STATE OF WISCONSIN
DEPARTMENT OF COMMERCE

In the Matter of the PECFA Appeal of

David Cramer
United Cooperative PECFA Appeal
Hearing # 02-279
Commerce #53916-9311-60

PROPOSED DECISION

Preliminary Recitals

Pursuant to a petition for hearing filed September 10, 2002, under §101.02(6)(e), Wis. Stats., and §Comm 47.53, Wis. Adm. Code, to review a decision by the Department of Commerce, a hearing was commenced on February 19, 2003 and was completed on March 6, 2003 at 201 West Washington Street, Madison, Wisconsin.

The issue for determination is whether the Wisconsin Department of Commerce's (the "Department") decision dated August 12, 2002 was incorrect with regard to the disputed costs identified in the Petitioner's appeal received by the Department September 10, 2002. The Department denied the cost associated with the Petitioner's use of a mobile gas chromatograph ("mobile GC unit") which was employed by the Petitioner during the site investigation phase of the cleanup of the property.

There appeared in this matter the following persons:

PARTIES IN INTEREST:

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FINDINGS OF FACT

Investigation and remediation of the Dodge County Cooperative Beaver Dam site commenced in 1997. During the investigatory stage of this process, the Petitioner used a mobile GC unit as an analytical field-screening device to determine the boundaries of the potential contamination plume. The issue at the hearing centered on whether the mobile GC unit expenses were cost effective within numerous PECFA statutory and regulatory guidelines cited by both parties requiring that all investigative activity be made in the least costly manner possible.

Initially, the Department denied reimbursement of these costs claiming they were not properly bid according to other PECFA statutory and regulatory requirements. After the Petitioner provided sufficient bidding documentation, the Department continued to deny the costs, asserting that the use of a mobile GC unit was an unnecessary analytical tool and not cost effective compared to the less expensive Photoionization Device ("PID"). The Department based its decision on what the Department's counsel in her post-hearing brief termed an "internal administrative rule." The Department reimbursed the Petitioner in an amount equal to what a PID would have cost. The Petitioner

appealed the denial of reimbursement for the costs that were in excess of what the Department typically pays for a PID.

DISCUSSION

As stated above, the Department based its decision to deny reimbursement first because of insufficient bidding information and then on its internal rule that ostensibly precluded reimbursement for expenses associated with the use of a mobile GC unit. The Department stated in its brief that after sufficient bids were provided, the Department continued to deny the costs associated with the mobile GC unit because the Petitioner did not demonstrate that using the mobile GC was more cost effective than using the PID.

The Department asserted that information available to the Petitioner from a previous investigation which commenced in 1993-1994 on a different portion of the same parcel of land provided with a significant degree of accuracy the levels and kinds of contamination expected to have been released on the property at issue[1]. In its post hearing brief, the Department argued that the present investigative and remedial activities were an extension of these prior investigative activities and that the types of contaminants discovered in 1993-1994 demonstrated the appropriateness of using a PID to obtain preliminary information on the present Beaver Dam site. The Department argued that:

> "the potential sources for the 1994 contamination.... were exactly the same as the potential sources of the 1997 contamination,"

and that:

> "the potential for contamination by heavier petroleum products was present in 1994 just as in 1997."

[1] This adjacent site had a confirmed release, was investigated and granted closure by the Wisconsin Department of Natural Resources ("WDNR") prior to the confirmed release from the site which is the subject of this appeal.

A careful reading of the 1997 Site Investigation Work Plan strongly suggests, however, that the earlier and later contamination sources and substances were not identical. The 1997 Work Plan states that the origin of contamination in 1997 came from six underground storage tanks located to the left of a building situated on the premises, which identifies the tanks at issue here. In contrast, as the 1997 document indicates, the 1993-1994 investigation focused on three storage tanks located to the north of the building. Neither party disagreed with documentation showing that these three northerly tanks contained primarily gasoline range fuel organics, which are adequately measured by PID's, while the westerly tanks contained both diesel and gasoline range products. Additionally, neither party disagreed that analytical results from 1994 test borings on these same tanks indicated the absence of contamination except for a detection of 18 parts per million of diesel range fuel organics.

The Department required the Petitioner to provide financial justification for using the mobile GC unit. The Department then rejected the Petitioner's justification, which was illustrated through a comparative analysis chart, showing higher overall PID costs to mobile GC costs. Essentially, the Department claimed that the data in this comparative analysis was based on the Petitioner's unsubstantiated assumption that if a PID was used, the necessity of a second PID sampling would be highly likely. To further support this assertion, the Department pointed out that in the body of the Petitioner's 1997 Site Investigation Work Plan, reference was made to the use of a PID not a mobile GC unit. The reference to this use of a PID was made in the section involving Field Activities for both soil and groundwater contamination.

