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

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

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DISMISSAL ORDER
(ALTERED)

This decision pertains to a revocation petition filed by Nathaniel Hendricks (the Petitioner) with respect to a permit issued for Putney Paper Company's (PPC's) paper sludge landfill located in the Town of Putney. As is explained below, the Environmental Board (the Board), after hearing and reviewing the Petitioner's direct testimony, concludes that the Petitioner has failed to meet his burden to prove grounds for revocation and therefore dismisses the petition.

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I. SUMMARY OF PROCEEDINGS

On October 1, 1991, the District #2 Environmental Commission issued Land Use Permit Amendment #2W0436-6 (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. On September 14, 1993, Board Chair Elizabeth Courtney convened a prehearing conference in the Town of Putney. On September 21, the Chair issued a prehearing conference report and order which is incorporated by reference.

On October 21, 1993, the Petitioner submitted a letter stating that he could not find all of the exhibits from the District Commission files for Amendments 5 and 6 and detailing the exhibits which he could not find. On that date, Board Counsel Aaron Adler wrote the Petitioner, stating that he had found many of the documents the Petitioner believed were missing, that some of the documents referred to by the Petitioner were not exhibits to Amendments 5 or 6, and that very few of the exhibits to those permits were missing. Counsel sent the Petitioner such of the exhibits as were readily photocopied. Among the exhibits sent was a copy of Exhibit #8 to Amendment 6, entitled "Interim Certification Correspondence." This was sent specifically in response to a request by the Petitioner for the exhibit concerning the "[t]ime frame and procedures outlined in the exhibits to obtain the Interim Certification."

On October 25, 1993, as required by the prehearing order, the Petitioner filed a detailed written statement of his allegations, with voluminous attachments. On November 15, PPC filed a detailed response and motion to dismiss, with attachments. The Board convened oral argument on the motion in South Royalton on December 8, 1993, with the following parties participating:

The Petitioner, ***pro se***
PPC by Lawrin Crispe, Esq.

During the argument, the Petitioner made an additional submission in support of

his allegations. Following the argument, the Board recessed and conducted a deliberative session.

On March 31, 1994, the Board issued a memorandum of decision which is incorporated by reference. This decision denied the motion to dismiss with respect to five allegations of violation made by the Petitioner and granted the motion with respect to four allegations of violation. The basis for dismissing the four allegations was that, even if proved at hearing, such allegations would not constitute grounds for revocation under the applicable statute and rule. The decision stated that this matter would go to hearing solely on the allegations which were not dismissed.

The March 31 decision stated that a hearing would be held on May 18, 1994. On April 13, the Petitioner requested a continuance. In a memorandum to parties dated April 25, Counsel informed parties that Acting Chair John Ewing had authorized postponing the hearing until June 8, 1994.

During May and June 1994, parties filed lists of witnesses and exhibits, prefiled direct and rebuttal testimony, and objections to testimony. In a motion to strike testimony filed by the Petitioner on June 3, as amended by the Petitioner by a filing on June 7, the Petitioner requested a continuance of the hearing, which had previously been noticed for June 8. On June 7, PPC filed a reply. Prior to June 8, Counsel informed the Petitioner by telephone that the Board would convene on June 8 and initially would hear argument concerning the Petitioner's motion for a continuance.

The Board convened a hearing on June 8, 1994 with the following parties participating:

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

At the commencement of the hearing, Board member Rebecca Day made a disclosure and parties were offered an opportunity to object to her participation. The issue of member Day's participation in this matter is addressed in a separate memorandum issued simultaneously with this decision and incorporated by reference.

After hearing argument on the Petitioner's motion filed June 3, as amended June 7, the Board declined to continue the hearings. The Acting Chair stated that the Board would hear each party's direct testimony, beginning with the

Petitioner, and then each party's rebuttal testimony, again beginning with the Petitioner. The Board then heard the Petitioner's direct case. Specifically, the Petitioner called all of his witnesses for whom direct testimony had been prefiled, and introduced the prefiled testimony and exhibits. In compliance with 3 V.S.A. § 810, opportunity was given to PPC to cross-examine the Petitioner's witnesses, which cross-examination occurred. The Board also asked questions of those witnesses and allowed opportunity for re-direct testimony and re-cross examination.

At the close of the Petitioner's direct case, the Board recessed and conducted a deliberative session. Upon reconvening, the Board orally made a preliminary ruling that the Petitioner has not met his burden of proof because he has not made a *prima facie* case that grounds for revoking the permit exist. The Board offered the parties an opportunity to present oral argument in response to the ruling, which each party presented. In addition, the Board allowed each party until July 15, 1994 to file memoranda in support of or in opposition to the Boards preliminary ruling.

On June 13, 1994, the Petitioner filed a motion to strike all cross-examination using various exhibits which were prefiled as part of PPC's case and to strike those exhibits.

On June 16, 1994, the Acting Chair issued a recess memorandum pursuant to EBR 13(B), which stated in summary the Board's preliminary ruling and ruled on the Petitioner's motion to strike. The June 16 memorandum is incorporated by reference.

On July 12, 1994, the Petitioner filed a motion for continuance of the hearing of June 8, 1994. On July 15, the Petitioner and PPC each filed a memorandum in response to the Board's preliminary ruling. On August 12, PPC filed a response to the Petitioner's memorandum. On August 23, the Petitioner filed a reply.

