ARIZONA COURT OF APPEALS

DIVISION ONE

THE TOWN OF FLORENCE, a political subdivision of the State of Arizona; SWVP-GTIS MR, LLC, a Delaware limited liability company, Plaintiffs/Appellants, v. ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY, *et al.,* Defendants/Appellees.	Court of Appeals Division One No. 1 CA-CV 19-0122 Maricopa County Superior Court Case No.: LC2017-000466-001

COMBINED REPLY BRIEFS TO BOTH ANSWERING BRIEFS

THE TOWN OF FLORENCE AND SWVP-GTIS MR, LLC

Ronnie P. Hawks (No. 019122)
James L. Csontos (No. 010823)
Jennings, Haug & Cunningham, LLP
2800 N. Central Avenue, Suite 1800
Phoenix, Arizona 85004
(602)234-7800
Attorneys for SWVP-GTIS MR, LLC

Catherine M. Bowman (No. 011713)
Sims Mackin
3101 N. Central #870
Phoenix Arizona 85012
(602)772-5500
Attorneys for The Town of Florence

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I. INTRODUCTION

After a 34-day hearing, the Administrative Law Judge issued her 145-page 2014 Decision. The 2014 Decision unmistakably rejected Florence Copper's excuses and explanations for placing Point of Compliance Wells so far away from the Pilot Test Field that escaped pollutants would not be detected at a Point of Compliance Well for 11.6 years. Based on the belief that the 2014 Decision was irrelevant and could be disregarded, in 2016 Florence Copper submitted an amended permit application in which it acknowledged the Point of Compliance Wells "remain unchanged with the exception of a minor adjustment of the location of one proposed POC well."

The 2014 Decision unambiguously required the use electrical conductivity testing at certain observation wells provide *meaningful* monitoring of possible vertical migration of pollutants in the Lower Basin Fill Unit and require contingency action if such migration is identified. In 2016, Florence Copper submitted an amended permit application which included alert levels Florence Copper acknowledges would only alert and require reporting if pollutants pass *undiluted* by the ground water *directly* from the injection wells, past the recovery wells, and reach the observation well. Florence Copper agrees any less direct or diluted pollutants that reach the observation wells and threatened the LBFU would not set off any alerts and would not require reporting.

The 2014 Decision and Order were not irrelevant. Florence Copper was wrong to disregard the 2014 Decision and Order and leave the Point of Compliance Wells in place. ADEQ was wrong to repeat its prior error and accept the same Point of Compliance Wells previously held to violate the requirements of A.R.S. §§ 49-203, 49-243, and 49-244.

The 2014 Decision requires meaningful testing, alerts and reporting for any pollutants that travel from the injection wells, past the recovery wells and to the observation wells. Florence Copper's proposal to alert and report only if *undiluted* pollutants travel *directly* from the injection well to the observation well does not satisfy the 2014 Decision and Order and does not provide the best available demonstrated control of the pollutants.

II. LEGAL ANALYSIS

A. The 2014 Decision and Order Required FCI to Make Changes.

1. FCI and ADEQ claim not to be bound by the 2014 Decision and Order.

After the 2014 Decision, Order and remand, Florence Copper purposely ignored the Decision and Order and left unchanged the location of (1) injection wells, (2) extraction wells and (3) the Point of Compliance Wells. It also failed to address the 2014 Decision and Order requirement that electric conductivity be used as an additional method to identify pollutants that might leave

the well field and reach one of the observation wells. Florence Copper ignored the 2014 Decision and Order because it believed the Decision and Order were irrelevant, not at issue and should be disregarded.

When the Town of Florence and SWVP filed their appeal with the Superior Court, both ADEQ and Florence Copper tried to prevent the Superior Court judge from seeing the 2014 Decision and 2014 Order. Florence Copper stated:

> Appellants could have appealed the Board's final decision in Case No. 12-005-WQAB [the 2014 Decision] but they chose not to do so and the time to appeal has expired. *See* A.R.S. § 12-904(A). As a result, the Board's final decision in Case No. 12-005-WQAB and the administrative record in that matter is not at issue.

[Emphasis supplied] Superior Court **Index-11** (FCI's Joinder in Motion to Limit Record); *see also* **Index-9** (ADEQ's Motion to Limit Record). Ultimately, ADEQ and Florence Copper were unsuccessful in their attempt to keep the 2014 Decision and Order out of the record on appeal.

However, ADEQ still claims one of the issues on appeal is if the 2014 decision was binding. ADEQ's Answering Brief, p. 13. Consistent with its prior position, Florence Copper continues to argue the 2014 Decision and Order[1] were

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[1] Administrative **Record-2**, *Town of Florence v. ADEQ*, OAH No. 12-005-WQAB, Administrative Law Judge Decision (September 29, 2014) (RA001784-85) (hereinafter "2014 Decision"). The 2014 Decision was adopted by the Board in **Record-2**, *Town of Florence v. ADEQ*, WQAB No. 12-005-WQAB, Board Order (Nov. 14, 2014) (RA001938) (hereinafter "2014 Board Order").

not binding. Florence Copper claims the 2014 Decision and Order are "not at issue here."[2] Florence Copper therefore claims the same excuses and explanations rejected in the 2014 Decision and Order now support leaving the Point of Compliance Wells so far away.

Because Florence Copper premised its 2016 amended permit application on the belief that the 2014 Decision and Order were "irrelevant," "not at issue" and "should be disregarded,"[3] Florence Copper admittedly made no effort to comply with the 2014 Decision and Order. Because it never aimed at the target created by the requirements of the 2014 Decision and Order, Florence Copper's 2016 amended permit had no chance to be "consistent with this [2014] Order."

This Court should easily conclude the 2014 Decision and Order are at issue and are relevant. Florence Copper's 2016 amended permit application was required to be "consistent with this [2014] Order." This Court should conclude it was error to disregard the 2014 Decision and Order, as Florence Copper did and as Florence Copper requested the Water Quality Appeals Board and the Superior

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[2] "No party filed a judicial review action challenging the 2014 Order, and, therefore, it is not at issue here despite Appellants' repeated citations and misplaced reliance upon the 2014 Order." [Emphasis supplied] FCI's Answering Brief, pp. 8 and 44.

[3] "Because the 2014 ALJ's Decision and 2014 Order are irrelevant and not at issue here, Appellants repeated reliance upon them are inappropriate, misplaced, and should be disregarded by the Court." [Emphasis supplied] FCI's Answering Brief, pp. 28-29.

Court to do as well. Because Florence Copper's 2016 amended permit application was premised on a faulty belief that the 2014 Decision and Order were irrelevant, not at issue and should be disregarded, this Court should grant the relief requested in this appeal.

2. All parties were bound by the 2014 Decision and Order.

Both Florence Copper and ADEQ agree the 2014 Administrative Decision was binding upon *Appellants*. For example, Mr. Bradley Glass, attorney for Florence Copper, spoke during the June 9, 2016 public hearing on the 2016 amended permit application and characterized the 2014 Decision and any of the issues resolved in Florence Copper's favor as follows: "They're not subject to further administrative challenge." **Record 24**, November 21, 2016 ADEQ Response to Appellant's Brief Re Issues on Appeal, RA 0006541.