In the last section of its brief, the Department also argued that even if the mobile GC unit was found to be cost effective, the costs incurred by the Petitioner were not reimbursable claiming that the data obtained from the monitoring wells installed on the site was improperly obtained. The Department asserted that PECFA reimbursements are not available for improper and/or invalid samples.

The Petitioner's main argument focused on the content of the petroleum tanks located on the site at issue. The Petitioner introduced evidence to show that the tanks involved in the 1997 clean up contained a high percentage by volume of diesel fuel. Given this indicator of heavy petroleum contamination and based on the capabilities of the different testing devices, the Petitioner determined that a mobile GC unit would be more cost effective than a PID in obtaining necessary analytical field screening data. The Petitioner explained that the site-specific conditions indicated a high degree of likelihood that the results from a PID would not have been reliable thereby necessitating more than one PID mobilization. The Petitioner submitted uniformly accepted industry standards, in the form of ASTM guidance documents, which confirmed the preference of using a mobile GC unit over the PID in circumstances where heavy end petroleum product contamination was anticipated.

At the hearing, the Petitioner opposed the Department's introduction and reliance on evidence from the earlier investigation of the adjacent site stating that contrary to the Department's assertion, the clean up investigations were unrelated and the latter was not an extension of the former. Specifically, the Petitioner objected to the Department's introduction of the 1993-1994 Site Investigation Work Plan since the Petitioner was

unaware that the Department intended to use it and because it was not a document included in the present claim file.[2]

The Petitioner also claimed that even though the Department referred to the Field Activities section of the 1997 Site Investigation Work Plan, which indicated the use of a PID, the Petitioner noted that its choice of a mobile GC unit as part of initial field data analysis conformed to the Executive Summary of the same plan, which included:

> "Soil and groundwater sampling through hollow-stern auger drilling techniques in conjunction with field gas chromatograph (GC) analyses will be employed to provide preliminary definition of soil and possible groundwater contamination and characterization of subsurface materials."

Additionally, the Petitioner contested the Department's internal administrative "rule" regarding reimbursements for mobile GC unit costs. The Department's chief witness, a claim reviewer, testified that she denied reimbursement following the directives of this internal policy which she apparently interpreted as precluding all reimbursements for the use of a mobile GC unit for field analysis. Until the Department's claim reviewer referred to the policy manual in her testimony, the Petitioner did not know the document existed. Because the Petitioner did not have a copy of this rule prior to the hearing, during the proceedings the Department was asked to provide a copy to both the Administrative Law Judge and the Petitioner.

After reviewing this "rule," the Petitioner pointed out that it did not categorically deny all reimbursements for mobile GC cost. In relevant part the rule states:

> "The use of a mobile lab gas chromatograph (GC) during the INVESTIGATION phase is viewed an unnecessary cost unless justification can be provided that they saved the program money."

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[2] The Administrative Law Judge allowed the 1993-1994 Site Investigation Work Plan to be submitted as evidence, stating that she would determine the appropriate weight such evidence would be given once all

When asked during the hearing if this was a published and publicly available policy, or had been stated in a PECFA update, a recognized forum for the Department to communicate such policies, the Department's claim reviewer indicated she knew the policy only from the internal departmental manual. This witness also testified that she did not know who created the policy, did not know when it was created, whether it had been reviewed by anyone with a technical background, whether it had been updated and/or whether it had been consistently applied. Additionally, the Department's claim reviewer stated that she was unfamiliar with how mobile GC units work and did not consult with anyone to determine whether a mobile GC unit might have been the most appropriate sampling device under the current circumstances.

Finally, the Petitioner objected to the Department's allegation that proper monitoring well samples were not taken and that therefore a portion of the mobile GC costs should not be reimbursed. The Petitioner argued that the Department confused the issue between analytical field screening methods and actual groundwater sampling. According to the Petitioner, the mobile GC unit was not used to test and/or report definitive groundwater results but rather was used as an analytical device to facilitate determination of the boundaries of the plume. The Petitioner added that actual groundwater samples were collected and handled in accordance with what the Petitioner argued was applicable WDNR protocol. The Petitioner also stated that the WDNR had never indicated that technical deficiencies existed in either the Petitioner's field screening activities or its groundwater sampling and that all reports had been reviewed and the site was granted closure.

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information was presented and her decision was being made.

