

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

RE: Vermont Talc Division, FINDINGS OF FACT, CONCLUSIONS  
OMYA, Inc. OF LAW AND ORDER  
c/o Edward V. Schwiebert Land Use Permit #2W0551-1-EB  
Vice President and General  
Counsel  
61 Main St.  
Proctor, VT 05765

This decision pertains to an appeal filed with the Environmental Board ("the Board") on October 3, 1984, by Vermont Talc from the September 18, 1984 decision of the District #2 Environmental Commission ("the Commission") issuing Land Use Permit Amendment #2W0551-1. That permit authorized Vermont Talc to construct a new mine entrance ramp and to convert from the use of continuous mining machinery to the use of blasting at its mine on White Road in Windham, Vermont.

At the Permittee's request, the Board issued a stay of further proceedings on October 4, 1984, to allow Vermont Talc to pursue a motion for reconsideration pursuant to Board Rule 31 before the Commission. The Commission issued its decision on the Permittee's Motion on February 6, and the appeal was reinstated by Vermont Talc on March 6.

A prehearing conference was convened in this appeal on March 28, and a Prehearing Order was issued on April 8, 1985. A public hearing was convened on May 8, 1985, with the following parties present:

Applicant/Appellant Vermont Talc by Edward V. Schwiebert, Esq.;

The Town of Windham by Helen George;

The Windham Regional Planning and Development Commission by Gregory Brown;

Daniel and Karen Schwartz by Matthew T. Birmingham, Esq.;

Byron and Mary McCandless by Duncan Ogden;

Peter J. Stebbins;

Reginald W. Fleer.

The hearing was recessed on May 8, pending the filing of proposed findings by the parties, a review of the record and deliberation by the Board. Vermont Talc submitted proposed findings, conclusions and permit on May 21. Mr. Fleer submitted a written statement on May 21./1/ The Board determined the record complete on June 19, and adjourned the hearing.

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/1/ Mr. Fleer's statement included factual matters not part of the hearing record. These matters were not considered when making the findings and conclusions herein.

This matter is now ready for decision. The following findings of fact and conclusions of law are based upon the record developed at the hearing. To the extent that we agreed with and found necessary any findings proposed by the parties, they have been incorporated herein; otherwise said requests to find are hereby denied.

I. ISSUES IN THE APPEAL

The pending amendment application seeks approval to alter a previously permitted mining operation by increasing the number of authorized talc truckloads leaving the site and by converting from the use of continuous mining machinery to blasting as the method of talc extraction. Appellant objects to four conditions imposed by the Commission:

7. Vermont Talc shall be permitted to operate a monthly average of 20 ore round trips per day. The number of ore round trips per day shall not exceed 30 on any given day.
8. Vermont Talc shall be permitted to operate a monthly average of 30 ore round trips per day, not to exceed 40 ore round trips on any given day, if the road to the mine entrance from Route 11 is paved.
9. Talc loads shall be covered on all trips.
10. Truck movements shall be restricted to daylight hours of 7:00 a.m. to 6:00 p.m., Monday through Friday and 8:00 a.m. to 12:00 noon on Saturday.

These conditions were imposed by the Commission based upon findings with respect to Criterion 1 (air pollution resulting from road and talc dust), Criterion 5 (the capacity of town roads to safely accommodate additional truck traffic), and Criterion 8 (adverse impact on the aesthetics of the area caused by ore trucks).

In lieu of these conditions, OMYA proposes the following land use permit language:

The Board reserves the right to review the permit and to impose additional conditions in the event Permittee seeks to increase truck traffic to more than a monthly average of 30 ore round trips per day (not to exceed forty ore round trips on any given day).

Vermont Talc has agreed to take necessary and appropriate measures, with the approval of the Board of Selectmen of the Town of Windham, to

control dust generated by trucks on the road from the mine entrance to Route 11 until the said road is paved. Such measures may include grading, watering, application of wetting agents (provided same is not objected to by property owners in the immediate area of application), binding agents or a combination of the foregoing. Permittee has agreed that it shall contribute to the Town of Windham funds for the paving of said road upon or concurrent with completion of paving which currently is to be completed by October, 1985.

Vermont Talc has agreed to take necessary and appropriate measures to control dust generated from talc loaded in trucks. Such measures may include watering, covering or otherwise controlling talc loads depending upon the condition (i.e., dryness) of the talc ore.

