



Cote Maquam Shore Market Appeal

MERITS DECISION

This matter involves two separate appeals of determinations made by the Agency of Natural Resources relating to reimbursements under the Petroleum Cleanup Fund to Janet Cote for her property located at 3556 Maquam Shore Road in Saint Albans, Vermont (the “Property”).

Beginning on January 24, 2024, this Court held a two-day merits hearing in Courtroom 2C at the Costello Courthouse in Burlington, Vermont. At the close of the trial, the Court instructed the parties to submit proposed findings of fact and conclusions of law. This matter was thereafter placed under advisement.

Ms. Cote is represented by Attorney Eric Ramakrishnan. The Agency of Natural Resources is represented by Attorney Aaron Kisicki.

Statement of Questions

The original Statement of Questions filed with the Court in each appeal contained 72 Questions. On December 1, 2023, the parties stipulated that the following two Questions shall be the Questions before the Court in both dockets:¹

1. Were the Agency’s PCF reimbursement determinations made in its November 20, 2018, letter consistent with Vermont law, rules, and applicable guidance and standards; and, to the extent Vermont law, rules, and applicable guidance and standards confer any discretion on the Agency, did the Agency abuse its discretion?
2. Were the Agency’s PCF reimbursement eligibility determinations made in the Agency’s November 14, 2019, letter consistent with Vermont law, rules, and applicable guidance and standards; and to the extent Vermont law, rules, and

¹ We thank the parties for their efforts in reaching this stipulated SOQ.

applicable guidance and standards confer any discretion on the Agency, did the Agency abuse its discretion?

Findings of Fact

I. General Background

1. Ms. Janet Cote (“Appellant”) owns the property located at 3556 Maquam Shore Road (the “Property”).

2. The Property used to contain a convenience store with an upstairs apartment and a separate camper hook-up area behind the store (together the “Store”). The front parking lot contained an island and ground sign with gasoline pumps and associated underground storage tanks. Behind the store there was a kerosene pump and tank, along with an on-site wastewater treatment system, including a leach field.

3. In 2000, the Agency of Natural Resources (“Agency”) directed Appellant to pay for the removal of two underground storage tanks located on the Property. Appellant was also directed to install monitoring wells and pursue other remediation actions.

4. In 2012, a neighbor crashed into the Store with a tractor, damaging it beyond repair. The building’s foundation was unaffected.

5. While Appellant was obtaining permits to rebuild the Store, the Agency notified the City of Saint Albans Development Review Board (“DRB”) that the Property contained petroleum contamination. The DRB issued a building permit requiring Appellant to submit documentation of testing for contamination or remediation done to the soil.

6. Further soil sampling after the accident revealed that the contamination was more extensive than previously thought. The Agency determined that contaminated soil would need to be excavated and removed from the Property. Since the building had to be taken down to its foundation because of the crash, it was decided to remove the foundation to excavate the contaminated soil under it.²

7. In order to investigate and clean up petroleum releases, the Vermont Legislature established the Petroleum Cleanup Fund, which is administered by the Department of Environmental Conservation Sites Management Section (“SMS”) and serves as a financial mechanism to provide property owners with resources to address petroleum releases.

8. Removal of the Store began on June 19, 2014.

² It is unclear which party ultimately decided to remove the foundation. This fact is not relevant to our ultimate conclusions.

9. Significant portions of the Property were excavated to remove the soil contaminated by petroleum, including the front and side parking lots. In the process, all utilities were excavated, fill was stored against trees on site, a ground sign was removed, and a flagpole was damaged.

10. At the time of trial, it was undisputed that the petroleum contamination had been remediated.

11. To date, the PCF has reimbursed Appellant, her consultants, and her contractors over \$485,000 toward investigation, cleanup, and restoration of the Property, which is significantly more than reimbursement of contaminated sites of similar size and complexity.

II. 2018 Letter

12. During the excavation process, a contractor damaged the existing wastewater system on the Property.

13. Appellant sought a Site Plan Amendment to reconstruct the wastewater system. The DRB issued an amended permit which required a registered engineer to certify that the project was completed according to the approved plans and DRB decision.

