

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

Re: Putney Paper Co., Inc.
Land Use Permit #2W0436-6-EB (Revocation - 2nd Petition)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to a second petition for revocation filed by Nathaniel Hendricks (the Petitioner) with respect to Land Use Permit Amendment #2W0436-6 (Amendment 6), authorizing Putney Paper Co., Inc. (PPC) to continue operation of its paper sludge landfill in Putney, Vermont.

The Petitioner alleges violations of Amendment 6. As explained below, the Environmental Board concludes that, with two exceptions, PPC has not violated Amendment 6. With regard to the two exceptions, PPC has already corrected any violations. Accordingly, the Board declines to revoke.

I. SUMMARY OF PROCEEDINGS

On October 1, 1991, the District #2 Environmental Commission issued Amendment 6, authorizing PPC to continue operation of its paper sludge landfill. The landfill previously had been authorized by Land Use Permit Amendment #2W0436-5, issued December 2, 1983 (Amendment 5).

On June 30, 1993, the Petitioner, an adjoining landowner, filed a petition to revoke Amendment 6. This petition will be referred to as the "First Petition."

Proceedings ensued concerning the First Petition. Those proceedings resulted in Findings of Fact, Conclusions of Law, and Dismissal Order #2W0436-6-EB (Altered), issued June 30, 1995 (the First Petition Decision). The Petitioner filed a motion to alter the First Petition Decision, which the Board denied by memorandum of decision issued October 4, 1995.

Meanwhile, on June 16, 1995, the Petitioner filed a second petition for revocation (the Second Petition). The Second Petition alleges that the Petitioner is directly affected by violations of Condition #1 of Amendment 6, which requires conformance with the supporting findings of fact and the approved plans and exhibits.

The Second Petition also alleges that the plans for Amendment 5 are incorporated in Condition #1 of Amendment 6 because, in applying for the extension of Amendment 5 which became Amendment 6, PPC included all plans approved in Amendment 5.

The Second Petition further alleges ten specific violations of Condition #1, which are discussed below.

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On August 21, 1995, Board Chair John T. Ewing convened a prehearing conference. During the conference, the Petitioner filed a letter which included subpoena requests.

On September 22, 1995, the Chair issued a preheating conference report and order which is incorporated by reference.

During the period October through December 1995, proceedings and deliberations occurred regarding the Petitioner's subpoena requests and a motion for summary judgment or, in the alternative, motion to dismiss, and motion for sanctions filed by PPC.

On January 9, 1996, the Board issued a memorandum of decision which is incorporated by reference. In the memorandum, the Board denied PPC's various motions and the Petitioner's subpoena requests, and set the matter for hearing.

During February 1996, parties filed **prefiled** direct and rebuttal testimony and exhibits, and lists of witnesses and exhibits. On March 6, 1996, parties filed proposed findings of fact and conclusions of law and written **evidentiary** objections. With its March 6 filing, PPC included a request to take notice of nine documents.

On March 12, 1996, the Chair convened a second prehearing conference in Montpelier, with the Petitioner and PPC participating by telephone. In relevant part, the results of the conference were as follows:

- a. The parties agreed to a schedule for the hearing on March 13, 1996.
- b. The Petitioner requested that the Board take a site visit. The Chair determined that the Board would decide whether to take a site visit after it heard the testimony.
- c. The Chair overruled all evidentiary objections. Exhibit P12 was admitted with limiting instructions to be given to the Board.
- d. Over the Petitioner's objection to the first five of the documents, the Chair ruled that the Board should take notice of the nine documents listed in PPC's March 6 request. Parties would be given an opportunity to address the Board on these documents.
- e. With the agreement of parties, the Chair ruled that the permits, findings of fact, and applications for Amendments 5 and 6 are in the record.

- f. The "approved" Exhibit #6 from the file for Amendment 6 would be marked as Exhibit H12 in this proceeding.

On March 13, 1996, the Board convened a hearing in Putney, with the following parties participating:

PPC by Peter D. Van Oot, Esq.
The Petitioner, pro se

During the hearing, the Chair stated his evidentiary rulings on the record and gave limiting instructions with respect to Exhibit P12. In addition, after hearing from the parties, the Board took notice of the documents in PPC's March 6 request, with limiting instructions concerning the first five of the documents. The Board also took testimony and heard opening and closing arguments. The Board determined that a site visit was not necessary. The Board further granted the Petitioner's request to file supplemental proposed findings of fact and conclusions of law. The Board then conducted a preliminary deliberation and gave drafting instructions to staff, subject to review of the supplemental proposed findings.

