)(7) Add the phrase “applicant or the ” to clarify the intent of the rule that all time spent by program staff reviewing reports and requests for a no further action determinations, including review of modifications requested by the Department or by the applicant is reimbursable under R18-7-504.

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

**A. Hourly Fee Rates**

**Issue:** The proposed hourly rates are excessive in comparison to other states in the central and western United States. (The commenter) has seen oversight charges from the ADEQ VRP ranging from \$34.88 to \$49.74 per hour over the last 2 years. (The commenter) understands that it is the intent of VRP to be self-sufficient by July 2004 and to attract new sites to the VRP. However the increase to \$110.00 per hour is excessive and not in line with other similar state voluntary programs. For example, the Texas Natural Resources Conservation Commission (TNRCC) charges an hourly fee of \$81.00 and has a \$1,000.00 application fee. New Mexico requires a \$1,000.00 application fee and charges \$65.00 per hour. Other states, such as Kansas have a ranking system for four degrees of site contamination that require initial cash deposits ranging from \$1,000.00 to \$5,000.00. If additional oversight fees are required above the initial deposits, they are negotiated with the responsible party at an hourly rate of \$65.00.

**Analysis:** The Department performed a state by state comparison which proved useful for determining the range of existing fees. Our analysis showed hourly rates ranging from \$42.00 to \$120.00; application fees ranging from \$200.00 to \$5000.00; and deposits ranging from \$1,000.00 to \$25,000.00. We also found a wide variety of fee structures ranging from simple fixed application fee/hourly fee arrangements to Kansas’ requirement of a multi-tiered deposit with an additional hourly rate provision to cover non-typical cases.

The Department chose to base its hourly fee rate on a projection of costs and utilization-levels rather than on a direct comparison with fee rates in other states. As the commenter accurately notes, the amount of the Voluntary Remediation Program hourly fee rate is directly tied to the Legislature’s intent that the program attain self-sufficiency by July 1, 2004. The VRP hourly fee rate is based on the projected program costs for FY 2001-FY 2004 of \$1,060,665 divided by 9,600 billable hours projected for the same 4 fiscal years.

**Issue:** ADEQ created cost ceilings for its UST program for the regulated community and consultants of \$65.00 to \$75.00 per hour for oversight. (The commenter) recommends that ADEQ apply these same hourly rates to the VRP program, reduce the application fee to \$1,000 and reduce the initial deposit to \$2,000.00. New rates of \$65.00 and \$75.00 for the two currently used hourly rates would represent an 86% and 50% increase, respectively, over currently assessed charges. (The commenter) believes these rates to be more acceptable; at least until the effectiveness of the fee structure can be evaluated. ADEQ can evaluate the effectiveness of the fee structure at the end of the 12 months and propose alternate fee structures at that time, should they be warranted based on actual costs incurred and the growing popularity of the program.

**Analysis:** Given the requirement that the program attain self-sufficiency by July 1, 2004, the Department believes that the projection of costs and utilization-levels provide a better basis for establishing an hourly fee rate than does a comparison of fee rates charged by other programs or by consultants.

The purpose of the application fee is to ensure that the Department recovers its costs associated with the process of determining the applicant’s eligibility for participation in the program, its pre-application costs and its indirect costs such as those incurred when responding to the public’s request for information about the program. \$2,000.00 is an amount that the Department estimates will be sufficient to meet these costs. A lower amount would not ensure recovery of these costs.

It is the Department’s intent that, for most participants, payment of the application fee will not result in an increase in the cost of the remediation project. In all cases, the application fee will be applied as a credit against the total of the site-specific reimbursable program costs. Only in those cases where the application fee exceeds these site-specific costs, will the amount of the application fee increase the cost of the project and, then, only to the extent that the application fee exceeds the actual costs incurred. The Department expects that the application fee will exceed the actual costs incurred only when the applicant withdraws from the program in the early stages of application review or work plan review. The Department believes that these cost should be borne equally by all applicants, regardless of whether they choose to stay with the program or withdraw.