PROPOSED CONCLUSIONS OF LAW

The Petitioner produced reliable information to support its decision to use a mobile GC unit rather than a PID. Through witnesses which this Administrative Law Judge found credible and competent, the Petitioner provided information showing that the relatively high volume of heavy end tanks on the site would lead one to plan with the assumption of heavy end petroleum contamination necessitating the use of a mobile GC unit over a PID. Relying on its own expertise and uniformly accepted industry guidelines, the Petitioner determined that the likelihood for a second PID screening outweighed the initial higher cost of the GC unit.

The Petitioner had no knowledge of the Department's internal administrative rule regarding the use of a mobile GC unit. As translated by the Department in its post hearing brief, this rule required the Petitioner to show under the specific site conditions present here that:

"the PID *actually* did return unreliable results."(Emphasis added).

Such a requirement contradicts PECFA statutory and regulatory mandates for keeping expenses to a minimum because it implies that two mobilizations would be considered by the Department to be more cost effective than one.

As importantly, while the Department attempted to argue that its internal policy manual automatically precluded reimbursement for the use of this unit, the language in the Department's rule clearly states otherwise. In the absence of any publicly promulgated rule and set of standards outlining the kinds of preliminary site conditions that would warrant the use of a mobile GC, the Petitioner here relied upon acceptable guidelines as it made its choice of using the mobile GC. That the Petitioner was

persuasive in proving its reasonable reliance on ASTM guidance was supported by its evidence showing that the WDNR considers these guidelines acceptable industry standards and lists them as reference documents for consultants' use.

The Department in its post hearing brief requested a specific conclusion of law that the Petitioner's exhibit reflecting these ASTM standards is not relevant to the issues presented here. The Administrative Law Judge declines to make this ruling finding that the Petitioner's argument as put forth in its Reply Brief more persuasively illustrates the applicability of these standards to the decision-making of the Petitioner as it chose the mobile GC unit over the PID.

Additionally, the Department's attempt to rely on contamination substances on the adjacent parcel did not persuasively counter the ASTM guidelines the Petitioner used. While related, the Department did not prove that the investigative activities in 1997 were an extension of the 1993 ones. Also, the Department did not persuasively show that based on the actual tanks on the present site, the kinds of releases from the diesel range fuel contaminants from these tanks would be adequately measured by a PID.

Since the Petitioner had no notice of the Department's intent to submit documents from the investigation and remediation of the 1993-1994 clean up, this information was given relatively less weight since the Petitioner did not have a chance to fully assess its content as it was being used to support the Department's position.

Much effort was spent at hearing exacting the value of the Petitioner's predictions regarding the degree of likelihood of a second PID reading which would have thus increased the overall PID costs as they compared to the single use of a mobile GC unit. Whether the Petitioner was able to substantiate at a later date with complete accuracy the

validity of the assumptions underlying its comparative data cannot not be held so significantly against the Petitioner since the Department has not provided any guidance as to the kinds of financial justification that would be considered adequate.

The Petitioner's decision to use a mobile GC unit was based on the anticipated kinds of contamination from the tanks on site at the time the investigation was being commenced. Given the absence of any validly promulgated rule prohibiting the use of mobile GC units, the fact that the department's claims adjuster did not seek guidance in determining in this instance the appropriateness of such a unit which one of the Department's witnesses testified was necessary in approximately 10% of field investigations, and the Department's reliance on contamination of an adjacent parcel which housed tanks with different tank volumes and fuel sources, the Petitioner met its burden of proving that based on the specific conditions of the Beaver Dam site, its use of a mobile GC unit was appropriately determined to be the most cost effective.

Finally, the department's argument that certain costs associated with the mobile GC unit should not be reimbursable because of improper monitor well sampling is also rejected. The Petitioner presented enough information to persuasively show that the well sample results had not previously been challenged for technical deficiencies and that considerations surrounding these samples were nonetheless separate from initial field analysis concerns.

PROPOSED DECISION

The Department's August 12, 2002 decision is reversed and the department shall reimburse the appellant an additional $4,120.60 for Mobile GC costs.

By: _____
Mari Samaras-White
Administrative Law Judge

STATE OF WISCONSIN
DEPARTMENT OF COMMERCE

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NOTICE OF RIGHTS

Attached are the Proposed Findings of Fact, Conclusions of Law, and Order in the above-stated matter. Any party aggrieved by the proposed ruling has the right to file written objections to the proposed ruling. Such written objections must be filed within twenty (20) days from the date this Proposed Ruling is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to: Administrative Law Judge, Office of the Secretary, Wisconsin Department of Commerce, 201 West Washington Avenue, P.O. Box 7970, Madison, Wisconsin 53707-7970.

Mailed to:

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Date Mailed: 10-20-03

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