

STATE OF VERMONT
ENVIRONMENTAL BOARD
10 V.S.A., CHAPTER 151

RE: New England Telephone & Findings of Fact, Conclusions
Telegraph of Law and Order
P.O. Box 669 Land Use Permit Amendments
Rutland, VT 05701 #2W0037-1-EB and #2W0579-EB
and
Central Vermont Public Service Corp.
77 Grove St.
Rutland, VT 05701

On September 15, 1983 an appeal was filed with the Environmental Board (the "Board") by Central Vermont Public Service Corporation ("CVPSC") from two decisions issued by District #2 Environmental Commission ("District Commission") on August 17, 1983. Land Use Permits #2W0037-1 and #2W0579 specifically authorize CVPSC and New England Telephone and Telegraph ("NET") to construct 5033 feet of utility line along Taft Road in Townshend, Vermont, and to install new equipment along a 9461 foot portion of Vermont Highway 30 in Dummerston, Vermont.

On September 23, 1983 the Board notified the parties of its intent to designate its Chairman to act as a hearing officer in this matter pursuant to Board Rule 41 and 3 V.S.A. §811. Having received no objection, a public hearing was convened on October 13, 1983 in Springfield, Vermont, with Leonard U. Wilson acting as administrative hearing officer.

The only party present at the hearing was CVPSC represented by Joseph Kraus, Esq. The hearing was recessed on October 13, pending receipt of Appellant's supplemental Memorandum of Law, preparation of this Proposal for Decision, a review of the record, and deliberation by the Board. The following findings of fact and conclusions of law are based upon Appellant's Memoranda of Law dated September 19 and October 20, 1983, and the record developed at the hearing.

I. Issues Raised by the Appeal

CVPSC. objects to Conditions 7 and 8 of Land Use Permit #2W0579 and the substantially similar Conditions 8 and 9 of Land Use Permit #2W0037-1, which read as follows:

8. No herbicides shall be used on the R.O.W. without first submitting a list of wells and household springs along the R.O.W. and the rest of the application

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package for herbicide spraying to the Commission and shall comply with 6VSA, Chapter 87 Section IV (4)c, (2) and (3) in addition to all other parts of the regulations.

9. The Commission reserves the right to evaluate and impose additional conditions with respect to traffic, erosion and herbicide spraying. The Commission reserves this right for a period of time commencing and expiring with the permit.

These conditions were imposed by the Commission pursuant to Criteria 1 and 3 of 10 V.S.A. §6086(a).

More specifically, CVPSC argues:

- 1) The Board and Commission should defer to the expertise of the Department of Agriculture concerning herbicide management and should avoid duplicative administrative review.
- 2) The Board and Commission are preempted by the Department of Agriculture in respect to regulation of herbicide application.
- 3) The Board and Commission are prevented by Board Rule A-6 from imposing notification requirements different from those required by Department regulations.

II. Findings of Fact

1. In application #2W0579, CVPSC and NET propose to install telephone equipment along a 3271 foot stretch of Vermont Route 30, south of West Dummerston and to install telephone and electric equipment along a 6190 foot section of Route 30, north of West Dummerston. In application #2W0037-1, the Applicants propose to install telephone and electric equipment along a 5033 foot portion of Town Highway 63 (Taft Road) in Townshend, Vermont. Both applications propose distribution and not transmission facilities.
2. The CVPSC system includes approximately 7,000 miles of distribution line. Right-of-way maintenance consists of flat trimming and clearing, tree removal and herbicide spraying. Two percent of the distribution

line right-of-way maintenance budget is allocated to spraying activities and approximately 7.5% of the CVPSC distribution system is maintained by spraying. CVPSC uses a growth inhibiting herbicide called "**Krenite**" in its spraying operations. While CVPSC regards this chemical as "relatively safe," it nonetheless would be harmful and toxic should it reach ground water or wells.

