

STATE OF WISCONSIN
Department of Commerce

In the Matter of the PECFA Appeal of

Daniel Ludwig
City of Jefferson
317 S. Main Street
Jefferson, Wisconsin 53549

Hearing # 05-28
PECFA Claim # 53549-2034-21

Proposed Findings of Fact, Conclusions of Law, and Decision

The Department of Commerce (Department) April 25, 2005 decision determined that remediation costs at the petroleum release at the City of Jefferson wastewater treatment plant, Jefferson, Wisconsin are not eligible for PECFA reimbursement. Petitioner, City of Jefferson (City), by its June 13, 2005 petition to the Department for hearing on the decision, filed a timely appeal from the Department's Petroleum Environmental Cleanup Fund Act (PECFA) decision. The petition includes the name of Daniel Ludwig, current City public works director. The City had submitted a claim seeking \$32,000 in reimbursement costs, and by its June 13, 2005 petition requested Department re-evaluation of a prior determination of non-eligibility. (Exhibit 5.)

A prehearing telephonic conference on the appeal was held on February 10, 2006. Pursuant to proper notice, a class 3 administrative hearing was held on April 25, 2006 in Madison, Wisconsin, Steven Wickland, administrative law judge, presiding. Following the hearing, the parties filed written briefs, with the last brief received June 19, 2006.

The issue for determination raised by the petition is: Whether the Department's decision dated April 25, 2005 was correct with regard to the disputed costs identified in petitioner's appeal received by the Department on June 16, 2005.

In accordance with Wis. Stat. § 227.47 and 227.53(1) (c) the parties to this proceeding are certified as follows:

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The authority to issue a final decision in this matter remains with Department of Commerce Secretary Mary P. Burke by effect of her order dated June 16, 2005.

Daniel Ludwig, City public works director, appeared at the hearing on behalf of the City and testified. State of Wisconsin Department of Commerce staff Renee Dickey testified for the respondent.

The matter now being ready for decision, I issue the following:

Findings of Fact

1. This is an appeal filed by Daniel Ludwig, City of Jefferson of a Department decision dated April 25, 2005. The decision determined that the City's 2002 remediation costs at the site of its petroleum storage tank system were ineligible for PECFA reimbursement. The system is located at 221 East Henry Street, Jefferson, Wisconsin.
2. By its February 14, 2006 and March 8, 2006 notices of hearing herein, the Department noticed this matter to be held as a Class 3 administrative hearing.
3. The parties' two-page stipulation of facts was submitted at the hearing, and accepted, and exhibits 1 through 6 were received into evidence. A copy of the stipulation is attached hereto and incorporated herein by reference as additional findings of fact.

Applicable Statutes and Codes

Wis. Stat. § 101.143(3)(am). Upgraded underground systems. 1. An owner or operator or a person owning a home oil tank system is not eligible for an award under this section for costs incurred because of a petroleum product discharge from an underground petroleum product storage tank system or a home oil tank system if the discharge is confirmed after December 31, 1995, and the discharge is confirmed, or activities under par. (c) or (g) are begun with respect to that discharge, after the day on which the underground storage tank system or home oil tank system first meets the upgrading requirements in 40 CFR 280.21 (b) to (d) or in rules promulgated by the department relating to the upgrading of existing underground petroleum product storage tank system, except as provided in subd. 2.

Wis. Stat. § 101.143(3) Claims for petroleum product investigation, remedial action planning and remedial action activities.

(a) Who may submit a claim. ...an owner or operator ...may submit a claim to the department for an award...to reimburse the owner or operator...for the eligible costs that the owner or operator...incurs because of a petroleum products discharge from a petroleum product storage system...if all of the following apply:

5. The owner or operator or the person reports the discharge in a timely manner to the division of emergency management in the department of military affairs or to the department of natural resources, according to the requirements under s 292.11.

Comm. § 47.10 (1)(a)(2), Wis. Admin. Code. Initial claim eligibility. The responsible party, owner or operator, agent or an assignee, as established in subd. 1., may submit a claim if all of the following are performed: . . .

b. Notification to the department, before conducting a site investigation or remedial action activity, of the potential for submitting a claim under this chapter, except in emergency situations as provided under s. 101.143(3)(g), Stats.; . . .

d. Report of the discharge in a timely manner to the division of emergency management in the department of military affairs or to the DNR, according to the requirements under ch. 292, Stats.

Wis. Stat. § 292.11 Hazardous substance spills.

(2) Notice of discharge. (a) A person who possesses or controls a hazardous substance or who causes the discharge of a hazardous substance shall notify the department immediately of any discharge not exempted under sub. (9). . . .

(3) Responsibility. A person who possesses or controls a hazardous substance which is discharged or who causes the discharge of a hazardous substance shall take the actions necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge to the air, lands or waters of this state.

