

STATE OF VERMONT
ENVIRONMENTAL BOARD
10 V.S.A. CHAPTER 151

RE: Juster Associates
1304 Midland Avenue
Yonkers, New York 10704

Land Use Permit
Amendment #1R0048-5-EB

This is an appeal from the terms of an amendment to a Land Use Permit issued to Juster Associates for the construction and operation of the Juster Rutland Mall, in the Town of Rutland, Vermont. On October 20, 1980, the permittee applied to the District Environmental Commission #1 for an amendment to its permit, requesting approval for conversion of the wastewater disposal and water supply systems serving the Mall. On December 8, 1980, the District Commission conditionally granted the amendment request, and on December 18, 1980 the Commission denied a motion to reconsider its decision and to remove a condition of that amendment. Appeals from that denial were filed with the Environmental Board by the State of Vermont Agency of Environmental Conservation and the permittee on December 31, 1980 and January 12, 1981, respectively. Appellants seek review of a condition of the amendment relating to the Mall's proposed connection to the City of Rutland's municipal wastewater treatment plant. The Environmental Board held a public hearing on this matter on February 3, 1981, with the following parties represented:

'City of Rutland by Robert E. Broderick, Esq.
City of Rutland Planning Commission by Roderic Maynes;
The Applicant, Juster Associates, by Carl O. Anderson, Esq
Agency of Environmental Conservation by Stephen B. Sease,
Esq.
Town of Rutland by Jesse G. Billings 3rd
Town of Rutland Planning Commission by Edward Hemenway
Town of West Rutland by Richard F. Sullivan, Esq. and
Daniel Deuel
C. J. Abatiell by Anthony Abatiell, Esq.

Findings of Fact

1. The Rutland Mall, owned and operated by the permittee, Juster Associates, generates approximately 16,000 gallons of wastewater per day. That wastewater is currently held in storage and transferred by truck to the Town of West Rutland's treatment plant, where it is treated to a secondary level before discharge into the Clarendon River, a tributary of Otter Creek.
2. The Town of West Rutland has presented a petition for party status in this appeal under the provisions of Environmental Board 12(C) as a party whose interests may be adversely affected by the Board's decision in this matter.

The Town of West Rutland operates a secondary wastewater treatment plant, which discharges into the Clarendon River, a tributary of Otter Creek. Otter Creek flows through the Town of West Rutland, and the Town as a whole is affected by the quality of the water in the stream. The Town is specifically affected by the quality and amount of effluent discharged by the City of Rutland's treatment plant, which discharges upstream of West Rutland. West Rutland currently receives approximately \$20,000 annually from Juster Associates for the treatment of wastewater from the Mall, and this income would be terminated if the Mall were to connect to the City of Rutland's treatment plant. For these reasons we find that the Town of West Rutland has shown that its interests may be adversely affected by our decision in this appeal, and the petition for party status under Board Rule 12(C) is therefore granted.

3. The trucking of wastewater from Rutland Mall to the West Rutland treatment plant is permitted by the Vermont Health Department and the Agency of Environmental Conservation only as a temporary response to the Gall's effluent disposal problem, caused by the unexpected failure of the Mall's original on-site disposal system. The current disposal program would not be approved for a new development, and is acceptable now only as an interim measure, pending implementation of a final resolution to the Mall's disposal problem. The trucking of wastewater from a major facility is regarded as unacceptable on a permanent basis because of the increased risk of accidental discharges, which could result from scheduling problems, mishandling, or traffic accidents. For these reasons, we find that the continued trucking of wastewater from the Mall to the West Rutland plant is an undesirable alternative to a permanent, in-ground connection to an approved wastewater treatment facility.
4. The segment of Otter Creek relevant to this appeal is a Class C, Type II stream. The assimilative capacity of Otter Creek at Class C standards is between 1200 and 1450 pounds of Ultimate Oxygen Demand (UOD) per day. The current load discharged into the Otter Creek is approximately 11,000 pounds of UOD/day, or more than nine times the assimilative capacity of the stream. Three publicly-owned treatment works (POTWs) are permitted to discharge into this stream. These plants, operated by the City of Rutland, Rutland Fire District #1, and the Town of West Rutland, discharge into a "water quality limited" segment, a segment which could not meet national and state water quality standards even if all three treatment plants were operating at secondary treatment levels. To meet those standards in the future, the POTWs discharging to the segment will have to be operating at higher than secondary treatment levels.

