

XI. Department of Commerce -- William McCoshen, Secretary

The department requests a supplement of \$100,100 SEG in 1997-98 and \$212,100 SEG in 1998-99 from the Committee's appropriation under s. 20.865(4)(u) to the department's appropriation under s. 20.143(3)(w) Petroleum Storage --Environmental Remedial Actions; Administration, to fund 1.0 FTE SEG attorney project position and contract with the Department of Workforce Development for legal services.

Governor's Recommendation

Modify the request. Deny the request for a project position. Reduce the expenditure increase to \$73,100 SEG in FY98 and \$146,300 SEG in FY99 to contract with DWD for legal services.



Date: December 18, 1997
To: Members, Joint Committee on Finance
From: Mark D. Bugher, Secretary
Department of Administration
Subject: Section 13.10 Request from the Department of Commerce for Increased Expenditure Authority to Address PECFA Appeals Backlog.

Request

The department requests a supplement of \$100,100 SEG in 1997-98 and \$212,100 SEG in 1998-99 from the Committee's appropriation under s. 20.865(4)(u) to the department's appropriation under s. 20.143(3)(w) Petroleum Storage --Environmental Remedial Actions; Administration, to fund 1.0 FTE SEG attorney project position and contract with the Department of Workforce Development for legal services.

Background

PECFA staff audit all incoming claims to ensure that only costs eligible under administrative rule COMM 47 are reimbursed. Claimants often file appeals if reimbursement of certain expenses is denied. Some of the more frequent reimbursement appeals include ineligible costs and lack of documentation for costs claimed. Currently, the department has a backlog of 180 appeals.

The department employs 2.0 FTE attorney positions, 1.0 FTE position deals exclusively with PECFA and some Division of Safety and Building issues and 1.0 FTE position serves as the department's general legal counsel. Commerce has made this request to address the growing appeals backlog and to purchase legal and hearing examiner services from the Department of Workforce Development (DWD).

Commerce has previously contracted with DWD for legal and hearing examiner services. In FY 97, Commerce paid \$106,200 SEG to DWD, with \$26,600 SEG allocated to hearing examiner services and \$79,600 SEG to attorney services. The funding was available due to several hydrogeologist vacancies in the PECFA program, all of which have since been filled. In addition, 1997 Wisconsin Act 27 provided Commerce with \$20,000 SEG to purchase legal services from DWD.

Analysis

The PECFA program has had a backlog of appeals cases for a significant period of time. Since October 1995, the average monthly backlog has been 168 cases. The backlog peaked in December 1995, with 206 cases and reached its lowest level in March 1997 with 141 cases. This trend indicates that the backlog is an on-going program issue.

With 180 appeals currently in the backlog, it will take more than one year for a case to be addressed by Commerce. Since many appealed cases have large disputed reimbursement claims, the long waiting period can pose significant financial threat on the claimant and their lender. If the fund is not liable for the reimbursement, the claimant has to find alternative funding. Also, the department has been accused of denying due process to claimants since it is not addressing the structural issues causing the long waiting time.

The department was able to reduce the number of cases in the backlog through the purchase of legal services from DWD. However, with the PECFA program at full staffing, salary savings cannot be reallocated to meet the cost. Furthermore, only \$24,000 SEG in base funding is available. This is insufficient to fund a full-time attorney position at DWD.

Over the last 4 months, Commerce has on average received 21.5 cases per month, with a peak of 30 cases in October, and was able to close out an average of 15 cases each month. Even if Commerce could increase the average number of cases closed each month by 20%, or 3 cases, with existing staff resources, the backlog would continue to increase. However, the department cannot process more cases, since the chief legal counsel's time is devoted to rule development and personnel matters.

In order to avoid a further increase in the size of the backlog, the department needs to add additional legal services. However, addressing the systemic factors behind the backlog is a long-term issue that was partially addressed through penalty provisions included in 1997 Act 27. Fully addressing this issue will require future statutory and administrative rule revisions.

A key change is the development of an expedited appeals process in future legislation. An expedited appeals process could have a significant effect on the department's workload. As such, the need for additional legal services contracting or a project position should be considered in tandem with future statutory changes. Given the need to make structural changes to the appeals process and the uncertain workload impacts of such changes, funding should be limited to supporting legal services contracts to offset any further growth in the backlog.

