Connecticut Department of
ENERGY &
ENVIRONMENTAL
PROTECTION

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Office of Adjudications

IN THE MATTER OF	***:***	***SITE NO. 1402 UST BOARD APPEAL***
GOODWIN COLLEGE	***:***	***MAY 24, 2012***

PROPOSED FINAL DECISION

I SUMMARY

This matter involves a claim for reimbursement filed by Goodwin College (the applicant) with the Underground Storage Tank Cleanup Review Board (the Board). The claim resulted from investigation activities associated with petroleum contamination at a site the applicant owns at 1-5 Riverside Drive in East Hartford. In its initial claim, the applicant sought reimbursement of costs totaling $71,573.25. The Board denied this claim and the applicant filed a timely request for hearing seeking reconsideration of the Board's decision.

At a hearing conducted over two days, the applicant presented evidence regarding its eligibility for reimbursement. Staff from the Department of Energy and Environmental Protection (DEEP) Underground Storage Tank Cleanup Program (staff) presented evidence to support its argument that the claim as presented is ineligible for reimbursement. The applicant and staff filed post-hearing briefs that included legal arguments in support of the overall recommendation to approve or deny the claim.

I have been directed by the Commissioner to hear this claim pursuant to a request from the Board. I have independently reviewed the applicant's eligibility for reimbursement and present my recommendation to the Board in this proposed final decision. Based on my review

of the record, including all witness testimony and documentary evidence presented and admitted into the record, I find that the applicant has met its burden of proof in this matter and the preponderance of the evidence shows that it has satisfied the conditions for reimbursement outlined in the applicable statute and program regulations. However, as noted below, I recommend that the Board approve a portion of the applicant's claim in the amount of $59,513.25. This decision presents findings of fact and conclusions of law that support my final recommendation.

II
DECISION
A
FINDINGS OF FACT

The following findings of fact are based on a review of the entire record of this proceeding, a determination of the credibility and the weight to be given to competing evidence, and on reasonable inferences drawn from the evidence.

1
Procedural History

1. The applicant filed a claim with the Board on July 20, 2010 to request reimbursement under the provisions of General Statutes § 22a-449f and Regs., Conn. State Agencies § 22a-449e-1. Staff recommended that the Board deny the claim because the applicant failed to demonstrate that the work for which reimbursement was sought was eligible for reimbursement. Staff based its recommendation, in part, on its opinion that the release investigated by the applicant emanated from above ground storage tanks (ASTs) formerly on the property and surface releases and that the release area identified and investigated by the applicant was downgradient from the area where the ASTs were located. Staff also disputed the eligibility of costs related to the investigation of the spill containment tank because it was not subject to the federal financial assurance requirements. (Exs. DEP-9, APP-20, 22; test. R. Carr, 10/27/11.)

2. The Board denied the claim based on staff's recommendation and the applicant filed a timely appeal of that decision.[1] (Exs. APP-20, DEP-9.)

2
The Site

3. The 10-acre site is located at 1-5 Riverside Drive in East Hartford. It is bordered on the west by the Buckeye Pipeline and the Connecticut River, on the north by Colt Street, on the east by Riverside Drive and Route 2, and on the south by a boathouse currently owned by Trinity College. (Ex. APP-1; test. R. Carr, 10/27/11. [2])

4. The site was operated as a petroleum distribution facility since the 1920s until approximately 1993. The site received and dispensed large volumes of various petroleum products and stored these products in a complex array of above-ground storage tanks (ASTs), underground storage tanks (USTs) and associated piping, sumps, and dispensing equipment. (Ex. APP-1; test. R. Carr, 10/27/11.)

5. The ASTs received and stored the largest volumes of petroleum products offloaded from barges or from the adjacent Buckeye Pipeline and were separated from other parts of the site by a concrete retaining wall and an earthen embankment or berm. These ASTs were located on the south and southwestern portion of the property. (Ex. APP-1; test. R. Carr, 10/27/11.)

6. The facility relied on a loading rack system to dispense large volumes of petroleum products into tanker trucks that would transport the products for further distribution to commercial and residential customers. The trucks would pull onto the concrete surface of the loading rack and under the fill pipe. The needed product would be pumped into the ports on the top side of the tanker truck. There were diesel and gasoline dispensers adjacent to the loading

[1] All documents pertaining to the procedural history of this proceeding are contained in the docket file maintained by the Office of Adjudications and are part of the administrative record in this matter. General Statutes §4-177(d).

[2] The testimony and proceedings in this matter were recorded. No written transcript has been prepared. The audio recording of this hearing is on file with the Office of Adjudications and is the official record of this proceeding.

rack for filling tanker trucks with fuel for operation. (Exs. APP-2, DEP-7, 8; test. R. Carr, 10/27/11.)

