



1 determination to deny "volunteer status" to the owner of property on which has occurred  
2 leakage of contaminants from underground storage tanks. The issue posed is:

3  
4 *Whether ADEQ has been authorized by A.R.S. § 49-1052(I) to acknowledge*  
5 *"volunteer status" for remediation purposes and under what criteria? Did ADEQ properly*  
6 *determine that Walker Development did not satisfy the criteria, thereby justifying denial*  
7 *of "volunteer status?"*

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9 Evidence and argument were submitted by briefs following a schedule  
10 established by the Administrative Law Judge. Having read the argument of Counsel and  
11 having perused and considered the entire record,<sup>1</sup> Administrative Law Judge ("ALJ")  
12 Gary B. Strickland submits this DECISION AND RECOMMENDED Order to the Director of  
13 the *Arizona Department of Environmental Quality*.

#### 14 **FINDINGS OF FACT**

15 1. Stephen Klump and David Collins (hereafter also, "Klump/Collins") are the  
16 owners of property situated at a site formerly identified as *Walker Development* in  
17 Willcox, Arizona. The site is currently known as *Benedum Engine*.

18 2. A release of petroleum has been confirmed at the site. The release  
19 emanated from an underground storage tank ("UST") previously located at the property  
20 prior to Klump/Collins' ownership thereof.

21 3. On June 27, 2002, Appellants sought from the *Department* the designation  
22 "volunteer" in the clean-up effort. "Volunteer status" accorded such property owners is  
23 ostensibly authorized by A.R.S. § 49-1052(I).<sup>2</sup>

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25 <sup>1</sup> The parties stipulated that the official record consists of that record having been made of the written argument set  
26 forth by the parties' representatives, respectively, along with the exhibits that have been offered and documentation  
27 in the *Department's* case file. Appellant has filed an OPENING BRIEF on January 28, 2004 and a RESPONSE BRIEF  
28 submitted on February 4, 2004. The *Department* submitted its LEGAL MEMORANDUM IN SUPPORT OF ADEQ'S  
29 FINAL DETERMINATION on January 28, 2004 and a REBUTTAL BRIEF on February 4, 2004.

30 <sup>2</sup> The word "volunteer" is not used in the section. However, the designation is thought reasonably inferred from the  
language used. The section provides:

- I. The department may provide the coverage described in this article for eligible activity costs with respect to a release from an underground storage tank incurred by a person who currently owns

1 4. According to the *Department*, in practice, an applicant who proceeds with  
2 corrective action prior to the *Department's* recognition of "volunteer status" does so at  
3 the applicant's own risk of incurring costs that will not be reimbursed by the State  
4 Assurance Fund ("SAF"). Upon issuance of the "volunteer status," the *Department*  
5 advises the applicant that the status is "subject to change based on new information or  
6 changes in statute and rule." The *Department* puts out a "Volunteer Information" sheet  
7 wherein is stated that "the *Arizona Department of Environmental Quality* . . . provides,  
8 under certain circumstances, State Assurance Fund . . . coverage to persons who meet  
9 eligibility criteria. . . ."<sup>3</sup> The document goes on to advise that failure to comply with  
10 requirements "may result in *ADEQ* action including, but not limited to[,] loss of funding."<sup>4</sup>

11 5. Both parties agree that "volunteer status" enables one not an owner or  
12 operator to proceed with corrective actions for the remediation of a petroleum release.  
13 Having been granted such status, the property owner is allowed access to the State  
14 Assurance Fund for reimbursement of costs expended by the "volunteer" in the clean-up  
15 effort.

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18  
19 the property or a person with principal control of the property or the underground storage tank and  
20 who undertakes to meet the requirements of section 49-1005, but who is not an owner or operator.  
21 A person who undertakes to meet the requirements and who is not an owner or an operator is  
22 eligible for one hundred per cent coverage. By December 31 of each year, the department of  
23 environmental quality shall forward a list of the parties who received payment pursuant to this  
24 subsection during the previous calendar year to the department of revenue for purposes of  
25 determining eligibility for the income tax credit provided in sections 43-1085 and 43-1173. By  
26 December 31 of each year, the department of environmental quality shall also provide the  
27 department of revenue verification of the corrective actions taken by each person during the  
28 previous calendar year pursuant to this subsection.

