

STATE OF WISCONSIN  
Department of Commerce

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*In the Matter of the PECFA Appeal of*

Harold D. Wymore  
Wymore Amoco  
619 S. Clinton Street  
Cuba City, Wisconsin 53807-3737

Hearing # 06-39  
PECFA Claim # 53586-9999-11

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Proposed Findings of Fact, Conclusions of Law, and Decision

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The Department of Commerce (Department) November 10, 2006 decision denied reimbursement of certain remediation costs associated with the petroleum release at the Wymore Amoco site at Schullsberg, Wisconsin. Petitioner, Harold D. Wymore of Cuba City, Wisconsin by November 15, 2006 petition to 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 January 30, 2007. Pursuant to proper notice, a class 3 administrative hearing was held on February 15, 2007 in Madison, Wisconsin, Steven Wickland, administrative law judge (ALJ) presiding. Following the hearing, the parties had additional time to file written comments or argument.

The issue for determination raised by the petition was: Whether the Department's decision dated November 10, 2006 was incorrect with regard to the disputed costs identified in Petitioner's appeal received by the Department on November 15, 2006.

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

Harold Wymore

Wymore Amoco  
619 S. Clinton Street  
Cuba City, Wisconsin 53807-1465

Department of Commerce  
201 West Washington Avenue  
PO Box 7838  
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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 November 15, 2006.

Petitioner appeared by telephone at the hearing and participated therein, and his consultant, Ronald Anderson, testified. State of Wisconsin Department of Commerce staff Tim Prosa and Eric Scott 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 Harold D. Wymore of a Department decision dated November 10, 2006. The decision determined that certain interest relevant to the petitioner's remediation actions at the site of its petroleum storage tank system was ineligible for PECFA reimbursement. The site location is State Road 11 and Bruce Street, Shullsburg, Wisconsin.

2. The appeal was received on November 15, 2006 and challenged the Department's decision as to PECFA reimbursement. The petition sought a hearing by the Department, with petitioner seeking to obtain further reimbursement in the amount of \$1,202.58.
3. Ronald Anderson, of METCO, La Crosse, Wisconsin was retained by petitioner to review the site investigation and remediation work at the site.
4. The five-year period for completion of a site investigation as required by Wis. Stat. § 101.143(4) (cc)1.c began on March 5, 1998 with Department receipt of notification for PECFA consideration.
5. The site investigation was not completed by October 1, 2003 and as of the hearing date was continuing.
6. The statutory period for eligibility for interest costs ended on October 1, 2003.
7. There was no Department extension of the time by which petitioner had to complete its site investigation.
8. The exhibits 1 through 5 were received into evidence at hearing.

#### Applicable Statute

Wisconsin Stat. §101.143(4)(cc)1.c. Ineligibility for interest reimbursement.

This statute provides, in pertinent part:

Ineligibility for interest reimbursement. Except as provided in subd. 2., if an applicant does not complete the investigation of the petroleum product discharge by the first day of the 61st month after the month in which the applicant notified the department under sub. (3)(a)3. or October 1, 2003, whichever is later, interest costs incurred by the applicant after the later of those days are not eligible costs.

### Discussion

On November 14, 2006 the petitioner timely petitioned the Department and requested an administrative hearing for review of the November 10, 2006 Department decision in PECFA claim number 53586-9999-11, pursuant to Comm. § 47.53, Wis. Admin. Code. The appeal was filed on behalf of the petitioner Harold D. Wymore of Wymore Amoco. The Department received the appeal on November 15, 2006. In its reimbursement decision, the Department reviewed a claim of \$20,220.17. Pursuant to its decision, after deductibles, the Department made a total payment to petitioner in the amount of \$17,145.53 and denied as not eligible the amount of \$1,202.58. The appeal challenged the Department's decision and requested a hearing on Petitioner's contention that \$1,202.58 should be awarded him.

