

# NOTICES OF SUPPLEMENTAL PROPOSED RULEMAKING

After an agency has filed a Notice of Proposed Rulemaking with the Secretary of State's Office for *Register* publication and filing and the agency decides to prepare a Notice of Supplemental Proposed Rulemaking for submission to the Office, the Secretary of State shall publish the Notice under the Administrative Procedure Act (A.R.S. § 41-1001 et seq.). Publication of the Notice of Supplemental Proposed Rulemaking shall appear in the *Register* before holding any oral proceedings (A.R.S. § 41-1022).

## NOTICE OF SUPPLEMENTAL PROPOSED RULEMAKING

### TITLE 18. ENVIRONMENTAL QUALITY

#### CHAPTER 1. DEPARTMENT OF ENVIRONMENTAL QUALITY

#### ADMINISTRATION

#### PREAMBLE

1. **Register citations and dates for the original Notice of Proposed Rulemaking:**

Notice of Proposed Rulemaking: 3 A.A.R. 2363, August 29, 1997.  
Notice of Public Information: 3 A.A.R. 3313, November 21, 1997.  
Notice of Rulemaking Docket Opening: 5 A.A.R. 1925, June 11, 1999.

2. **Sections Affected**

R18-1-202  
R18-1-202

**Rulemaking Action**

Repeal  
New Section

3. **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 and 49-104(B)(4)

Implementing statute: A.R.S. §§ 41-1074 through 41-1076 and 41-1092 through 41-1092.12

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

Name: Martha Seaman  
Address: Department of Environmental Quality  
3033 North Central Avenue  
Phoenix, AZ 85012  
Telephone: (602) 207-2222  
Fax: (602) 207-2251  
TDD: (602) 207-4829

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

Overview

This rulemaking addresses 1 element of the previously proposed rulemaking "administrative appeals" cited above. The explanation of that rule and the summary of the economic, small business and consumer impact addressed all aspects of that rulemaking, including this element. The Department repeats the core of its earlier analysis to assist commenters in understanding the current rulemaking in context.

Purpose of the rulemaking as originally proposed

The purpose of the entire rulemaking for "administrative appeals" as originally proposed, is to conform the Department's rules governing administrative appeals to A.R.S. §§ 41-1092 through 41-1092.12. Those statutory provisions, which control the administrative appeal of agency actions, supersede the Department's current rules at R18-1-201 through R18-1-219.

As originally proposed, the rulemaking repeals R18-1-201 through R18-1-219 and adds new sections R18-1-201 through R18-1-207 to clarify the responsibilities of the Department under A.R.S. §§ 41-1092 through 41-1092.12.

Notices of Supplemental Proposed Rulemaking

Although the Office of Administrative Hearings (“OAH”) currently is responsible for conducting most appeal hearings on actions of the Department pursuant to A.R.S. §§ 41-1092 through 41-1092.12, and has recently made rules governing its conduct of those hearings (filed with the Secretary of State and effective on February 3, 1999), the Department remains responsible for processing notices of administrative appeal or requests for hearing sent to the Department, holding informal settlement conferences on administrative appeals, reviewing decisions arrived at through formal adjudication of administrative appeals before the OAH, or entertaining motions for rehearing on decisions arrived at through formal adjudication. As originally proposed, new sections R18-1-201 through R18-1-207 govern when and how the Department shall perform these tasks.

Comment received on R18-1-202

ADEQ received a comment addressing R18-1-202 as originally proposed that it is not appropriate for the Department to use rulemaking to identify departmental actions that are not adjudicative and to use the rules as a basis for not processing certain notices of appeal through the OAH.

**Explanation of R18-1-202 as originally proposed.**

As originally proposed, R18-1-202 provided that the Department shall not schedule an administrative appeal before the OAH or a hearing before the Department, hold an informal settlement conference on an administrative appeal, review a decision arrived at through formal adjudication of the administrative appeal, entertain a motion for a rehearing on a decision arrived at through formal adjudication of the administrative appeal, or otherwise process a notice of administrative appeal or request for hearing if the notice of appeal or request for hearing concerns an agency decision or action that does not constitute a contested case or appealable agency action, because it does not determine the legal rights, duties, or privileges of the party filing the notice of appeal or request for hearing, see A.R.S. §§ 41-1001(4) and 41-1092(3), unless the notice of appeal or request for hearing is made in accordance with A.R.S. § 41-1092.12.

