

STATE OF WISCONSIN
Department of Commerce

In the Matter of the PECFA Appeal of

Thomas Lasse
BLM Land LLC
400 Midland Ct, Ste 101
Madison, Wisconsin 53701-2984

PECFA Claim No. 53545-0242-01B
Hearing No. 07-54

Proposed Findings of Fact, Conclusions of Law and Decision

Preliminary Recitals

The Department of Commerce (Department) September 7, 2007 decision denied as ineligible for Department reimbursement certain costs associated with petroleum underground storage tank systems owned by petitioner. The tank site location is Oasis Shell Station, 3401 Milton, Janesville, Wisconsin (the site). The Department, in response to two requests for a site eligibility letters from petitioner, issued its decision stating, in pertinent part: “The Department has determined that these tank systems do not qualify for PECFA (Petroleum Environmental Cleanup Fund Program) reimbursement per Wis. Statute § 101.143(3)(am) Upgraded Underground systems.” (Department letters, page one.) The letters advising petitioner of the determinations were signed by Renee Dickey, PECFA Program Specialist-Senior. The letters noted that the tank system owner or operation may request an administrative hearing to review the decision. (Department letters, page 2.)

Petitioner, by letter dated October 8, 2007 (and marked as received by the Department on October 7, 2007), sought review of the two related eligibility decisions, requesting that the decisions (similar, but regarding two different tank systems) be reversed. By order of then Secretary Mary Burke, the secretary reserved the authority to make the final decision herein. At a

prehearing on the matter held with the parties on January 9, 2008, the petitioner indicated that it did not seek an administrative hearing; rather the parties agreed to submit briefs pursuant to a briefing schedule, addressing legal questions in light of the documents in the record and the facts contained therein (as stated in the briefs of each party).

The issue for determination raised by the petition is: Whether the Department's decision of September 7, 2007 was incorrect with regard to the disputed issue identified in petitioner's appeal received by the Department October 7, 2007.

Parties in Interest

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 parties agreed to proceed without hearing, on the basis of facts cited by each party in its brief. The parties reference documents attached as exhibits to their briefs, all to become part of the record. Thus, they presented this issue as a legal question, based on the documentary record and facts drawn from those documents. Absent the need to take testimony to establish facts, the matter is to be decided without holding an administrative hearing. During briefing by the parties, facts were presented by each party, and those facts were not challenged by the other party, reflecting agreement on the factual background herein.

Findings of Fact

For purposes of this opinion, the essential facts are referenced below.

BLM Land LLC (“BLM”) is the owner of a former “Road Ranger” truck stop and service station, located at 3401 Milton Avenue, Janesville, Wisconsin.

Tank system removal before July 1, 1987. Multiple underground tank storage systems at the site were removed by July 1, 1987. (Exhibit 1, Department Brief, pages 1-8.) Contamination was found during the closure assessment of the tank removal and was reported to the Wisconsin Department of Natural Resources (DNR) on July 28, 1987. (Exhibit 2, page 1.) This prior petroleum release at the site was granted closure by DNR in 1992. (Petitioner principal brief at page 2.) The DNR tracking system – BRRTS¹ – shows a closure date at the tank sites of April 21, 1992. (Exhibit 2.)

Installation of new underground storage tank systems in 1987 and 1988. BLM installed new underground storage tank systems on site in 1987-1988. The tanks and piping were fiberglass. (Petition, page 2.) The new gasoline tank system (BRRTS 03-54-549148) was

¹ BRRTS” refers to the DNR-maintained data base containing information about contaminated properties and other activities related to the investigation and cleanup of contaminated soil or groundwater in Wisconsin. The BRRTS acronym stands for DNR Bureau of Remediation and Redevelopment Tracking System.

installed in 1987, such gasoline tanks being installed in the basin of a pre-existing tank system where contamination remediation work had been completed. (BLM petition at page 2.) A diesel tank system (BRRTS 03-54-549535) was installed by petitioner at the site in 1988. These tank systems were constructed of fiberglass, had automatic tank gauge leak detection, spill protection and overfill protection along with fiberglass piping. (Exhibit 5.) According to petitioner, the systems met all requirements when installed, but in 1998, in order to meet the requirements of 40 CFR 280.21, the systems required automatic tank gauging to be installed. (BLM petition, page 2.) These tanks were all permitted and assumed in operation until they were taken out in 2007. (Exhibit 5.)