The Board deliberated on August 24, 1994. On August 30, the Petitioner made an additional filing which was not considered by the Board because it was not timely. On February 2, 1995, the Board issued findings of fact, conclusions of law, and dismissal order.

II. MOTION TO ALTER

On March 6, 1995, the Petitioner filed a motion to alter pursuant to EBR

31(A). On March 23, the Board, through staff, issued a memorandum to parties stating that it would consider the motion in deliberative session on May 24.

On May 11, 1995, PPC filed a memorandum in opposition to the motion to alter.

The Board deliberated on May 24, 1995 and voted not to reconsider except with respect to several matters concerning which it determined to make alterations. These alterations are included below and concern: fairness of placing the burden of proof on the Petitioner; a portion of Finding of Fact 6, relating to the testing of the Petitioner's wells; adding to Finding of Fact 7 the distance from the landfill site to the Petitioner's wells; clarifying Finding of Fact 40 to indicate that it is based on the testimony of a Petitioner witness; the relevance or irrelevance of PPC's knowledge to various elements of EBR 38(A)(2)(a); the time-frame for obtaining an interim certification; the lack of evidence tending to show that groundwater flows from the sludge landfill to the Petitioner's wells; the potential for change to the District Commission's decision; and the Petitioner's failure to raise concerns during a prior application proceeding. To the extent any alterations requested or arguments made by the Petitioner are not included or addressed below, they are denied.

III. DUE PROCESS

The Petitioner asserts that the Board has denied him due process in making a preliminary ruling that the Petitioner has not met his burden of proof.

For due process to apply, a liberty or property interest protected by the Constitution must be at issue. In re Great Waters of America, 140 Vt. 105, 108 (1981). The Petitioner contends that he is owed a high level of due process protection because his property interest in potable water is at issue. However, it is PPC's property, not the Petitioner's, which is subject to Amendment 6. Moreover, the Vermont Supreme Court has ruled that the right of adjoining landowners to participate in Act 250 proceedings is not of constitutional dimension. Id. at 108-09.

Even if the Petitioner's interest were constitutionally protected, due process requires sufficient notice and an opportunity for hearing. In re Vermont Health Service Corn., 155 Vt. 457, 460-61 (1990). The Petitioner was notified of the hearing date and the requirement to prefile testimony and exhibits. At the hearing, he was given the opportunity for his direct case to be heard. All of his direct evidence was admitted.

The Petitioner does not contest that his direct case was heard but protests that he was not allowed to cross-examine the other party's witnesses. This is on the basis of 3 V.S.A. § 810, which gives parties the right of cross-examination. This right, however, is a statutory grant and not a requirement of constitutional due process. Further, by definition, cross-examination is to allow a party to confront the witnesses who testify against the party. State v. Berard, 132 Vt. 138, 146 (1974). None of PPC's witnesses testified during the hearing on June 8, 1994.

Under the rubric of due process, the Petitioner makes various other contentions related to fairness. The Board believes that it is fair to require the Petitioner to meet his burden of proof before going forward with taking further testimony and thereby increasing the time and expense to the parties and the Board. This is a revocation proceeding. It is not a proceeding to grant or deny a permit; PPC has already received a permit which the Petitioner now alleges should be revoked for violations and incomplete or erroneous representations. It is therefore appropriate that the Petitioner be required to show that he has met his burden of proof.

IV. ISSUE

Whether the Petitioner has met his burden of proof to show grounds for revocation under 10 V.S.A. § 6090(c) and EBR 38(A).

V. FINDINGS OF FACT

The following findings of fact relate to the allegations made by the Petitioner. They are based on the relevant evidence proffered by the Petitioner or elicited on cross-examination of the Petitioner's witnesses. The exhibits proffered by the Petitioner as part of his direct case are numbered H-l through H-8-3. A copy of the exhibit list for the Petitioner is attached and incorporated by reference.

General

1. Land Use Permit Amendment #2W0436-6 (Amendment 6), authorizes Putney Paper Company, Inc. (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. Amendment 6 was issued on October 1, 1991.

3. PPC owns and operates a facility for producing recycled paper located in the Town of Putney. The facility produces paper sludge as a waste by-product and the sludge is disposed of at the landfill.

4. Nathaniel Hendricks (the Petitioner) owns land adjoining the site of the paper sludge landfill. He claims that the landfill has contaminated and is contaminating the wells on his adjoining land.

5. The Petitioner received notice of the application for Amendment 6 in 1991 when the application was before the District Commission. He was a party to the District Commission proceeding regarding Amendment 6 but did not participate in the hearing. The Petitioner did not appeal Amendment 6 to the Board.

6. The Petitioner has three wells on his adjoining land: one deep and two shallow. The Petitioner's well water contains arsenic, iron, and manganese. The water is bright orange. The Petitioner's wells have consistently shown this contamination since initial testing. The initial testing occurred prior to the issuance of Amendment 5.'

7. **The** Petitioner's property and PPC's sludge landfill are located near the Connecticut River and Interstate 91. The distance from the Petitioner's wells to the landfill site is approximately 2000 feet.

