

State of Vermont

Water Resources Board

Re: **Mountain Valley Marketing, Inc.**
Docket No. **91-06; 91-09**

Authority:
10 V.S.A. §§**1933**

PRELIMINARY ORDER

Background

On April 15, 1991, the Hazardous Materials Management Division ("**HMMD**") forwarded a letter to Mountain Valley Marketing, Inc. ("**MVM**") notifying the company that certain expenses for which MVM sought reimbursement from the Petroleum Cleanup Fund ("**Fund**") (10 V.S.A. §**1941**) were not costs associated with remediation of a site.* The Fund was established for the purpose of the cleanup and restoration of contaminated soil and groundwater caused by release of petroleum from underground storage tanks ("**UST**"). The Fund also covers compensation of third parties for injury and damage caused by a release. The **HMMD** reasoned that the costs were related to integrity demonstration of newly installed tanks required as part of a compliance action and, **therefore**, are not eligible for reimbursement under Title 10 V.S.A. §**1941**.

An appeal was filed on May 17, 1991, citing as authority for the appeal 10 V.S.A. §**1933** and a Department of Environmental Conservation ("**DEC**") internal document entitled "**Policies and Procedures for Reimbursement from the Petroleum Cleanup Fund**" (the "**Policy**").** The appellant claims that the statute and paragraph 4A of the Policy provide for reimbursement of the **type** of expenditures made by the appellant. **This** appeal became Docket No. 91-06.

*The expenditures claimed under this request included \$**409.16** for a bill from consulting geologists. The **RMMD** agreed to reimburse this amount **once confirming** invoices were **forwarded**. The remaining \$**5,292.47** of the total \$**5,701.63** claimed **involved expenditures** made for the purchase and installation of a tank, monitoring system.

The Policy is an internal procedure, but was not **adopted as a formal rule pursuant to 3 V.S.A. §§**836** et seq.



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On June 20, 1991, MVM forwarded an additional request for reimbursement in the amount of \$94,672.94 to the HMMD. The requested reimbursements are connected with the same tanks involved in the May 17 appeal.*

On July 9, 1991, the HMMD forwarded a letter to MVM denying the reimbursements requested in the June 20, 1991 letter. MVM filed an appeal with the Board on July 24, 1991 (Docket No. 91-09). On the same date, MVM filed a Motion to Consolidate Docket Nos. 91-06 and 91-09.

Prehearing conferences were held on September 12 and October 2, 1991. During the course of these conferences the parties stipulated that there has been no release of petroleum into the environment from the three new USTs installed in September, 1989. The parties also agreed that any issues regarding alleged penalties were prematurely raised. Consequently, that part (\$47,000) of the requested reimbursements was withdrawn from consideration. Finally, in addition to some other stipulations not relevant here, the parties agreed to consolidate Docket Nos. 91-06 and 91-09.

The matters at issue, as determined by the prehearing conferences, were then confined to whether the cost of installing an UST continuous monitoring system, the cost of air tank testing and the cost of attorney's fees incurred in defending administrative orders, all connected to the installation of the new USTs,** are legally reimbursable under Title 10 V.S.A. §1941(b), where the USTs have not been determined to be leaking. An additional issue involves whether legal fees incurred directly and solely as a result of site assessment activities related to the suspected release from the old USTs are legally reimbursable under 10 V.S.A. §1941(b)(1).

*This request included \$1,572.29 for air testing of the newly installed tanks, \$46,100.65 for attorney fees billed by Gravel and Shea for "defense of the tank manufacturer's 30 year warranties," and \$47,000 for payments "directed by the Secretary" (penalties for alleged violations by MVM).

**These attorney fees are the same fees billed by Gravel and Shea, originally noted as fees for the "defense of the tank manufacturer's 30 year warranties."

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On November 1, ~1991, the DEC filed a Motion to Dismiss **Certain** of the Appellant's Claims. The matters included in this motion relate to **the** reimbursement requests for installing the **USTs**, air tank testing and attorney fees incurred in defending administrative **orders connected** to the installation of the new **USTs**. MVM filed an Opposition to the Motion on November 12, 1991. On December 10, 1991, MVM requested oral argument on the DEC Motion to Dismiss. Notice **of a February** 12, 1992 Board hearing on the Motion to Dismiss was forwarded to the appellant on January 30, 1992. The appellant did not appear for the hearing and, therefore, waived oral argument.

Discussion

The Board is asked to construe the Underground **Liquid** Storage Tank statute, 10 V.S.A. Chapter 59, to determine whether the legislature intended that certain costs incurred by an owner or operator relative to **USTs** is reimbursable under 10 V.S.A. **§1941**.

