

STATE OF WISCONSIN
Department of Commerce

In the Matter of the PECFA Appeal of

Clifford J. Gidlund
Lakeside Veterinary Service
6557 Whitnall Edge Road
Franklin, Wisconsin 53132-1286

Hearing # 09-34
PECFA Claim # 53105-7962-07

Proposed Findings of Fact, Conclusions of Law, and Decision

The Department of Commerce (Department) September 23, 2009 decision denied reimbursement of certain remediation costs at the petroleum release at 2007 S. Browns Lake Drive, Burlington, Wisconsin. Petitioner, Dr. Clifford J. Gidlund, Lakeside Veterinary Service, on October 23, 2009 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 February 16, 2010. Pursuant to proper notice, a class 3 administrative hearing was held on April 15, 2010 in Madison, Wisconsin, Steven Wickland, administrative law judge (ALJ), presiding. The parties had the opportunity to file post-hearing briefs by April 30, 2010.

The issue for determination raised by the petition is: Whether the Department's decision dated September 23, 2009 was incorrect with regard to the disputed costs identified in Petitioner's appeal received by the Department on October 23, 2009.

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

certified as follows:

Clifford J. Gidlund
Lakeside Veterinary Service
6557 Whitnall Edge Road
Franklin, Wisconsin 53132-1286

Department of Commerce
201 West Washington Avenue
Madison, Wisconsin 53707-7838
By: Laura M. Varriale

The authority to issue a final decision in this matter remains with the designee of the Secretary of the Department of Commerce by the October September 26, 2009 order of then Secretary Richard J. Leinenkugel.

Petitioner appeared by Trent Ott, of Environmental & Development Solutions, Inc. ("EDS"), Milwaukee, Wisconsin, who participated by telephone. State of Wisconsin Department of Commerce staff, Mary Ann Gosda, testified for the respondent.

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

Findings of Fact

1. The Department administers the petroleum environmental cleanup fund program pursuant to Wis. Stat. § 101.143 and Wis. Admin. Code Ch. Comm 47.
2. This is an appeal filed by Clifford J. Gidlund, Lakeside Veterinary Service, of a Department decision dated September 23, 2009. The decision determined that certain costs associated with remediation actions at the site of petitioner's petroleum storage tank system were ineligible for PECFA reimbursement. The system is located at 207 S. Browns Lake Drive, Burlington, Wisconsin.
3. By its notice of hearing herein, dated February 16, 2010, the Department provided that this matter would be held as a Class 3 administrative hearing. The Department, in the decision at issue, had

- reviewed or considered a claim of \$6,914.41 filed by Petitioner and its consultant. The Department, by its decision, made a total payment for the claim of \$4,006.56. The decision denies as non-eligible the amount of \$2,907.85. (Exhibit 2, Breakdown of Pecfa Costs.)
4. The PECFA appeal of October 23, 2009 concerns that portion of the decision that denied costs of \$1,189.31, as such costs were deemed ineligible as not constituting costs incurred by petitioner for regulatory correspondence. (Exhibit 1, Appeal Letter.)
 5. Respondent exhibits 1 through 8 were offered into evidence at hearing. There were no objections by either party and the exhibits were admitted into evidence at hearing.

Applicable Statutes and Codes

§ 101.143(4)(a) &(b), Wis. Stats. Awards for petroleum product investigations, remedial action planning and remedial action activities, and eligible costs.

Wis. Admin. Code, Comm 47 Appendix

5. Closure Request.

This task consists of activities for the preparation and submittal of closure forms, closure narrative, appropriate notifications and closure justification, for requests made at the conclusion of remediation as required by chapter NR 726, Wis. Adm. Code. This submittal reimbursement maximum does not include the GIS Packet reimbursement maximum.

A separate incremental reimbursement rate has been established for a one-time free product abatement report. This is applicable if closure is being sought when residual free product is present. This incremental reimbursement only applies once per occurrence. This includes estimation of residual free product volume, summarizing free product recoveries to date and discussing potential remedial alternatives and costs.

Separate incremental reimbursement rates are included for GIS packets -- one for the source property and one for each off-source property.

This task is limited to no more frequently than once every 12 months. If closure is sought concurrent with task 22 (Soil Investigation Report) or task 23 (Soil and Groundwater Investigation Report) this cost item is not also eligible with the exception of the incremental cost for free product abatement reporting and GIS packet preparation and submittal.

