

## NOTICES OF PROPOSED RULEMAKING

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

### NOTICE OF PROPOSED RULEMAKING

#### TITLE 18. ENVIRONMENTAL QUALITY

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

#### PREAMBLE

**1. Sections Affected**

Article 6  
R18-7-601  
R18-7-602  
R18-7-603  
R18-7-604  
R18-7-605  
R18-7-606

**Rulemaking Action**

New Article  
New Section  
New Section  
New Section  
New Section  
New Section  
New Section

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

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

Implementing statutes: Laws 2000, Ch. 225, § 13, and A.R.S. §§ 49-152(K) and 49-158(G)

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

Notice of Rulemaking Docket Opening: 8 A.A.R. 4805, November 15, 2002

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

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

**A. Authorization**

This is an interim rulemaking authorized in 2000 Ariz. Sessions Laws Ch. 225, § 13. The session law requires the Department to adopt rules establishing the fees prescribed in A.R.S. §§ 49-152(K) and 49-158(G). The session law exempts this interim rulemaking from the rulemaking 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. These interim rules become effective no earlier than the thirtieth day after the last public hearing.

Laws 2000, Ch. 225, § 13 requires the Department to file a notice of rulemaking docket opening with the Secretary of State for the making of permanent rules within ninety days after filing the interim rules. Within thirty days of filing the notice of rulemaking docket opening, the Department is required to file a notice of proposed rulemaking for the permanent rules. The interim rules expire and are automatically repealed on the date that the permanent rules become effective.

**B. Purpose of This Proposed Rule**

This rule will establish a fee to be paid to the Department before a property owner records a Declaration of Environmental Use Restriction (DEUR) under A.R.S. §§ 49-152 or 49-158. Sections 49-152 and 49-158 call for recording a DEUR whenever an owner elects to use either an institutional control or an engineering control to reduce the potential for exposure to contaminants on the property, and A.R.S. § 49-152 further requires that a DEUR be recorded if an owner elects to leave contamination on the property that exceeds the applicable residential standard for the property. The applicable residential standard may be a risk-based site-specific level.

The fees paid under this rule will serve as the major source of funding for the Institutional and Engineering Control Fund established under A.R.S. § 49-159. Monies in the Institutional and Engineering Control Fund will be used by the Department for reasonable and necessary costs of implementing the DEUR provisions of A.R.S. §§ 49-152 and 49-158, and for reasonable and necessary costs of administering the Fund.

**C. Background of the Proposed Rule**

Soil Remediation and the VEMUR

In Arizona, property owners may remediate contaminated soil to either residential or non-residential standards established under the Soil Remediation Standards rules in 18 A.A.C. 7, Article 2. Soil that meets either the residential or the non-residential standard is “clean enough” for the purpose of meeting the remediation requirements of any program administered by the Department.

Remediation to a non-residential standard is an option for property owners remediating soil on property that is either industrial or commercial, or for any other use that will not result in residential use as defined in A.R.S. § 49-151(6). A property owner may decide that remediation to residential levels or to “background” (naturally occurring concentrations) levels is unnecessarily expensive in the context of a property which will be used as a warehouse, or a factory, or for some other industrial or commercial use. The option to remediate contaminated soil to an appropriate non-residential standard allows for remediation projects that may be completed more quickly and more affordably.

Remediation of a property to non-residential soil levels, however, is protective of human health and the environment only if the property is, in fact, not used for residential purposes for so long as the conditions described in the restriction remain. To ensure that the use of these properties is appropriate, A.R.S. Title 49, Chapter 1, Article 4 requires that property owners who remediate to the non-residential soil standards execute an agreement that legally restricts the use of their property to non-residential uses. The agreement is recorded in the County Recorder’s Office in the county where the property is located. The recording of the agreement provides notice to interested parties of the restriction on the use of the property.

Before July 18, 2000, the agreement a property owner signed and recorded was called a Voluntary Environmental Mitigation Use Restriction (VEMUR). The VEMUR was a relatively simple promise, by the property owner, to limit the property to non-residential uses. The VEMUR is a notice to deed recorded in the county(ies) where the property is located.

The DEUR

In 2000, the Legislature enacted Senate Bill 1454, amending A.R.S. Title 49, Chapter 1, Article 4 to eliminate the VEMUR and to replace it with a DEUR. Senate Bill 1454 became effective as Laws 2000, Ch. 225 on July 18, 2000.

The DEUR is more comprehensive than the VEMUR. Under the amended A.R.S. § 49-152, if a property owner remediates soil to non-residential standards or reduces the potential for exposure to contaminants on the property through the use of institutional controls or engineering controls, the owner must record a DEUR. Under the new A.R.S. § 49-158, if a remedial action, remediation, or corrective action performed under A.R.S. Title 49, or a response action performed under CERCLA, includes an institutional control or an engineering control, and the remedial action, remediation, corrective action, or response action is not subject to section 49-152, the owner of the property on which the institutional control or engineering control is located must record a DEUR.