2007 removal of tanks, discovery of contamination, and eligibility request. In January, 2007, all the diesel and unleaded gasoline underground storage tanks were removed. At that time, a tank closure assessment was performed and contamination was discovered. On April 11, 2007, notification of the contamination from unleaded gasoline was made to the DNR, and BRRTS activity number 03-54-549148 was opened. DNR sent out a responsible party letter to petitioner on May 2, 2007, noting the need to make a determination whether to re-open 03-54-000201 or open a new case. (Exhibit 6.) It appears that there was also diesel contamination. DNR was notified of this on May 16, 2007, and BRRTS activity number 03-54-549535 was opened. (Exhibit 7.)

On August 31, 2007, the BLM consultant - BT² - wrote Department staff Renee Dickey requesting eligibility for the tanks that were removed on behalf of BLM Land, LLC. (Exhibit 8) Ms. Dickey separated the unleaded and diesel eligibility requests into occurrence B and occurrence C respectively. On September 7, 2007, the Department sent letters to the petitioner stating that the tanks for which BT² requested eligibility on behalf of BLM were not eligible

because they did not meet the requirements of Wis. Stats. §101.143(3)(am). (Exhibit 9) The petitioner appealed these determinations.

Applicable Statutes and Administrative Regulations

Wis. Stat. §101.143

(3) Claims for petroleum product investigation, remedial action planning and remedial action activities.

(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 or 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 § 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 §. 292.11.
6. The owner or operator or the person investigates the extent of environmental damage caused by the petroleum product storage system or home oil tank system.
7. The owner or operator or the person recovers any recoverable petroleum products from the petroleum products storage system or home oil tank system.
8. The owner or operator or the person disposes of any residual solid or hazardous waste in a manner consistent with local, state and federal laws, rules and regulations.
9. The owner or operator or the person follows standards for groundwater restoration in the groundwater standards in the rules promulgated by the department of natural resources under §§ 160.07 and 160.09 and restores the environment, to the extent practicable, according to those standards at the site of the discharge from a petroleum product storage system or home oil tank system.

(ah) New aboveground systems. An owner or operator is not eligible for an award under this section for costs incurred because of a petroleum product discharge from a petroleum product storage system that is not an underground petroleum product storage tank system and that meets the performance standards in rules promulgated by the department relating to petroleum product storage systems that are not underground petroleum product storage tank systems and that are installed after April 30, 1991, if the discharge is confirmed after December 22, 2001.

(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 petroleum product 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 systems, except as provided in subd. 2.

2. If an underground petroleum product 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 systems, after December 31, 1993, and the owner or operator or person owning the home oil tank system applies for private pollution liability insurance covering the underground petroleum product storage tank system or home oil tank system within 30 days after the day on which the underground petroleum product storage tank system or home oil tank system first meets those upgrading requirements, then the owner or operator or person remains eligible for an award for costs incurred because of a petroleum product discharge, from that underground petroleum product storage tank system or home oil tank system, which is confirmed, and with respect to which activities under par. (c) or (g) are begun, before the 91st day after the day on which the underground petroleum product storage tank system or home oil tank system first meets those upgrading requirements.

40 CFR Section 280.21 Upgrading of Existing UST systems.

(a) Alternatives allowed. Not later than December 22, 1998, all existing UST[underground storage tank] systems must comply with one of the following requirements:

- (1) New UST system performance standards under § 280.20;
- (2) The upgrading requirements in sections (b) through (d) of this section; or
- (3) Closure requirements under Subpart G of this Part, including applicable requirements for corrective action under Subpart F.

(b) Tank upgrading requirements. Steel tanks must be upgraded to meet one of the following requirements in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory:²

40 CFR Section 280.20 Performance standards for new UST systems.

In order to prevent releases due to structural failure, corrosion, or spills and overfills for as long as the UST system is used to store regulated substances, all owners and operators of new UST systems must meet the following requirements.

(a) *Tanks.* Each tank must be properly designed and constructed, and any portion underground that routinely contains product must be protected from corrosion, in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory...

(b) *Piping.* The piping that routinely contains regulated substances and is in contact with the ground must be properly designed, constructed, and protected from corrosion in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory...