3

Underground Storage Tanks

7. There were several USTs used to store petroleum products located on the site. Some were located in the vicinity of or associated with the loading rack system. These included a 2000-gallon gasoline UST and a 4000-gallon diesel fuel UST.[3] These USTs were located to the south of the former loading rack area and north of the concrete retaining wall that surrounded the northeast portion of the AST area. DEEP was provided notice of the 2000-gallon gasoline tank and the 4000-gallon diesel tank on the department's EPHRM-6 form initially in May 1986 and subsequently in March 1989. The 2000-gallon gasoline tank and the 4000-gallon diesel tank were steel tanks installed in 1977 with a life expectancy of 15 years. These two tanks were subject to the federal financial assurance requirements and were removed in 1993. A 10,000-gallon underground spill containment tank was located immediately southwest of the loading rack. These three tanks located in the vicinity of the former loading rack were grouped closely together. There were also a 2000-gallon gasoline UST located along Riverside Drive and a 3000-gallon fuel oil UST[4] northeast of the former loading rack between the maintenance building and the garage.[5] The 2000-gallon gasoline tank near Riverside Drive was included in the 1986 and 1989 UST notices to DEEP. The 3000-gallon tank was identified in a subsequent notification form to DEEP in 2000. The 3000-gallon fuel oil UST and the 2000-gallon gasoline

[3] Both the 1986 and 1989 DEP notification forms within APP-1 indicate that the gasoline tank was 4000 gallons and the diesel tank was 2000 gallons. The sketch plan included with the notification indicates the diesel tank was 4000 gallons and the gasoline tank was 2000 gallons. Subsequent site investigations (Rizzo and GZA reports) indicate agreement with what was noted on the sketch plan. I have elected to use the values indicated in the environmental reports and indicated in Mr. Carr's testimony. The capacity of each tank exceeds the *de minimis* exclusion from financial assurance requirements for tanks with a capacity under 110 gallons so the inconsistency in the record would not impact the eligibility of work associated with releases or suspected releases from these two tanks.

[4]Again there is a discrepancy between the notification forms and the subsequent reports. The notification form indicates this is a 2000-gallon fuel oil tank that replaced another 2000-gallon tank. The location identified on the sketch plan matches the location identified in the reports. To be consistent, I will use the volume identified in the report. Again the tank's volume, whether 2000 gallons or 3000 gallons, far exceeds the *de minimis* exclusion for tanks under 110 gallons.

[5] There were additional USTs located on the site but they are not the focus of this claim for reimbursement as they were not identified as Areas of Concern in the Phase I site assessment completed by Zuvic Associates on behalf of the applicant.

tank near Riverside Drive were also subject to the financial assurance requirements. (Exs. APP-1, 2, DEP-5; test. R.Carr, 10/27/11 and 10/28/11.)

8. The 10,000-gallon spill containment tank collected spills at the loading rack area through a system that included catch basins, a sump, and underground piping. The spills could be gasoline, diesel fuel, and fuel oil depending on the product being dispensed at the loading rack. The spill containment tank was also removed in 1993. The tank had the capacity to handle a catastrophic spill from a full tanker truck. It also could contain modest spills from the filling process that occurred at the loading rack. Any spill at the loading rack would be directed to catch basins in the center portion of the loading rack pad. The loading rack pad was covered by a canopy. Stormwater would generally be directed outside the loading rack area from the canopy and not into the catch basins reserved for fuel spill containment. The spilt fuel would run through underground piping to a sump and then through another underground pipe to the 10,000-gallon UST. Product in the sump could be removed by accessing the sump through its removable cover. Product could be pumped out of the tank using a 3-inch suction pipe attached to a float and tethered to the surface by a stainless steel cable. The horizontal arm of the suction pipe was on a swivel to permit the suction end to move up or down with the product level. The tank had a manhole cover with a two-foot manway to allow access from the surface. There was also a liquid level indicator visible from the surface. There are no records that indicate how often or when the spill containment tank was emptied. The tank design allowed product to be pumped out of the tank and enter separate lines for gasoline, fuel oil, and water. There is no specific information that details the operation of the system. Staff and the applicant have made inferences about the operation of the spill containment tank based on facility design drawings drafted prior to tank installation. These drawings changed over time as a result of comments received from DEEP staff. There are no as-built drawings available to determine the final installation configuration. The final tank location was different from that shown on the design plans. (Exs. DEP-2, 8; test. R. Carr, 10/27/11 and 10/28/11, J. Gilbert, 10/28/11.)

9. The applicant offered its theory that the tank was allowed to fill with spilled fuel until it reached a sufficient volume that required it to be pumped out for off-site disposal or reuse. The applicant's expert determined that the design of the tank did not support it being expeditiously

emptied. It based its determination on the size of the tank, the fact that its design shows it was to be installed at a level grade, and that the end of the suction hose could be fixed in place at a certain level with the use of the stainless steel tether. (Ex. DEP-8; test. R. Carr, 10/27/11 and 10/28/11.)

10. The department offered an alternate opinion that spilled fuel was not allowed to accumulate in the spill containment system and was in fact expeditiously emptied from the tank. The department relied on design drawing showing liquid pumped from the tank entered three separate lines to indicate that spills of particular products were pumped out immediately and reused on the site rather than disposed of off-site. This separation and reuse of product would not allow for the collection and mixture of fuel in the actual tank. Staff also argued that the former site operators purposefully did not register the tank with the department because it did not intend for liquids to accumulate and it required the 10,000-gallon capacity to allow for recovery of a catastrophic spill from a tanker truck at the site and not for storage. (Ex. DEP-8; test. J. Gilbert, 10/28/11.)

11. The tank was expeditiously emptied. Smaller spills could be cleaned immediately from the three foot diameter sump and larger spills would be pumped from the tank into one of the three separate lines. There are no records of tank emptying events because the liquid emptied from the tank was distributed within the site to another spill containment structure or for reuse. A spill containment tank that is expeditiously emptied is not subject to the financial assurance requirements. The spill containment system is an unlikely cause of a significant release because product was not stored in the tank. (Exs. APP-1, 2, DEP-8; test. J. Gilbert, 10/28/11.)

4
Groundwater Flow

12. Rizzo Associates (Rizzo) collected depth to groundwater data from eleven monitoring wells it installed on the site. The data collected in January and March 1991 was used to create a map of the groundwater surface on the site as a means to evaluate groundwater levels and flow.

