

State of Vermont
WATER RESOURCES BOARD

In re: Jeffrey Jacobs

(DEC Site #93-1478, City of Montpelier)
Docket No. UST-94-13

PREHEARING CONFERENCE REPORT AND ORDER

I. BACKGROUND

On December 16, 1994, the Water Resources Board (Board) received a notice of appeal filed by Jeffrey Jacobs through his attorney Richard A. Unger, Esq., seeking review of the November 18, 1994, decision by the Hazardous Materials Management Division (HMMD), Agency of Natural Resources (ANR), denying Mr. Jacobs eligibility for reimbursement for environmental assessment and cleanup costs from the Petroleum Cleanup Fund, 10 V.S.A. § 1941, related to the removal of an underground storage tank at his property in Montpelier, Vermont. This appeal was filed pursuant to 10 V.S.A. § 1933(a).

On January 10, 1995, the appellant was informed by Board staff that his notice of appeal was deemed complete and docketed. Rule 18, Board's Rules of Procedure. On January 31, 1995, a Notice of Appeal and Prehearing Conference was issued and sent to persons required to receive notice. On that same date, a copy was sent to The Times Argus, which published it on February 14, 1995. Rule 18(C), Board's Rules of Procedure.

On March 10, 1995, the Board received a letter from counsel for the appellant indicating that neither he nor his client would be present at the scheduled prehearing conference. The letter set forth the matters at issue and a proposed list of witnesses and documents.

The prehearing conference was convened, as noticed, on March 15, 1995, at 10:30 a.m., at the Board's Conference Room, 58 East State Street, in Montpelier, Vermont, by Board Chair William Boyd Davies. Rule 24(A), Board's Rules of Procedure. The following persons were present at the prehearing conference:

Prehearing Conference Report and Order

In re: Jeffrey Jacobs

(DEC Site #93-1478, City of Montpelier)

Docket No. UST-94-13

page 2 of 7

Alex M. Elliott, Esq., and Elizabeth Cord, for the
HMMD, ANR

On November 9, 1995, a draft Prehearing Conference Report and Order was circulated to counsel for the appellant and HMMD, ANR. On November 22, 1995, the Board received comments from counsel for the appellant. On November 27, 1995, the Board received comments from counsel for the ANR. Having duly considered these comments, the Chair now issues a final Prehearing Conference Report and Order, making such revisions as he deems necessary.

II. ISSUES

Based on the notice of appeal and the appellant's March 10 filing, the question before the Board is whether the appellant has satisfied the three-prong test for reimbursement from the Petroleum Cleanup Fund pursuant to 10 V.S.A. § 1926(b). The ANR agrees that the appellant has satisfied the second prong of the test, in that the appellant has given all reasonable assistance in the removal of the underground storage tank on his property. Therefore, the issues on appeal are:

- (A) Whether the appellant can establish that after making a diligent and appropriate investigation he or she had no knowledge or reason to know of the existence of an underground storage tank (10 V.S.A. § 1926(b) (1)); and
- (B) Whether the appellant was ordered to remove or close the tank (10 V.S.A. § 1926(b) (3)).

The appellant contends that he exercised "due diligence" when inspecting the subject property at the time of purchase. Moreover, he claims that a letter from Bob Haslam, Assistant Hazardous Materials Specialist of the HMMD, ANR, constitutes an order within the meaning of 10 V.S.A. § 1926(b) (3).

III. PRELIMINARY ISSUES

At the prehearing conference, the ANR identified the following preliminary issues, which it argued should be addressed prior to a hearing on the merits:

- (A) Whether counsel for the appellant has a personal interest in the property at issue; and
- (B) Whether other persons in interest should be joined in this proceeding as parties or permissive intervenors.

With respect to question (A), the ANR indicated that Mr. Unger, counsel for the appellant, might be a part owner of the property in question. In its written comments with respect to the draft Prehearing Conference Report and Order, the ANR indicated that it no longer sought information concerning this issue.

With respect to question (B), the ANR suggested that others might have an interest in this proceeding such as the Vermont League of Cities and Towns (VLCT), the Dickey Trust (Dickey), and possibly the Environmental Protection Agency (EPA). In its written response to the draft Prehearing Conference Report and Order, the appellant provided the names and addresses for VLCT and Dickey, suggesting that they be provided with an opportunity to intervene as permissive parties.

Any persons wishing to intervene in this proceeding, including the VLCT and Dickey, shall do so in accordance with the deadlines and terms set forth in the Order below.

IV. STANDARD OF REVIEW

Any hearing on the merits in this appeal shall be conducted as a de novo proceeding, pursuant to 10 V.S.A. § 1933.

Prehearing Conference Report and Order

In re: Jeffrey Jacobs

(DEC Site #93-1478, City of Montpelier)

Docket No. UST-94-13

page 4 of 7

V. DISCLOSURES

At the prehearing conference, the current Board members were identified by name (Chair Davies, Stephen Dycus, Ruth Einstein, Gail Osherenko, and Jane Potvin) and their present and past professional affiliations.

Chair Davies noted that in the appellant's filing of March 10, 1995, Frank Reed of Catamount Consulting Services was specifically listed as a potential witness. The Chair therefore disclosed that he had provided legal services with respect to the formation of a maple candy company, and that Mr. Reed was a principal of that company. The Chair indicated that he would need to know more about Mr. Reed's involvement in the present case in order to determine whether a conflict of interest or appearance of conflict exists warranting his recusal.

