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

Re: Putney Paper Company, Inc.
Land Use Permit #2W0436-7-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to an appeal of Land Use Permit #2W0436-7 ("Permit") issued by the District #2 Environmental Commission ("District Commission") which authorizes Putney Paper Company, Inc. ("Putney") to extract earth to be used for closure and daily cover ("Extraction Project"). The Extraction Project is located on a 7 +/- acre parcel off River Road in the Town of Putney ("Site"). As explained below, the Environmental Board ("Board") concludes that the Extraction Project complies with 10 V.S.A. § 6086(a)(l)(B) (waste disposal), the sole criterion at issue in this appeal. Accordingly, the Board will issue an amended permit.

I. SUMMARY OF PROCEEDINGS

On September 7, 1994, the District Commission issued the Permit. The Permit states that it specifically authorizes Putney "to extract earth to be used for closure of the adjacent paper sludge landfill." In a letter dated March 28, 1995 from Assistant District #2 Coordinator Julia Schmitz to Turk Ellis of Putney Paper Co., Ms. Schmitz stated:

> The District 2 Environmental Commission understood throughout the permit procedure the earth extraction was for closure and daily cover of the adjacent paper sludge landfill. Not including the words 'daily cover' was an oversight.

On October 6, 1994, Nathaniel Hendricks ("Hendricks") filed an appeal from the Permit with the Board.

On December 12, 1994, Board Chair Arthur Gibb's delegate, Board General Counsel George Gay, convened a prehearing conference ("Conference") in Montpelier. At the Conference, Hendricks filed a document in which he alleged, among other things, that the District Commission erroneously denied him party status under a number of the criteria. This document also included a request for subpoena covering 26 identified witnesses, 14 unidentified witnesses and 25 documents or categories of documents.

On December 29, 1994, Chair Gibb issued a Prehearing Conference Report and Order denying Hendricks' subpoena request and directing the parties to brief Hendricks' party

status and the scope of the appeal. On January 9, 1995, Hendricks filed a memorandum setting forth the reasons he qualifies for party status under Criteria 1, l(A), (B) and (D)-(F), 3, 4, 8, 8(A), 9(B), (E), (K) and 10 and contending that Putney's entire sludge dump operation should be at issue in the appeal. In this memorandum, Hendricks did not provide any support or argument for why the Board should grant him party status under Criteria l(C) and (G), 2, 5 and 7.

On January 20, 1995, Hendricks filed a Request for Reconsideration of, or Objection to, Prehearing Ruling challenging Chair Gibb's December 29, 1994 ruling with respect to his subpoena request.

On January 30, 1995, Putney filed a response to Hendricks' January 9, 1995 memorandum.

On February 24, 1995, Chair John T. Ewing denied Hendricks' January 20, 1995 request for reconsideration. Also on that date, the Board issued a Memorandum of Decision sustaining Hendricks' January 20, 1995 objection concerning the subpoenas directed to Messrs. Ellis, Ledgard, Murray and Dorhman ("Subpoenas"). [1]

On February 27, 1995, Hendricks filed a Motion for Extension of Time.

On February 28, 1995, the Subpoenas were sent to Hendricks for process.

On March 1, 1995, Chair Ewing issued a memorandum to the parties:

1.) granting Hendricks party status under Criterion 1B ,and denying him such status under all other criteria under which he was seeking it;

2.) limiting the scope of the appeal to potential impacts of Putney's application for an Act 250 permit 'authorizing the utilization of soil material as daily cover for an adjacent landfill it owns and operates;

3.) determining that the parties could only rely upon j/evidence which directly relates to the excavation of soil

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[1] *On February 1, 1995, John T. Ewing became Board Chair "and, thereafter, Chair in this Appeal.*

for use as daily cover; and

4.) extending the prefile deadlines but otherwise denying Hendricks' February 27, 1995 Motion for an Extension of Time.

On March 2, 1995, Hendricks filed a Motion for Continuance which Chair Ewing denied on March 6, 1995.

On March 16, 1995, Hendricks filed objections to Chair Ewing's March 1, 1995 and March 6, 1995 rulings.