A.R.S. § 49-151 defines an engineering control as a “remediation method such as a barrier or cap that is used to prevent or minimize exposure to contaminants and includes technologies that reduce the mobility or migration of contaminants.” Examples of barriers that prevent exposure to contamination may include fences and concrete slabs that block access to the contamination. Caps, liners, berms, leachate collection systems, pump and treat technologies and methane gas collection systems are examples of technologies that may reduce the mobility or migration of contaminants.

An institutional control is defined in A.R.S. § 49-151 as “a legal or administrative tool or action taken to reduce the potential for exposure to contaminants.” Because the execution and recording of a DEUR is a legal or administrative tool or action taken to reduce the potential for exposure to contaminants, the DEUR itself is an institutional control. In fact, the most common example of the use of an institutional control is expected to be the remediation of contaminated soil on a property to non-residential levels accompanied by the execution and recording of a DEUR. Other land use restrictions or other legal or administrative actions, however, may also function to limit exposure potential and serve as institutional controls.

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Unlike the VEMUR, use of a DEUR is not limited to the remediation of properties containing contaminated soil. Properties that are sources of contamination of groundwater or surface water and properties that contain contaminated non-soil materials, also may be cleaned up under one of the Department's clean-up programs or under CERCLA. If the property owner uses an engineering or institutional control in the process of remediating these properties or remediates to a nonresidential standard, the owner must execute and record a DEUR.

A DEUR is a covenant that runs with and burdens the property, binds the owner and the owner's heirs, successors and assigns, and inures to the benefit of the Department and the state. The DEUR binds future owners of the property to the covenant made by the current owner. The DEUR is recorded in each county in which the property lies and, once recorded, becomes an encumbrance on the legal title to the property. A recorded DEUR ensures that future owners, as well as current owners, have notice of and responsibility for the remediation level or control mechanism that is described in the DEUR. The terms of the DEUR remain in effect until it is released by the Department under procedures established in A.R.S. §§ 49-152 and 49-158.

New Services Provided by the Department

The DEUR is a legally binding restriction on real property, and a major component of a remediation process that may include multiple institutional and engineering controls. Replacement of the relatively simple VEMUR with the more sophisticated and complex DEUR, results in a new range of responsibilities assumed by the Department.

A DEUR is submitted on a form provided by the Department. The Department will assist in the preparation of a DEUR and will carefully review each DEUR prior to its execution and recording. The Department will verify that descriptions of the property and of the area in which the institutional and/or engineering controls will be maintained, are complete and accurate. The Department will verify that the DEUR accurately describes the nature of the contaminants that remain on the site; the institutional and engineering controls that will address the contamination; and the requirements for maintenance of these controls.

The property owner is required to monitor and maintain the institutional and engineering controls and submit an annual report to the Department describing the status of the controls. The Department will also monitor the maintenance of the institutional and/or engineering control described in the DEUR during the lifetime of the DEUR. The Department will review annual reports from the owner and may inspect properties to verify that controls are being adequately maintained.

A property owner may request the Department to release a DEUR. The Department will review the request and may inspect the property, including current levels of contamination on the property. If appropriate remediation levels have been achieved pursuant to A.R.S. §§ 49-152(D) or 49-158(L), the Department will draft, execute and record the release.

Laws 2000, Ch. 225 also expanded the Department's role in notifying the public regarding sites that are being remediated under the Department's various programs. Under Laws 2000, Ch. 225, the Department provides copies of DEURs to appropriate local zoning jurisdictions. Further, the statute, in authorizing the DEUR fee, provides for partial funding for the development and maintenance of the Department's repository of sites that are subject to remediation under any of the Department's programs, including all sites where a DEUR has been recorded. Finally, all of the provisions of Laws 2000, Ch. 225, taken together, have resulted in additional Department workload by virtue of the range of new coordination and oversight activities that it has now been required to undertake to assure the proper implementation of the various aspects of the new law across all of its programs.

Today's Rulemaking

Today's interim rulemaking represents the Department's first step in establishing this fee. In the future, the Department will undertake a permanent rulemaking for the DEUR fee, pursuant to Laws 2000, Ch. 225, § 13.

**D. The Rule Development Process**

To develop a fee rule that applies to owners of institutional and/or engineering control properties, the Department:

1. Identified the activities that would be necessary to provide the services authorized under A.R.S. §§ 49-152 and 49-158;
2. Developed estimates of the number of hours that would be required to perform each activity; and
3. Developed a "dollar-multiplier" for use in converting the estimates of activity hours into dollar amounts for the purpose of establishing a fee.

