

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

and

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

Findings of Fact, Conclusions of Law, and Order

These related matters come before the Vermont Environmental Board (Board) on a Petition for Revocation, including a Motion for Stay, and on appeals of Land Use Permit Application #1R0387-2-EB. Appellants (defined below) have also requested that the Board revive an enforcement action for alleged continuing violations.

This Memorandum of Decision incorporates a settlement agreement filed by the parties. The agreement seeks to modify Land Use Permit #1R0387-2 by striking two conditions and modifying others.

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 the 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 dash 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 dash 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 dash 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 Marcy 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 Marcy 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.

During March and April 2002, the parties filed party status pleadings.

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

In a May 14, 2002 Memorandum of Decision, the Board ordered that it would perform a site visit and requested that Petitioners file supplemental information relating to their Petition for Party Status.

The Board conducted a site visit to the Rowe gravel pit on July 24, 2002. The parties filed a joint request on July 30, 2002, requesting a two-week extension for all filings and the hearing date. The parties also jointly requested that the Board postpone issuing decisions on any preliminary issues including petitions for party status to allow the parties an opportunity to reach a resolution to the revocation and appeal proceedings through their own independent

negotiations.

In a July 31, 2002 Chair's Preliminary Ruling, Chair Marcy Harding granted the extension and postponed the issuance of decisions on preliminary issues to allow the parties an opportunity to reach a resolution to the revocation and appeal proceedings through their own independent negotiations.

The parties subsequently filed additional joint requests for further extensions which were granted by Chair Harding or the Board on September 24, October 29, and December 5, 2002 and January 7, 2003.

On February 12, 2003, the parties filed their settlement agreement and asked that the Board accept the terms of the agreement and issue a further amended permit.

In a February 25, 2003 Chair's Preliminary Ruling, Chair Patricia Moulton Powden took official notice of the entire Commission file relative to LUP application #1R0387-2, including Land Use Permit #1R0387-2 and its supporting Findings of Fact, Conclusions of Law, and Order and ordered that the parties file further evidence to support the request to strike conditions limiting truck traffic and a bond in favor of the state to ensure restoration.

On March 14 and 17, 2003, the parties filed further evidence in support of their request to strike conditions limiting truck traffic and a bond in favor of the state to ensure restoration.

The Board deliberated on March 19 and April 16, 2003. Based upon a thorough review of the record and filings, including the parties' settlement agreement, the Board declared the record complete and adjourned. The matter is now ready for final decision.

II. DISCUSSION

A. Settlement agreements and the Board's obligations

Act 250 and the Board favor the non-adversarial resolution of issues by parties, see 10 V.S.A. §6085(e) and EBR 16(D). Public policy also "strongly favors settlement of disputed claims without litigation." *Dutch Hill Inn., Inc. v. Patten*, 131 Vt. 187, 192 (1973). The Board, however, has the obligation to review any settlement reached between the parties to determine whether an affirmative finding can be made under all criteria on appeal, and the Board need not accept a settlement agreement if the necessary affirmative findings cannot be made or if the agreement contravenes any of the Act 250 criteria. *Cersosimo Lumber Co.*, Land Use Permit #2W0957-EB, Findings of Fact, Conclusions of Law, and Order at 3 (Nov. 29, 1995); *Faucett Builders, Inc.*, Land Use Permit #4C0763-2-EB, Findings of Fact, Conclusions of Law, and Order at 6 (Aug. 6,

1996); *Pico Peak Ski Resort, Inc.*, Land Use Permit #1R0265-12-EB, Findings of Fact, Conclusions of Law, and Order at 4 (Nov. 22, 1995); *Accord, Andrew and Peggy Rogstad*, Land Use Permit #2S1011-EB, Findings of Fact, Conclusions of Law, and Order at 4 (December 12, 1996).

The Board is appreciative of the parties' efforts in resolving this matter. It is clear that the parties expended a great deal of time and resources reaching the settlement agreement.

B. The Parties' Proposed Agreement

In their settlement agreement, the parties stipulate and request that the Board issue a land use permit incorporating the terms and conditions of the Amended Permit, with the exception that condition number 3 limiting loaded truck trips to 75 per day be eliminated; that condition number 14 requiring a performance bond in favor of both the town and the state be amended to strike the requirement for a bond in favor of the state; and that the ground water level monitoring requirement be modified.¹

III. Findings of Fact

Generally, a settlement agreement will present the Board with stipulated proposed facts on which the Board can base findings of fact, which can in turn form the basis for the Board to make positive conclusions of law on the criteria. *See, Cersosimo Lumber Co., supra; Faucett Builders, Inc., supra; Andrew and Peggy Rogstad, supra.* The parties have not presented such proposed findings in this case.