The \$4,000.00 initial deposit amount is based on the Department’s experience with Voluntary Remediation Program sites under previous programs. The \$4,000.00 initial deposit amount is calculated to ensure that a significant amount of work is completed in relation to a voluntary site before the Department requires the payment of additional amounts into the participant’s site-specific deposit account. By the time that the site-specific deposit account initially falls below \$1,000.00, the Department and the applicant



should have a fairly clear understanding of at least the short-term cost requirements of the project based on actual experience with the specific project. This mutual understanding of the project's cost requirements should limit the potential for future disputes regarding program charges. A lower initial deposit amount would require that additional deposits be made at an earlier stage in the process.

The Department intends to evaluate the effectiveness of the fee structure on an ongoing basis and intends to propose alternate fee structures should they be warranted based on actual costs incurred and actual utilization levels of program staff.

**Issue:** (The commenter) believes that a more realistic fee structure that is in line with other ADEQ programs as well as other state voluntary programs will maintain the VRP's financial appeal and attract additional sites to the program. However, if the fees are increased too quickly to too high a level, then there is a disincentive for a responsible party to enter the VRP, and other ADEQ programs will become more attractive when regulatory oversight is warranted. If the new VRP is marketed and managed properly during the 12 month evaluation period, responsible parties should find the program more attractive than other ADEQ programs and enroll new sites. The increased growth would allow ADEQ to distribute the program costs across more sites and successfully maintain a lower fee schedule.

**Analysis:** The Department does not view the Voluntary Remediation Program as one program that competes with WQARF and its other regulatory programs on a comparative price basis. The program provides an alternative tool available to property owners and other interested parties who choose to remediate their contaminated sites. Participation in the program should be based on a decision that a voluntary remediation effort is the appropriate solution to a problem that otherwise might require a less appropriate response under WQARF or another regulatory program.

Cost is only one important consideration in the decision to participate in the program. Other important considerations include the availability of prompt Departmental oversight, increased project control, flexibility in the selection of a remedy that is appropriate to the site and the availability of a process to obtain a no further action determination without the necessity of remediating under one of the Department's regulatory programs. The program, as a whole, represents an opportunity for a cooperative collaboration between property owners and the Department in meeting mutual goals in a cost-effective and efficient manner. The Department intends to make every effort to manage the program in a manner that ensures that the costs will be reasonable and that the benefits available to participants will contribute effectively to the growth of a successful program.

**Issue:** By raising the utilization rate of the project managers and the supervisor and at the same time reducing the total project cost, it should reduce the hourly fee rate that is charged to somewhere in the range of \$85.00 an hour to \$95.00 an hour which seems a more reasonable average for most consulting firms that are out there these days as well as for the Department.

**Analysis:** The Department believes that its projections of costs and utilization-levels provide a better basis for establishing an hourly fee rate than does a comparison with fee rates charged by other programs or by consultants.

**Response:** The Department will go forward with an hourly fee rate of \$110.00. If, when actual program cost and utilization data becomes available, the data suggests that the rate is not appropriate the Department will initiate a rule making to appropriately amend the hourly rate.

## **B. Staff Utilization**

**Issue:** Information presented in the preliminary summary of the economic, small business, and consumer impact statement indicates the hourly reimbursement fee of \$110.00 was calculated by dividing the FY-01 through FY-04 budget total by 9600 hours (3 FTEs collectively billing 2,400 hours per year). That roughly equates to \$250,000.00 per year for one ADEQ employee. It is hard to imagine that the salary and support costs for one ADEQ employee would be \$250,000.00 per year, recognizing that essentially all site-specific costs, including travel costs, will be directly passed through to the applicant and are not involved in the fee calculation.

**Analysis:** The \$257,420.00 projected annual budget for fiscal year 2001 covers the projected costs of the first year of the Voluntary Remediation Program, not the salary and support costs of one ADEQ employee. Projected program costs include the salaries, related expenses and an allocation of overhead, for two project managers and one unit manager as well as non-personnel costs that are not directly passed through to participants. The hourly fee rate was calculated by dividing the projected program costs for FY 2001-FY 2004 of \$1,060,665 divided by 9,600 billable hours projected for the same 4 fiscal years.