(c) *Spill and overfill prevention equipment.* (1) Except as provided in paragraph (c)(2) of this section, to prevent spilling and overfilling associated with product transfer to the UST system, owners and operators must use the following spill and overfill prevention equipment...

² The rest of this cite is omitted as inapplicable as the tanks are fiberglass.

(d) *Installation.* All tanks and piping must be properly installed in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory and in accordance with the manufacturer's instructions.

(e) *Certification of installation.* All owners and operators must ensure that one or more of the following methods of certification, testing, or inspection is used to demonstrate compliance with paragraph (d) of this section by providing a certification of compliance on the UST notification form in accordance with §280.22.

Discussion

The nature of the PECFA program. As petitioner notes, the PECFA program reimburses certain expenses once eligibility is established: “Program eligibility is limited to certain owners of commercial and home heating oil tank systems. The program creates a fund to reimburse eligible expenses, subject to certain deductibles and a cap on reimbursement.” (BLM principal brief at page 3.)

The PECFA eligibility statute, §101.143(3)(am), limits who is eligible to submit a claim:

Wis. Stat. §101.143

(3) Claims for petroleum product investigation, remedial action planning and remedial action activities.

(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:

Wis. Stat. §101.143(3)(a), cited immediately above, then lists “all of the following,” i.e., 1-8, that are not at issue here. As 1-8 are not at issue, consideration next is of Wis. Stat. §101.143(3) (ae) and (am), which come into play for determining if underground tank systems are eligible.

However, the parties agree that only (am) is the decision basis. Subsection (am) states:

(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 petroleum product 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 systems, except as provided in subd. 2.

2. If an underground petroleum product 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 systems, after December 31, 1993, and the owner or operator or person owning the home oil tank system applies for private pollution liability insurance covering the underground petroleum product storage tank system or home oil tank system within 30 days after the day on which the underground petroleum product storage tank system or home oil tank system first meets those upgrading requirements, then the owner or operator or person remains eligible for an award for costs incurred because of a petroleum product discharge, from that underground petroleum product storage tank system or home oil tank system, which is confirmed, and with respect to which activities under par. (c) or (g) are begun, before the 91st day after the day on which the underground petroleum product storage tank system or home oil tank system first meets those upgrading requirements.

Wis. Stat. §101.143(3)(am)1 and 2 are quoted above. Petitioner states that (3)(am)1 does not apply here: “The pertinent statute is Wis. Stat. §101.143(3)(am). That statute provides that an owner or operator is ineligible if: (a) the discharge is confirmed after December 31, 1995 and (b) the discharge is confirmed or remedial investigation activities begin after the system first meets regulatory upgrading requirement. Wis. Stat. §101.143(3)(am)1. There is no dispute that BLM would be ineligible under this subsection.” (Petitioner’s principal brief at 3.) (Emphasis added.)

Consideration of the applicability of Wis. Stat. §101.143(3)(am)2.

The Department denial of eligibility, as noted by petitioner, “was based exclusively on the conclusion that BT²’s notice was untimely under Wis. Stat. §101.143(3)(am).” (BLM principal brief at 2.) The BLM petition states that: “The denial determinations are based on Wis. Stat. § 101.143(3)(am)...In this matter, Wis. Stat. § 101.143(3)(am) does not apply.” (Petition, page 1.)

BLM asserts that Wis. Stat. § 101.143(3)(am) does not apply, as BLM stated that the only upgrading required in 1998 for the tank systems was the installation of aboveground equipment, such that with no underground work and no evidence of a release of contamination, the owner could not determine if there was a discharge. (Petition, page 1.) BLM also states that pursuant to the upgrading requirements of 40 C.F.R. §280.21 and Wisconsin statutes and rules, the tanks did

not require any further upgrading below ground, and therefore there was no reason to conduct any excavation or other subsurface activities. BLM concludes that it “is inappropriate to apply Wis. Stat. § 101.143(3)(am) where there is no opportunity to detect a discharge.” (Petition, page 2.)

Essentially, at issue is whether Wis. Stat. §101.143(3)(am)2 applies to the facts herein such that (am)2 preserves eligibility for reimbursement. This subsection provides:

(am) Upgraded underground systems.