Compliance with Condition #5 of Amendment 6

8. In relevant part, Condition #5 of Amendment 6 provides as follows:

> An Interim Certification shall be obtained within the appropriate time frame and procedures outlined in the exhibits.

9. With his direct testimony, the Petitioner did not submit an exhibit from the District Commission file for Amendment 6 which specifies the appropriate time and procedures for obtaining an interim certification.

'The portions of this finding relating to testing are supported by the Petitioner's answers to questions from Board member Lawrence H. Bruce, Jr. during the hearing on June 8, 1994.

10. To prove that PPC did not meet the time frame referred to in Condition #5, the Petitioner submitted two letters, Exhibits H-3 and H-4.

11. Exhibit H-3 is a letter dated May 26, 1987 to Buddy J. Edwards of Putney Paper Co. from Russell W. Rohloff of Dubois & King. The letter states the results of an annual site inspection of the landfill "[i]n accordance with Condition 18 of the Disposal Facility Certification." The letter is not marked as an exhibit that was in the record of the District Commission with regard to Amendment 6. There is no testimony in the Board's record stating that Exhibit H-3 was an exhibit before the District Commission.

12. Exhibit **H-4** is a letter dated February 2, 1994 to Turk Ellis of the Putney Paper Co. from Edward L. Leonard of the State of Vermont Agency of Natural Resources (ANR), Solid Waste Division. The letter denies PPC's application for a "full" certification under 10 V.S.A. § 6605, stating that an application for such a certification submitted by PPC on December 1, 1993 was "administratively incomplete." The letter states that PPC may submit an application for an interim certification. The letter is not marked as an exhibit that was in the record of the District Commission with regard to Amendment 6. There is no testimony in the Board's record stating that Exhibit **H-4** was an exhibit before the District Commission.

13. As of June 8, 1994, PPC had not obtained an interim certification.

Non-submission of Information in Connection with Amendment 6

Presence of Dioxin in Sludge

14. At least since 1993, PPC has known that its sludge contains dioxin at a level of at least 15 parts per trillion (ppt). The U.S. Environmental Protection Agency estimates that the levels may be as high as 71 ppt.

15. Dioxins are compounds formed when organic materials react with chlorine. Dioxins are carcinogenic to humans and animals and also may cause birth defects, suppression of the immune system, and endocrine system disruptions. There may be no safe level of exposure to dioxins.

16. Dioxin may migrate through groundwater.

17. Dioxin is present in water samples from the Petitioner's well.

18. The Petitioner contends that Turk Ellis, PPc's Environmental Manager, knew that dioxins were in PPc's sludge in 1990. The Petitioner bases this allegation on 1990 test results which the Petitioner submitted as an attachment to his detailed statement of allegations filed on October 25, 1993 (see Summary of Proceedings, above.) The Petitioner did not offer this exhibit into evidence during the hearing on June 8, 1994 and did not call Mr. Ellis as a witness to prove what Mr. Ellis knew in 1990. Also, none of the Petitioner's witnesses testified that Mr. Ellis knew in 1990 of the 1990 test results. Therefore, the Board finds that the Petitioner has not proved that Mr. Ellis or PPC knew in 1990 that dioxins were in the sludge.

19. The Petitioner supplied no evidence tending to show that, if Mr. Ellis knew in 1990 that dioxins were in the sludge, Mr. Ellis affirmatively concealed this fact from the District Commission or acted with utter disregard for the rights of others or with indifference to legal duty.

May 14, 1986 Test Results

20. PPc's recycling process includes use of petroleum solvents and chlorine compounds.

21. Petroleum solvents are carcinogenic and may cause severe chronic health problems if ingested with drinking water. Chlorinated compounds formed when these solvents are exposed to chlorine would also be toxic.

22. PPc's sludge has been tested periodically over the years. One such test, dated May 14, 1986, was known to PPC prior to applying for Amendment 6. The May 14, 1986 test showed the presence in the sludge of petroleum solvents such as benzene and dichlorobenzene and of chlorinated hydrocarbons. PPC submitted the May 14, 1986 test results to the State of Vermont Agency of Natural Resources (ANR). Based on subsequent test results, PPC believed that the May 14, 1986 test results were an anomaly.

23. PPC did not submit the May 14, 1986 test results to the District Commission during the course of the application for Amendment 6.

24. The Petitioner did not submit the May 14, 1986 test results to the Board during the hearing in this matter on June 8, 1994.

1989 Blood Farm Preliminary Assessment

25. The Blood Farm was once a 165 acre pig farm. The Blood Farm is located in the Town of Putney near the Connecticut River and Interstate 91. The Farm is north of the site of PPC's sludge landfill. The Petitioner's property is adjacent to the Blood Farm.

26. In 1978, PPC purchased a 5.5 acre portion of the Farm. During 1978, PPC disposed of paper sludge on that portion. It is possible that sludge may have been dumped at the Blood Farm at other times, but no firm evidence exists.

27. After November 1, 1978, PPC took its sludge to other places and not to the Blood Farm.

28. PPC sold two acres of its Blood Farm land in 1985 to a third party and the remaining 3.5 acres in 1987 to another party. PPC no longer owns the 5.5 acre Blood Farm site.

