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

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

MEMORANDUM OF DECISION

This decision pertains to a motion for summary judgment, or in the alternative, dismissal and a motion for sanctions filed by Putney Paper Co., Inc. (PPC) with respect to a second petition for revocation filed by Nathaniel Hendricks (the Petitioner). The decision also pertains to a subpoena request filed by the Petitioner, who seeks revocation of Land Use Permit Amendment #2W0436-6 (Amendment 6), authorizing PPC to continue operation of its paper sludge landfill.

As explained below, the Environmental Board concludes that the motions must be denied. The Petitioner has filed a petition for revocation which makes sufficient allegations under 10 V.S.A. § 6090(c) and Environmental Board Rule (EBR) 38(A) and no legal authority of the Board supports PPC's motions. The Board also denies the subpoena request.

I. BACKGROUND

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).

Amendment 6 was not appealed to the Environmental Board within 30 days pursuant to 10 V.S.A. § 6089(a) and Environmental Board Rule (EBR) 40(A).

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 that the sludge landfill "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."

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.

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 prehearing conference report and order which is incorporated by reference.

On October 4, 1995, PPC filed a motion for summary judgment or, in the alternative, motion to dismiss, and motion for sanctions. PPC also filed a response to the subpoena requests.

On October 18, 1995, the Petitioner filed a response to PPC's motions and a reply concerning the subpoena requests.

The Board deliberated on November 29, 1995. On December 1, the Board issued a status update. On December 20, the Board deliberated further.

II. DISCUSSION

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 hear&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 term 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.

(Emphasis added.)

EBR ***38(A)(l)*** refers to, among other items, the hearing procedures stated in EBR ***40.*** In relevant part, EBR 40(A) states that an appellant "will be given a de novo hearing ...."

EBR 38(A)(1) also states that a petition for revocation is a "contested case." The Vermont Administrative Procedure Act (APA), 3 V.S.A. Chapter 25, applies to contested cases before administrative agencies such as the Board. 10 V.S.A. § 6002; 3 V.S.A. § 814. In relevant part, the APA provides: "In a

contested case, ***all parties shall be given an opportunity for hearing*** after reasonable notice." 3 V.S.A. § 809(a) (emphasis added).

These provisions demonstrate the following principles which are relevant to consideration of PPC's motions:

(1) That a petition for revocation needs to allege sufficient grounds for revocation;

(2) That among those grounds are the violation of permit conditions or the approved terms of an application; and

(3) That the Board must hold hearings on sufficient petitions for revocation.

B. Sufficiency of Allegations

The Petitioner alleges violations of Condition #1 of Amendment 6. The allegations are succinctly and clearly stated in the Second Petition. They relate to the following:

(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 violation of the **findings of fact;**

(6) excavation in an area marked "Inactive Area" on the approved exhibits;

(7) exceedance of 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.

The Petitioner further alleges that he is an adjoining property owner directly affected by the violations. The Petitioner alleges pollution of the water supply on his adjoining property, and that the violations have a direct bearing on such pollution.

Accordingly, the Petitioner has filed a sufficient petition for revocation under 10 V.S.A. § 6090(c). He alleges violations of a permit condition or of the approved terms of an application. He is an adjoining property owner who claims to be directly affected. Therefore, under the terms of EBR 38(A) and the APA, the Petitioner is entitled to a hearing to prove his allegations.

C. Motion for Summary Judgment or Motion to Dismiss

Despite the sufficiency of the petition, PPC makes various other arguments in an attempt to keep this matter from going to hearing. As discussed below, those arguments are without legal merit.

1. Summary Judgment

The Petitioner's first argument is that it is entitled to "summary judgment" under Vermont Rule of Civil Procedure (VRCP) 56. "Summary judgment" is a procedure available in the courts to obtain dismissal without trial.

On motions for summary judgment, the Supreme Court has stated that the moving party must satisfy a two-part test. First, the moving party must establish that "no genuine issues of material fact exist." Second, it must establish that it is entitled to judgment as a matter of law. Kelly v. Town of Barnard, 155 Vt. 296, 299 (1990). The moving party (in this case PPC) has the burden of proof and the non-moving party (the Petitioner) must be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue of material fact exists. Price v. Leland, 149 Vt. 518,521 (1988).

There is at least one significant flaw in PPC's motion. The VRCP apply *only* to proceedings in superior or district court. VRCP 1. *It is well-settled under Vermont law that the VRCP do not apply to administrative proceedings such as those before the Board.* Condosta v. Dept. of Social Welfare, 154 Vt. 465, 467 (1990);

International Association of Firefighters v. Montpelier, 133 Vt. 175, 177 (1975). Accordingly, the VRCP do not provide the Board with authority.