Jeffrey Cantrell, attorney for ADEQ, told the Water Quality Appeals Board that as to issues decided *against* Appellants in the 2014 Decision, "There is no need to hear this or brief issues as the Board has already rules on the previous merit; a fairly comprehensive ALJ decision was already adopted and there is no need to brief the issues." *See* **Record 17**, WQAB Meeting Minutes, October 13, 2016 Minutes of Water Quality Appeals Board Meeting, RA 0005761.

Florence Copper claimed that its 2016 amended permit application was not controlled by the 2014 Decision or Order. ADEQ, and later the Water

Quality Appeals Board, erroneously adopted the positions taken by Florence Copper. The Water Quality Appeals Board's review of the 2016 amended permit application was therefore incorrectly limited by Florence Copper's stated position. Florence Copper compounded the error by telling the Superior Court "[t]he 2014 Order is not at issue in this judicial review action." [**Index-61**, p. 14 (FCI's Superior Court Answering Brief)]

In its 2014 Order, the Board stated it "remands the matter to Respondent [ADEQ] for further proceedings consistent with this Order." Florence Copper's position is contrary to the remand language in the 2014 Order and contrary to Arizona law. *Bogard v. Cannon & Wendt Elec. Co., Inc*., 221 Ariz. 325, 334, ¶ 30 (App. 2009) (The "law of the case" doctrine requires appellate decisions from which no further appeal is sought to be "strictly followed."); *Hawkins v. State*, 183 Ariz. 100, 103 (App. 1995) (*res judicata* and collateral estoppel may apply to decisions of administrative agencies).

Although the cornerstone of Florence Copper's defense of this appeal is its claim that the 2014 Decision and Order are irrelevant, not at issue and should be disregarded, Florence Copper and ADEQ are without legal support for this position. Florence Copper and ADEQ were equally bound by the 2014 Decision as they claim Appellants were. The Law of the Case doctrine and *res judicata* do not create a one-way street.

B. The Law of *This* Case under the 2014 Decision and Order.

Florence Copper located the Point of Compliance Wells so far away that even with a complete failure of the extraction wells the pollutants would not reach any of the Point of Compliance wells for over ten years. The 2014 decision of the ALJ, as adopted and approved by the 2014 Order, included the following conclusions of law regarding Florence Copper's too-distant placement of the Point of Compliance Wells:

> 59. The substantially less costly POC wells cannot define the PMA under A.R.S. § 49-244(1) and cannot be used as POC wells for the PTF unless they meet the requirements of A.R.S. § 49-244(2)(b). **Appellants established that the existing POC wells are too far from "the limit projected in the horizontal plane of the area on which [lixiviant] will be placed," or PMA, to comply with A.R.S. § 49-244(2)(b)(iii).**
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> 60. ADEQ's witnesses attempted to downplay the significance of the location of the POC wells by stating that POC wells are not expected to monitor escaped contaminants, but only to provide a point at which compliance with AWQS may be determined. As noted above, the APP statutes must be read in *pari materia*. A.R.S. § 49- 203(A)(10) mandates that ADEQ "[r]equire monitoring at an appropriate [POC] for any organic or inorganic pollutant . . . if the director has reason to suspect the presence of the pollutant in the discharge." 75 (Emphasis added.) Dr. Wilson credibly testified and the evidence submitted at the hearing confirmed that **the permitted locations of the POC wells do not allow any meaningful monitoring of pollutants that may escape the PMA during PTF operations**.
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> 61. For all of the foregoing reasons, Appellants established that under A.R.S. §§ 49-203, 49-243, and 49-244, the PMA and **the location of the POC wells described in the application and permitted by the Temporary APP were arbitrary, unreasonable, and unlawful.**

[2014 Decision, *see* Opening Brief Appendix, pp. APX250-251].

Florence Copper did not appeal the 2014 Decision and Order. The Board stated it "remands the matter to Respondent [ADEQ] for further proceedings consistent with this Order." No reading of the 2014 Decision and Order permits the conclusion that the Point of Compliance Wells should be left "too far" from the well field where the pollutants are being injected into the ground.

But, because Florence Copper considered the 2014 Decision to be irrelevant, it disregarded the 2014 Decision and stated in its 2016 amended permit application that the locations of the Point of Compliance wells "remain unchanged with the exception of a minor adjustment of the location of one proposed POC well." *See* Opening Brief, p. 12, Statement of Fact ¶ 16.

ADEQ and Florence Copper do not explain why placing Point of Compliance Wells some 700 feet or more and 11.6-years away from the injection wells was too far in 2014 but now satisfies the statutory requirements. Because it contends the 2014 decision is irrelevant, Florence Copper was not prepared to explain how the factual inquiry for determining compliance with A.R.S. § 49-243 changed over time.

1. The operative facts have not changed.

In their Answering Briefs, both Florence Copper and ADEQ assert a claim that there were a significant change in essential facts between the permit considered in the 2014 Decision and the permit submitted after remand from the

2014 Decision. But, because they claim the 2014 Decision and Order are irrelevant and must be disregarded, they do not specifically address the 2014 Decision and Order to explain how the operative facts under A.R.S. § 49-243 have changed.

In the Opening Brief, Appellants explained how the 2016 amended permit application made no change to "the limit projected in the horizontal plane of the area on which [lixiviant] will be placed" as discussed in the 2014 Decision at Conclusion of Law 59. Specifically, the injection wells injecting the pollutants remained unchanged. The recovery wells that are designed to extract the pollutants remained unchanged, and created the same cone of depression. The Point of Compliance Wells remain unchanged (subject to one minor adjustment).

In their Opening Brief, at p. 12, ¶ 16, Appellants stated how Florence Copper agreed the Point of Compliance Wells were left far away as follows:

> The location of the Point of Compliance wells, Injection Wells and Recovery Wells remain unchanged from the locations considered in the 2014 Decision and 2014 Board Order, aside from a minor change in one well location. **Record-21**, FCI application at 3-1 (RA006198) ("The proposed point of compliance (POC) wells described in the March 1, 2012 Temporary APP application remain unchanged with the exception of a minor adjustment of the location of one proposed POC well.").

In its Brief, Florence Copper does not claim the "minor adjustment of the location of one proposed POC well" as a significant change in essential facts or

material to the distance or the number of years by which the Compliance Well would report an issue of non-compliance.