29. In 1989, Mr. Ellis received, from Dave Shepard of ANR's Department of Environmental Conservation, a preliminary assessment of the Blood Farm site. The assessment was prepared under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), commonly known as Superfund. Mr. Shepard sent Mr. Ellis the report under cover of a letter dated December 6, 1989.

30. The preliminary assessment (PA) describes prior tests done of the Blood Farm sludge. The tests showed the presence of metals and volatile organic compounds, all of which are potentially hazardous substances under CERCLA. The PA describes some of the tests, done in 1980 and 1982, as showing levels "below regulatory concern." The PA describes other tests, done in 1984 and 1988, as showing increasing concentrations. The PA also states some concerns about the reliability of the tests.

31. The PA states that dioxins and polychlorinated biphenyls (PCBs) are sometimes found in paper mill sludge. The tests described in the PA did not include tests for dioxins. Some of the tests did include tests for PCBs, which were not detected.

32. Because of potential receptors (the nearby Connecticut River, water supplies, and residences) of the substances found on the Blood Farm site,

the PA recommends "a medium priority" for a site inspection by ANR.

33. Amendment 6 did not pertain to the Blood Farm site, which is a separate site from PPC's sludge landfill.

34. PPC did not submit the 1989 PA to the District Commission in connection with Amendment 6.

35. The Petitioner has supplied no evidence tending to show that Mr. Ellis or PPC affirmatively concealed the PA from the District Commission or acted with utter disregard for the rights of others or with indifference to legal duty.

Intermittent Streams

36. The Petitioner claims that gullies exist on the Blood Farm site just across the border from his property. The Petitioner claims that these gullies run down to the Connecticut River.

37. During the 1960s, the Petitioner saw water running from these gullies to the Connecticut River. The Petitioner has not seen water running down these gullies during the 1990s.

38. PPC did not submit information on these gullies to the District Commission in connection with Amendment 6.

39. The Petitioner has supplied no evidence tending to show that PPC knew of any intermittent streams caused by water running down these gullies or that, if PPC knew of such, PPC affirmatively concealed this knowledge from the District Commission or acted with utter disregard for the rights of others or with indifference to legal duty.

Other Facts Pertinent to Non-submission of Information

40. PPC represented, in its application for Amendment 6, that its sludge is a mixture of paper fibers and clay. The Petitioner has submitted the testimony of Craig Stead stating that PPC represented to the District Commission not only that its sludge is such a mixture but also that such mixture is "benign." There is no evidence that Mr. Stead participated in the District Commission proceedings regarding Amendment 6. Moreover, the Petitioner did not offer the application for Amendment 6 into evidence

during the hearing on June 8, 1994. Also, the Petitioner provided no participant in the Amendment 6 proceeding to give testimony on what was in, or not in, the application, or what exact representations were made to the District Commission during its hearing process about the content of the sludge. The Board therefore finds that the Petitioner has not proved that PPC represented to the District Commission that its paper sludge was "benign."

41. The Petitioner has submitted no study or other evidence tending to show that groundwater moves from under the site of the sludge landfill to under the Petitioner's adjoining property.

42. The surface elevations of the Petitioner's wells are about the same as the surface elevations of the sludge landfill. The Petitioner has supplied no evidence concerning the depth to groundwater at his property or at the landfill.

43. Contamination of soil and groundwater creates complex situations, often difficult to evaluate from data available at the surface.

VI. CONCLUSIONS OF LAW

A. The Law Applied

1. Act 250 and Board Rules

The Board is authorized to revoke permits pursuant to 10 V.S.A. § 6090(c), which states:

> 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 this provision, EBR 38(A) provides as follows:

> Revocation for violations. 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.

(Emphasis added.)

Neither 10 V.S.A. § 6090(c) nor EBR 38(A) specifies who bears the burden of proof in a revocation proceeding. The burden of proof is generally held to consist of two elements: the burden of persuasion and the burden of producing sufficient evidence. The burden of persuasion refers to the burden of *persuading* the fact-finder that certain facts are true. The burden of producing sufficient evidence refers to the burden to *come forward* with evidence to support a favorable finding. See Re: Killington, Ltd. and International Paper Realty Corp., #1R0584-EB-1, Findings of Fact and Conclusions of Law and Order (Revised) at 21 (Sep. 21, 1990).

Where the burden of proof is not specified, that burden - in particular, the burden of persuasion - is generally held to lie with the moving party. Nader v. Toldenado, 408 A.2d 31, 48 (D.C. Cir. 1979), cert. denied, 444 U.S. 1078 (1980). Further, the burden of producing sufficient evidence to support a favorable finding is generally on the person who seeks an affirmative determination from the forum. Jones on Evidence § 5:5 at 532 (6th Ed. 1972). In this proceeding, such party is the Petitioner.

The Board believes that it is fair to place the burden on the Petitioner because he is seeking revocation of a permit which has already been granted and was not appealed. If this were a proceeding concerning an application for a permit or an appeal, the burden of persuasion would be on PPC with regard to most Act 250 criteria and the burden of production would be on PPC on all of those criteria. 10 V.S.A. §§ 6086(a), 6088; Killington, supra at 21. Thus, implicit in the grant of a permit which was not appealed is that PPC met its burden, and it should not have to do so again in a subsequent revocation proceeding.