Under A.R.S. § 41-1092.12, the Department must process a notice of administrative appeal through the OAH even though the agency decision or action being appealed does not fall within the definition of “contested case” or “appealable agency action,” if certain conditions exist: (1) the notice of appeal is filed on or after August 21, 1998 which is the effective date of Laws 1998, Chapter 85; (2) the appeal concerns an agency decision, investigation, inspection, or entry of private property; (3) the party filing the appeal has already expended reasonable attorney or professional fees regarding the decision or action being appealed; (4) the decision or action being appealed is not an order, rulemaking activity or policy making activity; (5) the decision or action is not already administratively appealable as a contested case or appealable agency action; (6) the decision or action is not already judicially appealable; (7) the party filing the appeal alleges the decision or action being appealed is arbitrary, capricious, or not in accordance with the law; (8) the party files the appeal within 10 days after the agency decision or action in question in accordance with the service provisions of A.R.S. § 41-1092.04; and (9) the Department does not cease the decision or action being appealed within 10 days after receiving the notice of appeal. If all these conditions are satisfied, then the Department must schedule a hearing with the OAH, hold an informal settlement conference, review a decision arrived at through formal adjudication, and entertain a motion for a rehearing on a decision arrived at through formal adjudication even though the decision or action being appealed does not determine legal rights, duties, or privileges. If the conditions for filing an administrative appeal under A.R.S. § 41-1092.12 are not satisfied, the rule then set forth steps the Department must follow.

Under R18-1-202 as originally proposed, the Department may not process an administrative appeal of 4 identified types of departmental actions, because such actions do not constitute contested cases or appealable agency actions, unless the notice of appeal is filed in accordance with A.R.S. § 41-1092.12.

ADEQ has reconsidered its position with regard to R18-1-202.

ADEQ analyzed at length the comment which held that it is not appropriate for the Department to use rulemaking to identify departmental actions that are not adjudicative. That analysis, which took the position that the rulemaking did not re-define the term “appealable agency action,” is contained in the rulemaking documents related to the original rulemaking.

After reconsideration, the Department has changed its position with respect to this issue. In the interest of allowing the majority of the original rulemaking to become effective in a timely manner, ADEQ has withdrawn R18-1-202 from the larger rulemaking and allowed the remainder of the package to proceed. This notice of supplemental proposed rulemaking reflects this change in R18-1-202 as described below.

**B. Section-by-Section Explanation of The Rule**

R18-1-202. Notice of Appeal

When the Department determines that an agency action rises to the level of an appealable agency action, the

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Department shall serve notice as set forth in A.R.S. § 41-1092.03(A). Any failure of the Department to serve notice of an appealable agency action under A.R.S. § 41-1092.03(A) does not prevent a party from requesting a hearing under § 41-1092.03(B) if the request is made within 30 days of receiving notice of the action giving rise to the request. The Department shall forward all hearing requests made under A.R.S. § 41-1092.03 to the Office of Administrative Hearings.

6. **An explanation of the substantial change which resulted in this supplemental notice:**

This change affects all persons who under the rule as originally proposed who might have been affected by ADEQ's assertion that certain departmental actions are not adjudicative and that this determination would be the basis for not processing certain notices of appeal through OAH. That class of persons with administrative appeals is now affected in a substantially different way in that all appeals will be forwarded to OAH and no ADEQ determination will be made of whether the action is an "appealable agency action."

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

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

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

To the extent ADEQ addressed the economic impact cost savings with regard to the rule as originally proposed by not forwarding these appeals into the OAH system, these cost savings will not be realized under the changed rule. Under the changed rule, ADEQ will forward all appeals to OAH.

a. **Identification of persons who will be directly affected by, bear the costs of, or directly benefit from the rulemaking:**

This rulemaking impacts the potential administrative appellant, the Department, the Office of Administrative Hearings (OAH), and the Attorney General's Office (AGO). The potential administrative appellant may be a political subdivision, a business, or a natural person.

b. **Cost-benefit analysis:**

(1) The probable costs and benefits to the Department -- there will be no savings as previously anticipated associated with reducing the number of noncognizable cases that require agency head review of OAH recommended decisions.

