

STATE OF WISCONSIN
Department of Commerce

In the Matter of the PECFA Appeal of

Sue Bentz
Bentz Shell Service
25 E. Main St.
Waupun, WI 53963-1907

PECFA Claim #53963-1907-25
Hearing #07-55

PROPOSED DECISION

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.

Administrative Law Judge:
Steven Wickland

Dated and Mailed:

PARTIES IN INTEREST:

Sue Bentz
Bentz Shell Service
25 E. Main St.
Waupun, WI 53963-1907

Department of Commerce
PECFA Bureau
201 West Washington Avenue
PO Box 7838
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By: Laura M. Varriale
Department of Commerce
201 E Washington Ave.
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Date Mailed: _____
Mailed By: _____

STATE OF WISCONSIN
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In the Matter of the PECFA Appeal of

Sue Bentz
Bentz Shell Service Inc.
25 E. Main Street
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Hearing # 07-55
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Proposed Findings of Fact, Conclusions of Law, and Decision

The Department of Commerce (Department) September 26, 2007 decision denied reimbursement of certain remediation costs associated with the petroleum release at 25 East Main Street, Waupun, Wisconsin. Petitioner, Sue Bentz of Bentz Shell Service, Inc., of Waupun, Wisconsin on October 20, 2007 petitioned the Department for hearing on the decision, thereby filing a timely appeal from the Department's Petroleum Environmental Cleanup Fund Act (PECFA) decision.

A prehearing telephonic conference on the appeal was held on June 12, 2008. Pursuant to proper notice, a class 3 administrative hearing was held on July 15, 2008 in Madison, Wisconsin, Steven Wickland, administrative law judge, presiding.

The issue for determination raised by the petition is: Whether the Department's decision dated September 26, 2007 was incorrect with regard to the disputed costs identified in Petitioner's appeal filed with the Department on October 20, 2007.

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

Sue Bentz
Bentz Shell Service
25 E. Main Street
Waupun, Wisconsin 53963-1907

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

By: Laura M. Varriale
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201 W. Washington Ave.
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The authority to issue a final decision in this matter remains with the Department of Commerce designee by effect of the October 23, 2007 order of then Secretary Mary P. Burke.

Petitioner, Sue Bentz, appeared by telephone at the hearing and testified. State of Wisconsin Department of Commerce staff Mary Ann Gosda appeared in person and testified for the respondent.

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

Findings of Fact

1. Petitioner, Sue Bentz (and her husband) purchased Bentz Shell Service, 25 E. Main, Waupun, Wisconsin in June, 2005.
2. In retaining a consultant to do contamination remediation work at Bentz Shell Service (“the site”), petitioner obtained an exemption from the Department in April, 2006, from the requirement to solicit proposals from various consulting firms to complete a site

investigation. (Exhibit 1, April 20, 2006 Department approval.) Pursuant to the exemption, petitioner retained Northern Environmental Technologies, Incorporated (“Northern Environmental”) of Waupun, Wisconsin as its consultant for the work. The project involved consultant work for which, ultimately, a claim would be filed by petitioner pursuant to Wis. Stat. § 101.143.

3. The Department, by letter of June 12, 2006, to petitioner as to on-site costs stated:

From the date of this letter forward, PECFA will only reimburse based on the department’s Usual and Customary Cost Schedule (Cost Schedule) per Comm 47.325(2). Be aware that some activities on the Cost Schedule require pre-approval to be eligible. Only costs less than or equal to the Cost Schedule will be considered eligible for PECFA reimbursement.

...

If this site currently has a maximum reimbursement amount established (cost cap), that cost cap cannot be exceeded. In addition, if the cost cap includes activities that are not on the Cost Schedule, costs for those activities must be pre-approved by Commerce.

4. Neither petitioner nor its consultant, Northern Environmental, filed a written application with the Department for approval of costs in excess of the cap amount, and, there was no written Department approval that would allow petitioner to exceed the cost cap in the non-eligible amount of \$5,696.84.
5. Petitioner in 2007 filed a PECFA claim with the Department for reimbursement of costs.
6. The Department reviewed the claim submitted in the amount of \$5,990.68. The Department audit of September 5, 2007 determined the \$5,468.88 of those costs were not PECFA eligible, informing petitioner of that determination on September 26, 2007.
7. This case concerns the appeal filed by Sue Bentz of Bentz Shell Service of that Department decision.

8. The appeal was received on October 20, 2007 and challenged the Department's decision on PECFA reimbursement. The petition requested a hearing, with petitioner seeking to obtain further reimbursement in the amount of \$5,468.88.
9. Exhibits 1 through 8 were received into evidence at the hearing.
10. Petitioner's costs exceeded the Department-approved cap by \$5,468.88.