14. In late 2017, the state permit for Appellant's wastewater system was set to expire.

15. In a meeting held on August 9, 2017, Agency official Chuck Schwer directed Appellant's consultants (RG Gosselin, Buermann Engineering, and an electrician) to finish work on the wastewater system. Testimony of Janet Cote; Ex. AX.

16. On April 5, 2018, Appellant submitted three invoices to the SMS for costs relating to the replacement wastewater system. The total amount for all three invoices was \$3,617.46.

17. The first invoice is for \$2,132.46 to Buermann Engineering, LCC for costs associated with engineering and design of the replacement wastewater treatment system. At the time this invoice was submitted, the PCF had reimbursed Buermann Engineering over \$16,000, which exceeded the pre-approved costs of \$13,400.

18. The second invoice is for \$850.00 to Bob Lamos Electrical for costs associated with electrical work on the replacement wastewater system.

19. The third and final invoice associated with the 2018 Letter is for \$635.00 to RG Gosselin Incorporated Concrete and Excavating for costs associated with testing and additional work on the replacement wastewater system.

20. In an email dated January 19, 2018, DEC analyst Tami Wuestenberg indicated that the invoices had technically been pre-approved in several previous work plan cost estimates. Ex. AW.

21. Waste Management and Prevention Division ("WMPD") staff member Matthew Moran denied reimbursement for the invoiced work on May 4, 2018, explaining that the costs were not

preapproved and that the costs for the replacement wastewater system had significantly exceeded what is reasonable for such a system. Appellant appealed this decision to WMPD Director Chuck Schwer, who affirmed the denial on November 20, 2018. This decision was appealed to this Court on December 12, 2018, and has been assigned Docket No. 134-12-18 Vtec.

III. 2019 Letter

22. In 2016, Mr. Moran asked Appellant to submit a “punch list” of items that she believed remained to be completed to restore the Property.

23. On September 25, 2016, Appellant emailed her punch list to Tami Wuestenberg.

24. On October 4, 2019, Mr. Moran sent Appellant a letter which formally addressed each of her reimbursement requests contained in the punch list.

25. Appellant appealed Mr. Moran’s letter to Chuck Schwer, who issued a final decision on November 14, 2019 (the “2019 letter”). Appellant timely appealed Mr. Schwer’s decision to this Court on December 11, 2019, which has been assigned Docket No. 135-12-19 Vtec.

26. The 2019 letter explained that all contaminated soil associated with the petroleum releases had been removed, and that the PCF had reimbursed Appellant over \$485,000.000 towards cleanup and restoration of the Property.

27. The letter further explained that several costs remain eligible for reimbursement from the PCF, including:³

- a. Up to \$1,510 for any final compaction testing;
- b. Final grading, seeding, and mulching of the Property;
- c. Returning the wooden island back to its original location;
- d. Removing the 55-gallon drum; and
- e. Sealing the wastewater system covers.

28. The 2019 letter identifies the following costs as ineligible for reimbursement from the PCF:

- a. Additional erosion control or safety measures;
- b. Additional site work coordinated by a licensed engineer;
- c. Additional restoration of the Property;
- d. Additional concrete work;
- e. Constructing a travel area for access to the camper;
- f. Repairing the damaged flagpole;

³ We attempt to summarize the items on the “punch list” and ANR’s response in our own words. The actual punch list contains vague and generalized assertions which are not framed as formal reimbursement requests.

- g. Additional electrical work;
- h. Reestablishing boundary lines;
- i. Obtaining site certifications regarding compaction;
- j. Obtaining sketches of neighbor's water line;
- k. Correcting site work performed by Young's Construction and Complete Septic Services, LLC;
- l. Additional work on wastewater system, including sleeving of pipes, tank location, and curb stops;
- m. Hiring general contractor to oversee remaining site work;
- n. Costs associated with a site restoration plan from Engineering Ventures dated August 7, 2019, in the amount of \$85,187.00;
- o. Filling truck ruts;
- p. Placing topsoil at the property line to narrow Sandy Cove Road to 15';
- q. Installing drainage outfall;
- r. Removing a small stone and debris pile;
- s. Tree removal and replacement; and
- t. Redesign of second story staircase.