Additionally, it was disclosed that Board member Ruth Einstein had worked between 1981 and 1988 for the following divisions of the ANR: Ground Water Management, Water Quality (Lab), and Hazardous Materials Management Division (Superfund).

In his comments with respect to the draft Prehearing Conference Report and Order, counsel for the appellant provided information clarifying the nature of Mr. Reed's interest in the present proceeding and Mr. Reed's relationship to Chair Davies and other members of the Board.

Any party seeking additional disclosures from Chair Davies, Ms. Einstein, or any other member of the Board shall do so in accordance with the deadline and terms set forth in the Order below.

Prehearing Conference Report and Order

In re: Jeffrey Jacobs

(DEC Site #93-1478, City of Montpelier)

Docket No. UST-94-13

page 5 of 7

VI. WITNESSES AND EXHIBITS

(A) The appellant's proposed list of witnesses and exhibits are identified in its filing of March 10, 1995, and incorporated herein by reference.

(B) At the prehearing conference, the ANR identified the following persons as potential witnesses: Bob Haslam, Project Manager, HMMD; Chuck Schwer, Mr. Haslam's supervisor, HMMD; Thomas Unkles, witness to the tank removal, HMMD; George Desch, Acting Director, HMMD; June Middleton, permit administrator, UST Section, HMMD; and Anne Whiteley, Esq., counsel for the Department of Environmental Conservation, ANR.

The ANR identified the following as potential exhibits: Reimbursement Package for the Petroleum Cleanup Fund (December 2, 1992); Underground Storage Tank regulations (effective February 1, 1991); correspondence in the HMMD file; and various photographs and charts.

(C) In order for the Board to consider any ANR regulations, forms, or guidance documents as part of the record, these must be offered as exhibits in accordance with the terms of this and any supplemental prehearing order.

VII. SUPPLEMENTAL PREHEARING ORDER

A Supplemental Prehearing Order reflecting a schedule for filing final witness and exhibit lists, prefiled testimony, exhibits, and stipulations will be issued as a later date after consultation with the parties.

Prehearing Conference Report and Order

In re: Jeffrey Jacobs

(DEC Site #93-1478, City of Montpelier)

Docket No. UST-94-13

page 6 of 7

IV. ORDER

1. The following are parties as of right in this proceeding:
 - a. Jeffrey Jacobs, appellant, pursuant to 10 V.S.A. § 1933;
 - b. The Agency of Natural Resources (ANR), pursuant to Rule 22(A) (4) of the Board's Rules of Procedure.
 2. On or before **4:30** p.m., Tuesday, December 19, 1995, any person seeking intervention should file a written request with the Board pursuant to Rule 22(A) or (B) of the Board's Rules of Procedure.
 3. On or before **4:30** p.m., Friday, January 12, 1996, any party or intervenor seeking additional disclosures from any Board member, concerning any actual or potential conflict of interest, shall file a written request with the Board. This request should state any facts known to the party which might require recusal of a Board member. Failure to file a timely request may be deemed a waiver of objection to the participation of a Board member.
 4. On or before **4:30** p.m., Friday, January 12, 1996, any party opposing a request for intervention filed by the December 19, 1995, deadline, shall file a written memorandum in opposition.
 5. On or before **4:30** p.m., Friday, February 2, 1996, any party or intervenor shall file any request for preliminary ruling or dismissal. Said request shall be in the form of a motion supported by legal memorandum.
 6. On or before **4:30** p.m., Friday, February 2, 1996, any party or intervenor objecting to the participation of a Board member in this proceeding shall file a written objection with the Board. This filing should state the reason(s) for the objection and any **facts known to the party which might require the Board member's** recusal.
-

Prehearing Conference Report and Order

In re: Jeffrey Jacobs

(DEC Site #93-1478, City of Montpelier)

Docket No. UST-94-13

page 7 of 7

7. On or before **4:30** p.m., Friday, February 16, 1996, any party or intervenor wanting to respond to any motion or objection filed by the February 2, 1996, deadline, may file a responsive memorandum with the Board.

8. Parties shall file an original and five (5) copies of any motions, memoranda, or other filings with the Board, and mail one copy to each of the persons listed as parties on the attached Certificate of Service or any revised Certificate of Service issued by the Board. A certificate of service indicating delivery to all listed persons by hand or by first class mail shall be filed with the Board and parties. The Board does not accept filings by FAX.

9. Oral arguments and hearings before the Board will be recorded electronically. In addition, oral argument may be recorded by a qualified stenographer, provided that a written notice is filed by the requesting party at least ten (10) days prior to the scheduled argument. Additionally, the requesting party must comply with the other requirements of Rule 28(C) with respect to arrangements for a stenographic record.

10. Pursuant to Rule 24(B) of the Board's Rules of Procedure, this order will be binding on all parties who have received notice of the prehearing conference, unless there is a timely objection to the Order, or a showing of cause for, or fairness requires, waiver of a requirement of this Order.

Dated at Montpelier, Vermont, this @day of December, 1995.

Water Resources Board
by its Chair


William Boyd Davies