25 The *Department* has acknowledged the status designation in its VOLUNTEER INFORMATION 1 (revised June 6, 2000).  
26 See Exhibit 5. The VOLUNTEER INFORMATION sheet indicates (1) how one can assume "volunteer" designation  
27 status (the person must have ownership or principal control of the property whereon the release has occurred and  
28 must not be the owner or operator of the UST) and (2) on what bases recovery from the SAF may be accomplished  
(conformance with the requirements of A.R.S. § 49-1005). The only difference between a "volunteer" and other  
types of SAF-eligible individuals is that a "volunteer" is eligible for 100% reimbursement, if otherwise qualified,  
whereas owner/operators are eligible for a 90% recovery of eligible costs.

29 <sup>3</sup> See Exhibit 3.

30 <sup>4</sup> *Id.*

1           6.     The SAF is funded by taxpayer dollars; a one penny (1¢) excise tax per  
2 gallon of petroleum placed in an underground storage tank.<sup>5</sup>

3           7.     In this instance, Klump/Collins began conducting investigations at the site,  
4 utilizing the services of environmental consultant *Tierra Dynamic Company* ("TDC") to  
5 ascertain the best available methods to employ in the clean-up effort, without first  
6 having received from the *Department* the coveted "volunteer status." Over the next  
7 fourteen (14) months, Klump/Collins, through *TDC*, voluntarily conducted corrective  
8 action at the site necessitated by multiple releases discovered by investigation. Costs  
9 accrued in the investigation (\$103,683.77) were submitted to the SAF in two separate  
10 applications (Nos. 4419.01 and 4419.01-.02).<sup>6</sup> Throughout the period from submission  
11 of application to the lapse of the intervening fourteen (14) months, the *Department* failed  
12 to respond to inquiries regarding the *Department's* action on the application for  
13 "volunteer status."

14           8.     On October 2, 2003, the *Department* notified Klump/Collins that their  
15 application for recognition of "volunteer status" had been denied. Because of its  
16 determination to deny the application, the *Department* considered the property owners  
17 ineligible to recover from the SAF their costs expended in the clean-up effort.

18           9.     In its denial, the *Department* informed the applicants: "[A]s the area's  
19 contamination is of such a scale that any corrective actions taken by you will not be cost  
20 effective, the *Department* will not provide coverage to you as an SAF volunteer . . . from  
21 the SAF for any corrective action costs incurred by you."<sup>7</sup>

22           10.    The *Department* has returned the SAF reimbursement applications to the  
23 sender because it had denied Klump/Collins "volunteer status."<sup>8</sup>

24           11.    The subject site is part of a regional petroleum plume in Willcox, Arizona.  
25 The *Department* has implemented its A.R.S. § 49-1017 "State Lead Program" in the

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27 <sup>5</sup> See A.R.S. § 49-1031(A).

28 <sup>6</sup> Exhibit 23.

29 <sup>7</sup> Exhibit 4 (October 2, 2003 letter from *ADEQ* to Klump/Collins, at p.1).

30 <sup>8</sup> Exhibit 5 (October 2, 2003 *ADEQ* letter to Klump/Collins).

1 area, considering its own broad corrective action approach the most cost effective  
2 method addressing the regional problem.

3 12. Klump/Collins have appealed the determination and have requested a  
4 hearing of the issue(s) presented.

5 13. At a prehearing conference conducted by the undersigned Administrative  
6 Law Judge on December 22, 2003, Counsel agreed to present their respective cases by  
7 submission of written explication of the facts, respectively, and argument of the law in  
8 relation to those facts. On December 23, 2003, the Administrative Law Judge issued a  
9 Minute Entry wherein was set forth the issues to be addressed and outlining a briefing  
10 schedule. Counsel have filed their explication and argument as scheduled.

11 **THE ISSUE(S) PRESENTED:**

12 *Whether ADEQ has been authorized by A.R.S. § 49-1052(I) to acknowledge*  
13 *“volunteer status” for remediation purposes and under what criteria? Did ADEQ properly*  
14 *determine that Walker Development did not satisfy the criteria, thereby justifying denial*  
15 *of “volunteer status?”*  
16

17 14. Appellant challenges the *Department’s* refusal to recognize Klump/Collins’  
18 “volunteer status” in the first place. Klump/Collins asserts that they unqualifiedly satisfy  
19 the statutory criteria to act as “volunteer” at the site because they (a) own the property  
20 at which the leakage has occurred and they (b) are neither owners nor operators of an  
21 underground storage tank that has caused contamination at the location. It is true,  
22 Appellant acknowledges, that on occasions where contamination from one or more  
23 releases may mix, or commingle with others in the subsurface, as is alleged to have  
24 occurred here, responsibility for corrective action and recovery costs has been  
25 addressed by the Legislature at A.R.S. §§ 49-1016(G), 49-1017(D), and 49-1022.  
26 However, the discovery of commingling of contamination, in itself, does not relieve the  
27 property owner of liability, reporting obligations, responsibility for corrective action, or  
28 rights to coverage from the SAF of costs incurred through corrective action. In those  
29 situations where liability for releases attaches to multiple parties, the *Department* may  
30 itself, through State Lead, take corrective action and subsequently recover direct costs