Rizzo concluded that the groundwater on the site flows generally to the west towards the Connecticut River with a slight southerly component. (Exs. APP-1, 2; test. R. Carr, 10/27/11.)

13. Zuvic Associates (Zuvic), on behalf of the applicant, also compiled groundwater data. Zuvic conducted groundwater monitoring on a quarterly basis in consideration of the potential seasonal fluctuations in groundwater levels. There are seasonal fluctuations to groundwater flow on the site. Zuvic measured groundwater levels on October 8, 2009, January 26, 2010, April 19, 2010, and July 20, 2010. Based on measurements taken at 19 groundwater monitoring wells in October, 15 wells in January, 18 wells in April, and 12 wells in July, groundwater levels consistently demonstrated flow predominantly to the west with a slight southwesterly component from the tank farm area. (Exs. APP-1, 2, 7; test. R. Carr, 10/27/11.)

14. A 1973 study of the AST area by Thomas L. Holzer, Ph. D. found contamination from the ASTs migrating south and southwest. It also concluded there was a slight flow to the east and away from the Connecticut River on the southeastern portion of the site. The 1973 study also states that groundwater can move in all directions from the tank farm area. However, all specific findings in that report based on soil borings and groundwater monitoring wells indicate the contamination was moving with groundwater south from the tank farm area. The groundwater mound referenced explained the small easterly flow and contamination found to the east of the tank farm area. It is not indicative of any flow in a northerly direction from the tank farm area against the data-derived gradient described in the Rizzo report and confirmed in the contour maps generated from the data collected by Zuvic. There are components of the groundwater flow that turn southwest and south approaching the southern boundary of the property and that turn to the north and northwest approaching the northern property boundary. The groundwater flow from the AST area is to the west and southwest. (Exs. APP-1, 2, 7, DEP-7; test. R. Carr, 10/27/11.)

15. A ten-inch tile drain ran along the southern boundary of the site. This tile drain historically collected petroleum contaminated groundwater and free liquid product from the tank farm area. Contaminated groundwater from the tank farm and the tile drain could potentially

flow both east towards Riverside Drive and West towards the Connecticut River. Contamination did not flow north from the tank farm area. (Exs. APP-2, DEP-7; test. R. Carr, 10/27/11.)

5

Site Investigation

16. Goodwin College finalized its purchase of the property in March 2007. It did not own or operate the property during the site's operation as a bulk petroleum facility and did not own or operate any part of the USTs or UST systems on the site associated with the loading rack. All tanks related to the bulk petroleum facility were removed prior to Goodwin College assuming ownership of the site. As part of the due diligence work associated with the property transfer and to establish a remedial action plan for the site, Goodwin College evaluated the environmental impacts associated with the former bulk petroleum terminal. In March 2007, Phase I and Phase II Environmental Site Assessments were completed by Zuvic on behalf of Goodwin College. The Phase I and Phase II covered the entire property. Through this investigation, Zuvic identified sixty-four areas of concern (AOCs) in the Phase I report. Of these sixty-four, five were identified as pertaining to USTs. The five AOCs identified by Zuvic that related to USTs were AOC #23, the 2000-gallon gasoline UST near Riverside Drive; AOC #18, the 3000-gallon fuel-oil UST northeast of the former loading rack; AOC #19, the 2000-gallon gasoline tank immediately south of the former loading rack; AOC #21, the 4000-gallon diesel tank immediately south of the loading rack; and AOC #21, the 10,000-gallon spill containment tank[6] immediately southwest of the loading rack. Zuvic performed soil samples and groundwater monitoring to determine whether releases at these AOCs may have occurred. These investigations were conducted in accordance with DEEP's Site Characterization Guidance. (Exs. APP-1, 2, 21; test. R. Carr, 10/27/11 and 10/28/11.)

17. In February 2010, Zuvic completed a Phase III Environmental Site Assessment to confirm any contamination and determine the degree and extent of any contamination. During the Phase III Assessment, Aromatic Volatile Organic Compounds (AVOCs) were detected at

[6]AOC 21 is depicted in two locations on site plans. One depiction, including original design drawings, shows it further west from the former loading rack. Tank registration documents for AOCs 19 and 20 show the actual location of AOC 21 was closer to the former loading rack.

significant enough levels to be considered separate phase product pursuant to the department Remediation Standard Regulations (RSRs). One such detection of AVOCs at these levels occurred immediately downgradient from the location of the former gasoline UST located south and southwest of the former loading rack system. The AVOCs were detected at these levels ten to fifteen feet below grade. AVOCs in soils are primarily attributed to a gasoline release. There is no way to pinpoint the source of a historic release for closely grouped USTs. At the time tanks were removed in 1993, no sampling of tank graves was conducted; only visual observations were noted. No releases or spills were noted at the time of the removal. The AVOC detection was upgradient of the spill containment tank. (Ex. APP-1; test. R. Carr, 10/27/11 and 10/28/11.)

18. Separate phase product in the form of LNAPL was detected on top of the water table. This detection was immediately downgradient of the gasoline and diesel USTs (AOCs 19 and 20) located south of the loading rack and in the vicinity of the spill containment tank. There were no detections of LNAPL further upgradient of these USTs and the loading rack area. Borings to either side of this location, including those beneath the northern boundary of the AST area did not reveal the presence of LNAPL or levels of AVOCs consistent with a significant release. LNAPL on the groundwater surface could contaminate soils through interface between fluctuating groundwater and soils on a seasonal basis. LNAPL on the water surface and AVOCs at levels high enough to be considered separate phase product are the results of a significant release. Soil and groundwater monitoring results confirmed an approximate area of contamination attributable to the UST area near the former loading rack system. The USTs consisted of the tanks and associated underground piping that led to and from the loading rack system. The USTs installed at this location were steel tanks. (Ex. APP-1; test. R. Carr, 10/27/11 and 10/28/11.)