On March 21, 1995, Putney filed a Motion to Alter Memorandum of Decision dated February 24, 1995 and Withdraw Subpoenas; To Quash Service of Subpoenas and for a Protective Order ("March 21, 1995 Motion to Alter"). On March 29, 1995, Hendricks filed a memorandum in response thereto.

On April 12, 1995, Chair Ewing advised the parties that his March 1, 1995 ruling contained typographical errors and that he had not granted Hendricks party status under Criterion 9(K). On April 19, 1995, Hendricks filed an objection to this ruling.

On April 19, 1995, Putney filed a Motion to Strike Evidence and Witnesses submitted by Hendricks ("Motion to Strike").

On April 21, 1995, Hendricks filed a Motion for Continuance.

On April 26, 1995, the Board deliberated on all pending motions.

On May 16, 1995, the Board issued a Memorandum of Decision:

1.) overruling Hendricks' March 16, 1995 objections to Chair Ewing's March 1, 1995 rulings;

2.) overruling Hendricks' March 16, 1995 objection to Chair Ewing's March 6, 1995 denial of his Motion for Continuance;

3.) granting Putney's March 21, 1995 Motion to Alter;

4.) denying Hendricks' January 20, 1995 objection to Chair Gibb's December 29, 1994 Prehearing Ruling;

5.) overruling Hendricks' objection to Chair Ewing's March 1, 1995 ruling regarding Hendricks' party status under Criterion 9(K), as confirmed in Chair Ewing's April 12, 1995 memorandum to parties;

6.) granting Putney's April 19, 1995 Motion to Strike; and

7.) granting Hendricks' April 21, 1995 Motion for Continuance.

On June 6, 1995, Hendricks filed a Motion to Transfer Appeal to the Waste Facility Panel ("Motion to Transfer") and a Motion to Alter ("June 6 Motion to Alter," collectively "Hendricks June 6 Motions") with the Board.

On June 6, 1995, Chair Ewing convened a second prehearing conference ("Second Prehearing") via telephone. The following parties participated:

Putney by Peter Van Oot, Esq.; and
Nathaniel Hendricks, pro se.

At the Second Prehearing, Chair Ewing overruled Hendricks' objections to portions of Putney's prefiled testimony, exhibits and rebuttal testimony ("Putney's Prefiled Testimony"), except for Putney's exhibit P5 ("Putney's P5"). Chair Ewing postponed consideration on Putney's P5 until the public hearing. Chair Ewing also requested that the parties be prepared to present oral argument with respect to Hendricks' June 6 Motions at the public hearing.

A public hearing was convened on June 7, 1995 ("Public Hearing") in the Town of Putney before an Administrative Hearing Panel of the Board ("Hearing Panel") pursuant to Environmental Board Rule ("EBR") 41. The following parties participated in the hearing:

Putney by Peter Van Oot, Esq.; and
Nathaniel Hendricks, pro se.

At the Public Hearing, the Hearing Panel adopted Chair Ewing's June 6, 1995 preliminary rulings with respect to Hendricks' objections to Putney's Prefiled Testimony. The Hearing Panel heard oral argument with respect to Hendricks' June 6 Motions and requested that the parties submit memoranda with respect to them on or before June 21, 1995.

The Hearing Panel also overruled Hendricks' objection to Putney's P5.

After taking a site visit and hearing testimony, the Hearing Panel recessed the matter. The Hearing Panel deliberated concerning this matter on June 7, July 6, July 7, and August 1, 1995.

The Hearing Panel issued a proposed permit amendment and related proposed findings of fact, conclusions of law and order on August 2, 1995 ("Proposed Decision"). The parties were provided an opportunity to submit written objections to the Proposed Decision and to present oral argument before the full Board. On August 17, 1995, Hendricks filed written objections and requested oral argument.

The Board heard oral argument from the parties on September 27, 1995. Thereafter, it reviewed the Proposed Decision and the evidence presented in the case, declared the record complete and adjourned the hearing. This matter is now ready for decision.

II. ISSUES

The issues in this appeal are:

1. Whether, pursuant to 10 V.S.A. §§ 6089 and 6105, the Board or the Waste Facility Panel has subject matter jurisdiction over this appeal.

2. Whether, pursuant to EBR 34, a district coordinator may issue a letter clarifying and not substantively altering the scope of a permit.