Recommendation

Modify the request. Deny the request for a project position. Reduce the expenditure increase to \$73,100 SEG in FY98 and \$146,300 SEG in FY99 to contract with DWD for legal services.

Prepared by: Jacqueline Jugenheimer
266-7597



P. O. Box 7970
Madison, Wisconsin 53707
(608) 266-1018

Tommy G. Thompson, Governor
William J. McCoshen, Secretary

November 20, 1997

The Honorable Brian B. Burke
Co-Chair, Joint Committee on Finance
Room LL1
119 Martin Luther King Jr. Blvd.
Madison, WI 53702

The Honorable John Gard
Co-Chair, Joint Committee on Finance
Room 315 North, State Capitol
Madison, WI 53702

Dear Co-Chairs:

The Department of Commerce requests an increase of \$27,000 and 1.0 FTE four-year project attorney position beginning February 1, 1998, and \$73,100 in FY 98 for contracting for additional legal services beginning January 1, 1998. Annualized costs of this request are \$212,100 for FY 99. This request is for funding from the s. 20.143 (3) (w) appropriation (Petroleum Storage Environmental Remedial Action; Administration). This funding will provide the resources necessary for the Department to manage and address appeals being filed with the Petroleum Environmental Cleanup Fund (PECFA) program. An amount of \$27,000 in FY 98 funding and \$64,800 in FY 99 will be used to support a project attorney that will further increase the program's ability to respond to the current backlog of 180 appeals. The balance of the request in the amount of \$73,100 in FY 98 and \$146,300 in FY 99 will be used to contract for the purchase of legal services from the Unemployment Insurance Division in the Department of Workforce Development.

The Department of Commerce continues to work to develop and implement strategies that will significantly change the PECFA appeal process. Although attempts to dramatically change the appeal process have met limited success, the Department continues to work towards fundamental change. In the interim, however, the number of appeals continues to grow along with the number of claims to be reviewed by the program. In the short term, additional resources are necessary to address the backlog of appeals.

More detail supporting this request is enclosed. Should you have questions about this request, please contact Christopher Mohrman at 266-8976. Questions about the supporting documentation included in this request should be directed to Jane Drake at 266-0271.

Sincerely,

A handwritten signature in black ink, appearing to read 'William J. McCoshen', with a long horizontal flourish extending to the right.

William J. McCoshen
Secretary

Department of Commerce
Environmental and Regulatory Services Division

Supplemental Funding Request
Under s. 13.10

November 20, 1997

REQUEST

The Department of Commerce requests an increase of \$27,000 and 1.0 FTE four-year project attorney position beginning February 1, 1998, and \$73,100 in FY 98 for contracting for additional legal services beginning January 1, 1998. Annualized costs of this request are \$212,100 for FY 99. This request is for funding from the s. 20.143 (3) (w) appropriation (Petroleum Storage Environmental Remedial Action; Administration) for costs associated with the administration and resolution of appeals under the Petroleum Environmental Cleanup Fund (PECFA) program. There is a current backlog of 180 appeals filed under the program, and it takes between six and twelve months to hear an appeal. This request will enable the Department to reduce the backlog, shorten the time period to hear appeals, and manage an average of 17 new appeals filed per month.

This request has two components:

First, the Department requests expenditure authority in the amount of \$27,000 in FY 98 and \$64,800 in FY 99 and authorization for 1.0 FTE four-year project attorney position that will provide the program with the ability to develop and prepare for complex appeals. The PECFA program receives appeals that deal with complex issues requiring significant knowledge of the program and its processes. An attorney that has in-depth knowledge of and a close working relationship with the program can most effectively provide the development and representation required by these appeals.

Second, the Department requests expenditure authority in the amount of \$73,100 in FY 98 and \$146,300 in FY 99 to be used to contract for the purchase of administrative law judge services and attorney services from the Department of Work Force Development's Unemployment Insurance Division. In developing the calculations for this portion of the request, the Department deducted \$20,000 for the additional supplies and services funding that was provided in 1997 Act 27 to purchase hearing services from another agency. The purchase of services from the UI Division responds to a range of appeals filed with the program.