19. The applicant had achieved at least three milestones at the time it had filed its application. The applicant had completed a release response report, the interim remedial action report and the investigation remedial action plan. (Ex. DEEP-1; test. R. Carr, 10/27/11.)

20. The UST systems investigated by the applicant were removed in 1993. They are not currently operating and were not operating at the time of the investigation. The UST systems are

not required to track compliance and were not required to track compliance from the time the applicant acquired the property and through the time it investigated the site. The applicant did not own the UST systems at the time of the release. (Exs. APP-1, 2; test. R. Carr, 10/27/11 and 10/28/11.)

6

Applicant's Reimbursement Request

21. The applicant's claim for reimbursement does not deduct the first $10,000 of costs associated with the USTs. The applicant's claim also includes $2,060.00 associated with the preparation of the reimbursement application for the UST Board. No evidence was provided that the applicant collected three bids for the services provided by Zuvic for which reimbursement is sought. (APP-1; test. R. Carr, 10/27/11.)

22. The applicant's purchase price for the property included a payment of $62,000 for the transfer of an escrow fund related to the remediation of the entire site. At the time of the transfer, the escrow fund contained $62,000. The escrow funds were released to Goodwin College. Goodwin College did not have insurance or a contract or other agreement sufficient to cover the costs and expenses associated with the investigation of contamination related to releases from the USTs at the site. (Exs. APP-21, DEP-3, 4; test. J. Emlet, 10/28/11)

23. The request for reimbursement does not include any costs associated with remediation because the applicant has received federal grant funds for remediation activities. The grant does not cover the costs of investigation. (Ex. APP-1; test. R. Carr, 10/27/11.)

24. The applicant provided copies of paid invoices related to the investigation of UST contamination to the Board as part of its application package. These invoices were relevant to potential and actual contamination from the USTs identified during the Phase I investigation as AOCs 18, 19, 20, 21, and 23. The five AOCs related to former USTs represent eight percent of the costs associated with the sitewide Phase I investigation. The applicant identified specific soil borings and groundwater monitoring wells proximate to and downgradient from the area of UST contamination. The number of borings attributable to the area of contamination from the

USTs was compared to the overall number of borings to derive a percentage of the overall soil boring costs at the site attributable to determining the extent of contamination from the UST and loading rack area. The same calculations were made for gauging and sampling of groundwater monitoring wells associated with the investigation of the USTs. (Ex. APP-1; test. R. Carr, 10/27/11 and 10/28/11.)

25. During the Phase II investigation, twenty-six out of 126 soil borings were related to the UST investigation or twenty one percent of the costs associated with the soil investigation conducted during the Phase II. These borings were in a zone proximate to and downgradient from the AVOC and LNAPL detections near the former location of the USTs in this area. The groundwater analysis conducted as part of the Phase II was not related to the regulated USTs. Groundwater monitoring was conducted in January 2010. Five of the fifteen wells analyzed were in the area proximate to USTs identified as AOCs. (Ex. APP-1; test. R. Carr, 10/27/11 and 10/28/11.)

26. During the Phase III investigation twenty-two out of eighty-one soil borings were located in the area related to the UST investigation and necessary to determine the existing and potential degree and extent of the contamination from the suspected UST release. Groundwater monitoring was also conducted in March, April, May and June of 2010. Thirty-three percent of the work completed for groundwater monitoring was attributable to the UST AOCs. Additional soil borings and groundwater monitoring did not occur in the vicinity of AOC 18 during the Phase III investigation because a release from that UST was ruled out during the Phase II investigation. (Exs. APP-1, 16; test. R. Carr 10/27/11.)

27. Licensed Environmental Professionals (LEPs) typically work with staff to come up with a reasonable allocation of costs attributable to the UST investigation at a site where overall contamination is not attributable solely to UST releases. The applicant provided a reasonable description of costs associated with the investigation of UST releases. The applicant provided every invoice paid and included the specific costs for laboratory analysis and only that analysis attributable to petroleum related constituents. Any laboratory analysis for non-petroleum related constituents was not included in the reimbursement total. Robert Carr is certified by the state of

Connecticut as a LEP and he signed and certified the application for reimbursement as a LEP. (Exs. APP-1, 19; test. R. Carr, 10/27/11 and 10/28/11.)

B
CONCLUSIONS OF LAW
1
Burden of Proof

The applicant has the burden to show its claim complies with the applicable statutory and regulatory criteria. The statute does not specify whether the Board or DEEP staff has the burden of proof in an appeal of a Board decision. However, the department's Rules of Practice clearly state that in a hearing "on an application, the applicant and other proponents of the application shall have the burden of going forward with evidence and the burden of persuasion with respect to each issue which the Commissioner is required by law to determine in deciding whether to grant of deny the application." Regs., Conn. State Agencies §22a-3a-6(f).

2
Applicable Statutory Provisions

I agree with staff's general presentation of the issues I must determine. The issues before me include: (1) whether the submitted expenses are eligible and reasonable; (2) whether the applicant has complied with all applicable requirements, including but limited to, General Statutes §§22a-449a through 22a-449p and Regs., Conn. State Agencies §22a-449e-1; and (3) whether the costs for reimbursement have been adequately substantiated and documented.[7] More specifically, General Statutes §22a-449f(c) sets out the following conditions that must be met for reimbursement.