PPC argues around this by pointing-to the First Petition Decision, in which the Board turned to the VRCP for guidance. PPC fails to understand a critical distinction: The *Board tumed to the VRCP for guidance only in making decisions which it otherwise had the authority to make.* Specifically, the Board, after hearing the Petitioner's direct evidence, dismissed the First Petition under EBR 18(D) for failure to prove grounds for revocation under EBR 38(A). In that case, the Board turned to the VRCP for guidance concerning what standard it should use in deciding whether the required showing under EBR 38(A) had been made. Importantly, it was not the VRCP which provided the authority for dismissal. Instead, it was the duly adopted Board Rules: 18(D), which provides for dismissals, and 38(A), which states the requirements for showing grounds for revocation.

In contrast, here PPC asks the Board to issue a "summary judgment." There is no such mechanism specified in the Board Rules. Moreover, no such procedure is set out in the Board's enabling statute, 10 V.S.A. Chapter 151 (Act 250) or in the APA. Instead, as discussed above, the applicable statutes and rules, call for a hearing when a sufficient petition for revocation is filed.

Administrative boards only have the powers granted to them by law. 3 V.S.A. § 203. In view of the complete absence of authority for granting "summary judgment," the motion for summary judgment must be denied.'

2. Motion to Dismiss

PPC asks in the alternative that the Board treat its claims as a motion to dismiss. However, its claims do not withstand analysis no matter what they are called.

a. Party Status

PPC argues that the Boar&should dismiss this petition because the

'*By stating that the Board has no authority to grant summary judgment, the Board does not mean to imply that such judgment would be granted if authority existed.*

Petitioner does not qualify for party status under EBR 14, the Board's party status rule.

EBR 14 is irrelevant to dismissal of this proceeding. The right to bring a petition for revocation is governed by EBR 38(A) which, in relevant part states that petitions for revocation may be filed by "any adjoining property owner whose property interests are directly affected by an alleged violation."

The Petitioner claims to be an adjoining property owner, a claim that PPC nowhere disputes.

The Petitioner also claims that he is directly affected by the violations. PPC appears to dispute this claim. This dispute is based on prior proceedings such as the First Petition Decision in which the Board found that he had not proved that groundwater from PPC's landfill moves toward his adjoining property.

Thus, PPC's most significant argument on "party status" is based on a decision in a prior proceeding. The argument is not based on the current proceeding, which has not yet gone to a hearing during which evidence could be taken on the actual effect on the Petitioner's property.

Since it is based on the prior proceeding, PPC's argument on "party status" can only prevail if, as PPC contends, the Second Petition is barred under the doctrine of res judicata, a finality doctrine which governs the impact of prior proceedings on subsequent proceedings. This contention is examined below, in the next section.

Before proceeding to discuss the res judicata claim, the Board will discuss one additional contention made by PPC in its party status discussion. Specifically, PPC attempts to support its party status contention by stating that the Petitioner's allegations are based on "irrelevant plans."

The Petitioner alleges that PPC has violated plans submitted in connection with Amendment 5, on which the Petitioner claims PPC relied in the application for Amendment 6. That application was made for the purpose of extending Amendment 5.

PPC contends that the plans for Amendment 6 "supersede" the plans for Amendment 5. However, this contention is not sufficient to prevent a hearing because, at best, the contention merely shows that PPC disputes the factual

allegation made by the Petitioner.[2] Factual disputes are resolved after review of evidence submitted at hearing.

Moreover, PPC's "supersedure" claim is not supported by any language in Amendment 6. Instead, the findings of fact supporting Amendment 6 describe the authorized project as "the renewal of an expired Act 250 Land Use Permit for the continued use of the Putney Paper Company sludge landfill."

b. Res Judicata

"Res judicata" means "thing decided." It is doctrine which promotes finality in adjudicative proceedings. The doctrine only applies if the parties, subject matter, and causes of action are identical or substantially identical with those of the prior proceeding. Berisha v. Hardy, 144 Vt. 136, 138 (1984).

Res judicata may be applied to proceedings before administrative agencies but may be relaxed in the face of important policy or practical considerations. Town of Springfield, Vermont v. Environmental Board, 521 F.Supp. 243 (1981). In the context of administrative proceedings, the Vermont Supreme Court has cautioned that res judicata and its variant, collateral estoppel, are not to be considered "inflexible rules of law." In re Application of Carrier, 155 Vt. 152, 15'7, 158 (1990).

