

1997

V-1 Oil Company v. Department of Environmental Quality, Division of Environmental Response and Remediation, and the State of Utah: Reply Brief of Petitioner

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

V-1 OIL COMPANY,	:	
Respondent/Petitioner,	:	
	:	Case No. 970315-CA
v.	:	
	:	Priority 14
THE DEPARTMENT OF	:	
ENVIRONMENTAL QUALITY,	:	
DIVISION OF ENVIRONMENTAL	:	
RESPONSE AND REMEDIATION, and	:	
THE STATE OF UTAH,	:	
Petitioners/Respondents.	:	

REPLY BRIEF OF PETITIONER

Petition For Review of Proceedings and Final Order
Issued By The Utah Solid and Hazardous Waste Control Board
On April 21, 1997

Jeff Utley, Chairman

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**UTAH COURT OF APPEALS
BRIEF**

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ARGUMENT

I. THE BOARD ERRED IN ITS DETERMINATION THAT V-1 WAS RESPONSIBLE FOR THE FREE PRODUCT IN THE SEWER AND THAT THE EMERGENCY ORDER AND NOTICE OF NON-COMPLIANCE WERE PROPERLY ISSUED.

A. The Emergency Order And Notice Of Non-Compliance Issued By The Executive Secretary (UST) Is Limited By The Technical Standards Set Forth In 40 C.F.R. Part 280.

The Division of Environmental Response and Remediation ("DERR"), in its Brief of Respondents, erroneously argues that Utah State law grants the Executive Secretary (UST) of the Utah Solid and Hazardous Waste Control Board, unlimited and unquestioned power to determine who must step forward and assume the financial costs of remediating a real or perceived emergency. See Brief of Respondents, 12-24. The Division further argues, that the reason for this is in the unlikely event the Executive Secretary's judgment proves fallible, the owner/operator of the underground storage tank can ask the Board to reallocate the responsibility to another party, identified by the owner/operator of course, and then sue that party for a refund or contribution. *Id.* The apparent basis for this omnipotence vested in the Executive Secretary is that once an owner/operator has experienced any confirmed release at its facility, at any time in the past, the Executive Secretary has no further duty to *correctly* identify whether the current emergency is caused by those prior events. He apparently need only cite the prior release and is immediately in compliance with the Act. *Id.* This argument is completely without merit and has no basis in law or fact.

The Executive Secretary derives his powers and duties from the Utah Underground Storage Tank Act ("Act"), Utah Code Ann. § 19-6-404 (as amended 1997). Relevant to this case, is section 19-6-420 which states:

(1) If the executive secretary determines that a release from a petroleum storage tank has occurred, he shall:

(a) identify and name as many responsible parties as reasonably possible.

Utah Code Ann. § 19-6-420 (as amended 1997). The statute does not grant the executive secretary with the power to arbitrarily assign responsibility without valid factual support. On the contrary, the Act merely grants the Executive Secretary the power to enforce the rules and requirements of the petroleum storage tank program. Utah Code Ann. §19-6-404.

The Utah Underground Storage Tank Act requires that the rules made under the authority of the Act "meet the federal requirements for the state's assumption of primacy in the regulation of underground storage tanks." Utah Code Ann. § 19-6-403(2). The Utah Underground Storage Tank Rules, R311, specifically adopt the underground storage tank technical standards set forth by the Environmental Protection Agency at 40 C.F.R. Part 280. Utah Admin. Rule R311-202. There is no grant of discretion to the Executive Secretary or the Board to elect when or under what conditions the federal technical standards are applied to the investigation of petroleum releases and/or spills as the DERR argues in its Brief of Respondents. *Niederhauser Ornamental & Metal Works Company, Inc.*, 858 P.2d 1034, 1037 (Utah App. 1993)(citing *King v. Industrial Commission*, 850 P.2d 1281, 1285-86 (Utah App. 1993)). Further, the Administrative Procedures Act specifically provides for agency review if an authorized party "contests the validity or correctness of the notice or order." Utah Code Ann. § 63-46b-1(k). V-1's Request for Agency Action specifically noted that the rules and standards set forth in the Code of Federal Regulations and adopted and incorporated in the Utah Underground Storage Tank

Rules, R311, "do not authorize the [Executive Secretary] to require abatement and corrective action prior to a determination that V-1 is the source of an off-site impact." R.012-14.

V-1 makes no attempt to dispute the DERR's statement that "[p]etroleum flowing into a sewer is considered a confirmed release." Brief of Respondents, p.24. However, such a conclusory finding is clearly insufficient to establish the source and/or party responsible for the release. It is essential that the agency make subsidiary findings in sufficient detail that the critical subordinate factual issues are focused on and resolved in such a fashion as to demonstrate that there is a logical and legal basis for that conclusion. *U.S. West Communications, Inc. v. Public Service Commission of Utah*, 882 P.2d 141, 144-5 (Utah 1994).