[7] Staff provided this statement of issues in its Prehearing Memorandum dated October 5, 2011 and affirmed it on October 11, 2011 in Staff's Objection to Goodwin's Filing Dated October 5, 2011.

(1) *Such cost is or was incurred after July 5, 1989.*

The application meets this condition. All work was conducted and related costs were incurred after the statutory deadline.

(2) *A responsible party was or would have been required to demonstrate financial responsibility under 40 CFR Part 280.90 et seq. as said regulation was published in the Federal Register of October 26, 1988, for the underground storage tank or underground storage tank system from which the release emanated, whether or not such party is required to comply with said requirements on the date any such cost is incurred, provided if the state is the responsible party, the board may order payment, within available resources, without regard to whether the state was or would have been required to demonstrate financial responsibility under said sections 40 CFR Part 280.90 et seq.*

Much of the evidence and argument centered on the eligibility of the tanks investigated. If a tank owner or operator was not required to demonstrate it met the federal financial assurance requirements for the tank from which the release or suspected release emanated then a responsible party cannot seek reimbursement from the UST fund for work related to that release or suspected release. General Statutes § 22a-449f(c)(2). Here, the applicant investigated a site with known petroleum contamination. The site in question had a complicated array of ASTs, USTs, piping, filler ports, and dispensing systems associated with the bulk petroleum facility. In the course of its investigation, areas of concern were identified near former UST systems. Through the collection of subsurface data, the applicant identified an area of contamination determined to have emanated from these former USTs.

Staff's initial recommendation to the Board to deny the claim was based, in part, on its opinion that this area of contamination was downgradient or cross gradient from the AST area. This is not supported by the evidence. Zuvic established through several rounds of groundwater data collection that groundwater flows essentially towards the Connecticut River. It acknowledges some radial components to the flow as you approach the northern and southern boundaries but confirmed that groundwater did not carry contamination from the AST location to the area of contamination identified to the west of the former loading rack area and USTs. More importantly, Zuvic's findings are corroborated by previous investigations of the site completed by Rizzo Associates in 1991, GZA in 1994, and Aegis, Inc. in 2000. The evidence presented

regarding the direction of groundwater flow eliminated the AST area as a source for this particular pollution.

Staff argues that these groundwater results are not representative of former site conditions and relies on the 1973 study for its opinion that groundwater can flow north from the AST area into this UST area. However, the 1973 study does not support this opinion. The references it makes to mounding and radial flow support a slight flow to the east of the AST area toward Riverside Drive. There is no indication that contamination flowed north toward the identified UST area near the former loading rack.

The applicant focused on the 10,000-gallon spill containment tank and piping but acknowledged the contamination, including the LNAPL on the groundwater surface and the AVOCs/interstitial (soil) NAPL, could have been released from the gasoline or diesel USTs in this immediate area. In fact, the applicant's expert considered the AVOC/interstitial NAPL to be the likely result of a significant gasoline spill. The diesel and gasoline USTs proximate to this area of contamination that was the subject of the applicant's investigation are clearly subject to the federal financial assurance requirements and are regulated USTs. The investigation of these USTs is necessarily and unavoidably intertwined with the investigation of the entire loading rack area. The inability to pinpoint the source of this contamination is not unusual for a historic release near tightly grouped USTs.

The statute only allows reimbursement for work related to the investigation of a release or suspected release from tanks subject to the federal financial assurance requirements. General Statutes §22a-449c(a)(2). Therefore, the staff also focused its argument on the status of the spill containment tank. Based on the limited evidence presented, it is more likely that this tank was not subject to these requirements because it was expeditiously emptied. However, there is no definitive evidence that the spill containment tank is the source of this contamination and the investigation remains tied to releases or suspected releases from regulated UST systems. In other words, even if the spill containment tank is considered ineligible, there is an equal or greater possibility that the release was the result of the regulated USTs and the subsequent investigation would still have been necessary as the reports confirm there was a subsurface

source. In fact, it is reasonable to infer that a tank that was "expeditiously emptied" would not be a source of a significant release but tanks that regularly held product for sustained periods of time would be. Therefore, the evidence indicating that the spill containment tank was not subject to the financial assurance requirements also indicates that it was not a likely source of the contamination.

The language of the statute provides that a responsible party may seek reimbursement from the fund for costs associated with the investigation of a release or suspected release. There is no requirement that a responsible party prove by a preponderance of the evidence that a specific release from a specific UST occurred or that an applicant must account for every possible theory for a historic release. Here, the applicant detected a substantial amount of free product downgradient and in close proximity to a set of USTs. The detection of free product occurred at levels 10-15 feet below grade. The applicant performed reasonable investigative work to rule out other sources, including groundwater monitoring to fully characterize groundwater flow and understand if any upgradient sources were present. The request for reimbursement does not seek payment for every hole poked on the site but focuses on a discreet area affected and potentially by contamination that the applicant reasonably suspected could only have come from an underground source.

There is no way to pinpoint which tank caused the release, but the presence of significant levels of AVOCs are likely the result of a gasoline release. Gasoline was stored on site in the immediate area of the contamination in a 2000-gallon tank from 1977 until the tank was pulled in 1993 while similar quantities of gasoline were not stored in the spill containment tank. Staff argues that any work related to a release from the 10,000-gallon spill containment tank would be excluded from reimbursement. However, there is no way to segregate the investigation of the regulated USTs from an investigation of the spill containment tank in this matter.

