

STATE OF WISCONSIN
Department of Commerce

In the Matter of the PECFA Appeal of

Paul Gyuro
Gyuro, Incorporated
15521 50thRd
Franksville WI 53126

PECFA Claim # 53132-9523-31
Hearing # 04-180

Proposed Findings of Fact, Conclusions of Law, and Decision

The Department of Commerce (Department) by its July 9, 2004 decision determined that the site of petitioners Gyuro Inc. and Paul Gyuro was ineligible for reimbursement by the Petroleum Environmental Cleanup Act (PECFA) for a tank system in Franklin, Wisconsin. Petitioners, by their July 15, 2004 petition to the Department for a hearing to review the decision, filed a timely appeal from that decision.

A telephonic prehearing conference was held on February 8, 2006. Pursuant to Wis. Stat. §§ 227.44 and 227.46(3)(a), and following proper notice, a class 3 administrative hearing was held herein on May 10, 2006, at Madison, Wisconsin, Steven Wickland, Administrative Law Judge, presiding. Following the hearing, the parties submitted written briefs, with the last brief received on July 18 2006.

The issue for determination is: Whether the Department's decision dated July 9, 2004 was correct with regard to the disputed issue identified in petitioner's appeal received by the Department July 15, 2004.

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 the Department by order of then Secretary Cory L. Nettles dated July 30, 2004.

Petitioner Paul Gyuro appeared at the hearing on behalf of the corporation and himself, and testified and participated in all aspects of the hearing in person, representing petitioners at the hearing. State of Wisconsin Department of Commerce staff Renee Dickey testified for the respondent.

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

FINDINGS OF FACT

1. Petitioners' site is located at 5333 West Ryan Road, in Franklin, Wisconsin. The site was acquired by the City of Franklin about 1992, by eminent domain. (Paul Gyuro testimony.)

2. The initial claim request form (Exhibit R-1) was filed by Gyuro in February 1998. The claim form was incomplete, so the Department asked for tank registration and other information, including describing the tank contents (Exhibit R-2).
3. Another PECFA eligibility request was filed by petitioners dated November 20, 1998 (Exhibit R-3). A DNR reference number was obtained by Department staff. The Department November 30, 1998 letter (Exhibit R-4) to Gyuro notes that the tank systems are ineligible for reasons stated therein – namely that the tank system(s) identified in the Department’s data base have an address that is different from the tanks listed in the petitioners’ November 1998 eligibility application.
4. There have never been underground storage tanks on petitioners’ site. This is established by the hearing testimony of Paul Gyuro and by Exhibit R-8, a January 1993 Phase I Environmental Site Assessment made by an independent engineering firm.
5. The source of the soil contamination on the site has not been determined.
6. Petitioners have not shown that the soil contamination on site came from a PECFA-eligible above ground or underground storage tank system at the site. (Renee Dickey testimony; Phase I and II reports (Exhibits R-8 and R-9)).
7. The Phase II Environmental Site Assessment (Exhibit R-9) in March 1993 notes that the contaminated soils on site do not appear to be “the result of an on-site” leaking underground storage tank (at page 11). The report concludes that the “source of the affected soils in the canopy is not known and it is possible that the affected soils may be the results of leaks from trucks or construction equipment stored on the property.” (Exhibit R-9, page 11.)
8. When the City of Franklin acquired the Gyuro site by eminent domain in the early 1990s, the City thereafter paid for the cleanup of contamination. Subsequently, when the City (pursuant to the valuation trial) paid Gyuro for taking its land, the City deducted therefrom the costs the City had paid for the contamination cleanup land. The Department has treated this matter as if petitioners had incurred these costs, with the issue of petitioners’ PECFA eligibility going to hearing.
9. Following the (most recent) Department denial of eligibility (by letter of July 9, 2004), Gyuro timely petitioned for an administrative hearing on that decision by letter of July 15, 2004 to the Department. (Exhibit R-17.)
10. A pre-hearing conference was held with the parties on February 8, 2006, with a notice of hearing issued on February 15, 2006. The administrative hearing was held on May 10, 2006 in Madison, Wisconsin, with briefing by the parties completed on July 18, 2006.

