

State of Vermont
ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

Re: Black River Valley Rod & Gun Club, Inc.
Application #2S1019-EB

MEMORANDUM OF DECISION

This Memorandum of Decision addresses a Motion to Alter (“Motion”) filed pursuant to **Environmental** Board Rule (“EBR”) 3 1 (A) by Black River Valley Rod & Gun Club (“Club”) with regard to **Re: Black River Valley Rod & Gun Club, Inc., #2S1019-EB**, Findings of Fact, Conclusions of Law, and Order (March 27, 1997) (“Board Decision”) and Land Use Permit #2S 10 19-EB (“Board Permit”). As explained below, the Environmental Board (“Board”) grants the Motion in part and denies the Motion in part.

I. BACKGROUND AND **PROCEDURAL** SUMMARY

The Board Decision contains a detailed summary of the background and procedural *history* prior to issuance of the Decision.

On April 28, 1997, the Club filed the Motion.

On May 13, 1997, Shirley Brand, Barbara **Remis**, Warren and Faith East-wick, Marcia Dockum, and Linda Hill (“Neighbors”) filed a response to the Motion.

On June 11, 1997, the Board deliberated relative to the Motion.

II. ENVIRONMENTAL BOARD RULE 3 1 (A)

EBR 3 1 (A) authorizes motions to alter as follows:

(A) Motions to alter decisions. A **party** may file within 30 days **from** the date of a decision of the board or district commission one and only one motion to alter with respect to the decision. However, no party may file a motion to alter a decision concerning or resulting from a motion to alter.

(1) All requested alterations must be based on a proposed reconsideration of the existing record. New arguments **are** not allowed, with the exception of arguments in response to permit conditions or allegedly **improper** use of procedures, provided that the party seeking the alteration reasonably could not have known of the conditions or procedures prior to decision. New evidence may not be submitted unless the board or district commission, acting on a motion to alter, determines that it will accept new evidence.

(2) A motion to alter should number each requested alteration separately. The motion may be accompanied by a supporting memorandum of law which contains numbered **sections** corresponding to the motion. The supporting memorandum should state why each requested alteration is appropriate and the location in the existing record of the supporting evidence. Any reply memorandum of law should also contain numbered sections corresponding to the motion. Additional requirements concerning motions and memoranda are set out in Rule 12 of these rules.

(3) The board or district commission shall act upon motions to alter promptly. The running of any applicable time in which to appeal to the board or supreme court shall be terminated by a timely motion filed under this rule. The full time for appeal shall commence to run and is to be computed from issuance of a decision on said motion. It is **entirely** within the discretion of the board or district commission whether or not to hold a hearing on any motion.

(4) The board or district commission may on its own motion, within 30 days **from** the date of a decision, issue an altered decision or permit. Alterations by board or district commission motion shall be limited to instances of manifest error, mistakes, and typographical errors and omissions.

In general, Board decisions under EBR 3 1 (A) indicate that a motion to alter is in the nature of reconsideration and that the motion should not ask the Board to reconsider matters it was not asked to consider originally. **Re: Vermont Egg Farms, Inc.**, Declaratory Ruling #3 17, Memorandum of Decision (September 4, 1996); **Re: Finard Zambias Associates, #1R0661-EB**, Memorandum of Decision (Jan. 16, 1991).

III. DECISION

A. Board Permit Condition #1

The Club requests amendment of Board Permit condition #1. Board Permit condition #1 states:

The Permittees shall complete, operate and maintain the project in accordance with:
(a) the terms and conditions of Land Use Permit #2S 1019 except as amended hereby;
(b) **Re: Black River Valley Rod & Gun Club, Inc.**, Application #2S 1019-EB, Findings of Fact, Conclusions of Law, and **Order** (March 27, 1997); and (c) the conditions of this permit. The Permittees shall not make changes in the project

without the written approval of the District #2 Environmental Commission (“District Commission”).

The Club argues that the Board Permit should not incorporate the terms and conditions of Land Use Permit #2S10 19 (“District Commission Permit”) “except as amended hereby” because the District Commission Permit requires the project to be completed in compliance with the District Commission’s findings of fact and conclusions of law (“District Commission Decision”). The Club further argues that there are discrepancies, inconsistencies, and conflicts between the District Commission Decision and the Board Decision and Board Permit.