Vermont Talc has agreed to restrict ore truck movements to between 6:30 a.m. and 6:30 p.m.

The Town takes no official position with respect to the issues in controversy before the Board. However, the Town notes that its relationship with OMYA has been favorable and that the Corporation has committed itself to up-grading Town Highways #3, #9 and #6, in addition to work underwritten by OMYA in the past. See Exhibit #18.

The Regional Planning Commission believes the project to be in conformance with the regional plan but has recommended several conditions to "minimize negative impacts." See Exhibit #7. The McCandlesses are generally in support of the OMYA application.

The Schwartzes, Mr. Stebbins and Mr. Fleer expressed objections concerning dust and noise generated by ore trucks. These parties allege that OMYA's trucks adversely impact their use and enjoyment of residential properties adjoining the route from the mine to Route 11.

## II. PRELIMINARY PROCEDURAL ISSUES

OMYA objected to the Board's consideration of traffic safety issues under Criterion 5 of § 6086(a) and conformance with the Town Plan under Criterion 10. The Board overruled these objections. Board Rule 40(C) provides:

The scope of the appeal hearing shall be limited to those reasons assigned by the appellant why the commission was in error unless substantial inequity or injustice would result from such limitation.

OMYA opened Criterion 5 issues to our review by specific reference in its October 2 and March 5 notices of appeal to the Commission's findings on traffic safety and congestion. The local plan issue was specifically raised by OMYA in its original notice of appeal. While the latter issue was not identified in the March 5 notice of appeal, it was raised in a March 26 filing by counsel for the Schwartzes which was received by the Board within the 14 day time limit imposed by Board Rule 40(D) for cross-appeals. While that filing is not denominated an appeal, we conclude that it would be inequitable to foreclose consideration of the Town Plan in view of OMYA's original notice of appeal.

OMYA also objected to the participation of Mr. Fleer because he failed to attend the prehearing conference and did not submit a written statement concerning his position and identifying witnesses and exhibits, as required by the Prehearing Order. The Board overruled this objection. Mr. Fleer is not a full-time resident of Windham and did not, therefore, receive the Board's hearing notice or Prehearing Order in time to allow him to comply with the requirements of the Order. However, Mr. Fleer contacted the Board by telephone on March 30, and confirmed that conversation (including a statement of his position with respect to the appeal) in a letter received on May 2. We concluded that fairness required waiving the April 19 deadline imposed by the Prehearing Order. See Board Rule 16(C). However, we agreed with OMYA that, because Mr. Fleer did not file an appeal with respect to Criterion 1(B) issues and because those issues have not been raised in any other notice of appeal, Criterion 1(B) will not be addressed in these proceedings.

Finally, on May 8, OMYA called several witnesses that it had failed to identify at the prehearing conference or in any other manner prior to the hearing. While the Board permitted these witnesses to testify (there having been no objection from other parties), the Board refused to admit as exhibits a traffic study prepared for OMYA by Douglas Kennedy (marked for identification as Exhibit #10) and an air quality analysis prepared by Tech Environmental, Inc. (marked for identification as Exhibit #13). Work had apparently commenced on the traffic study as of the time of the prehearing conference and the air quality work started four days after the conference. We concluded that introduction of these materials would impose an unfair hardship on other parties who had no advance warning of their introduction, had not had the opportunity to review the reports or interview their authors prior to the hearing, and who were not represented by counsel at the time the exhibits were offered. The Prehearing Order listed witnesses and exhibits which OMYA intended to present and that Order was binding. See Rule 16(C). Even were OMYA to believe it could supplement its exhibit list, it could not reasonably conclude that the April 19 deadline imposed on other parties did not apply to OMYA. There having been no objection to the Order and there being no basis

to conclude that fairness required waiver of the Order's limitations, the Board denied OMYA's offer of proposed Exhibits 10 and 13.

