

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

RE: Roger and Erma Rowe and Casella Construction, Inc.  
Land Use Permit #1R0387-EB (Revocation)  
Docket # 807

**MEMORANDUM OF DECISION**

This matter comes before the Vermont Environmental Board (Board) on a Motion for Stay (Motion) filed pursuant to 10 V.S.A. § 6086(f) and Environmental Board Rule (EBR) 42 by the Petitioners (defined below). The Board deliberated on the Motion on April 17, 2002. For the reasons stated below, the Board orders additional information to be filed by the Applicants (also defined below). The Board will again deliberate on the Motion during its May deliberations.

**I. PROCEDURAL SUMMARY**

There are two permits at issue in the motion to stay. The first, Land Use Permit #1R0387, issued September 15, 1980 (Original Permit), authorizes Roger and Erma Rowe (Permittees) to operate the so-called "Rowe Gravel Pit," a commercial gravel pit on a parcel of land bounded by the Plains and Furnace Brook Roads in the Town of Pittsford, Vermont (Original Project). The application for the second permit at issue was filed on July 16, 2001, by Roger & Erma Rowe and Casella Construction, Inc. (Applicants), Land Use Permit Application #1R0387-2, and seeks authorization to extract 100,000 cubic yards of gravel annually from the Rowe Gravel Pit with excavation to a depth of approximately 493.63 feet above sea level (five feet above groundwater) (Amended Project). The Amended 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 Original 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 Original Permit, but also allowed for an opportunity to cure.

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). The Amended Permit and Amended Decision are presently before the Board on appeal as a separate matter.

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) (Appeal proceeding).

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) in the Appeal proceeding and issued the Prehearing Conference Report and Order on March 8, 2002.

On March 21, 2002, Michael Cimonette, Ronald Crossman, Sandra Crossman, Robert Harnish, Breda Harnish, Melanie Greeno, Bernie Greeno, Henry Paynter, Donald Nickless, Shirlee Nickless, Sally Turner, James Rademacher, Ann Rademacher, Lucinda Seward and Michael Seward (Petitioners) filed a Petition for Revocation and a Motion to Stay with the Board, requesting the Board to both stay the activities at the Rowe Gravel Pit and revoke the Permit and Decision (Revocation proceeding). The Petitioners also request that the Board bring enforcement actions against Roger and Erma Rowe and Casella Construction, Inc. on the grounds that the Rowe Gravel Pit has been and continues to operate in violation of 10 V.S.A. §§ 6001 - 6092 (Act 250).

On April 9, 2002, Chair Harding convened a PHC in the Revocation proceeding with the following participants:

Casella Construction, Inc. by Allan Keyes, Esq.<sup>1</sup> and Bob Stedman,  
The Permittees by Roger Rowe,  
The Petitioners by Gerald R. Tarrant, Esq., Henry Payner and James  
Rademacher, and  
The Town of Pittsford Selectboard by Jim O’Gorman.

At the PHC, Applicants requested the opportunity to reply to the Motion until April 11, 2002. Petitioners objected to the request. Chair Harding verbally granted Applicants’ request during the PHC.

On April 11, 2002, Applicants filed their Memorandum in Opposition to Motion to Stay.

On April 16, 2002 Petitioners filed a letter with an Amended Motion to Re-Open Revocation Proceeding or in the Alternative, Motion to Revoke. This letter also provides further argument and attachments as to why Petitioners believe a stay is warranted.

The Board deliberated on the Motion on April 16, 2002.

## **II. ISSUE**

The issue presented to the Board by Petitioners’ Motion is whether a stay of all activities at the Rowe Gravel Pit should be ordered.

## **III. DISCUSSION**

Pursuant to EBR 42, any party aggrieved by a decision of the a district commission, subsequent to the filing of an appeal of that decision to the Board, may file a stay request with the Board identifying the order or portion thereof for which a stay is sought and stating in detail the grounds for the request. The Board may issue a stay containing such terms and conditions including the filing

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Allan Keyes, Esq. stated during the conference that he represents Casella Construction, Inc. only in this revocation proceeding.

of a bond or other security, as it deems just. EBR 42.

In summary, Petitioners state that a stay is necessary because of ongoing violations of the Original Permit, the Board's 1988 Revocation Order and the Amended Permit.

EBR 42 states the factors which the Board must weigh when determining whether to grant a stay. First, the Board must consider the hardship to the parties. Second, the impact, if any, on the values sought to be protected by Act 250 must be evaluated. Third, the effect on the public health, safety or general welfare is considered. EBR 42.

Petitioners have the burden in this case to prove that a stay is necessary, *Re: Stokes Communication Corp.*, 3R0703-EB, Supplemental Memorandum of Decision at 1 (Feb. 26, 1993). Consequently, Petitioners must prove that the above three factors weigh in favor of granting a stay.

**A. Hardship to Parties.**

Petitioners must prove that upon considering the hardships to all parties, the scale tips in favor of granting Petitioners' request for a stay.