A.) General contractor

29. Among the requests listed in the 2019 letter, Appellant's primary concern pertains to hiring a Vermont licensed project engineer to plan and oversee the remainder of the work. Specifically, Appellant seeks to hire the firm Engineering Ventures to oversee the remaining site work at an initial cost estimate of \$85,167.00.

30. One of the reasons Appellant wants a Vermont licensed project engineer is to satisfy a Town condition of approval that following the restoration of the Property, an engineer will certify that the work has been completed to the approved site plan. Appellant also has concerns about the sufficiency of fill material used to fill the excavated areas.

31. In or around 2014, the Agency denied Appellant's request to hire Engineering Ventures due to high costs and an overly broad scope of work. Instead, the Agency directed Appellant to hire two firms, Vermont Testing and GeoDesign, to conduct a geotechnical analysis and compaction testing.

32. Appellant ultimately dismissed GeoDesign due to billing issues and hired the firm Optimum to do additional compaction testing.

33. Despite the results of the compaction testing, Appellant still sought to hire Engineering Ventures.

34. At trial, Peter Gibbs, a professionally licensed engineer for Engineering Ventures testified that there was a fundamental difference between his firm and DEC regarding how to approach the project. Whereas DEC sought to fill the site and get it compacted up to the original grade, his firm focused on the redesign of the building and a more comprehensive evaluation of the Property as a whole. This is because the liabilities associated with a site preparation of this type are many, and that the required certifications are onerous.

35. The Agency denied Engineering Ventures' proposal on the grounds that all PCF eligible work is complete and that the costs associated with additional site work exceeded reasonable costs.

B.) Electrical work

36. Appellant also challenges the Agency's denial of her reimbursement request for additional electrical work.

37. Prior to the PCF site work and removal of the Store, the Property contained electrical service.

38. During the excavation process, the underground electrical wiring was removed.

39. Replacement of electrical service was approved by the Agency as an eligible PCF expense.

40. Appellant received an estimate for electrical work from Bertrand Electric, LLC, which was accepted by the Agency. The proposal included stubbing the new Store to electrical service and replacing preexisting electrical service to the sign, island, and camper areas.

41. The PCF reimbursed Bertrand Electric \$21,861.69 for costs related to electrical work at the site despite Appellant's objections that the electrical service had not been completed and therefore the electrician should not be reimbursed by the PCF.

42. Appellant credibly testified that the electrical work was not completed. Electrical service was brought to a panel outside the new store but was not connected to the building. Additionally, there is no wiring going up the signpost and into the island. The electrician also used the wrong gauge of wire to bring electrical service to the camper area.

43. To further support Appellant's contentions, Robert Lamos, a licensed electrician with over 50 years of experience, testified that the electrical work is incomplete, and that Bertrand Electric should not have been paid the amount that they were paid by the Agency.

44. The Agency denied Appellant's subsequent requests for reimbursement to fix and complete the electric work that is needed for the Property. The Agency's justification is that the electrical work is complete, and that any additional costs are in excess of reasonable costs.

C.) Concrete work

45. Prior to the crash in 2012, the Store contained a solid foundation.

46. The Store's foundation was removed as part of the PCF-funded work to remediate the contaminated soils on the Property.

47. The Agency directed Appellant to receive estimates for concrete work to replace the foundation.

48. The Agency later approved an estimate from Harrison's Concrete in which they were to provide three concrete slabs (two 6'x6'x6' slabs and one 8'x16'x6' slab)⁴ and an ADA accessible ramp at a total cost of \$26,850.

49. After they finished pouring one of the concrete slabs, the Agency directed Harrison's Concrete not to pour the two remaining 6'x6'x6' slabs.

50. The Agency reimbursed Harrison's Concrete \$23,750.00 from the PCF for this work.

51. In her punch list, Appellant requested reimbursement to complete the unfinished concrete work.

52. The Agency denied Appellant's request for reimbursement on the grounds that the 8'x16'x6' slab was poured in lieu of the two 6'x6'x6' slabs and that any additional concrete work would be in excess of reasonable costs and are capital improvements to the Property.