The Club requests the Board to alter condition #1 of the Board Permit to state as follows:

The **permittee** shall complete, operate and maintain the project in accordance with the Findings of Fact, Conclusions of Law and Order of the Environmental Board in case #2S 10 19-EB and the conditions of this permit. The permittee shall not make any changes in the project without the written approval of District #2 Environmental Commission pursuant to applicable Environmental Board rules. This condition supersedes and replaces Condition #1 of Land Use Permit #2S 10 19.

In the alternative, the Club requests the Board to alter its decision to indicate specifically which District Commission findings and conclusions of law have been overruled, altered and/or are no longer binding.

The Neighbors are opposed to the Club’s requested amendment of Board Permit condition #1.

The Board declines to alter condition #1 of the Board Permit as requested by the Club. Such an alteration would eliminate reference to the District Commission Permit, thereby eliminating conditions in the District Commission Permit which were not appealed to the Board by the Club. Since the Club only appealed conditions #5, 6, and 7 of the District Commission Permit, all other conditions in the District Commission Permit are final and, therefore, are incorporated into the Board Permit by reference. **In re Taft Corners Associates, Inc.**, 160 Vt. 583,593 (1993). The Board can review only what is presented to it, so the District Commission Permit is a necessary ingredient to determining what the District Commission approved. **See In re Denio**, 158 Vt. 230,241 (1992) (concluding that a permit condition incorporating the Board’s **findings of fact** and conclusions of law was reasonable because it was a necessary ingredient to determining what the Board had approved). Therefore, the Club’s request to alter condition #1 of the Board Permit is denied.

However, the Board will respond to the Club's alternative request by indicating specific District Commission findings and conclusions of law which have been overruled, altered and/or are no longer binding. In the memorandum supporting its Motion, the Club identified three inconsistencies between the District Commission decision and the Board Decision and Board Permit.

First, the Club contends that District Commission finding of fact #12 is inconsistent with Board **finding** of fact #62 and with condition #2(a) of the Board Permit. The Club further argues that such inconsistency makes it unclear whether the Board Permit allows shooting during the winter months. The District Commission's finding of fact #12 states "[t]here is no trap shooting in the months of November, December, January, February and March, with the exception of one **field** day in February." The Board's finding of fact #62 states "[s]now cover on the ground absorbs sound, thereby reducing the impact of shooting noise." Condition #2(a) of the Board Permit states:

a. Shooting shall occur at the trap range **only** on the following days and times:

- (1) three weekdays per week from 3:00 p.m. until 6:00 p.m.;
- (2) one weekend day per week from 12:00 p.m. until 6:00 p.m.; and
- (3) on two of the above-designated days, evening shooting may occur from 6:00 p.m. until **8:00** p.m.

The Board does not agree that finding of fact #12 is inconsistent with Board **finding** of fact #62 and with condition #2(a) of the Board Permit. However, in order to clarify that the Board Permit allows shooting during every month of the year, the Board hereby amends Board Permit condition #2(a) as follows:

a. Shooting may occur at the trap range during every month of the year but such shooting shall occur only on the following days and times:

- (1) three weekdays per week from 3:00 p.m. until 6:00 p.m.;
- (2) one weekend day per week from 12:00 p.m. until 6:00 p.m.; and
- (3) on two of the above-designated days, evening shooting may occur **from** 6:00 p.m. until 8:00 p.m.

Second, the Club contends that the District Commission's conclusions of law regarding 10 V.S.A. § 6086(a)(1) ("Criterion 1") conflict with the Board's conclusions of law regarding Criterion 1. The District Commission concluded that the project complied with Criterion 1 based on imposition of a permit condition requiring all shooting at the trap range to cease at 8:00 p.m. The Board concluded that the project complied with Criterion 1 and did not impose any permit conditions under Criterion 1.¹ The Board considered *de novo* whether the project complied with Criterion 1. See 10 V.S.A. §6089(a)(3) (stating that the Board shall hold a de novo hearing). Therefore, the Board's conclusions of law regarding Criterion 1 **are** binding and supersede the District Commission's conclusions of law regarding Criterion 1. The Board will amend page 18 of the Board Decision to **affirmatively** state that the Board's conclusions of law regarding Criterion 1 **are** binding and supersede the District Commission's conclusions of law regarding Criterion 1.

