

1 **Final agency action regarding decision below:**

2
3 **REQHRG Date hearing requested**

4
5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6
7 In the Matter of:

No. 05A-F125-DEQ-TAP

8 **FORMER JOHN'S SUPER SERVICE**

9 6551 East Thomas Road
10 Scottsdale, AZ 85251

11 *LUST Nos. 2170.01/02-19, -20, -22, -23,*
12 *-24, -25, -26, & -27*

**ORDER DENYING IN PART
APPELLANT'S APPLICATION FOR
ATTORNEYS' FEES AND COSTS AS
PREVAILING PARTY UNDER A.R.S. §
49-1091.01**

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14 On June 13, 2006, the recommended decision of the Administrative Law Judge
15 ("ALJ") was transmitted to the Director of the Arizona Department of Environmental
16 Quality ("ADEQ"). On July 13, 2006, the Director of ADEQ accepted the recommended
17 decision. On August 8, 2006, Appellant Former John's Super Service submitted an
18 application for attorneys' fees and costs as the prevailing party pursuant to A.R.S. § 49-
19 1091.01, which applies to appeals of denials by ADEQ of applications for
20 reimbursement from the State Assurance Fund ("SAF") for corrective actions
21 undertaken under Title 49. ADEQ responded to the application and Appellant replied to
22 ADEQ's response.¹

23 Because the Administrative Law Judge determines that Appellant only prevailed
24 with respect to a small portion of the proceedings, she denies its application for fees
25 and costs except as to the portion in which it prevailed, in an amount proportionate to
26 the portion reimbursed compared to the reimbursement requested.

27 **SUMMARY OF RELEVANT ARGUMENTS**

28 Appellant argued that, even though it was awarded only \$35,266.03 of the
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¹ The ALJ addresses ADEQ's Sur-Reply to Appellant's Reply Regarding Fees and Costs as the
Prevailing Party in a separate order.

1 \$173,960.03 it requested (approximately 20.27%),² the award makes it the prevailing
2 party because it prevailed on the technical and legal issues and obtained a money
3 judgment in its favor. Appellant argued that the mere fact that the award was for an
4 amount less than the amount requested does not affect its status as prevailing party
5 under cases construing A.R.S. §§ 12-341 and -348.

6 ADEQ opposed Appellant's application, arguing that Appellant did not prevail on
7 either the technical or legal issues. According to ADEQ, the mere award of a money
8 judgment does not make Appellant the prevailing party because, although A.R.S. § 49-
9 1091.01 does not define "prevailing party," the definition set forth in A.R.S. § 41-
10 1007(A)(2), which applies to appeals in the Office of Administrative Hearings, requires
11 that the agency's position be determined to be "not substantially justified" before fees
12 and costs may be awarded. According to ADEQ, because its position in this case was
13 substantially justified, Appellant is not eligible for an award of fees and costs as the
14 prevailing party.

15 Appellant replied that, under well-established canons of statutory construction,
16 the additional conditions on recovery set forth in A.R.S. § 41-1007 cannot be imposed
17 on an application made under A.R.S. § 49-1091.01.

18 **SUMMARY OF DECISION**

19 **Technical Issue**

20 At issue at the hearing were eight applications for reimbursement to the State
21 Assurance Fund for 22 months, between September 2002 and June 2004, for the
22 operation of a soil vapor extraction/air sparging ("SVE/AS") system. Appellant admitted
23 that the system was not operational for the 3½ months between June and the first half
24 of September 2003. Appellant also admitted that its consultant did not comply with the
25 Corrective Action Plan's requirement that quarterly reports be submitted on its
26 monitoring of the SVE/AS system's operation. Nonetheless, Appellant took the position
27 that it had submitted sufficient documentation to support reimbursement for the SVE/AS

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29 ² Appellant has moved for reconsideration on the calculation of its award. The ALJ does not comment on
30 the motion for reconsideration but notes that, if the Director of ADEQ grants the motion, the amount of
fees and costs awarded to Appellant should be recalculated according to the formula set forth in this
order.

1 system for the remaining 18½ months that it had been operated.

2 ADEQ's position was that the documentation that Appellant had submitted did
3 not support reimbursement for any of the months in question. ADEQ argued that
4 Appellant's document did not establish that operation of the SVE/AS system during
5 these months had reduced contamination at the site. Even if the SVE/AS system had
6 reduced contamination at some point, Appellant's documentation did not support
7 reimbursement for any of the months in question because it was impossible to conclude
8 from the documentation when contamination had been reduced or in what amount. This
9 information was necessary to determine that Appellant's operation of the SVE/AS
10 system for any of those months was "reasonable, cost-effective and technically feasible"
11 under A.R.S. § 49-1005(D)(3), as required for the cost of operation to be reimbursable.
12 Although ADEQ admitted that contamination had been reduced at the site, it attributed
13 the reduction to natural attenuation, which it argued had occurred shortly after the
14 SVE/AS system had been installed.

