

STATE OF VERMONT
Water Resources Board

Markon Engineering, Incorporated, Appeal
from Act of the Commissioner of the
Department of Water Resources

Findings of Fact,
Conclusions of Law,
Discussion and Order

Introduction

On May 11, 1981 Markon Engineering, Incorporated filed an appeal with the Vermont Water Resources Board under the provisions of 10 V.S.A., section 1269 from a decision of the Commissioner of the Department of Water Resources dated April 9, 1981. The decision appealed was the Commissioner's determination that the wastewater disposal facility proposed by Markon Engineering for a development project, planned for Tafts Corners in the Town of Williston, Vermont, would constitute a discharge subject to the provisions of 10 V.S.A., Chapter 47. On June 29, 1981 the Vermont Water Resources Board held a hearing on this appeal in Montpelier, Vermont at which the following parties entered an appearance:

1. Markon Engineering, Incorporated, by its attorney,
Samuel Perkins
2. Department of Water Resources, by its attorney
Stafford Davis

In the course of this proceeding the following documents were accepted into evidence:

- a. Markon Exhibit 1A: (prefiled testimony) A twenty-four page report prepared by Wagner, Heindel & Noyes, Inc. entitled "Presentation to the Water Resources Board for Markon Engineering".
- b. Markon Exhibit 1: A letter dated April 2, 1981 addressed to John Ponsetto, Commissioner of the Department of Water Resources from Kenneth E. Senecal.
- c. Markon Exhibit 2: A letter dated April 9, 1981 addressed to Kenneth E. Senecal from John Ponsetto, Commissioner to the Department of Water Resources.
- d. Markon Exhibit 3: A blue print drawing prepared by Engineers Incorporated of Vermont dated February 20, 1980 entitled "Soils Investigations," modified by notations made in colored felt tip pen.
- e. Department of Water Resources Exhibit 1: A series of Six charts- summarizing the provisions of the Vermont Health Regulations concerning on-site subsurface sewage disposal as interpreted by the Agency of Environmental Conservation with respect to the Markon Engineering subsurface sewage disposal facility.

Subsequent to the June 29th hearing, the Board received into the record of this proceeding and gave consideration to the following documents:

- a. A eight page undated document entitled "Second, Presentation on behalf of **Markon Engineering,**" by Wagner, Heindel & Noyes, signed by Jeff Noyes.
- b. A two page, document dated August 4, 1981 entitled "Proposed Findings of Fact on Behalf of **Markon Engineering, Incorporated**" signed by **Samuel Perkins.**
- c. A four page document dated August 4, 1981, entitled "Memorandum on Behalf of **Markon Engineering, Incorporated**" signed by Samuel Perkins.
- d. A three page **document** dated August 3, 1981 entitled "Requested Findings of Fact" signed by Stafford Davis.
- e. A three page document entitled "Stipulation" signed on behalf of **Markon Engineering** by Samuel Perkins, August 4, 1981, and on behalf of the Agency of Environmental Conservation and Department of Water Resources, by Stafford Davison August 13, 1981,

In the course of this proceeding the Vermont Water Resources Board took official notice of the following documents:

- a. Vermont Water Resources Board Classification Order for the Lower **Winooski River** Basin dated June 9, 1969.
- b. The Vermont Water Quality Standards adopted by the Vermont Water Resources Board effective March 7, 1978.
- c. The Vermont Health Regulations, Chapter 5, "Sanitary Engineering," subchapter 10, part 3: "Wastewater Treatment - Disposal by **Land Application**".
- d. State of Vermont Attorney General's **Opinion** #82-79 dated June 20, 1981 1979.

Findings of Fact

1. **Markon Engineering, Incorporated** proposes to construct a housing development on a site in Williston, Vermont.
2. The site is bounded on one side by Allen Brook, a tributary of the Winooski River. Allen Brook is **classified** as Class B waters by virtue of the Water Resources Board Classification Order dated June 9, 1969 and is further designated an upland stream by rule 12 of the Vermont Water Quality Standards.
3. **Markon Engineering, Incorporated** proposed to construct a wastewater treatment and disposal system for the housing project it wishes to build. This system is planned to consist of a **secondary level** treatment plant of an as yet undetermined'

design followed by a subsurface disposal field consisting of two sand filters.

- The subsurface, disposal **field is** planned to be constructed by removing native **soils** which are relatively impervious and replacing them with relatively pervious soils imported from **off-site**.
 - The size, configuration and materials to be used in the subsurface disposal field are as described in **detail in Markon** exhibits **1A** and **3**.
 - The proposed subsurface disposal field **is** designed to **provide** additional treatment to the wastewater by causing the effluent to pass through two sand filters **by gravity** flow. A characteristic of the planned **system is** the **weepage** of effluent on the downhill side of the disposal field.
 - After passing through the two sand filters, a **portion of the** effluent will surface on the ground as **weepage**, eventually reaching Allen **Brook by** means of **overland** flow.
8. The Water Resources Board **adopts** sections I, II, III, V, and VI of the Stipulation between **Markon** Engrneering, Incorporated and the Agency of Environmental Conservation as its findings in this proceeding **and they** are made a part hereof.

Conclusions of Law

1. Regardless of the degree of treatment achieved, the effluent from the wastewater treatment and disposal system described in **Markon** exhibits **1A** and **3** constitutes a **"waste"** within the meaning of 10 V.S.A., section 1251(6).
2. Allen Brook constitutes **"waters"** (of the State) within the meaning of 10 V.S.A., section 1251(7).
3. Wastes from the housing development which **Markon** Engineering, Incorporated proposes to construct would reach Allen Brook thereby creating a **"discharge"** within the meaning of 10 V.S.A. section 1251(3).

Discussion

Markon Engineering has argued that, in order to **address** the immediate issue of whether or not the proposed wastewater treatment facility **will create** a discharge, the **Board** must first confront **two** larger questions: on what basis **does the** state distinguish between those activities which are **regulated by** 10 V.S.A., Chapter 47 as "discharges" and those exempt from such regulation; and how **should the** regulation of "discharges" be correlated with related regulatory **programs**, in, particular the Vermont Public Building and Subdivision Regulations.

In support of its position Markon has argued that since sophisticated hydrogeological studies can always demonstrate a connection between Vermont's surface waters and every land disposal system in the state, a literal interpretation of the term "discharge" would extend the jurisdiction of 10 V.S.A., Chapter 47 far beyond the scope intended. Markon therefore concludes that the real issue in deciding whether a discharge is created should be the effect of a particular disposal system on nearby surface waters.

The Board, however, has concluded that this case is not the appropriate vehicle for establishing such a general policy about the term "discharge". Because Markon's system will result in effluent reaching Allen Brook, by a direct route via overland flow, the Board has concluded that it is a discharge regardless of the outcome of that review of existing policy.

Order

On the basis of the above findings of fact and conclusions of law the Vermont Water Resources Board hereby affirms the April 9, 1981 decision of the Commissioner of the Department of Water Resources that the wastewater treatment facility proposed by Markon Engineering, Incorporated is a discharge subject to the provisions of 10 V.S.A., Chapter 47.

Done this 8th day of September at Montpelier, Vermont.

By the authority of
the Water Resources Board



William A. Bartlett
Executive Secretary

WAB/kgr