**Response:** No change to the rules.

**Issue:** Utilization rates assumed for the project managers and the supervisor are too low and should be raised. If, for example, they can't keep a project manager more than 60% billable then maybe they don't need two project managers and one should be reassigned either part-time or full-time to another department.

**Analysis:** The utilization rate projections are based on the Department's estimates of both program capacity and projected demand. It would be premature to make changes to the program before we have data that supports these changes. The commenter's suggestion may become appropriate when the Department has reliable data to support an actual determination of staff utilization.

**Response:** No change to the rules.

**Issue:** Perhaps ADEQ could significantly reduce costs by restructuring units within the Waste Programs Division. For example, efficiencies could be achieved by assigning one person to the review of applications and reports and by assigning site inspections to other staff members within the division who have full-time field investigation responsibilities. Not only would such assignments result in improved operating efficiencies, they should minimize costs that must be passed on to the applicants. For example, I would think that training and medical monitoring is already provided for the hazardous waste inspectors. If so, the use of those inspectors for inspections of the VRP sites could eliminate the need for the VRP applicants to pay for the full cost of training the three individuals who will spend only part time on VRP activities and the full cost of medical monitoring costs for two individuals who will not be spending full time on site inspections. Instead the applicants would only pay a proportionate share of the costs for training and monitoring the hazardous waste inspectors.

**Analysis:** The Department is committed to maximizing efficiencies through the adoption of innovative approaches to administering the program. Over time and with the benefit of increased experience the Department will seek to identify innovative approaches and welcomes stakeholder involvement in this identification process.

At this time, however, the Department must focus its attention on providing the new, enhanced level of service anticipated in the new statutes. Questions of program stability and manageability must take precedence over the fine tuning that the commenter suggests. The Department's current expectation is that fine tuning may become appropriate as the Department gains experience in the early stages of implementing the program and in the process of developing and adopting the permanent rules. Fine tuning will likely be a major consideration by the time that the Department prepares its statutorily required report to be submitted to the Legislature on or before December 1, 2002. This report will include an evaluation of whether fees and reimbursements are sufficient to sustain the program.

**Response:** No change to the rules.

### **C. Alternate Program Funding**

**Issue:** The Department should take into account, in their calculation of the hourly rate, the funding that they receive from EPA to support the Voluntary Remediation Program. To do so could reduce the total program cost by as much as thirty percent for the first 18 months to two years of the program. The Department could increase the hourly rate if the EPA funding was discontinued in the future.

**Analysis:** The Department receives funding to support the Voluntary Remediation Program under a Core Program Cooperative Agreement with EPA. Core Program Cooperative Agreements provide funding to conduct CERCLA implementation activities that are not directly assignable to a specific site but are intended to support a state's ability to participate in the program. Activities funded are defined in a Statement of Work that is included in the Agreement.

It is unlikely that the Department's Core Program Cooperative Agreement funding from EPA could be applied in any manner that would result in a significant reduction of total program costs. The activities funded under the Agreement are defined as "voluntary program development" activities. These activities include the development of rules, policies, guidance documents, forms, and public outreach tools. The bulk of this program development work is performed by assigned program capacity development staff members. Their salaries are not Voluntary Remediation Program costs and were not included in the budget projections used to calculate the hourly fee rate. The two project managers, whose salaries are program costs, are not generally involved in program development projects. The unit manager's input has been essential in the rule development process and will undoubtedly be important in the development of program policies and guidance. It is anticipated, however, that this involvement will decrease as the program becomes operational and the unit manager's supervisory responsibilities increase. In the interest of developing a self-sufficient program, the Department is assuming that program personnel will not have significant ongoing involvement in program development as defined under the Core Program Cooperative Agreement.