1 associated with the effort. But, the effort of State Lead must be necessitated (a) by an  
2 owner or operator's failure to perform corrective action and (b) absence of a § 49-  
3 1052(I) property owner willing to make the effort on its own. Here, *Walker Development*  
4 argues, the property owners *are* willing to take the corrective action. In support of its  
5 position, *Walker Development* cites A.R.S. § 49-1019(E).<sup>9</sup>

6 15. As this case is presented, Appellant has directed the Administrative Law  
7 Judge's attention to a construction of the statute's (A.R.S. § 49-1052(I)) use of the term  
8 *may*:

9  
10 The department *may* provide the coverage described in this article for eligible  
11 activity costs with respect to a release from an underground storage tank  
12 incurred by a person who currently owns the property or a person with principal  
13 control of the property or the underground storage tank and who undertakes to  
14 meet the requirements of section 49-1005, but who is not an owner or operator.  
A person who undertakes to meet the requirements and who is not an owner or  
an operator is eligible for one hundred per cent coverage. (Emphasis added)

15 Simply put, Appellant construes the discretion afforded by the legislature's use of *may* in  
16 the section as intended to authorize the *Department* to address whether the corrective  
17 action for which reimbursement is sought has been demonstrated reasonable,  
18 necessary, cost effective and technically feasible under A.R.S. § 49-1005(D). The  
19 *Department* has no discretion, however, not to recognize the "volunteer status" of an  
20 owner of property whereat a release has occurred. If such owner determines to

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22 <sup>9</sup> The statute provides:

23 § 49-1019. Release of regulated substance; causes of action; limitation; liability

24  
25 E. The department may take corrective action for a release and recover direct costs pursuant to section 49-  
26 1017 in proportion to the allocation made pursuant to subsection D of this section if an owner or an  
27 operator does not perform all necessary corrective actions and there is no other person to perform  
28 corrective actions pursuant to section 49-1052, subsection I. An owner or an operator is eligible for one  
29 hundred per cent coverage from the assurance account for reasonable and necessary eligible costs above  
30 those for which they are liable if they elect to perform corrective action which exceeds their allocated share  
of liability.

1 undertake corrective action, the *Department* is statutorily bound to recognize the  
2 person's "volunteer status" and to assess the person's reimbursement applications to  
3 the SAF under the criteria established by A.R.S. § 40-1005. Bolstering its position  
4 Appellant argues: 1) the present construction given to the statute by the *Department*  
5 deviates from its historic practice; 2) the recognition of "volunteer status" has value  
6 separate and apart from payment from the SAF, and 3) "volunteers" are not responsible  
7 for filing annual activity reports or for paying annual tank fees. On the second point, it is  
8 significant that "volunteers" are deemed immune from liability to the State for  
9 contamination that has befallen their property. To prove the immunity from liability to  
10 lenders and business associates, *via* acknowledgment from the *Department* of its  
11 recognition of the status, is a valuable commodity.

12 16. The *Department*, on the other hand, argues that the legislature's use of  
13 *may* in A.R.S. § 49-1052(I) affords the *Department* absolute discretion to deny to an  
14 applicant "volunteer status," the word *may* construed according to its ordinary meaning  
15 and not limited to an assessment of the reasonableness, necessity, cost effectiveness  
16 and technical feasibility of the corrective costs claimed.

17 17. The *Department* argues that because the legislature has used both *may*  
18 and *shall* in the same section the terms must be accorded their usual rendering; the  
19 legislature would not use both words so close in proximity unless it had carefully  
20 considered alternative usage.<sup>10</sup>