Conclusions of Law

The Secretary of ANR has broad discretion in authorizing disbursements from the Petroleum Cleanup Fund ("PCF"), but this discretion is not unfettered, and the Secretary may not arbitrarily cut off payments. Rowley Fuels, Inc. v. State of Vermont, No. 202-9-05 Vtec, slip op. at 6 (Vt. Env'tl. Ct. July 31, 2006) (Wright, J.). The Department of Environmental Conservation Sites Management Section ("SMS") administers the PCF and relies on the PCF Reimbursement Procedures when reviewing requests for cost reimbursement from responsible parties. PCF Procedures for Reimbursement (September 2014). These procedures outline the specific categories of costs that are and are not reimbursable. Most notably, costs in excess of reasonable costs, costs not preapproved in writing, costs in excess of preapproved estimates, unapproved capital improvement costs, and subsurface utility damage costs are explicitly not reimbursable by the PCF. PCF Procedures for Reimbursement at 6–9 (September 2014).

This Court considers ANR decisions *de novo*, meaning we afford no deference to the appealed-from ANR decision itself, but apply the substantive standards that were applicable before the Agency.

⁴ At trial, the Agency pointed out that two separate quotes were submitted to the Agency, the first of which did not include the 8'x16'6' slab. However, this issue was resolved when Appellant's counsel showed that the slab in question was added by the contractor for no additional charge, and that the second quote was also approved by the Agency.

10 V.S.A. § 8504(h); V.R.E.C.P. 5(g). However, we defer to ANR’s construction of the regulations and statutes it administers within its area of expertise. In re ANR Permits in Lowell Mountain Wind Project, 2014 VT 50, ¶ 11, 196 Vt. 467. When these circumstances arise, “[a]n agency’s authority to define terms within its statutory purview will be given deference unless that authority is applied ‘arbitrarily and capriciously’ such that it ‘give[s] rise to a violation of due process.’” In re Korrow Real Estate, LLC Act 250 Permit Amendment Application, 2018 VT 39, ¶ 21 (citing Woodford Packers, Inc., 2003 VT 60, ¶ 17, 175 Vt. 579). Deference can also be owed when the Legislature provides the agency with wide discretion to implement the law in question because of the agency’s expertise, familiarity with interrelated regulatory provisions, and authority to author further regulations under the statute. See Mollica v. Div. of Prop. Valuation & Review, 2008 VT 60, ¶ 11, 184 Vt. 83 (construing Town of Killington v. State, 172 Vt. 182, 192); see also In re Unified Buddhist Church, Inc., Indirect Discharge Permit, No. 253-10-06 Vtec, slip op. at 1 (Vt. Envtl. Ct. Jan. 25, 2008) (Wright, J.) (citing Bacon v. Lascelles, 165 Vt. 214, 218-19 (1996)).

Here, we are called to consider ANR’s individual determinations with respect to Appellant’s requests for reimbursement from the PCF. These determinations were made pursuant to the Secretary’s broad discretion to authorize disbursements from the Fund. While we conducted a de novo evidentiary hearing, we will defer to the Agency’s interpretations of the applicable rules and policies, as well as the methodologies it used to reach its determinations so long as they are reasonable. See Plum Creek Maine Timberlands, LLC v. Vermont Dept. of Forest, Parks and Recreation, 2016 VT 103, ¶ 25, 203 Vt. 197 (explaining that trial court factual findings are reviewed for clear error, but agency determinations regarding interpretation of policy or methodology within the agency’s expertise are entitled to deference). With this framework in mind, we now turn to the Agency’s individual determinations, starting with the 2018 Letter.

I. 2018 Letter

The 2018 Letter involves three invoices for work done on the replacement wastewater system before Appellant’s wastewater permit expired. The first invoice, which was for \$2,132.46 to Buermann Engineering, LCC, was denied on the grounds that the costs exceeded a preapproved cost estimate. The remaining two invoices, \$850 to Bob Lamos Electrical and \$635 to RG Gosselin, were denied on the grounds that the costs were never pre-approved. For the reasons stated below, we conclude that these denials were unreasonable.