DEUR-Related Activities

Under A.R.S. §§ 49-152 and 49-158, the activities the Department will be performing in regard to DEUR properties include:

1. Reviewing the legal description of the property that will be subject to the DEUR;
2. Reviewing the description of the area where an institutional control or engineering control will be maintained;
3. Reviewing the contaminants on the property;

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4. Reviewing the proposed institutional control or engineering control;
5. Reviewing and approving the terms of the proposed DEUR documents;
6. Reviewing annual reports;
7. Performing periodic property inspections to verify maintenance of the institutional control or engineering control;
8. Administering the repository of properties being remediated under the Department's programs;
9. Reviewing and responding to requests for release of or modification to the DEUR;
10. Recording DEUR release notices; and
11. Coordinating and overseeing all DEUR activities.

Projection of Hours Required to Perform the DEUR Related Activities

The Department, with the input of the professionals in each program who would be implementing the DEUR provisions, projected the number of hours that would be required to perform DEUR related activities. The five Department programs that will be involved in the implementation of the DEUR provisions established under A.R.S. §§ 49-152 and 49-158 are the Aquifer Protection Permit Program; the Hazardous Waste Program; the Superfund Program; the Underground Storage Tank Program (UST); and the Voluntary Remediation Program.

Analysis from the different programs identified the need to provide different fee amounts for different categories of properties. This was considered appropriate to take account of the fact that the complexity of sites, and thus the time and cost to the Department, would vary according to the category of the site. After assessing this issue, professionals from the affected programs determined that properties with institutional or engineering controls should be grouped according to three levels. Level 1, the least time-consuming and lowest in cost, would be limited to all institutional control properties. The next most time-consuming category of sites should be engineering control properties with no groundwater monitoring, which would be Level 2 sites. The most complex and time-consuming sites, Level 3, should be engineering control properties with groundwater monitoring.

Level 3 sites present the potential for major commitment and costs to the Department. Examples include large Water Quality Assurance Revolving Fund (WQARF) Program sites, and Aquifer Protection Permit Program mining sites. Since these sites have been specified in the rule as Level 3 sites, the terms are defined in the definitions Section of the rule. To allow a mechanism in the rule to capture these substantial costs in the fee, while not unfairly charging other Level 3 sites, the rule uses an additional mechanism for calculating the fee for a Level 3 site. The proposed rule establishes a maximum number of hours for reviewing annual reports, and for periodic inspections, that can be used to calculate the Level 3 fee. These represent the maximum number of hours the Department is likely to face for major sites. Establishing this maximum limit is similar to the thirty-year limit placed on the fee calculation. For both of these factors, the Department determined that the rule should set a maximum, even though not required by A.R.S. §§ 49-152 or 49-158. The fee rule thus allows programs, for Level 3 sites, to take into account the broad range of sites that would fall within the criteria for Level 3. The program would determine, on a case-by-case basis, not only the number of years (up to thirty) that the control would be needed – as would be determined as well for Level 1 and Level 2 sites -- but also the likely number of hours per year for reviewing annual reports and for periodic inspections for that particular property. The hours required for these ongoing activities for Level 1 and Level 2 sites are more predictable and consistent, so this additional calculation was determined to be unnecessary for Level 1 and Level 2 sites.

Based on consultation with remediation program professionals, the Department estimates that the following activities will require approximately the following average number of hours in relation to each DEUR:

<b>Activity</b>	<b>Estimated Hours Level 1 Sites</b>	<b>Estimated Hours Level 2 Sites</b>	<b>Estimated Hours Level 3 Sites</b>
Legal Description Review	2 hours	2 hours	2 hours
Review Control Area	1 hour	3 hours	18 hours
Review Contaminants	2 hours	8 hours	13 hours
Review Institutional and Engineering Controls	2 hours	8 hours	27 hours
Review and Approval of the Terms of DEUR Documents	8 hours	8 hours	8 hours
DEUR Release or Modification	10 hours	20 hours	30 hours

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Record DEUR Release	4 hours	4 hours	4 hours
Review Reports	1 hour/year	2 hours/year	30 hours/year*
Periodic Inspections	1 hr./yr. (UST) 3 hrs./yr. (other)	10 hours/year	40 hours/year*
Centralized Costs, and Development and Maintenance of the Repository	See E, below	See E, below	See E, below

\* Maximum hours

The Dollar Multiplier

Finally, the Department sought the input of its program professionals, to utilize the programs’ operating and cost experience in order to determine the “dollar multiplier” to be applied to the estimates of hours to arrive at the appropriate fees. The dollar multiplier is a number intended to serve as a reasonable projection of the cost of performing the activities required of the Department under A.R.S. §§ 49-152 and 49-158 expressed on a per hour basis. The overall DEUR fee is based on projections of the average number of hours to perform the various activities at institutional control properties or engineering control properties, multiplied by the dollar multiplier.

