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

Re: NJM Realty Limited Partnership
Land Use Permit #2W0312-EB (Revocation)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision, dated December 17, 1991, pertains to the revocation of a permit issued for a gravel pit in Newfane. As is explained below, the Environmental Board decides to revoke the permit subject to an opportunity to correct the violation.

I. SUMMARY OF PROCEEDINGS

On May 19, 1989, Olin J. Stephens III and Carol D. Stephens filed a petition to revoke Land Use Permit #2W0312 (the Permit), which was issued on April 22, 1976 to Stewart N. Lawrence and which authorized a gravel operation in Newfane.

On June 1, 1989, NJM Realty Limited Partnership, a successor-in-interest to Mr. Lawrence, filed a motion to dismiss. On June 6, NJM also filed an answer to the Stephens' petition. On that date, former Chair Leonard U. Wilson convened a prehearing conference.

On June 20, 1989, the District #2 Environmental Commission issued Land Use Permit Amendment #2W0312-1, which amended the Permit to state that NJM is the Permittee. On June 22, the Board issued a prehearing conference report.

At the parties' request, an opportunity was given to the parties to settle this matter. Following requests for resumption of the revocation process, former Chair Stephen Reynes convened a second prehearing conference on April 27, 1990. At the conference and in a prehearing conference report and order dated May 16, the Chair directed that the Board first decide the Permittee's motion to dismiss.

Following submissions by the parties, on June 29, 1990, the Board issued a memorandum of decision dismissing the Stephens' petition and stating that it was initiating revocation proceedings on its own motion. The Board also noted that parties had attached to their submissions a stipulation and decided on that basis to stay revocation proceedings to allow an opportunity for the Permittee to enter into an Assurance of Discontinuance with the State of Vermont pursuant to 10 V.S.A. § 8007. The matter was referred for negotiation to the State of Vermont Agency of Natural Resources, Department of Environmental Conservation, Division of Enforcement (the Enforcement Division).

On September 16, 1991, the Board notified parties that it was considering re-activating the revocation proceedings because no Assurance had yet been signed. On September 27, the Board issued a memorandum of decision stating that it was re-activating the proceedings and taking notice of various documents.

On October 22, 1991, the Town of Newfane filed a memorandum of law and a motion for an evidentiary hearing. On October 24, adjoining landowner Eileen Houston filed a memorandum of law. On October 24, the Permittee filed a memorandum of law to which it attached a proposed reclamation plan and a document concerning creating an escrow account to guarantee reclamation.

On October 30, 1991, the Board held oral argument in the City of Rutland, with the following parties participating:

The Permittee and Fitzpatrick Excavating and Crushing, Inc. by Timothy J. O'Connor, Esq.
The Town of Newfane by Raymond P. Perra, Esq.

After hearing argument, the Board recessed the matter and held a deliberative session.

On October 31, the Board issued a recess memorandum in which it solicited written comment from the Enforcement Division concerning its negotiations with the Permittee. On November 4, the Enforcement Division submitted a letter. On November 6, the Permittee filed a reply.

The Board **deliberated again concerning this matter on November 13, 1991. On that date, the Board, following a review of the record and the arguments presented in the case,** decided that this matter is ready for decision. The following findings of fact are based on evidence noticed by the Board and the proposed reclamation plan and escrow arrangement submitted by the Permittee. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied.

II. ISSUES

1. Whether, pursuant to 10 V.S.A. § 6090(c), the Board should revoke the Permit for noncompliance with Condition #3.

2. Whether, pursuant to Board Rule 38(A)(3), the Board should grant the Permittee further opportunity to correct the

violation.

3. Whether the Board should expand the scope of review to consider alleged violations which do not relate to compliance with Condition #3.

III. FINDINGS OF FACT

1. On August 22, 1976, the District #2 Environmental Commission (the District Commission) issued Land Use Permit #2W0312 (the Permit), which authorized Stewart N. Lawrence to operate a gravel pit in Newfane.

2. The Permit states that "[t]he project must be completed in accordance with the findings of fact and conditions set forth below."

3. Finding of Fact #3 supporting the Permit states:

> The entire tract of land is approximately 114 acres in size and is owned in fee simple by the applicant. Approximately 6 acres are involved in this project.

4. Finding of Fact #4A supporting the Permit states:

> This land will be rehabilitated in accordance with a plan to be developed by the applicant and the U.S. Conservation Service.

5. Condition #3 of the Permit states:

> The applicant shall work out with the Soil Conservation Service and a representative of the District Environmental Commission [a] rehabilitation plan, as well as an escrow arrangement to guarantee said rehabilitation prior to the opening of the pit.

