

STATE OF WISCONSIN
Department of Commerce

In the Matter of the PECFA Appeal of

Sharif Malik
Dasada Property Management
11746 W. Van Beek Avenue
Greenfield, Wisconsin 53228

Hearing # 09-18
PECFA Claim # 53223-4709-09

Proposed Findings of Fact, Conclusions of Law, and Decision

The Department of Commerce ("Department") by its May 19, 2009 decision denied reimbursement of certain remediation costs at the Dasada Property Management site at 5909 W. Good Hope Road, Milwaukee, Wisconsin. Sharif Malik of Greenfield, Wisconsin by June 18, 2009 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 October 20, 2009. Pursuant to proper notice, a class 3 administrative hearing was held on November 11, 2009 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 May 19, 2009 was incorrect with regard to the disputed costs identified in Petitioner's appeal received by the Department on June 18, 2009.

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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Dasada Property Management
11746 W. Van Beek Avenue
Greenfield, Wisconsin 53228

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

By: Laura M. Varriale
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The authority to issue a final decision in this matter remains with Department of Commerce Secretary Richard J. Leinenkugel by effect of his order dated June 22, 2009.

Petitioner appeared by telephone at the hearing and testified. Petitioner's consultant, Ken Konicek, of Konicek Environmental Consulting, Port Washington, Wisconsin, appeared by telephone and testified on behalf of petitioner. Department of Commerce staff member Tim Prosa 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 Sharif Malik, Dasada Property Management, Greenfield, Wisconsin of a Department decision dated May 19, 2009. 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.

2. The appeal was received on June 18, 2009 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 \$9,336.55.
3. Petitioner testified that a consultant (doing site work prior to claim preparation by Ken Konicek) performed site investigation activities at the site at a cost of \$9,336.55, but Mr. Malik had no evidence beyond his testimony – such as in the form of supporting documents -- as to Department preapproval of the site work which led to the expense claimed.
4. Mr. Konicek did no work at the site. Rather, he reviewed Sharif Malik's file on the site investigation. He was unable to find in his review any Department authorization or preapproval for such site investigation expenses that may have been incurred as claimed.
5. The Department, in response to an earlier claim on this site, had previously paid reimbursement in the amount of \$45,454.81 pursuant to its PECFA program. (Department decision of May 19, 2009 at page 2.)
6. No exhibits were offered into evidence at hearing.

Applicable Statutes

Wisconsin Stat. §101.143

Petroleum storage remedial action; financial assistance

(2) Powers and duties of the department.

(b) The department shall promote the program under this section to persons who may be eligible for awards under this section.

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

(c) Investigations, remedial action plans and remedial action activities. Before submitting an application under par. (f), except as provided under par. (g), an owner or operator or the person shall do all of the following:

1. Complete an investigation to determine the extent of environmental damage caused by a discharge from a petroleum product storage system or home oil tank system.

2. Prepare a remedial action plan that identifies specific remedial action activities proposed to be conducted under subd. 3. and submit the remedial action plan to the department.
3. Conduct all remedial action activities at the site of the discharge from the petroleum product storage system or home oil tank system necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge as required under s. 292.11.
4. Receive written approval from the department of natural resources or, if the discharge is covered under s. 101.144 (2) (b), from the department of commerce that the remedial action activities performed under subd. 3. meet the requirements of s. 292.11.

101.143(3)(cp) Bidding process.

(1) Except as provided in subds. 2. to 5., if the department of natural resources or, if the site is covered under s. 101.144 (2) (b), the department of commerce estimates that the cost to complete a site investigation, remedial action plan and remedial action for an occurrence exceeds \$60,000, the department of commerce shall implement a competitive public bidding process to obtain information to assist in making the determination under par. (cs). (Emphasis added)

Applicable Administrative Rules
Wis. Admin. Code Chapter Comm 47

PETROLEUM ENVIRONMENTAL CLEANUP FUND
Subchapter I — Purpose, Authority and Application

Comm § 47.01 Purpose.

(1) PECFA Fund. The purpose of this chapter is to provide information on the Petroleum Environmental Cleanup Fund program...outline the processes and procedures for filing a claim for an eligible remediation and specify the process of determining award amounts.

(2) STATUTORY AUTHORITY. This chapter is adopted pursuant to ss. 101.143 and 101.144, Stats., as created by 1987 Wis. Act 399 and subsequent acts through 1997 Wis. Act 27.

(3) INTENT OF PECFA. (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 service.... (Emphasis added.)

(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. (Emphasis added.)

(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.

Discussion

On June 19, 2009 the petitioner timely petitioned the Department requesting an administrative hearing for review of the June 19, 2009 Department decision in PECFA claim number 53223-4709-09, pursuant to Comm. § 47.53, Wis. Admin. Code. The Department reviewed a claim of \$9,336.55. Pursuant to its decision, the Department denied as not eligible the entire claimed amount of \$9,336.55. The appeal challenged the Department's decision and requested a hearing on Petitioner's contention that \$9,336.55 should be awarded him.

The basis for the Department's decision was failure of petitioner to comply with the requirements of Wis. Admin. Code Comm Ch. 47, specifically, no commodity bids were submitted and the costs exceed the approved site investigation cap dated May 29, 2002. (Department decision of May 19, 2009 at page 1.)

The denial in the amount of \$9,336.55 was set as the single issue for hearing.

Testimony of Ken Konicek. Mr. Konicek is a consulting engineer, in Port Washington, Wisconsin. He testified that he was not involved in work at the site. Rather, in 2008, he was brought in to prepare and file this claim for petitioner. To do so, he reviewed Department regulations and petitioner's file.

