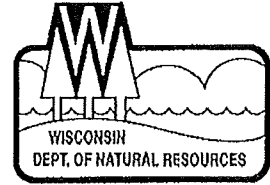


State of Wisconsin
DEPARTMENT OF NATURAL RESOURCES
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Milwaukee WI 53212-3128

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March 13, 2013

Attorney Ted A. Warpinski
Two Plaza East - Suite 1250
330 East Kilbourn Ave
Milwaukee WI 53202

Subject: Ralph Hoffman, DBA Valet Cleaners, Wauwatosa - Insurance Settlement
BRRTS # 02-41-307576

Dear Ted:

This is in response to your February 7, 2013, legal analysis regarding whether the State has a present claim to the proceeds from the Hoffman's recent insurance settlement for contaminated dry cleaner sites. There are two outstanding issues addressed in your February 7th letter: DNR's position on the allocation of funds and the timing of when the insurance settlement is applied to off-set DERF eligible costs. After discussing these two points, I will address your requests for variance from provisions of NR 169, dated January 3, 2013.

Allocation of Insurance Settlement

The statute (ss. 292.85(8)(j)(8m)) assumes that a court or other entity has determined the allocation of the insurance settlement. The statute offers no guidance on how the allocation (in the simplest case, eligible versus non-eligible DERF costs) should be made if a court or other entity has not determined this. The Department's letter of February 7, 2012 made it clear that:

"If there are no specific categories of costs listed in the insurance claim (i.e., it is a general claim of environmental contamination resulting from a business operation) or in the documentation awarding the payment, DNR will assume the entire payment or tax credit is intended to pay for DERF eligible costs. The eligible applicant can submit a variance for attorney fees as discussed in the next paragraph."

We disagree with your statement that "most claimants" use settlement funds to fund DERF ineligible costs. DNR oversees all cleanups at dry cleaner sites. The site investigation costs funded by insurance money are DERF eligible costs. However, it is true that insurance payments may cover more costs than would be reimbursable under DERF. Most insurance companies will not pay costs beyond that required for "defense." At most DERF eligible sites with insurance coverage, the insurance payments will end at completion of the site investigation. At that point, the DERF eligible site will enter back into DERF for reimbursement of remedial action costs.

You go on to state, "under these facts, it is our understanding that the Hoffmans could use the Net Remaining Settlement funds to pay future costs outside of the DERF program (i.e., ineligible costs)." The Hoffman's can use the Net Remaining Settlement funds to pay future costs outside (i.e., without asking for reimbursement from) the DERF program. However, we believe it is unreasonable to read the statute as envisioning ALL the settlement funds being used for ineligible costs. We believe your letter of January 3, 2013, sets out an allocation of the insurance payment. We interpret this allocation to mean that the Net Remaining Settlement Amount (= \$23,690.07) is the amount of funds that will be applied to future DERF eligible costs.

Timing of Applying Insurance Award to DERF Reimbursement

The Hoffman's have received DERF reimbursement equal to \$29,038.95. The question is whether the insurance settlement of \$23,690.07 must be "repaid" to DERF immediately OR if the insurance settlement can be applied at the end of the cleanup process. The statute appears to give the DNR the flexibility of waiting until the cleanup is complete. The formula in ss. 292.65(8)(j)(8m) refers to "total amount of eligible costs and the amount of the award." The total eligible costs will not be known until the cleanup is complete.

Variance from Certain Provisions of NR 169, WI. Admin. Code (response to January 3, 2013 letter)

Variance for ineligible costs. At the time the next reimbursement application is submitted, Hoffman's will need to submit the variance request for the ineligible costs identified in the allocation, i.e., attorney fees and EnviroForensics non-DERF work for audit by the DERF Fund Manager. At that time, the DNR will review the variance request. It is likely to be approved as necessary to obtaining the insurance settlement.

The DNR's February 7, 2012 letter states, "the eligible applicant will need to submit documentation that justifies the amount of attorney fees and costs." This statement applies to all ineligible costs.

Variance for Consultant Selection. EnviroForensics is contracted by Hoffman's to conduct the site investigation work and it is assumed they will continue to conduct that work. However, the variance request to NR 169.23(2)(b); NR 169.23(2)(c); and NR 169.23(2)(d), Wis. Adm. Code, to allow EnviroForensics to complete the Remedial Action workplan and cleanup process without bidding is NOT approved. NR 169, Wis. Adm. Code, uses the bidding process to control costs. DERF funding is extremely limited and good cost controls are vital to the future functioning of DERF. A variance in this situation is neither "essential to effect necessary actions . . . [nor] in the best interest of the state" (NR 169.29(1)) Wis. Adm. Code.

Variance for Frequency of Reimbursement Payments. This prospective variance request seeks to essentially establish a revolving loan fund, using the insurance settlement of \$23,690.07 as a "line of credit." Whenever the money is spent on cleanup, DERF reimbursement would be requested. The reimbursement would fund the next steps in cleanup, etc. until the cleanup is completed. The maximum reimbursement applications stated in NR 169.19(4), Wis. Adm. Code, would not apply.

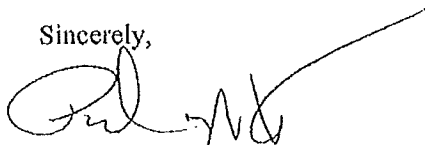
The DNR is willing to grant the variance for frequency of reimbursement payments. However, there are specific conditions we will require before agreeing to the "revolving loan" fund concept. Hoffman's must agree to all of the following stipulations prior to DNR's participation in this plan.

1. The \$23,690.07 settlement is used only for DERF eligible expenses. DERF ineligible expenses must be paid by the Hoffman's. This is expected of anyone receiving DERF reimbursement.
2. The "line of credit" is increased to \$50,000. Because there will be ineligible expenses and because the settlement is only a fraction of the expected cleanup costs (by your estimation, \$120,000), DNR is requesting that Hoffman's supplement the settlement money so that the "line of credit" is more likely to cover reasonable costs for each phase of cleanup. We recommend a minimum amount of \$50,000. (That is, that Hoffman's increase the settlement by a minimum of \$26,309.93).
3. The Hoffman's enter into an enforceable consent order. The consent order will set out the details of how the revolving account will function, who will control the account, how money enters and leaves the account, expectations for completion of the cleanup by the Hoffman's, etc.
4. The Hoffman's accept a lien by the State of Wisconsin on their property for the value of \$23,690.07. The lien will be satisfied when the cleanup is complete and the last claim for reimbursement of DERF eligible expenses equals or exceeds this amount. Alternately, Hoffman's

agree to pay whatever amount of money, up to the \$23,690.07 has been reimbursed but has not been spent on DERF eligible expenses at the time the site is closed.

I hope this addresses the issues you raised in both your January 3 and February 7, 2013 letters. Please call me at 414-263-8561 if you have questions.

Sincerely,



Pam Mylotta
Southeast Region Team Supervisor
Bureau of Remediation & Redevelopment

cc: Terry Evanson – Team Leader – Drycleaner/Vapor Intrusion Team – GEF 2
Lacey Cochart – DNR Attorney – GEF 2