Further, as shown in the Findings, above, the Petitioner previously has had opportunity to raise concerns about potential contamination of his well by the sludge landfill during prior application proceedings. The most recent of these proceedings occurred in 1991, after the sludge landfill had been operating for several years adjacent to the Petitioner's property. During the period prior to 1991, the Petitioner had ample opportunity to investigate and inquire, and then to raise concerns with the District Commission at a time when the permit for the landfill was up for renewal.

EBR 18(D) states that "[t]he board may, on its own motion or at the request of a party, consider the dismissal, in whole or in part, of any matter before the board for reasons provided by these rules, by statute, or by law."

2. Standard for Review of Petitioner's Case

Both the Petitioner and PPC state that, in deciding whether the Petitioner has met his burden to prove grounds for revocation, the Board must view the evidence in the light most favorable to the Petitioner. On review of the applicable case law, the Board concludes that it is not clear that the Board is so required. Specifically, the relevant rulings of the Vermont Supreme Court contain two separate lines of cases which contradict each other.

The relevant rulings are those in which the fact-finder also presides and decides questions of law, i.e., in which the judge and jury functions are combined in the same person or group of persons, This is because the Board not only decides questions of fact but also presides and determines the questions of law.

One line of relevant rulings supports the positions of the parties. This line is exemplified by In re Grievance of Gobin, 158 Vt. 432 (1992). In that case, the Vermont Labor Relations Board (VLRB) dismissed a grievance regarding work-related discrimination at the close of the grievant's case. The VLRB found that the grievant had not identified a rule or regulation that may have been applied

against him discriminatorily. The Court reversed, stating that the grievant had identified a guideline issued by the employer which supported his case. In its reversal, the Court stated the standard which should have been applied by the VLRB:

> A motion to dismiss under such circumstances is equivalent to a motion for directed verdict, and in deciding such a motion, the Board must view the evidence in the light most favorable to the nonmoving party, excluding all modifying evidence. See State of Environmental Board v. Chickering, 155 Vt. 308, 311, 583 A.2d 607, 609 (1990). The Board must not grant the motion if there is any evidence fairly and reasonably tending to justify a decision in favor of the nonmoving party. Id. at 312, 583 A.2d at 609.

158 Vt. at 433-34.

Thus, under Gobin and the cited Chickering case, the Board should view the evidence in the light most favorable to the Petitioner, excluding all modifying evidence. If the evidence fairly and reasonably tends to justify a decision in favor of the Petitioner, the Board should reverse its preliminary ruling.

The Chickering case cited in Gobin relies on Vermont Rule of Civil Procedure (VRCP) 41(b)(2), concerning involuntary dismissals.[2] However, a second line of relevant rulings under that rule rejects the standard enunciated in Gobin and Chickering.

Specifically, in the case of New England Educational Training Service. Inc. v. Silver Street Partnershin, 156 Vt. 604 (1991), the Court upheld a superior court's dismissal of a mortgage foreclosure action on the basis that the plaintiff had not proved a valid, enforceable mortgage. In the ruling, the Court stated:

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[2] *The VRCP do not apply to administrative bodies such as the Board. VRCP 1; Allen v. Vermont Employment Security Board, 133 Vt. 166, 168 (1975). However, it is reasonable to turn to the VRCP for guidance. It should also be noted* ***that the Vermont Supreme Court recently amended the VRCP to codify involuntary dismissals under new VRCP 52(c). See Order Amending the Vermont Rules of Civil Procedure, Vermont Supreme Court, November Term (Jan. 12, 1995). The new amendment is not relied on because parties filed briefs and argued this case before the amendment became effective.***

> A Rule 41(b)(2) motion for involuntary dismissal "serves the function of a directed verdict motion in a jury case." [Citation omitted.] The court, however, is required to make findings in accordance with Rule 52(a). VRCP 41(b)(2). *As opposed to a directed verdict, the court is not required to take the evidence in the light most favorable to the nonmoving parties.* Blais v Bowers, 136 Vt. 488, 489, 394 A.2d 1124, 1124 (1978). On appeal, the question is whether the court's fact findings are clearly erroneous, viewing the evidence in the light most favorable to the prevailing party. Stevens v. Cohen, 138 Vt. 7, 8-9, 409 A.2d 604, 605 (1979).

156 Vt. at 611 (emphasis added). Thus, under Silver Street and the cited Blais case, a court required to find facts on an issue of involuntary dismissal is not required to take the evidence in the light most favorable to the nonmoving party. By implication, the fact-finder may therefore apply the usual rule in judging the evidence, which is that the fact-finder has the right to believe all or part of the testimony, or to reject it altogether. In re Quechee Lakes Corp., 154 Vt. 543, 555 (1990).

The Gobin case, issued after the Silver Street decision, does not refer to Silver Street. Similarly, the Silver Street decision, issued after Chickering, does not refer to Chickering. Thus, the Board is faced with separate cases which offer contradictory guidance.

The Board concludes that the Silver Street line of cases provides more applicable guidance. Like the lower court in the Silver Street case, the Board is required by its own rules to find facts in a contested dismissal. See EBR 18(D), quoted above.