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21 <sup>10</sup> The *Department* cites *State of Arizona v. Old West Bonding Company*, 203 Ariz. 468, 474, 56 P. 3d 42 (2002)  
22 quoting *Matter of Guardianship of Cruz*, 154 Ariz. 184, 185, 741 P.2d 317, 318 (App. 1987) (when "shall" and  
23 "may" are used in the same paragraph of a statute, we infer that the legislature intended each term to carry its  
24 ordinary meaning) for support. However, Appellant is correct to point out that the the analysis based upon the  
25 proposition is not as neat as the *Department* represents it to be. See *Walker Development's* RESPONSE BRIEF  
26 submitted on February 4, 2004 at p. 3 *et seq.* Although Appellant's Counsel's argument more faithfully accounts for  
27 Arizona case law development of the issue, as will be seen, the Administrative Law Judge views the use of *may* in  
28 the section merely as permissive in the sense that the Legislature has thereby opened the door of the Fund to  
29 property owners and others to access the Fund. The language does not give the *Department* discretion whether to  
30 allow access; it affords the discretion to withhold payment by stipulating as a condition for payment conformity to  
the requirements of § 49-1005. Reasonably, if not obviously, § 49-1052(I) is an exception to, or an extension of, the  
primary class addressed by the legislation theretofor, "owners and operators" of USTs, just as is § 49-1052(H) an  
exception/extension by reference to "political subdivisions." Certainly, in the latter case, the legislation does not  
enable the *Department* to revoke "political subdivision" status. It merely qualifies, by the adjective "eligible," the  
costs incurred by the political subdivision that may be reimbursed. The *may* of § 49-1052(I) is an enablement, just  
as it is an enablement in § 49-1052(H). It is too much and unnecessary to translate the *may* into a *must*. The word  
*may* ordinarily suggests a "power" rather than a "duty." See NORMAN J. SINGER, STATUTES AND STATUTORY

1 18. The *Department* argues that Appellant does not qualify for the sought-after  
2 "volunteer status" under Title 49, Chapter 6 because it can not control, manage or clean  
3 up the regulated substances to allow for the maximum beneficial use of the water and  
4 soil. "[C]ontaminated up gradient off site contamination has and will migrate onto the  
5 site."<sup>11</sup> Moreover, it is no longer "reasonable or cost effective to attempt to remediate  
6 [the] site until the regional plume contamination is resolved" now under the direction and  
7 control of State Lead.<sup>12</sup> The State Lead investigation into the Willcox area commenced  
8 in 1993 and has since concluded that the groundwater contamination and the free  
9 product plume is extensive, that in many instances the contamination has commingled,  
10 and that "the only effective method of remediating [the] contamination is to treat it as a  
11 regional problem and initiate corrective actions [through State Lead]."<sup>13</sup> The best  
12 approach, to avoid duplication at the site and reduce expenditure, is to remove the free  
13 product and remediate the smear zone contamination. Those efforts in the region, in  
14 fact, are currently being undertaken by State Lead.<sup>14</sup> The *Department* argues that *Tierra*  
15 *Dynamics* (the Consultant hired by Klump/Collins) has failed to cooperate with the  
16 *Department* in the remediation effort and to satisfy State Lead expectations.<sup>15</sup> The  
17 *Department* fears that the \$500,000.00 maximum allowable from the SAF for a clean-up  
18 of a release may be exhausted through the efforts of *TDC* without *TDC* having  
19 characterized and fully remediated contamination at the site. It simply is not in the  
20 State's best interest, given its oversight responsibilities, to permit the property owners to  
21  
22

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23 *CONSTRUCTION* § 57.3 ( 6<sup>th</sup> ed., vol. 3, 2001 Revision). What has been conferred on the *Department* by the  
24 Legislature is the power to release monies from the SAF to property owners and others who, while not required to  
do so, engage in endeavors to remediate the damage caused by a release of contaminants into the soil.

25 <sup>11</sup> See LEGAL MEMORANDUM IN SUPPORT OF ADEQ'S FINAL DETERMINATION p.8, lns. 13-16; and, Exhibit 1, ¶ 15.

26 <sup>12</sup> *Id.* at p.8, lns. 17-19; and Exhibit 1, ¶ ¶ 15 and 17.

27 <sup>13</sup> *Id.* at p.9, lns.8-9.

28 <sup>14</sup> *Id.* at p.9, lns.9-14, citing Exhibit 2 §25.

29 <sup>15</sup> *Id.* at p.10, lns.4-8.

1 continue to address this serious problem through their Consultant, while, in the process,  
2 risking ineffective expenditure of public funds.<sup>16</sup>

3 19. It is found that the *Department* has provided a reasonable explanation,  
4 given its presumed expertise in the field delegated to its oversight and control, for its  
5 determination not to accord Appellants the requested "volunteer status" at the site.  
6 However, the question again arises whether the *Department* has acted within its  
7 statutory authority in denying the sought-after status, along with the benefits to the  
8 owners that may be derived therefrom. Ultimately, the question presented is one of law.