On March 20, 1996, the Board issued a recess memorandum. On March 25, the parties filed supplemental proposed findings of fact and conclusions of law. Subsequently, the Board reviewed a draft decision and the supplemental findings. On April 3, 1996, the Board approved the draft with modifications. This matter is now ready for decision. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied.

II. ISSUES

The issues concern the Petitioner's allegations that PPC has violated Condition #1 of Amendment 6. The allegations are succinctly and clearly stated in the Second Petition. They are summarized as follows:

1. exceedance of an alleged limit on sludge disposal rate of 175 cubic yards per **Week;**
2. exceedance of an alleged limit on total sludge disposal of 41,000 cubic yards;
3. failure to deposit sludge in lifts 25 feet wide, by 100 feet long, no more than two feet deep and covered with six inches of soil;

4. failure to maintain a separation distance of 25 feet between the sludge and water;
5. existence of **ponded leachate** and runoff at the site in alleged violation of the findings of fact;
6. excavation in an area marked "Inactive Area" on the approved exhibits;
7. exceedance of cut limits and maximum approved elevations;
8. removal of earth resources in violation of the findings of fact;
9. construction of infiltration ditches; and
10. dumping of sludge in an area marked "to be maintained for agriculture" on the approved plans.

III. FINDINGS OF FACT

1. On October 1, 1991, the District #2 Environmental Commission issued Amendment 6, authorizing PPC to continue operation of its paper sludge landfill.--The **landfill** previously had been authorized by Land Use Permit Amendment #2W0436-5, issued December 2, 1983 (Amendment 5).
2. **Neither Amendment 6 nor Amendment 5 includes a condition, finding of fact, or conclusion of law expressly limiting the annual or total volumes of sludge to be disposed of at the landfill.**
3. Condition #1 of Amendment 6 provides:

The project shall be completed as set forth in Findings of Fact and Conclusions of Law #2W0436-6, in accordance with the plans and exhibits stamped 'Approved' and on file with the District Environmental Commission, and in accordance with the conditions of this permit.
4. The approved exhibits to Amendment 6 include the application for Amendment 6. In a June 24, 1991 cover letter accompanying the application for Amendment 6, PPC represented that:

The papermill sludge landfill has and continues to be

operated within the engineering design limits contained in the original application. The only change that has occurred over the years is a reduction of the amount of sludge disposed due to the installation of more efficient equipment at the paper mill.

In support of the claim of no changes from the original conditions, the attached topographic site map clearly shows the elevations of the site as they existed in November of 1990.

5. In Schedule B of the application for Amendment 6, PPC stated:

Putney Paper Company obtained their original Act 250 permit in 1983 (attachment A) which, as explained in the cover letter, has expired. This application responds to the same criteria the original application did and *will include the same exhibits from the 1983 Permit*. There have been no deviations from the original design or process since the 1983 application was submitted.

(Emphasis added.)

6. The approved plans for Amendment 5 include Exhibit #2-Revised, which has been marked as Exhibit #H2 in this proceeding. Those plans are entitled "**Putney Paper Company Landfill Design, Layout & Operation,**" are stamped approved November 29, 1983, and consist of three sheets. They will be referred to as "the Amendment 5 Plans. "
7. Sheet 1 of the Amendment 5 Plans contains a "Cell Detail" which includes the statement: "175 cubic yards per week to be deposited in lifts 25' by 100' and 2' thick then covered with 6" of topsoil." At a rate of 175 cubic yards per week, the maximum yearly disposal would be 9,100 cubic yards of sludge.
8. In Schedule B of the Amendment 6 application, PPC stated:

Putney Paper generates approximately 10,000 to 12,000 cubic yards of sludge on an annual basis. The sludge is hauled to the disposal area by a Company owned truck and is dumped into an excavated area licensed by the Agency of Natural Resources.