6. The pit was opened without prior development of a rehabilitation plan or escrow arrangement in accordance with Condition #3.

7. In 1986, NJM Realty Limited Partnership (the Permittee) purchased the gravel pit authorized by the Permit. The

Permittee continued operation of the pit without developing a rehabilitation plan or escrow arrangement in compliance with Condition #3.

8. Fitzpatrick Excavating and Crushing, Inc. (Fitzpatrick) is the current operator of the pit and has been the operator for several years. On April 15, 1988, the Permittee received a check for $5,000.00 from Fitzpatrick which the Permittee agreed to hold in escrow until Fitzpatrick completes excavating the project site and restores it.

9. On June 20, 1989, the District Commission issued Land Use Permit Amendment #2W0312-1, which amended the Permit to name NJM Realty Limited Partnership as the Permittee.

10. On June 29, 1990, the Environmental Board initiated revocation proceedings based on several alleged violations, including allegations that the Permittee has excavated more than six acres on the project site and had not met Condition #3. On that date, the Board also stayed the proceedings to allow opportunity for the Permittee to enter into an Assurance of Discontinuance pursuant to 10 V.S.A. § 8007, and referred the matter for negotiation to the State of Vermont, Department of Environmental Conservation, Division of Enforcement (the Enforcement Division).

11. Subsequent to the Board's referral, negotiations occurred between Fitzpatrick and the Enforcement Division.

12. The Enforcement Division asserts that at some point during the negotiations concerning the Assurance, the Permittee informed the Enforcement Division it was in bankruptcy.[1]

13. Following review and investigation, on August 29, 1991, the Enforcement Division sent a proposed Assurance to the Permittee and Fitzpatrick. They subsequently rejected the Assurance because it contained a proposed penalty Of $5,250.00.

[1]The Board takes notice of the Enforcement Division's assertion pursuant to 3 V.S.A. § 810. This notice is not taken for the truth of the matter asserted, but only for the fact of the assertion.

14. On October 24, 1991, the Permittee submitted to the Board what it calls a rehabilitation plan and escrow arrangement.

15. The Permittee's proposed rehabilitation plan consists of a brief one-page text and a map entitled "Survey for Fitzpatrick Excavating and Crushing, Inc.," dated April 22, 1991.

16. The map shows an approximately six-acre excavated area as being within the existing gravel pit. It also shows a large area of the project site around the pit. The map portrays this large area around the pit as being excavated and extensively recontoured in the future. The future excavation area is approximately three times the size of the existing pit. Reclamation of the pit will occur as part of reclamation of the larger area. No phasing is proposed. The Permittee has not proposed a plan for reclaiming only the existing pit area.

17. The map also portrays a proposed access road running east out of the existing pit toward Route 30 and shows future excavation along that road. The map further depicts an existing access road running west out of the pit through. an existing ridge to River Road. The ridge is approximately 75 feet high and will be removed by the future excavation and recontouring.

18. The proposed rehabilitation plan does not include detail on where soil will be stockpiled or on stabilization of recontoured soils.

19. The proposed escrow agreement will be an account opened by the Permittee and Fitzpatrick. The initial deposit into the account will be the $5,000.00 described in Finding 8, above. In addition, Fitzpatrick will make quarterly deposits into the account of 5.03 for each yard of gravel removed from the pit. Withdrawals from the account will only occur over the joint signatures of the Permittee and Fitzpatrick.

IV. CONCLUSIONS OF LAW

A. Whether to Revoke

10 V.S.A. § 6090(c) provides:

> A permit may be revoked by the board in the event of violation of any conditions attached to any permit or the terms of any application, or violation of any rules of the board.

Rule 38(A)(2)(b) provides that one ground for revocation is a finding that:

> [T]he applicant or his successor in interest has violated the terms of the permit or any permit condition, the approved terms of the application, or the rules of the board.

Condition #3 of the permit was violated by the failure of the original applicant to have in place, prior to opening the pit, the required rehabilitation plan and escrow arrangement to guarantee that plan. Moreover, the successor-in-interest to the original applicant, the Permittee, bought the pit in 1986 and allowed its operation to continue for years without developing the required rehabilitation plan and escrow agreement. Accordingly, the Board revokes the permit.

The Permittee and Fitzpatrick argue that the Board should not revoke the permit because they submitted a proposed rehabilitation plan and escrow agreement to the Board on October 24, 1991. But this late filing, coming five years after the Permittee purchased the operation and fifteen years after the Permit was issued, does not moot the violation. The facts demonstrate that the pit has been in violation of Condition #3 since it opened many years ago. Thus; the October 24, 1991 submittal is not relevant to whether the Permit should be revoked. Instead, the submittal is relevant to the issue of correcting the violation, which is discussed immediately below.