2. If an underground petroleum product 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 systems, after December 31, 1993, and the owner or operator or person owning the home oil tank system applies for private pollution liability insurance covering the underground petroleum product storage tank system or home oil tank system within 30 days after the day on which the underground petroleum product storage tank system or home oil tank system first meets those upgrading requirements, then the owner or operator or person remains eligible for an award for costs incurred because of a petroleum product discharge, from that **underground petroleum product storage tank system** or home oil tank system, which is confirmed, and with respect to which activities under par. (c) or (g) are begun, before the 91st day after the day on which the underground petroleum product storage tank system or home oil tank system first meets those upgrading requirements.

Wis. Stat. § 101.143(3)(c), referred to above, concerns investigations and remedial action activities, and applies here. Wis. Stat. § 101.143(g) concerns emergency situations, does not apply.

The underground tank systems herein were upgraded in 1998. The upgrading dealt with installation of automatic tank gauging, accomplished to meet the requirements of 40 CFR 280.21. Thus, these underground tank systems first met the upgrading requirements in 40 CFR 280.21 after December 31, 1993. Application by petitioner for insurance cited in Wis. Stat. § 101.143(3)(am)2 is assumed. The remaining eligibility preservation criterion is whether

petitioner took action --here, with respect to which activities under Wis. Stat. § 101.143(3)(c) -- before the 91st day after the day on which the underground storage tank system first meets the upgrading requirements. The BLM upgrading occurred in 1998, with 90 days thereafter to begin remedial activities pursuant to Wis. Stat. § 101.143(3)(c). As the first remediation efforts by petitioner took place in 2007, petitioner does not meet the requirements of Wis. Stat. §101.143(3)(am)2, as the Department properly determined.

Upgrading of above-ground portions of an underground tank does not change the statutory application herein. The PECFA statute, Wis. Stats. §101.143, concerns the “petroleum product storage system” which system is defined as a “storage tank used to store petroleum products together with any on-site integral piping or dispensing system”. Wis. Stats. §101.143(1)(fg). This definition governs herein. Thus, an underground system includes the storage tank and any integral piping or dispensing system. Given a definition broad and practical enough to include in the “system” more than simply the (here, underground) tank itself, such a tank is not converted into an aboveground system because of parts or portions of it that may be above ground. It follows that modification to an underground system by upgrading aboveground gauges thereon is upgrading of an underground petroleum tank storage system.

As the statute is plain and unambiguous, reference to legislative history is unnecessary.

The Department in its brief opined that: “Contrary to petitioner’s assertions, the legislature had no benevolent purpose when they enacted these provisions [Wis. Stats. § 101.143(3)]. They wanted to limit state liability and shift the burden to private insurance for what were supposed to be new and infallible tanks systems.” (Department brief at 9.) The petitioner, in its second brief, discusses its view of the legislative history of PECFA, referencing the Legislative Reference Bureau’s “Wisconsin Brief,” issued in 2000, and petitioner concludes

that PECFA was intended, among other things, to be a substitute for private insurance. (BLM reply brief at 3.)

The parties seem to suggest that resolution of the issue herein requires consideration of such history. The statutory provisions governing eligibility are plain and unambiguous. Therefore, the plain language of the statute governs, and the goal of statutory interpretation in this matter can be accomplished by applying the statutory language to the facts of this matter.

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. As Wis. Stat. §101.143(3)(am), is not ambiguous, the issue herein can be resolved by applying the statute to the facts, without resort to legislative history.
4. The PECFA definition of “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.” Wis. Stat. §101.143(1)(fg)
5. Here, the tanks removed were upgraded underground storage systems, subject to PECFA provisions, which govern underground storage tank systems.
6. Work to upgrade an underground petroleum storage tank system, as occurred here in 1998, even when limited to portions of the system that are above ground, constitutes upgrading of an underground petroleum storage tank system, within the meaning of Wis. Stat. §101.143(3).

7. Because petitioner did not, within 90 days of upgrade in 1998, take action pursuant to Wis. Stat. §101.143(3)(am)2, petitioner's application for PECFA eligibility in 2007 was untimely, and therefore the Department properly determined petitioner ineligible for program participation.

Decision

The Department's decisions herein are affirmed.

Administrative Law Judge
Steven Wickland

Dated and Mailed:
October 23, 2008

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.

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