

STATE OF WISCONSIN
Department of Commerce

*In the Matter of the Claim for
Reimbursement under the PECFA
Program by*

Delbert G. Anderson
Andy's Tire & Muffler
W5997 S Elk Drive
Westfield, Wisconsin 53964

Hearing # 10-12
PECFA Claim # 53575-1529-20

Proposed Findings of Fact, Conclusions of Law, and Decision

The Department of Commerce (Department) April 7, 2010 decision denied reimbursement of certain remediation costs concerning a petroleum release and cleanup thereof at the site located at 220 Janesville Street, Oregon, Wisconsin. Petitioner, Delbert G. Anderson, Andy's Tire & Muffler, Westfield, Wisconsin by its April 20, 2010 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 December 7, 2010. Pursuant to proper notice, a class 3 administrative hearing was held on January 11, 2011, 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 April 7, 2010 was incorrect with regard to the disputed costs identified in Petitioner's appeal received April 20, 2010.

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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Westfield, Wisconsin 53964

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

By: Laura M. Varriale
Assistant Legal Counsel

The authority to issue a final decision in this matter remains with Department of Commerce designee of then Secretary Richard J. Leinenkugel, by effect of his order dated April 21, 2010.

Petitioner, Delbert Anderson, of Andy's Tire & Muffler, appeared in person at the hearing and testified. State of Wisconsin Department of Commerce staff Timothy 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 Delbert Anderson, Andy's Tire & Muffler, of a Department decision dated April 7, 2010. The decision determined that certain amounts relevant to the petitioner's remediation actions at the site of its petroleum storage tank system were ineligible for PECFA reimbursement. The site location is 220 Janesville Street, Oregon, Wisconsin.
(Exhibit 3.)

2. Prior to the April 20, 2010 petition at issue herein being filed, Petitioner herein had filed two PECFA claims with the Department, for reimbursement for cleanup work on this same site, which the Department had reviewed and made PECFA reimbursements of eligible amounts to petitioner.

3. The appeal at issue herein was received on April 20, 2010 and challenged the Department's decision as to PECFA reimbursement, which decision denied payment of certain loan interest amounts. The petition sought a hearing by the Department, seeking to obtain further reimbursement in the amount of \$1,990.06.

4. Exhibits 1 through 3 were received into evidence at hearing.

5. The Department's May 10, 2007 letter to petitioner (Exhibit 1) notified petitioner that the Department had determined that "...additional activities must be conducted for the site referenced above. A cost cap for the activities will be established through the PECFA public bidding process." The letter further stated that until a cost cap is established through public bidding, work at the site must cease, and that a claim for eligible costs incurred up to the date of the letter (May 10, 2007) had to be submitted to the Department no later than 120 days after the Department letter to petitioner. (Exhibit 1, page 6.) A copy of the letter was sent to petitioner's consultant at the time.

6. Petitioner did not file its claim containing the interest amount of \$1,990.06 until well beyond the 120-day period established in the Department's May 10, 2007 letter to petitioner. The claim was filed on May 21, 2008.

7. The total period of ineligible interest, as determined by the Department and explained by hearing testimony by Department staff Tim Prosa (and not otherwise rebutted by other hearing testimony), began on May 10, 2007 and concluded on May 21, 2008.

Applicable Administrative Rule
CHAPTER Comm 47
PETROLEUM ENVIRONMENTAL CLEANUP FUND
SUBCHAPTER I — PURPOSE, AUTHORITY AND APPLICATION

Comm 47.01 Purpose.

Comm 47.01(1) PECFA FUND. The purpose of this chapter is to provide information on the Petroleum Environmental Cleanup Fund program, also referred to as the Petroleum Storage Environmental Remedial Action Fund and the Petroleum Storage Remediation Fund; outline the processes and procedures for filing a claim for an eligible remediation and specify the process of determining award amount.

Comm 47.01(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.

Comm 47.625 Claim submittal required.

Comm 47.625(1) ASSIGNMENT TO PUBLIC BIDDING. Whenever the department notifies a responsible party and the consulting firm that an occurrence is subject to the public bidding process, a claim for eligible costs incurred up to then shall be submitted to the department, no later than 120 days after the date of the department's notice (emphasis added).

Comm 47.625(3) INELIGIBLE INTEREST COSTS.

Comm 47.625(3)(a) Failure to file a claim prior to the deadline prescribed in sub. (1) shall result in ineligibility of any interest expenses incurred between the date of the department's notice and the date a claim is filed. (Emphasis added.)