3. Whether, pursuant to 10 V.S.A. § 6089 and EBR 40, the Board properly limited the scope of this appeal.

4. Whether, pursuant to EBR 4, the Board may compensate a party for expenses associated with subpoenas where the Board has reevaluated whether such subpoenas would lead to the production of material evidence.

5. Whether, pursuant to 10 V.S.A. § 6086(a)(l)(B), the Extraction Project on the Site meets any applicable health and environmental department regulations regarding disposal of wastes and will not involve the injection of waste materials or any harmful or toxic substances into ground water or wells.

III. FINDINGS OF FACT

1. The Site is a 7+/- acre parcel off of River Road in the Town of Putney, Vermont. The Site is adjacent to a permitted sludge landfill owned and operated by Putney which is located generally to the east of the Site. A railroad right-of-way and Interstate 91 are located generally to the north of the Site. The Connecticut River is located generally to the south of the Site. Hendricks' property is adjacent to the Site and is located generally to the west of the Site.

2. Hendricks' property starts within the tree line near the west end of the Site. The Site is fairly level, but it slopes sharply down to the river over the bank. There would be an undisturbed strip between the tree line and the operations of the Extraction Project. Certain cuts were done for the purpose of archeological investigation where the undisturbed nature of the soil could be observed. A drainage ditch which collects stormwater runoff in the area and takes it to the Connecticut River exists to the east of the Site.

3. Putney proposes to utilize the Site to excavate soil.

4. The soil to be excavated consists of fine grain silts, fine course sands and lenses of gravel and clay.

5. The Extraction Project will occur in up to four phases. Each phase is expected to last for a five year period.

6. Phase I of the Extraction Project will begin with the construction of an infiltration basin. This basin will be maintained throughout the life of the Site for the purposes of stormwater runoff control. The basin will allow for the holding of any runoff, should any occur, until it either evaporates or permeates through underlying soils.

7. All top soil will be removed from the Phase I area and stockpiled along the property line. Each excavation phase will cover a 200 foot wide area. A minimum 50 foot buffer will be maintained at all property boundary lines and a 20 foot buffer will be maintained along the top of the bank facing the Connecticut River.

8. The present natural slopes will be maintained.

9. The final depth at completion of the excavation will not exceed 10 feet.

10. Upon completion of Phase I, the stockpiled topsoil will be placed back in the excavated area, reseeded and mulched to ensure the growth of grass.

11. Any additional phases at the Site will proceed in the same fashion as Phase I.

12. The Site has been used in the past as farmland or open land.

13. Putney's witness, Turk Ellis, who qualified as an expert, testified that waste materials have never been encountered at the Site. There is no evidence of waste materials, or harmful or toxic substances in the soils to be excavated at the Site.

14. Depth to groundwater at the Site is greater than 35 feet.

15. Soil excavations may affect groundwater flows.

IV. CONCLUSIONS OF LAW

A. Motion to Transfer

In the Motion to Transfer, Hendricks contends that this appeal should have been filed with the Waste Facility Panel rather than the Board and that the Board has no jurisdiction over this appeal. Hendricks also contends that the Board should transfer this appeal to the Waste Facility Panel rather than dismiss it.

In general, 10 V.S.A. § 6089(a)(l) requires that an appeal from a district commission shall be to the Board. Therefore, the Board presumes that a matter appealed from a district commission should be heard by the Board, unless an exception to Board jurisdiction exists or the parties otherwise object.

An exception to Board appellate jurisdiction exists when the appeal is in respect to a "waste management facility." Such appeals are heard by the Waste Facility Panel, a panel of the Board. 10 V.S.A. § 6105. Subchapter 5 of Act 250 governs appeals to the Waste Facility Panel. 10 V.S.A. §§ 6101-6108. The Waste Facility Panel has exclusive jurisdiction over such appeals. 10 V.S.A.

§ 6101(b). See Morean-Usher v. Town of Whitinsham, 158 Vt. 378, 381, 610 A.2d 1108 (1992).