The Chair has taken Official Notice of the Commission's file including its Findings of Fact and Conclusions of Law which accompany the Amended Permit. The Commission's file and its Findings and Conclusions lay the groundwork for the Board's analysis of the proposed settlement to the extent that the Commission's Findings of Fact and Conclusions of Law as well as the Amended Permit remain unchanged. Where modification of the Findings of Fact and Conclusions of Law is requested, however, the Board considers the additional facts supplied by the parties and reviews whether it can find new facts upon which to base new or modified findings and conclusions.

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The request to modify ground water monitoring is unclear as applied to the Amended Permit because it does not appear that the Amended Permit requires any such monitoring. The Board notes, however, that the Town of Pittsford Zoning Board of Adjustment's Findings of Fact, Decision and Order does require ground water monitoring. In subsequent filings, Applicants stated that the Board does not need to consider any modification of groundwater monitoring.

Based upon the parties' additional factual filings, the Board makes the following additional Findings of Fact:

1. The amount of truck traffic using the Project varies because demand for material from the Project is sporadic.
2. Peak demand is typically experienced over short periods of time when more than one construction project in the area needs material or when several road crews need material for winter storms.
3. There is no evidence of any traffic problems over the Project's history and the dash 2 application seeks to continue the same use of the Project without new traffic.
4. Under the settlement agreement, Applicants must take action which will further mitigate traffic impacts such as:
 - A. Petition the Town of Pittsford to set reduced speed limits on the roads used by the Project.
 - B. Maintain the access road as paved from Furnace Brook Road to Haskins Brook.
 - C. Create and maintain written logs to assure compliance with permit conditions.
 - D. Post a sign for the hours the Project is open.
 - E. Require that trucks carrying material from the Project be covered.
 - F. Limit the volume of material taken from the Project by both monthly and yearly maximum limits.
 - G. Specifically reduced Project activities during the weeks of July 4th and the first week of August to provide a slower pace in the community during summer holiday periods.
5. The reclamation plan currently being implemented at the Project involves reclamation in stages, all to be completed by September 15, 2010.
6. To date, Applicants have already performed much of the required reclamation.
7. Applicants estimate the remaining cost to complete reclamation of the Project to be no more than \$25,000 to \$30,000.

8. Applicants have procured a performance bond in favor of the Town of Pittsford to secure the final reclamation, however, the Town will not consent to adding the State to the existing Bond.

IV. Conclusions of Law

Upon considering the parties' settlement agreement, the Commission's file including the Amended Permit and Amended Decision, and the parties' additional filings the Board will issue a further amended land use permit to reflect the settlement reached by the parties as follows.

The parties' settlement agreement requests that condition number 3 of LUP #1R0387-2, limiting loaded truck trips to 75 per day, be eliminated. Based on the further mitigative actions required of Applicants in the settlement agreement and based on the monthly and yearly extraction limits, the Board concludes that the Project complies with Criterion 5 and eliminating condition number 3 will not cause unreasonable congestion or unsafe conditions with respect to the Project's use of roads.

The parties' settlement agreement requests that Condition number 14 of LUP #1R0387-2, requiring a performance bond in favor of both the Town and the State, be amended to strike the requirement for a bond in favor of the State. As a substantial amount of reclamation has been completed as of this date and based on Applicants' estimate that the cost of remaining reclamation is a maximum of \$25,000 to \$30,000, the Board concludes that amending condition number 14 to require a performance bond in favor of the Town only will ensure continued proper and progressive reclamation of the site in conformance with criterion 9(E).²

V. ORDER

1. Land Use Permit #1R0387-2-EB is issued.

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As part of Permittees request to eliminate the need for a Bond in favor of the State, Permittees argue that the Bond required by their zoning permit is allowed to be proportionally reduced as reclamation is completed in stages. Permittees have not requested that the Act 250 bond in favor of the Town be modified to match this capability and the Board is without a factual basis to do so on its own. As a result, condition number 14 remains as a \$100,000 bond for the entire project duration. Permittees are free to seek a determination from the District #1 Coordinator as to whether a permit amendment would be required to reduce the bond. If the answer to that question is affirmative, Permittees would have the right to seek a permit amendment for such a change from the Commission.

2. Appellant's Petition for Revocation and request for enforcement are dismissed.
3. Jurisdiction is returned to the District #1 Environmental Commission.

Dated at Montpelier, Vermont this 17th day of April, 2003.

ENVIRONMENTAL BOARD

 /s/Patricia Moulton Powden _____
Patricia Moulton Powden
Rebecca Day
George Holland
Samuel Lloyd*
Patricia A. Nowak
Alice Olenick
Richard C. Pembroke, Sr.
Jean Richardson
Donald Sargent**

* Member Lloyd participated in the March 19, 2003 deliberations, but did not participate in the April 16, 2003 deliberations. Although he has not reviewed this decision, Member Lloyd concurs with the result.

** Member Sargent participated in the March 19, 2003 deliberations, but did not participate in the April 16, 2003 deliberations. Member Sargent has review this decision and concurs.