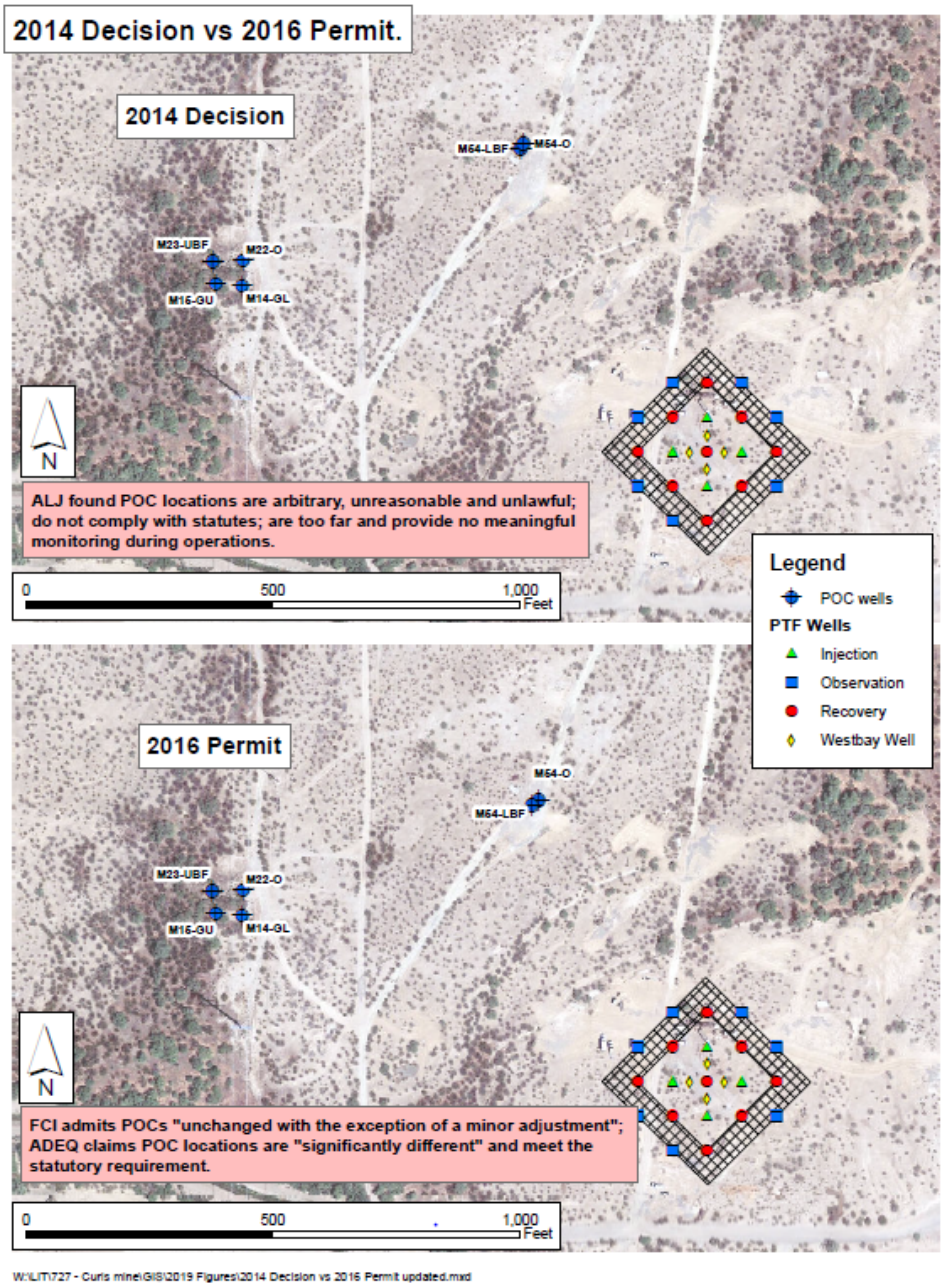
In its Brief, ADEQ points to the change of location of a well (ADEQ's Answering Brief, p. 21), but ADEQ fails to mention the change was admittedly a minor adjustment. ADEQ does not state this "minor adjustment" satisfied the findings and conclusions made and adopted in the 2014 Decision and Order. If ADEQ meant to imply this minor adjustment created a significant change in essential facts, the Court should not be distracted by this unsupported argument.

The injection wells remain the same and in the same location. The recovery wells remain the same and in the same locations. The Point of Compliance Wells remain 700 feet or more and 11.6 years from the well field, just as before. None of the findings of fact contained in the 2014 Decision relevant to the placement of the Point of Compliance Wells changed. These facts and conclusions include:

2014 Findings of Fact	**Present Permit**
The new M54 POC wells are approximately 500 feet from the PMA in the Temporary APP and approximately 730 feet from the nearest injection well in the PTF well field. The four existing POC wells approved in the Temporary APP are approximately 700 feet from	The POC wells remain in the same locations, with the two "new" wells still about 730 feet from the nearest injection wells, and the other existing wells still more than 900 feed from the nearest injection well in the PTF well

2014 Findings of Fact	Present Permit
the PMA and more than 900 feet from the nearest injection well in the PTF well field. 2014 Decision, FOF 323.	field.
Ms. Widlowski acknowledged that the POC wells were more than 700 feet from the PTF well field boundary and that the duration of the PTF was limited to 24 months. Using the figures that Mr. Nicholls had provided, Ms. Widlowski calculated that it would take contaminants approximately 2,500 days to travel 500 feet in the UBFU. Using a calculator, Ms. Widlowski estimated that it would take approximately 11.6 years for contaminants from the PTF to reach the POC wells. 2014 Decision, FOF 333.	The "significant amendment" did not change these facts. The POC wells are still "more than 700 feet from the PTF" and it still "would take approximately 11.6 years for contaminants from the PTF to reach the POC wells.
Ms. Widlowski testified that ADEQ did not expect contaminants to leave the well field because the Temporary APP required FCI to maintain hydraulic control. 2014 Decision, FOF 336.	ADEQ and FCI still claim hydraulic control, *i.e.,* the cone of depression should result in contaminants never leaving the well field. Yet, the Point of Compliance wells remain several hundred feet and 11.6 years away.

As depicted in the illustration below, there was no significant change of the facts essential to determining compliance with A.R.S. §§ 49-203, 49-243, and 49-244. The distance of the Point of Compliance Wells from the well field where pollutants are injected and expected to be removed remains the same. No party claims otherwise.



None of the critical elements have changed. The injection wells, recovery wells and Point of Compliance Wells are all the same as they were when discussed in the 2014 Decision. The 2014 Decision and Order does not permit leaving the Point of Compliance Wells so far away. Florence Copper's argument that the 2014 Decision and Order are irrelevant, not at issue and must be disregarded is without legal basis.

2. The changes made in the 2016 permit application did not excuse compliance with Point of Compliance Well requirements.

Appellants agree there were changes in the 2016 amended permit application *unrelated* to the location of the Point of Compliance Wells – but these changes were required by orders of the agencies and not as a substitute for compliance with A.R.S. §§ 49-203, 49-243, and 49-244. For example, the 2014 Decision and Order required additional monitoring wells. *See* 2014 Decision, p. 132, Conclusion of Law 40-41, Appendix to Opening Brief p. APX242-243. Even if Florence Copper included additional monitoring in its 2016 permit application, such does satisfy the other requirements of the 2014 Decision and Order. Florence Copper was required to comply with every requirement of the 2014 Decision and Order, not just the ones it chose to comply with.

The reason ADEQ and Florence Copper point to changes in the 2016 permit application not related to the statutory requirements of Point of Compliance

Wells is because they want to argue that they are not bound by the doctrines of *res judicata* or the law of the case. However, there has been no significant change of the facts essential to determining compliance with A.R.S. §§ 49-203, 49-243, and 49-244. Because these facts remain the same, the conclusion that the Point of Compliance Wells are too far away to provide meaningful detection of non-compliance remains the same.