Further, it is not prudent to assume that the Department's EPA Core Program Cooperative Agreement will continue to fund development of the Voluntary Remediation Program. Due to cutbacks at the federal level, Core Program Cooperative Agreement funding may not be available in the near future for even the limited purpose of program development.

**Response:** No change to the rules.

**Issue:** Because of uncertainties regarding the number and complexity of applications over the next two years, it is unlikely that the Department will calculate the exact level of effort required for program operations. If the Department significantly underestimates the required level of effort, delays in remediation projects will likely result. If overestimates occur, the applicants must bear unnecessary costs. Federal funds could serve as a buffer to protect applicants from the costs that will occur if the Department overestimates needed resources. The buffer would be especially important during the VRP's early years when uncertainties are at their greatest.

**Analysis:** Use of the Department's EPA funding as a "buffer" against cost overruns would not be appropriate. As mentioned above, the Department's Core Program Cooperative Agreement limits the EPA funding to use for program development purposes. Use of this EPA funding as a "buffer" against cost overruns is not anticipated in the Agreement.

**Response:** No change to the rules.

**Issue:** If not used to pay some of the ongoing costs, the federal funds should be used to develop policies and guidance documents that will provide for more efficient operations. The federal government and several of the states have already developed sophisticated guidance documents regarding site-characterization, risk assessments, remediation and attainment demonstrations. It would appear that most policy and guidance development work and related costs would be thus limited to the selection of existing documents for use in Arizona rather than for the development of new documents.

The availability of scientifically defensible documents-approved for use in Arizona- should be a high priority for ADEQ because the documents will provide streamlined processes for the applicants. The streamlined processes will not only reduce the applicants' direct costs, they will reduce ADEQ costs by reducing the time that ADEQ would otherwise have to spend for administrative and technical reviews.

**Analysis:** The Department agrees that the development of policies and guidance documents will provide for more efficient operations and represents an appropriate use of the federal funding provided under its Core Program Cooperative Agreement. To the extent that federal program development funding is and remains available, the Department is committed to using this funding for this purpose.

**Response:** No change to the rules.

#### **D. Overall Cost Controls**

**Issue:** There is no cap on the number of hours that can be billed to a given task. If the agency is going to take a market approach to this program, they should provide estimates not to exceed so many hours for a given report and, somehow, set a system to allow applicants to budget for these expenditures.

**Analysis:** The statutory requirement that the Voluntary Remediation Program be self-supporting precludes the possibility of placing a cap on the number of hours that can be billed to a given task. With capped hours, a participant would pay costs up to a predetermined cap. The cost of providing services in excess of the cap would not be reimbursed and the program would not be self-sufficient.

However, the Department agrees that the creation of vehicles that allow applicants to budget for program costs is essential to the success of the program. In an effort to assist applicants in evaluating potential site specific oversight costs, the Voluntary Remediation Program is in the process of developing management tools to analyze program costs for different types of sites and to track staff time expended on each of the cost recoverable activities identified in the interim rule. The information collected will allow the Department to develop guidance, fact sheets and examples to assist applicants in the process of budgeting for program costs. In addition, as specified in the rules, detailed cost summaries will be provided to the applicant on a quarterly basis, or when an individual site account drops below \$1,000. These cost summaries will allow the Department and the applicants to identify potential budget problems promptly as costs are incurred.

**Response:** No change to the rules.

**Issue:** The proposed hourly fee rate is considerably higher than any other hourly fee rate in all of ADEQ's other programs. I understand ADEQ's position that this is because of the unique statutory guidance regarding the collection of fees to support the program. In light of this very high hourly fee rate, ADEQ must establish appropriate mechanisms to ensure that the total cost of ADEQ's actions regarding VRP projects remains reasonable. I am not uncomfortable with ADEQ's estimate of average total costs in the \$8,000.00 range, as long as appropriate mechanisms are in place so that this is a true reflection of average project billings.

