



IN THE MATTER OF

:

**SITE NO. 1402
UST BOARD APPEAL**

GOODWIN COLLEGE

:

MAY 16, 2013

FINAL DECISION

I have reviewed the Proposed Final Decision and the evidence in the record. I affirm the findings of the hearing officer regarding the eligibility of the applicant for reimbursement. The applicable statutes provide for the reimbursement of costs related to, among other things, the investigation of a release or suspected release. Therefore, the investigation of releases or suspected releases from eligible underground tanks on the site can be found eligible for reimbursement. The hearing officer's approach to determining the applicant's eligibility was reasonable and based on substantial evidence submitted by the applicant and admitted to the record. However, based on the finding that one of the tanks investigated was ineligible for reimbursement, I must use my authority to modify the amount of reimbursement recommended by the hearing officer. Regs., Conn. State Agencies § 22a-3a-6(y)(3)(D). As a result, I recommend awarding reimbursement to the applicant in the amount of \$43,331.37.

Procedural Issues

DEEP staff filed exceptions to the proposed final decision on July 27, 2012. The department's rules of practice require that exceptions to be filed within fifteen days of the proposed final decision. The record shows that the decision was delivered by electronic mail on May 24, 2012. As noted in the hearing officer's e-mail, to which the proposed final decision was attached, the e-mail delivery constituted personal delivery for purposes of calculating the fifteen-day timeframe for filing exceptions. As a result, these exceptions were due no later than June 8, 2012. Instead they were delivered on July 27, 2012 with no advance notice or request for a continuance. The department's rules of practice apply equally to all parties, including DEEP

staff. There will be no further briefing and this decision will not address staff's exceptions point-by-point. At my discretion, I have addressed issues raised by staff in previous briefs to clarify the basis for my decision to affirm yet partly modify the proposed final decision.

Eligibility of the claim for reimbursement

The evidence at the hearing focused on the investigation of releases or suspected releases from three underground storage tanks next to the former loading rack area. The three tanks were in close proximity to one another and contained various petroleum products, including gasoline and diesel fuel. In the vicinity of the two eligible USTs in this area, the applicant detected significant concentrations of aromatic volatile organic compounds in soils and non-aqueous phase liquids on the groundwater surface. DEEP staff argued that the contamination in question resulted from a surface release because the East Hartford Fire Department did not observe signs of a release at the time the tanks in question were removed.

The applicant maintained and the hearing officer agreed that contamination detected in the vicinity of these underground tanks was attributed to the underground sources rather than surface releases. If this contamination migrated to depth from the surface, then it stands to reason that there would have been some observation of petroleum odors or product in soils at the time excavations were made to remove the tanks. The subsurface contamination was significant and the hearing officer's conclusion to attribute it to an underground source based on the evidence presented was reasonable. I decline to overturn the hearing officer's reasonable judgment that the sampling data in the vicinity of where these tanks were located outweighs the observational data collected at the time of removal.

DEEP staff also argues that subsurface contamination, if from an underground source, could not be from the eligible tanks because sampling locations from the approximate locations of those former USTs did not reveal any contamination. The record demonstrated that the exact location of the former tanks was never pinpointed and that there are inconsistencies within the historic information about tank size and location of the installed tanks in the original tank registration documents, the removal documentation, and the consultant reports completed prior to work performed by the applicant (See Proposed Final Decision, 5/24/12, Footnotes 3 and 4). Therefore, the maps drawn by the applicant's consultant are at best an estimate because a precise location was not fixed at the time the tanks were installed in approximately 1977 or at the time

they were removed in 1993. It is, however, reasonably certain that the samples taken fifteen years after the tanks were removed were downgradient of eligible underground sources that were the subject of the applicant's investigation.

The statutes and regulations provide that reimbursement may be awarded for costs incurred in the investigation of a release or suspected release. General Statutes §§ 22a-449c(a)(2) and 22a-449f(a); Regs., Conn. State Agencies § 22a-449e-1(d) and (e). The hearing officer determined it reasonable to award reimbursement for this claim, in part, because the claim was limited to the costs incurred in investigating contamination from eligible sources. The statute provides an incentive to undertake the effort to investigate and characterize the extent of suspected contamination in areas of concern related to eligible USTs. Here, the costs for investigation can be considered and reimbursed based on the substantial evidence provided that the applicant was investigating contamination from eligible underground sources and the applicant only sought reimbursement for investigation costs incurred for the area immediately surrounding or downgradient from eligible USTs. In addition, the applicant provided substantial evidence that the contamination it detected and investigated was not from aboveground sources that existed on site and were sources of contamination elsewhere.

Investigation and characterization of a suspected underground release is a responsible and proactive step that should be encouraged. However, in the case of historic contamination, reimbursement for the costs of investigation does not automatically ensure that costs to remediate the contamination are also eligible. All claims must be handled on a case-by-case basis. Had the applicant sought additional reimbursement for remediation, it is not clear whether all or a portion of such a claim would be awarded; greater evidence may have been required to specifically link the contamination to the eligible underground tanks. If the applicant in this matter also sought reimbursement for remediation costs, it would be wholly appropriate to require additional scientific evidence or further study to determine and confirm the eligibility of remediation costs before awarding them or sufficiently limit the award to the extent the release can be attributed to eligible sources.