The first step in showing a significant change in essential facts would be to discuss the essential facts or at least point to the factual findings in the 2014 Decision to explain how they changed. ADEQ's and Florence Copper's Answering Briefs do not identify the facts essential for the purposes of confirming compliance with A.R.S. § 49-244. Appellees therefore fail to describe how these facts significantly changed since the 2014 Decision which held "that the existing POC wells are too far from 'the limit projected in the horizontal plane of the area on which [lixiviant] will be placed,' or PMA, to comply with A.R.S. § 49-244(2)(b)(iii)." 2014 Decision, COL 59.

The "horizontal plane of the area on which [lixiviant] will be placed" is discussed in detail in the 2014 Decision, and remains the same because no change was made to the injection wells or extraction wells. There was no change to the distance the Point of Compliance Wells are from "the limit projected in the horizontal plan of the area on which [lixivant] will be placed." Florence Copper

cannot and does not claim it complied with the 2014 Decision and moved the Point of Compliance wells closer.

In the ALJ's 2014 Decision, two Point of Compliance Wells were 730 feet from the nearest injection well and the four Point of Compliance Wells were "more than 900 feet from the nearest injection well and the PTF well field." 2014 Decision, p. 92, FOF 323. After remand, four pre-existing wells used as Point of Compliance wells are still "more than 900 feet from the nearest injection well and the PTF well field." And the other two Point of Compliance Wells remain more than 700 feet away from the nearest injection well.

In the 2014 Decision, it was found it would "take approximately 11.6 years for contaminants from the PTF to reach the POC wells." After remand, the POC wells were left so far away that it will still take over a decade before contaminants reach the POC wells.

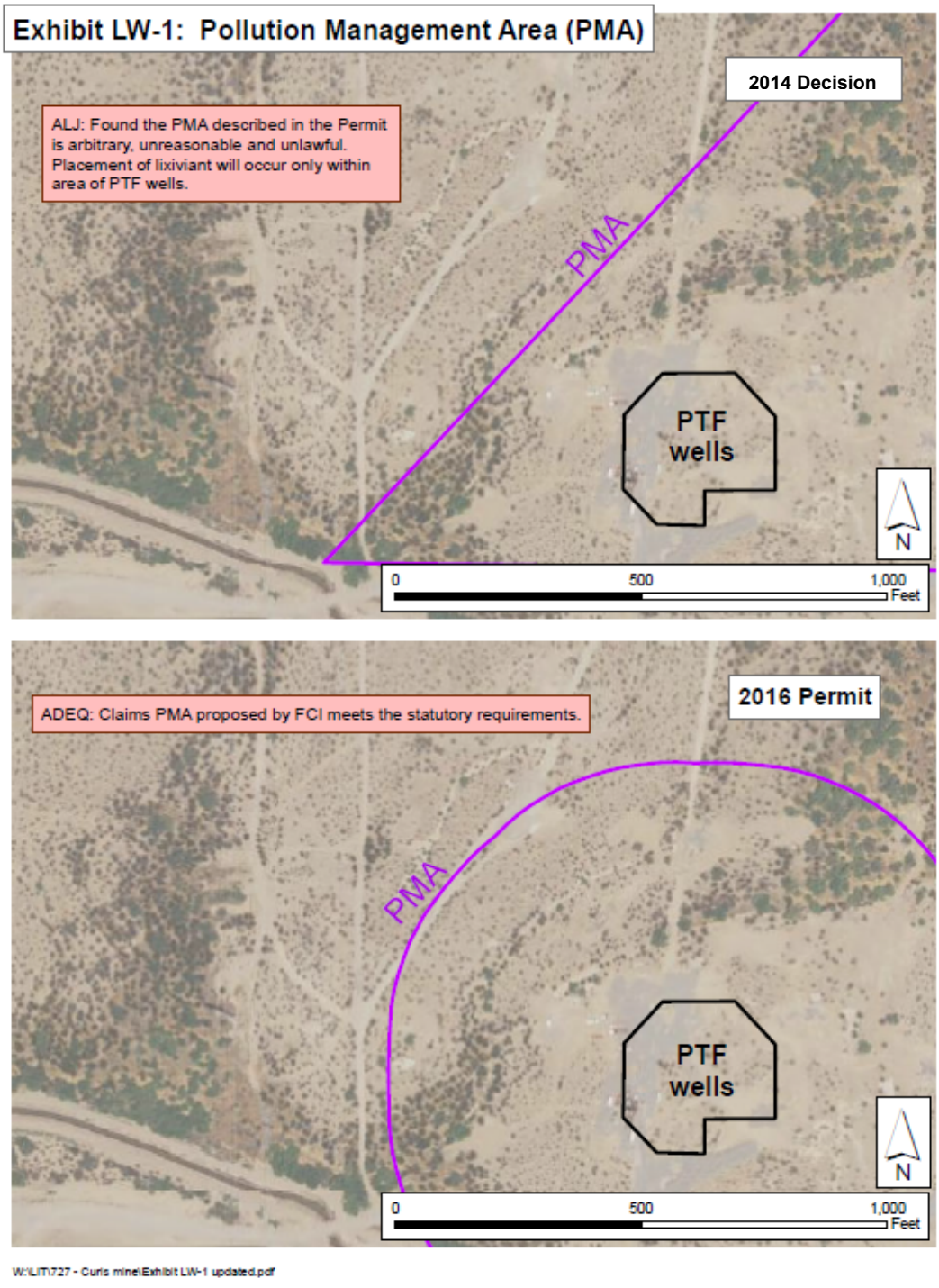
In the 2014 Decision, it was determined that because a monitoring or observation well "was not a POC well, ADEQ will not be able to take any enforcement action if contaminants reach" a monitoring well. 2014 Decision, Finding of Fact 330 (Appendix to Opening Brief p. APX203-204). After remand, any monitoring or observation wells referenced in the amended permit application still do not come with the mandatory enforcement that occurs when pollutants are found at a Point of Compliance Well.

Under the permit considered in the 2014 Decision, "ADEQ did not expect contaminants to leave the well field because the temporary APP required FCI to maintain hydraulic control." (Finding of Fact 336, pp. 96-97). In their Answering Briefs, ADEQ and Florence Copper continued to argue the cone of depression will maintain hydraulic control and that contaminants are not expected to reach the Point of Compliance wells. Florence Copper remains "confident that FCI will recover all injected solutions" by its recovery wells. 2014 Decision, FOF 274. Florence Copper claims its PMA can justify the distant Point of Compliance Wells as providing a meaningful point to measure compliance.

In the 2014 Administrative Law Judge Decision, the ALJ found that Florence Copper had drawn its pollution management area ("PMA") "approximately 200 feet from the boundary of the PTF well field," which "is too far." 2014 Decision, FOF 289.[4] After remand, Florence Copper redrew its pollution management area with a line that was *further* away and 500 feet from the well field. If the 200 feet conclusively determined to be "too far" in the 2014

[4] The PMA drawn 200 feet from the injection mines is too far because pollutants might not travel even 150 feet after five years. *See* Record-2 2014 Decision, at 112, FOF 387; *id*. at 113, FOF 389 RA001894-95) (ADEQ testified that "after five years, FCI's fate and transport model predicted that sulfate would migrate only 150 feet").Although a five-year delayed finding of non-compliance is still not meaningful, FCI's closest Point of Compliance well is far outside the "worst case" 5-year plume described by FCI. *See* Opening Brief, Appendix p. APX073.