5. The City of Rutland's municipal treatment facility is by far the major contributor to the pollution of the Otter Creek. The plant is a primary treatment facility, discharging 10,933 pounds of UOD/day to the stream, more than 98% of the existing UOD from direct discharges. At primary treatment levels, the hydraulic capacity of the plant is 6.77 million gal/day. The plant is currently operating substantially under that capacity, with an uncommitted reserve of 914,000 gal/day. At current treatment levels, the Rutland plant has sufficient hydraulic capacity to accept the Mall's effluent.
6. The amendment application, which is the subject of this appeal, involves the addition of a significant amount of pollution to Otter Creek. The Mall's wastewater is currently treated to secondary standards at the West Rutland plant. Under the proposed amendment, the Mall's wastewater would be treated only to primary standards at the City of Rutland's plant. Secondary treatment removes approximately 74% of the UOD from the effluent, while primary treatment removes only 22% of the UOD. Transfer of the Mall's waste to the Rutland plant would more than triple the Mall's contribution to Otter Creek's pollution problem, from the current level of 11 pounds of UOD/day to a level of 37 pounds of UOD/day.
7. The City's treatment facility will not be treating wastes to national- and state-mandated secondary standards by 1983, the statutory deadline for achievement of that level of treatment under the federal Clean Water Act and Vermont's water quality laws. For this reason the plant is operating under an Assurance of Discontinuance granted pursuant to §301(i)(1) of the Clean Water Act. Funding is not now assured for construction of secondary treatment facilities, and even optimistic assessments do not call for construction on those facilities' to commence before 1984. Without the introduction of some interim pollution reduction system, very heavy discharges will continue to pollute Otter Creek far beyond its assimilative capacity well into the 1980s.
8. Juster Associates and the City of Rutland have entered into an agreement whereby Juster will be paying Rutland City \$225,000 for permission to hook into the plant, and will pay a gallonage treatment fee at a rate equal to 1.5 times the fee paid by a Rutland City discharger. The City has no current plans to use these funds to pay for improvements to the plant or its effluent quality.
9. Technologically feasible techniques exist for the reduction of UOD from primary treatment works, and these techniques can significantly reduce pollution loading from primary plants at relatively low cost. For example, the cost of an add-on alum treatment process at the City

of Rutland's plant would probably cost less than the total fee paid by Juster for permission to hook into the plant. The UOD from the Mall could be totally removed from the plant's discharge by the utilization of an alum process in the plant for only 19 minutes per day.

10. The City of Rutland has no current plans to reduce the pollution load from its primary plant, or to compensate for additional pollution from new hookups, short of the eventual upgrading of the plant to secondary standards at an unknown point in the future. The Department of Water Resources, however, states that it will institute a program requiring primary-level POTWs discharging into water quality limited stream segments to use an add-on treatment system to compensate for pollution loads from new hookups, so that pollution loads from those plants would at least remain at "current" levels. The Commissioner of Water Resources has testified that this program will require the City of Rutland to install an add-on treatment process within the next year and will require the City to operate the system so as to remove from the plant's wastestream UOD equal to that added by the Rutland Mall and other hookups to the Rutland plant added after the date of issuance of the plant's Assurance of Discontinuance.

11. We find that the significant, additional pollution load that will be added to Otter Creek by the Mall's connection to the City's treatment facility would under normal circumstances be an undue increase in water pollution. However, in the unique circumstances of this case, involving an existing project which currently has an undesirable disposal system, and whose discharges will be soon compensated for, we find that the requested transfer will not cause undue water pollution. We wish to emphasize that we would find this discharge to be an undue increase in water pollution if we were certain that the current transportation and disposal system were an environmentally secure one, of if the Mall's effluent were not to be compensated for by an add-on treatment system in the near future.

Conclusions of Law

1. Under 10 V.S.A. §6089, the Environmental Board must review de novo factual issues raised in the appeals process. The appellants in this matter specifically appealed Condition #3 of the land use permit amendment issued by the District Commission. We have concluded that the condition cannot be reviewed in isolation from the factual background on which it was based, and have therefore considered on a de novo basis whether the condition is appropriate in view of the

statutory requirement that a permit may not issue if the project would cause undue water pollution. 10 V.S.A. §6086 (a) (1).

2. We have found that, although the requested transfer of the Rutland Mall's wastewater from the West Rutland plant to the City of Rutland's plant will cause a significant increase in pollution loading of Otter Creek, this increase will not be "undue" in the unique circumstances of this case. This finding was based upon the testimony of the Commissioner of Water Resources that the additional UOD contributed to the Otter Creek by this transfer will be offset by a required add-on alum treatment system in the near future. We conclude as well that such an offset is legally required by the terms of section 301(i)(1) of the Clean Water Act, and relevant regulations codified at 40 C.F.R. 5125.94. This Board's finding was also based upon our finding that the current disposal system for the Rutland Mall is, all things considered, inferior to the in-ground connection proposed by the permittee. We wish to make clear our conclusion that an additional discharge of this magnitude to receiving waters with serious pollution problems would normally be unreasonable and undue in the absence of a compensating treatment program where the effluent is treated only to primary standards, especially where substantial pollution reduction could be achieved at modest cost.
3. Because we believe that a secure, in-ground connection is environmentally superior to the Mall's current disposal system, we will permit the requested hook-up prior to the implementation of an offsetting chemical treatment program. Because we have found that this transfer will not cause undue water pollution, we find that Condition #3 of the District Commission's land use permit amendment is unnecessary, and we will therefore remove that condition from the land use permit.

ORDER

Condition #3 of Land Use Permit #1R0048-5 is hereby deleted from that permit. All other terms and conditions of that permit and its amendments remain in force.

Dated at Montpelier, Vermont this 23rd day of February, 1981;

ENVIRONMENTAL BOARD.

By Richard H. Cowart
Richard H. Cowart
Executive Officer

Members participating
in this decision:
Leonard U. Wilson
Ferdinand Bongartz
Melvin H. Carter
Dwight E. Burnham, Sr.