9 20. It is further found that the *Department* has neither promulgated  
10 regulation(s) nor issued a substantive policy statement addressing its creation of a  
11 "volunteer status" program and its potential interrelationship with the "State Lead  
12 Program."

### 13 CONCLUSIONS OF LAW

14 1. The Director of the *Department of Environmental Quality* has jurisdiction to  
15 issue a Final Decision in this matter under the authority of A.R.S. §§ 49-1091(E) and 41-  
16 1092.08(B) and (F).

17 2. At the administrative level, it is *Walker Development's* burden to persuade  
18 that the *Department* has wrongfully and improperly denied Klump/Collins the sought-  
19 after "volunteer" status, as that status is founded in A.R.S. § 49-1052(I). *Walker*  
20 *Development* has borne its burden by questioning the *Department's* construction (and,  
21 therefore, the authoritative basis for acting as it has in the matter) of the controlling  
22 statute.

23 3. The issue has been narrowed, in the first place, to that of statutory  
24 construction. Either the Legislature has intended that the *Department* exercise  
25 discretion in its determination whether to allow a property owner to enjoy "volunteer  
26 status" or the Legislature has mandated enjoyment of status as of right.

27 4 The principal goal sought to be achieved in the interpretation of a statute  
28 is to determine the legislative intent<sup>17</sup> and to give effect to that intent.<sup>18</sup> In order to

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30 <sup>16</sup> *Id.* at p.10, lns.12 through 20.

1 achieve the goal, the endeavor may require a consideration of context, language,  
2 subject matter, historical background, effects and consequences, and the spirit and  
3 purpose of the law.<sup>19</sup> However, words are to be accorded their usual and commonly  
4 understood meaning unless a different meaning was plainly intended<sup>20</sup> or unless such  
5 exegesis<sup>21</sup> would lead to an absurd result.<sup>22</sup> If the ordinary meaning leads to an absurd  
6 result, the exegete may only then employ other interpretive tools such as the policy,  
7 purpose, history, or context of the statute to give effect to the Legislature's intent.<sup>23</sup>  
8 Moreover, it must be emphasized that it is to the statute's language that one must resort  
9 as the primary and presumptive purveyor of intent and the source for proper exposition.  
10 After all, the language of the statute is "the best and most reliable index of a statute's

11 <sup>17</sup> Although the principle can be traced at least back to Blackstone, *see*, COMMENTARIES ON THE LAWS OF ENGLAND  
12 59-62, 91 (photo. Reprint 1979) (1765), the statement does not square with some traditionally-accepted rules of  
13 construction, foremost among which is that when the text is clear, it is the end of the matter. *See*, NORMAN J. SINGER,  
14 STATUTES AND STATUTORY CONSTRUCTION §§ 45.07 and 45.08 ( 6<sup>th</sup> ed., vol. 2A, 2001 Revision) ("Generally when  
15 legislative intent is employed as the criterion for interpretation, the primary emphasis is on what the statute meant to  
16 members of the legislature which enacted it. On the other hand, inquiry into the 'meaning of the statute' generally  
17 manifests greater concern for what members of the public to whom it is addressed, understand.") For a concise  
18 discussion of the subject, consult §§ 45.07 and 45.08. Recognizing that the "meaning criterion" justifies that great  
19 weight be given to maxims of interpretation constituting generalizations concerning customary language usage, and  
20 that the Legislature has mandated that the words and phrases found in a statute are to be construed according to the  
21 common and approved use of the language, unless the language be employed in a technical sense, A.R.S. § 1-213,  
22 the Administrative Law Judge has construed A.R.S. § 49-1052(I) in light of the manifest intent of the Legislature, as  
23 that intent can be discovered by the language used.

19 <sup>18</sup> *Southwest Airlines Co. v. AZ Dept. of Revenue*, 197 Ariz. 475; 4 P.3d 1018, 1019 (App. 2000). *See also*,  
20 *Palmcroft Development Co. v. City of Phoenix*, 46 Ariz. 200, 49 P.2d 626, modified in another respect 46 Ariz. 400,  
21 51 P.2d 921 (1935) ("While [a] court must give effect to intention of the Legislature, it cannot substitute its opinion  
22 of what was intended for intent of Legislature expressed in plain and unambiguous language which leads to no  
23 absurd results.").

22 <sup>19</sup> *Southwest Airlines Co. v. AZ Dept. of Revenue* at 476, 1019 citing *Martin v. Martin*, 156 Ariz. 452, 457, 752 P.2d  
23 1038, 1043 (1988). *See also*, *Apache East, Inc. v. Wiegand*, 119 Ariz. 308, 580 P.2d 769 (App. 1978).