At trial, Appellant provided compelling testimony that the costs addressed in the 2018 Letter were, in fact, pre-approved. At an in-person meeting, and documented in a follow up email exchange,

program director Chuck Schwer directed Appellant's consultants to complete work on the wastewater system before the permit expired. Later, in an email exchange between DEC officials Matt Moran and Tami Wuestenberg, Ms. Wuestenberg wrote that the work at issue was technically pre-approved in several previous work plan estimates.⁵ ANR provided no evidence to rebut Appellant's testimony. Rather, the only evidence ANR presented on this issue was to show that the PCF had previously reimbursed Buermann Engineering \$16,461.86, which exceeded the pre-approved cost estimate of \$13,400.00.

Taken together, the evidence shows that the Agency directed Appellant and her consultants to complete work on the wastewater system. The Agency then denied Appellant's subsequent requests for reimbursement. The Agency should have known that this work would exceed the pre-approved budget for Buermann Engineering before authorizing further work to be done on the wastewater system. Furthermore, in directing Appellant and her consultants to complete this work, the Agency effectively pre-approved the remaining electrical and concrete work. Based on these facts, we conclude that the Agency's denial of reimbursement for the three invoices in the 2018 Letter was unreasonable and an abuse of discretion. In so concluding, we direct Appellant to provide the Agency with evidence that she has paid these contractors directly, pursuant to PCF Procedures for Reimbursement. Upon receipt of such evidence of payment, the Agency shall thereafter reimburse Appellant for those costs as outlined in the 2018 Letter.

II. 2019 Letter

The 2019 Letter involves broad determinations made by the SMS in response to a punch list of remaining work items Appellant presented to the Agency back in 2016. In general, these items were never pre-approved by the Agency, and do not involve invoices that have been submitted to the SMS pursuant to the PCF Procedures for Reimbursement. At trial, Appellant's case-in-chief focused on the following three items listed in the 2016 punch list: (1) hiring a project engineer to oversee the remaining site work and certify the project's completion; (2) reimbursement for costs to complete remaining electrical work on the Property; and (3) reimbursement for costs to complete remaining concrete work pursuant to a pre-approved work plan and cost-estimate. We address each of these three items before turning to the remaining items in Appellant's punch list.

⁵ The email went on to explain that the work done by Buermann Engineering had exceeded the scope of their original cost estimate.

A.) General Contractor

Since 2013, Appellant has repeatedly asked the Agency to hire a licensed engineer to manage and oversee the site work. In that time, the Agency has consistently denied Appellant's request on the grounds that a general contractor is not a reimbursable expense. However, in or around 2014, the Agency invited Appellant to obtain three proposals from professional engineers. One such proposal was submitted by the firm Engineering Ventures. The Agency determined that the initial estimate was too expensive, so Engineering Ventures submitted a reduced scope estimate in August 2019 with a total cost of \$85,187. Again, the Agency determined that the proposed costs were ineligible for PCF reimbursement.

This dispute involves the Agency's interpretation of the PCF statute and procedures. The Agency disagrees with Appellant that the PCF should cover costs to obtain required permits and certificates of occupancy for the Property. At trial, Peter Gibbs of Engineering Ventures testified that the required certifications are onerous, and when an engineer certifies site work, they become liable for it. He further explained that since he did not oversee the work, he would need to conduct surveys to determine site conditions, ensure they conform to applicable codes and the approved site plan, and conduct any additional work to fix discrepancies. In response, the Agency argues that these costs are not for purposes of cleanup and restoration of the contaminated soil, but rather to bring Appellant's property up to every applicable code. In support of their determination, the Agency points to the fact that aside from some minor work which is eligible for reimbursement, all site management activities are complete and that the site is eligible for closure.

Appellant presented no evidence to show that any additional work related to the contamination cleanup is needed for the site. Rather, she argues that because she was not responsible for the contamination, and because she is a small business owner, it is the responsibility of the Agency to cover all costs associated with restoration of the Property, including required engineering certificates. We conclude that there is no legal basis for such an expansive interpretation of the PCF statute and procedures.

10 V.S.A. § 1941 states, in relevant part, that: “[t]he Secretary may authorize disbursements from the [PCF] for the purpose of the cleanup and restoration of contaminated soil and groundwater caused by releases of petroleum...” This discretionary authorization clearly applies to remediation of contamination and does not necessarily authorize funds for the costs associated with bringing the Property into compliance with other state and local land use standards. The PCF Procedures for Reimbursement further support this interpretation by disallowing reimbursement for capital

improvement costs and costs in excess of reasonable costs. PCF Procedures for Reimbursement at 7–8. To determine reasonable costs, the Agency may compare a submitted work proposal to costs associated with work performed on other PCF sites. Id. As Mr. Moran explained in his testimony, he is unaware of any past PCF reimbursements being used to hire a general contractor.