Applicable Administrative Rules

Comm 47.325(2) Cost Schedule. Any cost for items that are commonly associated with claims under this chapter, which exceeds the amounts listed in the department's schedule of usual and customary costs, as published and in effect while the work was performed, may not be reimbursed, except as provided in sub. (3).

Comm 47.338 Review of existing sites. (1) General. The department may review the remedial performance and costs associated with any existing sites.

(2) Existing Site Caps or Estimates. The department may require a redetermination of costs for any existing site to establish a total cost, excluding interest but including all closure costs, to achieve the status of a closed remedial action. After reviewing the total cost, the department may do any or a combination of the following:

Approve and establish a cap on total costs, excluding interest; deny approval of costs; approve system enhancements; bundle the site with another remediation(s); or direct the site through a public bid process to establish a lower site cost.

Discussion

On October 20, 2007 the petitioner timely petitioned the Department and requested an administrative hearing for review of the September 26, 2007 Department decision in PECFA claim number 53963-1907-25, pursuant to Comm. § 47.53, Wis. Admin. Code. The appeal was filed on behalf of the petitioner Sue Bentz, Bentz Shell Service, Waupun, Wisconsin. In its

reimbursement decision, the Department reviewed a claim of \$5,990.68. Pursuant to its decision, after subtracting deductibles of \$26.09, the Department made a total payment to petitioner in the amount of \$495.71 and denied as not eligible the amount of \$5,468.88. (Exhibit 4.) The appeal challenged the Department's decision and requested a hearing on petitioner's contention that \$5,468.88 should be awarded to petitioner.

Basis for decision. The Department's decision provides that the amount of \$5,468.88 Usual and Customary is non-eligible. The Department, in Notes to Claimant (accompanying its decision) stated: "No cost cap approved for work completed. Letter dated 6/12/06 notified you that if there was no cap established before anymore work was done under the U&C schedule a cap must be approved. In 2005 the site reviewer spoke to you and told you when you hired a new consultant that they would have to get a cost cap approval before doing any work. That was not done." (Exhibit 4, attachment at page 3.Emphasis added.) (U&C stands for "usual and customary" costs.)

The denial in the amount of \$5,468.88 was set as the single issue for hearing.

Testimony of Sue Bentz. The petitioner Sue Bentz appeared at the hearing by telephone, represented the petitioner and testified by telephone. Ms. Bentz provided the background to the claim, stating that she "came on board in 2005." Since June, 2005, she said her role has been secretary-treasurer, with her husband as president/vice-president of Bentz Shell. She identified the former owners, from whom they purchased the site in 2005.

Ms. Bentz testified that she had tried to figure out what they had to do to get the site cleaned up after assuming ownership. Ms. Bentz contacted the consulting firm, Northern Environmental, with offices in Waupun, "to have them begin the process for me, as they were

local.” She worked with Clint Wendt of the firm, who put together certain information to move ahead. Ms. Bentz said that she knew that the Department June 12, 2006 letter to Bentz Shell Service granted a public bid deferment and provided for approval of usual and customary costs only.

Ms. Bentz referred to the April 10, 2006 letter from Ms. Bentz (Exhibit 1) to Mary Ann Gosda of the Department, which letter sought a Department exemption from the consultant selection process so that petitioner could select Northern Environmental as its consultant.¹

Ms. Bentz discussed Exhibit 2, the Northern Environmental April 10, 2006 letter to petitioner, Sue Bentz. Exhibit 2, specifically Attachment A thereto, is entitled ”Cost Estimate using Comm U&C Schedule, Bentz Shell, Waupun, WI.” The petitioner said that Attachment A was prepared by her. Ms. Bentz stated that when the Department approved petitioner being exempt from bidding and allowed petitioner to simply select Northern Environmental as its consultant for the project (per Ms. Gosda’s signature of approval on Exhibit 1, dated April 20, 2006), she thought Bentz Shell was “good to go.”

The next event date Sue Bentz referred to was the Department June 12, 2006 to Bentz Shell Service entitled: “Public Bid Deferment – Approval for Usual & Customary Costs Only” (Exhibit 3). Ms. Bentz agreed in her testimony that the Department letter was addressed (only) to her, i.e., to Bentz Shell Service in Waupun, and that no “cc” or copy of the letter was indicated thereon. (Exhibit 3.) She said, although, that at the time she received that letter she did not understand that her consultant (Northern Environmental) did not get a copy of the letter. She

¹ Please note that there are two separate letters – Exhibits 1 and 2 – each dated April 10, 2006.

stated: “I didn’t catch that it wasn’t cc’d [to the consultant]...or that it would be my responsibility....I was working directly with the consultant and the consultant was working with the Department.” She further stated that she assumed that the consultant would receive a copy of the June 12, 2006 Department letter addressed to her, even though the letter, on its face, did not indicate a copy was being posted to the consultant.