24 <sup>20</sup> *Id.*, citing *Life Investors Ins. Co. of Am. v. Horizon Resources Bethany, Ltd.*, 182 Ariz. 529, 531, 898 P.2d 478,  
25 480 (App. 1995).

26 <sup>21</sup> The antonym is "eisegesis," which describes reading into a text the interpreter's own ideas.

27 <sup>22</sup> *State v. Estrada*, 201 Ariz. 247, 34 P.3d 356 (2001) ("For purposes of statutory construction, a result is absurd if  
28 it is so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intention of persons  
29 with ordinary intelligence and discretion."); *See also*, *Arpaio v. Steinle*, 201 Ariz. 353, 35 P.3d 114 (App. 2001) ("If  
30 the statute's language is clear and unambiguous, the court gives effect to that language and applies it without using  
other means of statutory construction, unless applying the literal language would lead to an absurd result.").

1 meaning.<sup>24</sup> If the language is plain, there is no need to inquire further.<sup>25</sup> 5.

2 In the effort to determine legislative intent from statutory language, the inquiry is  
3 not rightly regarded a subjective one; it is an objective endeavor. The intent sought is  
4 that of what a reasonable person might glean from the text placed within its *corpus juris*.

5 6. A most reasonable reading of the section finds that the Legislature has  
6 enabled the *Department* to allow access to the State Assurance Fund by property  
7 owners who undertake to satisfy the conditions for payment that are established at  
8 A.R.S. § 49-1005 and that, in doing so, the *Department* must fulfill certain reporting  
9 requirements. That's it. The section says nothing about a grant of status. And, to give  
10 the statute this plain reading, required by the language and syntax of the paragraph,  
11 does not lead to an absurd result.

12 7. The *Department* has, in effect, adopted a policy gloss on § 49-1052(I); and  
13 doing so certainly falls within its legislative enablement. However, the Legislature has  
14 proscribed development through unarticulated policy by prescribing methodology for the  
15 implementation of a policy or guideline. A.R.S. § 49-1014 provides:

16  
17 **§ 49-1014.** Rules; policies; guidelines

18 A. The director shall adopt rules pursuant to title 41, chapter 6 necessary to  
19 provide procedures for the administration of this chapter and to cause the program  
20 for the regulation of underground storage tanks established by this chapter to be  
21 approved by the administrator of the environmental protection agency pursuant to  
22 42 United States Code section 6991c.

23 B. The director may establish policies and guidelines for the administration of this  
24 chapter, subject to the following:

25 1. If a substantive policy statement as defined in section 41-1001 or a guideline is  
26 issued by the director, the director shall provide written notice to persons regulated  
27 by this chapter before the effective date of a policy or guideline that affects the  
28 substantive rights of owners and operators or other parties regulated under the

29 <sup>23</sup> *Id.*, citing *State v. Williams*, 175 Ariz. 98, 102, 854 P.2d 131, 135 (1993).

30 <sup>24</sup> See, *Rineer v. Leonardo*, 194 Ariz. 45, 46, 977 P.2d 767, 768 (1999) ("The best and most reliable index of a statute's meaning is its language."); *State v. Williams*, 175 Ariz. 98, 854 P.2d 131 (Ariz. S.Ct. 1993), citing "*Janson v. Christenson*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991).

<sup>25</sup> *Id.*

1 underground storage tank program. The written notice shall set forth the effective  
2 date of the policy or guideline. The policy or guideline shall not be retroactive or  
3 applied retroactively except as specifically authorized by law or by the agreement of  
4 the department and the person who is regulated by this chapter.

5 2. The department shall not base a determination of compliance with the  
6 requirements of this chapter in whole or in part on a policy or guideline that is not  
7 specifically authorized by statute or rule.

8 8. The *Department* has not promulgated any rules related to the so-called  
9 "volunteer status." A search of Title 18, Chapter 12 of the Arizona Administrative Code  
10 (A.A.C.) reveals no regulation touching the subject. Further, neither the *Department* nor  
11 Appellant has provided indicia of written policy governing the issue of a "volunteer  
12 status."