The dollar multiplier was based on the following methodology:

The Department first calculated the mid-range annual salary for a typical project manager, who will be performing the DEUR tasks (Grade 21), plus annual benefits and indirect costs. This would amount to \$70,768. The Department then determined the number of billable hours per year attributable to each project manager. As with other fee rules, such as for the Aquifer Protection Permit fee, the Department assumes that project managers work 62% of total hours (2080 hours per year) on billable projects, or 1290 billable hours per year. \$70,768 divided by 1290 is \$54.86 per hour. The calculation for the fee rule rounds this amount to \$55.00 per hour.

In limiting its dollar multiplier to the costs associated with one position, the Department was mindful that this did not account for substantial additional overhead costs that the Department must pay for each billable hour. However, the Department is prepared to absorb these additional costs and not charge them as part of the DEUR fee.

**E. The Proposed Fee Rule**

The fee proposed in this rule is paid before a DEUR is recorded. The fee amount is based on the Department’s projections of its costs of providing services under A.R.S. Title 49, Chapter 1, Article 4.

Costs of One-time Activities

One-time activities the Department performs under A.R.S. Title 49, Chapter 1, Article 4 are defined in R18-7-601 as including “reviewing and/or approving legal descriptions, control areas, contaminants, institutional or engineering controls, and draft DEUR documents.” Those activities are described in further detail as follows.

Legal description review: Level 1, Level 2 and Level 3 sites - two hours. This constitutes the technical delineation of the area where the control is established and must be maintained to protect the public health and the environment. It is important to the Department (and to the owner for that matter) that this delineation be accurate. Department staff review the proposed description of the area with the owner or consultant as the details of the control are being developed. They then spend some time, after a completed DEUR is submitted, evaluating the description of this boundary and calculating what area the legal description actually encompasses in relation to the location of the contamination.

Review control area: Level 1 sites - one hour; Level 2 sites - three hours; Level 3 sites - 18 hours. Department staff review the earlier site assessment reports and determine what area should be required to be covered by the control. In subsequently reviewing completed DEUR documents, the staff confirms that the control area conforms to site assessments.

Review contaminants: Level 1 sites - two hours; Level 2 sites - eight hours; Level 3 sites - 13 hours. Staff analyzes the contaminant in the context of an owner’s proposal to use a control as a tool to achieve cleanup of the site. The review assesses the nature of the contaminant and the related considerations in determining how to reach acceptable cleanup levels. When the completed DEUR documents are submitted, staff reviews them to confirm that the contaminant is accurately and completely reflected in the DEUR.

Review institutional or engineering control: Level 1 sites - two hours; Level 2 sites - eight hours; Level 3 sites - 27 hours. In the context of the contaminant in question, staff assesses the proposed control and its likely effectiveness in assuring that acceptable cleanup levels will be achieved and maintained, and works with the owner or consultant to assure everyone understands the nature of the control needed. Staff subsequently reviews the completed DEUR documents to confirm that the control described conforms to the need that had been identified earlier.

ADEQ signature/approval: Level 1, Level 2 and Level 3 sites - eight hours. The project manager prepares a briefing package for the division director, describing the site, the contaminants, the proposed control, and other information.

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The package is reviewed and discussed with the unit manager and then the section manager, then submitted to the Capacity Development Section, which coordinates the DEUR activities for the Department. That section's administrative assistant and its section manager review the package to confirm that it includes the proper information and that the DEUR and exhibits are in order. The Capacity Development Section manager reviews the package and proposed DEUR with the division director, who then approves the DEUR on behalf of the Department and signs the DEUR. The administrative assistant then prepares a letter returning the approved DEUR to the owner, with instructions to promptly record the DEUR.

The proposed amount of this fee component, representing the Department's projected costs of performing one-time activities in relation to the property, is:

For Level 1 sites - 15 (hours) x the dollar multiplier of \$55, or **\$825**;

For Level 2 sites - 29 (hours) x the dollar multiplier of \$55, or **\$1,595**;

For Level 3 sites - 68 (hours) x the dollar multiplier of \$55, or **\$3,740**.

Costs of Ongoing Activities

Ongoing activities the Department performs under A.R.S. Title 49, Chapter 1, Article 4 are defined in R18-7-601, as including "reviewing written reports, site inspections, or other verifications of the maintenance of institutional or engineering controls." The proposed fee includes amounts representing the Department's estimate of its costs of performing ongoing activities in relation to the property.

This amount for Level 1 sites will vary depending on whether the property is subject to corrective action for released petroleum under the UST program or is being remediated under one of the Department's other programs. The Department projects that review of the annual report for an institutional control property will require an average of one hour. The Department projects that institutional control properties that are subject to corrective actions for released petroleum under the UST program will require an average of one hour of annual inspection time. The Department projects that other institutional control properties will require an average of three hours of annual inspection time.