3. CVPSC follows a policy of not spraying herbicides in areas near surface waters or houses. The lines proposed in application #2W0579 are adjacent to the West River and run through residential areas. The line proposed in application #2W0037-1 would also run near streams and existing homes. CVPSC has not made application to use herbicide spraying as a **right-of-way** maintenance technique for these lines.
4. The Department of Agriculture ("**the Department**") has adopted "Vermont Regulations For Control of Pesticides" ("**the Regulations**") which, **inter alia**, control the spray application of herbicides by utilities like CVPSC and NET in right-of-way maintenance programs through the issuance of "Permits to Conduct Right-of-Way Spraying." We take official notice of the Regulations. Furthermore, the Vermont Pesticide Advisory Council ("**VPAC**") reviews applications filed with the Department under its Regulations and makes recommendations to the Commissioner of Agriculture concerning those applications.
5. As a matter of Department policy, the Commissioner¹ requires herbicide applicators to maintain the following minimum buffers:
 - a. for applications from the ground -
 - 100 feet from individual water supplies
 - 200 feet from public water supplies
 - 30 feet from surface waters
 - b. for applications from the air -
 - 300 feet from water supplies
 - 100 feet from surface waters.

¹The term "pesticide" as used by the Department is defined to include "... any substance ... used as a plant regulator, defoliant or desiccant." See 6 V.S.A. §911(5).

The Department can approve exceptions to these buffer limitations. Exhibit 1.

6. Herbicide sprayers are required by the Department's regulations to identify on geodetic maps all public water supplies. Private water supplies must be identified if the permittee has been notified of their locale by individual water supply owners or users.
7. While the Department requires weekly spray application reports (see Exhibit 4) and conducts random spot checks during spraying, no state representative regularly supervises the application of herbicides to rights-of-way to assure compliance with Department regulations and permits. Furthermore, the proceedings of the VPAC are open to the public and comment by interested citizens is received, but hearings are not conducted with full contested case notice and hearing formalities.
8. The Department's Regulations require newspaper notice of herbicide spraying as well as notification by any one of three alternate methods: radio spot messages, mail notice to residents adjacent to the right-of-way, or personal delivery. Regulation amendments now under consideration by the Department would require personal notice to residents adjacent to rights-of-way.
9. The Commission conditioned the permits now under appeal to require both mail and personal notice. Further, the **Commission** required the Applicants to submit a list of all wells and household springs "along the R.O.W."

III. Conclusions of Law

1. Duplicative Review

Before issuing a land use permit, the Board or Commission must find that the project will comply with applicable health regulations and "will not involve the injection of waste materials or any harmful or toxic substances into ground water or wells." 10 V.S.A. 56086(a)(1) (B). We must further find that the project "will, whenever feasible, maintain the natural condition of the [adjacent] stream, and will not endanger the health, safety, or welfare of the public or adjoining landowners." 10 V.S.A. §6086 (a) (1) (E).

We agree with CVPSC that it is not desirable to duplicate in regulatory detail the herbicide control activities of the

Department of Agriculture. However, it is inherent in the language of Criteria 1(B) and 1(E) that we must consider the impact of any herbicide use appurtenant to the proposed development on the values sought to be protected by those criteria. This obligation must be pursued independent of related regulatory activities of other state agencies. This conclusion is consistent with the language of 10 V.S.A. §6086(d), especially the statement, "The board shall not approve the acceptance of a permit or approval of such [a state] agency ... unless it satisfies the appropriate requirements of subsection (a) of this section."

Any protective measure required by the Department in its Regulations and permits is important evidence to be considered under Criterion 1, but those measures do not eliminate our statutory duty under Criterion 1.

2. Preemption

10 V.S.A. §1108, a portion of the Pesticide Control Act under which the VPAC and the Department regulate herbicides, states, in pertinent part:

The powers granted to the commissioner under this chapter shall not limit, restrict or suspend any similar powers he may have under other provisions of law, and shall not limit or restrict any powers presently, or at any time hereafter, granted to any other agency or department of the state.