13 9. If the *Department* had developed written policy on the issue of "volunteer  
14 status," or, more appealingly, had promulgated a rule governing the subject, likelihood  
15 of necessity for appeal and hearing would have been reduced.<sup>26</sup> What constitutes a  
16 "substantive policy statement" under A.R.S. § 49-1014(B)(1) is defined at A.R.S. § 41-  
17 1001:

18 20. "Substantive policy statement" means a written expression which informs the  
19 general public of an agency's current approach to, or opinion of, the requirements of  
20 the federal or state constitution, federal or state statute, administrative rule or  
21 regulation, or final judgment of a court of competent jurisdiction, including, where  
22 appropriate, the agency's current practice, procedure or method of action based  
23 upon that approach or opinion. A substantive policy statement is advisory only. A  
24 substantive policy statement does not include internal procedural documents which  
25 only affect the internal procedures of the agency and does not impose additional  
26 requirements or penalties on regulated parties, confidential information or rules  
27 made in accordance with this chapter.

28 Absent the promulgation of a rule delineating the *Department's* guidelines for the  
29 treatment of a person who is not the owner or operator of the UST, but who is the owner  
30 of property whereat a release has occurred and who attempts corrective  
action/remediation and seeks reimbursement therefor under and according to A.R.S. §

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<sup>26</sup> See JAMES LANDIS, THE ADMINISTRATIVE PROCESS 39 (1938) ("The ultimate test of the administrative [institutions] is the policy that it formulates; not the fairness as between the parties of the disposition of a controversy on a record of their own making." See also CHARLES H. KOCH, ADMINISTRATIVE LAW AND PRACTICE § 1.2 (2d ed. 1997) ("Setting policy is the most important function assigned to [administrative] agencies."))

1 49-1005, the *Department* is required to produce a substantive policy following the  
2 procedures set forth at A.R.S. § 49-1014. The *Department* has not done so *vis-à-vis* §  
3 49-1052(I) and its practice of conferring “volunteer status.” The affidavits supplied by the  
4 *Department* imply that the *Department* has developed a “process” over time whereby  
5 property owners are enabled to request “volunteer status” from the *Department*.<sup>27</sup> This  
6 may be the case; but, the testimony through affidavit of one or several employees does  
7 not create a substantive policy.<sup>28</sup>

8 11. The action undertaken here by the *Department* affects the substantive  
9 rights of Klump/Collins as “other parties” regulated under the underground storage tank  
10 program, as those rights are established by A.R.S. § 49-1052(I).

11 12. Therefore, all the discussion about whether the *Department* has discretion  
12 under A.R.S. § 49-1052(I) to grant Klump/Collins “volunteer status” is precipitate, if not  
13 presumptuous. The *Department* has not properly developed a policy to effectuate the  
14 provisions of A.R.S. § 49-1052(I) that it seeks to effectuate, in the manner prescribed by  
15 the Legislature at A.R.S. § 49-1014. Because this is the case, everyone involved is  
16 operating in the dark on the issue. Until the requirements of § 49-1014 are met, the SAF  
17 should entertain Klump/Collins's claims, through their contracted consultant, for  
18 reimbursement under A.R.S. § 49-1005.

19 13. This having been noted, it is the opinion of the undersigned that A.R.S. §  
20 49-1052(I)'s beginning sixty-five (65) word sentence merely grants to the *Department*  
21 authority to allow access of property owners (non-operators/owners of a UST) to the  
22 SAF for reimbursement of corrective action costs and that the access is limited or  
23 qualified by the assumption that the claims, to be payable, must pass muster under

24 <sup>27</sup> See Respondent's Exhibit 1, ¶6 in both this case and the *Judd Transmission* (03A-U166-DEQ) matter (a related  
25 case touching the subject of “volunteer status”).

26 <sup>28</sup> It is more in the nature of *ipse dixit*, albeit Mr. Dosendahl presumably was writing sincerely and intended  
27 accurately therein to set forth his and his colleagues' understanding of the matter.

28 Whether the *Department* is required to promulgate a rule on the issue and a discussion concerning the forum in  
29 which the lack of a rule or substantive policy statement may properly be challenged under A.R.S. §§ 41-1033 and  
30 41-1034 see *Phoenix Children's Hosp. v. Arizona Health Care Cost Containment Sys. Admin.*, 195 Ariz. 277, 987  
P.2d 763 (Ct. App. 1999) and *Ariz. Soc'y of Pathologists v. Ariz. Health Care Cost Containment Sys. Admin.*, 201  
Ariz. 553, 365 Ariz. Adv. Rep. 22, 38 P.3d 1218 (Ct. App. 2002). Appellant has properly challenged the agency's  
practice in the administrative forum, as is required by the existing statutes.