The basis for the Department's decision was the statutory requirement that when, as the Department found here, a site investigation was not "completed by the first day of the 61<sup>st</sup> month after the month in which the applicant notified the Department under sub. (a)3 or October 1, 2003 whichever is later, interest costs incurred by the applicant after the later of those days are not eligible costs." (Exhibit 3, attachment at page 3.) This statutory reference, fully stated, is to Wis. Stat. § 101.143(4)(cc)1.c..

The denial in the amount of \$1,202.58 was set as the single issue for hearing.

Testimony of Ronald Anderson. Mr. Anderson is an engineer with the environmental consultant, METCO, of La Crosse, who worked for petitioner after site investigation and remedial work had been done (by another consultant, Envirogen) on the site at issue. He testified by telephone as to the statutory provision providing that when a site investigation is not completed within a certain time period (typically within five years, or October 1, 2003,

whichever date is later), interest costs beyond that date are not eligible costs for PECFA reimbursement. Wis. Stat. § 101.143(4)(cc)1.c more fully sets out the provision.

Mr. Anderson noted that while he was testifying on behalf of petitioner, he was not the consultant who did the work on the project. That is, the company he is with became involved later. The witness stated he was not certain when his firm “took over the project....” Ron Anderson said his testimony is based on his review of the project, and that he believes the project was done in a timely manner.

In October 2000 certain monitoring activities were reported by consultants (to DNR), with, states Mr. Anderson, subsequent reports filed in April 2002, October 2002, and March 5 2003. The Environgen consultant report (which Environgen March 2003 report is Exhibit 3 in the hearing) was the subject of considerable testimony. Speaking generally, Mr. Anderson gave his opinion that information was submitted timely and continually by petitioner or its consultants. He views the project as a complex site, which affected matters. He stated his firm was still working on the project as of the date of the hearing.

Mr. Anderson said that there are examples he knows of where site investigations have lasted beyond five years, often where the State asks for additional work. He said that, therefore, “to say that the investigation has to be completed within five years is not necessarily true.” On cross examination, Mr. Anderson could not name such sites. He also agreed that the statute has no exception that would allow interest eligibility beyond five years.

The 4/7/03 public bid document (Exhibit no. 2), as discussed by Mr. Anderson, has a scope of work. His company was brought into this matter as it successfully bid on the project.

The work scope was for excavation, monitoring well replacement, removal of excavated waste, survey, and a test. These requirements are part of site investigation, said Mr. Anderson.

Mr. Anderson agreed with respondent counsel that at the time METCO bid on the project, the bid document contained a written warning as to ineligible interest, as follows:

“Any interest costs incurred after October 1, 2003 are not eligible for reimbursement from the PECFA program. The successful bidder needs to be aware of this deadline and do whatever is in its power to ensure the work is completed on or before that date in order to maintain potential eligibility of interest costs for reimbursement.” (Exhibit 2, at Page 3.)

The witness agreed that in completing its bid, Mr. Anderson’s firm was aware of this provision and the October 1, 2003 deadline.

The witness said that in 2003 he had obtained a copy of notes from Linda Hanefeld, of the DNR (Department of Natural Resources), of a purported conversation between her and Ralph Smith. There was a hearsay objection to this testimony. Mr. Anderson said he was not present at this conversation, but said he has the 8/21/03 notes. Counsel for the Department objected to the testimony as an out-of-court statement made supposedly by a Department hydrogeologist, Ralph Smith, to Ms. Hanefeld. The witness stated he had no personal knowledge of the conversation, but is offering the document notes to prove a point. The objection was granted, as the testimony would be based on other than the witnesses’ knowledge, as the offered document contained hearsay.

As of March 5, 2003 the Envirogen report notes that the groundwater plume was not defined completely and on that basis, on cross examination, Ron Anderson acknowledged the site investigation was not complete.

Testimony of Tim Prosa. Mr. Prosa works with the Department's PECFA section, and has so for the last seven years, handling environmental claims for reimbursement. His current position is senior PECFA claims reviewer, held for the last two years. He audits claims in the program, determining what claims are eligible for reimbursement, guided by statute and Department code. Mr. Prosa audited this claim, denying the \$1,202.58 in interest costs.