Third, the Club contends that District Commission Permit condition #8 is inconsistent with the Board's conclusions of law regarding the scope of jurisdiction. Condition #8 of the District Commission Permit states "[b]y April 15, 1996, the Permittee shall implement all noise reduction measures outlined in Exhibit 14." To the extent that Exhibit 14 includes noise reduction measures applicable to the rifle range, such measures are inconsistent with the Board's conclusion, on page 17 of the Board Decision, that it does not have jurisdiction over the rifle range. Therefore, the Board will amend condition #8 of the District Commission Permit by deleting the **requirement** that the Club implement noise reduction measures outlined in Exhibit 14 pertaining to the rifle range. Because the Club did not appeal District Commission Permit condition #8, it is still required to implement all noise reduction measures outlined in Exhibit 14 pertaining to the trap range.

In the memorandum supporting its Motion, the Club states that there are other inconsistencies between the District Commission Decision and the Board Decision and Board Permit. However, the Club does not identify any such inconsistencies. It is the Club's burden to **identify** specific requested **alterations**, state why each requested alteration is appropriate and state the location in the existing record of the supporting evidence. EBR 31(A)(2). Because the Club failed to identify other specific requested alterations, the Board is left to guess which "other" inconsistencies the Club requests the Board to address. Nevertheless, the Board has reviewed the District Commission Permit, the District Commission Decision, the Board Permit, and the Board Decision to **determine** whether there are any inconsistencies which were not identified specifically by the Club. The Board's review did not identify any such inconsistencies.

¹The Board Permit conditions were imposed under 10 V.S.A. §6086(a)(8) ("Criterion 8").

B. Condition #13 of the District Commission Permit

The Club requests the Board to delete condition #13 of the District Commission Permit. Condition #13 of the District Commission Permit states:

The lighting at the pavilion building shall be evaluated by the District 2 **Environmental** Commission **staff** and the permittee's representative to determine if the light source is visible from the Dockum or other properties. If the light source is visible the permittee shall be required to install fully down-shielded lights or otherwise retrofit the lights to correct the problem. A plan for lighting, if required, shall be submitted to the District 2 Environmental Commission for review and approval by February 1, 1996.

The Neighbors are opposed to the deletion of District Commission Permit condition #13. They state that if condition #13 is to be altered in any way, it should be modified as follows:

The applicant shall ensure that the lights do not adversely impact neighboring residences. Trees which shield neighboring properties from the lights will not be removed by the applicant. Any proposed increase in elevation of the lights, increase in the number of lamps and/or wattage or illumination levels over the lights now in place will be submitted to the District as a change in the project.

The Club's Notice of Appeal specifically references District Commission Permit conditions #5, 6, and 7 as issues in this appeal but it makes no **reference** to District Commission Permit condition #13. Pursuant to EBR 40(E), the scope of an appeal is limited to the issues assigned by the appellant. Because the Club did not appeal District Commission Permit condition #13 and raises the validity of such condition for the first time in this Motion, the Board denies the Club's request for deletion of this condition. See Re: Vermont Egg Farms, Inc., supra, at 2 (a motion to alter should not ask the Board to reconsider matters that it was not asked to consider originally). If the Club wishes to amend or delete District Commission Permit condition #13, it may file a request to amend its permit with the District Commission.

C. District Commission Permit Conditions #8, 11, and 14

The Club requests the Board to delete conditions #8, 11, and 14 of the District Commission Permit. Condition #8 of the District Commission Permit states:

By April 15, 1996, the permittee shall implement all noise reduction measures

outlined in Exhibit 14.

Condition #11 of the District Commission Permit states:

The permittee shall by April 15, 1996, post warning signs at the boundaries of the trap shoot and rifle range to adequately warn people of the range of fire.

