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**State of Vermont
Water Resources Board**

**In re: Mountain Valley Marketing
Docket No. 91-06 and 91-09**

Preliminary Order

Backaround

Pursuant to a Board Order dated March 16, 1992, and in response to a motion of the Department of Environmental Conservation ("DEC"), certain claims of Mountain Valley Marketing ("appellant") were dismissed.

The remaining issue is whether legal fees incurred as a result of site assessment activities related to a suspected release from old underground storage tanks (USTs) are legally reimbursable.

Preliminary to addressing this issue, the DEC requested that it be provided a breakdown of the legal fees incurred by appellant in order to verify that the fees were related to site assessment activities resulting from a suspected release. Before providing the breakdown appellant requested that the prehearing conference order be amended to reflect a third party claim for coverage of the attorney fees.

Appellant was advised to first seek reimbursement from the DEC for its third party claim. After requesting and being denied the ability to amend its original reimbursement request at the DEC, the appellant filed a Motion For Enlargement of Issues on May 21. Appellant's motion requests that the Board include the following two issues in the prehearing conference order:

- (1) Whether penalties are payable by thi petroleum clean up fund for issues previously dismissed with prejudice by the Water Resources Board;
- (2) Whether Mountain Valley Marketing (appellant) is entitled to recover attorneys fees as a third party claimant.

Discussion

Appellant argues that the second issue should have been included as a Matter at Issue in the Prebearing Conference Order because it was raised in a DEC letter of July 9, 1991 that was submitted, to the Board with appellant's appeal. In that letter the DEC informed the appellant that legal fees do not represent costs incurred by a third party for injury and

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damage under 10, V.S.A. §1941(b)(2).


Board Rule of Procedure 18(D) specifically provides: that the scope of any **de novo or** appellate proceeding shall be limited to those issues specified in the petition or notice of appeal unless the Board determines that substantial inequity or injustice would result from such limitation. Neither Appellant's original Notice of Appeal dated May 15, 1991, nor its Notice of Appeal dated July 23, 1991* indicate that appellant had **sought to** have the DEC consider appellant's **attorney fees** as a third party claim.

The DEC has original jurisdiction under the cleanup fund provisions to determine whether specific legal fees of the appellant can be covered **as a** third party claim. 10 V.S.A. §1941(b)(2). The DEC has yet to make a formal determination on whether the **specific** legal fees of the appellant are covered under this section. The Board, on the other hand, has **no authority** under the statute to make an original **determination**. The **Board's** authority is limited to the situation where the appellant has sought reimbursement from the DEC, DEC has denied the claim, and the appellant has appealed the denial to the Board. 10 V.S.A. §1933. For the foregoing reasons, the appellant's motion must be denied

ORDER

Appellant's Motion for Enlargement of Issues is hereby denied.

Vermont Water Resources Board
by its Chair


Dale A. Rocheleau, Chair

Date 8/18/92

Concurring:
Elaine Little
Stephen Reynes

Absent:
Mark DesMeules
Jonathan Lash

*Appellant originally filed an **appeal** on May 15, 1991. The July 23 appeal, though denoted a "Notice of **Appeal**," is actually an amended appeal.