APPLICABLE STATUTES AND CODE PROVISIONS

Wis. Stat. §101.143(3)(a): *Who may submit a claim.* Subject to pars. (ae), (ah), (am) and (ap), an owner or operator or a person owning a home oil tank system may submit a claim to the department for an award under sub. (4) to reimburse the owner or operator or the person for the eligible costs under sub. (4)(b) that the owner or operator or the person incurs because of a petroleum products discharge from a petroleum product storage system or home oil tank system if all of the following apply:

1. The owner or operator or the person is able to document that the source of a discharge is from a petroleum product storage system or home oil tank system.
3. The owner or operator of the person notifies the department, before conducting a site investigation or remedial action activity, of the discharge and the potential for submitting a claim under this section except as provided under par. (g).
4. The owner or operator registers the petroleum product storage system or the home oil tank system is registered with the department under s. 101.09.
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.

Wis. Stat. §101.143(1)(e): “Owner” means any of the following:

1. A person who owns, or has possession or control of, a petroleum product storage system, or who receives direct or indirect consideration from the operation of a system regardless of whether the system remains in operation and regardless of whether the person owns or receives consideration at the time environmental pollution occurs.

Wis. Stat. §101.143(1)(f): “Petroleum product” means gasoline, gasoline-alcohol fuel blends, kerosene, fuel oil, burner oil, diesel fuel oil or used motor oil.

Wis. Stat. §101.143(1)(fg): “Petroleum product storage system” means a storage tank that is located in this state and is used to store petroleum products together with any on-site integral piping or dispensing system. The term does not include pipeline facilities; tanks of 110 gallons or less capacity; residential tanks of 1,100 gallons or less capacity storing petroleum products that are not for resale; farm tanks of 1,100 gallons or less capacity storing petroleum products that are not for resale, except as provided in sub. (4)(ei); tanks used for storing heating oil for consumptive use on the premises where stored, except for heating oil tanks owned by school districts and heating oil tanks owned

by technical college districts and except as provided in sub. (4)(ei); or tanks owned by this state or the federal government.

Wis. Stat. §101.143(1)(i): “Underground petroleum product storage system” means an underground storage tank used for storing petroleum products together with any on-site integral piping or dispensing system with at least 10% of its total volume below the surface of the ground.

DISCUSSION

Paul Gyuro. Petitioners presented the testimony of petitioner Paul Gyuro, president (Exhibit R-15) of the corporation. Mr. Gyuro stated that there were no underground tanks at the Gyuro, Inc. site. The petitioners Paul Gyuro and Gyuro, Inc. (collectively “Gyuro”) are in the earth-moving and snow-plowing business, operating at the Franklin site since 1962. The City of Franklin obtained this property by eminent domain about 1992. Gyuro learned of the presence of contamination by the 1993 site assessments. The site became a Department of Natural Resources (DNR) supervised cleanup. Apparently, the City paid for the cleanup of contamination on site (after acquiring the property). The City later paid petitioners for the property, less the amount the City had expended on the cleanup at the site. Gyuro subsequently sought PECFA eligibility from the Department, starting in 1998 and concluding with their PECFA application and eligibility request in 2004.

Paul Gyuro discussed exhibits 1-8, aerial photos of the site, most taken in 1993 for the eminent domain action and used herein. On cross examination, Mr. Gyuro agreed that the underground tanks (salvaged from somewhere else and now visible on the site) pictured in those exhibits are not PECFA-eligible.

Department position.

The basis for the Department's 2004 decision was its determination that the Gyuro tank systems are not eligible for PECFA reimbursement and there is a question as to the source of the contamination. An earlier denial (Department denial of eligibility for PECFA reimbursement, letter of January 5, 2000 – Exhibit R-12) sets forth the basic Department reasoning at length.

In response to the most recent request, PECFA Section Chief Dennis Legler stated in his July 9, 2004 denial of eligibility letter to Gyuro:

I am in receipt of your letter dated June 25, 2004, in which you again are requesting the Department to consider your site eligible for PECFA funding.

You indicate in your letter that you purchased pumps and attached them to a salvaged underground petroleum storage pump of about 8000 gallons, in which you left above the ground and pumped the product out of. There is not an 8000 gallon aboveground tank registered to this site, only an underground storage tank of this capacity. Although you set this tank near the canopy that was intended for dispensing, this is not an acceptable method of aboveground tank design per Wisconsin Administrative Code Chapter 10.

Per Comm 10.355 Above tank design. Tanks that are used for aboveground storage shall be listed for aboveground use. Tanks designed and built for underground use shall not be installed for aboveground use.

