

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

Re: Pike Industries, Inc.  
and William E. Dailey, Inc.

Land Use Permit  
#1R0807-EB

**ORDER ON PRELIMINARY ISSUES**

This Order pertains to certain party status and other preliminary issues raised by the parties in response to rulings and other matters addressed in the Prehearing Conference Report and Order issued on January 14, 1998. See EBR 16(B). For reasons stated in the Order, the scope of this appeal has been expanded to include criteria 1 (air pollution -- noise), 5 (traffic), and 8 (aesthetics -- noise). and 10 (regional plan). Furthermore, the Board has determined that certain parties should be granted party status with respect to additional criteria.

I. BACKGROUND:

On June 27, 1997, the District #1 Environmental Commission ("Commission") issued Land Use Permit #1R0807 and its supporting Findings of Fact, Conclusions of Law, and Order ("Permit"). The Permit was issued to Pike Industries, Inc., and William E. Dailey, Inc., ("Permittees") and specifically authorizes them to operate a concrete plant for production of up to 25,000 cubic yards of cement per year, and to extract up to 67,000 cubic yards of aggregate, sand, and gravel during a 200 day annual operating season from an existing gravel pit in Wallingford, Vermont ("Project"). On October 23, 1997, the Commission issued a Memorandum of Decision on Motions to Alter.

On November 24, 1997, Pike Industries, Inc., ("Appellant") appealed the Permit through its attorneys, Kimbell & Storrow. This appeal is filed pursuant to 10 V.S.A. §6086(a). The Appellant contends that the Commission erred with respect to Permit Conditions 3, 10, 12, 19(f) and 27, and supporting Findings of Fact and Conclusions of Law under Criteria 1 (air pollution), 5 (traffic), and 8 (aesthetics), and its interpretation of 10 V.S.A. §6090(b)(1) (permit duration). The Appellant also filed a Request for Stay of Permit Conditions 10 and 19(f), and a request to Recess or Continue Hearing on Appeal.

A preheating conference with respect to this matter was convened by Chair Harding on January 5, 1998, and on January 14, 1998, the Chair issued a Preheating Conference Report and Order, memorializing certain party status and other preliminary rulings addressed at the preheating conference.

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On January 27, 1998, the Board received the Appellant's Memorandum Regarding Issues of Party Status and Scope of Appeal ("Appellant's Memorandum"); Ruth Tarbell's Motion to File Cross Appeal Out of Time or, In the Alternative, To Broaden the Scope of the Appeal ("Ruth Tarbell's Motion for Cross Appeal and Motion to Broaden Scope of Appeal" or "Motions"); Ruth Tarbell's Objection to Prehearing Conference Report and Order ("Ruth Tarbell's Objection"); Ruth Tarbell's Motion for Oral Argument; Ken Fredette's Objection to Party Status Ruling; and Response to Prehearing Conference Report and Order filed by Highland Beach Associates ("HBA") and Highland Homesites Associates, Inc. ("HHA"). On February 10, 1998, in response to these filings, the Board received separate written Objections to Appellant's Memorandum from Cynthia and Oscar Daubenspeck and Ken Fredette, as well as the Appellant's Memorandum in Response to Ruth Tarbell's Objection and two Motions,

Oral argument and deliberations with respect to the issues raised in the parties' filings, in addition to the Appellant's initial Request for Stay, were held on February 25, 1998. So as not to delay the preparation and filing of *prefiled* testimony and exhibits in this proceeding, the Board decided to issue this Order, ruling on the various questions presented.