Moreover, the Board decides not only questions of law but also is the finder of fact. As the finder of fact, it is the Board's role to weigh the evidence and determine the credibility of witnesses, giving evidence such weight as it believes appropriate. Quechee, supra. Thus, once all parties put on their evidence, the Board is not required to view the evidence of the party with the burden of proof in the light most favorable to that party. It therefore would not be reasonable to require that, in making a dismissal determination at the close of a direct case, the Board apply a different standard. Such a requirement could in fact lead to irrational results. For example, in this case, PPC could have avoided the "most favorable" standard simply by calling one witness and then arguing for a decision in its favor on the grounds that the Petitioner had not met his burden of proof.

The Board therefore adopts the reasoning of Silver Street with respect to the standard under which it decides, at the close of a revocation petitioner's case, whether the petitioner has met the burden of proof. However, the Board believes that, even if the evidence is viewed in the light most favorable to the Petitioner, he still has not met his burden of proof.

B. **Analysis of the Petitioner's Case**

The Board will analyze the Petitioner's case in light of the foregoing discussion. Specifically, the Board will analyze in turn: (a) the Petitioner's allegation of non-compliance with Condition #5 of Amendment 6 and (b) the Petitioner's four allegations of failure to submit information to the District Commission.

1. Compliance with Condition #5

The Petitioner's first allegation is that PPC violated Condition #5 of Amendment 6, which states in relevant part: "An interim certification shall be obtained within the appropriate time frame and procedures outlined in the exhibits." This would appear to require PPC to obtain an interim certification from the Agency of Natural Resources (ANR) pursuant to 10 V.S.A. § 6605b.

Under EBR 38(A)(2)(b), the Board may revoke a permit if it finds that PPC has violated a permit condition. The Petitioner therefore has the burden to show: (1) the existence and terms of a permit condition and (2) the underlying facts to demonstrate the violation.

In most cases, the existence and terms of a permit condition can be easily demonstrated from the face of the permit. However, in this case, the relevant permit condition requires that an interim certification be obtained within a time frame "outlined in the exhibits." Therefore, the Petitioner must provide the Board with the exhibit or exhibits which states the relevant time frame.

The Petitioner has not met his burden to show the terms of Condition #5 because he has not provided the Board with an exhibit to Amendment 6 which demonstrates the relevant time frame. Instead, he has provided the Board with 1987 and 1994 letters which are not exhibits to Amendment 6, and argues simply that it has been five years since Amendment 6 was issued and PPC still has not obtained an interim certification.

Further, as described in the Summary of Proceedings, the Petitioner has

had opportunity to review the file and Board Counsel has sent the Petitioner such exhibits as could be found in the file by our staff regarding the interim certification. Thus, if an appropriate exhibit existed, it is likely that the Petitioner would have submitted it.

The Board believes that its conclusion meets the differing standards enunciated by the Supreme Court in the Silver Street and Gobin cases discussed above. Specifically on the Gobin standard, the Board concludes that, taking the evidence in the light most favorable to the Petitioner, the lack of any exhibit in the record setting out the "appropriate time frame" means that there is no evidence which fairly and reasonably supports a conclusion that PPC did not act within an appropriate time frame. If the applicable time-frame cannot be proved, then Condition #5 is too indefinite to support a conclusion that it has been violated.

2. Non-submission of Information to the District Commission

The Petitioner makes four separate allegations that Amendment 6 should be revoked based on EBR 38(A)(2)(a), which provides that the Board may revoke a permit if it finds that:

> 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 ....

Accordingly, under this rule, the Petitioner must prove the existence of each of the following elements:

(a) that PPC or its representative submitted inaccurate, erroneous, *or materially incomplete information* in connection with the permit application;

(b) that PPC did so *willfully or with gross negligence;* and

(c) that submission of accurate and complete information *may have caused denial of the permit or issuance of different conditions.*

The Petitioner's four allegations are: (1) that PPC did not submit test data

from 1990 showing that PPc's sludge contains dioxin; (2) that PPC failed to submit test data from 1986 indicating that samples of PPc's sludge contained benzene, dichlorobenzene, and "high boiling hydrocarbons as fuel oil"; (3) that PPC failed to submit tests from 1989 of PPc's so-called "Blood Farm" site showing the presence of heavy metals and volatile organic compounds at that site; and (4) that, on a site plan submitted to the District Commission in connection with Amendment 6, PPC failed to portray an intermittent stream that allegedly runs from the sludge landfill site to the Connecticut River.[3]

(a) Inaccurate, Erroneous, or Materially Incomplete Information

The first allegation concerns the 1990 test results which allegedly show the presence of dioxin in PPc's paper sludge and which were not submitted to the District Commission. Based on the foregoing findings of fact, the Board concludes that the Petitioner has not demonstrated that, in connection with the 1990 test results, PPC submitted inaccurate or erroneous information regarding the nature of its paper sludge, This is because the Petitioner did not introduce sufficient evidence at hearing to support his contention that PPC represented to the District Commission that its sludge is benign. However, the Petitioner has shown that PPC submitted a materially incomplete application by not submitting the 1990 test results.