The Waste Facility Panel was created pursuant to P.A. No. 218, § 3 (1989 Vt., Adj. Sess.) ("Act 218"). The purpose of the Waste Facility Panel is to provide a route by which solid waste facility appeals under Act 250 and Act 78, Vermont's Waste Management Law, 10 V.S.A. §§ 6601-6612, could be consolidated for review. The legislature made this purpose clear in the title of Act 218, which states "AN ACT ESTABLISHING PROCEDURES FOR THE EMERGENCY CERTIFICATION OF SOLID WASTE LANDFILLS **AND PROVIDING FOR A COMBINED ENVIRONMENTAL AND LAND USE REVIEW PROCESS FOR NEW SOLID WASTE FACILITIES."** In its short history, the Waste Facility Panel has only heard appeals of matters which have also been reviewed under Act 78.

As a result, in most cases the distinction between Board jurisdiction and Waste Facility Panel jurisdiction is clearcut. An appeal of a district commission decision of a matter which has also been reviewed by the Agency of Natural Resources ("ANR") with respect to Act 78 goes to the Waste Facility Panel. Other appeals from the district commission go to the Board.

Nonetheless, it is conceivable that in a proper case, an appeal of a district commission decision might be within the purview of the Waste Facility Panel, even though the underlying project was not susceptible to Act 78 review by ANR. Under the doctrine of primary jurisdiction, judicial bodies may refrain from exercising jurisdiction when an alternative tribunal with expertise in the subject matter is available to decide the dispute. C.V. Landfill, Inc. v. Environmental Board, 158 Vt. 386, 388-89, 610 A.2d 145 (1992).

This, however, is not such a case. A number of factors in this case dictate against Waste Facility Panel jurisdiction. The jurisdictional issue was raised during the prehearing conference on December 12, 1994. As stated by the Prehearing Conference Report and Order at 2, "[n]either party disputed the Board's jurisdiction to hear the Appeal. Related objections are deemed waived." This ruling is deemed binding on Hendricks under Section V, Paragraph 10 of the Prehearing Conference Report and Order at 5. Hendricks did **not file a timely objection as required by that paragraph, so the jurisdictional ruling is final.**

We recognize that as an administrative body, the Board has only the adjudicatory authority conferred on it by statute. In re Taft Corners Assocs., 160 Vt. 583, 590, 632 A.2d 649 (1993); In re Lake Sadawsa Dam, 121 Vt. 367, 370, 159 A.2d 337 (1960). In general, subject matter jurisdiction can be raised at any time and cannot be waived. See Lafko v. Lafko, 127 Vt. 609, 612, 256 A.2d 166 (1969). Based on this general rule, lack of subject matter jurisdiction can even be raised at the Supreme Court. See Town of Charlotte v. Richmond, 158 Vt. 354, 358, 609 A.2d 638 (1992).

The Board, however, is not absolutely bound by the general rule regarding waiver of subject matter jurisdiction. In re Denio, 158 Vt. 230, 234, 608 A.2d 1166 (1992). In Denio, the Supreme Court held that the subject matter jurisdiction of the Board could not be raised for the first time on appeal to the Supreme Court. In addition, the Board has recognized that it may be barred from asserting Act 250 jurisdiction under the doctrine of equitable estoppel. Re: Rock of Ages (Bethel White Quarry), Declaratory Ruling Request #291, Memorandum of Decision and Dismissal Order at 7 (March 28, 1994); Re: Triple M Marketplace, Declaratory Ruling Request #271, Memorandum of Decision at 3 (January 15, 1993),

In Denio, the Supreme Court recognized the specialized expertise of the Board in making jurisdictional 'determinations, stating that "the vast majority of Act 250 appeals involve jurisdictional issues, and in resolving them, we have accorded 'a high degree of deference' to the interpretation of Act 250 by the Board." The Court stated that "for an administrative board of limited jurisdiction virtually any disagreement with its actions can be phrased in jurisdictional terms," and speculated that "[i]f we adopt appellants' position [that issues regarding Environmental Board jurisdiction can be raised for the first time at the Supreme Court], applicants will be able to avoid raising jurisdictional challenges before the Board, and seek a ruling for the first time in [the Supreme Court] if they are dissatisfied with the Board's action on the merits." In re Denio, 158 Vt. at 235. As a result, the Denio Court concluded that the appellants were foreclosed from raising the issue of jurisdiction before the Supreme Court. In re Denio, 158 Vt. at 236.