Decision, the Court can take judicial notice of the fact that 500 feet is also "too far." *See* illustration, below, or Figure 8 found with Opening Brief at APX078.



There were no changes to the injection wells, recovery wells or Point of Compliance Wells. There were no material changes to the facts between those which were considered and ruled upon in the 2014 Decision and Order and now, other than Florence Copper re-drawing its PMA from the "too far" 200 feet from the well field all the way to 500 feet from the well field.. Under the doctrines of *res judicata* and the Law of the Case, Florence Copper and ADEQ were required to comply with the 2014 Decision and Order. The fact they ignored the 2014 Decision constitutes legal and reversible error.

3. FCI has pre-existing duty to use Best Available Control Technology.

As an after-the-fact attempt to justify why it ignored the 2014 Decision and Order, ADEQ and Florence Copper claim there were fortuitous and material changes to the essential facts such that the 2014 Decision was no longer applicable. ADEQ lists at pages 15-16 of its Answering Brief certain "changes" it claims made in the 2016 permit application. However, ADEQ does not describe why any of these changes were material or essential to measuring compliance with A.R.S. § § 49-243 *et seq*., specifically A.R.S. § 49-244 (Point of Compliance).

None of the changes mentioned by ADEQ change the location where the pollutants are to be injected, where the recovery wells are located or how far or quickly the pollutants are expected to travel. Instead, ADEQ list of changes includes 14 examples of additional *monitoring* and *observation*. Florence Copper

joins in this argument and describes what it claims is additional monitoring on pages 33-34 of its Answering Brief. Basically, ADEQ and Florence Copper claim that because Florence Copper will *monitor* the contaminants as they move underground, the statutory requirements Point of Compliance Wells required under A.R.S. §§ 49-243 and 49-244 are excused.[5]

Nothing found in A.R.S. §§ 49-243 and 49-244 allows for an exception to the Point of Compliance Well requirements for those who promise to carefully observe or monitor contaminants placed in the groundwater. Florence Copper is already obligated under A.R.S. § 49-243(B)(1) to "ensure the greatest degree of discharge reduction achievable" through the "best available demonstrated control technology."[6] Carefully monitoring the injection of pollutants and their underground movement is part of complying with A.R.S. § 49-243(B)(1). Florence Copper must *also* comply with the Point of Compliance requirements set forth at A.R.S. §§ 49-243 and 49-244. Florence Copper cannot substitute compliance with one statute for compliance with the Point of Compliance statutory

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[5] One of the other "changes" ADEQ claims was made in the 2016 permit was that Florence Copper would provide the "Best Available Demonstrated Control ('BADCT') monitoring of non-POC wells § 2.5.8 and supplemental wells, § 2.5.8.2 (Id. at 9-12)." ADEQ Answering Brief, p. 15. A pre-existing duty under A.R.S. § 49-243(B)(1) has at all material times required Florence Copper use the best available demonstrated methods when monitoring any of the non-POC wells or otherwise running its operations.

[6] ADEQ's BADCT Manual, § 3.4.5.3.1 (2004) (available at http://legacy.azdeq.gov/environ/water/wastewater/download/badctmanual.pdf).

requirements. All statutes exist for a purpose and all statutes must be complied with to achieve their purpose.

The Point of Compliance Wells must still be located at the "limit projected in the horizontal plane of the area on which pollutants are or will be placed." A.R.S. § 49-244(1). The 2014 Decision, at page 83, Finding of Fact 293, begins the discussion of the "area where pollutants are or will be placed." *See* Appendix to Opening Brief, p. APX 193. Pollutants will be placed at the injection wells. Pollutants are not expected to move past the recovery wells – and in fact "would be contained within the outermost ring of recovery wells in the PDF well filed." *Id.*, Finding of Fact 299 (Appendix to Opening Brief APX194). Even if the recovery wells stopped working for 48 hours, pollutants would not migrate more than 67 feet horizontally from the injection wells." *Id.*, Finding of Fact 295 (Appendix to Opening Brief APX194). None of these essential facts changed.

The 2014 Decision and Order concluded the current locations of the Point of Compliance Wells do not satisfy the statutory requirements. Nothing has changed regarding how or where the pollutants will be injected, where the pollutants are expected travel on their way to the recovery wells or how distant the Point of Compliance wells are located from where the "pollutants are or will be placed."

ADEQ and Florence Copper were told the monitoring wells are "not designed to satisfy the statutory requirements of A.R.S. §§ 49-243 and 49-244 in

order to determine APP compliance objectives." 2014 Decision, FOF 335. ADEQ's and Florence Copper's current argument is unsupported by law or fact and contrary to the provisions of the applicable statutes.

Because ADEQ is claiming that additional monitoring and observing is a material change to essential facts allowing them to be excused of any other statutory requirements, and because the statutes allow for no such exception, this Court should determine as a matter of law that Florence Copper and ADEQ failed to comply with the 2014 Decision and Order and the statutory requirements. The amended permit was improperly granted. This Court should reverse and remand for the termination of the improperly granted permit.

4. The cone of depression created by recovery wells did not allow lack of meaningful Point of Compliance Wells in 2014 or today.

Although placing Point of Compliance Wells over 700 feet and 11.6 years away from finding an event of non-compliance was too far away in 2014, Florence Copper and ADEQ both claim this distance in feet and time is fine now because of the cone of depression.

The Administrative Law Judge heard from each of Florence Copper's witnesses on the cone of depression (aka hydraulic control) argument for why Point of Compliance Wells can be placed so far away as to make it impossible to confirm compliance for over a decade. The cone of depression is created by the

pumping of the recovery wells. The same recovery wells were discussed in the 2014 Decision and Order as are now described in the 2016 amended permit.

The Administrative Law Judge ruled against the Appellants claim that hydraulic control was inadequate. 2014 Decision, COL 29. After finding hydraulic control was adequate, the Administrative Law Judge found that Florence Copper and ADEQ "did not expect the contaminants to leave the well field because the Temporary APP required FCI to maintain hydraulic control." 2014 Decision, FOF 336. Under the amended permit, Florence Copper still contends the cone of depression created by the recovery wells will keep the contaminants from leaving the well field.

The Administrative Law Judge found "the distance that contaminants might travel beyond the recovery wells was in the order of a well spacing, or 50 to 70 feet. * * * If the injection well was drilled through a fault, a contaminant might travel 100 feet." 2014 Decision, FOF at ¶ 360; *id*, FOF at ¶ 295 (worst-case, "injected flues were not expected to migrate more than 67 feet horizontally from the injection wells"). Florence Copper, in its amended permit application, does not contend the "limit projected in the horizontal plane of the area on which [lixiviant] will be placed" is any greater than that described by the Administrative Law Judge in her 2014 Decision.