This is not an eligible aboveground tank system that is covered by PECFA, and we must therefore again deny your request. If you have any questions please contact me at (608) 267-7642. (Exhibit R-16.)

Testimony of Renee Dickey. The Department's witness, Renee Dickey, a State employee since 1991, became a Department staff member in 1996 as a PECFA program assistant, to determine PECFA eligibility of sites. She testified that she became a PECFA claim reviewer in 1999, and became a senior PECFA claim reviewer in 2003. She is still the primary point for reviews of 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 Wis. Admin Code Comm. Ch. 47.

Ms. Dickey noted that to be eligible, a tank system must be above ground or under ground; used to store petroleum products; and must include on-site integral piping or an on-site dispensing system. Thus, to be eligible for PECFA, it must be a complete tank system that dispenses fuel (such as a gas station pump). She cited, as an ineligible example, the site fueling truck here, which is not eligible, as a truck has no piping and is not a tank system. Also for PECFA eligibility, a tank system must be registered.

The initial claim request form (Exhibit R-1) was filed by Gyuro in February 1998. The claim form was incomplete, so the Department asked for tank registration and other information, including describing the tank contents (exhibit R-2). A new PECFA eligibility request was filed by petitioners in November 1998 (Exhibit R-3). The Department November 30, 1998 letter to Gyuro notes that the tank systems are ineligible for reasons stated therein.

The Department sent out tank registration forms (Exhibit R-5) that petitioners filled out and returned, indicating that the several tanks (in R-5) came from a site other than the petitioners' 5333 W. Ryan Road, Franklin site (making each tank PECFA-ineligible as the tanks were not operated at that site, and as they were cut up). This holds true for all tanks identified by registration numbers in Exhibit R-5, Dickey stated. There are other, additional, reasons that certain tanks do not qualify. Often, more than one type of contents is listed. For example, tank 466944 indicates two types of contents, when

only one type of contents should be listed. (Ex. R-5, page 3.) Another example is tank no. 466972, tank construction noted as “trailer mounted tanker,” which is simply not a regulated, eligible system under Wis. Adm. Code Comm Ch. 10. (Ex. R-5.)

Another document, Exhibit R-6 dated April 19, 1999, includes waste stream information as to the site, yet indicates that soils were contaminated from “heavy equipment and automobile repairs.” Ms. Dickey notes that as that soil was contaminated from sources not covered by PECFA (as the contamination did not come from tanks), there is no eligibility. This is supported by Exhibit R-6 at page 2, stating that 15 to 20 tons of soil on site were contaminated by heavy equipment and from automobile repairs, which constitutes contamination of soil by non-PECFA eligible sources.

Exhibit R-7 includes several April 1999 tank registration forms, which forms had been updated to show contents (such as “motor oil”) that are not covered by PECFA reimbursement. (R-7 at page 1, tank 466976.) The other tanks noted in Exhibit R-7, after being updated as to registration, have been deleted by Department staff. The basis for deletion from the tank registration data base is that such tank contents are not regulated. The initials of staff LMS denote each tank deleted from the tank registry (based on additional information that the tank system was not eligible). Typically, either the specific contents were not regulated or another reason was cited on the form. When tanks, as occurred here, are deleted from the tank registration system, Ms. Dickey said they are no longer eligible for PECFA reimbursement.

The 1993 “Phase I” environmental site assessment at the site was conducted to determine if the contamination at the site was caused by above or underground tanks.

(Ex. R-8.) The first page of the report, beneath the heading “Executive Summary,” states: “According to Paul Gyuro, no USTs [underground storage tanks] exist on the property, now or in the past.” (Ex. R-8 at page 4.) This shows, Dickey testified, that taken together with other information, there was never an eligible operating system on site. This Phase I report itself, prepared by an outside engineering firm, states “there are no facilities on the Gyuro site that have existing or former USTs [underground storage tanks].” (Ex. R-8 at page 6, labeled page 3 in the report.)

The evidence demonstrates that the petitioners never had any petroleum product systems registered with the Department prior to their attempt to register many tanks in 1999 as required by Wis. Stat. §101.143(3)(a)4. There is no evidence, either in the submissions to the Department or given at hearing, to show that any petroleum product storage tank system ever existed at the site as required for reimbursement and defined under Wis. Stat. §§101.143(1)(e), (f), (fg), and (i). None of the tanks registered later by petitioners had the requisite “on-site integral piping or dispensing system”.