The reason for denial was failure to complete the site investigation by October 1, 2003, pursuant to Wis. Stat. §101.143(4)(cc)1.c. Mr. Prosa said he had determined that the site investigation was still going on. Further, he stated that he had "no leeway" in applying the statute, so that he determined that no interest costs are eligible after October 1, 2003. Mr. Prosa regularly applies this statute when reviewing claims. To his knowledge, he and other PECFA claim reviewers apply the provision without leeway.

Mr. Prosa reviewed Exhibit 4, the DNR printed history of the chronology of this site. It reflects notification to the DNR at various times. Exhibit 5 is the Department's tracking of this site, which shows data and dates of events. The witness stated that exhibit 5 shows an SIR date (site investigation report date) with receipt by the Department of such report on August 13, 2004. The notification date to the Department is shown on Exhibit 5 as March 5, 1998 (meaning the five years is completed on or about March 5, 2003). When applying the interest statute, that is the date Mr. Prosa uses, adding five years, or (as here) applying the later statutory date of October 1, 2003. On cross examination by petitioner, Mr. Prosa said he is familiar with the public bid process, and agrees that site investigations serve to identify the extent of contamination. He himself is aware of no sites that are investigated beyond the five-year time period.

Testimony of Eric Scott. Mr. Scott, is with the Department's PECFA Bureau. He started his work in this field in 1992 with the Department's predecessor agency (DILHR). Mr. Scott has been a claim auditor, site reviewer, and since 2004 has been chief of PECFA site review section. In the role, he supervises over twenty PECFA site reviewers on medium and low-risk sites. Mr. Scott examined Exhibit 1 (the Envirogen letter of March 5, 2003). In his opinion, that letter summarizes work completed, work on site investigation yet to do, the fact that the letter states (at page 1) results shows that groundwater is not defined down gradient. The letter, at page 2, suggests further site investigation is needed. Mr. Scott, based on this document, agrees with the conclusion therein that the site investigation is not complete, as the extent of groundwater contamination is not yet defined. The March 5, 2003 letter to the Department, requests approval to exceed the Department site investigation cost cap. The Department denied this request, so, by statute the Department had the public bid process utilized. Eric Scott testified that the public bid document, Exhibit 2, includes additional site investigation work at page 2 (referring to the extent of contamination not being defined). In Mr. Scott's opinion, even when, as here, a petitioner has gone by the five-year (or October 1, 2003) deadline for site investigation interest eligibility purposes, the site investigation still must be completed.

#### 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 single issue to be decided in this matter is whether the Department's decision was incorrect with regard to the \$1,202.58 in interests costs denied because the site investigation was not completed within the statutory five-year period.
4. Because the petitioner did not complete the site investigation within the statutory time frames of Wis. Stat. § 101.143(4)(cc)1.c. interest costs beyond the date of October 1, 2003 are not reimbursable under PECFA.
5. Therefore, the Department properly denied the claim amount of \$1,202.58 in interest costs for remediation work, as ineligible 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 Department has the statutory authority to include interest costs as PECFA reimbursable when those interest costs, for site investigations, are made for such investigations which are within the statutory period.

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 \$1,202.58 from a claim in which \$19,250.51 was reviewed.

Essentially, the statutory deadline (the later of the five-year period or October 1, 2003) is mandatory. It is not subject to exceptions. Further, there was no testimony that the Department attempted to (or did) extend such deadline. Also, the public bid document made petitioner and its consultant aware of the statute as it pertains to a date after which PECFA interest costs are no longer eligible. The Department, therefore properly applied applicable law to the facts before it here. That decision was proper for reasons discussed above.

#### Decision

The Department's decision herein is affirmed.

#### NOTICE OF RIGHTS

This is a proposed decision under §227.48, Stats. 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, 201 W. Washington Avenue, 3<sup>rd</sup> Floor, PO Box 7838, Madison, WI 53707-7838.

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, 6<sup>th</sup> 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  
PO Box 7838  
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copies to:

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Date Mailed: \_\_\_\_\_

Mailed By: \_\_\_\_\_