The Administrative Law Judge concluded:

> 50. An agency may not disregard clear statutory directives or legislative intent. A.R.S. § 49-244(1) is not ambiguous: the PMA "is the limit projected in the horizontal plane of the area on which pollutants are or will be placed," or for the PTF, where the lixiviant will be injected and recovered. FCI's applications for the Temporary APP and for the UIC permit made clear that lixiviant would be placed in the IRZ and was not expected to migrate more than one or two well spacings to the northwest of the PTF well field. All of FCI's witnesses agreed with this interpretation of the unequivocal statements in FCI's applications.

2014 Decision, COL 50 (Appendix to Opening Brief, pp. APX246).

Although the Board accepted each of the findings of fact contained in the 2014 Decision, the Board's 2014 Order did not adopt conclusion number 53 because the Board determined Florence Copper was not seeking to "expand the statutory definition of PMA" but rather Florence Copper had erroneously "relied on the cone of depression to support the PMA." **Record-2**. The Board's adoption of conclusion number 50 quoted above, and its decision that Florence Copper had erroneously "relied on the cone of depression to support the PMA" is consistent.

Yet, Florence Copper continues to erroneously rely on the same cone of depression argument to support the PMA drawn 500 feet from the well field and erroneously ignored the prior determination that 200 feet was "too far." Florence Copper, in its amended permit application, does not claim the pollutants are expected to migrate more than one or two well spacings. Florence Copper still

cannot rely on the cone of depression to support a PMA extending "too far from 'the limit projected in the horizontal plane of the area on which [lixiviant] will be placed,' or PMA, to comply with A.R.S. § 49-244(2)(b)(iii)." *See* 2014 Decision, COL 59.

5. The less costly alternative exception did not excuse Point of Compliance Wells in 2014 or today.

Just like now, prior to the 2014 Decision and Order, Florence Copper claimed it costs more to place Point of Compliance Wells in a meaningful location than it costs if Florence Copper leaves the Point of Compliance Wells located at the four existing wells 11.6 years away. *See* Florence Copper's Answering Brief, p. 27/66, ¶ 18, p. 36/66, p. 41/66. Florence Copper claims the less costly alternative allowed under A.R.S. § 49-244(2)(b) is more acceptable today than when that same argument was rejected in 2014.

In the 2014 Decision and Order, it was found:

> 58. A.R.S. § 49-244(1) requires POCs to be located at the limit of the PMA, unless FCI establishes that an alternative POC will be substantially less costly under A.R.S. § 49-244(2). FCI established at the hearing that using existing POC wells left over from BHP's commercial mine will be substantially less costly than building new POC wells at the limit of the PMA for the PTF.
>
> 59. The substantially less costly POC wells cannot define the PMA under A.R.S. § 49-244(1) and cannot be used as POC wells for the PTF unless they meet the requirements of A.R.S. § 49-244(2)(b).74 Appellants established that the existing POC wells are too far from "the limit projected in the horizontal plane of the area on which

> [lixiviant] will be placed," or PMA, to comply with A.R.S. § 49-244(2)(b)(iii).

See Appendix to Opening Brief, p. APX250.

Although it might be less costly to place the Point of Compliance Wells 10, 20 or even more years away, that would not "allow any meaningful monitoring of pollutants that may escape the PMA [Pollution Management Area] during PTF operations." 2014 Decision, Conclusion of Law 60-61, Appendix to Opening Brief pp. APX250-51. The "less costly" alternative cannot trump the requirement that the Point of Compliance Wells satisfy the "mandates that ADEQ '[r]equire monitoring at an appropriate [POC] for any organic or inorganic pollutant'" as required by A.R.S. § 49-203(A)(10). 2014 Decision, Conclusion of Law 60, Appendix to Opening Brief pp. APX250.

6. POC Wells placed 11.6 years away do not offer meaningful monitoring of pollutants in 2014 or today.

The Administrative Law Judge, in her 2014 Decision, found and concluded Point of Compliance Wells located 700 or more feet and 11.6 years away did "not allow any meaningful monitoring of pollutants that may escape the PMA during PTF operations." Yet, Florence Copper claims the 2014 Decision is irrelevant and it was never required to provide "meaningful monitoring of pollutants." Florence Copper claims "meaningful monitoring" is a requirement invented and argued by Appellants. *See* FCI's Answering Brief, pp. 62-63

The requirements of the statutes considered in the 2014 Decision have not changed. In 2014 and in 2019, there is nothing "meaningful" about how distant Florence Copper is keeping its Point of Compliance Wells. The ALJ required "meaningful" monitoring when placing the Point of Compliance Wells because if, as here, the Point of Compliance Wells will never detect contamination during the life of a project, they become irrelevant and "meaningless." This, in turn, allows ADEQ to render A.R.S. § 49-244 meaningless by approving a permit for which the POC wells completely fail to meet the letter and spirit of the statute. ADEQ has no authority to do so.

A.R.S. § 49-243(B)(1) requires Florence Copper to "ensure the greatest degree of discharge reduction achievable" through the "best available demonstrated control technology." All of the monitoring and observing Florence Copper and ADEQ claims are present are merely satisfying this statutory requirement but do not replace the statutory requirement, and the 2014 Decision requirement, to have Point of Compliance Wells located closer to the well field to allow for "meaningful monitoring of pollutants."

Florence Copper elected not to explain why waiting a 11.6 years before the Point of Compliance Wells can register an event of non-compliance is meaningful. Florence Copper's silence is an admission that the Point of

Compliance Wells still do "not allow any meaningful monitoring of pollutants that may escape the PMA during PTF operations."

a. Point of Compliance Wells are relevant.

Florence Copper claims the 11.6-year distant location of the Point of Compliance Wells has "no real relevance to the successful operation of the PTF well field." FCI Answering Brief, p. 37. What Florence Copper is actually stating is that it will call the operations successful if it avoids any finding of non-compliance at the Point of Compliance Wells. By locating the Point of Compliance Wells so far away, Florence Copper guaranteed "success" for at least the next 10 or 11 years.

Florence Copper argues the Point of Compliance wells is *not* intended to monitor "compliance with discharge limitations or BADCT." FCI Answering Brief, p. 39. However, Point of *Compliance* Wells are specifically and statutorily required to measure compliance. A.R.S. §§ 49-243 *et seq*.

Florence Copper claims the *monitoring* it will conduct "already provides the 'early warning' of any potential problems," [Answering Brief., p. 40] and therefore argues Point of Compliance Wells are not necessary at all and there is no need to provide the "meaningful monitoring of pollutants that may escape the PMA during PTF operations" as required by the 2014 Decision, COL 59-60.

However, A.R.S. §§ 49-243 *et seq.* do not allow an exception to those who carefully monitor and observe.

Florence Copper's argument is nothing more than camouflage offered to draw attention from the true purpose of the 11.6-year distant location of the Point of Compliance Wells. Florence Copper deems its operation successful if it is profitable. Any finding of non-compliance could hurt profitability or prevent obtaining a permit to go to full-scale mining operations. Florence Copper's method of avoiding a determination of non-compliance it to place its Point of Compliance Wells so far away that it will be the next generation of judges and attorneys who will deal with results.

By leaving the Point of Compliance Wells in locations conclusively determined to be too far away, Florence Copper failed to comply with the 2014 Decision and failed to "ensure the greatest degree of discharge reduction achievable through application of the best available demonstrated control technology." A.R.S. § 49-243(B)(1).

b. Meaningful measure of compliance is required.

