

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

RE: Sigda Lumber, Inc. by
Rhys Evans, Esq.
P.O. Box 1205
Manchester Center, VT 05255

Findings of Fact,
Conclusions of Law
and Order
Land Use Permit
#2W0749-EB
(Revocation)

This decision pertains to a petition for revocation filed by Eric and Karen Skeldon concerning the above permit. As is explained below, the Environmental Board has found that the Permittee violated the permit and revokes the permit subject to correction of the violation.

I. SUMMARY OF PROCEEDINGS

The District #2 Environmental Commission issued Land Use Permit #2W0749 (the permit) on January 4, 1988 pursuant to the minor application procedures in Board Rule 51. The permit authorizes the construction of an 80 x 126 foot metal building to be used as a retail lumber and home center business on property located off Route 100 in South Londonderry.

On February 17, 1989, the Board received a request from the District Commission to initiate proceedings to revoke the permit. On March 22, the Board voted not to initiate revocation proceedings and to offer the Permittee the opportunity to sign an Assurance of Discontinuance pursuant to 10 V.S.A. § 8007. A draft Assurance was sent to the Permittee on June 27, and rejected by the Permittee by letter dated July 13. On July 28, the Board received a revocation request from Eric and Karen Skeldon, who live across the road (Route 100) from the Permittee's store.

Environmental Board Member Ferdinand Bongartz convened a prehearing conference in South Londonderry on August 31, 1989. At the prehearing, the Permittee objected to a number of issues raised by the Skeldons on the ground that they had no standing to raise them. On September 11, the Skeldons filed a memorandum regarding their standing to raise these issues. On September 13, the Board issued a prehearing conference report and order. On September 15, the Agency of Natural Resources noticed its appearance. On September 18, the Permittee filed a letter standing that it no longer objected to the Skeldons' standing to raise certain issues.

On October 6, 1989, the Skeldons filed a list of witnesses and exhibits. On October 17, the Permittee filed a list of witnesses and exhibits. On November 28, the Permittee filed prefiled testimony. On November 29, the Skeldons filed prefiled testimony. On December 4, the

Agency of Natural Resources filed an executed stipulation and escrow agreement entered into between it and the Permittee. On December 5, a hearing panel of the Board convened a public hearing in South Londonderry. After taking a site visit and hearing testimony, the panel recessed the hearing pending review of the record, deliberation, and preparation of a proposed decision.

At the hearing the parties agreed that a revised stipulation between the Agency of Natural Resources and the Permittee could be filed subsequent to the hearing. The Permittee filed a revised stipulation signed by it and the Agency on December 22, 1989.

A proposed decision was sent to the parties on April 27, 1990, and the parties were provided an opportunity to file written objections and to present all argument before the full Board. Requests for oral argument were to be filed no later than May 7, 1990.

On May 2, 1990, the Permittee filed correspondence stating that it had no objection to the proposed decision. On May 8, 1990, the Skeldons filed a response to the proposed decision and a request for oral argument. The Board deliberated on May 24, 1990 in Chittenden, Vermont and determined to approve the panel decision and to deny **the Skeldons'** request for oral argument because it was not timely filed.

This matter is now ready for decision. To the extent that any proposed findings of fact and conclusions of law are included below, they are granted; otherwise these findings of fact and conclusions of law are denied.

II. ISSUES IN THE REVOCATION REQUEST

1. With respect to culverts, filling of wetlands, project **signage**, and lighting, whether the project conforms to Condition 1 of the permit, which requires that the project be completed in accordance with the plans and exhibits on file with the District #2 Environmental Commission.

2. Whether the project conforms to Condition 12 Of the permit, which requires maintenance of 50 feet of naturally undisturbed vegetation along the southwest property line and Route 100.

3. Whether the project conforms to Condition 13 of the permit, which requires a sound barrier and plantings to screen the barrier from Route 100.

4. Whether the project conforms with Condition 19 of the permit, which requires shielding of lights and light sources from view.