At hearing, it was noted that the June 12, 2006 letter discusses in its text deferment of public bidding, pursuant to Department regulations. In response to this, petitioner stated that at that time she thought, “Oh, we submitted U&C, so we’re good; we’re following the right stuff.”

On cross examination, Ms. Bentz was asked about her April 10, 2006 correspondence to Mary Ann Gosda, of the Department. Ms. Bentz testified that her understanding of the purpose of that letter authored by her was to request Department permission to use a different consulting firm to complete the project. (Exhibit 1.) That request was for Department exemption from its regulations concerning selection of a consulting firm to “continue groundwater monitoring and prepare site closure documents for the above-reference property.” (Exhibit 1.) The letter states, in pertinent part: “Therefore, I request exemption from the consultant selection process in Comm 47.33(1)(a), Wis. Admin. Code.” Exhibit 1, a one-page letter, includes a reply annotation thereon, namely, an approval signed by Mary Ann Gosda, dated 4/20/06. Ms. Bentz agreed that her April 10, 2006 letter does nothing other ask permission from the Department, allowing petitioner to select Northern Environmental to be petitioner’s consultant in completing the PECFA project.

As to Exhibit 2, the April 10, 2006 Northern Environmental letter to Sue Bentz, (entitled “Proposal to Complete Groundwater Monitoring at Bentz Shall, 25 East Main Street, Waupun,

Wisconsin; Commerce # 53963-1907-25....”) the petitioner testified that the Northern Environmental letter to her, signed by Clint Wendt, project scientist, does not indicate on its face that a copy of the letter was sent to the Department. That letter includes as attachment A, a cost estimate using “Comm U&C Cost Schedule.” Ms. Bentz stated that she has no evidence that the Department was ever asked by her or Northern Environmental to approve any amount of money by which petitioner could exceed U&C cost schedules, nor any evidence of Department approval of such. Ms. Bentz did say that perhaps such information or request may have been faxed to the Department (perhaps by her consultant), but said she could not really recall such a fax, and therefore could not say for sure that anything like that occurred.

Ms. Bentz was asked if she had reviewed her contract with Northern Environmental; she stated that she had not. At the conclusion of her testimony, Sue Bentz said she had nothing further to present at hearing.

Testimony of Mary Ann Gosda. Ms. Gosda is employed with the Department, in Madison, and has worked in the Department’s Bureau of PECFA since 1990. She has been PECFA Programs Senior Reviewer for the last fifteen years. Her duties include, among other things, reviewing claims, overseeing pre-audits, consultant waivers, and bid waivers. She originally was involved in this matter as part of her consultant waiver duties.

Exhibit 4 is the Department’s decision under review herein, entitled “Breakdown of PECFA Costs.” The Department therein considered the invoices submitted on this claim. (Ms. Bentz, participating by phone, noted -- during Ms. Gosda’s testimony -- that she had copies of the Department exhibits discussed at hearing). Ms Gosda stated that Exhibit 4, with an audit date of 9/5/07, shows that costs were denied because petitioner had no Department approval to

exceed the cost cap for this site. As the costs submitted exceeded the cap by \$5,468.88 the amount found not eligible was \$5,468.88. The PECFA payment to Bentz Shell for this claim was \$495.71, namely, the costs of consultant to submit the claim.

Ms. Gosda said that Exhibit 1 is petitioner's request of April 10, 2006 for an exemption of certain bidding requirements, and includes the Gosda signature thereon dated April 20, 2006, approving that request. This Department approval meant that instead of getting several (three) consultant proposals or bids for the project work, the petitioner could (with this Department approval of the consultant proposal waiver, or exemption from Comm 47.33) hire Northern Environmental without getting other bids or proposals.

Exhibit 3 is the June 12, 2006 Department letter concerning the site, from Renee Dickey, PECFA Program Specialist-Senior to Bentz Shell Service. The letter states, in pertinent part:

RE: Public Bid Deferment – Approval for Usual & Customary Costs Only
Commerce #: 53963190725 DNR BRRTS #: 0314002792

Dear Claimant:

The Wisconsin Department of Commerce (Commerce) received the Occurrence-Classification Form for the site referenced above. Commerce is deferring this site from the public bidding process at this time.

From the date of this letter forward, PECFA will only reimburse based on the department's Usual and Customary Cost Schedule (Cost Schedule) per Comm 47.325(2). Be aware that some activities on the Cost Schedule require pre-approval to be eligible. Only costs less than or equal to the Cost Schedule will be considered eligible for PECFA reimbursement.