The error, as previously identified by V-1, is that the Emergency Order, issued by the Executive Secretary on January 19, 1996, must be supported by evidence that establishes that the noxious order in the sewer on Whitney Avenue was caused by free product petroleum, and that the V-1 facility located on 300 West was responsible for that product entering the sewer system. R.012-14. The Executive Secretary was very specific in stating that the emergency he was addressing in his Emergency Order was "free product in the sewer" on Whitney Avenue. R.005. The Order stated "[a] recent and/or ongoing petroleum release from V-1 is the source of the free product infiltrating the sewer line." R.004. V-1 was directed to "investigate the release of free product ... [and] remove and abate free product ... impacting the sewer line." R.003; 000117. The investigation commenced by environmental consultants, TriTechnics Corporation, reported, however, that V-1 was not the likely source of free product in the sewer on Whitney Avenue. R.644; 000096. The Executive Secretary's Notice of

Noncompliance, issued five days later, states that because V-1 "fail[ed] to remove and abate the free product ... impacting the sewer line by January 23, 1996," the Executive Secretary would proceed with abatement, apparently without further investigation, and "may" seek to recover its costs of doing so, from V-1. R.009; 000122.

Following an evidentiary hearing on February 13, 1997 the Utah Solid and Hazardous Waste Control Board held that the Emergency Order was "properly issued under Utah Admin. Code R311-202, which incorporates by reference 40 C.F.R. Part 280." R.896; 000031. The Board's Order is based on Findings of Fact and Conclusions of Law set forth in its Order dated April 21, 1997. R.901; 000024. The Board's findings of fact are, however, contrary to the substantial weight of evidence when viewed in light of the whole record before the court. *King v. Industrial Commission of Utah*, 850 P.2d 1281, 1285 (Utah App. 1993), Utah Code Ann. § 63-46b-16(4)(g)(1989).

B. The Board's Findings Of Fact Are Contrary To Substantial Record Evidence, Incompetent and Arbitrary and Capricious And Do Not Represent A Mere Recitation Of The Executive Secretary's Findings.

The DERR also attempts to argue that the "Findings of Fact" and "Conclusions of Law" presented in the Board's Order of April 21, 1997 "cannot be attributed to the Board." Brief of Respondents at 11. The DERR states that "all of the [] so-called conclusions that V-1 attributes to the Board were not conclusions but a summary of the evidence relied upon by the executive secretary in issuing the Emergency Order and Notice of Noncompliance." Brief of Respondents at 11 (emphasis added). This is a disingenuous and completely vacuous argument.

First, if the Findings of Fact and Conclusions of Law set forth by the Board in its Order merely reflect a recitation of what the Executive Secretary relied on in issuing his Emergency Order and do not constitute the Board's own findings and conclusions, the agency action must be reversed as a matter of law. "An administrative agency must make findings of fact and conclusions of law that are adequately detailed so as to permit meaningful appellate review." *LaSal Oil Company, Inc. v. Department of Environmental Quality*, 843 P.2d 1045 1047 (Utah App. 1992)(emphasis added). "Absent such detailed findings, this court 'cannot perform its duty of reviewing the [agency's] order in accordance with established legal principles and of protecting the parties and the public from arbitrary and capricious administrative action.'" *Id.* Moreover, the "conclusions" which the DERR does attribute to the Board¹ are vague and conclusory, merely highlighting the fact that the Board wholly failed to make the appropriate subordinate factual findings that are required to demonstrate the logical and legal basis for its ultimate conclusion necessary to enable this Court to conduct a meaningful review. *Id.* Again, this leads to the unavoidable conclusion that the agency's action was arbitrary and capricious. *Id.* Finally, the Board makes no reference in its Order to adopting or summarizing the executive secretary's findings. On the contrary, the Board specifically states: "The

¹ The DERR states that the only conclusions reached by the Board are "(1) that the geoprof and monitoring well data, and other factors support the Executive Secretary's findings that V-1 is a source of the petroleum contamination found on the V-1 property and which entered the sewer line on Whitney Avenue and therefore the Emergency Order was properly issued under Utah Admin. Code R311-202, which incorporates by reference 40 CFR Part 280; (2) that the Executive Secretary complied with all of the requirements of the Underground Storage Tank Act in issuing the Emergency Order ...; and (3) the issuance of the Notice of Noncompliance was authorized by Utah Code Ann. § 19-6-420 (2)(b)." Brief of Respondents at 11.

Board hereby issues its written findings of fact, conclusions of law, statement of reasons and ORDER as required by Utah Code Ann. § 63-46b-12 with regard to said Request for Agency Action." R.899; 000026. The Order explains that *"its* written findings of fact, conclusions of law, statement of reasons and ORDER" are the result of "having considered the testimony, exhibits and arguments of counsel..." R.900-899; 000024-25. Nowhere in the Board's decisions does it specifically adopt the findings of the executive secretary or, for that matter, even make reference to any findings made by the executive secretary. R.900-891; 000024-33. The Board specifically states that its Order is "[b]ased upon the foregoing Findings of Fact, Conclusions of Law and Reasons for Decision..." R.891; 000032.