With larger projects, I understand that the costs may be higher. However, it is critical for these larger projects that processes, such

as advance cost estimates, time frames for agency action, etc. be put in place to regulate overall review costs. I do not see many of these mechanisms in the draft rule. Unless appropriate mechanisms are included to regulate total project costs, the high amount of the hourly fee rate will cause ADEQ billings to skyrocket, and will jeopardize the success of this important program.

**Analysis:** The Department agrees with the commenter that, in light of the \$110.00 hourly fee rate, the Department must establish appropriate mechanisms to ensure that the total cost of VRP project oversight remains reasonable. It is not clear, however, that these mechanisms are best adopted as rules. Appropriate cost control mechanisms for agency action are best developed as management tools to be used by the Department and by program participants to realize the mutual goals of cost control and participant satisfaction with the Voluntary Remediation Program.

**Response:** Appropriate mechanisms to ensure the reasonableness of project costs will be developed as management tools which will be tested and refined during the early stages of implementation of the Program. Because the ultimate test of these mechanisms will be the extent to which they actually control project costs, the Department will welcome stakeholder input on this issue as it implements the program.

**Issue:** I appreciate the difficulty that ADEQ faces as it attempts to establish a fee system that will make the Voluntary Remediation Program self-sufficient while also keeping fees low enough so that participation will not be discouraged. Although the Department has made a commendable effort to date, I hope that it will continue to seek ways to reduce costs. If the Department does not have time to pursue cost reductions as part of the current rule making process, I hope that it will make time as it begins the development of the proposed final rule.

**Analysis:** Cost reduction is a goal that the Department shares with the program participants. While the Department is committed to the development of a self-sufficient Voluntary Remediation Program, it agrees that fees not discourage program participation. Widespread participation is the best guarantee of a successful program.

The Legislature provided one process to ensure that the program will be both self-sufficient and cost effective. As the commenter notes, the session law requires that the Department propose permanent rules. The Department shall do so within 120 days of the effective date of these interim rules. To the extent possible, the Department will take advantage of the brief opportunity provided by the adoption of interim rules to test its cost and revenue assumptions prior to the proposal of permanent rules. Once proposed, the permanent rules will be subject to public comment and review by the Governor's Regulatory Review Council. This process will necessarily involve a review of the Department's cost and revenue projections. Before December 1, 2002, the Department will develop a report to the Governor and the Legislature as required under the session law. This report will include an evaluation of the sufficiency of the fees and reimbursements collected under both the interim and permanent rules.

The Department intends to supplement this legislated process by establishing information systems for tracking, profiling and analyzing costs. The program is putting in place a system that will track staff time expended on each of the cost recoverable activities identified in the interim rule, cost estimates of program costs for different types of sites, and a matrix that will identify average times for document review within the unit. The Department will use these management tools to evaluate the productivity of individual staff, improve productivity and reduce costs.

**Response:** No change to the rules.

#### **E. Allocation of Agency Overhead Costs**

**Issue:** VRP costs reductions could be achieved if indirect costs and agency overhead costs could be more equitably distributed across all ADEQ programs, regardless of funding sources.

**Analysis:** The distribution of indirect and agency overhead costs among programs is not generally under the control of the Department. The percentage of indirect costs that a program can charge is determined by the Legislature. Programs funded under the general fund carry no indirect charges. Indirect costs must be distributed across the unrestricted programs such as the Voluntary Remediation Program.

The commenter is correct that VRP costs reductions could be achieved if indirect costs and agency overhead costs could be redistributed across all Department programs regardless of funding source. The Department's Director of Administration has undertaken a process to evaluate the question of the appropriate allocation of indirect and overhead costs in relation to the Department's fee structure. This evaluation may result in a different distribution of these charges in the future.

**Response:** No change to the rules.

#### **F. Cost Data**

**Issue:** In the preliminary summary of the economic, small business, and consumer impact statement, there is not a one-to-one correspondence between the costs shown in Table 1 and the definitions included in Appendix A. One might suppose “personnel services” shown on Table 1 would include the 51.24% agency overhead, as described in Part 1(A) of Appendix A. However, the high indirect costs shown in Table 1 raise the question of whether the agency overhead costs were also included in the indirect costs.

