

STATE OF WISCONSIN
Department of Commerce

In the Matter of the PECFA Appeal of

Darrel Eisenhardt
North Shore Bank FSB
15700 W Bluemound Rd
Brookfield WI 53005-6024

PECFA Claim #53226-2724-06
Hearing #06-37

PROPOSED DECISION

NOTICE OF RIGHTS

Attached are the Proposed Findings of Fact, Conclusions of Law, and Decision in the above-entitled matter. Any party aggrieved by the proposed decision must file written objections to the findings of fact, conclusions of law and decision within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection you wish to make and send them to: Madison Hearing Office, Department of Commerce, PO Box 7838, Madison, WI 53707-7838. After the objection period, the hearing record will be provided to the Deputy Secretary of the Department of Commerce, who is the individual designated to make the final decision of the Department in this matter.

Administrative Law Judge:
Steven Wickland

Dated and Mailed:
September 5, 2007

PARTIES IN INTEREST:

Darrel Eisenhardt
North Shore Bank FSB
15700 W Bluemound Rd
Brookfield WI 53005-6024

Department of Commerce
PECFA Bureau
201 West Washington Avenue
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Date Mailed: _____
Mailed By: _____

STATE OF WISCONSIN
Department of Commerce

In the Matter of the PECFA Appeal of

Darrel Eisenhardt
North Shore Bank FSB
15700 W. Bluemound Road
Brookfield, Wisconsin 53005-3394

Hearing # 06-37
PECFA Claim # 53226-2724-06

Proposed Findings of Fact, Conclusions of Law, and Decision

The Department of Commerce (Department's) September 26, 2006 decision denied reimbursement of certain remediation costs associated with the petroleum release at the site at 8706 W. North Avenue, Wauwatosa, Wisconsin. Petitioner, Darrel Eisenhardt of North Shore Bank FSB, of Brookfield, Wisconsin on October 26, 2006 petitioned the Department for hearing on the decision, filed a timely appeal from the Department's Petroleum Environmental Cleanup Fund Act (PECFA) decision.

A prehearing telephonic conference on the appeal was held on February 14, 2007. Pursuant to proper notice, a class 3 administrative hearing was held on April 18, 2007 in Madison, Wisconsin, Steven Wickland, administrative law judge (ALJ) presiding.

The issue for determination raised by the petition is: Whether the Department's decision dated September 26, 2006 was incorrect with regard to the disputed costs identified in Petitioner's appeal filed with the Department on October 26, 2006.

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

Darrel Eisenhardt
North Shore Bank FSB
15700 W. Bluemound Road
Brookfield, Wisconsin 53005-6024

Department of Commerce
201 West Washington Avenue
PO Box 7838
Madison Wisconsin 53707-7838

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The authority to issue a final decision in this matter remains with the Department of Commerce designee of Secretary Mary P. Burke by effect of her order dated October 27, 2006.

Petitioner, Darrel Eisenhardt of North Shore Bank FSB, appeared by telephone at the hearing and testified, as did his consultant, Richard Frieseke, of Environmental & Development Solutions, Inc, (EDS) of Milwaukee, WI, and Jason Bartly, also with EDS. State of Wisconsin Department of Commerce staff Mary Ann Gosda appeared in person and 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 Darrel Eisenhardt of North Shore Bank FSB of a Department decision dated September 26, 2006.
2. The decision determined that certain amounts relevant to the petitioner's remediation actions at the site of its petroleum storage tank system were ineligible for PECFA reimbursement. The site location is 8706 W. North Avenue, Wauwatosa, Wisconsin. (Exhibit 4, page 1.)
3. The appeal was received on October 26, 2006 and challenged the Department's decision as to PECFA reimbursement. The petition sought a hearing, with petitioner seeking to obtain further reimbursement in the amount of \$452.73.
4. The Department letter of December 13, 2005, by Advanced Hydrogeologist Jennifer Skinner, pursuant to Wis. Adm. Code Comm 47.338, specifically approved the "costs to closure for the following not-to-exceed amount: \$5,696.84". (Exhibit 2, page 1.)
5. There was no written application to the Department for approval of costs in excess of the above amount, and, there was no written Department approval that would allow petitioner to exceed the amount of \$5,696.84.
6. Exhibits 1 through 4 were received into evidence at hearing.
7. Petitioner's work costs exceeded the approved amount by approximately \$452.
8. The Department UCC schedule became effective on May 1, 2006. Petitioner's consultant costs were incurred for work prior to that date.