C. There Is No Reliable Evidence That V-1 Has Experienced A "Series" Of Releases At The Salt Lake Facility.

The DERR argues for an entire section of its Brief of Respondents on the correct definition of a "release" versus a "spill" of petroleum into the environment. Brief of Respondents at pp. 18-19. However, the entire argument amounts to unnecessary, incorrect and inconsequential hyperbole. The DERR and the executive secretary argued to the Board that V-1 had experienced a series of "releases." R.895, 898, 841, 809-41; 000026. The record, however, supports no such conclusion.

In support of the executive secretary's allegations that there have been a "series" of releases at the V-1 facility, the DERR introduced a document, prepared by the DERR itself, which states that the "first" of these releases occurring at the V-1 facility was the result of a line leak which was reported to the Fire Department in 1985. R.841; 000047. Neither the alleged "report to the fire department" nor the individual who made the allegation, nor the individual who prepared the DERR report

were available at the hearing for examination. R.801-41. As this Court has previously pointed out, "[d]espite the flexibility of administrative hearings, there remains the 'necessity of preserving fundamental requirements of procedural fairness in administrative hearings.'" *Tolman v. Salt Lake County Attorney*, 818 P.2d 23, 28 (Utah App. 1991). Although hearsay evidence may be admissible in an administrative hearing, the Board's findings of fact "cannot be based *exclusively* on hearsay evidence." *Hoskings v. Industrial Commission of Utah*, 918 P.2d 150, 155 (Utah App. 1996). The president of V-1 Oil Company testified that he had been with the company for almost 36 years at the time of the administrative hearing and was completely unaware of any such release occurring at the Salt Lake facility in 1985. R.714. Each finding of fact made by an administrative agency must be supported by a residuum of legally competent evidence. *Id.* The Board's reference to multiple releases in its Order, not buttressed by a residuum of competent legal evidence, taints its decision. *Id.* Moreover, in 1985, there was no Division of Environmental Response and Remediation or technical reporting requirements, or definitions of what constitutes a "release."² Therefore, the DERR's argument that it recorded or maintained this information in the regular course of business is without merit.

Mr. Huskinson also testified that, with the exception of the documented release which V-1 reported to the DERR in December 1995, he was unaware of any "reportable" release of petroleum at the V-1 station. R.528, 714. Mr. Huskinson did

² The State of Utah adopted the federal requirements compelling the cleanup and upgrading of underground storage tanks and enacted the Utah Underground Storage Tank Act in 1989 originally codified at 26-14e-101 *et seq.*, later renumbered in 1991 to Utah Code Ann. § 19-6-401 *et seq.* The Act required owners and/or operators to undergo testing and obtain a certificate of compliance by July 1991. Utah Code Ann. § 19-6-412.

testify that in July 1990, Eaton Metals prepared a LUST Release/Spill Report, specifically noting that during a tank tightness test, the Eaton employee noted "contamination around the fill pipes, etc." R.194; 000193. The report further identified the "type of release" as an "overfill and spill." R.294;000193. The technical standards of the Code of Federal Regulations identifies a reportable "overfill or spill" as one that "results in a release of petroleum to the environment that exceeds 25 gallons..." R.528; 000008. As the DERR has so artfully pointed out in its Brief, this type of release refers to the above ground discharge of petroleum which may occur when an underground storage tank is being filled. Brief of Respondents at 19. However, the DERR apparently disputes V-1's argument that the contamination noted in July of 1990 was not a "reportable release," and further argues that V-1 is incorrect in its assumption that a "spill" is the same as a "release" and that an owner/operator is not required to report a spill unless it exceeds 25 gallons. *Id.* at 18-19.

The relevance of DERR's argument is somewhat vague.³ However, these above ground spills and overfills are clearly included by both the Utah and the federal Acts as "releases." 40 C.F.R. §§ 280.12, 280.53. Further, the DERR asserts that "William Moore, an expert witness for DERR, testified that V-1 is incorrect in assuming that it only had to report a release if it was 25 gallons or more. R.742."

³ DERR does, however, attempt to use this rationale "that a *spill* is not the same as a *release*" to attack the V-1 President, Mr. Gary Huskinson's, credibility and infer that V-1 has failed to report underground releases by defining them as less than 25 gallons. Brief of Respondent, at 31-32. This argument has no merit as the DERR has clearly misquoted both its own witness William Moore and the technical standards mandated by State and federal statute.

Brief of Respondents at 19. This is an inaccurate quote and mischaracterizes Mr. Moore's testimony. William Moore testified:

Q: ... if you have a release of less than 25 gallons, does that mean you can just let it go? Do applicants have to do anything about it?

A: No.

Q: What are you required to do?

A: Clean it up.

Q: But I thought this said that you only have to report it if it exceeds 25 gallons?

A: *You have to report it if it exceeds 25 gallons.* You are still required to clean up the release and remove the contamination.