The Point of Compliance Wells must be placed to allow "meaningful monitoring of pollutants that may escape the PMA during PTF operations." 2014 Decision, p. 140, COL ¶ 60 (Opening Brief, Appendix p. APX250). No appeal was taken from this determination.

Florence Copper claims there is confusion on what is or is not the "meaningful monitoring of pollutants that may escape the PMA during PTF operations." *See* FCI's Answering Brief, p. 62. Florence Copper dismisses Appellants' reference to this final, binding Conclusion of Law because Florence Copper believes the Appellants "have simply made it up and attempt to treat it as a statutory requirement." *Id.*, p. 63.

When Florence Copper submitted its amended permit application, Florence Copper ignored the ALJ's findings of fact and conclusions of law. This explains why the locations of the Point of Compliance Wells remain over 700 feet and 11.6 years away from detecting non-compliance. Only by ignoring the 2014 Decision can Florence Copper claim Appellants made up the requirement that Point of Compliance Wells offer meaningful measure of compliance.

If the locations of the Point of Compliance Wells were so far as to avoid "any meaningful monitoring of pollutants that may escape the PMA during PTF operations" in 2014, the Point of Compliance Wells left over 700 feet and 11.6 years away from the well field still failed to provide "any meaningful monitoring of pollutants that may escape the PMA."

The Court should not accept Florence Copper's invitation to ignore the 2014 Decision. This Court should enforce the findings of fact, and conclusions of law, which determined the location of the Point of Compliance Wells were and

still are too far away to provide "any meaningful monitoring of pollutants that may escape the PMA during PTF operations."

C. The 2014 Decision and Order Required Electrical Conductivity Measurements to Provide Meaningful Monitoring of Possible Pollutant Migration in Lower Basin Fill Unit.

The 2014 Decision and Order required, on remand, that Florence Copper include a provision for electric conductivity tests to be performed at the Observation Wells. 2014 Decision, Conclusions of Law 35-36. (Opening Brief Appendix p. 241.

In 2014, it was determined Florence Copper's then-existing permit "did not require meaningful monitoring of possible vertical migration through electric conductivity sensors or hydrosleeve in the LBFU in the PTF well filed or require any contingency action if such migration is identified" and as such, Florence Copper was found not to have used the best available demonstrated control technology. *Id*.

In its 2016 permit application, Appellants expected to see electric conductivity to be used to determine "if such migration is identified." However, the 2016 amended permit application sets the alert limit to "alert" only if 100% concentrated pollutants travel from the injection wells to the observation wells. Florence Copper admittedly set the alert level so high as to only "alert" when there are pollutants "traveling *directly* from injection wells to observation wells." Only

when there is "a *direct* excursion of lixiviant from an injection well to an observation well" did Florence Copper intend there to be an alert. [Emphasis supplied] Florence Copper's Answering Brief, pp. 54/66 to 55/66.

ADEQ agrees it allowed this very high alert level which would require reporting only if pollutants traveled directly from injection to observation wells at 100% concentration found at the point of injection and states that:

> Observation well conductivity data that is equal to or greater than the injection well conductivity data triggers an alert level. ADEQ considers this monitoring a relevant measure to determine whether lixiviant is short-circuiting, by-passing the recovery wells, and travelling directly from injection wells to observation wells.

[Emphasis supplied] ADEQ's Answering Brief, p. 30.

The 2014 Decision (which Florence Copper wants to ignore) required alerts and reporting "if such migration is identified." The 2014 Decision did not limit the purpose to identifying "direct" or 100% concentrate migration of pollutants. Any migration of pollutants to the observation well that threatened the LBFU was to be reported.

Florence Copper admittedly is not setting the alert level to require reporting "if such migration is identified" and instead is seeking to limit the alert and reporting requirements only if a "direct excursion" of pollutants is identified. This avoids alerts and reporting for other, less direct migration of pollutants into the

LBFU. The 2014 Decision cannot be read to allow *some* pollutants to migrate toward the Lower Basin Fill Unit without being an alert and duty to report.

ADEQ failed to catch this slight-of-hand and allowed a permit that does not require an alert and reporting of pollutants less than 100% concentrate or that move in a method other than by a direct path from the injection wells to the observation wells.

If any pollutants escaped the well field or move more than a well-spacing or two from the recovery wells, the alert levels must be set to alert and require reporting of these events to provide "meaningful monitoring of possible vertical migration" of pollutants required by the 2014 Decision and Order.

Florence Copper's operations must be "operated as to ensure the *greatest* degree of discharge reduction achievable through application of the *best* available demonstrated control technology, processes, operating methods or other alternatives, including, where practicable, a technology permitting no discharge of pollutants." A.R.S. § 49-243(B)(1). Setting alert levels and reporting requirements to alert and require reporting of pollutants found at the observation well at less than 100% concentrate or that move in a method other than by "direct excursion" from the injection wells to the observation wells is *better*, and provides a *greater* degree of discharge reduction than what Florence Copper requested or ADEQ approved. As such, the better and greater alert levels are required by law.

In their Opening Brief, Appellants described why baseline data is set based on pre-pollutant data or "clean" condition data. If post-pollutant measurements at the observation wells show an increase from the "clean" baseline the parties are alerted to possible escape of pollutants past the recovery wells and detected at the observation wells. This is exactly how all of the other alert levels in permits are established.

A baseline or alert level based on conditions that exist at the observation well before the injection of pollutants is the proper level to start with, and would allow the *greatest* degree of discharge reduction achievable. Any naturally occurring variations in the pre-pollution conductivity levels found at the observation wells could be factored in the alert level to eliminate some potential false alerts – although the best and greatest method is to require a report for any level exceeding the baseline – and then make further tests to determine if the level want above the alert level due to natural variations or because pollutants moved beyond the recovery wells and are being detected at the observation wells. Because the best and greatest are statutory requirements, ADEQ committed error in allowing a permit requiring the high, direct alert levels set by Florence Copper.

The explanations provided by ADEQ and Florence Copper do not require a different result. Neither ADEQ nor Florence Copper explain in their Answering Briefs how pollutant levels could increase as the pollutants move from the point of

injection out to the observation wells. Instead, ADEQ claims this is "a complex technical process" and then seeks to confuse the Court with a discussion of when conductivity at recovery wells and observation wells can differ [ADEQ Answering Brief, pp. 30-31] rather than how conductivity data at the point of injection of the pollutants can increase the further the pollutants move away from that point.

Florence Copper, in its Answering Brief, makes a similar argument as made for why the Point of Compliance Wells are not relevant. Florence Copper points to other requirements required on remand after the 2014 decision, and claims complying with the 2014 Decision COL 35-36 is not important. *See* FCI's Answering Brief, p. 52 ("The measurement of fluid electrical conductivity in the PTF well field is one means of confirming hydraulic control."); *id*., p. 53 ('The measurement of fluid electrical conductivity in the PTF filed is just one of several methods of detecting any vertical or horizontal migration of contaminants form the PTF well field." Florence Copper lists several of these other methods at pp. 53-54 as a distraction before attempting to directly address how electroconductivity can increase the father the injected pollutants travel.