III. FINDINGS OF FACT

1. On October 20, 1982, Land Use Permit #2W0551 was issued to OMYA authorizing the opening of a new surface talc mine adjacent to Town Highway #9 (White Road) in Windham, Vermont. In support of its application for the permit, OMYA indicated that it would rely principally upon continuous mining machinery and would only occasionally use blasting to extract talc. By Condition #4 of the permit, the Commission reserved jurisdiction to impose additional conditions if OMYA exceeded an average of 20 ore truck trips per day from the new mine.
2. The pending amendment application seeks approval for the use of blasting (on average, once per day) instead of machinery, the installation of a new mine entrance ramp, and an increase in the average number of daily ore trips from 20 to 30. The mine is located on the south side of T.H. #9, across the road from a mine operated by Vermont Talc since 1963. Both mines are located on the 84 acre "Hamm Property" now owned by OMYA and located in Windham. See Exhibits #1 and #2.
3. Vermont Talc has operated mines in Windham since 1905. The mine at issue in this appeal is part of a continuous vein of talc which includes the existing mine north of T.H. #9 and the original Vermont Talc mine near Route 11. Windham is the sole source for the Appellant's talc.
4. Material extracted from the White Road mine is transported to Vermont Talc's Chester processing facility. Trucks travel from the mine on T.H. #9, then onto T.H. #3 for a short segment, then onto T.H. #6 (Horsenail Hill Road) to its intersection with Route 11 (hereafter referred to as the "ore haul route"). Lands adjoining this truck route are wood and pasture land used primarily for residential purposes. The only non-residential use along the route is the Windham Volunteer Fire Department.
5. Vermont Talc has participated over a number of years in improving the ore haul route. In 1983 Vermont Talc spent approximately \$23,000 improving the section of T.H. #9 between the access drives to the old mine and the new mine. This work included tree removal, road widening, removal of ledge, installing culverts and drainage ditches, and the addition of gravel. Exhibit #2. In 1983 and 1984, Vermont Talc cleaned out ditches along the ore haul route and added an 18" gravel layer at a total cost of approximately \$58,000.

6. Vermont Talc has agreed to pay for paving the entire length of the ore haul route at an estimated cost of \$154,477, together with the "fine grading" expense of \$1,200. In addition, Vermont Talc has agreed to contribute \$10,000 each year to a capital improvement reserve fund to be used in the future to repave or otherwise maintain the ore haul route. This latter commitment is contingent upon the Town securing a similar commitment from "any other developer of industrial, commercial or residential projects which use portions of the haul route as their primary access." Exhibits #15 and #16. Pavement of the haul route is expected to be completed during the summer of 1985.
7. The McKenzie Brothers haul talc from the White Road pit under contract from Vermont Talc; Vermont Talc does not operate ore trucks itself. The normal pattern of truck traffic involves an average of 20 ore loads each day, operating during daylight hours and only on weekdays. Trucks have on occasion operated on the haul route as early as 5-5:30 a.m.
8. Because overtime compensation must be paid for week-end work and because Vermont Talc and McKenzie employees prefer not to work week-ends, substantially all truck trips occur during weekdays. However, when production drops because of weather conditions or equipment malfunctions at the Chester processing plant, week-end work is required in order for Vermont Talc to fulfill contractual obligations. There have been no Sunday truck trips from 1980 to the present and only 23 Saturdays have been worked within that period (including three thus far in 1985).
9. Tater Hill Country Club has its main access on T.H. #6 and is a major generator of both truck (mostly delivery vehicles) and automobile traffic. High speed vehicles apparently headed to and from this facility have posed safety concerns and have generated a substantial amount of dust. Automobile and truck traffic is also generated, to a far lesser degree, by residences along the ore haul route.
10. The McKenzie ore trucks generate a substantial amount of dust. Because the trucks are large (three axles with 10 wheels) and often travel at speeds of up to 40 miles per hour, road dust is generated whenever the ore haul route roadbed is dry. Furthermore, when loads of dry talc are transported without any covering, talc dust is generated by the McKenzie trucks.
11. Road dust generated by vehicles on the ore haul route, and talc dust generated by the McKenzie trucks, is deposited on the residential properties adjoining the haul route. This deposition adversely affects area residents' use and enjoyment of their property.