**Analysis:** The commenter correctly points out that the costs shown in Table 1 are not consistent with the definitions in Appendix A. In Table 1, the category “personnel services” does not include agency overhead. Agency overhead is included in the indirect costs. In Appendix A, agency overhead is included in direct costs and not in the indirect costs.

**Response:** Appendix A of the Economic, Small Business and Consumer Impact Statement in this Notice of Exempt Rulemaking correctly defines agency overhead as an indirect cost. No change to the rules.

**Issue:** Although “non-personnel” costs are described in Part 1(B) of Appendix A, they are not shown in any of the tables. Admittedly, the costs need not be shown because they are to be passed on directly to the applicants and are not included in the fee calculations. Nevertheless, a display of the costs would help a reviewer better understand the total costs experienced by VRP applicants. To the extent that the non-personnel costs indicate program activity, they could also explain why the indirect costs appear to be so high.

**Analysis:** Non-personnel costs are not shown in any of the tables because they are site-specific and contingent. For example, travel costs incurred and reimbursed under R18-7-506(B)(3) will be indirect costs billed directly to the applicant. The specific amount billed will depend on the such factors as the distance traveled, the price of gasoline, the cost of lodging, etc. Costs incurred for work provided under a contract and reimbursed under R18-7-506(B)(2) will be billed at actual cost. Actual cost will depend on the nature of the services provided and the provider’s billing rate.

**Response:** No change to the rules.

#### **G. Billing Methodology and Structure**

**Issue:** In the information provided, documentation was not found on how ADEQ’s costs will be collected and tracked, how hourly fees will be documented and invoiced, how fee disputes will be resolved or how refunds of unused deposits will be requested and returned. ADEQ should consider providing a quarterly accounting statement for each project to the responsible party. This statement would include the current VRP charges as well as deposit status and amount remaining.

**Analysis:** The Department’s costs will be collected and tracked by project managers on a site-specific basis. Proposed R18-7-506 provides for a quarterly accounting statement that itemizes reimbursable costs charged against the site-specific deposit account and provides a summary of account activity during the quarter, including opening and closing account balance. Unused deposits will be refunded after the final accounting is prepared and provided under R18-7-507. Informal and formal dispute resolution processes will be available under A.R.S. 49-185.

**Response:** No change to the rules.

#### **H. Deposits**

**Issue:** ADEQ should adopt Texas’ VCP practice of billing the RP on a quarterly basis and forgo the requirement that the RP maintain a cash fund that ADEQ can draw from.

**Analysis:** The deposit requirement in proposed R18-7-503 is intended to reduce or eliminate the costs that would be otherwise incurred as a result of late-payment or nonpayment of amounts due for services provided. Recovery of these costs through an increased hourly rate would place an unfair burden on participants who pay their bills in a timely manner.

**Response:** No change to the rules.

**12. Any other matters prescribed by statute that are applicable to the specific agency or any specific rule or class of rules:**  
None.

**13. Incorporations by reference and their location in the rules:**  
None

**14. Was this rule previously adopted as an emergency rule?**

No.

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

**TITLE 18. ENVIRONMENTAL QUALITY**

**CHAPTER 7. DEPARTMENT OF ENVIRONMENTAL QUALITY -**

**REMEDIAL ACTION**

**ARTICLE 4. VOLUNTARY REMEDIATION PROGRAM GREENFIELDS PILOT PROGRAM**

**ARTICLE 5. VOLUNTARY REMEDIATION PROGRAM**

Sections

<u>R18-7-501.</u>	<u>Definitions</u>
<u>R18-7-502.</u>	<u>Application Fee</u>
<u>R18-7-503.</u>	<u>Deposit</u>
<u>R18-7-504.</u>	<u>Voluntary Remediation Program Reimbursement</u>
<u>R18-7-505.</u>	<u>Hourly Reimbursement Rate</u>
<u>R18-7-506.</u>	<u>Voluntary Remediation Program Accounting</u>
<u>R18-7-507.</u>	<u>Account Reconciliation</u>

