

STATE OF WISCONSIN
Department of Commerce

In the Matter of the PECFA Appeal of

Anup K. Khullar
Kunal Enterprises
7222 N. Teutonia Avenue
Milwaukee, Wisconsin 53209

Hearing # 07-49
PECFA Claim No. 54166-2754-44

Proposed Findings of Fact, Conclusions of Law and Decision

Preliminary Recitals

The Department of Commerce (Department) August 29, 2007 decision denied reimbursement of certain costs associated with the remediation of property at 344 S. Main Street, Shawano, Wisconsin. The petitioner, Anup K. Khullar, Kunal Enterprises, by September 25, 2007 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 conference with the parties was held on January 8, 2008. Pursuant to proper notice, a class 3 administrative hearing was held on February 5, 2008 in Madison, Wisconsin, with Steven Wickland, administrative law judge presiding. Following the hearing, the briefs of the parties were completed in March 2008.

The issue for determination raised by the petition is: Whether the Department's decision of August 29, 2007 was incorrect with regard to the disputed issue identified in petitioner's appeal received by the Department September 25, 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 authority to issue a final decision in this matter has been reserved with the secretary by order of then Secretary Mary P. Burke dated September 26, 2007.

The petitioner appeared by counsel. The petitioner presented the testimony of its consulting engineer, Pratap Singh, of K. Singh & Associates, Inc. (“KSA”). The respondent presented the testimony of Department staff Mary Ann Gosda.

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

Findings of Fact

1. In 1991, remediation activities began at Clark Oil Station #1683, 344 S Main Street, Shawano, Wisconsin (hereinafter “the site”), owned by Clark Refining and Marketing, Inc., (hereinafter “Clark”). (Exhibit R-1.) On September 24, 1991, Clark (a/k/a Premcor) notified the Wisconsin Department of Natural Resources (hereinafter “DNR”) of a release or contamination found at that site. (Ex. R-1) Clark retained as its consultant Sigma Environmental Services (hereinafter, “Sigma”) in September, 1991. (Ex. P-1, page 1.) Clark then prepared a site investigation work plan which it submitted to DNR on October 25, 1991. After completion of a site investigation, Clark submitted a Site Investigation Report to DNR on October 12, 1994. A further listing of remediation activity at the site appears in Exhibit R-1 herein. That document is a DNR form entitled the “BRRTS [Bureau for Remediation and Redevelopment Tracking System] for Clark Oil Station #1683.” It sets out in chronological order the remediation activity at this leaking underground storage tank site. It notes, among other events, submission of a groundwater contour map and continued gathering data for the Remedial Action Plan (Ex. R-1, page 2), transfer of jurisdiction over the site from DNR to the Department, and the final entries of conditional closure on June 9, 2006 and activity closure by the Department on July 11, 2006 (Ex. R-1).
2. As Sigma conducted remediation work on site, Sigma submitted invoices to the Department for consulting services, remedial equipment, lab analysis, well drilling, and trucking and landfill expenses for the site, as reflected by remediation costs incurred each year at the site from 1991 through 2000. (Exhibit R-7, pages 1-9.)

3. In 1998, Clark (also known as Premcor Refining Group, Inc., hereinafter “Premcor”) sold the site to National Petroleum, Inc. (hereinafter “National”), pursuant to an agreement of purchase and sale executed on March 4, 1998, by those entities. (Exhibit R-2.) The sales agreement describes the ongoing remediation at the site and provides that the seller, Clark, will remain responsible for the on-site remediation at the site until a “no further action” letter is received. (Exhibit R-2, article 9.2.) National requested that the Department issue a PECFA eligibility letter, and the Department’s October 6, 1998 letter to National Investments, LLC (associated with National) stated there were tanks at that site that were eligible as was the discharge from those tank systems. (Exhibit P-2.) The letter, in effect, did not name or identify a responsible party, rather, it indicated that the tanks on site and costs of remediation are eligible. (Mary Ann Gosda testimony and text of letter.)
4. In April 1998, National hired KSA to perform a site investigation and remediation on the site. (Exhibit P-1, and testimony, Dr. Singh.)
5. National’s June 26, 2000 letter informs Clark that it retained KSA on April 16, 1998. It states that it wants Clark to discontinue any work on the site to prevent a duplication of efforts, and National advises that it will indemnify Clark from all further responsibility. (Ex. R-3.)
6. On December 15, 2000, National by letter to Premcor (formerly, Clark) advised that National is taking over the cleanup of the site, and provides the statement from National that (in its view) Premcor is no longer responsible for cleanup of the site. (Ex. R-4)

