

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Chapter 151

Re: Crushed Rock, Inc. and Land Use Permit
Pike Industries, Inc. #1R0489-4-EB

MEMORANDUM OF DECISION

This Memorandum of Decision pertains to a Motion to Alter filed by the Town of West Rutland (the Town), and a stipulation filed by the Town and Crushed Rock, Inc. and Pike Industries, Inc. (the Permittees). As is explained below, the Board accepts the parties' stipulation, and grants in part and denies in part the Town's Motion to Alter.

I. BACKGROUND

On February 18, 1994, the Board issued Amended Land Use Permit #1R0489-4-EB (the Permit) and Findings of Fact, Conclusions of Law, and Order (the Decision). The Permit authorizes the Permittees to operate a stone quarry (the Quarry) located off of Route 133 in the Town of Clarendon, and to transport up to a maximum annual amount of 260,000 tons of aggregate material from the Quarry along Clarendon Avenue in West Rutland (the Project). As part of the Project, Pike Industries will pay a toll (the Toll) pursuant to the terms and conditions of the Permit.

On February 22, 1994, the Vermont Senate rejected the confirmation of Board Chair Elizabeth Courtney, and Board members Ferdinand Bongartz and Terry Ehrich. This resulted in only four remaining Board members who participated in the appeal. 1 V.S.A. § 172 provides that a majority of the total number of the members of a board is required to take an action. Thus, a minimum of five Board members is needed to make a decision.

On March 7, 1994, Governor Howard Dean appointed Board member Arthur Gibb as Chairman of the Environmental Board.

On March 21, 1994, the Town filed a Motion to Alter.

On March 28, 1994, Board Chair Gibb issued a memo to the parties stating that pursuant to 3 V.S.A. § 849, former Board members Bongartz and Ehrich would participate in deciding the Town's Motion to Alter unless an objection from a party was received on or before April 8, 1994. There were no objections to the participation of Messrs. Bongartz and Ehrich.

On April 15, 1994, the Town filed a Motion for a Stay and Enlargement of Time. The Town requested that a deadline in Condition 21 of the Permit be extended, and that the Board issue a stay of the Permit pending a decision of the Board on

the Town's Motion to Alter.

On April 21, 1994, Board Chair Gibb informed the parties -that the Board would be unable to deliberate on the Town's Motion for a Stay and Enlargement of Time prior to its deliberation on the Town's Motion to Alter.

On April 25, 1994, the Permittees filed a response to the Town's Motion to Alter.

On April 28, 1994, the Town filed a Supplement to Motion for a Stay and Enlargement of Time.

On May 9, 1994, the Permittees filed a response to the Town's Motion for a Stay and Enlargement of Time.

On May 24, 1994, the Town and the Permittees filed a stipulation which amends Condition 21 of the Permit.

On May 25, 1994, the Board deliberated on the Town's Motion to Alter and the parties' stipulation.

II. STIPULATION BY THE PARTIES

The parties stipulate that Condition 21 of the Permit shall now provide:

Pike Industries' obligation to perform the improvements identified in Finding of Fact #68 of the Board's Findings of Facts, Conclusions of Law and Order dated February 18, 1994, shall be contingent upon Pike Industries' receipt within 30 days of the date of the decision of this Board on the Town of West Rutland's Motion to Alter of a written acceptance by the Town of Pike Industries' offer to perform the improvements. If Pike Industries' offer is accepted by the Town, Pike Industries shall commence the construction of the improvements identified in Finding of Fact #68 no later than June 1, 1995, unless otherwise impracticable due to weather conditions, lack of materials necessary to complete the improvements, or any other major unforeseen event, or unless otherwise agreed to by the Town. In addition, Pike Industries will provide to the Town up to 1,000 tons of the asphalt removed from the cold planing of Clarendon Avenue and up to 1,000 tons of crushed gravel for mixing with the asphalt tonnage by the Town.

In addition, the parties stipulate that upon the Board's acceptance of the parties' stipulation, the Town's Motion for a Stay and Enlargement of Time, and the Motion to Alter relative to Condition 21 and Finding of Fact #72, should be considered withdrawn. The Board will accept the parties' stipulation, subject to one minor, stylistic modification.¹

III. DECISION ON REMAINING ISSUES RAISED BY THE TOWN'S MOTION TO ALTER

A. Criteria 8 and 10

The Town's Motion to Alter requests that the Board reverse its decision that the Project will not have an undue adverse effect on the aesthetics of the Town under Criterion 8, and that the Project conforms with the West Rutland Town Plan under Criterion 10.