Petitioners allege the hardships which they have and are experiencing including, but not limited to, unreasonable levels of noise and dust, the use of an "illegal" crusher, and higher than appropriate speed limits on Furnace Road all of which allegedly threaten Petitioners' property and their uses. Other alleged hardships include a threat to the water table (apparently stemming from deeper extraction), inappropriate bank slopes, and the ability of adjacent lands to hold water.

Applicants allege the hardships they would experience should a stay be issued. Applicants state that the Amended Permit is 'front-ended' with reclamation requirements and continued operations are necessary for the needed reclamation to continue. Applicants also allege that they have invested upwards of \$100,000 for reclamation based on an expectation that the reclamation would allow ongoing pit operations.

**B. Impact on Values Sought to be Protected by Act 250.**

To obtain a stay in this matter Petitioners must also show that Permittees' activities will cause significant impacts on the values sought to be protected by Act 250.

Petitioners allege that the same hardships addressed above are also Act 250 values significantly impacted. Petitioners also argue that the public's faith in Act 250 is also jeopardized if a stay is not granted. Additionally, Petitioners allege that while aesthetic values, as well as dust, noise and other considerations may be resolvable, the quarry activities potentially impacting the water table, slope viability and ability of the adjacent land to hold water may be irreversible impacts on Act 250's values.

Applicants allege that Act 250's value of protecting earth resources and encouraging their use for the benefit of the people of the state would be adversely impacted by granting a stay. Furthermore, Applicants allege that a stay would deprive the owners of their property and is therefore contrary to public interest. Applicants also allege that the Amended Permit protects environmental concerns of noise, aesthetics, dust control, the water table and slope issues.

**C. Effect Upon Public Health, Safety or General Welfare.**

Lastly, the Board must consider the effect on the public health, safety or general welfare.

Petitioners' Motion incorporates the arguments they make concerning hardship and Act 250 values impacted and then allege that a stay is necessary to maintain the public's confidence in Act 250 as well as the values Vermonters place on their lands and home.

Applicants argue that public policy protects earth resources and encourages their use for the benefit of the people of the state, i.e. Criterion 9(D).<sup>2</sup> Applicants also argue that reclamation itself involves the extraction and processing of substantial amounts of material used to create banks and stabilize

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The Board is not convinced that Criterion 9(D) alone sets public policy protecting earth resources. The Board does believe, however, that Criterion 9(D), when considered in combination with 10 V.S.A. § 6042(2) (Capability and Development Plan; Utilization of Natural Resources), does establish policy protecting and promoting the wise use of earth and mineral resources.

slopes and that the Board cannot stay the permit without stopping the current reclamation work and it is in the public interest to continue the reclamation.

#### **D. Conclusion**

The Board believes that the Petitioners have gone a long way to satisfy their burden in this proceeding of proving that a stay is necessary. The Board also believes, however, that additional information and evidence is required for to the Board be persuaded that a stay is warranted. Additional evidence is necessary regarding Applicants' compliance with the Original Permit, the Board's 1988 Revocation Order, and the Amended Permit. For instance, neither the Petitioners nor Applicants have provided any information relating to condition number 14 of the Amended Permit requiring a performance bond in the amount of \$100,000 to ensure funds are available for reclamation. Furthermore, while there is some information that Applicants are currently undertaking reclamation activities, the Board has little evidence of the extent of reclamation performed to date and the extent of reclamation yet to be completed. The Board also has little evidence relating to the extent of continuing extraction and whether or not extraction activities are in compliance with the permits and the Board's 1988 Revocation Order.

Accordingly, as set forth in Section IV. Order below, Applicants must provide the Board with additional information relating to their compliance with the Original Permit, the Board's 1988 Revocation Order, and the Amended Permit.

#### **IV. ORDER**

- 1. On or before Thursday, May 2, 2002**, Applicants shall file with the Board a certification that Applicants are in compliance with the Original Permit, the Board's 1988 Revocation Order, and the Amended Permit. If Applicants can not certify that they are in full compliance with the Original Permit, the Board's 1988 Revocation Order, and the Amended Permit, then Applicants' shall certify the extent to which they are in compliance with the Original Permit, the Board's 1988 Revocation Order, and the Amended Permit and shall also certify and provide details of all requirements or conditions for which they are not in compliance, including a schedule for when compliance will be achieved.

Applicants' certification shall also include the extent of reclamation performed to date, the extent of reclamation yet to be completed, the extent of continuing extraction and whether or not extraction

activities are in compliance with the permits and the Board's 1988 Revocation Order.

2. **On or before Thursday, May 9, 2002**, Petitioners may file a reply to Applicants' certification of compliance.
3. The Board will again deliberate on the Motion for Stay on Wednesday, May 15, 2002.

Dated at Montpelier, Vermont this 19th day of April, 2002.

ENVIRONMENTAL BOARD

\_\_\_\_/s/Marcy Harding\_\_\_\_\_  
Marcy Harding, Chair  
John Drake  
Alice Olenick  
Jean Richardson  
Donald Sargent  
Robert Opel