I recognize that the applicant and department staff posited two plausible theories for the operation of the spill containment system. My determination that fuel was not allowed to accumulate in the tank is based on a few factors. First, the spill containment tank design was specifically changed so product could be pumped from the tank into three separate lines

depending on the product in the tank. This was best accomplished by immediately pumping the spilt product from the tank into one of these lines for reuse and not by allowing an accumulation and mixing of product. The use of the tank for longer term storage and mixing of spilt product would render the three separate lines meaningless. Second, the operator of the bulk petroleum facility clearly knew of the requirements to register its USTs with the department and did so in 1986. There is no evidence that the 10,000 gallon UST was ever registered. It is reasonable to conclude that the operator thought this tank was exempt from the registration requirements because it was a spill containment tank designed to be expeditiously emptied and not designed or intended for long term storage. Also, the sump was accessible through a removable cover and smaller spills that collected there could be removed. There is no evidence that spills would accumulate in the piping to the tank. All of these factors lead to my conclusion that the spill containment tank was expeditiously emptied and therefore unlikely to be the source of the release.

The evidence presented by the applicant is sufficient to allow a reasonable fact-finder to make the inference that the release came from one or more USTs located onsite. It is the right and duty of the fact finder to draw reasonable and logical inferences from the evidence. See *Connecticut v. Tangari*, 44 Conn. App. 187, 197 (1997). Even though the specific UST from which the release emanated has not been identified, it is undisputed that the USTs more likely to be the source of this release were within the scope of tanks required to meet the federal financial assurance requirements. The applicant has met its burden of showing that it investigated a release or suspected release from USTs subject to the federal financial assurance requirements.

(3) *After the release, if any, the responsible party incurred a cost, expense or obligation for investigation, cleanup or for claims of a person other than a responsible party resulting from the release, provided any such claim shall be required to be finally adjudicated or settled with the prior written approval of the board before an application for reimbursement or payment is made,*

The applicant seeks reimbursement for its investigation of releases and suspected releases from the USTs. The paid invoices presented in its application coupled with the relation back to the activities in question are substantial evidence that investigative costs were incurred related to the regulated USTs. The investigation was for the purpose of characterizing the existing and

potential extent and degree of soil and groundwater pollution as required by Regs., Conn. State Agencies § 22a-449e-1(d)(3). Staff argues that the costs of the investigation were related to Goodwin College's Transfer Act obligations and any costs related to Transfer Act requirements are ineligible. There is no statutory or regulatory basis for this argument. In order to exclude that type of work categorically, the legislature would have to have done so specifically within the statute or the department could have done so in its regulations. Staff can only point to a portion of the legislative history to support this argument.

In fact, there is no need to examine legislative history where the language of the statute is clear. "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." General Statutes §1-2z. The legislative history does not need to be reviewed here because there is no ambiguity in the language. The statute provides "[a] responsible party may apply to the Underground Storage Tank Petroleum Clean-Up Review Board established under section 22a-449d, for reimbursement for costs paid and payment of costs incurred as a result of a release, or a suspected release, including costs of investigating and remediating a release, or a suspected release." General Statutes §22a-449f(a). Also, "the program shall provide money for reimbursement or payment pursuant to section 22a-449f, within available appropriations, to responsible parties or parties supplying goods or services, for costs, expenses and other obligations paid or incurred, as the case may be, as a result of releases, and suspected releases, costs of investigation and remediation of releases and suspected releases." § 22a-449c(a)(2). The legislature put no explicit restriction on costs that were also incurred to meet Transfer Act obligations.

This is in contrast to elsewhere in the statute where the legislature specifically excluded work from eligibility. For example, "no payment or reimbursement shall be made for any costs, expenses and other obligations paid or incurred for remediation, including any monitoring to determine the effectiveness of the remediation, of a release to levels more stringent than or beyond those specified in the remediation standards established pursuant to section 22a-133k,

except to the extent the applicant demonstrates that it has been directed otherwise, in writing, by the commissioner." General Statutes § 22a-449c(a)(3)(A). A similar provision could have been included for Transfer Act investigations but was not. The plain wording of the statute does not allow for such an exclusion to be implied. Given an unambiguous statute, 'it is assumed that the words themselves express the intent of the legislature ... and there is no need to construe the statute'. [Citations]" *Glastonbury Co. v. Gillies*, 209 Conn. 175, 179-80 (1988).

Even if it was necessary to consider the legislative history, it does not necessarily warrant a conclusion that all work serving a dual purpose of remediating the site and meeting Transfer Act requirements is ineligible. In its brief, staff references and attaches a portion of the floor debate on the UST reimbursement fund legislation from 1990 to support its argument (Brief After Hearing of the UST Petroleum Clean-up Program Staff). In that portion of the debate, a legislator inquires, whether a buyer that does an investigation to see if a property is contaminated "in any way" can seek reimbursement from the fund for that type of investigation. The answer from a fellow legislator was no.

This example from the inquiring legislator does not match the factual situation in this matter because Goodwin College's efforts went far beyond determining whether the property was contaminated. The concern expressed during the floor debate was also expressed prior to the current requirement that an applicant must prove certain remedial milestones are met on the property to be eligible for reimbursement. The fact that these milestones are being met at the time of or shortly after a property transfer should not exclude such claims from reimbursement. The milestone requirement addresses the concern brought up in the legislative history. Investigative work done at sites is reimbursable as long as progress towards remediation is being made by the applicant. An applicant bears the responsibility to demonstrate this by meeting the milestones articulated in General Statutes §22a-449p. If the investigation also related to meeting Transfer Act requirements, then that does not impact eligibility absent specific provisions for such an exclusion from the legislature or the department in its regulations.