Discussion

On June 13, 2005 the City of Jefferson timely petitioned the Department and requested an administrative hearing for review of the April 25, 2005 Department decision in PECFA claim number 53549-2034-21(Exhibit 5). The appeal was filed by Daniel Ludwig, city engineer and director of public works, on behalf of the City of Jefferson, Wisconsin. The appeal challenged the Department's decision and requested a hearing. The amount at issue is approximately \$32,000 incurred by the City in remediation costs (Ludwig testimony).

Pertinent stipulated facts. The stipulation of facts (Stipulation) agreed to by the parties and adopted at the hearing sets out several events concerning this case. In 1985 three fuel tanks were installed on the City site (one 1000-gallon unleaded tank, one 1000-gallon leaded gasoline tank and one 2000-gallon diesel tank). (Stipulation, paragraph 2.) In 1988, repair work was performed on the vent pipes connected to those tanks, and at that time it is noted that petroleum discharge has occurred. No notification is made to the Wisconsin Department of Natural Resources or the Wisconsin Department of Commerce. No remediation is attempted at this time.

(Stipulation, paragraph 3, emphasis added.) On or about March 31, 1994, the referenced underground storage tanks (UST) are upgraded, with the installation of fuel dispensing pumps, piping, and venting and overflow protection. (Stipulation, paragraph 4, emphasis added.) On January 14, 2002 the City removes two 1000-gallon tanks. The City on February 14, 2002 notifies the Wisconsin Department of Natural Resources (DNR) of the hazardous substance release from these tanks. (Stipulation, paragraph 7.) Over three hundred tons of contaminated soils are removed during the tank pull, with the soil disposed of at a licensed landfill on April 15, 2002. (Stipulation, paragraph 6.) The City claims it had no knowledge that it had to report the 1988 spill to the DNR. (Stipulation, paragraph 15.)

Testimony of Daniel Ludwig.

Mr. Ludwig became City engineer and public works director in 1996. His review of City files (much of it prior to his being hired by the City) led him to prepare a 1984 – 2002 timeline (Exhibit 6) concerning tank events in the 1980s and 1990s at the City's wastewater treatment system and refueling center. He testified that two hot spots were discovered when the tanks were pulled in 2002. Based on his file review, Mr. Ludwig stated that he believes that the contamination occurred between those two hot spots (represented – in terms of time – in red on the exhibit 6 timeline) during the period 1985-1988.

Daniel Ludwig stated that he was not present when the 1988 contamination occurred and was discovered by City staff, nor present in 1994 when the tank system was upgraded. He was on staff in 2002 when the tanks were removed, and oversaw that effort, and the notification of DNR and the testing and removal of the contaminated soil. The cost to the City was about \$32,000. Later in the hearing, Mr. Ludwig, recalled to the stand, testified that the City properly

cleaned the site up, and that he considered the find of contaminated soil in 2002 and its removal an “emergency.”

Affidavit from City staff. The 2003 affidavit of Mike Kelly, part of exhibit 6, provides evidence by another City employee that there were discharges of gasoline at the site at the City site in the late 1980s, likely over time when the storage tanks were refilled. Kelly, the City’s wastewater treatment operator, states that:

“In the late 1980s, several years after the tanks were installed, my staff and I periodically notice the presence of strong gasoline vapors in the some of the wastewater treatment plant structures located near the USTs. I was told there was a problem with the fill pipe for one of the underground storage tanks. It may have been hit by a snow plow during plowing activities, and its fittings may have become loose, or the fill pipe may have developed a crack. A small amount of gasoline may have been leaking out of the fill pipe to the surrounding soils each time the tanks were filled.” (Exhibit 6)

Conclusions from the above evidence. The Stipulation establishes that although the initial discharge from the tanks was discovered by City staff in 1988, the City did not notify the DNR or the Department of Commerce (or other agency) of the discharge at that time nor did the City then clean up or remediate that discharge. These matters are corroborated by the testimony of Daniel Ludwig and the affidavit of City employee Mike Kelly.

This failure by the City to report and remediate the 1988 discharge when it learned (by observations of staff in 1988) of the discharge, violated the provisions of Wis. Stat. § 292.11(2) and (3). Those violations – the failure to notify and the failure to remediate the site in 1988 – cause the claim to be ineligible. That is, such failures to comply with § 292.11(2) and (3), in turn cause the City site not to meet the PECFA requirements of Wis. Stat. § 101.143(3) (a) 5 (and Comm. § 47.10(1) (a) (2) d), which provides that to be eligible for PECFA reimbursement an owner/operator (such as the City) must have reported the discharge in a timely manner as set out in Wis. Stat. § 292.11(2).

In similar fashion, the City may submit a claim to the Department if the City notifies the Department of the potential for submitting a PECFA claim before conducting a site investigation or remedial action activity.... Comm. § 47.10 (1)(a)(2) d, Wis. Admin. Code. Here, the evidence shows that the remedial action was begun by the City in January 2002 but only later, in February 2002 did the City notify the Department of this action. Thus, the claim is ineligible for PECFA reimbursement pursuant to this Department rule.

Testimony of Renee Dickey.

