

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

RE: Roger and Erma Rowe and Casella Construction, Inc.
Land Use Permit #1R0387-2-EB
Docket # 802

MEMORANDUM OF DECISION

This proceeding concerns appeals of Land Use Permit Application #1R0387-2-EB. The Environmental Board (Board) deliberated on party status issues on May 1, 2002. This Memorandum of Decision establishes a date for the Board to perform a site visit to assist its review of the party status issues and also modifies the schedule in this matter as set forth in the Prehearing Conference Report and Order.

I. PROCEDURAL SUMMARY

On July 16, 2001, Roger & Erma Rowe and Casella Construction, Inc. (Applicants) filed Land Use Permit Application #1R0387-2 with the District #1 Environmental Commission (Commission) seeking authorization to extract 100,000 cubic yards of gravel annually from the so-called "Rowe Gravel Pit" located off Furnace Road in the town of Pittsford, Vermont with excavation to a depth of approximately 493.63 feet above sea level (five feet above groundwater) (Project). The Project is an amendment to an original permit issued in 1980 (1980 Permit). The Project also includes the construction of a temporary scale, scale house building and washroom facilities adjacent to the existing gravel extraction operation, along with reclamation of the presently disturbed areas of the site.

In a 1988 revocation proceeding, subsequent to the 1980 Permit but prior to the permit amendment application, the Board issued its Findings of Fact, Conclusions of Law and Order (Board's 1988 Revocation Order) which considered revoking the 1980 Permit, but also allowed for an opportunity to cure. The Rowses filed a '-1' amendment application with the Commission in the fall of 1988 in response to the Board's 1988 Revocation Order. A hearing was held before the Commission on the '-1' application, then the proceeding was recessed pending the Commission receiving additional information. It appears that further information was not provided to the Commission and no further action was taken on the '-1' application.

On December 5, 2001, the Commission issued Land Use Permit #1R0387-2 (Amended Permit) and Findings of Fact, Conclusions of Law, and Order (Amended Decision).

On January 2, 2002, Applicants filed a Motion to Alter the Amended Permit and Amended Decision with the Commission.

Also on January 2, 2002, Michael Cimonette, Robert Harnish, Breda Harnish, Melanie Greeno, Bernie Greeno, Henry Paynter, Donald Nickless, Shirlee Nickless, Sally Turner, James Rademacher, and Ann Rademacher (Appellants) filed an appeal with the Board from the Amended Permit and Amended Decision alleging that the Commission erred in its conclusions with respect to 10 V.S.A. § 6086(a)(1), (4), (5), (8), (9)(K), and (10) (Criteria 1, 4, 5, 8, 9(K), and 10).

In a January 8, 2002 Chair's Preliminary Ruling, Chair Harding ruled that the appeal was ineffective until such time as the Commission ruled on the Motion to Alter.

On February 4, 2002, following the Commission's January 23, 2002 Decision on Motion to Alter, Applicants filed a cross-appeal challenging the party status of Ann Moran, Michael Cimonette, Ron and Sandra Crossman, Henry Paynter, James and Ann Rademacher, Robert and Breda Harnish, Ronald and Shirlee Nickless, Michael Seward, Jeff Danoski, Melanie and Bernie Greeno, and Sally Turner. The cross-appeal also challenges permit conditions limiting truck traffic and requiring a performance bond.

On March 4, 2002, Chair Harding convened a prehearing conference (PHC) and issued the PHC Report and Order (PHCR&O) on March 8, 2002. The PHCR&O sets out party status as a preliminary issue.

On March 28 and April 8, 2002, Petitioners filed their Petition for Party Status and supporting Affidavits, respectively. Petitioners filed their petition two days late due to their attorney's error, and accordingly, Petitioners filed a Motion to Extend Filing Deadlines.

On April 9, 2002, Applicants filed a Request for Enlargement of Time to Respond to Petitions for Party Status. Applicants sought an extension from April 9 to April 16, 2002, to file their response.

On April 16, 2002, Applicants filed their Objection to Petitions for Party Status.

On May 1, 2002, the Board deliberated on the party status issues.

II. DISCUSSION

A. Requests for Additional Filing Time.

Petitioners filed their Petition for Party Status two days late due to their attorney's error, and accordingly, Petitioners filed a Motion to Extend Filing Deadlines. Thereafter, on April 9, 2002, Applicants filed a Request for Enlargement of Time to Respond to Petitions for Party Status seeking an extension from April 9 to April 16, 2002. During the PHC in a related revocation proceeding, Applicants stated that they did not object to Petitioners' two day extension request and Petitioners stated that they did not object to the Applicants' extension request.

