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

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

MEMORANDUM OF DECISION

This decision pertains to a motion to dismiss filed by Putney Paper Co., Inc. (the Permittee) with respect to a revocation petition filed by Nathaniel Hendricks (the Petitioner). The petition seeks the revocation of a permit issued for the Permittee's paper sludge landfill located in the Town of Putney. The Petitioner alleges nine grounds for revocation. As is explained below, the Environmental Board grants the Permittee's motion with respect to some of these grounds and denies it with regard to others.

I. BACKGROUND

On October 1, 1991, the District #2 Environmental Commission issued Land Use Permit Amendment #2W0436-6 (Amendment 6), authorizing the Permittee 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 6 was not appealed to the Environmental Board within 30 days pursuant to 10 V.S.A. § 6089(a) and Board Rule 40(A).

On June 30, 1993, the Petitioner, an adjoining landowner, filed a petition to revoke Amendment 6. On September 14, 1993, Environmental 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 25, 1993, as required by the prehearing order, the Petitioner filed a detailed written statement of his allegations, with attachments. On November 15, the Permittee 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
The Permittee 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.

3/31/94

[Docket #583M]

During January and February 1994, the actions of the Vermont Senate caused delay in the issuance of this decision. Specifically, on January 19, 1994, the Senate voted not to confirm the Board Chair and members Ferdinand Bongartz and Terry Ehrich, all of whom had participated in this matter.

On January 21, 1994, Governor Howard Dean re-appointed the Chair and members Bongartz and Ehrich. Lengthy confirmation hearings ensued. On February 17, to expedite this matter, the Chair appointed member Steve E. Wright as Acting Chair. On February 22, the Senate again voted not to confirm Chair Courtney and members Bongartz and Ehrich. The Board reviewed this again during March 1994.

II. ISSUE

The issue raised by the motion to dismiss is whether, even if proved at hearing, all or any of the Permittee's nine allegations would not constitute grounds for revocation under 10 V.S.A. § 6090(c) and Board Rule 38(A).

III. DISCUSSION

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, Board Rule 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 shah consist of an original and 10 copies of the petition which shah 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.
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> (2) *Grounds for revocation, The board may after hearing revoke a permit if it finds that: (a) The applicant or his representative willful& 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.
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> (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.)

Board Rule 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."

The Board will analyze each of the Petitioner's nine allegations in light of these provisions.

Allegation One. The Petitioner's first allegation is that the Permittee has 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 the Permittee to obtain an interim certification from the Agency of Natural Resources (ANR) pursuant to 10 V.S.A. § 6605b. The Permittee concedes that it has not yet obtained such a certification but contends that it has made good faith efforts to do so.

While it is not clear from Amendment 6 what the "appropriate time frame" for obtaining an interim certification was to be, the Board concludes that the Petitioner has made a sufficient allegation to survive a motion to dismiss and to *go* to hearing. Condition #5 of Amendment 6 clearly requires obtaining an interim certification within that time frame and the failure to meet that condition would be a violation of the terms of a permit condition under Rule 38(A)(2)(b). Further, it is evident from the District Commission's findings of fact #3, 4, and 6, with respect to waste disposal, that the District Commission placed great importance, in issuing an Act 250 permit, on the Permittee's obtaining an interim certification.

The Petitioner also appears to have standing to make this allegation. He is an adjoining landowner and alleges that the water supply for his adjoining property is contaminated by substances from the landfill and that an interim certification would have provided him with protection against water supply contamination.

The Board is not concluding that the Permittee has in fact violated Condition #5. At hearing, parties will need to present evidence, based on the exhibits to Amendment 6, concerning what the District Commission meant by the phrase "appropriate time frame and procedures." Further, following such a hearing, the Board will request written argument from the parties concerning whether the phrase is sufficiently clear to put the Permittee on notice of its obligations. In addition, the Permittee's claim of diligence in pursuing an interim certification is relevant and evidence should be presented on this claim as well.

Allegation Two. The Petitioner's second allegation is that, because the Permittee has failed to submit an interim certification to the District Commission, the Permittee "willfully or with gross negligence submitted inaccurate, erroneous, or materially incomplete information in connection with the permit application."

The Board concludes that it should dismiss this allegation because Amendment 6 and supporting findings clearly indicate that the Permittee was to obtain an interim certification *in the future*, that is, after Amendment 6 was issued.