9. Between 1991 and 1995, PPC's average disposal rate at its sludge landfill was 11,493 cubic yards of sludge annually. Calculated on an average weekly basis, such rate was 221 cubic yards.
10. Sheet 3 of the Amendment 5 Plans states the following concerning "Volumes": "Total Cut 125 yd.³" and "Total Fill 41,000 yd.³"
11. The Amendment 5 Plans shows that, upon completion, the depicted landfill cell will be above the grade which existed at the time the Plans were prepared. The credible evidence is that the reference to "Total Fill 41,000 yd.³" on Sheet 3 states an additional volume of fill to occur above that existing grade, and not the total volume of sludge to deposited in the cell.
12. Condition #4 of Amendment 5 provides:

This permit hereby incorporates all of the conditions of the Disposal Facility Certification issued on November 23, 1983 by the Environmental Engineering Division, Agency of Environmental Conservation. If there is no substantial change, the Certification may be amended without following Act 250 procedures.
13. On August 24, 1984, Julie Hackbarth, an appropriate official from the Agency of Environmental Conservation (now Agency of Natural Resources), issued a letter to William Aloisi of PPC, stating in **relevant part**:

The Agency grants Putney Paper permission to increase the sludge lift thickness from two feet to a maximum of eight feet before covering with soil. This does not represent a substantial change and therefore a modification to the Disposal Facility Certification is not -necessary.
14. Prior to applying for Amendment 6, PPC began depositing sludge in the landfill in lifts which are eight feet thick.
15. The record contains no credible evidence that the increase in lift thickness had or has the potential for significant impact on one or more of the criteria at 10 V.S.A. § 6086(a).
16. Sheet 1 of the Amendment 5 Plans includes a "Hydraulic Gradient" diagram

which states a minimum separation distance of 25 feet between the bottom of the depicted cell and "water." The credible evidence is that this separation is to be from *groundwater*. The record contains no credible evidence that the cell is within 25 feet of groundwater.

17. With respect to Criterion I(B) (waste disposal) of 10 V.S.A. § 6086(a), Finding of Fact #2 supporting Amendment 6 states: "Runoff adequately infiltrates on the site."
18. **Ponded** surface water has occurred within the waste impoundment at the landfill site. This occurs because the sludge underneath is relatively impermeable.
19. PPC has constructed infiltration trenches which remove the **ponded** water from the waste impoundment to another location at the landfill site. At this other location, the water adequately infiltrates the soil.
20. The above infiltration trenches were neither approved nor prohibited as part of Amendment 5 or Amendment 6. On April 21, 1995, Bryan Harrington, an appropriate official from the Agency of Natural Resources (ANR), approved (with conditions) the infiltration trenches as part of a **ponded** water abatement plan;
21. The credible evidence is that the infiltration trenches have a positive, rather than a **negative, water quality impact**. With respect to other Act 250 criteria at 10 V.S.A. § 6086(a), there is no credible evidence in the record that the infiltration trenches had or have the potential for significant impact.
22. Sheet 2 of the Amendment 5 Plans depicts an approximately two-acre area of the landfill site as "inactive."
23. **PPC has excavated** material from the area marked as "inactive" on Sheet 2 of the Amendment 5 Plans.
24. The approved plans for Amendment 6 include an Exhibit #6 which has been marked as Exhibit #H12 in this proceeding. This exhibit consists of one page, is entitled "Putney Paper Company Papermill Sludge Landfill Site Plan," and is stamped approved September 20, 1991. The exhibit will be referred to as "the Amendment 6 Plan."
25. The Amendment 6 Plan depicts the area marked as "inactive" on the

Amendment 5 Plans but does not mark the area as "inactive." At the time of the site visit and hearing by the District #2 Commission on Amendment 6, the "inactive area" had been substantially excavated. The contours shown on the Amendment 6 Plan reflect such excavation.

26. There is no credible evidence in this record that the **landfill** has exceeded any cut limits or maximum approved elevations shown on the approved plans.
27. In the findings of fact supporting Amendment 5, under Criterion 9(E) (extraction of earth resources) of 10 V.S.A. § 6086(a), the District #2 Commission found that "[t]he applicants have agreed that no earth resources will be removed as part of this project without an amendment to the permit."
28. Commencing at least in 1984, on several occasions both before and after the issuance of Amendment 6, PPC removed earth resources from the **landfill** site for use in its other operations. The total amount of earth resources removed was small.
29. On March 10, 1995, Assistant District #2 Coordinator Julia **Schmitz** directed Turk Ellis, Environmental Manager for PPC, to cease removing earth resources from the landfill site. PPC has complied with this directive. There is no credible evidence in the record that additional action is required to correct the violation.
30. **Sheet 2 of the Amendment 5 Plans depicts an "Area to be maintained as agriculture."** There is no credible evidence in the record that PPC has dumped sludge in this area.