III. FINDINGS OF FACT

1. In issuing the permit, the District #2 Environmental Commission approved the construction of an 80 by 126 foot metal building to be used as a retail lumber and home center business. The project was constructed and is located on Route 100 in Londonderry, Vermont.
2. The project abuts Route 100 on the west side. A parking lot is located between Route 100 and the west side of the metal building. Vehicles enter the project from Route 100 through an access which leads into the northwest part of the parking lot. The parking lot is paved. The pavement continues along the northern side of the building, connecting the parking lot adjacent to Route 100 to a paved area on the eastern side of the building. Most of this paved area is screened from view of Route 100 by the building.
3. Condition 1 of the permit states:

The project shall be completed in accordance with the plans and exhibits stamped "**Approved**" and on file with the District Environmental Commission and in accordance with the conditions of this Permit. **No** changes shall be made in the project without written approval of the District Environmental Commission.
4. Condition 12 of the permit provides:

The Permittees shall maintain a minimum 50 feet of naturally undisturbed vegetation along the southwest property line and along Route 100.
5. Condition 13 of the permit provides:

A sound barrier shall be installed between the parking lot and the 50 feet along Route 100. Grouping of evergreen plantings shall be used to screen the sound barrier from Route 100.
6. Condition 19 of the permit provides:

All lights and light sources shall be shielded from view of neighbors and the road.

7. Exhibit #2 to the permit is entitled "District Environmental Commission II & III Schedule B, Act 250 Information** and is stamped "approved." Page nine of Schedule B describes the exterior lights for this project as "seventy five watt mercury vapor under canopy and behind shields during store hours seasonally [as] needed." Page nine of Schedule B also describes exterior signs for the project to be **"block** letters on building - down cast lighting from above again, during store hours seasonably as needed."
- a. Exhibit #5 to the permit is a map stamped **"received"** October 16, 1987 and "approved" on January 11, 1987. The hand-drawn map shows a sound barrier and evergreen planting located 50 feet from Route 100 on the western side of the parking area between Route 100 and the project building.
9. Exhibit #20 to the Permit is a map stamped **"approved"** and entitled "Site Plan for Sigda Lumber Co.," dated November 17, 1987. The map represents that a twelve-inch culvert would be installed under the front access driveway to Route 100. The map also shows lines running along the northern, eastern, and southern boundaries of the project, with the notation "Natural Tree Barrier (Existing) Left Untouched." The map further shows, in a hand-written notation, a **"noise barrier"** of indeterminate length marked to be a three-foot high earth berm with landscaping. Notations on the map indicate that the landscaping on the berm would be "spreading **yews,**" and **"mix** hemlock, spruce, and balsam." The map is unclear, but does not appear to show 50 feet of space between the berm and Route 100.
10. Since the completion of project construction, the Permittee has at times exhibited a portable sign with hanging plastic flags near the access driveway next to Route 100. This portable sign, which stands on a skid, was not referenced in either the permit or the approved exhibits to the permit.
11. The permit required the installation of a twelve-inch culvert. The purpose of the culvert under the front driveway is to enable drainage to occur between a wetland located south of the project and a wetland located north of the project. The Permittee has not installed the culvert.
12. The Permittee, in constructing the project, placed fill in the wetland located north of the project. This

construction encroached approximately 20 to 25 feet further north into the wetland than is allowed by the Natural Tree Barrier line marked on Exhibit #20 to the permit.

The Permittee and the Agency of Natural Resources have submitted a stipulation and escrow agreement, admitted as Exhibit #12 in this revocation proceeding. (The stipulation is referenced within Exhibit #12 as Exhibit B.) The terms of the stipulation are incorporated herein by reference. Paragraphs 1 and 2 of the stipulation set forth specific actions which the Permittee will undertake regarding the installation of a culvert under the front access driveway to insure that proper drainage occurs from the wetland located south of the property to the wetland located north of the project, the removal of the fill from the wetland located north of the project, and other measures related to the restoration of that wetland.

The Permittee did not leave 50 feet of undisturbed vegetation between Route 100 and the parking lot to the west of the project. Instead, the Permittee installed an earthen berm between the parking lot to the west of the project and Route 100. This berm is eight feet high near the parking lot access point from Route 100 which is its northern terminus, and slopes down somewhat towards its southern end. Some evergreens have been planted on top of the berm.

15. The Permittee has placed three 300-watt bulbs on lighting fixtures on the earthen berm which are adjustable and can be lowered. The lights are not shielded. The Permittee turns these lights off at 5:30 p.m. unless customers are still in the store or in the parking lot. During and after hours, there are machines inside the building which are lit, as well as lit exit signs for the project. Some light from within the project reflects out through the entry doors to the project in the front of the project, which are made of glass. The store closes at 5:30 p.m. There are no night deliveries.