The second allegation concerns the 1986 test data which show that petroleum solvents and chlorinated compounds were present in the sludge and which were not submitted to the District Commission. Based on the foregoing findings of fact, the Board concludes that the Petitioner has not demonstrated that, in connection with the 1986 test data, PPC submitted inaccurate or erroneous information regarding the nature of its paper sludge. This again is because the Petitioner did not introduce sufficient evidence at hearing to support his contention that PPC represented to the District Commission that its sludge is benign. However, the Petitioner has shown that PPC submitted a materially incomplete application by not submitting the 1986 test data.

The third allegation concerns the 1989 preliminary assessment of the Blood

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[3] ***In his July 15 memorandum in response to the Board's preliminary ruling, the Petitioner appears to include failure to seek an interim certification as an allegation under Rule 38(A)(2)(a). However, the Board dismissed such an allegation from this case in its memorandum of decision issued March 31, 1994.***

Farm site, which the Permittee did not submit in connection with Amendment 6. Based on the foregoing findings of fact, the Board concludes that the Petitioner has not demonstrated that information about the Blood Farm site would have been material to Amendment 6.

The fourth allegation concerns intermittent streams which the Petitioner claims exist and of which PPC did not inform the District Commission in connection with Amendment 6. Based on the foregoing findings of fact, the Board concludes that the Petitioner has not demonstrated that information about the intermittent streams would have been material to Amendment 6 because the Petitioner's supporting evidence involves gullies on the Blood Farm, which is not the site of the sludge landfill authorized by Amendment 6.

Accordingly, the Board concludes that the Petitioner has met element (a) with regard to the first and second allegations under EBR 38(A)(2)(a) but not with regard to the third and fourth allegations under that subsection of the rule.

The Board believes that its conclusions concerning the four allegations meet the differing standards enunciated in the Silver Street and Gobin cases discussed above. Concerning the alleged representations that the sludge is benign, it may be argued that the Board's conclusions do not meet the Gobin standard because of the testimony of Craig Stead, who states that PPC made those representations to the District Commission. However, as shown in Finding 40, above, the Petitioner provided no evidence that Mr. Stead participated in the proceedings concerning Amendment 6, the Petitioner did not introduce the application for Amendment 6 during the hearing on his revocation petition, and the Petitioner provided no participant in the Amendment 6 proceeding to prove what was in or not in the application.or what exact representations were made. Accordingly, the Board concludes that the Petitioner's evidence, even when viewed in the light most favorable to him, neither fairly nor reasonably supports the contention that PPC represented its sludge to be benign during the Amendment 6 proceedings.

(b) Willfully or with Gross Negligence

With respect to all four allegations under EBR 38(A)(2)(a), the Board concludes that the Petitioner has not provided sufficient information to show that PPC acted willfully or with gross negligence.

With regard to "willfully," the Board previously has stated that an act or omission is done willfully "if done voluntarily and intentionally and with the

specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done." Re: Talon Hill Gun Club, Inc. and John Swinington, #9A0192-EB (Revocation), Findings of Fact, Conclusions of Law, and Order at 11 (Oct. 8, 1993), citing Black's Law Dictionary.

Concerning gross negligence, in Shaw v. Moore, 104 Vt. 529 (1932), the Vermont Supreme Court discussed the legal standard:

> Gross negligence is substantially and appreciably higher in magnitude and more culpable than ordinary negligence. Gross negligence is equivalent to the failure to exercise even a slight degree of care. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty, and to utter forgetfulness of legal obligations so far as other persons may be affected. It is heedless and palpable violation of legal duty respecting the rights of others.

104 Vt. at 531-32.

The foregoing findings of fact demonstrate that the Petitioner has not shown that PPC's conduct rises to the level of the legal standards for either willfulness or gross negligence.

For example, the Petitioner did not provide at the hearing the evidence to support his contention that PPC knew, in 1990, of the 1990 test results showing dioxin. His evidence submitted at hearing proves only that PPC knew of the results in 1993.

Further, even if such evidence exists, the Petitioner provided no specific evidence of an intent on PPC's part to conceal the information from the District Commission or that PPC proceeded with utter disregard for the rights of others or indifference to legal duty. The Board does not believe that it is required, under either the Silver Street or Gobin standards, to infer from an omission that PPC

acted willfully or with gross negligence.[4]

Similarly, the Petitioner did not prove that PPC's actions regarding the 1986 test data meet the legal standards for willfulness or gross negligence. In fact, the Petitioner's own evidence shows that PPC believed the result of this data to be an anomaly. Prefiled Testimony of Craig F. Stead, Exhibit H-8 at 14.

Further, concerning the 1986 test data, as well as the 1989 Blood Farm preliminary assessment and the alleged intermittent streams, the Petitioner provided no specific evidence of an intent on PPC's part to conceal the information from the District Commission or that PPC proceeded with utter disregard for the rights of others or indifference to legal duty.

In its motion to alter, the Petitioner asserts that the Board's conclusions under this second element of EBR 38(A)(2)(a)contradict its conclusions under the first element. The Petitioner's specific argument is that it is contradictory to conclude under this second element that he has not proved knowledge of the 1990 test results, but that he has proved under the first element that PPC's application for Amendment 6 was materially incomplete as to those results.