Q: So, is it still a release if it's less than 25 gallons.

A: Sure.

Q: What constitutes a release?

A: Any petroleum that escapes into the environment.

R.741-42, testimony of William Moore, DERR employee (emphasis added). Douglas Hansen, also a DERR employee, testified:

Q: Is there any indication on this document that you're relying on that there was any release on the environment of greater than 25 gallons?

A: There's no specified amount.

Q: Okay. The next document that was referred to, does it document any release on this? []

A: It doesn't address a specific release, just the presence of contamination.

R.771; 000064.

The further reports dated in 1991 and 1992 and identified by the DERR as separate "incidents" of contamination were the result of the DERR's testing and soil samples taken from the excavation site and investigation of the "spill" identified by Eaton Metals in July 1990. R.293. Examination of Mr. Huskinson by the Board confirmed that this "release" resulted in the removal of two or three yards of contaminated soil. R.702; 000081. The remaining references to contamination found at the facility during various inspections does not support a conclusion that each time the testing occurred the results documented a separate and distinct incident or release. There was absolutely no evidence presented to the Board that the V-1 facility has experienced a "series of releases."

Although there is no evidence that a separate and distinct spill or release occurred on the dates referred to by the DERR and relied upon at the evidentiary hearing, the DERR argues that "[t]he incidents referred to in the (V-1 inventory) reports as inventory losses or staining were all considered releases." Brief of Respondents, at 32. The DERR cites to testimony offered by Douglas Hansen of the DERR who testified "if in the first month if you are over or short above the amount that's allowed, it's considered a suspected release and needs to be reported." Brief of Respondents, at 32; R.797.

This is an inaccurate representation of the technical standards adopted by the Utah Act. Utah Code Ann. § 19-6-413, Utah Admin. Code R311-202-1, 40 C.F.R. §§ 280.43, 280.50. Product inventory control must be *conducted* monthly to detect

a release of at least 1.0 percent of flow-through plus 130 gallons. 40 C.F.R. §280.43(a); R.530; 000008; R.690; 000084. Accurate inventory control, if used as a method of release detection, must be demonstrated prior to the issuance of an owner/operator's certificate of compliance. Utah Code Ann. § 19-6-413, Utah Admin. Code R311-202, 40 C.F.R. § 280.40; R.531; 000007. At all times relevant to this case, V-1 was issued an annual certificate of compliance. R.680; 000087. The technical standards adopted by the State of Utah provide that owners/operators who use the inventory control method of release detection, must report a shortage of inventory, or "suspected release,"... "when a *second* month of data" exceeds the recommended allowable flow-through. Utah Admin. Code R311-202, 40 C.F.R. § 280.50(c)(2); R.690; 000084; R.530; 000008. The technical standards set forth in the federal regulations and adopted by the Utah Underground Storage Tank Act specifically contradict the testimony offered by the V-1 employee Douglas Hansen. R.797. Further, the relevant statutory provision does not grant the agency the discretion to arbitrarily reduce the reporting requirement set forth in the technical standards. Utah Admin. Code R311-202, 40 C.F.R. § 280.50(c)(2); R.690; 000084; R.530; 000008. No agency enjoys the discretion to exceed the authority vested in it by the Legislature. *Tasters v. Department of Employment Security*, 863 P.2d 12, 19 (Utah App. 1993). The agency's discretion in this matter is confined by statute. *Tolman*, 818 P.2d at 26 (citing *Williams v. Mountain States Telephone & Telegraph Co.*, 763 P.2d 796, 800 (Utah 1988)).

DERR continues with further mendacious arguments regarding "releases" at the V-1 facility, none of which are supported by the record. Brief of Respondents, pp. 31-36. DERR states, "V-1 has not disputed that it has *never* complied with a reporting

and remediation compliance schedule in relation to any of these releases." Brief of Respondents, p. 34. DERR cites to a Notice of Violation issued by the Executive Secretary which merely recites this same allegation as support for the argument. R.284. However, clearly this is an inaccurate statement and disingenuous argument. V-1's environmental consultant investigated allegations of contamination at the site in 1991,⁴ again in 1994 and 1995 which led to the excavation and removal of two (2) underground storage tanks, which was both reported and attended by the DERR. R.279-80. Further, DERR witnesses confirmed that V-1 even met the reporting requirements in this instance but refused to assume remediation of the off-site impact which V-1's environmental consultant advised did not originate with the V-1 facility. R.133-36, 644, 650, 465, 616, 804, 895; 000029, 000056, 000094, 000096. DERR then argues that DERR employee, William Moore, testified that V-1 used an inventory control method that incorporates "what V-1 considers an allowable leak rate." Brief of Respondents, p. 35. Again, this is an inaccurate representation of the testimony elicited at the hearing. Mr. Moore did not testify regarding what V-1 "thought" or "considered" in this regard. Rather, Mr. Moore actually stated:

Q: Could you briefly tell us if you saw any problems with the inventory control methods or the accuracy of them?