15 The issue submitted to the Technical Appeal Panel ("TAP") was as follows:

16 Whether ADEQ erred in its determination that, for each of
17 the months in question, [Appellant] failed to provide sufficient
18 pertinent information to demonstrate that the operation of the
19 SVE/AS system was reasonable, necessary and cost-
20 effective for that month.

21 The TAP in its findings agreed with ADEQ that Appellant's documentation did not
22 conclusively establish that the cause of the observed decline in contamination was due
23 to Appellant's operation of the SVE/AS system,³ did not establish when the decline in
24 contamination had occurred,⁴ and did not gauge the extent of the decline in soil
25 contamination.⁵ The TAP found that Appellant's consultant's field monitoring
26 documentation, not only did not meet the CAP's requirements, but that it "did not meet .

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28 ³ See TAP Finding No. 6.

29 ⁴ See *id.*

30 ⁵ See TAP Finding No. 13.

1 . . . acceptable industry practices.”⁶ The TAP also found that the documentation that did
2 exist indicated that “the catalyst portion of the Catox unit was out of compliance with
3 [the Maricopa County Environmental Services Department] requirements,” as well as
4 the CAP.⁷
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28 ⁶ See TAP Finding No. 10.
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30 ⁷ See TAP Finding No. 11.

1 \$3,349.72) plus 16% markup (for a total of \$3,894.23/
2 month), as opposed to the rental rate of \$4,901.00/month for
3 the SVE plus \$674.00/month for the AS, charged by the
4 consultant to S&G.

5 Appellant had argued in a motion *in limine* that the final decision in Case No.
6 03A-F099-DEQ-TAP ("Barney's Case") established the rate of reimbursement was the
7 applicable Cost Ceiling under principles of *res judicata* and collateral estoppel. ADEQ
8 argued that, under A.R.S. § 49-1054(C), the presumption established by the cost ceiling
9 amount was a rebuttable presumption. In a prehearing order dated April 19, 2006, the
10 ALJ in this matter denied the motion in limine, in relevant part as follows:

11 [T]he ALJ has determined that neither *stare decisis*, *res*
12 *judicata*, nor collateral estoppel prevent relitigation of this
13 issue, despite ALJ Gary B. Strickland's recommended
14 decision and the appellant's successful appeal to Maricopa
15 County Superior Court in Case Nos. 03A-F099-DEQ-TAP
16 and 03A-F100-DEQ-TAP. As a practical matter, however,
17 the ALJ in this matter finds ALJ Strickland's analysis highly
18 persuasive and applicable to the legal issue in S&G's
19 appeal.

20 After the hearing in this matter, the ALJ again found that the legal principles of
21 collateral estoppel and *res judicata* did not require ADEQ to reimburse the cost of the
22 SVE at the full Cost Ceiling amount. The ALJ distinguished the facts established in the
23 Barney's case from the facts established at the hearing in this matter, in which "[t]he
24 TAP . . . expressly determined that the claimed costs for the entire SVE/AS system
25 were not reimbursable, at any rate."¹⁴ The ALJ noted that the TAP had determined that
26 only the blower of the SVE was reimbursable at the Cost Ceiling item 146 rate of
27 \$1,021/ month, rather than the whole SVE at the amount of Cost Ceiling item 141 of
28 \$4,901, or any lesser rate. The ALJ therefore determined that Appellant was not
29 entitled to the full Cost Ceiling amount of \$4,901/month, as Appellant argued, or the
30 cost to the consultant plus a 16% markup, as ADEQ argued, but instead was entitled to
the rate that the TAP had found was appropriate, \$1,021/month for the blower under
Cost Ceiling item 146.

¹⁴ Conclusion of Law No. 21.

LEGAL ANALYSIS

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2 Because A.R.S. § 49-1091.01 does not require Appellant to show that ADEQ's
3 position was unreasonable or not substantially justified, ADEQ's reasonableness or the
4 substantial justification of its position is not a defense to Appellant's application for fees
5 and costs.¹⁵ If the legislature had not intended for fees and costs to be awarded under
6 A.R.S. § 49-1091.01 in cases in which the state's position was substantially justified, it
7 could have provided for a good faith exception, as in A.R.S. § 41-1007.¹⁶

8 A.R.S. § 49-1091.01 has never been construed in a published appellate decision.
9 The statutes on which Appellant relies for its argument that an award in any amount
10 makes it the "prevailing party," A.R.S. §§ 12-341 and -348, respectively require courts to
11 award costs to "[t]he successful party to a civil action" and to award costs and fees to a
12 party who "prevails by an adjudication on the merits" in certain actions against
13 governmental agencies. An award is mandatory to the successful or prevailing party
14 under both statutes, as under A.R.S. § 49-1091.01(B). But "[t]he determination of who
15 is a successful party . . . is left to the discretion of the trial court."¹⁷ Under various
16 rationales, appellate courts have affirmed trial courts' denials of fees and costs under
17 A.R.S. §§ 12-341 and -348 to parties who obtained at least somewhat favorable
18 judgments because, overall, they were determined not to be the prevailing or successful
19 party.¹⁸

20 ¹⁵ See *Cortraro Water Users' Association v. Steiner*, 148 Ariz. 314, 318, 714 P.2d 807, 811 (1986)
21 (construing A.R.S. § 12-348, which like A.R.S. § 49-1091.01 is mandatory and does not require that the
22 state's position be substantially unjustified).