For all these reasons, we conclude that the Agency’s determination not to reimburse Appellant for a general contractor/engineer was reasonable, consistent with the law, and fully supported by the facts presented.

B.) Electrical Work

While excavating the contaminated soil, underground electrical wiring had to be dug up and replaced. The Agency initially determined that replacement of the electrical service was a PCF reimbursable expense and directed Appellant to obtain three estimates from electricians. The Agency accepted one of the proposals, from Bertrand Electric, LLC. The accepted proposal included various work items, such as stubbing the new Store to electrical service and replacing preexisting electrical service to the sign, island, and camper area. The Agency reimbursed Bertrand Electric \$21,861.69, despite Appellant’s repeated assertions that the work was not complete. Appellant now argues that the PCF should reimburse her for the amount required to complete the electrical work that was originally approved. In response, the Agency argues that the work is complete, and that costs associated with relocating underground electrical lines are outside the scope of site cleanup and are not reimbursable by the PCF.

The uncontroverted evidence at trial demonstrated that the previously approved electrical work was not completed, and that the Agency improperly paid Bertrand Electric, including for work that was not done. Appellant provided compelling and extensive testimony, supported by the expert testimony of Bob Lamos, showing that significant electrical work remains to be done on the Property. The Agency paid Bertrand Electric for this incomplete work, but now argues that electrical work is not a PCF eligible expense. This argument is inconsistent with the Agency’s own approach to the electrical payments, and the Agency has not provided any evidence to support its contention that the work is now complete, particularly when considering the extensive evidence provided by Appellant. Because this work was preapproved as a PCF eligible expense, we conclude that the Agency must reimburse Appellant for any additional expenses relating to the completion of this work, within the scope of the original proposal. In so concluding, we note that to receive reimbursement for these expenses, Appellant must comply with the PCF Procedures for Reimbursement. This includes submitting a revised work plan and cost estimate for the remaining work, providing documentation

that the work has been completed, and finally, submitting paid invoices to the SMS for direct repayment. Failure to comply with these procedures may result in a denial of reimbursement at the discretion of the Agency.

C.) Concrete Work

As indicated in the 2019 Letter, the Agency initially approved funds to construct a basement for the new Store to replace the former foundation, and to provide several concrete slabs as part of the new foundation of the building as well as an ADA accessible ramp. The Agency directed Appellant to receive estimates for concrete work, and later approved an estimate from Harrison's Concrete which included three slabs, two 6'x6'x6' slabs and one 8'x16'x6' slab. The Agency later reimbursed Harrison Concrete \$23,750 for costs related to concrete work at the Property. The parties dispute whether the preapproved work was fully completed, and the Agency now argues that the costs associated with pouring a concrete foundation are outside the scope of site cleanup and are ineligible for reimbursement.

Again, the uncontroverted evidence at trial demonstrated that the preapproved concrete work has not been completed. Appellant testified that after Harrison Concrete poured the 8'x16'x6' slab, the Agency directed Harrison Concrete not to pour the remaining slabs. At this time, the two 6'x6'x6' slabs and ADA ramp have not been constructed. The Agency offered no evidence to suggest otherwise. Despite preapproving this work and paying Harrison Concrete nearly the full amount of their initial budget, the Agency now argues that this concrete work is not an eligible PCF expense. This approach is inconsistent with the Agency's previous decisions, and the Agency offers no reasonable explanation for its subsequent denial of reimbursement for the remaining work items. For all these reasons, we conclude that the Agency must reimburse Appellant for the costs to finish the remaining concrete work that was previously approved in Harrison Concrete's budget proposal. In so concluding, we note that to receive reimbursement for these expenses, Appellant must comply with the PCF Procedures for Reimbursement. This includes submitting a revised work plan and cost estimate for the remaining work, providing documentation that the work has been completed, and finally, submitting invoices to the SMS for direct repayment. Failure to comply with these procedures may result in a denial of reimbursement at the discretion of the Agency.