Condition #14 of the District Commission Permit states:

All construction on this project must be completed by April 15, 1996.

The Neighbors oppose deletion of conditions #8, 11, and 14. Rather, the Neighbors state that the deadlines in the conditions should be modified to reflect a change from April 15, 1996 to more appropriate dates. The Neighbors suggest that 30 days from issuance of the Board's decision on the Motion to Alter is an appropriate date.

The Club's Notice of Appeal specifically references District Commission Permit conditions #5, 6, and 7 as issues in this appeal but it makes no reference to District Commission Permit conditions #8, 11, and 14. Pursuant to EBR 40(E), the scope of an appeal is limited to the issues assigned by the appellant. Because the Club did not appeal District Commission Permit conditions #8, 11, and 14 and raises the validity of such conditions for the first time in this Motion, the Board denies **the Club's** request for deletion of these **conditions.**² See Re: Vermont Egg Farms, Inc., supra, at 2 (a motion to alter should not ask the Board to reconsider matters that it was not asked to consider originally). If the **Club** wishes to amend the deadlines in Board **Permit** conditions #8, 11, and 14, it may file a request to amend its **permit** with the District Commission.

D. District Commission Permit Conditions #2, 3, 4, and 12

The Club requests the Board to delete conditions #2, 3, 4, and 12 of the District

²The Club argues that conditions #8, 11, and 14 of the **District** Commission Permit should be eliminated because such dates passed during the **pendency** of its appeal and the Club could be **subject** to enforcement for failure to comply with the conditions. EBR 42 states that no decision of a district commission is automatically stayed by the **filing** of an appeal and that any party aggrieved by a final order of a district commission may request a stay by written motion filed with the Board. The Club did not request a stay of the District Commission Decision or any of the conditions in the District Commission Permit.

Commission Permit. Condition #2 of the District Commission Permit states:

By acceptance of this permit the permittee agrees to allow representatives of the State of Vermont access, at reasonable times, to the property covered by the permit, for the purpose of ascertaining compliance with Vermont environmental and health statutes and regulations and with this permit.

Condition #3 of the District Commission Permit states:

By acceptance of the conditions of this permit without appeal, the permittee confirms and agrees for itself and all assigns and successors in interest that the conditions of this permit shall run with the land will be upon and enforceable against the permittee and all assigns and successors in interest. The granting of less than an undivided whole interest in this project is prohibited without prior approval of the District Environmental Commission.

Condition #4 of the District Commission Permit states:

The District Environmental Commission maintains continuing jurisdiction during the lifetime of the permit and may periodically require that the permittee file an **affidavit** certifying that the project is being completed in accordance with the terms of the permit.

Condition #12 of the District Commission Permit states:

The District Environmental Commission reserves the right to evaluate and impose reasonable additional conditions necessary to ensure no undue adverse impact with respect to water pollution. The Commission reserves this right for a period of time commencing and expiring with the Permit.

The Neighbors oppose deletion of conditions #2, 3, 4, and 12. They state that condition #2 is necessary to ensure compliance with the Permit. They further state that condition #4 reiterates authority already provided to the District Commission by EBR 32, 34, and 37. Finally, the Neighbors state that condition 12 is necessary to provide for monitoring of the project site for lead pollution caused by lead shot being deposited on the trap range.

The Club's Notice of Appeal specifically references District Commission Permit conditions #5, 6, and 7 as issues in this appeal but it makes no reference to District

Commission Permit conditions #2, 3, 4, and 12. Pursuant to EBR 40(E), the scope of an appeal is limited to the issues assigned by the appellant. Because the Club did not appeal District Commission Permit conditions #2, 3, 4, and 12 and **raises** the validity of such conditions for the **first** time in this Motion, the Board denies the Club's request for deletion of these conditions. **See Re: Vermont Egg Farms, Inc., supra**, at 2 (a motion to alter should not ask the Board to reconsider matters that it was not asked to consider originally).