7. On April 9, 2001, Premcor, the responsible party (hereinafter “RP”) of record, by its letter to the Department and the DNR (with copy to National and KSA) states to those agencies that National – as of December 15, 2000 --- is the RP for the site. (Ex. R-5.) The letter further states that Premcor had responsibility for these sites until December 15, 2000, and that, therefore, any PECFA reimbursements for site work prior to that date should go to Premcor.
8. From March 4, 1998 (the date of the sales agreement) through December 15, 2000 (the date that Premcor stated it was no longer the responsible party -- albeit making such statement in its April 9, 2001 letter), the evidence (documents and testimony) indicates that Clark (a/k/a Premcor) was regarded as the responsible party for PECFA purposes. Effective December 15, 2000 Premcor stated that it relinquished its right, pursuant to the sales agreement, to control the site remediation and be PECFA-reimbursed for expenses beyond that date (Exhibit R-5, April 9, 2001 letter). By that letter, Premcor advised the Department, as well as DNR, and National and Pratap Singh that it was no longer the responsible party. (See exhibit R-5, Premcor April 9, 2001 correspondence.)
9. Claim One (Premcor) – not at issue herein. On June 19, 2002, Premcor (formerly Clark) submitted a PECFA claim for reimbursement of its costs until December 15, 2000. The Department considered the claim amount of \$91,869.72 submitted, and, less a deductible, paid Premcor the amount of \$84,776.23 in 2002. (Ex. R-7.)
10. In 2004, Kunal Enterprises purchased the site pursuant to a foreclosure sale, and had KSA continue at the site. Petitioner apparently paid the invoices for the KSA work done from 1998 to 2004.

11. Claim Two (Kunal Enterprises) – at issue herein. On June 25, 2007, Kunal Enterprises filed a PECFA claim for work from 1998 to 2007. The Department reviewed the claim, and on August 29, 2007 issued its decision. The Department paid petitioner a total PECFA payment of \$14,509.10. However, the Department denied \$18,092.46 of the \$33,008.07 submitted for reasons listed in Ex. R-6, attachments at 6. The Petitioner subsequently filed a request for hearing, concerning the amount denied, received by the Department September 25, 2007.
12. Basis for Department denial. The Department denied the \$18,092.46 in costs, viewing those costs as duplicative during 1998-2000 (two consultants doing site investigation work at the same time for different parties), thus not eligible for reimbursement. (Exhibit R-6, attachments at 6.)
13. Petitioner's exhibits P1 and P2 and Respondent's exhibits R-1 through R-9 were offered into evidence at hearing. There were no objections by either party and the exhibits were admitted into evidence at hearing.
14. Prior to hearing, petitioner, by its December 7, 2007 letter (admitted as Exhibit P-1 at hearing) to Department counsel, provided additional information to the Department. In that letter, petitioner cited the Department denial of the amount of \$18,092.46 on the basis of duplication of work for site assessment. (Hearing exhibit P-1 at page 2). The petitioner's December 7, 2007 letter further stated that petitioner now viewed as duplication by Kunal Enterprise (by its consultant K. Singh & Associates, Inc.) tasks in the amount of \$5,737.92, such that subtracting that amount from Kunal Enterprise's original claim (\$18,092.46 - \$5,737.92) leaves a remaining balance of \$12,354.54. (Exhibit P-1 at pages 2-3.)

15. The parties agreed at hearing that the petition herein is amended to reflect that there was overlap of work at the site to the amount of about \$5,737.92, an amount that counsel for petitioner at hearing said should be subtracted from the dollar amount at issue for hearing, leaving an amount for this appeal of \$12,354.54. That sum of claim is listed in Exhibit P-1.

Applicable Statutes and Codes

Wis. Stat. §101.143(3)(a) Who may submit a claim.

. . . [A]n 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: . . . 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).

Wis. Stat. §101.143(1)(d) "Operator" means any of the following:

1. A person who operates a petroleum product storage system, regardless of whether the system remains in operation and regardless of whether the person operates or permits the use of the system at the time environmental pollution occurs.
2. A subsidiary or parent corporation of the person specified under subd. 1.

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.
2. A subsidiary or parent corporation of the person specified under subd. 1.