## II ORDER

1. Ruth Tarbell's request to file a cross appeal out of time is denied. Pursuant to EBR 40(D), a cross appeal must be filed with the Board within 14 days of the date the notice of appeal was mailed to the party by the appellant, or before the expiration of the 30 days allowed for filing appeals, whichever is later. The rule does not allow the filing of cross appeals out of time.
2. Ruth Tarbell's alternative request to expand the scope of this appeal to include criteria not identified in the Appellant's Notice of Appeal is denied in part and granted in part. The Board grants her request to include within the scope of this appeal criterion 10 (regional plan). The Commission's *affirmative* finding under criterion 10 was reached, at least in part, based on the issuance of a permit with a duration of eight years. See Re: Pike Industries, Inc., and William E. Dailey, Inc., LUP #1R0807, Findings of Fact, Conclusions of Law and Order at 24, Finding #89 (June 27, 1997). Because the Appellant has appealed Condition #27, the Appellant has placed at issue criterion 10. However, the Board is not convinced that Mrs. Tarbell has demonstrated that substantial inequity or injustice will result from otherwise limiting the scope of the appeal in accordance with EBR 40(E) to criteria 1 (air pollution), 5 (traffic), and 8 (aesthetics), the criteria identified in the Appellant's Notice of Appeal.
3. Ruth Tarbell's request to expand her party status participation under 14(A)(5) is denied in part and granted in part. In addition to being granted party status under criteria 1, 5 and

8, the Board grants Mrs. **Tarbell** party status with respect to criterion 10 (regional plan). However, the Board declines to grant her party status with respect to other criteria for which she has sought the right to participate, these being criteria 7 (burden on municipal and government services), 9(D) (earth resources), 9(E) (extraction of earth resources), and 9(K)(**development** affecting public investment). These criteria are not within the scope of the Appellant's Notice of Appeal nor has the Board deemed that they must be considered pursuant to EBR 40(E) to avoid substantial inequity or injustice.

4. Appellant's request to limit the scope of this appeal under criteria 1 and 8 to consideration of noise impacts only is granted. Appellant's Notice of Appeal contained objections to specific findings of fact and conditions imposed by the Commission with respect to noise impacts and not dust or aesthetics generally.
5. Appellant's request to deny party status to all parties under criterion 5 is denied. The question of whether various parties' interests will be affected by traffic associated with the Project is a factual question which can only be decided based upon a record developed at hearing.
6. Ken Fredette's request for party status under EBR 14(B)(1) with respect to criteria 1 (air pollution) and 8 (aesthetics), in addition to criterion 5 (traffic) which was granted in the January 14, 1998, Prehearing Conference Report and Order, is granted. Mr. Fredette is also granted party status under criterion 10 (regional plan). He had party status before the Commission with respect to these criteria, no appeal was filed by the Appellant relative to Mr. Fredette's party status, and these criteria are within the scope of the Appellant's appeal. To the extent that he has requested party status under other criteria, that request is denied because those criteria are not within the scope of the Appellant's Notice of Appeal and have not been allowed by the Board pursuant to EBR 40(E).
7. HBA and HHA had party status before the Commission under criterion 10, no appeal was filed by the Appellant relative to HBA's and HHA's party status, and this criterion is within the scope of Appellant's appeal. Therefore, in addition to having party status under 14(B)(1) with respect to criteria 1 (air pollution), 5 (traffic) and 8 (aesthetics) which was granted in the January 14, 1998, Prehearing Conference Report and Order, the HBA and HHA have party status under criterion 10 (regional plan).
8. The Appellant's request for a stay of Conditions 10 and 19(f) of the Permit is granted. Although Mrs. **Tarbell** opposed the grant of a stay in her initial party status petition, she did not renew her objection or request oral argument on this issue following the issuance of the Prehearing Conference Report and Order. Additionally, no other party or party status petitioner opposed the stay request. EBR 42 requires the Board to conduct a

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balancing test to weigh the hardships to the parties, the impact, if any, on the values sought to be protected by Act 250, and any effect upon public health safety or general welfare. On balance, the Board believes that the issuance of a stay of Conditions 10 and 19(f) during the pendency of this appeal is warranted in light of the alleged hardship to the Appellant and minimal impacts, if any, on the values to be protected by Act 250, and limited effect, if any, upon public health or general welfare.

Dated at Montpelier, Vermont, this 26th day of February, 1998.

VERMONT ENVIRONMENTAL BOARD

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