Even if the Club had appealed District Commission Permit conditions #2, 3, 4, and 12 in a timely manner, the Board would conclude that such conditions are valid under Act 250 and the **EBRs**. 10 V.S.A. § 6086(c) enables the Board to impose such permit conditions as are allowable within the proper exercise of the police power and which are appropriate with respect to the ten criteria of Act 250. **Additionally**, EBR 32(A) states that "[t]he board or a district commission may ... **require a permittee to file affidavits** of compliance with respect to specific conditions of a permit at reasonable **intervals**." Finally, EBR 34(A) states "[c]ontinuing jurisdiction over all development and **subdivision** permits is vested in the district commissions unless the board, in acting on an appeal, has specifically reserved the right to maintain jurisdiction over a development or subdivision in part or in its entirety."

E. Conclusion on Page 16 of the Board Decision

The Club requests the Board to alter its conclusion on page 16 of the Board Decision that "the pavilion and lights have caused a substantial increase in the amount of shooting at the trap range above the historic amount of shooting." The Club requests the Board to conclude instead that the installation of the lights and the construction of the pavilion have not **caused** any substantial increase in the amount of shooting. The Board will alter its conclusion on page 16 of the Board Decision to state "the pavilion and lights have resulted in a substantial increase in the amount of shooting at the trap range above the historic amount of shooting." Such conclusion is rationally derived from the Board's findings of fact which are based on the credible evidence presented by the Neighbors.

F. Board Permit Condition #2(a)

The Club requests the Board to amend condition #2(a) of the Board **Permit**. Condition #2(a) of the Board Permit states:

a. Shooting shall occur at the trap range only on the following days and times:

- (1) three weekdays per week **from** 3:00 p.m. until 6:00 p.m.;
- (2) one weekend day per week **from** 12:00 p.m. until 6:00 p.m.; and

(3) on two of the above-designated days, evening shooting may occur from 6:00 p.m. until 8:00 p.m.

The Club requests amendment of condition #2(a) to state, in the alternative, one of the following:

Alternative #1- Land Use Permit 2S1019 conditions 5, 6, and 7 are deleted.

Alternative #2- Conditions 5, 6, and 7 of Land Use Permit 2S1019 are hereby superseded and are replaced by the following:

Shooting shall occur at the trap range **only** during the times specified in the nationally acceptable levels recognized by the International Association of Fish and Wildlife Managers and the National Rifle Association as more particularly set forth in Finding #61 of the Board findings.

Alternative #3- Shooting shall occur at the trap range only in accordance with the following:

(1) Scheduled shooting (involving four or more shooters competing at one tie) shall occur only on the following days and times:

(a) three week days per week from 12:00 noon until 6:00 p.m.;

(b) one weekend day per week **from** 10:00 a.m. until 6:00 p.m.; and

(c) on two of the above designated days scheduled shooting may occur from 6:00 p.m. until **10:00** p.m.

(2) Practice and instructional shooting (not involving more than three shooters) may occur at any time between 8:00 a.m. and 8:00 p.m.

The Neighbors are opposed to all three alternatives set forth by the Club.

The Board declines to alter condition #2(a) of the Board Permit because the Club's three alternatives are not consistent with the Board's conclusions on pages 20 through 21 of the Board Decision that condition #2(a), among other conditions, is necessary to alleviate the undue adverse effects that would otherwise be caused by the trap range under Criterion 8. As to the Club's alternative #3, the Board notes that the Club failed to provide the Board with any evidence that the impacts of scheduled shooting differ from the impacts of practice

and instructional shooting.

G. Board Permit Condition #2(b)

The Club requests the Board to amend condition #2(b) of the Board Permit. Condition #2(b) of the Board Permit states:

b. On or before May 1, 1997 and on or before January 1 of each year thereafter, the Permittee shall designate specific shooting days and times for the trap range within the parameters of the abovedesignated shooting days and times and notify its members, the parties in this matter or their successors in title, and the District Commission of such designated shooting days and times. On or before May 1, 1997 and on or before January 1 of each year thereafter, the **Permittee** shall post a sign in the pavilion at the trap range notifying users of the designated shooting days and times.

The Club requests amendment of condition #2(b) to state:

b. Permittee shall designate the days and **times** when shooting may occur at the trap shooting range, notify its members and post a visible sign at the trap range notifying users of the designated shooting days and times. If the permittee changes the days and hours designated, it shall notify its members and revise its posted sign accordingly.

