

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

Re: **Winhall/Stratton** Fire District #1
P.O. Box 611
Stratton Mountain, VT 05155

and

The Stratton Corporation
RR1, Box 145
Stratton Mountain, VT 05 155

MEMORANDUM OF DECISION

The matter comes before the Environmental Board on a Motion for a Preliminary Stay and a Motion for a Long Term Stay (“Motions”) filed pursuant to Environmental Board Rule (“EBR”) 42 by Stratton Area Citizens Committee (“SACC”), a party to this appeal. SACC asks the Board to stay Land Use Permit #2W0519-6A (“Permit”) granted to the **Winhall/Stratton** Fire District #1 and the Stratton Corporation (“Permittees”) by the District 2 Environmental Commission (“Commission”) on February 1, 1999.

The Board deliberated on the Motion for a Long Term Stay (“Motion”) on July 14, 1999. For the reasons below, the Board denies the stay.

I. Procedural History

On September 4, 1998, Permittees filed Application #2W0519-6A with the Commission seeking a Land Use Permit to build and operate a Sequential Batch Reactor which will allow for a total sewage treatment capacity of 830,000 gallons/day (the “Project”). The application was treated as a “minor” application (EBR 51). SACC was granted party status for Criteria 1A (headwaters), 1B (waste disposal), 1E (streams), 2 (water supply) and 4 (erosion control) and requested a hearing, indicating its opposition to the issuance of a permit for the Project prior to issuance of Findings of Fact and Conclusions of Law on the Stratton Master Plan Application #2W0519-10 (“Master Plan”) which is presently under review by the Commission. On February 1, 1999, the Commission issued the Permit authorizing the Project and denying SACC’s request for a hearing because the Commission believed that the issues raised by SACC with regard to the Project had been addressed within the context of the hearings on the concurrent Master Plan. SACC’s timely appeal followed.

[730M1]

On July 1, 1999 SACC filed its Motions requesting the Board Chair to grant a preliminary stay and the Board to grant a long-term stay. The Stratton Corporation (“Stratton”) filed a reply memorandum on July 9, 1999.

II. Discussion

Pursuant to EBR 42, the Board must consider three factors in determining whether to grant a request for a stay:

- i) the hardship to the parties,
- ii) the impact on the values sought to be protected by Act 250, and
- iii) the effect on the public health, safety or general welfare

The burden in this case is on SACC to address these criteria and prove that a stay is necessary. *Stokes Communication Corp.*, #3R0703-EB, Supplemental Memorandum of Decision (February 26, 1993). The Board concludes that SACC has not adequately addressed these criteria and, consequently, has not met its burden with regard to any of the factors of Rule 42. Therefore, the Board denies SACC’s Motion for Long-Term Stay.

Regarding the first element of Rule 42, SACC argues first that its hardship “consists primarily of the undermining of the very basis for the appeal if Stratton is allowed to construct the wastewater treatment facility before the appeal has been heard ... because . . . the permit approves infrastructure that *will* be used by developments *that have not been approved* by the District Commission in its pending master plan proceedings or any other proceedings.” *Motions* at 2 (emphasis added). Certainly, the mere fact that a permit has been appealed cannot establish hardship, as this would render the first element of Rule 42 meaningless. Nor does SACC’s claim that the Project *will* be used by as yet unpermitted development further its argument; while the Project indeed *may* be used for such development, such use is at this time speculative and uncertain. See *Juyaraj v. Scappini*, 66 F.3d 36, 39 (2d Cir. 1995) (to obtain preliminary injunction staying action, party must show harm which is imminent or certain, not merely speculative); *c.f. Parker v. Town of Milton*, _ Vt. ___, 726 A.2d 477,480 (1998) (for purposes of establishing standing, “the existence of an actual controversy turns on whether the plaintiff is suffering the threat of actual injury to a protected legal interest, or is merely speculating about the impact of some generalized grievance.”) As Stratton notes, the fact that the upgraded plant has greater capacity does not, in itself, authorize anything. Stratton’s *Response to SACC’s Motion for Preliminary and Long-Term Stay* at 3. Further, Stratton concedes that the upgraded plant “will operate only at its previously permitted and existing level of 430,000 gpd” and “will not be used for new development” until such time as

new projects have received the necessary Agency of Natural Resources and Act 250 approvals. *Id*

SACC also argues that if the treatment plant expansion is constructed before the Commission or the Board has decided whether a permit for the Project should issue, “any review of the cumulative impacts will be influenced and rendered meaningless by the fact that Stratton has already constructed the treatment plant.” Motions at 3. Again, SACC’s concerns are unfounded; the mere fact that the Project may have been constructed does not necessarily mean that cumulative impacts will not be seriously reviewed.

Finally, SACC states that, “given the history of events there is a serious question about whether (Stratton) would actually remove the new construction even if they were denied a permit.” *Id.* at 5. SACC asserts that “where Stratton built an illegal bridge abutment in a stream, Stratton continued using it and benefiting from it months after the Environmental Board denied the permit. Thus it appears that Stratton has learned that there is in fact an advantage to taking the risk that they might have to dismantle infrastructure illegally or imprudently built.” *Id.* SACC fails to note, however, that, as a result of an enforcement action brought by the Board, Stratton was required to rebuild the unpermitted bridge and to pay a civil penalty. *Vermont Environmental Board v. The Stratton Corp.*, Dkt. No. 121-7-98 Vtec (Aug. 13, 1998).

The Board concludes that SACC has failed to meet its burden of proving that it will suffer hardship if the permit is not stayed.

Regarding the other two elements of Rule 42, the Board similarly concludes that SACC has failed to meet its burden of proof. SACC’s Motion does not specifically address the project’s impact on values protected by Act 250 or the effect on public health, safety, or general welfare. The Board has been unwilling “base a stay (of a permit) on a general allegation of detrimental impact to the public health, safety and welfare.” *Brian Nichols d/b/a Speedwell, Inc.*, #7C0568-2-EB Memorandum of Decision at 3 (Dec. 22, 1995). If general allegations are insufficient to form the basis of a stay, the absence of allegations will certainly not suffice.’

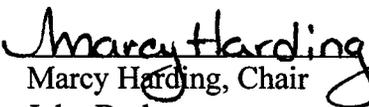
¹ In contrast, Stratton notes that the Project “is an upgrade of an existing wastewater treatment plant which is needed every day for existing permitted uses” which will be “an environmentally superior level of wastewater treatment at permitted levels.” Stratton’s *Response to SACC’s Motion for Preliminary and Long-Term Stay* at 3, 4.

SACC argues, and Stratton does not contest, that Stratton has already commenced construction on the sewage treatment plant. Even though this case is on appeal, Stratton may commence construction on the plant since it holds, at this time, a valid permit. Of course, the Board wishes to make it clear that any construction undertaken by Stratton at this time must only occur with the knowledge that the Board (or Commission on remand) may ultimately find that the permit should not have been granted. Stratton proceeds at its own risk. *Stokes Communication Corp., supra*. ("If, after hearing, the Board denies or modifies the permit, the Applicant will have to restore the site to its pre-construction condition.")

III. Order

SACC's Motion for Long-Term Stay is denied.*

Dated at Montpelier, Vermont this 28th day of July, 1999.


Marcy Harding, Chair
John Drake
George Holland
Sam Lloyd
W. William Martinez
Rebecca Nawrath
Alice Olenick, Esq.
Robert Opel, Esq.
Jill Broderick

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² Because the Board denies the Motion for Long-Term Stay, the Chair need not address SACC's Motion for a Preliminary Stay.