Furthermore, the Department's Regulations state, in Section IV(4)h:

The clearing of brush, trees, and other vegetation from rights-of-way shall be conducted in accordance with other applicable provisions of state and federal laws and regulations.

We must assume that the requirements of Act 250 were contemplated by these two provisions: the Pesticide Control Act was passed during the same Legislative session as Act 250 and

distribution line review activities under Act 250 were well established when the Department's Regulations took effect on May 11, 1981.

We, therefore, conclude that the Legislature did not intend the Department's pesticide regulation program to preempt Board and Commission review of herbicide use as it relates to a proposed development. CVPSC argues that the Board should use "statutorily ordained channels" if it wishes to comment on herbicide use. Contrary to CVPSC's argument, the Environmental Board is not "part of the agency" for the purposes of 3 V.S.A. §2803 and does not act in an advisory capacity to the Agency of Environmental Conservation. See 10 V.S.A. §§2801 and 2878. Therefore, it is not represented on the VPAC.

CVPSC further argues that the Board should emulate the Public Service Board example of deference to the Department of Agriculture in the area of herbicide management. However, Exhibit A, appended to CVPSC's October 20, 1983 memorandum (a portion of the PSB's findings, conclusions and Certificate of Public Good in Docket Nos. 4622/4724, dated February 25, 1983) reveals a substantial degree of involvement by the PSB in right-of-way vegetative management decisions. See, for example, condition number 4, page 3 of the Certificate. Furthermore, we will take official notice of the PSB's order dated June 22, 1983 pertaining to an "investigation into maintenance of rights-of-way by utilities" which suggests an intention to review vegetative management issues which may also be within the Agriculture Department's purview.

3. Rule A-6

Board Rule A-6 reads as follows:

Right-of-way improvements shall be specified in the application and shall clearly not have an undue adverse effect on the ecology and aesthetics of the area, and should include vegetation control techniques to avoid unreasonable soil erosion or water pollution. All herbicide applications shall be in strict conformance with the regulatory and licensing requirements of the commissioner of agriculture or as provided by statute.

We conclude that the second sentence of Rule A-6 establishes the Department's Regulations as the minimum

standards applicable to right-of-way herbicide applications. This conclusion is consistent with the first sentence of Rule A-6 and with our obligations under Criteria 1(B) and 1(E). In any event, CVPSC would be in strict conformance with the Department's Regulations if Condition #8 of permit #2W0037-1 and Condition #7 of permit #2W0579 are fulfilled.

4. Reasonableness of Conditions

The Board is authorized to impose "such requirements and conditions as are allowable within the proper exercise of the police power and which are appropriate with respect to" the 10 criteria. 10 V.S.A. 56086(c). We have previously found that CVPSC does not consider the rights-of-way at issue in this appeal appropriate, under its own standards, for maintenance through spray application of herbicides. Furthermore, we have found that CVPSC has no current intent to use herbicides in the maintenance of these projects.

We, therefore, conclude that the imposition of any requirements or conditions with respect to herbicides is inappropriate. Should CVPSC decide at some future time to use herbicides, **appellant should** consult with the District #2 Commission to determine whether a permit amendment would be required. While such a decision rests first within the Commission's discretion, we suggest that herbicide use would constitute sufficient change in these developments to warrant a permit amendment.

We have addressed the various issues raised by CVPSC in an effort to provide limited guidance concerning matters which are likely to again be presented in future distribution line proceedings. However, because herbicide use is not a matter of active controversy in these appeals, we cannot address the propriety of the conditions imposed by the Commission in Land Use Permits #2W0037-1 and #2W0579.

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IV. Order

Land Use Permits #2W0037-1-EB and #2W0579-EB are issued in accordance with the Findings of Fact and Conclusions of Law herein.

Dated at Montpelier, Vermont this 30th day of November, 1983.

Board members participating
in this decision:
Leonard U. Wilson
Warren M. Cone
Priscilla N. Smith
Dwight E. Burnham, Sr.
Ferdinand Bongartz
Lawrence H. Bruce, Jr.

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