If this site currently has a maximum reimbursement amount established (cost cap), that cost cap cannot be exceeded. In addition, if the cost cap includes activities that are not on the Cost Schedule, costs for those activities must be pre-approved by Commerce.

(Emphasis added.)

Ms. Gosda noted that the above letter is: "...stating that if they do not have a cap, they could continue on their project using U&C schedule." She said the letter provides "...if the cost cap includes activities that are not on the Cost Schedule, costs for those activities must be pre-approved by Commerce." Ms. Gosda said that this site had a cost cap.

The witness discussed Exhibit 5, the May 4, 1998 Department letter to Richard Bentz, of Bentz Shell, entitled "\$40,000 Cap Exceedance...." She stated that several project cost figures at the site were referenced in the letter: \$40,000 investigation cap against \$38,600.00 investigation costs incurred to date; proposed additional investigation costs of \$7,475.50; and total investigation costs of \$46,075.50. Ms. Gosda said the \$40,000 was the investigation cap (an amount allowed on every site). After costs to date of \$38,600.00, there were still additional costs of \$7,475.50 (such that the total investigation costs would be not stop at \$40,000, rather than it would be \$46,075.50). This letter, then, said Ms. Gosda, reflected project costs to date and costs as anticipated, and the Department in the letter approved the requested cap exceedance. The letter states: "Based on the information provided, the Department APPROVES an exceedance of the \$40,000 site investigation cap in the amount of \$6,075.50...The approved exceedance is a not-to-exceed amount. Total site investigation costs shall not exceed \$46,975.50. Investigation and remedial action plan preparation costs that exceed the amount approved herein will not be considered for reimbursement." (Exhibit 5, page 1.)

In response to a second request for cap exceedance (from a site consultant on this project at Bentz Shell), made in 2000, the Department in its July 11, 2000 letter to Richard Bentz of Bentz Shell (Exhibit 6 herein), stated the year 2000 request for additional costs of \$2,500.00 was approved, such that the cost cap was now \$48,554.80, which is a "not-to-exceed" amount.

(Exhibit 6 at page 1.) To the witnesses' knowledge, no other cap exceedance requests were made by petitioner or granted by the Department. Ms. Gosda stated that, therefore, the total amount approved by the Department for the site was \$48,554.80.

Exhibit 8, a one page document, reflects a Department entry from a data base, and is a data note the witness found. The data base is used by PECFA staff to track costs, and to communicate with others. The note in this case describes a reviewer's conversation with Sue Bentz. Mary Ann Gosda read this note in her review of this claim. The note indicates that the Department PECFA reviewer (someone other than Ms. Gosda) in 2005 told Ms. Bentz that "I recommend that her new consulting firm submit a cap exceedance request to me for the next phase of work." (Exhibit 8.)

In response to questions from the administrative law judge, Ms. Gosda stated that the entry on exhibit 8, "GML 9/1/05" stands for the initials of Gina Larson, and is the date, September 1, 2005, that the data observations were entered.

To Ms. Gosda's knowledge, petitioner's consultant, Northern Environmental, never submitted to the Department a cap exceedance request. The completion of the direct examination of Ms. Gosda concluded the Department's case. Ms. Bentz had no questions of the witness.

At the conclusion of the Department's case, Ms. Bentz stated that she had clearly heard the proceedings. The parties then summarized their positions or points of view on the matters that had been presented at hearing. Sue Bentz suggested that her knowledge of PECFA and language relating to PECFA in correspondence was such that there were some aspects that she might not have understood. Department counsel stated the view that when Sue Bentz took over

the site, her consultant Northern Environmental should or could have contacted the Department but did not; therefore no cost cap exceedance was submitted to the Department for the site.

At the conclusion of the hearing, all exhibits (1-8), were admitted into evidence. The parties were allowed two weeks to submit recommended findings of fact.

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.

All testimony was presented at hearing in good faith and was helpful. Ms. Gosda was a particularly credible witness, combining considerable experience and properly applying her knowledge of PECFA procedure fairly to this case. Sue Bentz provided testimony which was candid and responsive.

The testimony of the witnesses establish that petitioner, absent Department approval, exceeded the cap earlier established by the Department. The costs denied as non-eligible did exceed the cost cap, and there was no Department approval authorizing such additional costs.

The Department has the fiscal responsibility to reimburse only those costs determined to be eligible and not subject to any exclusion under the code. The Department's decision was proper for reasons discussed above. The Department's decision dated September 26, 2007 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 \$5,468.88 in costs denied.
4. Because the petitioner exceeded the cost cap, and no approval by the Department allowed doing so, costs of \$5,468.88 are excess of the cap and are not reimbursable under PECFA.
5. The Department properly denied the claim amount of \$5,468.88 in costs for remediation work, as ineligible for PECFA reimbursement.

DECISION

The Department's decision herein is affirmed.