The effort to investigate contamination from eligible sources is distinguishable from remediation. Here, the applicant investigated a portion of the site where pockets of contamination were reasonably attributed to underground sources. The applicant is only seeking the portion of its investigative expenses that were concentrated in the area of these suspected

releases. Staff disagrees with the contention that these releases could be attributed to eligible underground sources and argues that without the ability to pinpoint the source, the investigation costs should be deemed ineligible.

Although this investigation could not pinpoint the source of the release, i.e. which tank leaked, there was sufficient evidence to attribute the release or a portion thereof to an eligible underground source. The thorough investigation of the area could not be limited to just the eligible tanks. Given the complexity of this site and its intensive petroleum-related use, it was reasonable to weigh these factors in favor of the applicant when considering reimbursement for its investigation costs. I would not want to discourage voluntary investigation and characterization of eligible historic contamination when it is conducted with the goal of remediation and eventual reuse of vacant, former industrial sites. Here, the applicant only sought reimbursement for a portion of the investigation it conducted and clearly recognized that certain portions of the site would not be eligible. The fact that one of the tanks was determined to be ineligible during the hearing process can be properly addressed by reducing the award rather than denying all reimbursement for the investigation and the portion of it related to clearly eligible tanks.

Amount of reimbursement

In the proposed final decision, the hearing officer recommended payment to the applicant in the amount of \$59,513.25. This amount represented the applicant's request less the \$10,000 deductible and the ineligible \$2060.00 in application preparation costs. The \$2060.00 in application preparation costs were deemed ineligible because they did not fit within one of the categories outlined in Reg., Conn State Agencies §22a-49e-1(d). I agree with and intend to carry forward those reductions. However, the hearing officer failed to further reduce the award based on the determination that there was an ineligible tank included in the investigation. I acknowledge that the applicant in this matter is entitled to costs incurred to investigate a suspected release but cannot ignore that one of the tanks investigated is not eligible for reimbursement under the statutory criteria. General Statutes §22a-449f(c)(2). This must be factored into the overall award.

The applicant focused the request for reimbursement initially on five areas of concern (AOCs) identified during the Phase I investigation and these areas were all subject to

investigation during the simultaneously submitted Phase II investigation. One of these AOCs is the 10,000 gallon spill containment tank that the hearing officer determined to be ineligible. Therefore any costs associated with the investigation of a release or suspected release from a tank determined to be ineligible must be rejected. The costs for the investigation of these five areas of concern during the Phase I and II investigation should be reduced by a factor of twenty percent because one of the five tanks investigated is ineligible. The total request for the Phase I and Phase II equals \$23,936.69. After a reduction of twenty percent, the eligible amount is \$19,149.35.

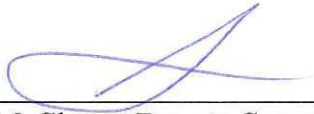
The applicant also submitted costs related to the Phase III investigation. At the time this portion of the site investigation was conducted one of the five AOCs had been eliminated as a source of contamination. Therefore, the Phase III investigation, as it related to eligible USTs was only focused on four areas of concern. Again, the hearing officer determined that one of these four areas was ineligible. Therefore, the costs related to the Phase III must be reduced by twenty-five percent. The reimbursement request for costs related to the Phase III report was \$45,576.56. After a reduction of twenty-five percent, the eligible amount equals \$34,182.42. The total eligible costs equal \$53,331.77.¹ The applicant bears the responsibility for the first \$10,000 of the eligible costs. Therefore, I recommend an overall reimbursement award of \$43,331.77.

Conclusion

In this matter, the applicant investigated a complicated site with many sources of contamination. As a result, the applicant employed a sampling program at and downgradient from the underground storage tanks to characterize and determine the extent of the contamination. A portion of the applicant's investigation focused on two areas where eligible underground storage tanks are known to have existed and where releases from underground sources were reasonably suspected based on soil and groundwater sampling and scientifically determined groundwater gradients. There were subsurface detections of petroleum product in soils and in certain circumstances, on the ground water surface in sufficient concentrations to suspect a release from an underground source.

¹ This total does not include the \$2060.00 in application preparation costs because I agree they are not reimbursable.

The evidence provided is sufficient to show that the investigation of this contamination was linked to releases reasonably attributed to eligible underground tanks. The limited reimbursement of costs associated with this investigation is a reasonable result and supported by the evidence. However, the determination that certain underground tanks investigated were not eligible must be accounted for in the overall award. Therefore, the reimbursement award shall be reduced to \$43,331.77.



Macky McCleary, Deputy Commissioner

SERVICE LIST

In re Goodwin College – UST Board Appeal
Site No. 1402

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