The Board deliberated on both request for additional time on May 1, 2002. As neither party objects to the other parties' requests, and because there is no prejudice to any party or the proceeding, the Board concludes that the extensions are warranted.

B. Party Status

Act 250 confers party status to participate in an appeal upon adjoining property owners, as a matter of right, *provided that* the adjoiner demonstrates that the proposed project "may have a direct effect on the adjoiner's property" under one or more of the ten criteria set forth at 10 V.S.A. § 6086(a). 10 V.S.A. § 6085(c); EBR 14(A). *See also Re: Gary Savoie d/b/a/ WLPL and Eleanor Bemis, #2W0991-EB, Findings of Fact, Conclusions of Law, and Order at 6 (Oct. 11, 1995).* In addition, the district commissions and Board have the discretion to grant party status to any individual or entity that demonstrates that its interests may be affected by the project under one or more of the ten Act 250 criteria or that it can materially assist the commission or Board as to any of those criteria. EBR 14(B)(1) and 14(B)(2), respectively. *Gary Savoie, supra at 6-7.*

Petitioners have the burden to prove that they are entitled to party status. *See, Re: Pike Industries, Inc., #400008-2-EB, Memorandum of Decision (Jun.*

12, 1997). Both the Board's rules and decisions clearly set forth the burden which Petitioners must satisfy for party status under EBR 14(A)(5), 14(B)(1) and 14(B)(2). For Petitioners to establish EBR 14 (A)(5) party status as an adjoining land owner they would have to show that they own property adjacent to the Project as well as demonstrate that the Project may have a direct effect on this adjoining property. See EBR 14(A)(5); *Stone Cutter's Way / Winooski East Waterfront Redevelopment Project*, Declaratory Ruling Request #391, Memorandum of Decision (June 1, 2001).

The Board considers three elements when determining party status pursuant to EBR 14(B)(1). *Mount Anthony Union High School District #14*, Land Use Permit Application #8B0552-EB(Interlocutory) (Jan. 31, 2002). The petitioner has the burden of establishing a connection between the Project and a specified interest. *Id.* Second, the petitioner must show that, due to the demonstrated connection, its specified interests may be affected. *Id.* Citing to *Maple Tree Place Associates, #4C0775-EB, Memorandum of Decision and Order at 6 (Oct. 11, 1996)*. Third, the petitioner must articulate how its interests are different from those of the general public. *Id.* Citing to *Springfield Hospital, #2S0776-2-EB, Memorandum of Decision at 5-6 (Aug. 14, 1997), appeal dismissed, In re Springfield Hospital, No. 97-369 (October 30, 1997)*; see also, *Josiah E. Lupton, Quiet River Campground, #3W0819 (Revised)-EB, Chair's Preliminary Ruling at 4 (Oct. 3, 2000)*.

A determination that a EBR 14(B)(2) party can materially assist the Board requires more than an assertion that the party can cross-examine witnesses and present experts. *Mount Anthony Union High School District #14*, Land Use Permit Application #8B0552-EB(Interlocutory) (Jan. 31, 2002). The Board considers the following elements. First, that they possess particular expertise with respect to the Project; second, that the Project is complex and that the issues presented by the Project are novel and unfamiliar. *Id.* Citing to *Maple Tree Place Associates, supra at 7*; see also, *Josiah E. Lupton, Quiet River Campground, #3W0819 (Revised)-EB, Chair's Preliminary Ruling at 4 (Oct. 3, 2000)* and *Northeast Cooperatives and L&S Associates, #2W0434-11-EB, Memorandum of Decision at 3 (Jan. 29, 1999)*. Third, the Board also considers whether another party will provide the assistance which a person who seeks EBR 14(B)(2) status may give. *Id.* Citing to *Stonybrook Condominium Owners Association, Declaratory Ruling #385, Memorandum of Decision at 3 (May 3, 2000)* (citing to *Circumferential Highway, State of Vermont, Agency of Transportation and Circumferential Highway District, #4C0718-EB, Memorandum of Decision and Dismissal Order at 2 (Sept. 25, 1989)*).

Upon review of the parties' filings, the Board believes that Petitioners have provided considerable evidence to satisfy their burden of proof that they are entitled to party status under at least some of the criteria. The Board finds that Petitioners' filings leave some facts questionable however. For instance, the map provided as an attachment to Henry Paynter's Affidavit and incorporated by reference by all Petitioners in support of their petitions, is not to scale, does not show a direction (i.e. no North arrow), and does not clearly delineate property boundaries. The Board also believes that Applicants have raised some credible facts as to why Petitioners do not qualify for party status.