The department also argues that the costs of preparing the application are not eligible for reimbursement. The applicant cites to the regulations as support for the eligibility of application

costs. However, application costs do not fit into any of the categories of eligible costs articulated in Reg., Conn State Agencies §22a-49e-1(d). The $2060 related to this work is ineligible for reimbursement. Finally, the first $10,000 in costs associated with the UST release must be paid by the applicant and that must be verified by the applicant. General Statutes §22a-449c(3), Regs., Conn. State Agencies §22a-449e-1(e)(1)(O). The applicant has not provided evidence that it assumed the first $10,000 of costs associated with the UST release in this matter. The original claim must be reduced by an additional $10,000.

(4) *The board determines that the cost, expense or other obligation is reasonable and that there are not grounds for recovery specified in subdivision (1) or (3) of subsection (g) of this section,*

The applicant provided substantial evidence that the costs incurred were reasonable. The work for which reimbursement is sought focused on a discreet area of contamination proximate to the area where known USTs and associated piping were located. The applicant identified specific soil borings and groundwater monitoring wells proximate to the area of UST contamination. The applicant provided every invoice paid and included the specific costs for laboratory analysis. Any laboratory analysis for non-petroleum related constituents was not included in the reimbursement total. Every effort was made to detail the costs and how they related to the UST area and focused on investigating the extent of contamination from a suspected UST release. This constitutes substantial evidence that the costs were reasonable. No evidence to the contrary was presented by staff on this issue.

However, the applicant did not provide evidence that it received three bids for the investigative work for which reimbursement is sought or of a process to seek and evaluate three bids for the work as required by Regs., Conn. State Agencies § 22a-449e-1(e)(1)(J). In his review of the application, the Commissioner may only deem an application complete upon satisfactory fulfillment of the of the application requirements. Regs., Conn. State Agencies § 22a-449e-1(f)(2). However, it is not clear whether the Board can reject a claim when the information listed in §22a-449e-1(e)(1) is not provided. The regulations specify only that the Board may deny a claim for failure to supply any additional information it requires during its review. Regs., Conn. State Agencies §22a-449e-1(e)(3). The regulations also indicate the Board

shall render a decision not more than 45 days after a decision is received provided "such application included all information required by subdivision (1) or (2) of subsection (e)." §22a-449e-1(f)(4). Finally, department staff must evaluate, based on costs and standards prevalent in the relevant market or industry, whether some or all of the costs incurred were reasonable in amount for the goods or services provided. §22a-449e-1(f)(3)(A)(xi).

The information regarding the three bids could be used to assist the Board in determining the reasonableness of the costs. In this matter, the Board did not consider in any detail the reasonableness of the claims because the recommendation against reimbursement focused on the eligibility of the tanks and the conclusion that the ASTs and surface releases were likely the source of contamination. Department staff did not argue that the costs incurred for the site investigation are unreasonable and did not present evidence on this issue during the hearing. I also have no indication from staff that the allocation of costs to UST related work was unreasonable. Staff only argued that costs related to the applicant's Transfer Act obligations are not reimbursable but provides no legal support for this argument from the actual language of the statutes or the regulations as already discussed.

The applicant, on the other hand, provided detailed invoices and explanations of how it calculated costs attributable to the UST investigation. I accept the documentation of costs provided by the applicant. The regulations provide the Board *may* exercise its authority to reject a claim for an applicant's failure to provide additional information required by the Board. §22a-449e-1(e)(3). If the information regarding three bids was missing and the Board would like to require it, it can require it. If the information is not provided, then this type of permissive language provides the Board with the discretion to award a claim without this information as well as the authority to reject it. There is no information in the hearing record that would allow me to reject this claim solely on that basis. Staff acted on the application and made a recommendation to the Board so it stands to reason that staff determined the application to be complete and that the information provided by the applicant satisfactorily fulfilled the requirements of subdivision (1) of subsection (e) of the UST regulations as required by §§ 22a-449e-1(f)(1) and (2). However, the Board upon reviewing this proposed decision and the materials in the record may exercise its discretion differently.

(5) *The responsible party notified the board, as soon as practicable, of the release and of any other claim by a person other than a responsible party, resulting from the release, in accordance with the regulations adopted pursuant to section 22a-449e,*

The applicant notified DEEP staff affiliated with the UST fund through the presentation of investigative findings conducted upon assuming ownership of the property. The applicant was not an owner or operator of the UST system and was not in a position to inform the Board through DEEP staff any earlier.

(6) *The responsible party, or, if a person other than a responsible party applies for payment or reimbursement from the account, then such person demonstrates the remediation, including any monitoring to determine the effectiveness of the remediation, for which payment or reimbursement is sought is not more stringent than that required by the remediation standards established pursuant to section 22a-133k, except to the extent the responsible party or such person demonstrates that it has been directed otherwise, in writing, by the commissioner,*

This condition is not applicable because the application does not seek reimbursement for remediation work.