A: There's a major problem in the accuracy of the inventory control method. They are supposed to be measured every one eighth of an inch accuracy ... it's obvious they were not measuring very accurately ...

The other occasions were indications that when they did the total overages and

⁴ R.293.

shortages and they calculated their allowables for several months in a row, their overages from October and November and December were over their allowables. And after the second month of confirming levels over the allowables, they're supposed to report it to the division.

The fact that they're over the allowables at all should send up -- even for one month -- should have sent up their own alarm that they should start to investigate. The allowable calculated at one percent plus 130 gallons is reporting quantity only, it is not an allowed leak rate.

R.607-8, 000105, testimony of William Moore, DERR employee.

D. The Board's Finding That V-1 Is Responsible For Free Product In the Sewer Is Contrary To The Facts In The Record.

(1) The Only Competent, Scientific Data Presented To The Board Documented A Significant Groundwater Flow To The Northeast.

The Board relies on the following finding of fact that:

"A groundwater flow map provided to DERR indicated that the direction of the regional groundwater flow is slightly northwest in the direction of the Jordon River ... This is the direction from V-1 to the point where there is petroleum entering the sewer."

R.895; 000029. This finding is against the weight of substantial evidence, and completely ignores the only competent, scientific evidence presented at the hearing.

"We will reverse the Board's decision if we determine that it was 'based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court."

Harken Southwest Corporation v. Board of Oil, Gas and Mining, 920 P.2d 1176, 1180

(Utah 1996)(citations omitted). "Nonetheless, in evaluating the sufficiency of the evidence, we will not sustain a decision which ignores uncontradicted, competent, credible evidence to the contrary." *Id.*

The only "competent, credible evidence" presented to the Board regarding groundwater flow and velocity on the V-1 property, or in the area of the investigation, was collected by direct scientific testing of the groundwater across the entire V-1 facility and along the western portion of 300 West where it borders the V-1 property. R.464-67; 000168-71. That testing established that the groundwater flow across the V-1 property was *clearly* to the northeast, toward 300 West, and not Whitney Avenue. R.650, 465; 000093, 000170.

"The information we have which is the monitor wells that are installed here, there's a clear gradient to the northeast and it's a good one foot difference in groundwater over something like a hundred feet. That's significant gradient ... [s]o I believe the gradient is clear ..."

Testimony of George Condrat, registered professional geological engineer in the State of Utah. R.616, 657; 000093; 000103. The DERR witnesses confirmed that they had no direct, or scientific knowledge regarding groundwater flow or velocity. R.200, 649-50, 727.

The DERR employed Delta Environmental Consultants to perform the environmental investigation on behalf of the State. See Delta Environmental Consultants, Inc., Subsurface Investigation Report, R.036-210 ("On January 18, 1996, the DERR notified Delta of the situation and Delta personnel visited the site and began exploring petroleum vapor abatement options." R.206). Delta Environmental did not undertake to establish groundwater flow or velocity by direct analysis. R.200; 649-50; 727. On the contrary, the Delta Subsurface Investigation Report specifically

states that "[t]he direction of ground water movement is *assumed* to be to the northwest, following the topography." R.200. All of the state witnesses⁵ further confirmed the DERR's total lack of direct knowledge regarding groundwater flow in the area:

Q: Did you test to determine what the groundwater flow was in that area?

A: We did not ...

Testimony of DERR employee/witness, Douglas Hanson, R.111; 000062.

⁵ The DERR makes the absurd statement that George Condrat, the registered geological engineer hired by V-1 to conduct its subsurface investigation, lacks "complete knowledge of the site and the release ... [because] [h]e was not the person who performed the testing on the V-1 site..." Brief of Respondents, p. 37. DERR further identifies the engineer as merely "the office manager for TriTechnics." *Id.* This is an irresponsible and disingenuous mischaracterization of the facts and evidence presented. Mr. Condrat testified to the Board:

Board member: Was [the investigation] a team effort or were you a one man task?

Mr. Condrat: Well, I manage the work in the office. I had a fellow that works for me that directed much of the day-to-day activities, and there's at least four other people that worked on the job.

R.635. Moreover, such a hollow accusation belies the fact that *none* of the DERR testifying witnesses "performed the testing at the site." R.034-210. The actual investigation and testing was performed by Delta Environmental Consultants who filed reports of its testing and subsurface investigation with the DERR for their review. R.034-210. DERR even argues in its Brief, Mr. Zahn didn't even visit the site, he merely reviewed the reports filed by Delta and Mr. Condrat of TriTechnics. Brief of Respondents, p.30.

Q: Is there an exhibit that we have before us right now that graphs the top of the water table for this site?

A: The only data we have is in V-1's hearing brief, TriTechnic's reports ...

Testimony of DERR employee/witness, Paul Zahn, R.727; 000075.

Q: Okay. One last question. Why didn't you try to measure groundwater elevation and establish groundwater flow?

A: I'm in the underground storage compliance section, I'm not in the LUST section any more.