The Board will deny the Town's Motion to Alter relative to criteria 8 and 10. The Town's motion does not raise any issues not otherwise decided, and the Board concludes that the Decision is sound for the reasons stated therein.

B. Condition 19 of the Permit

The Town's Motion to Alter next requests that the Board alter Condition 19 of the Permit such that if traffic monitoring along Clarendon Avenue in the years 1997 or thereafter shows that new traffic signals are required, then the Permit may be reopened. Presently, Condition 19 allows the Town to use Toll funds to help defray the cost of installing traffic signs or signals. Implicit in the Town's request to alter is the contention that Condition 19 is an insufficient basis upon which, in part, to make positive findings under criteria 5, 7, and 9(K).

The installation of new traffic signs or signals is one cost among many which may be incurred by the Town as a result of the increased usage of Clarendon Avenue. Notwithstanding the Town's assertion to the contrary, the Town is not required to use the Toll funds to pay for the installation of new traffic signals or signs (although the Town may choose to do so). Further, the Town did not seek a higher Toll rate, and

¹Instead of "within 30 days of the date of the decision of this Board on the Town of West Rutland's Motion to Alter" in the first sentence of Condition 21, Condition 21 shall provide "within 30 days of the date of this permit."

nor did it request that the Toll funds be available for purposes other than roadway maintenance to Clarendon Avenue. However, the Board, in making positive findings under criteria 5, 7, and 9(K), imposed Condition 19 of the Permit and thereby gave the Town the option of using the Toll funds to offset a wide range of potential costs which may be incurred due to the increased truck traffic along Clarendon Avenue.

The Board will deny the Town's Motion to Alter relative to Condition 19 of the Permit. The Town's proposed alteration, that is, reopening the Permit after 1997, is not supported under the Decision's Findings of Fact and is not required for the Board to make positive findings under criteria 5, 7, and 9(K).

C. Condition 17 of the Permit

Finally, the Town's Motion to Alter requests that the Board alter Condition 17 of the Permit such that the Toll funds remain available for the uses authorized by the Permit, notwithstanding the abandonment or expiration of the Permit.

As found by the Board, the general purpose of the Toll is to defray the costs which may be incurred by the Town due to the increase in truck traffic along Clarendon Avenue. The Board is persuaded that after the expiration or abandonment of the Permit, there may be accrued liabilities which are properly charged to the operation of the Project (and therefore subject to Condition 19 of the Permit), but for which the Town has not yet expended any Toll funds. Therefore, based on the Decision's Findings of Fact, the Board will grant the Town's Motion to Alter and amend Condition 17 of the Permit by striking the last sentence of Condition 17 of the Permit, and adding the following:

After this permit's expiration or abandonment, the Town shall have two years to spend the funds in the Toll Bank Account as provided for herein. If there are funds remaining in the Toll Bank Account after the end of the two year period following the abandonment or expiration of this permit, then such remaining funds shall revert to and become the property of Pike Industries. This permit shall be deemed abandoned for the purpose of triggering the two year period only if Pike Industries sends written notice to the Town, the District #1

Crushed Rock, Inc. and Pike Industries; Inc.
Land Use Permit #1R0489-4-EB
Memorandum of Decision and Order
Page 5

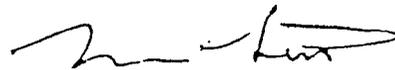
Environmental Commission, and the Environmental Board thirty days prior to its abandonment of this permit, and, further, provided that such notice specifies the exact date on which this permit is to be abandoned. Pike Industries shall send such notice to the aforementioned by United States mail, first class, certified, return receipt requested.

IV. ORDER

1. The parties' stipulation is accepted as provided for herein.
2. The Town's Motion to Alter relative to criteria 8 and 10 of the Decision, and Condition 19 of the Permit, is denied.
3. The Town's Motion to Alter relative to Condition 17 of the Permit is granted.
4. Amended Land Use Permit #1R0489-4-EB (Revised) is hereby issued, and it supersedes Amended Land Use Permit #1R0489-4-EB.
5. Jurisdiction over this matter is returned to the District #1 Environmental Commission.

Dated at Montpelier, Vermont, this 21st day of June, 1994.

ENVIRONMENTAL BOARD



Arthur Gibb, Chair
Ferdinand Bongartz
Terry Ehrich
Lixi Fortna
Samuel Lloyd
William Martinez