B. Opportunity to Correct

Rule 38(A)(3) provides:

> Unless there is a clear threat of irreparable harm to public health, safety, or general welfare or to the environment by reason of the violation, the

> board shall give the permit holder reasonable opportunity to correct any violation prior to any order of revocation becoming final. For this purpose, the board shall clearly state in writing the nature of the violation and the steps necessary for its correction or elimination. These terms may include conditions, including the posting of a bond or payments to an escrow account, to assure compliance with the board's order. In the case where a permit holder is responsible for repeated violations, the board may revoke a permit without offering an opportunity to correct a violation.

The Permittee has already been given a lengthy opportunity to correct the violation by entering into an Assurance of Discontinuance pursuant to 10 V.S.A. § 8007. The Permittee and Fitzpatrick argue that the Board should not look disfavorably on the Permittee's failure to take advantage of this opportunity because the State of Vermont sought a penalty of $5,250 as part of the draft Assurance. They contend that this penalty amount was unreasonable.

The Board believes the penalty amount sought by the Enforcement Division was very reasonable. Under the law, the Secretary of Natural Resources (to whom the Division reports) has the authority to issue an order assessing a penalty of $10,000 per day up to a limit of $100,000 for a continuing violation such as the one at issue here. 10 V.S.A. §§ 8008, 8010(c). In addition, the Secretary or the Board may seek penalties of $25,000 per day in civil court for a continuing violation. Such penalties can, and may, still be sought regardless of this revocation proceeding.

Thus, in view of the 15 years during which the violation in question has continued, a $5,250 penalty cannot be called unreasonable. Accordingly, the Board considers the Assurance opportunity to have been a reasonable means for the Permittee to correct the violation.

However, the Board concludes that further opportunity to correct should be given because the Board infers that the Permittee left the violation allegations for Fitzpatrick to resolve rather than taking responsibility itself for achieving an Assurance. See Finding 11, above. If no further opportunity is given, Fitzpatrick will be placed in a 'difficult situation because of the Permittee's lack of action. The Board believes that the effect on Fitzpatrick of disallowing such further opportunity outweighs the Permittee's

inability to take advantage of the Assurance opportunity.

Nonetheless, in view of the lengthy period during which the pit has been in violation and the time allowed for achievement of an Assurance, the Board concludes that the opportunity to correct should be brief and strict. No later than January 3, 1992, the Permittee shall open an escrow account with a Vermont bank. An independent third party, not tied to the Permittee or Fitzpatrick except through the escrow account, shall be trustee of the account. As an initial payment on the account, the Permittee shall deposit the $5,000 received from Fitzpatrick which it claims to be holding in escrow. This amount **must be deposited by** January **3, 1992. The agreement creating the account shall provide that funds are to be disbursed only on approval of the trustee and only to reimburse the Permittee or Fitzpatrick for expenditures directly related to reclamation of excavated areas at the pit. The agreement shall provide means for such disbursement and for documented verification that the funds are going toward actual reclamation activities.**

Concerning the account, the Permittee shall provide to the Board the following documentation by January 3, 1992, under cover of sworn affidavit:

1. **A statement signed by an appropriate bank representative that the account has been opened and showing the amount deposited.**

2. **A copy of the escrow agreement.**

3. **The name, address, and telephone number of the trustee.**

4. **Sworn certification that the trustee has no ties to the Permittee and Fitzpatrick except for being trustee of the escrow account.**

Further, no **later than 60 days from the date of this decision, the Permittee shall provide to the Board the following:**

5. **A detailed statement of how much it will cost to reclaim the approximately six acres already excavated at the pit.**

6. **A statement signed by an appropriate bank representative showing funds in the escrow account**

in an amount equal to the amount called for in the statement of reclamation cost.

7. Adequate proof that no funds in the escrow account will be invaded by a bankruptcy trustee, or any other person, to discharge the Permittee's debts.

8. A revised reclamation plan including the following:

   a. Reclamation only of the six-acre area which has already been excavated.

   b. Complete reclamation of that area and a map showing finished contours throughout the existing pit.

   c. Detailed, step-by-step statements and maps concerning phasing of reclamation, stock-piling of soils, and soil stabilization.

   d. A schedule for reclamation of the existing pit.

9. A sworn affidavit as to whether excavation has occurred on the site beyond the edge of the existing pit shown on the April 22, 1991'survey. See Findings 15 and 16, above.