Q: Would you have an opinion why the division didn't do that?

A: Probably because all they had initially -- when they first go in they usually use a geoprobe and they're not very conducive for measuring groundwater levels. You need to actually put full ground monitoring wells in which is what I understand you are doing now. You need better information first before you accuse somebody, so they want to get the initial information first to support their accusations.

. . .

Q: [V-1] was able to establish [groundwater flow] with six wells or something like that. Can the state do the same with six or so wells established?

A: I'm not in that section any more...I'm the senior scientist in the division of the underground storage tank branch anyway, but I have been out of the LUST section where I have the knowledge. But I don't know the particular case close enough when it comes to the LUST issues.

Testimony of DERR employee/witness William Moore, R.602-05; 000106.

The only direct groundwater measurements taken in the area was from the monitoring wells located on the V-1 property. R.731, 616, 649-50, 465. All of the witnesses who testified before the Board, both State and V-1, confirmed that the *only* direct measurement of groundwater flow showed that the groundwater flow on the V-1 property was *clearly* to the northeast and not "slightly northwest .. the direction from V-1 to the point where there is petroleum entering the sewer." Findings of Fact Conclusions of Law and Order, R.895; 000029; *see also* R.898; 000026.

The Board's conclusion that V-1 is "up-gradient from the point at which the contamination was entering the sewer line," or that "the groundwater flowed in a slightly northwest direction" from V-1 to the sewer is not "resolved in such a fashion as to demonstrate that there is a logical [or] legal basis for the ultimate conclusion." *U.S. West Communications v. Public Service Commission of Utah*, 882 P.2d 141, 144 (Utah 1994).

The Board's refusal to acknowledge this uncontradicted testimony regarding the groundwater flow is arbitrary and capricious as well. *U.S. West Communications v. California Packing Corp.*, 901 P.2d 270, 275 (Utah 1995). "The law does not invest the Commission with any such arbitrary power to disbelieve or disregard uncontradicted, competent, credible evidence, as it appears to have done here." *Id.* (quoting *Jones v. California Packing Corp.*, 244 P.2d 640, 644 (Utah 1952) *cf. De Vas v. Noble*, 369 P.2d 290, 293 (Utah 1962) ("arbitrary and unreasoning distortions of justice could occur if courts were permitted to ignore credible and uncontradicted evidence.") This arbitrary disregard of the established groundwater flow also impacts the Board's finding that "eight of the [UST facilities located in the general area of the

sewer line] appeared to be down-gradient from the release," and further ignores the evidence regarding conduits from any or even all of the identified Leaking Underground Storage Tank ("LUST") Sites. R.251-2.

**(2) Investigation Following The Issuance Of The Emergency
Order And Notice of Non-Compliance Clearly Identify
Contaminated LUST Sites "Up-gradient" From Whitney Avenue.**

The DERR argues that the Executive Secretary reviewed 14 UST sites in the general vicinity of the release shortly after the release was reported to DERR. Brief of Respondents, p. 27. However, the records clearly indicate that Bob Smith first reported the "smell of thinner in the floor drain," on January 12, 1996. R.262; 000203. On January 19, 1996, the Executive Secretary issued his Notice of Violation which simply states, "V-1 is the only known underground storage tank facility in the area." R.004; 000116. DERR environmental consultant, Delta Environmental Consultants, Inc., submitted a Subsurface Investigation Report on February 15, 1996⁶ which indicates that only two possible sites were even considered at that time: V-1 and the property directly north of V-1. R.145-7; 000189-90. It was not until a year later, on January 28, 1997, that DERR submitted a document noting 14 UST sites in the general vicinity of Whitney Avenue. R.250-51; 000191-92.

The DERR argues that its research confirmed that only V-1 was a potential source of contamination in the area. Brief of Respondents, pp. 27-28. However, three LUST sites were directly up-gradient from the Whitney Avenue sewer given the only evidence of groundwater flow established at the site. R.250; 000191. The Executive

⁶ R.210.

Secretary disregarded these sites because he mistakenly *assumed* that the contamination entering the sewer was the direct result of a fresh release occurring at the V-1 station in December 1995 - only one month prior to the sewer contamination, and because he relied on the erroneous further *assumption* that the groundwater flow was to the northwest as the DERR has clearly indicated by the arrow appearing on DERR's exhibit entitled "V-1 Oil Vicinity LUST Sites." R.251; 000190 (attached as Exhibit "J" to Petitioner's Brief).

The Board ignored the fact that even in those cases where the tanks have been removed from the sites, they remain LUST (leaking underground storage tanks) sites. R.803-804; 625; 646; 628-29; 000100-101, 000056. The closure does not prevent contamination already generated by a release from migrating to the sewer on Whitney Avenue moving in the direction of the groundwater flow. R.803-804; 625; 646; 628-29; 000100-101, 000056. This is the same argument the Executive Secretary utilized in its argument to the Board that V-1 was responsible for the contamination due to *prior* contamination at the site. Brief of Respondents, 39-40. George Condrat, the TriTechnics geological engineer testified in response to the Board's cross examination:

Q: Assuming that there is a -- that there was prior contamination on the site prior to the leak at dispenser number 4, that the leak actually occurred sometime in the later part of 1995, but that there was some prior groundwater contamination at the site, is it possible that as long as it was there for a period of at least two or three years that it could have migrated toward it and been encountered by the sewer on Whitney Avenue?