The Department estimates that the average number of hours per year required for reviewing annual reports for Level 2 sites is two hours. Its estimate of the average time per year required for conducting periodic inspections of Level 2 sites is ten hours.

For Level 3 sites, as described above the Department determined that it was appropriate to undertake an additional case-by-case calculation of projected annual ongoing costs, to take account of the uniquely broad range of sites that would be covered by the Level 3 criteria. Thus, for Level 3 sites the rule establishes a maximum of thirty hours per year for reviewing annual reports, and a maximum of forty hours per year for periodic inspections. For each property, the program would project an estimated annual number of hours, which could not exceed these maximums, but which could be substantially below the maximums.

The fee amount will also vary based on the Department's projection of the number of years the property will require ongoing activities. For every DEUR property (Level 1, Level 2 and Level 3), the Department will project the number of years required on a case-by-case basis. Although nothing in Article 4 limits the potential duration of a DEUR, the number of years that the Department projects, for fee purposes, will not exceed 30 years.

Cost of Releasing the DEUR

Under A.R.S. §§ 49-152(D) and 49-158(L), the Department will review a request for release of a DEUR and, if release is appropriate, prepares and records a release of the DEUR in each county where the property is located. The fee amount includes a payment of the following amount, representing the Department's projected costs of releasing the DEUR:

For Level 1 sites – 14 (hours) x the dollar multiplier of \$55, or **\$770**;

For Level 2 sites – 24 (hours) x the dollar multiplier of \$55, or **\$1,320**;

For Level 3 sites – 34 (hours) x the dollar multiplier of \$55, or **\$1,870**.

As an accommodation to property owners, the Department is proposing an option to the payment of this portion of the fee. Under R18-7-605, a property owner may agree to reimburse the Department, at the time that the property owner requests the release, for the Department's reasonable and necessary costs of reviewing and acting upon the request for a release. This option allows property owners to pay for this service only if it is requested and also to pass the costs of obtaining a DEUR release to the party that owns the property at the time the DEUR is released. Given the potentially long life span of a DEUR, this option may be attractive to some property owners. Property owners should note, however, that those who elect to use this option acknowledge that the future amount of the release portion of the fee, may be greater than the current amount described in R18-7-604(A)(3), (B)(3), or (C)(3), as applicable.

Development and Maintenance of the Repository

The fee includes a fixed payment of **\$550**. This represents the Department's projected costs of the DEUR-related share of developing and maintaining the repository under A.R.S. § 49-152(E), allocated equally to each property

owner recording a DEUR. The Department estimates its repository costs to be \$55,000 per year. This amount represents the salary and benefits for one full-time Grade 19 information technology position, plus agency indirect costs. Projections from the affected Department programs reflect that approximately 20 percent of their annual remediated site closures will be for DEUR properties. Therefore, the DEUR fee would cover 20 percent of the above cost, or \$11,000 per year. Those programs also project about 20 closures of DEUR properties per year. \$11,000 divided by 20 is \$550 per DEUR.

The costs of collecting and maintaining the information required under the statute will not vary significantly from site to site. As a result, the size of the site, and the complexity of the control, were not factors the Department used in allocating among DEUR properties its costs in maintaining the repository. This portion of the proposed DEUR fee is allocated equally among all DEURs.

#### Costs of Centralized Coordination Activities

The fee also includes a fixed payment of **\$1,985**. This represents the Department's projected costs of coordinating and overseeing its DEUR-related functions created by the DEUR statute, allocated equally to each property owner recording a DEUR.

In the course of beginning to implement the statutory DEUR provisions, the Department has confirmed that it is incurring such new costs associated with carrying out its responsibilities on behalf of all of its relevant programs. This fee component would reflect the costs to the Department in coordinating and overseeing the agency's DEUR-related functions, which cut across the programs of the Waste Programs Division and the Aquifer Protection Permit Program. The functions are less specific than those within the programs associated with the development and review of determinations and documents related to individual DEURs. Rather, the DEUR coordination and oversight costs are based on a calculation of the amount of overall Department staff time that is being devoted to this range of activities, that the agency would not be doing if there were no DEUR provisions. Those functions include providing guidance to programs to assure that DEURs are handled in a uniform manner; responding to inquiries from stakeholders about DEUR provisions and procedures; providing periodic DEUR training; updating DEUR forms and management documents; assuring that funding arrangements properly reflect DEUR-related costs; providing DEUR instructions and advice to property owners and consultants; tracking annual reports; coordinating with local governments and zoning authorities; participating in zoning hearings; and monitoring EPA guidance on institutional and engineering controls as it is issued, to assure consistency with such guidance. The positions involved in these functions include grades 15, 21, 22 and 23. The Department's experience indicates that a combined commitment of at least half a person's time per year is required for these miscellaneous DEUR tasks, at an approximate cost averaging \$39,700 per year. This represents salary, benefits, and indirect charges totaling \$32,500 per year, plus \$7,200 per year in direct costs.