12. At the rate of 20 round trips each day, an ore truck passes along the haul route every 15 to 20 minutes. If the rate increases to 30 trips per day, a truck will pass every 10 to 15 minutes. Passing trucks produce both a loud diesel engine noise (especially when accelerating or decelerating), braking noises, and tailgate-banging noises when bumps are encountered. Some noise is acceptable to adjoining residents during day-time, weekday hours but adversely impacts enjoyment of their property before daybreak and on weekends.
13. Road dust can be reduced up to 50% by the application of water or calcium chloride to the dry roadbed. Road dust will be virtually eliminated as a problem once the ore haul route is paved. While engine noise impacts may not change, noise attributable to roadbed conditions may also be eliminated with paving of the haul route.
14. Most loads of talc hauled from the White Road mine are wet due either to weather conditions or an accumulation of water in the mine. No talc dust is generated by wet loads. Use of a properly installed and maintained cover over all dry talc loads substantially limits the generation of talc dust by ore trucks.
15. The Windham Town Plan (adopted December 17, 1979) provides, in part:

A proportion [sic] of the total land areas of the Town of Windham has a resource value of importance and must be protected, including ... mineral, stone and sand deposits .... [Land Use and Economic Development, II. Utilization of Natural Resources.]

Lands with high potential for the extraction of mineral and earth resources should be developed so as not to interfere with the subsequent extraction or processing of the resource. The extraction of such resources must ensure site rehabilitation, suitable for alternative uses./2/ and not result in a nuisance to neighboring property owners nor a burden on public services. [Resource Use and Conservation, V Earth Resources.] See Exhibit #17.
16. The talc deposit mined by Vermont Talc is a mineral resource with high value to the Town and, in view of the company's activities in the area, has a high potential for

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/2/ Site rehabilitation was addressed by the Commission in its findings in support of permit #2W0551. Because those findings are not at issue in this appeal we need not address site reclamation.

economic extraction. However, Vermont Talc's facilities are situated in an area used for residential purposes and, until the ore haul route is paved, the operation of ore trucks in the area during early morning hours, at speeds approaching 40 miles per hour, and on dry roads results in an undue burden on neighbors in that talc dust, road dust and noise is generated.

17. The Vermont Talc site is located within a "Rural Resource Area" as designated by the Regional Settlement Pattern Map of the "Summary Plan - Regional Land Use and Housing" adopted by the Windham Regional Planning and Development Commission on March 28, 1978. That area includes lands with a potential for mineral extraction and lists "mineral excavation" as a preferred use. Exhibit #8.
18. In view of Vermont Talc's contributions to the labor market (83 individuals are employed either directly or indirectly in association with the talc mine), the proposed development conforms with the economic development goals and findings of the Regional Plan. See Exhibit #8, § 11.1, Population Growth and Economic Development, page 18. Like the Town Plan, the Regional Plan identifies mineral deposits as important resources and provides: "Extraction should be planned to minimize negative impacts and ensure site rehabilitation." Exhibit #8, pages 37 and 66. Until the ore haul route is paved, negative impacts will arise from the increased volume of talc truck traffic but Vermont Talc can take steps to minimize those impacts.

#### IV. CONCLUSIONS OF LAW

We conclude that Vermont Talc's operation of ore trucks on the currently unpaved ore haul route at the rate proposed by the applicant, without talc loads being covered and without the use of water or calcium chloride on the road surface would cause undue air pollution. Thirty ore loads translates into trucks passing along the ore haul route at least 60 times each day, or one truck every 10 to 15 minutes. When the road surface is dry, the ten-wheel vehicles travelling at up to 40 miles per hour generate a substantial amount of road dust which is deposited on adjoining property. When talc loads are dry, air passing over the vehicles (both when loaded and empty) generate talc dust. Finally, the trucks generate considerable noise: engine noise, braking noise, and tailgate noises caused by the bumpy road surface.<sup>/3/</sup> The combined impacts of these conditions produces an excessive, negative impact on prevailing air quality in the residential area adjoining the ore haul route.

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<sup>/3/</sup> In addition to considering this issue under Criterion 8, noise may be considered as a component of air pollution. See In re Barker Sargent Corp., 132 Vt. 42, 47 (1973).

These impacts also result in an undue adverse effect on the aesthetics and the natural beauty of the area. Noise and dust interrupt the quiet enjoyment of the area by Vermont Talc's neighbors. This is especially true when noisy vehicles operate during very early morning hours.

However, these negative impacts will be virtually eliminated once the ore haul route is paved, assuming that dry talc loads are properly covered. Properly fitted and tied-down covers would prevent any substantial talc dust generation. We conclude that no useful purpose is served by requiring wet loads to be covered if Vermont Talc assures that all dry loads are covered; if the Applicant is unable to consistently fulfill this requirement, then all loads will have to be covered. We will impose an appropriate condition in the amended permit we now issue.