**ARTICLE 4. VOLUNTARY REMEDIATION PROGRAM GREENFIELDS PILOT PROGRAM**

**ARTICLE 5. VOLUNTARY REMEDIATION PROGRAM**

R18-7-501. Definitions

The following definitions shall apply in this Article, unless the context otherwise requires:

"Applicant" means a person who participates in the Voluntary Remediation Program. Participation in the Voluntary Remediation Program begins when the Department receives an application under A.R.S. § 49-173 and continues until any one of the following occurs:

The Department grants the applicant's request for a no further action determination.

The applicant provides the Department with notice of the applicant's intent to withdraw from the program.

The Department terminates the applicant's participation under A.R.S. § 49-178(B).

"Department" means the Arizona Department of Environmental Quality.

"Voluntary Remediation Program" means the program authorized under A.R.S. Title 49, Chapter 1, Article 5.

**R18-7-502.** **Application Fee**

- A.** At the time of filing an application to participate in the Voluntary Remediation Program, the applicant shall pay a nonrefundable application fee in the amount of \$2,000.00.
- B.** The application fee shall be in the form of a company check, cashier's check, certified check, or money order made payable to the Arizona Department of Environmental Quality.
- C.** Except as provided in subsection (D), an application does not meet the requirements in A.R.S. § 49-173 unless accompanied by the application fee. The Department shall not review an application until the application fee is paid in full.
- D.** At the request of an applicant that is a small business as defined under A.R.S. § 41-1001, the Department may review and approve an application upon receipt of a partial payment of the application fee in an amount approved by the Department and an agreement to pay the remainder of the fee in scheduled installments.
- E.** An applicant that withdraws or is terminated from participation in the Voluntary Remediation Program may reapply to the program by submitting an application that meets the requirements of A.R.S. § 49-173, including payment of the application fee.

**R18-7-503.** **Deposit**

- A.** At the time that an applicant submits a work plan under A.R.S. § 49-175 or a report under A.R.S. § 49-181, the applicant shall submit to the Department an initial deposit of \$4,000.00.
- B.** The deposit shall be in the form of a company check, cashier's check, certified check, or money order made payable to the

- Arizona Department of Environmental Quality.
- C.** The Department shall begin review of the applicant's work plan or the report submitted under A.R.S. § 49-181 upon receipt of the initial deposit.
- D.** Upon receipt of the initial deposit, the Department shall establish a site-specific deposit account identified by a unique account number. The Department shall charge all incurred reimbursable costs attributable to the applicant's site against the site-specific deposit account.
- E.** If, at any time during the applicant's participation in the program, the balance in the site-specific deposit account falls below \$1,000.00 and the Department reasonably estimates that the reimbursable costs chargeable to the account will exceed the amount available in the account, the Department shall mail or fax a written request that the applicant submit an additional deposit in an amount not to exceed \$4,000.00. The Department may request any number of additional deposits, in amounts of \$4,000.00 or less, at any time that the conditions of this subsection are met.
- F.** If any requested additional deposit is not received within 30 days after the Department mails or faxes the request in subsection (E) and the Department determines that the applicant's site specific account balance is insufficient to support continued program participation, the Department shall mail a written notice of deficiency under A.R.S. § 49-178 and shall notify the applicant that work on the site may be suspended until the additional deposit is received. If the Department does not receive the requested additional deposit within 60 days after the notice of deficiency is mailed or faxed and the applicant does not dispute the Department's determination that the site specific account balance is insufficient to support continued program participation, the Department may terminate the applicant's participation in the program. An applicant whose participation is terminated under this subsection may reapply to the program as provided in R18-7-502(E).