The reasoning of Denio is appropriate here where Hendricks has been silent with respect to jurisdiction until the Board's May 16, 1995 ruling on his broad array of

procedural challenges to this appeal. We note that Hendricks is no stranger to Waste Facility Panel subject matter jurisdictional issues. See Re: Putney Paper Company, Appeal of Solid Waste Variance No. SW-93-1, Proposal for Dismissal (Waste Facility Panel of the Environmental Board, June 3, 1994). In that decision, the Waste Facility Panel dismissed an appeal by Hendricks, on grounds different than those here, because it was without subject matter jurisdiction.

Like the Supreme Court in Denio, we are concerned that parties will reserve their jurisdictional challenges until such a challenge seems tactically advantageous. The Board considers economy of public resources in reviewing motions which will lead to repetitive proceedings and delays to other applicants. Re: Leo A. and Theresa Gauthier and Robert Miller, (#4C0482-EB) Memorandum of Decision and Order at-2 (December 10, 1990). As recognized in Re: St. Albans Group and Wal*Mart Stores, Inc., (#6F0471-EB) Memorandum of Decision on Motions to Alter at 4 (June 27, 1995), the Board disfavors motions which cause appeals to take longer and which tie up resources which are then not available for later-filed appeals.

Aside from Hendricks' delay in presenting the jurisdictional challenge, he has not raised the jurisdictional issue in sufficient detail for the Board to rule in his favor. The Board recognizes that the person who raises the question of jurisdiction has the burden of production. Re: L. W. Haynes, Inc., Declaratory Ruling Request #192 at 8 (September 25, 1987), citing Re: Mr. & Mrs. Joseph Gaanon, Declaratory Ruling Request #173, Memorandum of Decision (July 3, 1986) (Emphasis in ioriginal). Haynes involved a decision regarding a substantial change to a pre-existing development under 10 V.S.A. § 6081(b) and Gagnon involved a decision regarding 'jurisdiction over a development under 10 V.S.A. § 6001(3), but the ruling retains its persuasive impact here. In this respect, the Board in Gagnon noted that the person raising the question of jurisdiction "must provide sufficient evidence to the Board for the Board to be able to find that the particular activity in question [is within the jurisdiction of the Board]." Gagnon at 5.

In addition, where a prior jurisdictional ruling has been made and **no timely objection was raised, the Board** "recognizes that such rulings be given presumptive weight. Rock of Ases (Bethel White Quarry), supra, Declaratory Ruling Request #291, Memorandum of Decision at 7. With

respect to advisory opinions, the Board stated in Rock of Ages that:

> [T]o the extent that an issue has been addressed in a prior advisory opinion that was not appealed, the opinion should be presumed correct on that issue, unless: (a) it is shown that circumstances have changed materially since the opinion was issued, or (b) it is demonstrated by clear and convincing evidence or argument that the opinion was incorrect or that the information relied upon was materially incorrect.

Rock of Ases at 7.

In his Motion to Transfer, Hendricks recites the jurisdictional authority of the Waste Facility Panel and then simply states "Land Use Permit # 2W0436-7 involves a solid waste management facility as that term is defined at 10 V.S.A. section 6606 and the Solid Waste Management Rules. Accordingly, the appeal must be heard by the Waste Facility Panel; the Environmental Board has no jurisdiction over this matter." Motion to Transfer at 1.

Hendricks would have this Board nullify months of proceedings on the basis of that paragraph. However, more is required to warrant such a precipitous step. Applying the Rock of Ases standard to the jurisdictional ruling in the December 12, 1994 Prehearing Conference Report and Order, it is clear that Hendricks has not carried his burden of production or persuasion on the jurisdictional issue.

Finally, the Board is unable to say that it does not have jurisdiction over this appeal. The Extraction Project merely involves the excavation of soil as defined in the scope of appeal as set forth in the Board's May 16, 1995 Memorandum of Decision, and as first set forth in Chair Ewing's March 1, 1995 memorandum to the parties, and also as reiterated by Chair Ewing throughout the Second Prehearing and the Public Hearing. Today's decision affirms all Board, Hearing Panel and Chair rulings on the scope of this appeal.