Title 10 V.S.A., .§1941(b) (Petroleum Cleanup Fund) provides:

(b) The Secretary may authorize disbursements from **the** fund for the purpose of the cleanup and restoration of contaminated soil and groundwater caused by releases of **petroleum from** underground storage tanks, including air emissions for remedial actions, and for compensation of third parties for injury and damage caused by a release. Disbursements under this section may be made only for insured costs incurred after January 1, 1987 and for which a claim is made prior to July 1, 1994 and judged to be in conformance **with prevailing** industry rates,...

When construing a statute, a court must ascertain and give effect to the intention of the legislature; Paquette v. Paquette, 146 **Vt.** 83; 86 (1985). If the meaning of a statute is plain on its face, it must be enforced according to its terms, and there is no need for construction. Id.

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The plain language of 10 V.S.A. §1941 indicates that the legislature sought to provide reimbursement only for those costs directly caused by a release of petroleum from an UST. It is equally clear that these disbursements are within the discretion of the Secretary of the Agency of Natural Resources, of which the DEC is a part. The costs for which MVM seeks reimbursement are related to tanks which, by agreement of the parties, have not been determined to be
The Board finds
MVM's requests.

MVM also argues that the Policy contains language supporting its claim. Under the heading "Ineligible Costs - Remediation," the Policy provides:

All costs associated with confirming the presence of a suspected release, including the cost of tightness testing to determine the integrity of the and piping are not from PCF, unless this activity is ordered by the DEC and such activity goes beyond the monitoring requirements of the owner's permit.

Policies and Procedures for Reimbursement from the Petroleum Cleanup Fund, 54(A).

MVM would have the DEC reimburse it for the DEC ordered tank monitoring, although there have been no allegations that these tanks have leaked. Clearly, monitoring is authorized by at least two sections of the statute, neither of which is related to the Fund. See 10 V.S.A. §1924 and §1931. It is also clear that §4(A) of the Policy envisions an exception to ineligibility when there is a suspected release. That the DEC ordered MVM to monitor the newly installed tanks was not a declaration by the DEC that it suspected the tanks to be leaking.

MVM's the Board to accept §4(A)
of the Policy, it would be sanctioning a DEC reimbursement that the statutory enabling legislation has not authorized. As such, the reimbursement would be outside the purposes and the §1941(b) and impermissible. See In re Agency of Administration, 141 Vt. 68, 75 (1982). Furthermore, the Policy is an internal document of the DEC, not pursuant to

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Act, and does not have the force of law. 3 V.S.A. **§845(a)**.

MVM has made additional arguments which the Board finds unpersuasive. MVM has provided no support for its assertion that 10 V.S.A. **§1941(b)** has been given a wide interpretation by the DEC to include anything "directed by the Secretary." MVM has similarly provided no support for its assertion **that** the cost of tank testing has been covered by the DEC for other gasoline retailers under similar facts and circumstances. Whatever these interpretations or circumstances might have been, their legality **is** limited by the clear intent of the statute.

Finally, **MVM** argues that a DEC employee made statements at an educational seminar to the effect that an UST operator will be reimbursed if DEC orders tank monitoring and testing and the tanks prove to be tight. This representation is correct to the extent that a request for tank testing is made in conjunction with a suspected release. Aside from the fact that reimbursement for testing not connected **to** a **suspected** release would be contrary to the statutory scheme, reimbursement under **§1941(b)** is discretionary on the part of the Secretary.

O r d e r

The Board now holds that costs of installing an UST **continuous monitoring** system, air tank testing and attorney's fees incurred in defending administrative **orders**, all connected to the installation of new **USTs**, are not legally reimbursable pursuant to 10 **V.S.A. §1941(b)**, where the **USTs** have not **previously** been determined to be leaking, and, in the **case of** the monitoring system and the tank testing, where the activities have been ordered by the DEC.

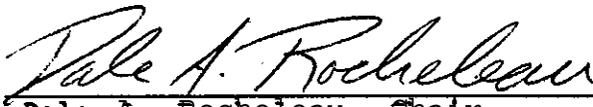
The Motion to Dismiss Certain of the Appellant's Claims is granted. The remaining issue left for determination is whether **legal** fees incurred directly and solely as a result of site assessment activities related to the suspected release

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from the old USTs are legally reimbursable pursuant to 10
V.S.A. §1941(b)(1).

Dated at MONTPELIER, Vermont this /&/day of
MARCH, 1992.

Vermont Water Resources Board
by its Chair


Dale A. Rocheleau, Chair

Concurring: Jonathan Lash
Elaine Little
Stephen, Reynes