As with the repository costs, the Department has determined that its DEUR coordination and oversight costs should be allocated equally among all DEURs. Dividing \$39,700 by the projected 20 DEURs per year, the Department proposes this portion of the DEUR fee as **\$1,985**.

#### DEUR Modification Fee

A.R.S. §§ 49-152(K) and 49-158(G) include provisions for a fee when a DEUR is modified, as well as when it is originally recorded. The proposed rule includes a Section which specifies what the fee would be if a proposed modification were submitted for the required approval of the Department. The Department anticipates that most DEURs will not be the subject of subsequent modification. However, if circumstances should lead to a modification request, the Department has estimated that the amount of time that would be required to review and process the modification request would be virtually the same as for a proposal to release the DEUR. Therefore, the rule specifies a fee for a DEUR modification request that is the same as the fee for requesting a DEUR release. The amount would depend on whether the property were a Level 1, Level 2 or Level 3 site. For the purpose of this rule, modification is defined as modification of a DEUR that continues to address the same spill or release, and the same contaminants, as in the original DEUR. A different spill or release, a contaminant not previously addressed, or a significant change to an engineering control would be the subject of a separate DEUR, and not a modification of an existing DEUR.

#### Section by Section Analysis

##### **R18-7-601. Definitions**

Terms with specific application to these rules are found in R18-7-601. These rules establish a fee to be paid by owners of institutional control or engineering control properties. Fee calculations are based on the Department's projections of the costs of "one-time activities" and "ongoing activities" as defined in this Section, as well as on other costs, both projected and actual.

##### **R18-7-602. Applicability**

This Section provides that this rule applies to properties where the owner uses an institutional control and/or an engineering control to reduce the potential for exposure to contaminants on the property or closes with levels above residential standards. It also reiterates the basic requirement that a DEUR must be recorded. Although the statute and rule establish that the specified obligations are the responsibility of the owner, the owner's responsibilities may be carried

out by the owner in person, or by the owner's authorized representative. However, only the owner may sign a DEUR for recording.

**R18-7-603. Fee**

R18-7-603 requires that property owners recording a DEUR pay the fee described in these rules. The Section also clarifies the Department's understanding that, in A.R.S. §§ 49-152(K) and 49-158(G), the phrase "when the declaration of environmental use restriction is recorded" is intended to impose a condition that must be satisfied before the property owner records the DEUR or modification of the DEUR. The Section requires the property owner to pay the fee before recording the DEUR or modification.

**R18-7-604. Fee Calculation**

Although the DEUR fee is a single fee paid at the time that the DEUR is recorded, the fee reimburses the Department for the costs of the range of services provided under A.R.S. Title 49, Chapter 1, in relation to properties with an institutional and/or engineering control. The fee amount is the sum of the following amounts:

- An amount representing the Department's projected costs of performing one-time activities.
  - For properties using institutional controls only, this would be **\$825**, or 15 (hours) x \$55.
  - For properties using an engineering control without groundwater monitoring, this would be **\$1,595**, or 29 (hours) x \$55.
  - For properties using an engineering control with groundwater monitoring, this would be **\$3,740**, or 68 (hours) x \$55.
- An amount representing the Department's projected costs of performing ongoing activities. For properties using institutional controls only, this amount will vary depending on whether the property is subject to corrective action for released petroleum under the underground storage tank program or is being remediated under one of the Department's other programs. This amount will also vary based on two factors: 1) whether the control is an institutional control, an engineering control without groundwater monitoring, or an engineering control with groundwater monitoring; and 2) the Department's projection of the number of years the property will require ongoing activities. Although nothing in Article 4 limits the potential duration of a DEUR, the maximum number of years for this projection, for fee purposes, will not exceed 30 years.