A: For that to happen you would have to have a gradient to move the contamination, and we don't see it ...

R.624-25; 000100-101. It is apparent, that even if you assume that the groundwater flow or gradient changed the moment you moved away from the V-1 property, it would still require groundwater gradient to move the contamination to the west and off V-1. R.624-5; 000100-101.

Moreover, both environmental consultants agreed that contaminants may take "shortcuts" or travel rapidly along conduits, such as a sewer lateral. R.804, 647-8; 000095, 000056. The video clearly demonstrated several open sewer laterals as did drawings of the sewer line included as an appendices to Delta's report. R.645; 000096.

"Based on Delta's report and based on my experience, the sewer line [on Whitney Avenue] is probably leaking, and so it forms a location where the groundwater isn't going past it. And so, based on the Delta information, it doesn't look like it goes past the sewer line in this area here. However, they haven't looked very carefully at the area to the east of there. There's really a lack of information, and one possibility is, is that if there is a lateral extending off to the north, that it's another conduit. And even though there may not be product going into the sewer through the sewer line, it could be moving along the outside of the sewer line and moving down in this area [of Whitney Avenue]."

Testimony of George Condrat, R.641; 000097.

Douglas Hanson of the DERR testified that the Division initially assumed that the contamination in the sewer was the result of the release which occurred at V-1 in December 1995. R.804. It was quickly ascertained, however, that in order for there to be a connection between the V-1 1995 release and the sewer contamination there had to be a conduit -- "the most likely pathway of migration would be maybe

a sewer lateral or something else that hooked into V-1's facility and property..." R.804; 000056. However, it was quickly learned, that "there was no connection between the sewer line and the V-1 property ..." R.804; 000056.

**(3) There Is No Evidence That The Contamination
On Southern Pacific Property Migrated From V-1.**

The DERR argues that there is no evidence to support a conclusion that the source of the contamination in the sewer originated on the Southern Pacific property. Brief of Respondents, p. 29-31. However, record evidence confirms that benzene contamination is higher on the Southern Pacific property than anywhere on the V-1 property. R.246-49; 000212-15. Testimony confirmed that the highest concentrations of benzene should remain near the site of the release. R.612. Further, DERR's argument that soil samples did not show shallow contamination is not accurate. Brief of Respondents, p. 29. Testimony of Paul Zahn and Douglas Hansen, employees of DERR, confirmed that there was no inspection of the site for surface staining. R.720, 773; 00006, 77. Further, several of the geoprobe soil samples exhibited significant shallow contamination on the railroad property. R.051-66, 758, 719, 732. As Richard White, Board member noted in his examination of DERR employee Douglas Hanson:

Q: "There are a number of geoprobe locations where there were elevated PID concentrations near the surface, at least the upper samples that were collected. It appears those upper samples were collected at a depth or upper measurements were collected at a depth of about two feet. If you want to look at GP4, it would appear to me there's fairly high concentrations, shallow as compared with the concentrations of depth at GP 7, GP 8, GP 9.

Wouldn't those indicate that there's at least some contamination?

A: There was some. A couple of those were over a hundred, which is high, and a typical flag number.

R.758; 000067.

Mr. Zahn testified that he asked Delta Environmental if there was visual evidence of staining in the samples; he stated "... in some of the geoprobe what they told me was, again, it was probably vapors in the soil, wasn't related to the contamination . . . unfortunately, it didn't take samples . . . it would have been nice to have taken soil samples there." R.732.(emphasis added).

Mr. Wasden, the station manager testified about his observations of the railroad property where both diesel and *gasoline* driven vehicles were refueled, as well as contaminated snow and garbage from Rick Warner Ford and the city street and several above ground petroleum storage tanks in the area. R.674-5; 000088. No tests where ever run to determine whether the product invading the sewer was gasoline, diesel fuel, paint thinner or some other petroleum or oil based substance. R.871, 857; 000039, 43. Richard Bright, Waste Water Collections Manager for Salt Public Utilities, testified: "... it looked like gasoline or oil substance in [the sewer]." R.871; 000039. Further, the tests that were conducted contradict the Executive Secretary's finding that the sewer contained any explosive vapors. R.857, 007; 000115, 000043. Mr. Bright testified that direct testing of the vapors in the sewer "didn't register, it registered basically .01 on our gas detector ... [t]hat's really not much of a detectable measure." R.857; 000043.