Wisconsin Administrative Code Chapter Comm 47- Petroleum Environmental Cleanup Fund

Comm 47.015 Definitions

Comm 47.015(42)

(42) "Responsible party" means either the owner, operator, person owning a home oil tank system or claimant who is financially responsible for all costs of remediation of a discharge of petroleum product.

Comm 47.015(45)

(45) "Site investigation" means the investigation of a petroleum product discharge to provide the information necessary to define the nature, degree and extent of a contamination and to allow a remedial action alternative to be selected.

Comm 47.01(3)(a)

(a) The PECFA fund does not relieve a responsible party from liability. The individual or organization responsible for a contaminated property shall carry out the remediation of that property. PECFA's role is to provide monetary awards to responsible parties who have completed and paid for PECFA-approved remediation activities and services....

Comm 47.01(3)(b)

(b) The responsible party shall be the primary point for the control of costs within the PECFA program. The focus of the program will be to maintain the responsible party as the central control point throughout the claim process.

Comm 47.30(1) General

(a) *Responsible parties.* Responsible parties may submit claims to the department pursuant to s. 101.143 (4), Stats., for reimbursement of eligible costs incurred because of a petroleum product discharge from a petroleum product storage system or home oil tank system.

1. If a responsible party is not the sole owner of the site, an Owner Assignment Certification form (ERS-8070) shall be filed with the department to establish one entity to submit the claim and receive the award under this chapter.
2. 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: . . .

Comm 47.30(2) EXCLUSIONS FROM ELIGIBLE COSTS. The department has identified various costs determined to be ineligible for reimbursement. Section 101.143, Stats., lists specific

cost items which may not be reimbursable under the PECFA program. In order to control costs and provide awards for the most cost-effective remediations of petroleum-contaminated sites within the scope of this chapter, the following costs may not be reimbursed:

(a) Costs determined to be unrelated to remedial action activities under the scope of this chapter: . . .

8. Other costs that the department determines to be associated with, but not integral to, the remediation of a petroleum product discharge from a petroleum product storage system or home oil tank system. . . .

(b) Costs related to improper or incompetent remedial activities and services: . . .

4. Any costs associated with actions that exceed the necessary activities to bring a site to the required level of remediation;

NR 700.03(51) "Responsible party" means any person who is required to conduct a response action or is liable to reimburse the department for the costs incurred by the department to take response action under s. 292.11, 292.31 or 292.41, Stats.

Discussion

Two periods of time are of interest in considering the Department decision to deny petitioner's PECFA claim for site work prior to December 15, 2000. The 2001-2006 period provides background to the second time period.

February, 2001 – May, 2006. The Department paid the petitioner herein, Kunal Enterprises, the amount of \$14,509.10 in PECFA funds for work by KSA. (Exhibit R-6, including attachments.) This was proper (as Clark/Premcor was no longer the responsible party), and that PECFA reimbursement of costs is not at issue herein.

1998 to December 15, 2000.

Clark/Premcor claim (1998- December 15, 2000 period). The evidence indicates that Clark/Premcor in 1998 sold the site to National. Yet by sales agreement, the seller, Clark, retained responsibility for site remediation. After review of the Premcor claim for PECFA

reimbursement (for the 1998 – December 15, 2000 period, for ease of reference, hereinafter “the 1998-2000 period”), the Department paid the claim in the amount of \$84,776.23.

During this period, Sigma was the consultant, and Clark/Premcor was regarded as the responsible party. (Exhibit R-7.) This claim was properly paid to the only responsible party during the time period.

Kunal Enterprises / KSA (1998-2000 period). For this period, the Department denied the petitioner’s claim for reimbursement, such that the amount of \$18,092.46 was denied. Specifically, the Department decision (Breakdown of PECFA Costs, Exhibit R-6) reflects: Department review of a total dollar amount of \$33,008.07; Department determination that the amount not eligible for reimbursement is \$18,092.46. The Petitioner subsequently filed a request for hearing, received by the Department September 25, 2007.

The basis for the decision, set out in Exhibit R-6 is that “PECFA considers this work to be a duplication of work. PECFA has reimbursed the previous RP [responsible party] for investigation costs for work being done during this same time and by a different consultant that was hired by Premcor. Premcor was the responsible party until 12/15/00 per letter of 4/9/01. PECFA cannot reimburse for duplication of SI [site investigation] costs. It appears there were 2 consultants and both doing SI work at the same time but for different parties. This is considered a duplication of work and the previous responsible party has been reimbursed the costs of that SI work.” (Exhibit 6, attachments at page 6.)