(2) The probable costs and benefits to the OAH -- The rulemaking does not impose costs on the OAH. The rulemaking would result in all appealable agency actions forwarded to OAH.

(3) The probable costs and benefits to the Attorney General's Office -- The rulemaking does not impose costs on the AGO. The AGO would represent the Department in appeals forwarded to OAH.

(4) The probable costs and benefits to the potential administrative appellant -- The potential administrative appellant may be a political subdivision, a business, or a natural person.

The rulemaking does not impose costs on the potential administrative appellant. There is no appreciable change to an appellant whose action is determined to be noncognizable. The difference between the rule as proposed and this version is that now OAH, not ADEQ makes this determination.

c. **General description of the probable impact on private and public employment:**

The probable impact on private and public employment is expected to be negligible.

d. **Statement of the probable impact on small businesses and consumers:**

The probable impact on small businesses is expected to be negligible.

e. **Statement of the probable effect on state revenues:**

The probable effect on state revenues is expected to be negligible.

f. **Description of less intrusive and less costly alternatives, if any:**

The Department is not aware of any less intrusive or less costly alternatives.

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

Name: Martha Seaman

Address: Department of Environmental Quality  
3033 North Central Avenue  
Phoenix, AZ 85012

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

Date: July 20, 1999  
Time: 9 a.m.  
Location: Arizona Department of Environmental Quality, Room 1706  
3033 North Central Avenue  
Phoenix, Arizona 85012

The close of the public comment period is 5 p.m. on July 20, 1999.

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

Not applicable. There are no other matters prescribed by statute that are applicable to the Department within the context of this rulemaking or related rulemakings.

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

Not applicable. There are no incorporations by reference in this rulemaking.

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

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**CHAPTER 1. DEPARTMENT OF ENVIRONMENTAL QUALITY  
ADMINISTRATION**

**ARTICLE 2. PRACTICE AND PROCEDURE - CONTESTED CASES**

Section

~~R18-1-202. Initiation of proceedings and notice~~ Repealed

~~R18-1-202. Notice of Appeal~~

**ARTICLE 2. PRACTICE AND PROCEDURE - CONTESTED CASES**

~~**R18-1-202. Initiation of proceedings and notice**~~ Repealed

- ~~**A.** A contested case may be initiated only by the Department or by a person whose legal rights, duties, or privileges are required by Title 49 of the Arizona Revised Statutes; by Title 41, Chapter 6, Article 6 of the Arizona Revised Statutes; or by rule, to be determined after an opportunity for a hearing.~~
- ~~**B.** A contested case shall be initiated in the manner provided by the statute or rule authorizing the hearing.~~
- ~~1. When a contested case hearing is initiated by a request for hearing served upon the Department, the request for hearing shall specifically cite:
    - ~~a. The specific actions of the Department which are the basis of the hearing request.~~
    - ~~b. The statute or rule requiring the Department to grant that person a hearing.~~~~
  - ~~2. Whenever a contested case hearing is initiated by the Department, a copy of the notice of proceedings shall be served by the Director on the parties named therein. The notice shall be in accordance with the provision of A.R.S. § 41-106(B). The notice shall be signed by the Director.~~

**R18-1-202. Notice of Appeal**

- A.** When the Department determines that an agency action arises to the level of an appealable agency action, the Department shall serve notice as set forth in A.R.S. § 41-1092.03(A).
- B.** The failure of the Department to serve notice of an appealable agency action under A.R.S. § 41-1092.03(A) shall not prevent a party from requesting a hearing under § 41-1092.03(B) if the request is made within 30 days of receiving notice of the action giving rise to the request.
- C.** The Department shall forward all hearing requests made under A.R.S. § 41-1092.03 to the Office of Administrative Hearings.