PPC's res judicata claim is based primarily on the First Petition Decision, which involved the same parties and which was a revocation petition concerning Amendment 6. However, PPC's claim fails because the Petitioner alleges entirely different causes of action in the Second Petition.[3]

As stated above, the Second Petition concerns violations of Condition #1

[2]*The Board notes that this dispute would be a 'genuine issue of material fact" sufficient to defeat PPC's motion for summary judgment, even if such granting such motions was within the Board's authority.*

[3]*To the extent that PPC's res judicata claim, or the above-discussed finality aspects of its party status claim, rely on other proceedings, such claims are clearly without merit because there have been no prior revocation proceedings on Amendment 6 besides the First Petition.*

of Amendment 6, which incorporates the plans and exhibits submitted by PPC to the District Commission. The violations relate to many matters, including but not limited to the alleged exceedance of a limit on sludge disposal of 175 cubic yards per week, an alleged failure to maintain a required separation distance to groundwater, and alleged dumping of sludge in an area marked "to be maintained for agriculture" on the approved plans.

In contrast, the First Petition Decision did not involve violations of Condition #1. Instead, it involved an alleged violation of Condition #5, regarding PPC's obtaining an interim certification, and alleged failures to submit information to the District Commission in connection with Amendment 6 regarding: the presence of dioxin in sludge, 1986 test results, a 1989 preliminary assessment of the so-called Blood Farm, and intermittent streams on the Blood Farm site.

Thus, the alleged violations in the current petition are completely new. They were not ruled upon in the First Petition Decision.

PPC argues that these differences do not matter, relying heavily on a Supreme Court case which states that:

> Under res judicata, "a final judgment on the merits bars further claims by parties or their privies *based on the same cause of action.* ... Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.

Fitzgerald v. Fitzgerald, 144 Vt. 5549, 553 (1984), quoting Brown v. Felsen, 442 U.S. 127, 131 (1979) (emphasis added).

The fatal weakness in this argument is that it is based on the presence of the same cause of action. The Supreme Court has stated the test for deciding if the same cause of action is present: "For res judicata purposes, the cause of action is the same *if the same evidence will support the action in both instances."* Hill v. Grandey, 132 Vt. 460, 463 (1974).

On the face of the Petitioner's allegations in this proceeding, it is clear that they will have to be supported by different evidence from what would have been needed to support the First Petition. For example, in this proceeding, the Petitioner will need to prove that Amendment 6 limits PPC's sludge disposal rate to 175 cubic yards per week and that such limit has been exceeded. Such

information would have been entirely irrelevant to whether PPC timely obtained an interim certification or failed to submit information in connection with Amendment 6.

Based on the foregoing, dismissal of this matter is not warranted on the basis of res judicata. In addition, the related portions of PPC's party status claim also do not warrant dismissal.

c. Laches

PPC argues that this matter should be dismissed under the doctrine of "laches."

This doctrine was developed by the courts under their inherent equitable powers. The Supreme Court describes the doctrine thus:

> Laches is the failure to assert a right for an unreasonable and unexplained period of time when the delay has been prejudicial to the adverse party, rendering it inequitable to enforce that right.

Stamato v. Quazzo and Ada Chester, Inc., 139 Vt. 155, 157 (1980).

The Petitioner counters that he was not aware of the alleged violations presently at issue at the time he filed the First Petition. He also contends that, as a matter of policy, laches should not be applied to permit violations because such undermines the responsibility of permittees to comply. He further contends that laches is not applicable because this proceeding is not one to enforce a personal right but rather to enforce a permit.

This board is not a court. Unlike a court, it does not possess equitable powers. As stated above, the Board is limited to those powers assigned to it by law.

The Petitioner cites no authority in law for an administrative body such as the Board to bar a proceeding on the basis of laches. Accordingly, dismissal of this matter on such basis is not warranted?[4]

[4] ***Even if laches were applicable, it appears that the doctrine would not result in dismissal of this matter without a hearing because the relevant facts are in dispute. Such include whether the Petitioner was aware of the alleged violations at the time the First Petition was filed.***

D. Motion for Sanctions

PPC moves for monetary sanctions against the Petitioner under VRCP 11, claiming that the Petitioner filed this petition for the purposes of harassment. PPC claims that the Board can sanction the Petitioner based on the case of In re Decato Brothers, Inc. 149 Vt. 493 (1988).

Decato Brothers does not provide the Board with authority to impose a monetary sanction. That case merely states that an administrative agency has such "incidental, implied power as may be needed" for the agency to exercise the powers assigned to it by law. Id. at 495.

The imposition of sanctions is a serious matter. There is no authority in Act 250 for the Board to impose sanctions. Moreover, such imposition cannot be said to be an "incidental" power which is necessary to achieve any of the tasks expressly assigned to the Board in Act 250.

PPC may or may not have grounds to feel harassed. PPC may or may not deserve sanctions. Regardless, the Board has no power to grant PPC's motion.

E. Subpoena Requests

The Petitioner's initial subpoena request (filed August 21, 1995) concerned three witnesses. In his October 18, 1995 filing, he reduced his requests to one witness: Turk Ellis, a PPC employee.