1 A.R.S. § 49-1005 (be "reasonable, necessary, cost-effective and technically feasible"). It  
2 is the payment that is conditional, not the status. Therefore, the section does not  
3 provide the *Department* direct authority to deny a status recognized by the Legislature.  
4 In reality, the section says nothing about it. The *Department's* decision to deny  
5 Klump/Collins "volunteer status" was wrong as a matter of law. It was wrong (1)  
6 because there is no "status" that may be created by ADEQ; it was wrong (2) because  
7 the status of voluntary corrective actor was recognized by the Legislature at A.R.S. §  
8 49-1052(I); it was wrong (3) because the *Department* has not developed policy in the  
9 manner prescribed by the Legislature at A.R.S. § 49-1014 to implement a process for  
10 payment of one voluntarily entering into remediation activities; and it was wrong (4)  
11 because the *Department* has muddied the waters, as it were, by raising the "status"  
12 issue when it merely needed to inform Klump/Collins that it had concluded that the  
13 consultant could not handle the corrective action, in the *Department's* view, and that the  
14 *Department* was implementing a State Lead effort on the property; that any corrective  
15 efforts by the property owners would increase risk of their accountability therefor.  
16 Moreover, application of this policy, as it currently is applied, directly contravenes the  
17 language of A.R.S. § 49-1019(E), a provision related to State Lead: "The *Department*  
18 may take corrective action . . . if an owner or an operator does not perform all necessary  
19 corrective actions **and there is no other person to perform corrective actions pursuant**  
20 **to § 49-1052, subsection I.**" (Emphasis added).

21 14. But, if the *Department* believes that to allow Klump/Collins's consultant to  
22 continue to direct the corrective action at this site would jeopardize the public health and  
23 welfare and the environment,<sup>29</sup> the Director should proceed under the authority granted  
24 to him by A.R.S. § 49-1017 and take the lead on the project. A.R.S. § 49-1052(I) does  
25 not insulate a property owner from the effects of the intervening corrective action  
26 authority delegated to the Director by A.R.S. § 49-1017. Given the facts that have here  
27 been presented, there is nothing preventing the *Department* from assuming its A.R.S. §  
28 49-1017 responsibilities. If the decision to do so is based on technical criteria, the

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29  
30 <sup>29</sup> See A.R.S. § 49-1005(D)(1).

1 *Department* may give Klump/Collins notice of those criteria, along with its notice of  
2 implementation of State Lead activity at the site. If necessary, under concern for human  
3 health, safety, and environmental welfare, the *Department* may seek an injunction  
4 prohibiting Klump/Collins from continuing their corrective action efforts, or some other  
5 form of relief. However, at this juncture, the *Department's* October 2, 2003 notice of  
6 "denial" of "volunteer status" is unavailing.

7 15. Appellant's application for attorneys fees and costs under A.R.S. §§ 41-  
8 1007 and 41-1091.01 has been prematurely-filed and is not addressed herein.

9  
10  
11 **RECOMMENDED ORDER**

12 **IT IS RECOMMENDED** that the Director of the *Arizona Department of*  
13 *Environmental Quality* rescind the *Department's* October 2, 2003 written notice<sup>30</sup> to  
14 Klump/Collins of its intent to "deny" their application for "volunteer status" under A.R.S.  
15 § 49-1052(l).

16 Done this 13<sup>th</sup> day of February 2004.

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19  
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21 \_\_\_\_\_  
22 Gary B. Strickland  
23 Administrative Law Judge  
24  
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26  
27  
28  
29

30 \_\_\_\_\_  
<sup>30</sup> Found at FINDINGS OF FACT ¶8.

1 Copy mailed this \_\_\_\_ day of  
2 \_\_\_\_\_, 2004 to:

3  
4 Stephen A. Owens, Director  
5 *Department of Environmental Quality*  
6 Attn: Judith Fought  
7 1110 W. Washington, Sixth Floor  
8 Phoenix, AZ 85007

9 Office of the Attorney General  
10 Environmental Enforcement Section  
11 Barbara U. Pashkowski, Assistant Attorney General  
12 Edward W. Parker, Assistant Attorney General  
13 1275 West Washington  
14 Phoenix, AZ 85007  
15 Fax #: (602)542-7798

16 *Fennemore Craig, P.C.*  
17 Philip Fargotstein, Esq.  
18 John M. Pearce, Esq.  
19 3003 North Central Avenue, Suite 2600  
20 Phoenix, AZ 85012-2913  
21 Fax #: (602)916-5576

22 **As a courtesy, forwarded to Counsel this day *via* facsimile transmission.**

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26  
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28  
29  
30  
By \_\_\_\_\_