**R18-7-504. Voluntary Remediation Program Reimbursement**

- A.** The applicant shall reimburse the Department, at an hourly reimbursement rate established under R18-7-505, for time spent by Voluntary Remediation Program staff on activities specifically related to the applicant's site, including the following:
1. Review of the application submitted under A.R.S. § 49-173, including review of any modifications requested by the Department or the applicant or additional information submitted by the applicant.
  2. Review of the work plan submitted under A.R.S. § 49-175, including review of any modifications requested by the Department under A.R.S. § 49-177 or by the applicant or the Department under A.R.S. § 49-180.
  3. Review of progress reports submitted as part of a work plan under A.R.S. § 49-175 or as requested by the Department under A.R.S. § 49-177 or A.R.S. § 49-180.
  4. Consideration by the Department under A.R.S. § 49-176(D) of written comments submitted in response to a public notice providing an opportunity to comment or a public meeting.
  5. Participation in public hearings required by the Department under A.R.S. § 49-176(D).
  6. Site inspections under A.R.S. § 49-177 and site investigations under A.R.S. § 49-181, including time spent in travel to and from the site.
  7. Review of the report and request for a no further action determination submitted under A.R.S. § 49-181, including review of any modifications requested by the applicant or the Department.
  8. Time spent in reviewing a request submitted by an applicant under A.R.S. § 49-182 for approval of a remedial action under A.R.S. § 49-285.
  9. Time spent in meetings or discussions requested by the applicant or the Department.
- B.** The applicant shall reimburse the Department for the site-specific costs of goods and services contracted by the Department including:
1. Reasonable and necessary attorneys' fees billed to the Department by the Attorney General for legal services, including legal fees billed for representation in regard to appeals or dispute resolution under A.R.S. § 49-185.
  2. Costs incurred by the Department for work provided under a contract described in A.R.S. § 49-179(D)(1) or A.R.S. § 49-179(D)(2).
  3. Reasonable and necessary travel costs incurred in the performance of activities described in subsections (A)(5), (A)(6) or (A)(9) or performed at the request of the applicant.
  4. Other reasonable site related expenses documented in writing by the Department.

**R18-7-505. Hourly Reimbursement Rate**

The hourly reimbursement rate is \$110.00 per hour.

**R18-7-506. Voluntary Remediation Program Accounting**

- A.** Within a reasonable time after the end of each calendar quarter, the Department shall mail or fax each applicant a statement itemizing reimbursable costs charged against the site-specific deposit account and a summary of account activity during that quarter. The statement shall be in a form consistent with generally accepted accounting principles.

**R18-7-507. Account Reconciliation**

- A.** Within a reasonable time after completion of the remediation work at the site, or after termination or withdrawal of the

applicant from participation in the program, the Department shall prepare and mail or fax to the applicant a final statement which shall include:

1. An itemization of site-specific reimbursable costs incurred by the Department but not previously reported in a quarterly statement.
  2. The total amount of site-specific reimbursable costs incurred by the Department during the course of the project, including the costs reported in subsection (A)(1).
  3. The total amount submitted as deposits by the applicant and applied by the Department to the applicant's site-specific deposit account during the course of the project, plus the amount paid by the applicant as an application fee.
- C.** If the final statement shows that the amounts submitted or paid during the course of the project are less than the Department's reimbursable costs, the applicant shall be responsible for and shall pay, within 30 days after receipt of the final statement, the difference between the costs incurred and the amounts submitted or paid.
- D.** If the final statement shows that the amounts submitted or paid during the course of the project are more than the Department's reimbursable costs and the Department's reimbursable costs exceed \$2,000.00, the Department shall return to the applicant, within a reasonable time period, the difference between the amounts submitted or paid and the costs incurred.
- E.** If the final statement shows that the amounts submitted or paid during the course of the project are more than the Department's reimbursable costs and the Department's reimbursable costs total \$2,000.00 or less, the Department shall retain the applicant's nonrefundable application fee of \$2,000.00 and shall return to the applicant the amount of any deposits submitted.
- F.** The Department may withhold any program approval or no further action determination until the applicant has paid any amount due and payable under the final statement.