This task will be reimbursed for a complete request only. Additional costs to remedy omissions or corrections for this document are not eligible.

7. Regulatory Correspondence

This task will include labor to prepare and submit status reports, periodic reporting, requests for copies of existing documentation, general written correspondence to responsible party and regulatory agency(s). This reimbursement maximum is limited to 12 per 12-month period. This task may not be used to remedy omissions or corrections for tasks operation & maintenance report, closure request, letter report/addendum, regulatory correspondence, site investigation report, investigation work plan preparation, soils and water investigation report, and claim submittal.

Discussion

Basis for Department denial. The Department denied \$2,907.85 in costs, viewing those costs as not eligible for reimbursement. Of those costs, petitioner appealed the denial of \$1,189.31, deemed ineligible, as not meeting the PECFA definition of "regulatory correspondence". (Exhibit 2, attachments at 1-2.).

Specifically, the decision states in Notes to Claimants, Exhibit 2:

Note #2 Task 7 See PECFA Update #34 Dated 5/16/08 - Phone calls and brief emails are not considered regulatory correspondence. When emailing or calling claimant regarding the claim submittal is also considered part of Task 27 costs for claim submittal and are not eligible for Task 7. Task 7 also cannot be used for corresponding regarding the appeal process. Any costs associated with the appeal of a determination are not eligible for PECFA reimbursement. Many of the emails appear to be what is considered project management costs and would not be eligible.

Testimony of Trent Ott.

The petitioner, Dr. Clifford J. Gidlund, of Lakeside Veterinary Service, did not appear at the hearing, nor did he participate by telephone. Rather, Trent Ott appeared on behalf of petitioner, and also testified. He was the sole witness for petitioner.

Trent Ott is with the consulting firm, EDS, or Environmental & Development Solutions, Inc, in Milwaukee. He was sworn in and testified by phone. Mr. Ott was the project consultant for the petitioner at this site. His role was to oversee the remediation of releases from two underground storage tanks that were removed from the property.

Mr. Ott testified that two storage tanks were encountered at the site in 2006; the site located at 2007 S. Browns Lake Drive in Burlington. It had been a gasoline station before Lakeside Veterinary Service purchased the property for use as a veterinary clinic. Lakeside apparently did not know that the site was a former gasoline service station. Mr. Ott testified that the owner of Country Vet -- Dr. Cliff Gidlund -- was in the process of selling the property, and had in that process conducted a Phase I environmental site assessment, which, Mr. Ott stated "...turned up the fact that it used to be utilized as a gas station." He said that in 2006, the business was known as "Country Veterinary Clinic," and currently the business run there, by Dr. Gidlund, is Lakeside Veterinary Service, which is the claimant herein.

The tank removal in 2006 was conducted by Petroleum Equipment. Following the removal, EDS performed a site assessment. When obvious signs of contamination were noted during the site assessment, EDS then performed a site investigation. This included installing monitoring wells, and collecting soil and groundwater samples, over the period of the next three years. This is the final PECFA claim for the project, the site having been closed by the Department of Natural Resources (DNR).

This last claim for the project covers the period April 2008 to approximately April 2009. The regulatory correspondence and phone calls include EDS contacts with DNR and the client.

An October 23, 2009 letter EDS to the PECFA Claim Reviewer, marked Exhibit 1, was discussed by Mr. Ott. All letters claimed by petitioner to be "regulatory correspondence" were deemed ineligible by the Department, resulting in a denial of \$1,189.31. Mr. Ott testified that this amount was denied as the Department believed the documents did not rise to

the level of regulatory correspondence. The witness referenced the appeal letter as a source of reasons to adopt the petitioner's position.

Cross examination of Trent Ott. Department Counsel asked the witness to discuss the contents of Exhibit 2, "Breakdown of PECFA Costs," dated September 9, 2009. That document reflects an amount submitted (and reviewed by the Department) of \$6,914.41; an amount determined ineligible of \$2,907.85; and a PECFA payment total of \$4,006.56.

The witness read aloud the reasons for Department denials, at Exhibit 2, attachment, page 2 of 2. Task 7 is a term in the Department rule, Wis. Admin. Code, Comm Ch. 47 and Appendix. Mr. Ott testified that he is aware that the Comm Chapter 47 Appendix includes a list of tasks which are eligible for reimbursement and that task 7 includes and defines the term regulatory correspondence.

Testimony of Mary Ann Gosda.