Accordingly, pursuant to EBR 20, the Board will perform a site visit and make observations on the record to assist the Board in rendering its decision on the petitions for party status.¹ Additionally, also pursuant to EBR 20, the Board requires that Petitioners file with the Board, in advance of the site visit, a scaled map providing clear property boundaries and a North arrow. A copy of this map shall be served on the Parties listed on certificate of service for this matter.

During the Board's review of the party status issues, the Board noted inconsistencies within the Petitioners' filings. For instance, the Petition and individual affidavits are inconsistent with respect to the type of party status and under which criteria each Petitioner is seeking status. Also, the Nicklesses inconsistently allege in the Petition that they live "immediately next to the gravel pit" and in the very next sentence of the Petition they state that they own a house and property within sight distance of the pit. Mr. Nickless' affidavit states that they live 3,000 to 4,000 feet east-southeast of the pit and that they can see the pit. Accordingly, to the extent any correction or clarifications are necessary within the Petitioners' filings, the corrections/clarifications should be filed along with Petitioners' new map.

III. ORDER

- A. The parties' requests for extensions of time for party status filings are GRANTED.

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As this memorandum discusses, petitioners for party status must always satisfy their burden of proof that they are entitled to status before the Board. The Board's normal practice is to deny a petition with does not meet this burden. In this case, the Board is willing to take a site visit and accept further evidence, in part, because the Board also has before it a separate but related revocation matter which includes a request for stay. The Board believes that the stay issue is significant and that the Board will benefit from observing the operations and conditions at the Rowe Gravel Pit as it decides whether or not to grant a stay.

- B. The Board will conduct a site visit on **Thursday, June 13, 2002 at 9:00 a.m.** The Board will convene the site visit at the entrance of the Rowe Gravel Pit.
- C. On or before, **Monday, June 3, 2002**, Petitioners shall file with the Board a scaled map providing clear property boundaries and a North arrow. Along with the map, Petitioners shall correct or clarify any inconsistencies within their filings relative to the party status issues. A copy of the map and clarifications/corrections shall be served on the Parties listed on certificate of service for this matter.
- D. The Board's Order as set out in the March 8, 2002 PHCR&O is revised as follows:
8. On or before **Thursday, July 11, 2002**, parties shall file (a) exhibits, (b) prefiled direct testimony for all witnesses they intend to present, and (c) lists of witnesses and exhibits. **Prefiled testimony must be clearly organized and contain a table of contents identifying the criteria and issues addressed.**
 9. On or before **Thursday, July 25, 2002**, parties shall file (a) rebuttal exhibits, (b) prefiled rebuttal testimony, and (c) a final list of witnesses and exhibits reflecting the addition of rebuttal witnesses and exhibits. As indicated above, **prefiled testimony must be clearly organized and contain a table of contents identifying the criteria and issues addressed.**
 10. On or before **Thursday, August 8, 2002**, parties shall file written requests for time beyond the time allotments outlined in Section V, SCHEDULING. The Chair may allow more time if good cause is shown.
 11. On or before **Thursday, August 8, 2002**, parties shall file evidentiary objections to the pre-filed evidence or such objections shall be deemed waived.
 12. On or before **Thursday, August 8, 2002**, parties shall file proposed findings of fact and conclusions of law.

13. The Chair or Acting Chair will conduct a second prehearing conference on **Monday, August 26, 2002 at 2:00 p.m., at the Environmental Board's Conference Room, National Life Records Center Building, National Life Drive, Montpelier, Vermont.** (Take Exit 8 off I-89 onto Memorial Drive, then right at the first set of lights onto National Life Drive. The Records Center Building is at the extreme easterly end of the parking lot, separate from the main National Life buildings.) The second prehearing conference will address any pending evidentiary objections, the site visit, other preliminary rulings, etc. Any party wishing to participate in this conference by telephone should advise Board Secretary Donna Seckington (telephone 802-828-5449) accordingly on or before **12:00 noon on Thursday, August 15, 2002.** Ms. Seckington will arrange the conference call.
14. The Board will convene **a hearing** in this matter on **Wednesday, August 28, 2002 at 9:00 a.m.** The specific location of this hearing shall be announced later.

Dated at Montpelier, Vermont this 14th day of May, 2002.

ENVIRONMENTAL BOARD

Marcy Harding, Chair
John Drake
Samuel Lloyd
Alice Olenick
Jean Richardson
Donald Sargent

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