(7) *The responsible party, or, if a person other than a responsible party applies for payment or reimbursement, then such person demonstrates that it does not have insurance, or a contract or other agreement to provide payment or reimbursement for any cost, expense or other obligation incurred in response to a release or suspected release, or if there is any such insurance, contract or other agreement, that any insurance coverage has been denied or is insufficient to cover the costs, expenses or other obligations, paid or incurred or that any contract or other agreement is not able to or is insufficient to cover the costs, expenses or other obligations, paid or incurred, for which payment or reimbursement is sought,*

The applicant demonstrated through the presentation of evidence in the form of a settlement statement and witness testimony that the escrow account from which it received funding was not sufficient to cover the costs for which reimbursement is sought. First, the applicant paid for the account dollar for dollar. There is no room for a potential windfall to the applicant because the dollar value of the escrow account was added to the purchase price. Second, the fund was for costs incurred on the entire site and was not restricted in any way to UST related costs. The investigation costs for the entire site totaled over $310,000. The applicant seeks reimbursement from the fund for only what was related to the USTs and had no

obligation to utilize the escrow funds as "reimbursement" for its UST related costs. Based upon this clarification, I find the applicant has met its burden to demonstrate there was no insurance, contract, or other agreement sufficient to reimburse it for the costs for which reimbursement is sought.

(8) *The responsible party demonstrates and the board determines that one of the milestones noted in section 22a-449p has been completed,*

Through the work completed by Zuvic and presented as part of its application, the applicant has shown that it has met three of the milestones articulated in § 22a-449p.

(9) *The board determines what, if any, reductions to the amounts sought should be made based upon the compliance evaluations performed pursuant to subsection (d) of this section,*

The site is not subject to reductions for identified compliance issues because the UST systems connected to the area of contamination and addressed in the investigation were removed in 1993.

(10) *At the time any application or request for payment or reimbursement … (A) for applications filed with the Underground Storage Tank Petroleum Clean-up Review Board on or after October 1, 2007, there is no underground storage tank system subject to the financial responsibility demonstration required in subdivision (2) of this subsection dispensing petroleum on the property where the release or suspected release emanated or occurred, and if the application is submitted by the person who owns or operates or who owned or operated the underground storage tank system at the time of the release, such person demonstrates, in addition to all other applicable requirements, that lack of compliance with provisions of the general statutes and regulations governing underground storage tank systems was not a proximate cause of the release or suspected release and that there are not grounds for recovery specified in subdivision (2) of subsection (g) of this section….*

This section is not applicable to this claim because the application was not filed by a person that owns or operates or owned or operated the UST systems at the time of the release. There is also no UST system dispensing petroleum on the area of the site where the release was detected.

3
Staff's Additional Arguments

In addition to the testimony and documentary evidence put on the record during the hearing, DEEP staff also put forward several arguments in its brief and relpy brief to support its opinion that the applicant did not meet its burden to prove the releases are eligible for reimbursement.[8] First, staff argues that the applicant did not prove there was a release from the USTs. It cites to the tank removal report that indicates the tanks removed were free of defect and there was no evidence of a spill. However, the applicant's subsurface investigation and sampling program found evidence that a substantial subsurface release occurred in the vicinity of and directly downgradient of regulated USTs. The applicant's determination was based on a detailed scientific investigation performed by environmental professionals and is supported by on-site soil and groundwater sampling. As evidence, it carries more weight than the observations in the tank removal report.

Staff also argues that certain aspects of the investigation related to an ineligible 10,000-gallon gasoline additive tank. The record does not support this. There was a 4000-gallon vapor condensate tank proximate to the loading rack area and circled on Exhibit APP-15 during the hearing, but that was not identified as a potential source of contamination or as an area of concern for which the applicant sought reimbursement. Staff also cites concerns about a 500-gallon waste oil tank. The applicant initially identified this tank as one that was investigated but offered a correction that clarified it was the 3000-gallon fuel oil UST (AOC 18) that was the subject of the investigation. Phase II soil borings established there was no release in the area of this AOC.

[8]Staff also argued against the consideration of a prior Board decision at another site owned by the applicant. This information did not provide a basis for the findings of fact or conclusions of law in this decision, so I will not further address staff's legal arguments on this issue.

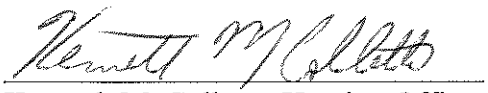
4
Conclusion

Based on the substantial and persuasive evidence on the record, I find that the applicant has satisfactorily demonstrated the eligibility of the potential sources of the petroleum contamination that were investigated at this site. The investigation the applicant conducted determined there were areas of contamination, namely separate phase AVOC detections in soil and the LNAPL on the groundwater surface, in close proximity to a tight grouping of historic USTs. Two of these USTs were subject to the federal financial assurance requirements. The groundwater flow does not support the theory that the AST area was the source of these distinct areas of contamination. Although a specific tank was not specifically identified as the source of this historic release, the applicant's investigative efforts for which it seeks reimbursement focused on characterizing the existing and potential extent and degree of soil and groundwater pollution from these regulated USTs. The evidence presented as a result of this investigation revealed a reasonable and sufficient basis upon which the Board may rely in awarding costs associated with this claim.

The investigation of the petroleum release or releases in the UST area was reasonable and in accord with the department site characterization guidance. The costs associated with this investigation are reasonable and therefore eligible for reimbursement.

III
RECOMMENDATION

Based on the evidence in the record and my finding that the applicant met its burden to demonstrate the eligibility of its claim, I recommend the Board award reimbursement in the amount of $59,513.25. The reduction of $12,060 from the original claim represents my finding that application costs of $2060.00 are ineligible and that the applicant must assume responsibility for the first $10,000 in eligible costs.



Kenneth M. Collette, Hearing Officer

SERVICE LIST

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

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