IV. CONCLUSIONS OF LAW

A. Revocation Generally

This proceeding is a petition for revocation. Concerning revocation, 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.

Interpreting and implementing this provision, the Board has promulgated EBR 38(A), which provides in relevant part:

A petition for revocation of a permit under 10 V.S.A. § 6090(c) may be made to the board by any person who was party to the application, by any adjoining property owner whose property interests are directly affected by an alleged violation, by a municipal or regional planning commission, or any municipal or state agency having an interest which is affected by the development or subdivision. The petition shall consist of an original and 10 copies of the petition which shall include a statement of reasons why the petitioner believes that grounds for revocation exist. The board may also consider permit revocation on its own motion.

(1) Procedure. The board will treat a petition for revocation as an initial pleading in a contested case, in accordance with the notice and hearing procedures of Rule 40 of these rules.

(2) Grounds **for revocation.** **The** board may after hearing revoke a permit if it finds that: (a) The applicant or his representative willfully or with gross negligence submitted inaccurate, erroneous, or materially incomplete information in connection with the permit application, and that accurate and complete information may have caused the district commission or board to deny the application or to require additional or different conditions on the permit; or (b) **the 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;** or (c) the applicant or his successor in interest has failed to file an affidavit of compliance with respect to specific conditions of a permit, contrary to a request by the board or district commission.

(3) Opportunity to correct a violation. 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.

(Emphasis added.)

In the First Petition Decision, the Board held that a revocation petitioner has the burden of proof, including both the burdens of production and persuasion. Re: Putney Paper Co., Inc., #2W0436-6-EB (Revocation), Findings of Fact, Conclusions of Law, and Dismissal Order (Altered) at 12-13 (June 30, 1995).

B. The Alleged Violations

The Board examines each of the ten alleged violations in turn.

1. Exceedance of Alleged Weekly Sludge Disposal Limit. The Petitioner claims that the Amendment 5 Plans limited the sludge disposal rate to 175 cubic yards per week. The Petitioner also claims that, since the application for Amendment 6 states that it includes the Amendment 5 Plans, conformance with the Amendment 5 Plans is required by Condition #1 of Amendment 6. Therefore, the Petitioner claims that PPC violated Condition #1 by disposing of more than 175 cubic yards of sludge per week.

The Board concludes that the Amendment 5 Plans do form part of the approved plans and exhibits with which Condition #1 of Amendment 6 requires conformance. This is because Schedule B of the application for Amendment 6 clearly refers to and incorporates the plans submitted with Amendment 5.

However, this does not end the matter. The **requirement** to conform to the Amendment 5 Plans must be construed within the whole context of Amendment 6, including its express permit conditions, findings of fact, conclusions of law, and the other submitted plans and exhibits.

In this regard, Schedule B of the application for Amendment 6 not only incorporates the Amendment 5 Plans but also states a sludge disposal rate of 10,000 to 12,000 cubic yards per year. This rate is irreconcilable with the concept of a weekly limit of 175 cubic yards because that weekly limit results in a yearly limit of 9,100 cubic yards. The express conditions, findings, and conclusions of Amendment 6 do not resolve this conflict, because they contain no discussion of a weekly or yearly limit on the rate of sludge disposal.

To resolve the conflict, the Board has turned to rules of statutory construction, which it will apply by analogy. One such rule is that, where two statutes conflict, the later-enacted statute is given effect. Montgomery v. Brinver Corn., 142 Vt. 461, 464 (1983).

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Schedule B, submitted with the application for the 1991 Amendment 6, was submitted and approved many years later than the Amendment 5 Plans. The Board therefore concludes that the disposal rate expressly stated in Schedule B should be given effect over the rate stated on the Amendment 5 Plans.

As found above, PPC's disposal rate between 1991 and 1995 is 11,493 cubic yards per year. This rate is within the Schedule B statement of 10,000 to 12,000 cubic yards annually. Accordingly, with respect to the Petitioner's first allegation, PPC has not violated Condition #1.

2. Alleged Limit on Total Sludge Disposal. Based on the foregoing findings of fact, the Board concludes that the notation "Total Fill 41,000 yd.³" on the Amendment 5 Plans was and is not a limit on total sludge disposal.

