

State of Vermont

Water Resources Board

Re: Appeal of Premium Petroleum
Authority: 10 V.S.A. 51933, 1269

Docket No. 91-10

ORDER

BACKGROUND

Premium Petroleum ("**Premium**") forwarded a letter to Richard Phillips, Director of Enforcement, Department of Environmental Conservation ("**DEC**") on June 28, 1991, enclosing a "**methodology** on handling water contaminated with petroleum."

The methodology submitted by Premium concerned amounts of water generated by a **gas** station's underground storage tanks ("**UST**"). The cover letter requested that DEC either inform Premium how its methodology could be improved, or certify in writing that it complied with hazardous waste management rules.

On August 28, 1991, John C. Miller, at the request of Richard Phillips, forwarded a reply to Premium in which he suggested that Premium's plan would not necessarily meet the Hazardous Waste Management Regulations. Mr. Miller noted deficiencies in the plan and offered two alternative approaches to Premium that he had observed in practice.

Subsequently, Premium filed an appeal based upon the reply of Mr. Miller, citing Title 10 V.S.A. §1933 as its basis for jurisdiction. Premium also noted that other rules at issue included the Underground Storage Tank Regulations, the Hazardous Waste Management Regulations, and the Labor and Industry Codes. This appeal was timely filed on September 11, 1991.

On September 23, 1991, **the Agency** of Natural Resources filed a Motion to Dismiss the appeal, citing the Board's lack of jurisdiction.

On September 27, 1991, Premium filed a Motion to Amend Notice of Appeal and Premium Petroleum's Opposition To **ANR's** Motion To Dismiss And Request For Oral Argument. These motions were filed within **30 days of** the original letter from John C. Miller. In the Motion to Amend, Premium moves to include 10 V.S.A. §§1269 and 1281 as additional authority for its appeal.

DISCUSSION

I. Jurisdiction under 10 V.S.A. §1933

Title 10 V.S.A. §1933 provides that any person aggrieved by an act or decision of the secretary pursuant to Chapter 59 may appeal to the Board within 30 days. Chapter 59 of Title 10 V.S.A. covers Underground Liquid Storage Tanks. Nothing in Chapter 59 requires the secretary to review the methodology regarding water generated in an UST, provide an opinion on the "legality" of the methodology or provide a methodology to be used by a generator.

The only section of Chapter 59 potentially relevant to the issue raised on appeal is §1932 which gives the secretary discretionary power to issue an order to an owner or operator of an UST "establishing reasonable and proper methods for the control" of activity which may present a threat or a hazard to personal health or the environment. 10 V.S.A. 51932. Such orders may include tank closure, the removal of contaminated materials and the management of substances in the tank or the surrounding environs. Id. No order was issued or contemplated in this situation. Premium merely sought approval on its own initiative of a general plan to be applied to the removal and storage of contaminated water from tank bottoms.

A quasi-judicial body has only those powers expressly conferred by statute, 3 V.S.A. §203, Miner v. Chater, 137 Vt. 330, 333 (1979), or prescribed in terms definite enough to serve as a guide. State v. Auclair, 110 Vt. 147 (1939). An agency must operate for the purposes and within the bounds authorized by its enabling legislation. The Board's jurisdiction under 10 V.S.A. §1933 is limited to acts or decisions of the Secretary of the Agency of Natural Resources made pursuant to Chapter 59. The reply letter of John C. Miller was not made pursuant to Chapter 59.

Similarly, no UST regulation requires that Premium develop and submit to DEC for approval a methodology for handling petroleum contaminated water residue from USTs.* In fact, Chapter 59 of Title 10 and the UST regulations specifically provide that a "regulated substance," as that term applies to underground storage tanks, does not include any substance regulated as a hazardous waste under Chapter 159 of Title 10 V.S.A. 10 V.S.A. §1922(6)(A); Underground Storage Tank Regulations §8-201(24)(a).

*The Underground Storage Tank Regulations were promulgated pursuant to 10 V.S.A. Chapter 59.