Discussion

On April 20, 2010 the petitioner timely petitioned the Department and requested an administrative hearing for review of the April 7, 2010 Department decision in PECFA claim number 53575-1529-20, pursuant to Comm. § 47.53, Wis. Admin. Code. The appeal was filed on behalf of the petitioner Delbert G. Anderson, Andy's Tire & Muffler, Westfield, Wisconsin. The Department received the appeal on April 20, 2010. The appeal challenged the Department's decision and requested a hearing on petitioner's contention that an additional \$1,990.06 in PECFA reimbursement should be awarded to petitioner. Specifically the appeal states:

In receipt of the recent reimbursement from PECFA dated April 7, 2010, there were costs considered ineligible by the department. After review of the costs denied, I would like to submit an appeal for the ineligible amounts. The total dollar amount being appealed is \$1,990.06.

The reason given for the costs being denied is that it was duplicate interest processed in the previous claim.

The interest amount, \$1,990.06, is the interest that was advanced on the loan on 7/31/08. In the previous claim, Claim #2, the claim was paid on 07/29/08, and interest was paid through 05/10/07. Therefore, I do not believe that the interest from 07/31/08, \$1,990.06, was paid on the previous claim.

The basis for the Department's decision was Interest - Late Claim under Comm 47.625(3)

"Note to Claimant: Bank costs submitted through 4/21//2008. Per Comm 47.625 bank costs are non-eligible from 5/10/2007 through 5/21/2008." (Exhibit 3, page 4.)

The denial in the amount of \$1,990.06 was set as the single issue for hearing.

Testimony of Timothy Prosa. Mr. Prosa is a Department of Commerce employee based in the Madison office, and is a senior claim reviewer in the Department's PECFA program. He

has been in that position since 2004-2005. His duties include auditing environmental claims, i.e., those claims filed by responsible parties, following contamination cleanups of qualifying sites, sites such as gasoline stations with underground storage tanks.

The witness explained the PECFA claim audit process, which he said typically occurs when a person "who has contamination and they use our program, they hire a consultant to do the cleanup work usually. Then there's costs incurred and those costs are reimbursable less a deductible, if they follow the rules of the program. So when it comes time to submit a claim, the consultant usually helps the responsible party...which would be Mr. Anderson." A claim is submitted pursuant to PECFA and Prosa would be assigned to audit the claim.

The witness noted that for this site, petitioner over time submitted three claims for PECFA reimbursement. He stated that he had audited all three claims for the site or property in question herein. Mr. Prosa said that while this case deals only with the third and final claim, he would need to discuss claim 2 in his testimony. Prosa testified that claim 2 was never appealed.

Mr. Prosa testified as to the contents and import of Exhibit 1. He stated that this six-page exhibit relates to claim 2, and contains bank information on interest charges related to an M&I bank loan that petitioner secured to do the cleanup work at the site herein. Prosa's handwritten notes on Exhibit 1, page 1 relate to the date of claim 2 ("5-21-08") and the date claim 2 was paid by the Department ("7-29-08"). He said that the information on page 1 originated with the lender (with the remaining pages of Exhibit 1 being his calculations of interest on the loan).

Specifically, exhibit 1, pages 2-4, contain Prosa's tables of calculations as to interest paid over periods of time, divided into fluctuating or changing rates of bank interest at various times (as this was not a fixed-rate loan). Prosa, by way of background, noted that there was some "non-

eligible" interest (on claim 2) based on the fact that a claim had not been timely submitted. This non-eligible interest period, he stated, was about one year, from approximately May 2007 to May 2008.

The Prosa calculations (Ex. 1, pages 2-4) are based on the ongoing loan balance from a given date to another, later, date, multiplied for the (varying) interest rate for periods. The interest rate (as it varied during the period May 2007 – May 2008) was based on prime rate minus 1%. As the loan balance diminished over time, Prosa made his calculations. Exhibit 1, page 5 has Prosa's hand-written notes for the M&I Bank loan, showing how interest accrued on the loan from November, 2003 through May 16, 2005, such interest not being paid off, by petitioner, rather every few months, M&I added the accruing interest to the existing loan balance. Prosa used this information to calculate his hand-written amounts on Exhibit 1, page 5, with a balance totaling \$1,990.06. This figure is the sum of the interest costs over time that Prosa determined non-eligible.. He has on this page followed his typical audit practice of writing the name of the bank, and has a column with interest postings that have been applied against the loan that would be PECFA-eligible, and any fees. Prosa listed interest amounts and the sum of total interest on Exhibit 1, page 5:

Interest / Note 53010

11-16-03	\$179.03
2-16-04	143.93
5-16-04	71.64
8-16-04	77.99
11-16-04	91.74
2-16-05	106.33
5-16-05	115.79
	<u>1,990.06</u>

(Sum of interest on loan at this site)

Exhibit 1, page 6 is the May 10, 2007 letter by Department staff Ralph Smith, a senior hydrogeologist in the PECFA site review section to petitioner. That letter subject line is: "RE: Assignment to Public Bidding....Andy's Tire & Muffler, 220 Janesville Street, Oregon" The letter states, in pertinent part:

The Wisconsin Departments of Natural Resources (DNR) and Commerce have determined that additional activities must be conducted for the site referenced above. A cost cap for the activities will be established through the PECFA public bidding process. You must cease all work at this site. This site will be listed in public bid round 52, scheduled to begin on December 3, 2007. Until a cost cap is established through the bidding process, Commerce will not reimburse costs, including interest, for any work performed more than five business days after the date of this letter....