The Neighbors do not think the process required in Board Permit condition #2(b) is unduly burdensome. However, the Neighbors do not object to elimination of direct notification of the parties each year as long as the days and hours are clearly posted at the range by May 1 of each year and **are** not subject to change during the course of the year.

The Board hereby amends Board Permit Condition #2(b) to state as follows:

b. On or before July 15, 1997 and on or before January 1 of each year thereafter, the Permittee shall designate specific shooting days and **times** for the trap range for the upcoming year within the parameters of the above-designated shooting days and times and notify its members and the District Commission of such designated shooting days and times. On or before July 15, 1997 and on or before January 1 of each year thereafter, the Permittee shall post a sign in the pavilion at the trap range and at the Ludlow Town Offices containing notification of **the** designated shooting days and times. The **Permittee** shall not change the shooting days and times it has designated for a particular year.

IV. ORDER

1. The Board partially grants and partially denies the Club's Motion as set forth **below**.

2. The Board hereby amends Board Permit condition #2(a) as follows:

a Shooting may occur at the trap range during every month of the year but such shooting shall occur only on the following days and times:

(1) three weekdays per week from 3:00 p.m. until 6:00 p.m.;

(2) one weekend day per week **from** 12:00 p.m. until 6:00 p.m.; and

(3) on two of the above-designated days, evening shooting may occur from 6:00 p.m. until 8:00 p.m.

3. The Board hereby amends conclusions of law regarding Criterion 1 on page 18 of the Board Decision to affirmatively state that the Board's conclusions of law regarding Criterion 1 are binding and supersede the District Commission's conclusions of law regarding Criterion 1.

4. The Board hereby amends the Board Permit by adding condition #3 (and renumbering subsequent conditions) which states as follows:

3. Condition 8 of Land Use Permit #2S 1019 is hereby amended to state as **follows**:

By April 15, 1996, the Permittee shall implement all noise reduction measures outlined in Exhibit 14 pertaining to the trap range. The Permittee is not required to implement noise reduction measures outlined in Exhibit 14 pertaining to the rifle range.

5. The Board denies the Club's request for deletion of condition #13 of the District Commission Permit

6. The Board denies the Club's request for deletion of conditions #8, 11, and 14 of the District Commission Permit.

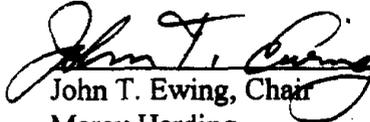
7. The Board denies the Club's request for deletion of conditions #2, 3, 4, and

12 of the District Commission Permit.

8. The Board hereby alters its conclusion on page 16 of the Board Decision which states that "the pavilion and lights have caused a substantial increase in the amount of shooting at the trap range above the historic amount of shooting." The Board substitutes the following language: "the pavilion and lights have resulted in a substantial increase in the amount of shooting at the trap range above the historic amount of shooting."
9. **The** Board denies the Club's request to alter Board Permit condition #2(a) by substituting one of the Club's three alternatives.
10. The Board hereby amends Board Permit Condition #2(b) to state as follows:
- b. On or before July 15, 1997 and on or before January 1 of each year thereafter, the Permittee shall designate specific shooting days and times for the trap range for the upcoming year within the parameters of the **above-**designated shooting days and times and notify its members and the District Commission of such designated shooting days and times. On or before July 15, 1997 and on or before **January 1** of each year **thereafter**, the **Permittee** shall post a sign in the pavilion at the trap range and at the Ludlow Town Offices containing notification of the designated shooting days and times. The Permittee shall not change the shooting days and times it has designated for a particular year.
11. To the extent that the Board grants the Club's Motion, the Board will reissue the Board Decision and Board Permit and incorporate the alterations, as set forth above, in bold type.

Dated at Montpelier, Vermont this 12th day of June, 1997.

ENVIRONMENTAL BOARD


John T. Ewing, Chair

Marcy Harding

Samuel Lloyd

William Martinez

Rebecca M. Nawrath

Steve E. Wright