Petroleum contaminated water from tank bottoms is a hazardous waste under 10 V.S.A. Chapter 159** and under the Hazardous Waste Management Regulations. 10 V.S.A. **§6602(16)(A)(ii)**. State of Vermont Agency of Natural Resources v. Burlinaton Rent-All, Inc., Environmental Law Division, Docket No. E 91-012, Page 6 (August 9, 1991); Hazardous Waste Management Regulations, 7-201(1)(a), 7-201(1)(b), **7-201(1)(c)**, **7-201(g)**, 7-204, 7-210 (VT 02, VT 09). See also, discussion regarding 10 V.S.A. Chapter 159, below, Part II.

The Board holds that it lacks jurisdiction under 10 V.S.A. 51933 and under the Underground **Storage** Tank Regulations to address an appeal of a **DEC** rejection of a UST generator's proposed methodology for handling petroleum contaminated water.***

II. Jurisdiction under 10 V.S.A. §1269

Title 10 V.S.A. §1281 provides that the Secretary of ANR shall adopt rules relating to the handling, storage and transport of oil and other hazardous materials. Under 10 V.S.A. **§1251(5)**, the definition of "hazardous materials" refers to materials having a harmful effect on water quality if discharged to the waters of the state. "**Waste**" is defined as effluent, sewage or any substance that is deleterious to waters. 10 V.S.A. **§1251(12)**. "**Waters**" are defined to cover surface waters. 10 V.S.A. **§1251(13)**. This chapter does not contemplate covering hazardous materials or hazardous wastes which are not in a position to discharge to the surface waters

Title 10 V.S.A. Chapter 159 is designed to provide a comprehensive statewide program for the disposal, storage and treatment of solid waste materials. Title 10 V.S.A. **§6602 contains definitions of hazardous wastes (**§6602(4)**) and hazardous materials (**§6602(16)**). Hazardous wastes are contained within the definition of hazardous materials (**§6602(16)(A)(iii)**).

Additional sections of Chapter 159 deal with a comprehensive system for storage, collection and transportation of solid wastes, including hazardous wastes (**§6604**); administration of a certificate program for management of hazardous wastes (**§6604(b)** and 56606); authority of the Secretary of Transportation to deal **with transportation** of hazardous wastes (**§6607**); and authority of the Secretary of ANR to take action to protect health and the environment when storage, transportation, treatment or disposal of any hazardous waste may present a hazard (56610).

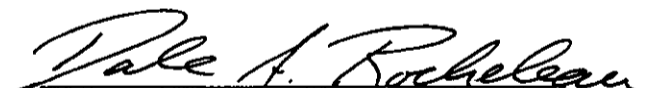
of the state. The mere fact that the contamination being addressed by Premium involves water has no relationship to the surface waters of Vermont.

The Board holds that it lacks jurisdiction under 10 V.S.A. §1269 to address an appeal of a DEC rejection of an UST generator's proposed methodology for handling petroleum contaminated water.

***Section 7-303(3)(b) of the Hazardous Waste Management Regulations provides that a conditionally exempt small quantity generator (of hazardous wastes) must handle his hazardous wastes by one of five different methods. Subsection (b)(v) of this section requires that the generator submit a written request for an alternative handling method to the Secretary. The Secretary must determine that the proposed handling method will not have an adverse impact on human health and the environment. The small quantity generator can not treat, store or dispose of waste under this section until receiving written approval from the Secretary for such method. Although Premium does not specifically refer to this particular section and subsection in making its request to the Department of Environmental Conservation, it does note in its letter to Richard Phillips that it is seeking either comments on improvement in the plan or a certification that the plan complies with the hazardous waste management rules. The steps outlined in the "methodology", as well as the suggestions contained within the Department's letter in reply, indicate that this section and the additional sections 7-307, 7-308, and 7-309 were contemplated by the parties in their correspondence.

Dated at MONTPELIER, Vermont, this 9th day of
January, 1992.

Vermont Water Resources Board
by its Chair


Dale A. Rocheleau, Chair

Concurring: Elaine Little
Stephen Reynes