The application for Amendment 6 would have been filed *before* the Amendment was issued. If the District Commission agreed that the certification was to be obtained later, then the Permittee, in the context of a revocation petition filed almost two years after Amendment 6 was issued, cannot be faulted on this basis for an inaccurate, erroneous, or incomplete application.[1]

Allegation Three. The Petitioner alleges that Amendment 6 should be revoked because the Permittee "has violated Environmental Board Rule 19(B)" in failing to obtain an interim certification and file it with the District Commission to create a presumption of compliance with 10 V.S.A. § 6086(a)(l)(B) (waste disposal). Therefore, the Petitioner argues, Amendment 6 should be revoked for violation of the Board Rules, because the District Commission relied on a non-existent interim certification to create such a presumption.

The Board concludes that it should dismiss this allegation because Amendment 6 was not appealed to the Board within 30 days as provided by 10 V.S.A. § 6089(a) and Board Rule 40(A). Specifically, the Petitioner's allegation in essence questions the propriety of the District Commission's actions in issuing Amendment 6. Such an allegation would be proper in an appeal from the District Commission to the Board but is not appropriate in a revocation proceeding. A revocation proceeding is for the purpose of enforcement and is not a vehicle for litigating whether a permit should have been issued in the first place.

Allegation Four. The Petitioner alleges that the Permittee failed to submit, as part of the application for Amendment 6, test data from 1990 showing that the Permittee's sludge contains dioxin. The Petitioner claims that dioxin is "well known to be a serious threat to health and the environment." The Petitioner claims that dioxin could contaminate his water supply and present a health hazard through airborne transmission. The Petitioner further asserts that the Permittee's alleged failure to submit 1990 data was willful and grossly negligent and that the 1991 District Commission decision might have been different had the Permittee submitted the test data.

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[1] *The Board notes that it would be proper, in an appeal filed within 30 days of a permit under 10 V.S.A. § 6089(a), to rake the question of whether the District Commission should have issued a permit conditioned upon obtaining an interim certification in the future. However, no such appeal of Amendment 6 was filed.*

The Permittee contends that it performed dioxin testing voluntarily in 1990 and not in response to any mandate from the federal or state governments. The Permittee also contends that the Agency of Natural Resources was aware of this testing and that there was no willful or negligent failure to disclose the tests to the District Commission. The Permittee further argues that the dioxin content in its paper sludge poses little risk to the Petitioner, contending that the tests show levels of dioxin to be at background levels, to be within federal exposure limits, and to be much less than other common sources of dioxin such as oil or wood heating systems.

The Board concludes that the Petitioner's allegation concerning dioxin is sufficient to survive a motion to dismiss. If the Petitioner's allegations are true, then grounds for revocation would appear to exist under Rule 38(A). In this regard, the Board believes that the Permittee's arguments appear to attack the factual basis of the Petitioner's allegation rather than the allegation's legal sufficiency. While the Permittee's factual statements may be true, those statements - as well as the statements of the Petitioner - are subject to proof during an evidentiary hearing.

Allegation Five. The Petitioner's fifth allegation is that the Permittee failed to submit, as part of the application for Amendment 6, test data from 1986 indicating that samples of the Permittee's sludge contained benzene, dichlorobenzene, and "high boiling hydrocarbons as fuel oil." The Petitioner's arguments with respect to this allegation are similar to those he makes regarding his fourth allegation.

The Permittee contends that the Agency of Natural Resources did receive the 1986 test results, and that subsequent analyses showed the 1986 test results to be an anomaly.

For the same reasons that the Board did not dismiss allegation four, it is not dismissing allegation five.

Allegation Six. The Petitioner's sixth allegation is that the Permittee failed to submit, as part of the application for Amendment 6, tests from 1989 of the Petitioner's so-called "Blood Farm" site showing the presence of heavy metals and volatile organic compounds at that site. The Petitioner's arguments with respect to this allegation are similar to those he makes regarding his fourth allegation.

The Permittee contends that the Blood Farm site is a different site not governed by Amendment 6, that a certification for this site was issued in 1983

allowing sludge disposal there, and that the contaminant levels found at the site are low. The Petitioner does not appear to dispute that the Blood Farm is not governed by Amendment 6.