23 ¹⁶ See *id.* at 319, 714 P.2d at 812 ("We note that the legislature has reacted in the past to our decisions
24 when it believes the scope of public liability is too great.").

25 ¹⁷ *Bishop v. Pecanic*, 193 Ariz. 524, 530, 975 P.2d 114, 120 (App. 1998) (citation omitted).

26 ¹⁸ See, e.g., *Arizona Water Co. v. Department of Water Resources*, 205 Ariz. 532, 543, 73 P.3d 1267,
27 1278 (App. 2003), *opinion affirmed in relevant part*, 208 Ariz. 147, 91 P.3d 990 (2004) (Fees and costs on
28 appeal denied under A.R.S. § 12-348 because "Arizona Water has prevailed on one issue, lost on
29 another, and failed for now to successfully defend or increase the attorney's fees award issued by the trial
30 court."); *Tonto Creek Estates Homeowners Association v. Arizona Corporation Commission*, 177 Ariz. 49,
60, 864 P.2d 1081, 1092 (1993) (Fees and costs denied under A.R.S. § 12-348 because "[t]he
Homeowners Association did prevail on the merits for the very narrow issue of transfer of the certificate
but lost on the more significant issue of providing nondiscriminatory service to Tonto Rim Ranch
subdivision."); *McAlister v. Citibank*, 171 Ariz. 207, 216, 829 P.2d 1253, 1262 (App. 1992) (Costs denied
under A.R.S. § 12-341 "under the totality of circumstances and the relative success of the litigants,"

1 In this case, the only factual issue on which Appellant prevailed was that the TAP
2 found that operation of the SVE/AS system was more likely than natural attenuation to
3 have reduced contamination at the site. Appellant did not prevail on the factual issues
4 that any other inferences could be drawn from the documentation submitted, which
5 substantially reduced the amount of reimbursement. Appellant did not prevail on the
6 legal issue concerning the rate of reimbursement for the SVE.

7 A.R.S. § 49-1091.01(C) provides in relevant part that “[t]he attorney fees,
8 consultant fees and costs shall be paid only for those amounts that are . . . not
9 excessive in **the portion of the proceedings** that are the subject of the notice of
10 disagreement **in which the owner . . . prevailed . . .**” [Emphases added.] Neither
11 A.R.S. § 12-341 nor A.R.S. § 12-348 limits an award of fees and costs to those incurred
12 in “the portion of the proceedings . . . in which the [party] prevailed,” like A.R.S. § 49-
13 1091.01(C) does. “In applying a statute, . . . its words are to be given their ordinary
14 meaning unless the legislature has offered its own definition of the words or it appears
15 from the context that a special meaning was intended.”¹⁹ Cases construing A.R.S. §§
16 12-341 and -348 therefore have limited value in construing A.R.S. § 49-1091.01(C).

17 Appellant’s attorneys are well qualified and performed substantial work taking this
18 case to hearing. Their professionalism and expertise allowed the TAP and the ALJ to
19 understand the nature of this dispute. Nonetheless, under the circumstances and the
20 plain language of A.R.S. § 49-1090.01, Appellant is only entitled to its fees and costs in
21 the same proportion that it prevailed at hearing, 20.27%, in the following amounts:

25 award to plaintiff “was not the result of any motion . . . or order of the court,” and “Citibank has prevailed
26 on all other issues.”); *Willow Creek Leasing, Inc. v. Bartzan*, 154 P.2d 339, 342, 742 P.2d 840, 843 (App.
27 1987) (Costs denied under A.R.S. § 12-341 because plaintiff’s “action achieved neither of [its] objectives,”
28 although “filing of lawsuit resulting in the payment of delinquent real property taxes.”); *Watson*
29 *Construction Co. v. Amfac Mortgage Co.*, 124 Ariz. 570, 585, 606 P.2d 421, 436 (App. 1979) (Denying
award of costs under A.R.S. § 12-341 and rejecting “‘net judgment’ rule or the ‘winner take all’ rationale”
because a substantial portion of both parties’ claimed costs were incurred in the unsuccessful
prosecution of numerous claims and counterclaims against their adversaries.).

30 ¹⁹ *Mid Kansas Federal Savings and Loan Ass’n of Wichita v. Dynamic Development Corp.*, 167 Ariz. 122,
128, 804 P.2d 1310, 1316 (1991).

Category	Amount Requested	Amount Awarded (20.27%)
Attorneys' Fees	\$65,806.01	\$13,338.88
Costs	\$12,587.18	\$ 2,551.42

Based on the foregoing, IT IS ORDERED awarding (or recommended that the Director of ADEQ award) Appellant \$12,587.18 for its attorneys' fees and \$2,551.42 for its costs in prosecuting its appeal, for a total award of \$15,890.30.

Done this day, August 28, 2006.

Diane Mihalsky
Administrative Law Judge

Copy mailed this ____ day of
August, 2006 to:

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By _____