3. Use of Lifts Greater Than Two Feet Deep. Based on the foregoing findings of fact, the Board concludes that PPC's use of lifts which exceed a two-foot depth is not a violation of Condition #1 of Amendment 6 because: (a) Condition #4 of Amendment 5 allowed changes to the sludge landfill's ANR certification, without further Act 250 procedures, if such changes do not constitute a "substantial change"; (b) ANR approved PPC's use of lifts with an eight-foot depth, prior to Amendment 6; and (c) the Board is not persuaded that the use of eight-foot lifts constitutes a substantial change under EBR 2(G).

4. Alleged Failure to Maintain 25-Foot Separation Distance. Based on the foregoing findings of fact, the Board concludes that the required 25-foot separation distance is to *groundwater*, and the Board is not persuaded that such requirement has been violated.

5. Existence of Pondered Leachate and Runoff. Condition #1 of Amendment 6 requires conformance with the findings of fact and, with respect to Criterion I(B) (waste disposal), finding of fact #2 supporting Amendment 6 states that "[r]unoff adequately infiltrates on the site."

The Petitioner has proved that **pondered** water has occurred within the sludge landfill's waste impoundment. Clearly **pondered** water cannot be considered to adequately infiltrate the soil. PPC nonetheless disputes that the **pondered** water results from runoff.

However, regardless of whether the **pondered** water can be considered runoff, it is clear that the ponding of water has been corrected. Specifically, with ANR's approval, PPC has constructed infiltration trenches which remove the **pondered** water

from the waste impoundment to another location at the landfill site. At this other location, the water adequately infiltrates the soil. Accordingly, to the extent the ponding of water within the waste impoundment constitutes a violation of Condition #1, the Board declines to revoke Amendment 6 because any violation has been corrected.

6. Excavation in "Inactive Area." Based on the foregoing findings of fact, the Board concludes that excavation in the area marked "inactive" on the Amendment 5 Plans is not a violation of Condition #1 of Amendment 6. This is because the later-submitted Amendment 6 Plan depicts the area as excavated, and the Amendment 6 Plan was approved on issuance of Amendment 6.

7. Exceedance of Cut Limits and Maximum Approved Elevations. Based on the foregoing findings of fact, the Board is not persuaded that PPC violated Condition #1 of Amendment 6 with respect to this allegation.

8. Removal of Earth Resources. Finding of Fact #9(E) supporting Amendment 5 states that "[t]he applicants have agreed that no earth resources will be removed as part of this project without an amendment to the permit." Continued adherence to this finding of fact is implicit in PPC's representation, in the application for Amendment 6, that no changes had occurred from the landfill operation as permitted in Amendment 5. Such adherence is therefore brought into Condition #1 of Amendment 6 through that condition's requirement to conform to the exhibits, which include the Amendment 6 application.

Based on the foregoing findings of fact, the Board concludes that PPC violated Condition #1 of Amendment 6 by removing a small amount of earth resources from the landfill site for use in its other operations. However, PPC has ceased such removal, and there is no credible evidence that additional actions are necessary to correct the violation. Accordingly, with regard to this allegation, the Board declines to revoke Amendment 6 because the violation has been corrected.

9. Construction of Infiltration Trenches. Based on the foregoing findings of fact, the Board concludes that the construction of infiltration trenches does not constitute a violation of Condition #1 because of the totality of the following: (a) the trenches were constructed to abate the ponded water **within** the waste impoundment, and therefore constitute corrective action; (b) the credible evidence is that the trenches have a positive, and not a negative, effect on water quality; and (c) there is no credible evidence in this record that the trenches have the potential for significant impact on the other criteria at 10 V.S.A. § 6086(a).

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10. Dumping Sludge in an "Agricultural Area." Based on the foregoing findings of fact, the Board is not persuaded that PPC violated Condition #1 of Amendment 6 with respect to this allegation.

V. ORDER

1. With respect to Allegations 1 through 4, and 6, 7, 9, and 10 of the Second Petition, PPC has not violated Condition #1 of Amendment 6.

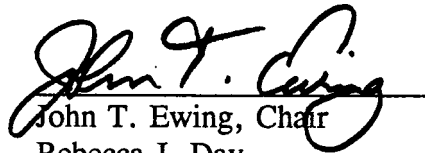
2. Concerning Allegation 5 of the Second Petition, to the extent there was a violation, the violation has been corrected.

3. With regard to Allegation 8 of the Second Petition, PPC violated Condition #1 of Amendment 6 and has corrected the violation.

4. The Board declines to revoke Amendment 6.

Dated at Montpelier, Vermont this 4th day of April, 1996.

ENVIRONMENTAL BOARD



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