As discussed above, a further basis for the Department's decision was its determination that the City's tank systems are not eligible for PECFA reimbursement, as the tanks were upgraded in 1994 and the (1988) release from the tank systems was not reported by the City to the DNR until February 14, 2002. (Exhibit 4; Stipulation at paragraph 8, and Dickey testimony).

Ms. Dickey, a State employee since 1991, became a Department staff member in 1996 as a PECFA program assistant. She testified that she became a PECFA claim reviewer in 2000, and became a senior PECFA claim reviewer in 2002. In this role, she reviews claims, often complex claims, and makes PECFA fund eligibility determinations. She conducts reviews of individual claims and determines if they meet the criteria for reimbursement in the PECFA statute, Wis. Stat. § 101.143, and Department regulations, including Comm. Chapters 40 and 47.

Ms. Dickey handled this claim, reviewing the City's PECFA application (Exhibit 1); the Department and DNR tank registration data base (the DNR data base to see if the City had or had not notified the DNR of a discharge earlier than 2002); and other materials including the Mike Kelly affidavit. She stated that as a result of her review, she determined that the tanks were upgraded in March 1994, and the first notification by the City to the State of a confirmed release was in February 2002. She testified that in order to have a PECFA-eligible tank system,

upgrading of tanks had to be complete by December, 1998. The tanks were upgraded in 1994, but as Ms. Dickey noted, by statute (Wis. Stat. § 101.143(3)(am) – cited in her April 25, 2003 letter, Exhibit 4) that for upgraded tank system sites, a petroleum release reported after January 1, 1996 is not eligible for reimbursement under PECFA. As her April 25, 2003 letter to the City stated (referencing that statute);

“Upgraded tank systems, where a petroleum release is reported after 1-1-96 are *not* eligible for PECFA funding. The release occurring from these tank systems was reported to the DNR 2-14-02. The affidavits enclosed attest that the tanks were upgraded in 1994. Owners were required to obtain insurance to protect against petroleum releases occurring from an upgraded system if the release occurred after 1-1-96 (Exhibit 4)

Renee Dickey stated that when City employees discovered contamination during the 1980s, in her opinion, the City should (to report the contamination in a timely manner pursuant to § 292.11) have reported it to DNR immediately. This testimony was allowed, over objection to her giving an opinion now as to what the City should have done in 1988. The testimony was allowed, subject to what weight it is to be given. This witness was credible. She has several years Department PECFA service, and has been a senior PECFA claims reviewer for approximately four years. Given this credibility, in part experience-based, allowing her opinion on the City’s immediate duty to report the contamination upon finding it in 1988 is appropriate. Ms. Dickey further explained that pursuant to Comm § 47.10(1)(b), the City (to be PECFA-eligible pursuant to that rule) must notify the Department of the contamination and of the City’s intent to remediate before starting a site investigation or any remedial work. As the facts and her testimony shows, the City removed the soil in January 2002, yet notification to the DNR was not made until February 2002. (See also, Stipulation, paragraphs 6 and 7.)

The Renee Dickey testimony shows that Department, by its PECFA staff, gave a thorough review to this claim. This testimony was credible and reasonable, reflecting an effort to proceed carefully and fairly. Based on this testimony, the Department did exercise reasonable regulatory discretion in determining that the City's claim is not eligible for PECFA reimbursement.

Conclusion

The PECFA program was established to assist owners, operators and other persons in the process of remediating contaminated soil and water from releases of petroleum products from private petroleum products storage tanks. Such assistance is provided by the reimbursement of the eligible costs of remediating the sites to participants who qualify for the program. The City did proceed to address the contamination in 2002, but the Department properly determined that the costs associated with that effort are not eligible for reimbursement for reasons discussed above.

The Department's decision dated April 25, 2005 is affirmed.

Conclusions of Law

1. Pursuant to Wis. Stat. § 101.143, the Department has primary and extensive authority for the promulgation and administration of the program for petroleum storage remedial action and financial assistance.
2. The Department is authorized to reimburse owners and operators for costs of remediating soil and water contamination for sites that are deemed to be eligible under the statute.
3. The Department is authorized to deny claims for reimbursement payments on the basis of a finding that a claimant is not eligible under the PECFA program, pursuant to Wis. Stat. § 101.143(3)(am).

4. The issue herein is whether the Department's decision dated April 25, 2005 was correct with regard to the disputed costs identified in petitioners' appeal received by the Department on June 16, 2005.
5. The remediation conducted by the City in 2002 did not constitute an "emergency" pursuant to Wis. Stat. § 101.143(3)(g). Contamination was discovered by the City in 1988, and remediation upon (re)discovery of contamination in 2002 does not constitute an emergency. It becomes another opportunity to notify and remediate, which the City did in 2002. But such actions so distant in time from the 1988 events and failure to act then deprive the claim herein of eligibility for PECFA reimbursement. The Department's decision is based on adequate evidence and is consistent with the above-cited laws and regulations.
6. The Department exercised reasonable regulatory discretion pursuant to Stat. § 101.143 and Comm § 47.10 in denying the City's PECFA reimbursement claim.

Decision

The Department's decision herein is affirmed.