Applicable Administrative Rule

Comm 47.338 Review of existing sites. (1) GENERAL. The department may review the remedial performance and costs associated with any existing sites. As part of the review, the department may elect to do any or all of the following:

(a) Deny any or all funding, after July 1, 1998, if a claimant failed to carry out site recommendations developed by the DNR in its “PECFA Efficiency Project.”

Note: “PECFA Efficiency Project” refers to a study conducted by the DNR.

(b) Deny any or all funding if a claimant fails to provide information required by the department as part of a review of existing sites.

(2) EXISTING SITE CAPS OR ESTIMATES. The department may require a redetermination of costs for any existing site to establish a total cost, excluding interest but including all closure costs, to achieve the status of a closed remedial action. After reviewing the total cost, the department may do any or a combination of the following:

approve and establish a cap on total costs, excluding interest; deny approval of costs; approve system enhancements; bundle the site with another remediation(s); or direct the site through a public bid process to establish a lower site cost. A claimant may elect either to implement the alternative or to select another alternative. If the claimant elects to implement a higher cost remedial strategy, the claimant shall notify the department in writing of the intent to use a higher cost alternative. The notification shall include the statement that the claimant agrees that the department–approved alternative establishes the maximum reimbursable amount for consulting and commodity services under the fund and that additional costs for the occurrence, excluding interest, will not be submitted to the fund.

History: Cr. Register, December, 1998, No. 516, eff. 1–1–99.

DISCUSSION

On October 26, 2006 the petitioner timely petitioned the Department and requested an administrative hearing for review of the September 26, 2006 Department decision in PECFA

claim number 53226-2724-06, pursuant to Comm. § 47.53, Wis. Admin. Code. The appeal was filed on behalf of the petitioner Darrel Eisenhardt of North Shore Bank FSB, Brookfield, Wisconsin. In its reimbursement decision, the Department reviewed a claim of \$6,649.57. Pursuant to its decision, after deductibles, the Department made a total payment to petitioner in the amount of \$6,196.84 and denied as not eligible the amount of \$452.73. The appeal challenged the Department's decision and requested a hearing on petitioner's contention that \$452.73 should be awarded to petitioner.

The basis for the Department's decision was the amount of \$452.73 "Exceed Cap – Comm 47.338 – 452.73 Letter of 12/13/05 said the cap was 'not to exceed amount.' No request to exceed cap before work was completed. See Notes to Claimant." (Exhibit 4, attachment at page 2.) The Notes to Claimant, in turn, further state: "Original 338 Cap request included costs estimates that were not charged to PECFA and still exceeded cap. (VOC vs pvoc, GIS packet prep estimated twice for \$433, drum disposal-estimate twice and not done, standard invoice form 5x15 – not done.)"

The denial in the amount of \$452.73 was set as the single issue for hearing.

Testimony of Richard Frieseke. Richard Frieseke discussed the start of the project, at a site that had been "sitting idle for a number of years after a soil excavation had occurred back in 1995, I believe." Mr. Frieseke is employed by a PECFA-approved consulting firm, Environmental & Development Solutions, Inc. (EDS), based in Milwaukee. Richard Frieseke contacted Darrel Eisenhardt in September or October of 2005, and learned that the project was not closed. There had been a PECFA claim submitted and paid for on the investigation and remedial costs. An initial or first claim was made in 1995 and paid sometime in 1996. Mr.

Frieseke stated that the payment did not bring the project to closure. Part of the remedial action plan was to do some ground water monitoring, after the excavation (which had not been done), and then put a closure request together, which was not part of the original scope of work.

Mr. Frieseke stated that he contacted Jennifer Skinner at the Department concerning the project status. Mr. Frieseke said at that time the “usual and customary cost schedule” (UCC) was out in draft which allowed Department staff to defer the project from the public bidding process (which Mr. Frieseke sought to do). Mr. Frieseke prepared a document as to closure aspects – this is Exhibit 1 – the EDS letter of October 21, 2005 to Jennifer Skinner. This letter sets out the EDS view of the project, and provides additional estimated costs anticipated for remaining tasks, and a request for deferring the public bid process. Mr. Frieseke said that he felt “UCC,” i.e., the usual and customary costs, would apply. Yet petitioner understood that the PECFA draft UCC guidelines would not be implemented until May, 2006. Thus, costs for groundwater work and abandonment of sump pump work was not included in the original scope of work. Exhibit 1, the October 21, 2005 letter notes that petitioner will use usual and customary costs for those items.