In general, a project which merely involves the excavation of soil does not trigger Waste Facility Panel jurisdiction. The purpose of the Waste Facility Panel is to bring its specialized expertise to bear on the problems raised in consolidated appeals of Act 78 and Act 250 proceedings. See Morean-Usher, supra, 158 Vt. 380-81 (noting the specialized expertise of the Waste Facility

Panel). See also Re: C.V. Landfill, Inc. and John F. Chapple, III, Air Pollution Control Permit #AP-92-025-WFP and Land Use Permit Application #5W1150-WFP, Prehearing Conference Report and Order - Memorandum of Decision (December 13, 1993), which states:

> [10 V.S.A. §§ 6105-6107] establish an appellate scheme whereby an appeal from an Act 250 district commission decision and an ANR decision in respect of the same waste management facility is made to the Waste Facility Panel as a single, consolidated appeal.

Accordingly, we find that it is proper that jurisdiction over this appeal remain with the Board. Hendricks' Motion to Transfer is DENIED.

B. June 6 Motion to Alter

In the June 6 Motion to Alter, Hendricks makes three contentions based on the Board's May 16, 1995 Memorandum of Decision. He contends that the activities authorized by the Permit cannot be expanded by the Assistant District #2 Coordinator. He contends that the Board erred with respect to the scope of the appeal. He also contends that the Board should compensate him for his expenses with respect to the subpoenas which he requested.

The Board examines a motion to alter under EBR 31(A), which states:

> Motions to alter decisions. A party may file within 30 days from the date of a decision of the board or district commission such motions to alter as may be appropriate with respect to the decision.

As a result, a motion to alter is reviewed as to whether it is "appropriate." A motion may be appropriate where the motion seeks reconsideration based on the existing record, and does not present new arguments. "In general, the Board disfavors reconsideration under EBR 31(A) because it causes appeals to take longer and ties up resources which are then not available for later-filed appeals. The Board therefore believes that reconsideration under EBR 31(A) should not be liberally granted." See Re: St. Albans Group and Wal*mart Stores, Inc. #6F0471-EB, Memorandum of Decision on Motions to Alter at 3-4 (June 27, 1995).

1. Putney's Corrected Permit

Hendricks contends that the activities authorized by the Permit cannot be expanded by the District Commission staff and that Julia Schmitz's letter of March 28, 1995 to Turk Ellis ("Schmitz Letter") does not meet the standards of EBR 34(D). However, the Board notes that a review of Putney's permit application at the District Commission reveals that Putney stated at least twice its intent to use the excavated soil for daily cover. This is important as the District Commission's Conclusion of Law for Land Use Permit #2W0436-7 states:

> Based upon the foregoing Findings of Fact, it is the conclusion of this District Commission that the project describedin the application referred to above, if completed and maintained in conformance with all of the terms and conditions of that application, and of Land Use Permit #2W0436-7 will not cause or result in a detriment to public health, safety or general welfare under the criteria described in 10 V.S.A., Section 6086(a). (Emphasis added).

The Board also notes that the record reveals numerous instances where Hendricks recognized that the excavated soil would be used for daily cover. See e.g. Hendricks' January 9, 1995 Memorandum at 9 ("The soils are used for daily cover").

As a result, the Schmitz Letter merely reiterates and clarifies the activities authorized in the Permit and makes no substantive alterations to the Permit. Accordingly, Hendricks' June 6 Motion to Alter is DENIED with respect to the Schmitz Letter.

2. Scope of Appeal

In his March 1, 1995 Memorandum to Parties, Chair Ewing limited the scope of appeal to the potential impacts of the Extraction Project. On March 16, 1995, Hendricks filed an Objection to Chair's Ruling, contending that the scope of this appeal should also consider the adjacent landfill. On May 16, 1995, the Board affirmed Chair Ewing's March 1, 1995 ruling on the scope of appeal.