The annual charge for the ongoing activity portion of the fee is:

- \$110 (2 [hours] x \$55) for underground storage tank properties with institutional controls only;
- \$220 (4 [hours] x \$55) for all other properties with institutional controls only;
- \$660 (12 [hours] x \$55) for engineering control properties without groundwater monitoring;
- For engineering control properties with groundwater monitoring, the total portion of the fee representing ongoing activity costs will not exceed \$115,500. As described above, the Department would determine on a case-by-case basis the projected number of hours per year that it estimates would be required for ongoing activities. This will not exceed thirty hours per year to review annual reports, and forty hours per year for periodic inspections, and will not project those activities in excess of thirty years.
- An amount representing the Department's projected costs of releasing the DEUR.
  - For properties using institutional controls only, this would be **\$770**, or 14 (hours) x \$55;
  - For properties using an engineering control without groundwater monitoring, this would be **\$1,320**, or 24 (hours) x \$55;
  - For properties using an engineering control with groundwater monitoring, this would be **\$1,870**, or 34 (hours) x \$55.
- **\$550** per site, representing the allocation to the property of the Department's projected costs of administering the repository under A.R.S. § 49-152(E).
- **\$1,985** per site, representing the allocation to the property of the Department's projected costs of coordinating and overseeing its DEUR-related functions on behalf of all of its relevant programs.

**R18-7-605. Postponement of the Release Portion of the DEUR Fee**

Under R18-7-605, payment of the portion of the fee representing the Department's costs of releasing the DEUR is one of two options available to property owners. The owner may, instead, agree to reimburse the Department, at the time the owner requests the release of the DEUR, for its reasonable and necessary costs of releasing the DEUR. This agreement must take the form of a covenant, contained in the DEUR, that runs with the land, burdens the property, and inures to the benefit of the Department and the state.



**R18-7-606. DEUR Modification Fee**

This Section recognizes that a property owner may request modification of a previously approved and recorded DEUR, and that, pursuant to A.R.S. §§ 49-152 and 49-158, a modification requires approval by the Department and payment of a fee. The Department has estimated that the cost to review and render a decision on a request to modify a DEUR would be virtually the same as the cost to review and render a decision on a request to release a DEUR. Therefore, R18-7-606 specifies a DEUR modification fee that is the same as the release portion of the DEUR fee set forth in R18-7-604(A)(3), R18-7-604(B)(3), or R18-7-604(C)(3), as applicable.

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

None

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

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

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

Not applicable. This interim rulemaking is exempt from the rulemaking provisions at A.R.S. Title 41, Chapter 6, Article 3.

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

Not applicable

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

Date: November 24, 2003

Time: 2:00 p.m.

Location: Arizona Department of Environmental Quality  
1110 W. Washington, Suite 250  
Phoenix, AZ 85007

Written comments will be accepted through November 25, 2003, at 5:00 p.m. Written comments should be addressed to James P. Lawless, Waste Programs Division, Arizona Department of Environmental Quality, 1110 W. Washington, Phoenix, AZ 85007.

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

None

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

None

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

**TITLE 18. ENVIRONMENTAL QUALITY**

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

**ARTICLE 6. DECLARATION OF ENVIRONMENTAL USE RESTRICTION FEE**

Section

R18-7-601. Definitions

R18-7-602. Applicability

R18-7-603. Fee

R18-7-604. Fee Calculation

R18-7-605. Postponement of the Release Portion of the DEUR Fee

R18-7-606. DEUR Modification Fee

**ARTICLE 6. DECLARATION OF ENVIRONMENTAL USE RESTRICTION FEE**

**R18-7-601. Definitions**

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

“APP mine sites” means mining facilities which are subject to the aquifer protection permit provisions of Chapter 2, Article 3 of the Arizona Revised Statutes.

“Department” means the Arizona Department of Environmental Quality.

“DEUR” means declaration of environmental use restriction, as described in A.R.S. §§ 49-152 and 49-158. It is an institutional control and a restrictive covenant that runs with and burdens the property, binds the owner and the owner’s heirs, successors and assigns, and inures to the benefit of the Department and the state.

“Fee” means the fee authorized by A.R.S. §§ 49-152(K) and 49-158(G).

“Engineering control” has the meaning in A.R.S. § 49-151(1).

“Institutional control” has the meaning in A.R.S. § 49-151(2).

“Modification” means modification of a DEUR that continues to address the same spill or release, and the same contaminants, as in the original DEUR. No other changes are considered a modification of a DEUR, but would be the subject of a separate DEUR.

“One-time activities” includes reviewing and/or approving legal descriptions, control areas, contaminants, institutional or engineering controls, and draft DEUR documents.

“Ongoing activities” includes reviewing written reports, conducting site inspections, or otherwise verifying maintenance of institutional or engineering controls.

“Underground storage tanks” means those underground storage tanks defined and regulated under A.R.S. Title 49, Chapter 6, Article 1.

“WOARF sites” means sites that are listed on the site registry specified in A.R.S. § 49-287.01 and are the subject of remedial action pursuant to Chapter 2, Article 5 of the Arizona Revised Statutes. A property that is within a registry site boundary, but does not involve a contaminant of concern identified for that registry site and is not the subject of remedial action pursuant to the above Chapter 2, is not a WOARF site for the purpose of this rule.