D.) Remaining Requests for Reimbursement

The 2019 Letter identified several costs which are eligible for reimbursement from the PCF.⁶ The Letter explained that to receive reimbursement for these costs, Appellant must submit a work plan and cost estimate for pre-approval and final invoices once the work is complete. Because these items remain eligible for reimbursement, and because the Agency's determinations go unchallenged, we affirm the Agency's determinations and direct Appellant to take the appropriate action on such items if she wishes to be reimbursed. We now turn to the remaining requests which the Agency determined are not PCF eligible.

The Agency determined that the remaining items in Appellant's punch list are ineligible for PCF reimbursement on the grounds that they constitute capital improvements unrelated to the clean-up of contamination.⁷ For each of these items, the Agency provided testimony at trial supporting its determinations, and demonstrating these types of costs are ineligible PCF expenses. In response, Appellant argues that these work items are related to the PCF clean-up, and therefore must be reimbursed. According to Appellant, the Agency's failure to reimburse her for these items constitutes an abuse of discretion. We disagree.

As explained above, the PCF statute and procedures confer broad discretion on the Agency to reimburse costs related to the cleanup and restoration of contaminated soil. 10 V.S.A. § 1941. Capital improvements costs are ineligible for reimbursement, as well as costs to repair subsurface utilities which were unintentionally damaged during remediation. PCF Procedures for Reimbursement at 8–9. The Agency is not responsible for resolving disputes between a responsible party and its contractors.

The remaining work items in Appellant's punch list are only incidentally related to the clean-up of the Property. In reviewing these items, the Agency relied on its interpretations of the PCF procedures and classified these items as capital improvements. The Agency was consistent in denying reimbursement for these items and did not apply its standards arbitrarily. Many of these items relate to disputes between Appellant and her various contractors, which the Agency is under no obligation

⁶ Those items include: (1) up to \$1,510 for final compaction testing; (2) final grading, seeding, and mulching; (3) returning the wooden island back to its original location; (4) removing a 55-gallon drum from the Property; and (5) sealing the wastewater system covers.

⁷ Those ineligible items include: (1) sleeving and venting the wastewater system; (2) constructing travel areas for access to the camper; (3) replacing boundary markers; (4) replacing trees along the Southern boundary; (5) cost to redesign the Store to relocate exterior stairs; (6) repairing the damaged flagpole; (7) sketching the location of the new water line; (8) filling low spots and truck ruts; (9) placing topsoil over stone along Sandy Cove Road; and (10) removing a pile of stones near the camper area.

to resolve. Because these remaining items are not directly related to the petroleum cleanup, and because Appellant has not provided evidence to the contrary, we conclude that the Agency's decision making was reasonable and is therefore affirmed.

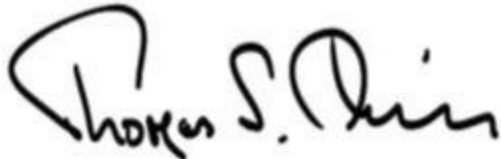
Conclusion

Based on the Factual Findings and Legal Conclusions above, we hereby Order as follows:

- A. In Docket No. 134-12-18 Vtec, we hereby reverse the Agency's determination that the three invoiced expenses are not eligible for PCF reimbursement. We direct Appellant to submit evidence that she has paid these expenses directly, upon receipt of which, the Agency shall reimburse Appellant for those expenses.
- B. In Docket No. 135-12-19 Vtec, we hereby affirm in part, and reverse in part, the Agency's eligibility determinations. We reverse with respect to the Agency's denial of reimbursement of costs to finish the remaining electrical and concrete work, which the Agency originally pre-approved. We affirm the Agency's denial of a general contractor/engineer as well as the remaining items contained in Appellant's punch list.

This completes the current proceedings before this Court. A Judgment Order accompanies this Merits Decision.

Electronically signed at Brattleboro, Vermont on Friday, May 17, 2024, pursuant to V.R.E.F. 9(d).

A handwritten signature in black ink that reads "Thomas S. Durkin". The signature is written in a cursive, flowing style.

Thomas S. Durkin, Superior Judge
Superior Court, Environmental Division