The Board is not persuaded that a subpoena should be issued and therefore the Petitioner's request is denied.

III. ORDER

1. PPC's motions are denied.

2. The Petitioner's subpoena request is denied.

3. On or **before February 8, 1996,** parties shall file final lists of witnesses and exhibits and prefiled testimony for all witnesses they intend to present.

4. **On or before February 26, 1996,** parties shall file prefiled rebuttal testimony and revised lists showing rebuttal witnesses and exhibits.

5. On **or before March 6, 1996,** parties shall file in writing all objections to the prefiled testimony and exhibits previously identified, or such objections shall be deemed waived. The term "objections" means objections based on the Vermont Rules of Evidence. No later than March 6, parties shall file any proposed findings of fact and conclusions of law.

6. The Chair, or his delegate, will convene a prehearing conference at **1:30 p.m. on Wednesday, March 12, 1996 at the Environmental Board conference room, 58 E. State Street, Montpelier.** Topics for the conference will include: the allotment of time for testimony and cross-examination on a witness-by-witness basis; the itinerary of a site visit; rulings on evidentiary objections; and any other procedural matters deemed relevant by the convening officer.

7. The Environmental Board may convene a hearing in this matter on **Wednesday, March 13, 1996,** to be confirmed by subsequent notice with location. The **hearing will be conducted in accordance with the "Suggested Hearing Day Schedule" (attached). There will be only one day of hearing.**

8. **No** individual may be called as a witness in this matter if he or she has not been identified in a witness list filed in compliance with this order. All reports and other documents that constitute substantive testimony must be filed with the prefiled testimony. If prefiled testimony has not been submitted by the date specified, the witness will not be permitted to testify. Instructions for filing prefiled testimony are enclosed.

9. The Board may waive the filing requirements upon a showing of good cause, unless such waiver would unfairly prejudice the rights of other parties.

10. Parties shall file an original and ten copies of prefiled testimony, legal memoranda, all exhibits which are 8% by 11 inches or smaller, and any other documents with the Board, and mail one copy to each of the parties listed on the attached Certificate of Service.

Parties are required to file only lists identifying exhibits which are larger than 8% by 11 inches that they intend to present, rather than the exhibits themselves. Exhibits must be made available for inspection and copying by any parties prior to the hearing.

11. To save time at the evidentiary hearing, the Board will require that parties label their prefiled testimony and exhibits themselves and submit lists of exhibits which the Board can use to keep track of exhibits during the hearing. With respect to labeling, each person is assigned a letter as follows: H for the Petitioner and P for PPC. Prefiled testimony and exhibits shall be assigned consecutive numbers: for example, the Petitioner will number his exhibits H1, H2, H3, etc. If an exhibit consists of more than one piece (such as a site plan with multiple sheets), letters will be used for each piece, i.e. H2A, H2B, etc. However, each page of a multi-page exhibit need not be labelled.

The labels on the exhibits must contain the words ENVIRONMENTAL BOARD, #2W0436-6-EB (2nd Revocation), the number of the exhibit, and a space for the Board to mark whether the exhibit has been admitted and to mark the date of admission. Label stickers which can be used by the parties are available from the Board on request; parties must complete the information sought on the stickers prior to the hearing.

Concerning preparation of lists of exhibits, each list must state the full name of the party at the top and the Board's case number. There must be three columns, from left to right: NUMBER, DESCRIPTION, and STATUS. The list must include exhibits and prefiled testimony. An example is as follows:

TOWN OF PUTNEY
LIST OF EXHIBITS
RE: PUTNEY PAPER CO., INC.,
#2W0436-6-EB (Revocation - 2nd Petition)

Number	Description	Status
T1	Prefiled testimony John Smith	

T2A-D	Plan dated ,	sheets
	Al through A4	

The Board will use the status column to mark whether the exhibit has been admitted.

12. The hearing will be recorded electronically by the Board or, upon request, by a stenographic reporter. Any party wishing to have a stenographic reporter present or a transcript of the proceedings must submit a request by **February 8, 1996, with** a deposit check of $100 made payable to the State of Vermont, unless **the** party **wishes to make his or her own arrangements with a reporter.** One copy of any transcript made of proceedings must be filed with the Board at no cost to the Board.

Dated at Montpelier, Vermont this 9th day of January, 1996.

ENVIRONMENTAL BOARD

John T. Ewing, Chair
John M. Farmer
Arthur Gibb
Marcy Harding
Samuel Lloyd
William Martinez
Rebecca M. Nawrath
Robert G. Page
Steve E. Wright

Attachments:

Suggested Hearing Day Schedule
Instructions for Filing Prefiled Testimony