In preparing the claim, he testified, he was unable to obtain certain documents from the Department of Natural Resources (DNR) or from an earlier consultant for petitioner, which consultant had apparently performed site investigation work. Such documents are necessary in order to establish the amount of the claim, as well as the appropriateness of such expenditure for

PECFA reimbursement. Mr. Konicek testified that he simply can not establish the basis for petitioner to make the Comm 47 claim.

The witness testified in response to questions from the administrative law judge. Neither petitioner nor respondent had questions for the witness following those initial questions and the witness' responses thereto.

Testimony of Sharif Malik. The petitioner is in the gasoline and convenience store business on Good Hope Road, Milwaukee, Wisconsin. Site activities were discussed. Mr. Malik purchased this former Clark Oil site in 2002 and sold it in December, 2004. He stated that a consultant worked for him at the site in 2004, and he paid for site work by check, approximately \$9,000. This is the PECFA claim denial that is the subject of this hearing.

Mr. Malik said that he trusted the earlier consultant, AXIS Consulting, to file the claim, but the claim was denied. He testified that he did not know the law on these matters. He said that proceeding in good faith, he hired and paid the consultant for and certain work done. Mr. Malik, discussing site work and reimbursement claims, said that as a layman, unfamiliar with the law, he relied on the earlier consultant, and the money was spent on site work.

Cross examination of Mr. Malik. Mr. Malik stated that he has no copy of any letter (advising, for instance, that site work would be completed for equal to or less than \$60,000) that might have been written by the earlier consultant to the Department. He also has no copy of any consultant letter that involves bidding on his site. Following these two witnesses, petitioner had no further testimony, and petitioner's case at hearing was considered complete.

Testimony of Tim Prosa. Mr. Prosa works with the Department's PECFA section, in Madison. He has been a PECFA claim reviewer for approximately ten years, with the last five

years as a senior claim reviewer. His duties include auditing environmental claims for reimbursement under the PECFA program, determining what claim costs are eligible for reimbursement, guided by statute and Department code. He audited this claim.

Mr. Prosa testified that he denied all the costs because there were no approvals from the Department for the work that was done at the site. He discussed the Department process for such claims prior to May 1, 2006 pursuant to the former Comm Chapter 47. Prior to May 1, 2006 the witness said a consultant working for an RP -- a responsible party -- could spend up to \$40,000 conducting a site investigation before the consultant went to bid or sought Department approval to expend additional funds beyond the \$40,000.

Mr. Prosa noted that, at this site, an earlier claimant at the site had exhausted the \$40,000. That is, the \$40,000 (maximum site investigation amount at a site) had already been claimed and reimbursed in an earlier claim (as well as an additional approval cap amount for site investigation). And importantly, there was no further request from Mr. Malik or consultant for a budget or any other additional funds.

Mr. Prosa was asked to explain a funding situation of "\$60K" that Mr. Konicek referenced in his testimony. The witness stated that there was a time period from approximately 1999 through May 1, 2006 that consultant firms doing environmental work on a site that was PECFA-eligible, could provide to the Department a "less-than-60K-notification." This notification meant "that they had determined that they could probably get the site cleaned up and get conditional closure from either the Department of Natural Resources or the Department of Commerce, whichever had jurisdiction, and that they could get the work done for less than \$60,000."

In the event such notification was provided, the benefit was that by holding costs to under \$60,000, the petitioner could complete all work without obtaining three comparative bids for any work. Mr. Prosa testified that his review of all Department files on this site, he did not find any such notification made to the Department. Additionally, there was no correspondence asking for Department approval for exceeding the existing \$40,000 site investigation cap. Thus, a request for cap exceedence had not been received from the previous consultant, AXIS.

Upon conclusion of respondent counsel's direct examination of the witness, neither Mr. Malik nor Mr. Konicek had any questions for Mr. Prosa on cross examination. The presentation of this testimony concluded the Department's case. When asked by the administrative law judge if petitioner had any rebuttal testimony, the petitioner said he had nothing further to offer.

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 deny costs as PECFA reimbursable when those costs, here for site investigation work, are not preapproved by the Department (when, as here, an established cost cap is already in place) and the additional expenses (here for \$9,336.55) exceed the cap and have not been requested as an authorized PECFA additional expense.

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 denial of the entirety of the \$9,336.55 claim was proper for reasons discussed above. The Department's decision 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. Wis. Admin. Code Chapter Comm 47 provides that the Department may deny site investigation expenses that exceed the established cap or are otherwise ineligible, which is the circumstance here.
4. The single issue to be decided in this matter is whether the Department's decision was incorrect with regard to the \$9,336.551 in consultant site investigation costs denied.
5. The Department (and petitioner's) testimony establishes that the petitioner may have incurred the claimed costs in good faith and in reliance upon the assumed expertise of an earlier consultant, but, further, that such costs exceeded the existing PECFA cap for the site and there is no documentation that petitioner or its earlier consultant ever requested and received Department approval for the additional expenses now claimed.
6. Therefore, the Department properly denied claimed amount, as ineligible for PECFA reimbursement.

Decision

The Department's decision herein is affirmed.

Dated: _____

Steven Wickland
Administrative Law Judge
Wisconsin Department of Commerce
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copies to:

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NOTICE TO PARTIES

Request for Rehearing

This is a proposed agency decision under §227.48, Stats. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send or deliver a written request to Rehearing Request, Department of Commerce, 201 W. Washington Avenue, 3rd Floor, PO Box 7838, Madison, WI 53707-7838. Rehearing requests may also be filed by fax at the following number: (608) 267-1381. Faxed rehearing requests received after 4:30 p.m. on a business day will be filed effective the next business day.

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

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

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

Date Mailed: _____

Mailed By: _____