On filing of the required submissions by the Permittee, the Board will review them and determine whether they are adequate to correct the violation. The Board reserves the right to require the Permittee to take further action, or to allow the revocation order to become final, if it determines that the submissions are inadequate. If, however, the Board concludes that the submissions correct the violation, it will issue a written decision so stating which incorporates the submissions into the Permit. The Board cautions the Permittee that any approval of a proposed escrow arrangement will not mean that its obligation to reclaim the pit will be limited to the funds available in the escrow account. Instead, the Permittee's obligation will be to reclaim the pit in accordance with an approved plan even if such reclamation will cost more than the amount in the escrow account.

The Board is requiring the above submissions because the proposed escrow arrangement and rehabilitation plan submitted by the Permittee on October 24, 1991 are not sufficient to correct the violation. Specifically, the proposed escrow arrangement will be an account to which the Permittee and

Fitzpatrick will have access. The term "escrow," however, connotes that the account will be controlled by a third party. Black's Law Dictionary defines escrow in relevant part to mean:

> A scroll, writing, or deed, delivered by the grantor, promisor or obligor into the hands of a third person, to be held by the latter until the happening of a contingency or performance of a condition ....

Thus, the Board is requiring that the escrow account be overseen by an independent trustee who will reimburse for reclamation expenditures.

The escrow arrangement also does not provide any means for determining the total cost of reclaiming the existing excavated area, for disbursement of funds, or for verification that the funds are actually going toward reclamation. The Board considers these to be necessary components of an escrow arrangement to guarantee reclamation and therefore is requiring them.

Further, the proposed rehabilitation plan is not really a rehabilitation plan. Rather, it appears to be a plan for excavation and recontouring of a large portion of the project site, much of which is outside the existing six-acre excavated area.

The Board does not believe that such a plan is appropriate to correct the violation because the Permit limits the excavation to six acres. Specifically, the findings supporting the Permit state that approximately six acres are involved with the project and the Permit states that the project must be operated in accordance with the findings. Accordingly, the Board cannot approve a plan which involves excavation and recontouring outside of the six-acre excavated area. Instead, the Board will require a revised plan as set forth above. If the Permittee seeks to expand the excavated area beyond six acres, it must obtain a permit amendment from the District Commission.

The Board also is requiring that the Permittee submit a sworn affidavit concerning whether excavation has occurred on the site outside of the edge of the pit as shown on the April 1991 map. The reason for this requirement is to Verify that the edge of the pit is the limit of excavation. The Board reserves the right to assess whether excavation outside the

edge of the existing pit is a violation and to require, if necessary, correction of that violation, including, but not limited to, cessation of excavation and reclamation.

The parties will note that the Board is imposing a requirement concerning proof that the escrow account will not be invaded by a bankruptcy trustee. The reason for this is the Enforcement Division's assertion that the Permittee stated it was or is in bankruptcy. While the Board does not know for a fact that the Permittee is in bankruptcy, it is a fact that the Enforcement Division has made the assertion and the Board considers further investigation warranted. Consequently, the Board is requiring the Permittee to submit evidence sufficient to quell any doubts created by the assertion.

Finally, the Board is requiring that the Permittee place $5,000.00 in the escrow account up-front and quickly. The Board believes that such a requirement is warranted as a demonstration of good faith because of the lengthy period of the violation and the time allowed for negotiation of an Assurance.

C. Consideration of Other Alleged Violations

The Town of Newfane and adjoiner Eileen Houston request that the Board consider other alleged violations: (a) that the Permittee exceeded the six-acre limit in the Permit and (b) that the Permittee violated the stipulation between the parties cited by the Board in its decision of June 29, 1990. The Town seeks an eviden- tiary hearing on the alleged violation of the stipulation.

The Board denies these requests. The Permit limited the Permittee to "approximately" six acres. The alleged violation is based on the Permittee's April 1991 survey and the contention is only that the excavated area of the pit is currently 6.1 acres. The Board believes that 6.1 acres is "approximately" six acres.

Moreover, the stipulation filed by the parties has never been adopted by the Board and violation of the stipulation does not meet any of the enumerated grounds for revocation under Rule 38(A)(2).

V. ORDER

1. Land Use Permit #2W0312, as amended by Land Use Permit #2W0312-1, is revoked subject to an opportunity to correct the violation.

2. Upon failure of the Permittee to correct the violation as provided in the above decision, this revocation order shall become final.

3. The requests of the Town of Newfane and Eileen Houston to expand the scope of these proceedings are denied.

Dated at Montpelier, Vermont this 17th day of December, 1991.

ENVIRONMENTAL BOARD

Elizabeth Courtney, Chair
Ferdinand Bongartz
Terry Ehrich
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Arthur Gibb
Samuel Lloyd
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