FUNDING SOURCE

The funding for this request will come from the segregated Petroleum Inspection Fund. Petroleum Inspection Fund revenues are generated by a three-cent per gallon inspection fee imposed in Chapter 168 on all petroleum products inspected. Annual revenue is projected in the amount of \$107,741,700 in FY 98. The fund balance at the end of FY 97 was \$12,805,207. Current Chapter 20 budget authority for FY 98, including authorized carry-

forward encumbrances, is \$106,821,667. Approval of this request will still provide projected year-end balances of \$13,625,140 at the end of FY 98 and \$14,264,840 at the end of FY 99.

PROPOSAL

The Department requests authorization and funding for a 1.0 FTE four-year project position, in addition to funding to contract for legal services from the Unemployment Insurance Division in the Department of Workforce Development (DWD). This request is intended to address several pressing issues with the PECFA appeals resolution process, including:

The Department of Commerce presently has a backlog of 180 appeals filed under the PECFA Program, compared with a backlog of 154 appeals in June, 1997. This backlog is growing, and it is expected to reach 210 appeals by January, 1998. The Department receives an average of 17 additional appeals per month. Appendix I has a graph depicting the backlog in appeal cases since January, 1995. A caseload of approximately 50 cases is considered acceptable in the dispute resolution process.

Currently, the Department allocates the resources of one full-time attorney position to the PECFA program. Approximately 70 percent of the position focuses on representing the Department in the appeal process. Based on experience and on the record of appeals closed since January, 1995, a full-time attorney position closes an average of 10 cases per month. With 70 percent of the attorney position's time focused on resolving appeals, the Department closes an average of 7.0 cases per month. The remaining time is spent on personnel issues in the Division of Environmental and Regulatory Services, where the PECFA program is located, and on other PECFA-related legal issues.

The Department of Commerce is requesting additional resources to reduce the present backlog of 180 appeals and to manage the existing workload of 17 incoming appeals per month. With the current staff capacity to close 7.0 cases per month, it is not possible to address the existing monthly workload. It also is not possible to initiate a process for reducing the present backlog, which is projected to grow to 210 cases by January, 1998.

The Department anticipates that approval of the request will enable the agency to manage the existing workload of 17 additional appeals per month, and to reduce the backlog to an acceptable level of approximately 50 appeals by October, 1999, as shown in Appendix II, as follows:

- Beginning in February, 1998, the Department will expand the attorney resources focused on resolving PECFA appeals from 0.7 FTE to 2.7 FTEs by hiring a project attorney and by contracting for legal services with DWD. With this expansion in attorney services, there will be an initial training period of six months in which the existing PECFA attorney will train the project attorney. As a consequence, there will be a period of reduced efficiency in which the combined productivity of both attorneys focused solely on dispute resolution will total 1.0 FTE. The remaining 1.0 FTE workload will be assumed by the attorney who is hired under contract with the Unemployment Insurance Division at DWD. During this period, the attorneys will close 20 appeals per month, which addresses the existing workload and reduces the backlog from 210 appeals to 192.

- Beginning in August, 1998, the project attorney will be fully trained. One hundred percent (100%) of the position's work efforts will focus on PECFA appeals (1.0 FTE). Meanwhile, the existing PECFA attorney will return to the current work schedule of 70 percent on PECFA appeals and 30 percent on other PECFA legal issues. Finally, the Department will continue its contract with DWD for legal representation consisting of 1.0 FTE. The Department projects that 2.7 FTE attorney positions will close 27 appeals per month, which will address the existing workload and reduce the backlog to an acceptable caseload level of 52 appeals by October, 1999.
- Beginning in October, 1999, the Department anticipates the need for 1.7 attorney positions. This reduced level of staffing will be sufficient to address the existing workload of 17 cases per month, which is projected to remain constant assuming the annual funding level for PECFA awards remains at \$91.1 million. The Department anticipates a continuing need for the project attorney position to deal with the complex issues that require in-depth knowledge of and involvement in the program.
- During the period beginning in February, 1998 and ending in September, 1999, the Department anticipates addressing nearly 500 appeals. Based on past experience, 15% of appeals proceed to a hearing. As a consequence, the Department projects that approximately 75 appeals (500 x .15) will proceed to a hearing during this period. It is estimated that a .50 FTE administrative hearing officer will handle a caseload of approximately 30-35 hearings per year. The Department thus anticipates that a contract with DWD for a .50 FTE hearing officer should be sufficient to handle the projected caseload. The contract will stipulate that the hearing officer be paid for the actual expenses incurred and time involved in the appeal proceedings.