Exhibit 2 is the December 13, 2005 Department letter, authorized by Jennifer Skinner, Advanced Hydrogeologist, Site Review Section, to staff at North Shore Bank. That letter states, in pertinent part that “Commerce hereby approves the costs to closure for the following not-to-exceed amount: Additional remedial costs through closure: \$5,696.84.” The PECFA claim was submitted in September, 2006, and costs of \$452.73 were denied as above the approved cap.

During cross examination, the witness stated he had been doing PECFA-related work since about 1990. He is certified under Comm 5 for that purpose. He is familiar Wis. Admin.

Code Comm. § 47.338. Counsel for respondent asked the witness to describe the regular procedure that is in place when dealing with PECFA site for getting additional budget approved beyond the budget amount. The witness said he contacted Jennifer Skinner. Answering further, Mr. Frieseke said the procedure was “to submit a scope of work and cost estimate and to get that approved.” Typically, any Department approval, if given is made in budget. Exhibit 1, in effect, included a request for additional budget.

However, the Skinner letter December 13, 2005 stated, in part:

Pursuant to Comm 47.338, the Wisconsin Department of Commerce ...has reviewed your estimate of additional work and funding required to achieve a closed remedial action status at the site [North Shore Bank, 8706 W. North Avenue, Wauwatosa] referenced above. The costs to case closure are stated in the Project Status Scope of Work and cost Estimate to Request Closure submittal, dated October 21, 2005, prepared by Environmental & Development Solutions, Inc. Commerce hereby **approves** the costs to closure for the following not-to-exceed amount:

Additional remedial costs through closure: \$ 5,696.84. (Exhibit 2 at page one, as quoted at the hearing.)

Mr. Frieseke at hearing agreed with this reading. With the additional \$500 for claim preparation (referenced in the letter), the written approval totaled \$6,196.00. The witness agreed, and said that the amount submitted in the claim exceeded that latter amount. Mr. Frieseke said that no further cost cap modification was sought by petitioner in writing. Mr. Frieseke referenced usual and customary costs, but received nothing in writing from the Department. Mr. Frieseke stated that any conversations with Jennifer Skinner occurred before the Exhibit 2 letter date of December 13, 2006, which is prior to Ms. Skinner writing that letter.

Testimony of Jason Bartley. The witness discussed Exhibit 3, a seven-page exhibit containing a spread sheet of invoices and invoice amounts, reflecting EDS amounts. Exhibit 4 is the Department’s Breakdown of PECFA Costs. Mr. Bartley gave his opinions on the services

relative to the \$452.73 denied. Department counsel noted that the agency does not dispute that such services were rendered, rather the denial is based on the fact that the Department cap was exceeded. On cross examination, the witness admitted that Exhibit 2 contains a “not-to-exceed amount.”

Testimony of Mary Ann Gosda. Ms. Gosda has worked in the Department’s PECFA section since 1990. She has been PECFA Programs Specialist Senior for the last ten years. Her duties include reviewing claims, overseeing other claim reviewers and reviewing their work if needed, and help with training new employees. She helped early on with the development of Wis. Adm. Code Comm 47, and did training in 2007, and considers herself very familiar with the new code (effective May 1, 2006) as well as the former code Comm 47.

Exhibit 4 is her decision under review herein, discussed by her as “claim number 2”. Ms. Gosda based the decision on Exhibit 2, the Jennifer Skinner letter setting a cap to closure. She also contacted Department staff in Milwaukee (as Jennifer Skinner is no longer with the Department), namely, Linda Michalets, who agreed the cap amount is reasonable, and more than sufficient. Ms. Michalets reviewed the file herein, in her role as a PECFA site reviewer. Ms. Gosda determined that the cap was \$5,696.84 plus \$500. She denied costs over that, as there is nothing in the Jennifer Skinner letter that says that amount could be exceeded.