**R18-7-602. Applicability**

The provisions of this Article apply to properties where the owner uses an institutional control and/or an engineering control to reduce the potential for exposure to contaminants on the property, or leaves contamination on the property that exceeds the applicable residential standard for the property. The owner of such property shall record, in each county where the property is located, a restrictive covenant labeled “declaration of environmental use restriction,” that contains the information required by A.R.S. §§ 49-152 or 49-158, as approved by the Department. The owner shall submit the information on a form provided by the Department.

**R18-7-603. Fee**

Except as provided in R18-7-605, before recording the DEUR or DEUR modification, property owners shall pay to the Department a fee as provided in R18-7-604 by company, cashier, or certified check, or money order, or other method approved by the Department.

**R18-7-604. Fee Calculation**

- A.** Property owners who use only an institutional control shall pay to the Department a fee that is the sum of the following:
1. \$825, representing Department costs to perform one-time activities;
  2. An amount representing the costs of ongoing activities performed by the Department that is one of the following:
    - a. For properties contaminated only by a petroleum release from one or more underground storage tanks: \$110 multiplied by the number of years the Department projects the property will require ongoing activities, not to exceed thirty years; or
    - b. For all other properties: \$220 multiplied by the number of years the Department projects the property will require ongoing activities, not to exceed thirty years;
  3. \$770, representing Department costs to review and render a decision on a request to release a DEUR, and to record the release, pursuant to A.R.S. §§ 49-152(D) or 49-158(L);
  4. \$1,985 per site, representing the property owner’s pro-rata share of Department costs to oversee and coordinate its DEUR-related activities; plus
  5. \$550 per site, representing the property owner’s pro-rata share of Department costs to administer the repository under A.R.S. § 49-152(E).

Notices of Proposed Rulemaking

- B.** Property owners who use an engineering control without groundwater monitoring shall pay a fee to the Department that is the sum of the following:
1. \$1,595, representing Department costs to perform one-time activities;
  2. \$660, representing Department costs of annual ongoing activities, multiplied by the number of years the Department projects the property will require ongoing activities, not to exceed thirty years;
  3. \$1,320, representing Department costs to review and render a decision on a request to release a DEUR, and to record the release, pursuant to A.R.S. §§ 49-152(D) or 49-158(L);
  4. \$1,985 per site, representing the property owner's pro-rata share of Department costs to oversee and coordinate its DEUR-related activities; plus
  5. \$550 per site, representing the property owner's pro-rata share of Department costs to administer the repository under A.R.S. § 49-152(E).
- C.** Property owners who use an engineering control with groundwater monitoring, and owners of WOARF sites and APP mining sites, shall pay to the Department a fee that is the sum of the following:
1. \$3,740, representing Department costs for performing one-time activities;
  2. A component of the fee to be determined on a case-by-case basis, at \$55 per hour, based on both:
    - a. The number of hours per year that the Department projects will be required for ongoing activities performed by the Department for the property, not to exceed 70 hours per year; and
    - b. The number of years that the Department projects the property will require ongoing activities, not to exceed 30 years;
  3. \$1,870, representing Department costs to review and render a decision on a request to release a DEUR, and to record the release, pursuant to A.R.S. §§ 49-152(D) or 49-158(L);
  4. \$1,985 per site, representing the property owner's pro-rata share of Department costs to oversee and coordinate its DEUR-related activities; plus
  5. \$550 per site, representing the property owner's pro-rata share of Department costs to administer the repository under A.R.S. § 49-152(E).

**R18-7-605. Postponement of the Release Portion of the DEUR Fee**

Property owners may elect to postpone payment of the portion of the fee to release the DEUR, described in R18-7-604(A)(3), R18-7-604(B)(3), or R18-7-604(C)(3), on the condition that payment of the reasonable and necessary costs of releasing the DEUR is made with the request to the Department to release the DEUR from the property. The condition shall be included in the recorded DEUR. Property owners electing to use this option acknowledge that the future amount of the release portion of the DEUR fee will be the amount established by this Article at the time the request for the release of the DEUR is filed with the Department, which may be greater than the amount described in R18-7-604(A)(3), R18-7-604(B)(3), or R18-7-604(C)(3) at the time the DEUR is recorded.

**R18-7-606. DEUR Modification Fee**

A property owner who wishes to request a modification to an existing DEUR pursuant to A.R.S. §§ 49-152(I)(2), 49-152(J)(2), 49-158(E), or 49-158(F) shall pay to the Department a fee, representing Department costs to review and render a decision on the request to modify the DEUR. The fee shall accompany the proposed modification, and shall be in the form of company, cashier, or certified check, or money order, or other method approved by the Department. The fee shall be the amount specified in R18-7-604(A)(3), R18-7-604(B)(3), or R18-7-604(C)(3), as appropriate for the category of site as described in R18-7-604(A), R18-7-604(B), or R18-7-604(C).