As noted above, the Department expects that this request will be sufficient to reduce the backlog, handle the existing workload, and shorten the time period to hear appeals. The Department will carefully monitor the situation, and it will analyze and evaluate changes in the appeal process, funding levels and in staffing needs. If necessary, the Department may recommend changes in funding levels or staffing needs as part of its 1999-2001 biennial budget request.

In the past, the Department was able to reallocate resources to address the backlog of appeals. In FY 97, the PECFA program shifted funding from some vacant hydrogeologist positions to legal services to control the growth in appeals. The Department contracted with DWD for the purchase of services equivalent to a .75 FTE attorney position. The backlog in appeals was reduced from 196 in July, 1996, to 154 in June, 1997. The hydrogeologist positions are now filled, and it is no longer possible to reallocate the funds.

Background

During the process of reviewing claims filed for reimbursement under the PECFA program, costs and even entire claims are identified which are not statutorily eligible for reimbursement. These costs are removed from the claim and not funded by the program. In most instances of a cost denial, the cost item is appealed by the claimant filing against the agency decision as

provided in Chapter 227 of the statutes. The items that generate appeals range from simple issues of charges which exceed cost caps to highly complex issues of cost shifting, gross negligence, remedial engineering competency, statutory intent and hydrogeology.

The cost denials by the program create an immediate financial impact on owners. Although the level of denied costs has been very low, any denied item is of concern to an owner. This high level of concern derives from a general belief, on the part of claimants, that PECFA should pay the entire cost of their mandated remediation. As claim activity within the program has grown, this general attitude has caused a growth in the number of appeals filed with the program.

The Department examined the appeal process in some depth and has generated a number of potential solutions. Some of these can be readily implemented, while others require extensive additional development and legislation. Key concepts that have been developed include:

- Creation of an additional 50% deduction for certain ineligible items if they are included in a claim. Key ineligible items are continually included in claims and then appealed when they are disallowed. A new statutory provision adopted as part of 1997 Wisconsin Act 27 will encourage claimants to not include these items in the original claim and to take more care in general in the development of their claim. Nonetheless, because an owner cannot file an appeal until the claim has actually been paid, there will be a three-year time lag before the impact of this concept translates into reduced appeals.
- Elimination of coverage for miscellaneous charges that tend to generate appeals. The elimination of reimbursement for mileage, meal, travel, and similar charges would reduce appeals. These charges would have to be recovered in hourly rate charges and not collected as additional reimbursements.
- Requiring claimants to provide better documentation in their claims and appeals so that fewer issues revolve around a failure to provide key documentation and receipts.

Although there have been a number of changes which will impact the appeal process, the one that has the most potential still requires legislation. This alternative would provide claimants with an option of utilizing the full Chapter 227 appeal process or opting for a faster, expedited appeal process.

The Department of Employment Relations utilizes an optional expedited process with apparent success. In an expedited process, the claimant and the program staff would present their positions and the rationale for their actions to an individual who is knowledgeable in the provisions of the program and remedial processes. After presentation of the positions, the hearing officer would issue an immediate decision.

The use of an optional appeal route would provide a faster avenue of review for issues of a less complex nature. It is likely that only the most difficult issues would continue to follow the full Chapter 227 hearing route and that this would generate savings in attorney and staff time. An expedited appeal process has been suggested by the Department a number of times. Only

recently, however, has there been the level of interest necessary to really pursue a change this significant.

Alternatives

A permanent reduction in the appeal backlog will require both changes in the basic appeal process and funding levels. The major process change (expedited appeals) must be accomplished through a statutory provision. The additional funding is being requested through the 13.10 process.