Florence Copper then reveals how its "baseline" is intended to alert only when the pollutants are found to be "traveling directly from injection wells to observation wells. FCI Answering Brief p. 55. Only when there is "a direct

excursion of lixiviant from an injection well to an observation well" did Florence Copper intend there to be an alert.

The 2014 Decision was not so narrow or limiting. Florence Copper's facility must be "operated as to ensure the greatest degree of discharge reduction achievable through application of the best available demonstrated control technology, processes, operating methods or other alternatives, including, where practicable, a technology permitting no discharge of pollutants." A.R.S. § 49-243(B)(1). Florence Copper must not only monitor for pollutants moving "directly" from injection to observation wells, it must also monitor and set alert levels to allow the report of pollutants traveling an indirect path past the recovery wells and out to the observation wells.

D. Attorney Fees.

Appellants' Opening Brief sought recovery of their costs and attorney fees. Florence Copper does not address this request. The Court may conclude the lack of objection by Florence Copper constitutes a lack of opposition to this request. ADEQ did object to this request, but only to the request for attorney fees under A.R.S. § 12-2030. ADEQ claims A.R.S. § 12-2030 applies only if ADEQ failed to satisfy a "duty imposed by law." See ADEQ's Answering Brief, p. 33. Otherwise, ADEQ has no further objections.

In this appeal, Appellants contend ADEQ failed to require compliance with the 2014 Decision and Order and therefore again failed to obtain compliance with A.R.S. §§ 49-203, 49-243, and 49-244, and the 2014 Decision and Order that concluded ADEQ earlier failed to comply with these very same statutes. This repeated failure to satisfy a "duty imposed by law" would therefore allow for recovery of attorney fees.

ADEQ requests an award of costs and attorney fees pursuant to A.R.S. § 12-341 and 12-348.01. ADEQ's requests are misplaced. Although costs may be awarded to the successful party on appeal, A.R.S. § 12-348.10 does not specifically apply to appeals pursued under A.R.S. §§ 12-901 *et seq*., and likewise does not apply to appellate court proceedings. Because A.R.S. § 12-348.01 is an exception from the common law American Rule, the statute must be narrowly strictly. *See* *Ward v. State*, 181 Ariz. 359, 362 (1995) ("Because the statute limits common-law liability, we must construe it strictly."); *Langerman Law Offices, P.A. v. Glen Eagles at Princess Resort, LLC*, 220 Ariz. 252, 256, ¶ 14 (App. 2009)(Discussing American Rule). Fees under A.R.S. § 12-348.01 are also not awardable against private parties such as SWVP-GTIS MR, LLC. Any fees incurred by ADEQ in responding to SWVP-GTIS MR, LLC claims, arguments and issues must be apportioned and are not recoverable under A.R.S. § 12-348.01.

Florence Copper requests fees pursuant to "A.R.S. §§12-341, 12-342, 12-348, 12-348.01, 12-349, 12-912, 12-2030, and 41-1001.01(A)(1), as well as any other relevant and applicable authorities." Florence Copper's claim under "any other relevant and applicable authorities" must be denied as not sought in accordance with Rule 21(a)(2), Rules of Civil Appellate Procedure.

Florence Copper is not an intended beneficiary under A.R.S. § 12-348.01. This section refers only to governmental agencies and does not mention private parties. Because A.R.S. § 12-348.01 creates an exception to the common law American Rule, the statutory exception must be narrowly construed. This statute was intended to apply only to actions between governmental entities and not to private parties. *See* legislative hearing comments of HB 2676 (2012) available at: http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=10561

Florence Copper's claim under A.R.S. § 12-349 is based on Florence Copper's argument that Appellants rely on the 2014 Decision and Order, which Florence Copper believes is irrelevant and should be disregarded. Appellants disagree with Florence Copper's position on this issue.

Florence Copper's claim for fees and costs under A.R.S. § 12-912 is misplaced. This statute speaks only of awards to "the appellee agency" and Florence Copper is not an "agency" under this statute. Likewise, Florence

Copper's reliance on A.R.S. § 12-2030 is misplaced because this statute allows for the recovery of attorney fees to a private party "in a civil action brought by the party against the state[.]" Florence Copper has not brought a civil action against the state or any political subdivision of the state. Finally, Florence Copper is not entitled to recover fees or costs under A.R.S. § 41-1001.01(A)(1), which is limited to a party who "prevails by adjudication on the merits against an agency in a court proceeding regarding an agency decision[.]. Florence Copper is not proceeding against an agency or claiming the agency's decision is erroneous. As such, Florence Copper is not an intended beneficiary under A.R.S. § 41.1001.01(A)(1). Any fees incurred by Florence Copper in responding to SWVP-GTIS MR, LLC claims, arguments and issues must be apportioned and are not recoverable under the statutes cited by Florence Copper

More importantly, Florence Copper's principal argument that the 2014 Decision and Order are irrelevant and must be disregarded explains Florence Copper's actions in this matter but are entirely without merit. Florence Copper is not entitled to recover attorney fees in an appeal where its positions are without legal basis.

III. CONCLUSION

Florence Copper claims that the need for "meaningful monitoring" of pollutants in the groundwater is a figment of Appellants' imagination, and Point of

Compliance Wells are not relevant and not intended to measure compliance. Florence Copper and ADEQ claim as long as everyone monitors and observes, the Point of Compliance Wells become window dressing and can be located far, far away. Based on these beliefs, under the amended permit application Florence Copper left the Point of Compliance Wells over 700 feet and 11.6 years away from detecting non-compliance. Florence Copper has thus guaranteed its right to report there "has never been a finding of non-compliance," at least until 2029.

ADEQ argues Florence Copper is correct, and approved the location of the Point of Compliance wells in the same locations approved prior to the 2014 Decision and Order. ADEQ is repeating the error found to exist by the ALJ in her 2014 Decision. Because there was no effort to comply with the 2014 Decision or Order, the amended permit includes the same errors.

The 2014 Order required the meaningful monitoring of pollutants that unexpectedly might reach an observation well. Florence Copper's permit alerts and requires reporting of only 100% concentrated (or higher) pollutants that travel directly from the injection wells to the observation wells. This does not provide the meaningful monitoring of any pollutants reaching the observation wells or threatening to contaminate the LBFU.

As presented in the Opening Brief, and has further illustrated in the two Answering Briefs, the Board's dismissal of Appellants' appeal was arbitrary,

capricious, an abuse of discretion, and contradictory to substantial evidence. Appellants respectfully request that the Court:

- Reverse the Superior Court's December 21, 2018 Ruling and subsequent judgments;
- reverse the Board's 2017 Decision;
- remand the Significant Amendment to ADEQ with direction that it reopen the permit to address these issues in compliance with Arizona law and the final, unappealed 2014 Decision;
- award Appellants their attorneys' fees and costs; and
- grant such other relief as is justified.

DATED this 18th day of September, 2019

JENNINGS, HAUG & CUNNINGHAM, LLP

s/ James L. Csontos
Ronnie P. Hawks
James L. Csontos

SIMS MACKIN

s/ Catherine M. Bowman
Attorneys for The Town of Florence