Ms. Gosda has worked for Department of Commerce PECFA program since 1990; all twenty years as a PECFA claims reviewer. She is currently (as she has been for the last fifteen years) a senior PECFA claims reviewer. Her duties include reviewing claims, approving agents, and pre-auditing of invoices for consultants and banks. As a senior reviewer, her duties also include working on the most complicated claims.

Ms. Gosda reviewed the claim at issue herein. This included reviewing reports, Usual and Customary ("U&C") invoices, and checking for proper documentation. As to the amount found not eligible, she stated that "there were some costs related to Task 7, regulatory correspondence.

Her understanding is that regulatory correspondence consists of "letters to the owners... and DNR regarding the site; usually in writing." She said that PECFA rules do not, pursuant to Department rule updates, extend to "phone calls and emails." The witness stated that items which are not considered regulatory correspondence include: "day to day operations -- informing the client of the claim submittals [which] should be part of the claim submittal cost -- that's why we allowed over \$500 for that...the day-to-day, back-and-forth with the consultant or in-office emails."

Ms. Gosda testified as to the purpose of the U&C schedule, which she said is to control costs. See Wis. Adm. Code Comm Ch. 47, Appendix. The U&C schedule sets costs that are allowed for certain tasks that are customary in the field work consultants perform on petroleum-contaminated sites. If correspondence is related to, for example, questions to Department staff about a claim, the witness believes that such correspondence shall be a "claim submittal" cost. The same is true for correspondence about the closure process. That is, such items would not fall within "regulatory correspondence."

Exhibit 3, PECFA Update # 34, dated May 16, 2008.

The witness quoted from this Department update:

Costs for regulatory correspondence will no longer be included in cost cap approvals. Due to the inconsistent and unpredictable nature of the activity, costs will now be reimbursed at the time of claim review with submittal of proper supporting documentation. The reimbursement maximum of 12 per year will be enforced.

Phone calls or brief emails are not considered regulatory correspondence under Task 7 and will not be reimbursed. When using email to correspond about a site or specific subject all questions and clarifications should be stated with the initial correspondence. Multiple one- or two-line emails to gain clarification of the original subject are not considered additional regulatory correspondence and will not be reimbursed. (Exhibit 3, page 1, emphasis added.)

Ms. Gosda testified as to the correspondence herein which Mr. Ott asserts should be reimbursed. She said that they were brief emails and phone calls; and therefore not reimbursable. The witness further explained the purpose of PECFA updates (such as Exhibit 3). “A PECFA update is when we’re informing consultants of a clarification of the code, or something that is changing in the code or a change in procedure.” She notes that the updates, then, are for public consumption, particularly for consultants doing PECFA projects. The updates are distributed by email (to those consultants and others on the Department’s certified consultant registry), and all registered PECFA consultants. Additionally, they are available on the Department’s webpage. Ms. Gosda stated that registered PECFA consultants are expected to read and understand all Department rules and updates on the PECFA program.

Ms. Gosda discussed Exhibit 5, an email dated June 24, 2008, which was authored by Trent Ott and submitted with the claim. The email, sent to Cliff Gidlund, discusses invoices on the PECFA project, and includes (later added) handwritten notes (dated July 9 and August 12, 2008) as to phone calls Trent Ott made concerning the project. Ms. Gosda denied these as PECFA-ineligible because they concern claim submittal and closure of the site, rather than actual project work. She said that claim submittal cost is not regulatory correspondence, but rather a cost associated with claim submittal. Closure costs are allowed as part of the closure information in the closure report. Ms. Gosda notes that Task 5 describes what is eligible for reimbursement under “closure requests,” and that Task 27 describes what is eligible under for reimbursement under “claim submittal.”

Next, Ms. Gosda discussed Exhibit 6, the “EDS Phone Log,” a one-page handwritten summary of a call from Trent Ott to DNR's Nancy Ryan, dated October 8, 2008 concerning the project. The notes reflect that site closure was discussed, and that the two discussed GIS Report (“Geographic Information System” Report), which is part of the closure process (which is also part of Task 5, Comm 47 Appendix). This item was held to be ineligible as regulatory correspondence.

Exhibit 7 is a January 20, 2009 email from Trent Ott to Shanna Laube-Anderson of DNR. The email discussed the Browns Lake potable well status, as it related to the initial closure request to DNR. Trent Ott’s handwritten note on the email states that he called Cliff Gidlund to tell him that “DNR was reviewing the closure request – will go in front of the closure committee soon. . .” Ms. Gosda said, as with her reasoning on similar matters, that, here, an email about closure costs and the PECFA process was not eligible for reimbursement.