If there are any outstanding eligible costs, including loan interest, that have been incurred to date, a PECFA claim must be submitted no later than 120 days after the date of this letter. Failure to file a claim prior to the deadline will result in ineligibility of interest expenses incurred between the date of this letter and the date the claim is filed.

(Emphasis added.)

The copy of the typewritten letter includes the handwritten notations of the witness. The Prosa annotation "47.625(3)" is a reference by Prosa on the letter to the Department rule applied in determining these costs to be non-eligible (in Prosa's abbreviation, "N/E" stands for "non-eligible.") Mr. Prosa testified that the notation on the letter ("Interest N/E, 5/10/07 through 5/21/08") is the time period for interest that deemed to be non-eligible – that is, the period begins on 5/10/07 (the date of the Department letter to petitioner) and concludes on 5/21/08, when the claim was filed.

The witness stated that Exhibit 1 contains typical information received from a bank lending to a responsible party in the PECFA cleanup. In this matter, petitioner has a PECFA loan in order to pay his consultant for work. Upon receipt and review of a claim, the Department

reimburses eligible amounts of the loan (and interest on the loan) to the bank. In this case, the bank document (Exhibit. 1, page 1) shows (as to claim 2), M&I bank note number 53010:

Current balance	\$ 16,751.13
Interest (accrued through 4/21/08)	1,990.06
<u>Other fees</u>	<u>0.00</u>
Total payoff	18,741.19

The governing rules in this case provide:

Comm 47.625(1) ASSIGNMENT TO PUBLIC BIDDING. Whenever the department notifies a responsible party and the consulting firm that an occurrence is subject to the public bidding process in s. Comm 47.68, a claim for eligible costs incurred up to then shall be submitted to the department, no later than 120 days after the date of the department's notice (emphasis added).

Comm 47.625(3) INELIGIBLE INTEREST COSTS.

Comm 47.625(3)(a) Failure to file a claim prior to the deadline prescribed in **sub. (1)** shall result in ineligibility of any interest expenses incurred between the date of the department's notice and the date a claim is filed.

Based on Prosa's testimony relating the events to the above rules, he properly applied these rules to deny the current claim as untimely.

Prosa also denied the \$1,909.06 sought in claim 3, in part, because he said it was "duplicate interest." This, as he stated when the Department paid certain reimbursements in claim 2, the interest amount of \$1,990.06 was part of the amounts reimbursed in that claim payment. Yet, this appeal seeks payment for that amount in interest. (See Petitioner's appeal.) Mr. Prosa stated that Petitioner likely made claim 3 without realizing that the interest amount had been reviewed and paid by the Department earlier, as there are various numbers and categories in the documents.

After Mr. Prosa testified, the respondent's case concluded. Mr. Delbert Anderson was advised of his right to testify. He declined that opportunity, but did, in a narrative discussion on the record, state his unsworn narrative of events.

He noted that he felt there was confusion by the bank or his consultant as to the need to file within the 120-day period, and misunderstanding by him as to the possibility that the interest sought herein may have been paid earlier.

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 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 \$1,990.06 in the claim reviewed. That decision was proper for reasons discussed above. The Department's decision dated April 7, 2010 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. The single issue to be decided in this matter is whether the Department's decision was incorrect with regard to the \$1,990.06 in interest costs denied.
4. Despite written notice to petitioner (Department letter of May 10, 2007), petitioner did not file a PECFA claim for outstanding eligible costs (including loan interest that had been incurred by May 10, 2007) with the Department within the 120-day period for filing the claim. The failure to timely file its claim within the 120-day period, makes the claimed interest costs ineligible for PECFA reimbursement, pursuant to Wis. Admin. Code, § Comm 47.625(3). Further, there is credible evidence that the claimed interest had already been paid by the Department as part of an earlier claim.
5. Therefore, the Department properly denied the claim amount of \$1,990.06 in loan interest costs for remediation work, as ineligible for PECFA reimbursement.

DECISION

The Department's decision dated April 7, 2010 is affirmed.

By: Steven Wickland
Steven Wickland
Administrative Law Judge

Dated: 3/8/2011

copies to:

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Date Mailed: <u>3/8/11</u>
Mailed By: <u>Laura Pleasants</u>

NOTICE TO PARTIES

The foregoing is a 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 Secretary of the Department of Commerce, who is the individual designated to make the final decision of the Department in this matter.