In evaluating Hendricks' motion to alter the scope of appeal, the Board is guided by Re: Walker Construction, Inc., #5W0816-1-EB, Findings of Fact, Conclusions of Law and

Order (January 14, 1987), where the Board ruled that it would review only the expansion to a previously permitted project because the previous permit was a final, unappealed Board decision. The appellant in Walker had argued for a review of the entire project, contending that the expansion could not be reviewed in isolation from the rest of the project. In ruling against the appellant, the Board in Walker stated:

> Any decision of a commission may be appealed to the Board within 30 days (10 V.S.A. § 6089). Once a permit is issued, the permittee has a vested right to rely upon the terms of the permit. A permit may be revoked by the Board only after a hearing at which it is proved that the permit was fraudulently obtained or the permittee is in violation of its permit. 10 V.S.A. § 6090(c) and Board Rule 38. In this case, the permittee has a vested right to construct the project as originally approved in [the previous permit]. The Board has no authority to alter that permit in any respect at this time.

Likewise here, Hendricks cannot use this proceeding to reopen permits on other previously permitted projects. It is proper to limit the scope of this appeal to the impacts of the Extraction Project. Accordingly, Hendricks' June 6 Motion to Alter is **DENIED** with respect to the scope of appeal.

3. Subpoenas

With respect to Hendricks' third contention, Hendricks is seeking new relief rather than moving to alter the Board's May 36, 1995 Memorandum of Decision.

The Board does not issue refunds except in accordance with EBR 11(D) regarding withdrawn applications. Neither Act 250 nor EBR 4 regarding subpoenas authorize the Board to compensate parties for expenses incurred with respect to subpoenas where the Board has reevaluated whether such subpoenas would lead to the production of material evidence.

For these reasons, Hendricks' request that he be compensated for his expenses associated with the subpoenas is **DENIED.**

c. Criterion on Appeal

1. Burden of Proof

Under 10 V.S.A. § 6088(a), the applicant has the burden of proof on Criterion l(B). The burden of proof generally is considered to include both the burden of production and the burden of persuasion. In Act 250, the burden of production means the burden of producing sufficient evidence upon which to make positive findings under the criteria. The burden of persuasion refers to the burden of persuading the Board that certain facts are true. Re: MBL Associates, Inc., #4C0948-EB, Findings of Fact, Conclusions of Law, and Order (May 2, 1995) at 22 (citations omitted).

2. Criterion l(B) - Waste Disposal

10 V.S.A. § 6086(a)(l)(B) provides that a permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the development or subdivision will meet any applicable health and environmental conservation department regulations regarding the disposal of wastes, and will not involve the injection of waste materials or any harmful or toxic substances into ground water or wells.

The Extraction Project involves the excavation of soil for fill. Excavated topsoil will be the only material which will be physically deposited on the Site by Putney during the life of the Extraction Project. During each phase, excavated topsoil will initially be stockpiled on the northern part of the Site. Upon completion of each phase, the stockpiled topsoil will be placed back in the excavated area, reseeded and mulched to ensure the growth of grass. These activities do not constitute the disposal of waste materials. Therefore, based upon the evidence presented by the parties, we conclude that there are no health and environmental conservation department regulations regarding the disposal of waste applicable to the Extraction Project.

Putney presented evidence that no waste materials, or harmful or toxic substances exist on the Site. There is no evidence in the record to convince us to the contrary.

Hendricks argued that waste materials and harmful and toxic substances exist on and near the Site. Hendricks also argued that waste materials and harmful and toxic substances which might be present on or near the Site could flow through the groundwater down gradient to the groundwater underlying his property. Hendricks, however, provided no evidence with respect to the Extraction Project to support

these arguments.

As in any case, we are alert to the possibility of waste materials finding their way into water supplies. However, Putney has satisfied its burden of proof with respect to showing that the Extraction Project in this appeal will not cause impacts under Criterion l(B). Hendricks has not provided any contrary evidence. Therefore, we conclude that the Extraction Project does not involve the injection of waste materials or any harmful or toxic substances into ground water or wells.

We conclude that the Extraction Project complies with Criterion l(B) with respect to waste disposal and that no undue water pollution will result.

VI. ORDER

Land Use Permit #2W0436-7-EB is hereby issued. Jurisdiction of this matter is remanded to the District #2 Environmental Commission.

Dated at Montpelier, Vermont this 3rd day of November, 1995.

ENVIRONMENTAL BOARD,

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