The Board concludes that the Petitioner's allegation six is sufficient to survive a motion to dismiss, but just barely. The Board believes that test results of the Blood Farm site may have had some (albeit limited) relevance to the application for Amendment 6 in terms of showing what types of substances can be found in paper sludge. Thus, although the Board is skeptical concerning whether submission of the Blood Farm information would have changed the District Commission's decision, the Board cannot say that, as a matter of law, allegation six does not constitute grounds for revocation. Accordingly, for the same reasons that the Board did not dismiss allegations four and five, allegation six will go to evidentiary hearing during which both parties may submit proof of their contentions.

Allegation Seven. The Petitioner alleges that, on a site plan submitted to the District Commission in connection with Amendment 6, the Permittee failed to portray an intermittent stream that allegedly runs from the sludge landfill site to the Connecticut River. The Petitioner contends that submission of such information would have led to different conditions to protect the stream and possibly to conditions requiring stream monitoring. The Petitioner alleges that he is affected because his property is downstream from the outlet of the intermittent stream and that therefore his use of the Connecticut River could be adversely affected.

The Permittee contends that the alleged stream is a small dry gully and contains no evidence of significant water flow. The Permittee also contends that, even if this were a stream, its drainage area would be too small to cause new or different conditions to be issued.

The Board believes that the Permittee's arguments against this allegation raise questions of fact and not of law. The Board therefore is not convinced that this allegation should be dismissed as a matter of law. The Permittee and the Petitioner may seek to prove their contentions at hearing.

Allegation Eight. The Petitioner argues that Amendment 6 should be revoked because no attempt was made during the application process for that amendment to assess groundwater flow from the sludge landfill.

The Board believes that this allegation would be proper if this case were an appeal filed within 30 days under 10 V.S.A. § 6089(a) and Board Rule 40(A). This is because the allegation, if true, constitutes an argument that the District Commission should not have issued a permit without a complete groundwater assessment. However, Amendment 6 was not appealed and therefore is a final decision even if erroneous. Accordingly, the Board will dismiss allegation eight from this revocation proceeding.

Allegation Nine. The Petitioner's ninth allegation is that Amendment 6 should be revoked because the sludge landfill is allegedly not in compliance with all applicable health and environmental conservation department regulations. 10 V.S.A. § 6086(a)(l)(B) requires that, before issuing a permit, the District Commission find a project to be in such compliance.

Again this allegation would be relevant to a timely filed appeal of Amendment 6. But this is not such an appeal; it is a revocation proceeding. Accordingly, the Board will dismiss allegation nine from the proceeding.

IV. ORDER

1. The Permittee's motion to dismiss filed November 15, 1993 is granted with respect to the Petitioner's allegations #2, 3, 8, and 9 contained in the Petitioner's detailed statement of allegations filed October 26, 1993. Those allegations 2, 3, 8, and 9 are hereby dismissed.

2. The Permittee's motion to dismiss is otherwise denied, and this matter will proceed to hearing on the Petitioner's allegations #1, 4, 5, 6, and 7 and solely on those allegations.

3. **On or before April 27, 1994,** parties shall file final lists of witnesses and exhibits and prefiled testimony for all witnesses they intend to present.

4. **On or before May 12, 1994,** parties shall file prefiled rebuttal testimony and revised lists showing rebuttal witnesses and exhibits.

5. The Environmental Board will convene a hearing in this matter **on May 18, 1994.** A notice with time and location will be issued subsequently.

6. **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 attached.

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

8. 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 8½ 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.

9. 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 the Permittee. Prefiled testimony and exhibits shall be assigned consecutive numbers: for example, the Permittee will number its exhibits and prefiled testimony P1, P2, P3, 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. P2A, P2B, 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, 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

Number	Description	Status
T1	Prefiled testimony of 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.

10. The hearings 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 **April 13, 1994**. 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 31st day of March, 1994.

ENVIRONMENTAL BOARD

Steve E. Wright (by AWP)

Steve E. Wright, Acting Chair
Lixi Fortna
Arthur Gibb
Samuel Lloyd
Jean Richardson*

*Jean Richardson resigned from the Board in early January 1994 but is participating in this decision pursuant to 3 V.S.A. § 849 because she heard oral argument in this matter on December 8, 1994 and participated in deliberation.

Former Chair Elizabeth Courtney and former members Terry Ehrich and Ferdinand Bongartz heard oral argument on December 8 and participated in deliberation on that date but have not participated further because on February 22, 1994 the Vermont Senate voted against their re-appointment by the Governor.

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