Although additional funding is being requested, other alternatives were tried and considered before deciding to make a request. These strategies included:

1. **Improvements in the claim review process to increase completeness of claims and claimant response to requests for information.** Although this alternative has made the claim process better and received good reviews from the claimants, it will not impact the backlog of appeals that must be serviced.
2. **Shift program dollars to increase funding for the appeal process.** The PECFA program has adjusted staffing to increase the number of persons performing direct claim review. During the time period in which these positions and a number of vacancies were being recruited, lapse dollars were available to fund increased appeal services. On a long-term basis, however, the program can not move claim review dollars to appeals. The program has a substantial backlog in claims waiting for review.

Even though program dollars will not immediately be available to pay all claims reviewed, the performance of a review provides certainty to claimants and lenders. A review allows sites to move ahead as "reviewed dollars" have a substantially higher degree of acceptance. In order to fund the level of appeal activity necessary to address the current backlog, it would be necessary to convert 3.0 to 4.0 claim review positions. A conversion of this nature would have a tremendous negative impact on the claim review process. An impact of this size can not be justified.

3. **Allow the appeal backlog to grow.** The appeals which are filed with the program are "after the fact" types of events. The work has been performed and the core issues in the appeal concern only the ultimate reimbursement to the owner for costs that they have incurred. Overall goals for the protection of the environment and remediation can be met even though there is a long delay in the appeal process.

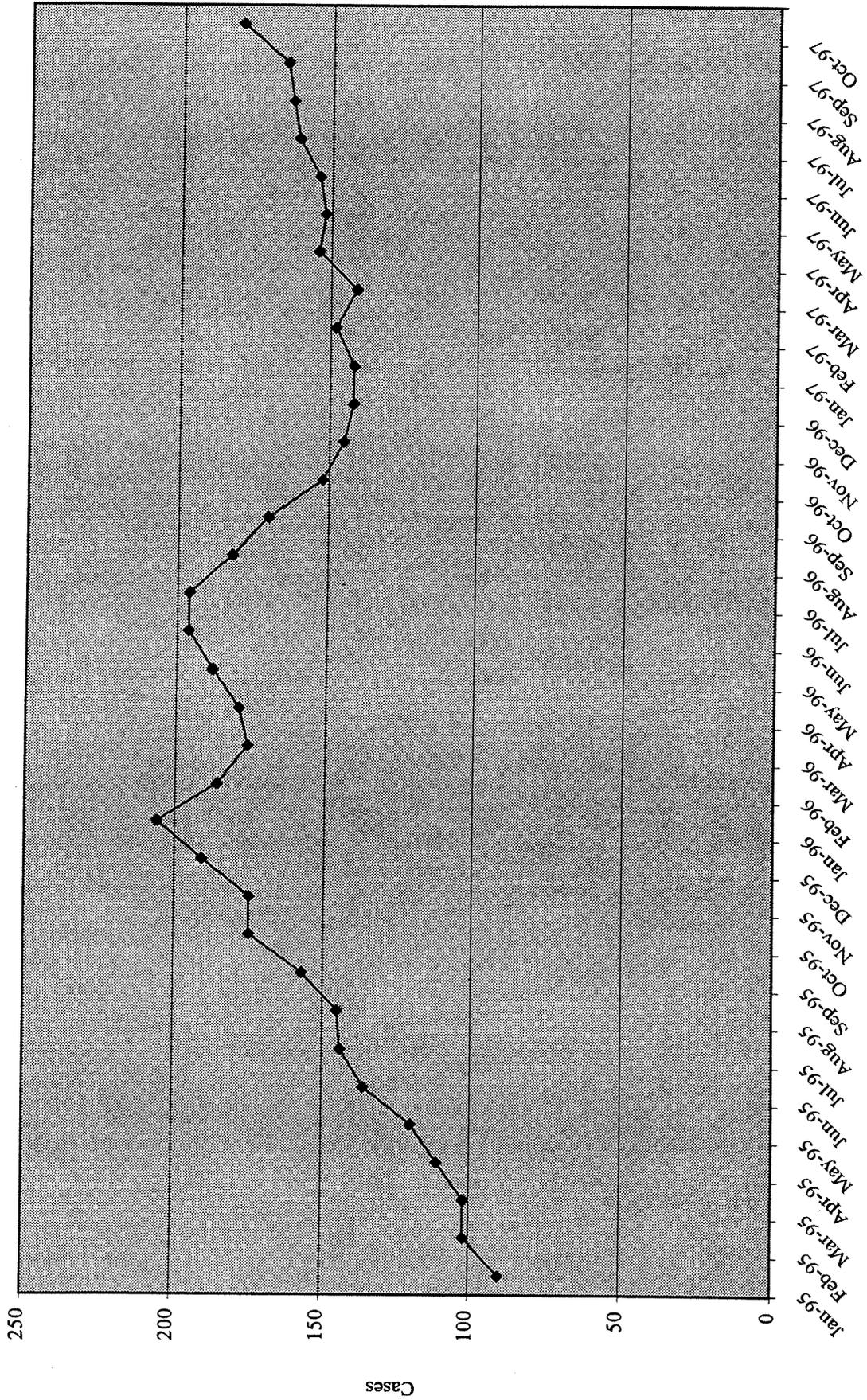
The delay in the appeal process does, however, impact owners and lenders. Interest costs continue to grow during the appeal process and this fact can result in large out of pocket costs for an owner, if the claim exceeds the statutory maximum. The increased interest costs paid by the fund also delays payments for other claims because the fund can only pay out a sum certain amount in each biennium. An expeditious appeal process serves to provide security for the lenders who provide the front end financing for remediations and for owners who hope to minimize the financial impact of their cleanup.