Ms. Gosda explained UCC, that is, “usual and customary cost schedule.” She stated that the schedule, effective May 1, 2006, is used for new PECFA sites coming into the program and beginning a site investigation – that claimants and consultants must use the usual and customary costs schedule. She noted that if a site goes to bid, the UCC schedule may be referenced but does not have to be used for a site that has a cap (though, in their costs, they may not exceed the

PECFA cost cap). When a site exceeds or will exceed a cost cap, Ms. Gosda testified that the consultant must first request Department approval and approval must be obtained to exceed the cap. The request can be approved (or denied) or the project can go to public bid, but the cap cannot be exceeded (without further Department approval). Once a claim is made, it goes to the Department's PECFA review section.

Claims are reviewed in terms of site-reviewer correspondence, other letters, and an electronic file the Department maintains. In Ms. Gosda's seventeen years of experience, PECFA claim reviewers, as a general practice, document their work. On cross examination, the witness said that in October 2005 the Department did not use the UCC procedure, as it was not in effect at that time. As to training during that time, none occurred on the UCC. A draft rule may have been in existence at that time. The UCC sets maximums as to what consultants may charge at a project site. At page 3 of Exhibit 3, the witness looked at mobilization charge of \$234.00 in comparison to the UCC in effect in May 2006. Counsel objected to this testimony as irrelevant, as the claim was filed prior to the UCC rule taking effect. Further, testimony as to what Ms. Skinner may or may have not decided was given. Although testimony was allowed, (during which the witness stated the \$234.00 would be reimbursed in 2006) a ruling on the objection was withheld for further consideration. Upon such consideration, the testimony must be disregarded, as it is irrelevant, given that the UCC schedule was not in effect until May 1, 2006, and the work was performed prior to the schedule being in effect.

Also, testimony on other settlements by the Department of other claims by other parties was ruled inadmissible during the hearing as irrelevant to this claim, this case. The decision herein must turn on the facts of this case, not negotiated settlements reached in other cases.

Exhibits 1 and 2 had been admitted, and at the close of the Gosda testimony, Exhibit 4 was admitted. Petitioner offered Exhibit 3, the consultant summary of vendor invoices. Counsel for the Department objected on relevancy, yet stated the respondent is willing to stipulate that they incurred certain costs and were invoiced for them, while maintaining that this testimony was not relevant, as the Department decision was not based on whether the vendor submitted these costs. At hearing, over objection, Exhibit 3 was admitted, with weight of the exhibit to be determined. The objection at hearing to disallow testimony by petitioner as to interpretation of any conversations between Jennifer Skinner and petitioner or consultant as hearsay was considered at the close of the hearing. Department counsel objected to the reference as to what Jennifer Skinner may or may not have said beyond the written letter, as to any further understanding concerning the letter. Ms. Skinner, of course, did not testify at hearing, was not subpoenaed by petitioner, and is no longer with the Department. Counsel's objection was granted; on the basis that Ms. Skinner was not present, under oath, and subject to cross examination.

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.

All testimony was presented at hearing in good faith and was helpful. Ms. Gosda was a particularly credible witness, combining considerable experience and properly applying her knowledge of PECFA procedure fairly to this case. There is no question but that petitioner, absent Department approval, exceeded the cap earlier established by the Department. The

petitioner's witnesses emphasized their view that the costs incurred were proper. But they failed to demonstrate that those costs, which exceeded the cost cap, had received Department approval.

The Department also has the fiscal responsibility to reimburse only those costs determined to be eligible and not subject to any exclusion under the code. The Department denied a total of \$452.73 from a claim in which \$6,649.57 was reviewed. That decision was proper for reasons discussed above. The Department's decision dated September 26, 2006 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. Department rule, Comm 47.325, says the section applies UCC to work performed after May 1, 2006. Thus, the petitioner's work done prior to that time is not subject to the UCC schedule.
4. The single issue to be decided in this matter is whether the Department's decision was incorrect with regard to the \$452.73 in costs denied because they exceeded the cost cap for the site.
5. Because the petitioner exceeded the cost cap, and no approval by the Department allowed doing so, costs of \$454.73 in excess of the cap are not reimbursable under PECFA.
6. Irrelevant and hearsay matters were not considered in the decision.

7. The Department properly denied the claim amount of \$452.73 in costs for remediation work, as ineligible for PECFA reimbursement.

DECISION

The Department's decision herein is affirmed.