Testimony.

Testimony of Pratap N. Singh. Pratap Singh has been with KSA, a civil and environmental engineering firm in Elm Grove, Wisconsin for twenty years. He is the

executive vice president, with a PhD in soil and water engineering. National retained KSA in February 1998 at the site. KSA was retained to address problems at Clark Oil, the costs thereof which form the basis of the claim denial, and is considered herein.

Dr. Singh testified that National acquired the site from Clark Oil. KSA was to complete environmental work, starting in 1998, at the site. National applied to the Department for PECFA eligibility for the site and the application was granted. He said that National decided to have KSA continue to do work at the site, as KSA was already doing work on other National properties. After some time, National transferred ownership of the site to Kunal Enterprises. Dr. Singh said that National later went out of business, and Kunal Enterprises took over the site and KSA continued at the site, as consultant to Kunal Enterprises. The witness said KSA started at the site herein on April 14, 1998 and continued through 2006, when site closure was attained.

Dr. Singh noted that petitioner herein previously submitted a PECFA claim to the Department, a portion of which was acceptable. Work that KSA did at the site between April 1998 and summer, 2000 was not acceptable to the Department, and those costs were denied. The Department held that was a duplication of work by KSA from April 1998 until December 2000. On direct examination, the witness was asked if he believed duplication occurred. He testified that there was a “minor level of duplication of effort.” In the time period that KSA was doing an environmental investigation, Sigma had left that project, yet Sigma continued to do some environmental testing, so there was some overlap said Dr. Singh. The witness said KSA was able to use some of the Sigma work.

The KSA letter of December 7, 2007 to the Department (Exhibit P-1) includes a table prepared by the witness, Dr. Singh, comparing KSA's work with that of Sigma. The table, an attachment to Exhibit P-1, provides the KSA view of tasks performed at the site (listed by month) by Sigma and by KSA. At the foot of the table appears the conclusion, "Total Maximum Duplication \$5,737.92."

Dr. Singh testified as to the duplication amount. First, he acknowledged that there was duplication by KSA at site of tasks also performed by Sigma -- thereby accounting for petitioner's reduction of its original PECFA claim denial (that is, \$18,092.46 denied by the Department in August 2007, minus \$5,737.92 of overlap or duplication of services by KSA, for a balance of \$12,354.54 at issue herein, per Exhibit P-1, page 3). Second, in his testimony, Dr. Singh presented petitioner's view that the individual tasks and costs (making up the reduced amount of \$12,354.54) were not duplicative and should be reimbursed by the Department. Those tasks and the comparison are listed in exhibit P-1. The Department reaches a different conclusion, as Department staff testified that there was duplication.

Testimony of Mary Ann Gosda. Ms. Gosda has worked for Department of Commerce, in the PECFA program since 1990, starting in PECFA claims review. In the last five years, she has trained all the new employees for that section. She is currently in the position of "PECFA Program Specialist, Senior." The senior designation means that "you are one of the advanced reviewers... and do the more complicated files." Her responsibilities include "reviewing claims, doing pre-audits of claims for some of the banks for sites where they will not give loans for certain consultants, and also overseeing some problem sites."

Ms. Gosda reviewed the claims at issue herein. She reviewed the first claim (from Sigma) and the second claim (from KSA as consultant). She “compared the dates and the work being done and made the decision based on two consultants being on the site at the same time doing the site investigation as a duplication of work.” She discussed Exhibit R-7, a spread sheet for Sigma Environmental Services’ consulting work at the Clark Oil station that started in 1991, with services listed there into 2002. The initial date of invoice paid (page 1) is 10/22/1991. Ms. Gosda thought the last date of services completed was in 2001. The last date of services associated with the first claim is 3/25/2002 (page 9).

The witness reviewed Exhibit P-2, the Department’s October 6, 1998 letter to National Investments LLC, entitled “Claim Number and Site Eligibility....” The letter indicates which tanks are eligible for PECFA – indicating to the witness “...that these tanks are registered at the site and that they are eligible tanks.” In terms of PECFA eligibility, that means “they are eligible for reimbursement if the costs are eligible because they are registered properly, they’ve been removed.” Asked if the letter (Exhibit P-2) indicates who is eligible to claim the costs associated with the tanks, Ms. Gosda noted that the letter is addressed to National Investments (Kenosha, Wisconsin), but that she has no idea if they are the owner, adding that the letter itself does not mean that they were the owner of the tanks at the time.