Pursuant to Wis. Stat. §101.09 the Department is charged with the responsibility of regulating the storage of flammable, combustible and hazardous liquids which includes petroleum products. The rule which governs that responsibility is Wis. Admin. Code §COMM 10. The tank described by Mr. Gyuro in Respondent’s Exhibit 17 and at hearing referencing a previously installed underground tank that was removed from its site and salvaged to petitioners’ site whereby they attached valves to drain the tank and the tank had holes in it which released the product into the environment, simply does not meet any definition of an acceptable or eligible system. That is the only demonstrated

source of contamination. Finally, the source of contamination was not determined, but it appeared that leaks from various construction equipment tanks as well as many salvaged USTs were the likely sources of contamination. Therefore, Gyuro did not meet the requirements of Wis. Stat. §101.143(3)(a)1, such that the Department properly denied eligibility.

Exhibits 1-8, offered by petitioners, and Respondent Exhibits R-1 through R-19 were admitted into evidence at the hearing.

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 and the considerable documentation herein, the Department did exercise reasonable regulatory discretion in determining the petitioners' systems are PECFA ineligible.

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 essential issue to be decided in this matter is whether the Department's decision was incorrect with regard to the decision that petitioners' site in Franklin, Wisconsin was ineligible for PECFA reimbursement was incorrect.

4. Petitioners have not proven that there was an above-ground or underground petroleum storage tank that meets the requirements of COMM 10 in order to be eligible for PECFA reimbursement under Wis. Stats. §101.143 or COMM 47, nor has Gyuro provided any evidence that the contamination found on the property was from an eligible source.
5. Petitioners never had any petroleum product systems registered with the Department prior to their attempt to register many tanks in 1999 as required by Wis. Stat. §101.143(3)(a)4. There is no evidence, either in the submissions to the Department nor given at hearing, to show that any petroleum product storage tank system ever existed at petitioners' site as required for reimbursement and defined under §§101.143(1)(e), (f), (fg), and (i). None of the tanks registered later by petitioners had the requisite "on-site integral piping or dispensing system".
6. Pursuant to Wis. Stat. §101.09 the Department is charged with the responsibility of regulating the storage of flammable, combustible and hazardous liquids which includes petroleum products. The rule which governs that responsibility is Wis. Admin. Code § COMM 10. This, in turn, references the provisions of the National Fire Prevention Act sections 30 and 30A. In these acts, codes, and statutes, the tank described by Mr. Gyuro in Respondent's Exhibit 17 and at hearing whereby a previously installed underground tank was removed from its site and salvaged to appellant's site, with Gyuro then attaching valves to drain the tank (a tank that had holes in it which released the product into the environment), does not meet the definition of an acceptable or eligible system.

DECISION

I hereby find that:

1. Petitioners did not demonstrate that he had met the eligibility requirements of Wis. Stat. §101.143(3)(a) as they never owned or operated a petroleum storage tank system as defined in §101.143 (1)(fg).
2. Petitioners were further unable to demonstrate that the contamination came from an eligible source as required in Wis. Stats. §101.143(3)(a)1.

The Department's decision to deny PECFA eligibility is herein affirmed.

NOTICE TO PARTIES

Request for Rehearing

This is a final agency decision under §227.48, Stats. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send or deliver a written request to Rehearing Request, Department of Commerce, Office of Legal Counsel, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970. Rehearing requests may also be filed by fax at the following number: (608) 266-3447. Faxed rehearing requests received after 4:30 p.m. on a business day will be filed effective the next business day.

Send or fax a copy of your request for a new hearing to all the other parties named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the hearing examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the mailing date of this decision as indicated below. Late requests cannot be granted. The process for asking for a new hearing is in Sec. 227.49 of the state statutes

Petition For Judicial Review

Petitions for judicial review must be filed no more than 30 days after the mailing date of this hearing decision as indicated below (or 30 days after a denial of rehearing, if you ask for

one). The petition for judicial review must be served on the Secretary, Department of Commerce, Office of the Secretary, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" and counsel named in this decision. The process for judicial review is described in Sec. 227.53 of the statutes.

Dated: _____

Steven Wickland, Administrative Law Judge
Wisconsin Department of Commerce
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