Further, there is no support in the record for the DERR's argument that "there is no evidence that there had been UST's on the [railroad] site." Brief of Respondents, p. 29. The testimony was that DERR has no record of what, if anything, is buried under the Southern Pacific property. Testimony of Douglas Hanson, R.750-51. Moreover, inasmuch as the DERR prevented V-1 from investigating the property, TriTechnics was unable to determine groundwater flow or the nature or source of the contamination on the Southern Pacific property. R.708-10, 492, 496; 000078-80.

Administrative bodies may not rely upon findings that contain only ultimate conclusions. *Adams v. Industrial Commission*, 821 P.2d 1, 6 (Utah App. 1991). The Tenth Circuit Court has stated that the "arbitrary and capricious standard requires an agency's action to be supported by the facts in the record." *Olenhouse*, 42 F.3d at 1575. The Board's conclusions are against the substantial weight of evidence in the record as well as arbitrary and capricious. "Agency Action must be set aside 'if the agency relied on factors which Congress has not intended for it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Id.*(quoting *Motor Vehicle Mfrs. Assn. v. State Farm Insurance Company*, 463 U.S. 29, 43 (1983)). Such is the case here.

II. THE GUARANTY OF DUE PROCESS DEMANDS THAT AGENCY ACTION NOT BE ARBITRARY OR CAPRICIOUS OR DENY V-1 MINIMAL PROCEDURAL SAFEGUARDS.

V-1 has argued throughout its initial brief that the Executive Secretary, the DERR, and the Board have ignored uncontradicted, competent and credible evidence that is inconsistent with the Board's conclusion that the Emergency Order and Notice

of Non-compliance were properly issued. Petitioner's Brief at 18-22. V-1 has further argued that the Board's decision is not based on legally competent evidence and is arbitrary and capricious in endorsing the ultimate conclusion that V-1 is responsible for free product in the sewer in Whitney Avenue. Petitioner's Brief at 22-38. "[T]he guaranty of due process ... demands that the law shall not be unreasonable, arbitrary or capricious and that the means selected shall have a real and substantial relation to the object sought to be attained." *International Union of Operating Engineers v. Utah Labor Relations Board*, 203 P.2d 404, 408 (Utah 1949); ("decision of Board of Pardons... is arbitrary and capricious in violation of due process guarantees" *Preece v. House*, 886 P.2d 508 (Utah 1994)).

Procedural due process is also violated when a finding of fact is made by an administrative agency without the support of a residuum of legally competent evidence. *Hoskings v. Industrial Commission of Utah*, 918 P.2d 150, 155 (Utah App. 1996). "Despite the flexibility of administrative hearings, there remains the necessity of preserving fundamental requirements of procedural fairness in administrative hearings." *Tolman*, 818 P.2d at 28. It arbitrary and capricious for the agency to base its decision on findings that are not supportable by legally competent evidence and does, therefore, violate due process guarantees. *Id.*

The DERR argues that the evidence relied upon by the agency to support the conclusion that V-1 experienced a "series" of releases is not hearsay because they are "public records." Brief of Respondents, p. 33. This argument is inaccurate and disingenuous. The memo prepared, which indicates that a leak occurred at V-1 in 1985, has absolutely no record support. It is an allegation of an event which occurred more than four (4) years before the agency was created, or agents were even

employed to collect such data. Utah Code Ann. 26-14e-101 *et seq.* (1989)(repealed and recodified in Title 19). Moreover, the DERR failed to produce the alleged report, the individual who made the allegation or even the individual who included the allegation in the DERR memo. R.809-41.

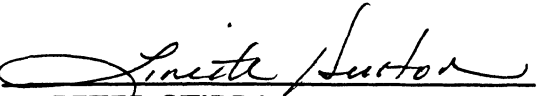
When reviewing the agency's explanation of whether the Executive Secretary acted properly in issuing the emergency order and order of non-compliance, the reviewing court must determine whether the agency considered all relevant factors and whether there has been a clear error of judgment. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994). The arbitrary and capricious standard focuses on the rationality of the agency's decision making process and the rationality of that decision. *Id.* It does, therefore, necessarily implicate our constitutional guarantees of due process. *Id.* (the administrative law judge violated the Fund's due process rights by relying on a scholarly medical commentary which was not introduced at the administrative hearing and was not made a part of the record. *Workers Compensation Fund v. Industrial Commission of Utah*, 761 P.2d 572, 575 (Utah App. 1988)); *See also Olenhouse*, 42 F.3d 1560 (10th Cir. 1994); *Tolman*, 818 P.2d 23 (Utah App. 1991); *Hoskings*, 918 P.2d 150 (Utah App. 1996).

CONCLUSION

Based on the foregoing, V-1 Oil Company respectfully requests that this Court reverse the Utah Solid and Hazardous Waste Control Board's Findings of Fact Conclusions of Law and Order dated April 17, 1997.

DATED this 2ND day of February, 1998.

STIRBA & HATHAWAY

By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2ND day of February, 1998, I caused to be served a true and correct copy of the foregoing REPLY BRIEF OF PETITIONER to the following, using the method indicated below:

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