Vermont Talc has agreed to operate trucks only between the hours of 6:30 a.m. and 6:30 p.m., avoiding the disturbance caused by early morning and late evening operations. We conclude that these hours of operation will reduce adverse impacts on the aesthetics of the area and represent a reasonable accommodation of the interests of area residents.

We conclude that no undue adverse impacts with respect to air quality or aesthetics will result if round trips are limited to an average of 20 per day (and no more than 30 on any one day) until the ore haul route is paved. However, once the roadway is paved, we conclude that, in view of the record in this case, there is no reasonable basis for restricting the number of ore loads that can travel on town roads. Therefore, we will impose conditions which will:

- 1) Maintain the 20 load limit and require dust-control substances until the ore haul route is paved;
- 2) Eliminate vehicle load limits after the road is paved;
- 3) Retain jurisdiction in the Commission to re-evaluate the project with respect to Criteria 1, 5, and 8, and impose additional conditions if necessary, once Vermont Talc exceeds an average of 30 daily trips;
- 4) Require Vermont Talc to maintain accurate logs of daily ore truck loads, and to submit copies of the logs to the Commission upon request; and
- 5) Limit truck operating hours to 6:30 a.m. to 6:30 p.m.

Finally, because the Applicant has not operated on any Sunday since 1980 and because Saturday operations have been rare since that date, there is no basis at this time to impose any restrictions on weekend operations./4/

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/4/ Board members Bongartz and Eastman would impose limitations on weekend operating hours.

We also conclude that, with the conditions noted above, this project conforms with both the Town and Regional Plans.<sup>/5/</sup> Both plans encourage the productive use of mineral resources which is the very goal of the pending application. The Regional Plan encourages the creation of jobs and expansion of the local economy, goals which are also addressed by this application. In respect to extraction operations, the plans also encourage an accommodation with surrounding land uses in an effort to avoid negative impacts on adjoining lands. The conditions which we have drafted should assure this accommodation.<sup>/6/</sup>

V. ISSUANCE OF AMENDED LAND USE PERMIT

In accordance with these findings of fact and conclusions of law, we will issue Land Use Permit #2W0551-1-EB. The Board hereby incorporates by reference as if fully set forth, and adopts as its own, those findings of fact and conclusions of law issued by the Commission which were not appealed and which are not affected by the Board's proceedings. The amended permit approves the project subject to conditions imposed by the Commission and not addressed in this appeal, and conditions reflected in our findings and conclusions.

Based upon the foregoing findings of fact and conclusions of law, it is the conclusion of the Board that the project described in amendment application #2W0551-1, if completed and maintained in accordance with all terms and conditions of that application, the exhibits presented to the Commission and the Board by the Applicant and the Conditions set forth in Land Use Permit #2W0551-1 as amended by Land Use Permit #2W0551-1-EB, will not cause or result in a detriment to the public health, safety or general welfare under the criteria set forth in 10 V.S.A. § 6086(a).

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<sup>/5/</sup>We note that the Regional Plan by its terms attempts to limit the use of that document in Act 250 proceedings. While this limitation is of little relevance to this case because the Town and Regional Plans are consistent with each other in relation to the Vermont Talc proposal, it is 24 V.S.A. § 4348(a) which guides decision making under Criterion 10 with respect to the applicability of town and regional plans.

<sup>/6/</sup>The Applicant raised a series of legal issues in a memorandum filed with the Board on May 8. However, we need not address those issues because the amended permit we now issue contains conditions which are consistent with those suggested by the Applicant. However, should the Applicant believe otherwise, it may avail itself of the remedies provided by Board Rule 31 and we will address the May 8 objections.

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VI. ORDER

Land use Permit Amendment #2W0551-1-EB is hereby issued in accordance with the findings of fact and conclusions of law herein. Jurisdiction over this matter is returned to the District #2 Environmental Commission..

Dated at Montpelier, Vermont this 21st day of June, 1985.

VERMONT ENVIRONMENTAL BOARD

by:



Darby Bradley, Chairman  
Ferdinand Bongartz  
Dwight E. Burnham, Sr.  
Jan S. Eastman  
Samuel Lloyd  
Donald B. Sargent