Ms. Gosda noted that, typically, those who request letters of (PECFA) eligibility from the Department are “owners, operators, and purchasers of property..., real estate agents.” Asked if, when eligibility is requested, the Department does not inquire if the one asking is the owner, she said “No, not in 1998. In the present time, if one says they are the owner, yet

the Department determines that the tanks are not registered to their name, they are told they will have to correct that.” Her testimony was that the Department, then in 1998, would not automatically have taken a request for tank eligibility (from, here, National Investment), as a notification that National Investment was now the owner and would be making the claim. Staff would review the request for eligibility to see if the requester identifies itself as the owner.

Gosda views exhibit R-5, the April 9 2001 letter, as Premcor stating that it is the RP until 12/15/2000. The Premcor letter to the Department states (as to the site at issue, and several others): “This letter serves as notification that as of December 15, 2000, the responsible party for the investigation and remediation of the subject sites is now National Petroleum, Inc. (Kenosha, Wisconsin).” As a claim reviewer, the significance of this letter to Ms. Gosda is her conclusion that National was not going to take over the site until after December 15, 2000.

The witness reviewed Exhibits R-3 and R-4. Exhibit R-3 is National’s June 26, 2000 letter to Clark Refining & Marketing, Inc., advising that KSA was retained to provide restoration services at the site herein, effective April 16, 1998. In the letter, National tells Clark Refining: “Please have your consultants discontinue any environmental services...in order to prevent a duplication of efforts.” (Exhibit R-3.)

The December 15, 2000 National, Inc. letter to Premcor (Exhibit R-4) notes that National Investments has taken over the cleanup herein (and at other sites), and that Premcor Refining Group is no longer responsible for cleanup. Ms. Gosda testified that those letters

support her interpretation of Exhibit R-5. Based thereon, she believes that by December 15, 2000, National informed the recipients of its intent to take over the site(s).

Exhibit R-8 is the Premcor May 23, 2000 letter to the Department (with copy to KSA). The letter states, in part: “As the Responsible Party, Premcor has been (as both owner and former owner) the only entity to have incurred costs integral to the investigation/remediation of both sites. Therefore, Premcor is the sole party eligible to submit claims for any awards from the PECFA program.” This letter, Ms. Gosda testified, helped her act on the basis that Premcor was the responsible party, and the only entity the Department could reimburse for costs.

Continuing her testimony, Ms. Gosda stated that the Department will not pay for two site investigations being conducted simultaneously by different parties. This is, the witness noted, “Because that is usually considered a duplication of costs, and PECFA doesn’t pay for duplication of costs.” While Dr. Singh testified that certain activities KSA engaged in were not duplication of effort, Ms. Gosda stated that in her opinion, “Based on the information in the reports, it is still two consultants doing a site investigation at the same time on the same site.” During her testimony, she said she was familiar with Wis. Admin. Code Comm 47.

Asked if the Department cares what individual soil borings are (during the investigation) or that there is a site investigation going on, she replied that “That there is a site investigation going on. Consultants may do different soil borings, do different monitoring wells, but that doesn’t mean that it was all necessary....” (Emphasis added.)

Conclusions based on documents and testimony - There was a duplication of services, such that the amount at issue was properly denied.

Mary Ann Gosda provided credible testimony, displaying both a working knowledge of Department regulations and a practicable application of those rules to this case. She has considerable experience in the PECFA program from 1990 to the present, and some years of responsibility as senior claims reviewer. Ms. Gosda is well familiar with the background here, having worked on both claims one and two. Her reasoning as to denial for duplicative costs is based on her review of the claims and on Department PECFA rules which prohibit payment for duplicative or unnecessary costs.

Comm 47.30(1)(a) pertains to eligible costs in PECFA matters. Comm 47.30(2) deals with exclusions:

(2) EXCLUSIONS FROM ELIGIBLE COSTS. The department has identified various costs determined to be ineligible for reimbursement. Section 101.143, Stats., lists specific cost items which may not be reimbursable under the PECFA program. In order to control costs and provide awards for the most cost-effective remediations of petroleum-contaminated sites within the scope of this chapter, the following costs may not be reimbursed:

- (a) Costs determined to be unrelated to remedial action ...under the scope of this chapter:
- (b) Costs related to improper or incompetent remedial activities and services:
 1. Costs associated with incompetent or non-effective cleanup actions which were not based upon sound professional and scientific judgment;
 2. Costs of redoing remedial action activities or remedial action work which was incomplete or incompetent;
 3. Costs associated with rework on remedial systems to accommodate construction, upgrades, retrofits, or redevelopment projects;
 4. Any costs associated with actions that exceed the necessary activities to bring a site to the required level of remediation;

In this regard, Mary Ann Gosda testified that the KSA activities at the site during 1998-2000 were not necessary, since "...there were two consultants [Sigma and KSA] doing a site investigation on the same site at the same time." She testified that when there is a site investigation, "Consultants may do different soil borings, do different monitoring wells, but that doesn't mean that it was all necessary...." This view accords with the purpose of PECFA as to containing costs: "Comm 47.01, Purpose. (4) Control of costs. The framework for the control of costs within the PECFA program shall be based upon the responsible party minimizing costs in all phases of the remediation."

The regulations the Department relies on are in Wis. Adm. Code Comm Chapter 47. Such administrative rules have the force of law. Law Enforcement Stds. Bd. v. Lyndon Station, 101 Wis. 2d 472, 488-89, 305 N.W.2d 89 (1981).

Petitioner (and its consultant, KSA) lacked responsible party status during 1998-2000.

This reason for denying reimbursement is cited in the decision which notes that only Premcor was the responsible party until 12/15/00, per letter of 4/9/01. (Exhibit R-6, attachment at page 6.) Application of Department regulations defining "responsible party" demonstrates that in 1998-2000 the only RP was Clark / Premcor, such that National's successor – Kunal Enterprises – was not RP during the time period, and therefore not eligible to claim PECFA reimbursement.

Several provisions -- definitions within Comm Chapter 47 -- support the Department's decision by application of Department PECFA rules to the facts herein.

Comm 47.015(42), provides: Responsible party" means either the owner, operator, person owning a home oil tank system or claimant who is financially responsible for all costs of remediation of a discharge of petroleum product.

During 1998-2000, only Clark was the responsible party – pursuant to the sales agreement which included this site, Clark/Premcor was financially and contractually in control of remediation work at the site -- not National. And, since petitioner, Kunal Enterprises, bought the site from one who did not have responsibility for the site (National), it follows that during 1998-2000 neither petitioner Kunal Enterprises nor its consultant KSA had responsibility for the site – as that responsibility was retained by Clark/ Premcor.

The sales agreement provides, in pertinent part:

THIS AGREEMENT OF PURCHASE AND SALE (“Agreement”) is made and entered into as of the 27th day of February, 1998 (the “Effective Date”) by and between CLARK REFINING & MARKETING, INC., a Delaware corporation (“Seller”) and NATIONAL PETROLEUM, INC., a Wisconsin corporation (“Purchaser”).

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

ARTICLE 9

Environmental Condition (On-going remediation)

Purchaser acknowledges that the Property was operated by Seller or Seller’s predecessors in title as a service station for the storage, sale, transfer or distribution of motor vehicle fuels, petroleum products and/or derivatives containing hydrocarbons. The term “NFA Letter” as used in this Article 9 shall mean a no further action (or the equivalent) letter from the appropriate state agency(ies) collectively known as the department of natural resources (or the equivalent) (“DNR”) where the particular Property is located, in which the DNR has determined that the owner or operator of USTS has no further obligations to remediate, monitor or perform any other activity concerning the delineated presence of petroleum hydrocarbons on the Property relating to a previously-assigned specific incident number. Except as expressly set forth below, Seller shall have no obligation to Purchaser with respect to the environmental condition of the Property.

9.1 There is ongoing remediation relation to a known, reportable release of petroleum hydrocarbons which occurred prior to Closing at the Service Stations known as Clark Store Nos. 117, 125, 1090, and 1683 (the “Remediation Sites”). Purchaser acknowledges that the tanks and lines

located at the Remediation Sites may or may not be in compliance with 42 U.S.C. §6991 et seq. and the regulations promulgated pursuant thereto.