Ms. Gosda then discussed Exhibit 8, a March 16, 2009 EDS, Inc., phone log, with handwritten notes of Trent Ott of a call to Department staff on the project. The witness saw nothing eligible in the exhibit. The witness further stated, without going over all other emails in detail, that the ones she had discussed were representative of matters claimed to be regulatory correspondence but which were denied as not being regulatory correspondence.

Cross examination of Ms. Gosda.

During examination by Mr. Ott, the witness stated that “status updates” -- from consultant to client --are eligible as regulatory correspondence, if such status updates pertain to work on project (e.g., lab results), and if they do not involve what is going on with a claim or an appeal. For example, results of analytical testing would be eligible status updates, and would typically go to the DNR and the site owner. Exhibit 6 (another phone log from Ott to DNR staff) was discussed as not being regulatory correspondence as it is considered part of petitioner’s closure report. Thus, to the extent Exhibit 6 is eligible in any manner, it would only be as a closure report.

Redirect examination.

The webpage referred to in this matter and in the hearing, Ms. Gosda explained, is on the Department's website. It was created by and is administered by the Department. The Department's website provides a tracking system for consultants to report progress on sites (including PECFA sites) to Department site reviewers and for the DNR to review. Consultants can communicate with the Department by this means, as to work progress at sites. In terms of the regulatory correspondence task specification, under U&C, consultants have to report annually via the web site. The information includes cost estimates for the site to get closure and the groundwater results for monitoring wells, i.e., sampling data on site.

Comm 47, Appendix, Task 5 as to Closure Request, was read by the witness. The witness stated that there is an amount assigned for the closure request; she said that she does not know what that amount is. There is a separate amount, as well, allowed for the GIS packet. In further discussion of the provisions of Comm 47, Appendix, Task 5, Ms. Gosda said that within the Task 5 Closure Request, the phrase, “This task consists of activities for the preparation and submittal of closure forms...” does include all activities that would be related to preparing and submitting those closure forms.

In discussing Exhibit 6, the Trent Ott email to Nancy Ryan Ms. Gosda believes that the “results” referred to are the type required in the closure request. She said that letting DNR staff, Nancy Ryan, know that closure is coming is an action that is directly related to preparation of closure forms. The witness stated that all notes on Exhibit 6 are related to closure (with the exception of the GIS packet reference, which Comm 47, Appendix, Task 5, provides for payment for such packet as a separate amount.) Finally, the witness stated that all items in Exhibit 6 are related to closure request matters.

The witness said that the web reporting for the Department’s web site is something the Department of Commerce requires. Therefore, the Department considers it “fair” -- since the Department requires web reporting (once a year, i.e., annually) by those working on PECFA projects -- that such cost of annual reporting be reimbursed. Finally,

if a consultant, such as Trent Ott of EDS, calls DNR staff to ask or discuss with such staff matters pertaining to consultant completion of a closure report to be filed with DNR, such calls (and the notes made on the call, that is, Exhibit 6 herein) are not reimbursable. The witness noted that although the claimant or its consultant may regard such notes as regulatory correspondence, the Department holds that they are closure report matters required by the DNR and not eligible for Department of Commerce PECFA reimbursement.

The examination of the witness concluded the Department's case. The testimony of each party was presented at hearing in good faith and was helpful. Mary Ann Gosda was a particularly credible witness, combining considerable experience and properly applying her knowledge of PECFA procedure and regulations to this case.

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 denied a total of \$2,907.85 from a claim in which \$6,914.41 was reviewed. Of that denied amount, Petitioner appealed the denial of \$1,189.31. That denial decision was proper for reasons discussed above.

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 those costs of remediating soil and water contamination 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 denial of \$1,189.31 in costs, thought by petitioner to be regulatory correspondence.
4. The Department's decision to deny \$1,189.31 in costs submitted by the petitioners was both consistent with past practice and in compliance with § 101.143(4)(a) & (b), Wis. Stats and Wis. Admin. Code Comm Ch. 47 and Appendix thereto.

Decision

The Department's decision herein is affirmed.

Steven Wickland
Administrative Law Judge

Dated and Mailed:
August 5, 2010

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: _____