Conclusion

The infusion of additional legal resources is necessary at this point as:

- Program vacancies are not available to fund additional legal services.
- Full claim review staffing will be determining claim reimbursements at an all time high rate and this will generate additional appeals.
- Even with systemic changes in the appeal process, it is still necessary to resolve the existing appeal backlog.
- Smaller scope changes to the appeal process have not generated real reductions in the appeal workload.
- Funding of project attorney staffing and dollars for administrative law judges and temporary assistance from the UI Division can be integrated with the overall strategy to create an expedited appeal process.

PECFA APPEALS BACKLOG



EFFECT OF ADDITIONAL STAFFING ON PECFA APPEALS BACKLOG

Appendix II

Month	Appeals Received	Appeals Closed	Cases in Backlog
Jan-95	12	12	90
Feb-95	15	3	102
Mar-95	12	12	102
Apr-95	21	12	111
May-95	10	1	120
Jun-95	18	2	136
Jul-95	10	2	144
Aug-95	19	18	145
Sep-95	23	11	157
Oct-95	26	8	175
Nov-95	15	15	175
Dec-95	25	9	191
Jan-96	24	9	206
Feb-96	22	42	186
Mar-96	17	27	176
Apr-96	8	5	179
May-96	22	13	188
Jun-96	16	8	196
Jul-96	16	16	196
Aug-96	13	27	182
Sep-96	4	16	170
Oct-96	11	29	152
Nov-96	17	24	145
Dec-96	18	21	142
Jan-97	10	10	142
Feb-97	26	20	148
Mar-97	7	14	141
Apr-97	18	5	154
May-97	11	13	152
Jun-97	14	12	154
Jul-97	19	12	161
Aug-97	19	17	163
Sep-97	18	16	165
Oct-97	30	15	180
Nov-97	17	7	190
Dec-97	17	7	200
Jan-98	17	7	210
Feb-98	17	20	207
Mar-98	17	20	204
Apr-98	17	20	201
May-98	17	20	198
Jun-98	17	20	195
Jul-98	17	20	192
Aug-98	17	27	182

EFFECT OF ADDITIONAL STAFFING ON PECFA APPEALS BACKLOG

Sep-98	17	27	172
Oct-98	17	27	162
Nov-98	17	27	152
Dec-98	17	27	142
Jan-99	17	27	132
Feb-99	17	27	122
Mar-99	17	27	112
Apr-99	17	27	102
May-99	17	27	92
Jun-99	17	27	82
Jul-99	17	27	72
Aug-99	17	27	62
Sep-99	17	27	52
Oct-99	17	17	52
Nov-99	17	17	52
Dec-99	17	17	52

Assumptions:

1. One attorney closes 10 cases per month
2. 17 incoming cases per month
3. Existing PECFA attorney = 0.7 FTE
4. For first six months of project attorney: existing = 0.5 FTE and project = 0.5 FTE
5. Contract attorney = 1.0 FTE
6. Contract attorney drops out in October 1999. Project attorney remains.