9.2 Seller has performed or is in the process of performing an environmental site assessment of the Remediation Sites (“Assessment”) relating to a known, reportable release of petroleum hydrocarbons which occurred prior to Closing. A copy of each report setting forth the results of the Assessment and any additional testing, studies and investigations (“Additional Assessments”), if any, have been or will be provided to Purchaser prior to Closing. Purchaser agrees to keep the Assessment, Additional Assessments and reports confidential and not to disclose the same to any third party, unless specifically required to do so by applicable law; and if so required, Purchaser shall simultaneously provide to Seller a copy of any information submitted to such third party. Seller at its sole cost and expense, shall complete such on-site remediation for each Remediation Site provided, however, Seller’s remediation obligation as to any Remediation Site shall be complete upon the issuance of a “no further action” or similar letter from the applicable state environmental protection agency or department of natural resources. Seller agrees to indemnify and hold Purchaser harmless from any liability resulting from Seller’s failure to remediate a Remediation Site as provided in this Section 9.2.

(Emphasis added; Clark Store 1683 is the site at issue herein.)

Petitioner herein admits, candidly, that even though National may have wanted to assert responsibility, it was quite late in even notifying the Department of its thoughts: “National, Inc. failed to inform the Department of Commerce that it assumed status as responsible party.” (Brief at page 1.) Also, even had National written such notice to the Department in 1998 (rather than in 2000), asserting such status does not mean that one becomes such.

Other Department rules support a rationale of reimbursement on to the responsible party – Clark / Premcor during 1998-2000.

Comm 47.01(3)(a) provides:

(a) The PECFA fund does not relieve a responsible party from liability. The individual or organization responsible for a contaminated property shall carry out the remediation of that property. PECFA's role is to provide monetary awards to responsible parties who have completed and paid for PECFA-approved remediation activities and services....

This provision reinforces the notion that PECFA focuses on reimbursing parties actually responsible for a site. Here, that responsible party during the period 1998-2000 was clearly Clark/Premcor. National was not the RP, but had allowed Clark/Premcor (by the sales agreement) to retain financial and actual control of remediation of the site at this time.

Also supporting the decision is Comm 47.01(3)(b), which provides:

(b) The responsible party shall be the primary point for the control of costs within the PECFA program. The focus of the program will be to maintain the responsible party as the central control point throughout the claim process.

Again, this party was Clark / Premcor, so that National was not the point for cost control, lacked RP status during 1998-2000, meaning, of course, that National transfer of the site in 1998 to petitioner Kunal Enterprises did not transfer RP status, such that neither Kunal Enterprises nor KSA have standing for site work reimbursement during that time.

The KSA testimony at hearing cannot overcome the conclusion that the Department, by PECFA, cannot pay costs to other than the responsible party. Thus, even assuming (not necessarily accepting the KSA view that the remaining claim costs are not duplicative), the law and regulations governing PECFA provide that eligible, reasonable remediation costs at a site are only paid to the responsible party during the time period the remediation work was accomplished. For the period covered by the claim denial herein, the petitioner and its consultant simply lack status to make costs during this time reimbursable.

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 initial petition to the Department herein in September, 2007 has been amended by petitioner's December 7, 2007 and confirmed at hearing to reduce the initial claim of \$18,092.46 to the amount of \$12,354.54.
4. The costs to petitioner during 1998-2000 were duplicative of work accomplished by Sigma on behalf of Clark / Premcor, as pursuant to Department rules and testimony were properly denied.
5. The Department, by rule, will reimburse only a claimant who is a responsible party, i.e., a claimant "who is financially responsible for all costs of remediation of a discharge of a petroleum product. Comm. 47.015(42). By virtue of the 1998 sales agreement between Clark and National, the latter was not financially responsible for all costs at the site, as Clark/Premcor retained that responsibility. Clark did not relinquish such responsibility until, by its April 9, 2001 letter, identified that as of December 15, 2000 Clark / Premcor transferred responsibility to National. Because during the period March 4, 1998 through December 15, 2000, National lacked responsible party status under PECFA, neither National nor the consultant KSA, were eligible to be reimbursed for any remediation actions at the site. The petitioner, Kunal Enterprise, had no standing during that time period as a responsible party.
6. The only responsible party eligible for PECFA reimbursement during the 1998 – December 15, 2000 period is Clark (a/k/a Premcor), and that reimbursement was made by the Department in response to Claim One.

7. Petitioner, Kunal Enterprises was not the responsible party prior to December 15, 2000, and thus cannot be reimbursed by PECFA for expenses at the site for costs in 1998-2000.
8. Therefore, the Department properly denied the claim at issue herein, as ineligible for PECFA reimbursement.

Decision

The Department's decision herein is affirmed.

Steven Wickland
Administrative Law Judge

Dated

copies to:

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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.

Date Mailed: _____

Mailed By: _____