However, the first element of EBR 38(A)(2)(a) relates solely to the submission or non-submission of information during an application proceeding. Information may be inaccurate, erroneous or materially incomplete even if the applicant does not know the correct or omitted information. The question of knowledge is not relevant to the first element of EBR 38(A)(2)(a); it is relevant to the second element.

(c) Denial or Issuance of Different Conditions

Based on the foregoing findings of fact, the Petitioner has not provided sufficient evidence to show that the District Commission might have denied the application or issued different conditions had it had the 1990 or 1986 test date, or the information concerning the Blood Farm site or gullies.

This is because the Petitioner has not submitted any study or other evidence tending to show that ground water moves from under the site of the

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[4] *With regard to the 1990 test results, the Board might conclude differently if the Petitioner had proved PPC knew of the results in 1990 and had subsequently represented the sludge to be benign.*

sludge landfill to under the Petitioner's adjoining property. Given the absence of such a study or evidence and the approximately 2000-foot distance between the Petitioner's wells and the landfill site, the Board is not persuaded that the outcome of the proceeding for Amendment 6 might have been different or that the evidence fairly and reasonably supports the contention of different outcome.

In this regard, the Board stresses that the Petitioner's standing in this matter is as an adjoining property owner seeking review of allegations which directly affect his property. See EBR 38(A).

Based on the foregoing, the Board concludes that the Petitioner has not met element (c) with respect to any of the four allegations under EBR 38(A)(2)(a).

C. Conclusion

Based on the foregoing, the Board will dismiss this matter because the Petitioner has not met his burden of proof to show grounds for revocation.

In making this decision, the Board stresses its belief that dismissal on such a basis is appropriate for this revocation proceeding. The Board does not plan to adopt, and does not welcome, such an approach to proceedings involving applications for permits or appeals of such applications.

The Board recognizes that the Petitioner is concerned that the sludge landfill potentially has caused contamination of his well. But the Petitioner has had ample opportunity to raise these concerns previously. **At** a minimum, concern about contamination could and should have been raised by the Petitioner during the 1991 application to extend the original permit. At that time, the sludge landfill had already been operating adjacent to the Petitioner's property for several years. During that period prior to 1991, the Petitioner had ample opportunity to investigate and inquire and to attempt to establish whether groundwater flows from the landfill toward his well. Moreover, during the proceedings resulting in Amendment 6, he could have sought the District Commission to require PPC to make such investigation, but he did not do so. Having not raised the concern during the 1991 application or appealed the resulting permit to the Board within 30 days, the Board declines to allow the Petitioner to go forward with a revocation petition when he has not been able to present a substantially clearer and stronger case.

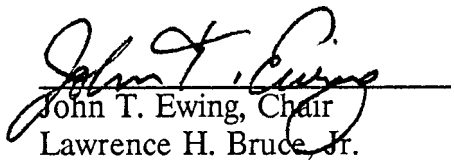
VII. ORDER

1. This matter is dismissed.

2. These altered findings of fact, conclusions of law, and dismissal order supersede the findings of fact, conclusions of law, and dismissal order issued February 2, 1995.

Dated at Montpelier, Vermont this 30th day of June, 1995.

ENVIRONMENTAL BOARD



John T. Ewing, Chair
Lawrence H. Bruce, Jr.
Rebecca Day
Lixi Fortna*
Arthur Gibb
Samuel Lloyd
William Martinez
Steve E. Wright

*Former member Fortna continues to serve on this case pursuant to 3 V.S.A. § 849.

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

PETITIONER'S EXHIBIT LIST

RE: PUTNEY PAPER CO., INC., #2W0436-6-EB (REVOCATION)

Exhibit No.	Description	Status
H-1	Direct Testimony of Nathaniel Hendricks	ADM 6/8/9
H-2	Excerpt from State of VT Agency of Env. Cons. Guidelines for the Landfill Disposal of Solid Waste, Effective May 1, 1978, Revised November 1, 1978	ADM 6/8/94
H-3	Letter dated 5/26/87 from Russell Rohloff, P.E., Senior Project Engineer of DuBois & King, Inc. to Buddy Edwards of Putney Paper	ADM 6/8/94
H-4	Letter dated 2/2/94 from Edward Leonard, Dir., Solid Waste Management Division (State of Vermont) to Turk Ellis, Env. Mgr., Putney Paper	ADM 6/8/94
H-5	Topographical map from State of Vermont Dept. of Highways, labeled, Vicinity of Putney, VT, Route U.S. No. 5	ADM 6/8/94
H-6	Direct Testimony of Ross Hume Hall	ADM 6/8/94
H-7	Ross Hume Hall, Curriculum Vitae (Summary)	ADM 6/8/94
H-7A	Three-page Curriculum Vitae	ADM 6/8/94
H-8	Direct Testimony of Craig F. Stead	
H-8-1	Resume of Craig F. Stead	ADM 6/8/94
H-8-2	- 12/6/89 letter from Dave Shepard, DEC, to Turk Ellis - 11/29/89 letter from Dave Shepard, DEC, to Turk Ellis with enclosure: Blood Farm Dump Preliminary Assessment Report (VTD982542730)	ADM 6/8/94
H-8-3	Figure l-l. Contamination of soil and groundwater creates complex situations, often difficult to evaluate at the surface	ADM 6/8/94