IV. CONCLUSIONS OF LAW

In this matter, there are six different grounds alleged for revocation of this permit: (1) failure to install the twelve-inch culvert under the front access driveway, (2) fill of a portion of a wetland located north of the project, (3) placement of a sign near the intersection of the front access driveway and Route 100, (4) failure to maintain a

50-foot zone of undisturbed vegetation between Route 100 and the parking lot on the west side of the project, (5) failure to construct an adequate sound barrier, and (6) failure to shield the three lights on the earthen berm from view and use of 300 watt bulbs on the berm.

Act 250 provides that "[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." 10 V.S.A. § 6090(c).

Board Rule 38(A) provides concerning revocations for violations:

(2) Grounds for revocation. 'The board may after hearing revoke a permit if it finds that: (a) The applicant or his representative willfully or with gross negligence submitted inadequate, 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.

(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 a escrow account, to assure compliance with the board's order ...

The Board has concluded that grounds to revoke the permit exist for failure to install the culvert under the front access driveway and the filling of part of the wetland located north of the project. Condition 1 of the permit requires the Permittee to build this project in conformance with the plans which the District Commission approved in

issuing the permit. Exhibit #20 to the permit clearly specifies the placement of a twelve-inch culvert under the front access driveway and the limitation of project construction to an area south of a line marked "Natural Tree Barrier." The Permittee did not construct the twelve-inch culvert under the front access driveway. The Permittee did fill a portion of the wetland located north of the Natural Tree Barrier line and encroached into the wetland approximately 20 or 25 feet beyond that line.

The Board has also concluded that, except for the lights on the earthen berm, the other grounds alleged in this matter do not warrant revocation. The use of the free-standing sign at the intersection of the front access driveway and Route 100 does not constitute grounds for revocation pursuant to Rule 38(A). The Board believes, however, that use of this sign may require a permit amendment pursuant to Board Rule 34, and suggests that the Permittee seek a determination from the District #2 Coordinator on whether such an amendment is required.

The failure to maintain the 50-foot zone of undisturbed vegetation also is not a ground for revocation. The Board believes that there is a contradiction between Condition 12 of permit, which requires this zone, and Exhibit #20 to the permit, which appears to place a three-foot high earthen berm with landscaping within this zone. Thus, the Board cannot say that the permit clearly required the maintenance of this zone between Route 100 and the parking lot located to the west of the project.

In addition, the sound barrier requirement has not been violated. An approximately eight-foot high earthen berm with evergreen plantings has been constructed. Exhibit #20 to the permit only specifies a three-foot high earthen berm. While Condition 13 does state that a sound barrier would be installed between the parking lot and the 50-foot zone of undisturbed vegetation along Route 100, the Board has noted above that Exhibit #20 appears to place the earthen berm within that zone.

Finally, the Board has concluded that the lights on the earthen berm do violate the permit. Condition 19 of the permit requires that project lighting be shielded. Condition 1 of the permit requires compliance with the approved plans and exhibits. Exhibit #2 to the permit states that the Permittee will use seventy-five watt bulbs for the exterior lighting of this project. Accordingly, the failure to shield the lights on the berm and the use of any wattage greater than seventy-five watts are violations of the terms of the permit.

Pursuant to Rule 38(A)(3), the Board will give the Permittee an opportunity to correct the violations which it has found. Exhibit #12 to the Board file in this matter contains an executed stipulation and escrow agreement between the Permittee and the Agency of Natural Resources. By agreement of the parties at the hearing, this stipulation and escrow agreement was updated in a revised document executed December 14, 1989, which the parties agreed could be considered by the Board in this matter. To remedy the violations concerning the culvert under the front access driveway and the fill of the wetland north of the project, the Board will require the Permittee to take those steps outlined in the stipulation and escrow agreement as updated and executed December 14, 1989. To remedy the lighting violation, the Board will require the installation of shielding for the berm lights and the replacement of the 300 watt bulbs with seventy-five watt bulbs.

The Board will require the Permittee to certify that, the violations have been corrected by affidavit to be received on or before July 9, 1990, a copy of which affidavit is to be sent by the Permittee to all parties. This affidavit shall set forth in detail the corrective measures taken. If the Board concludes that the affidavit meets the specific corrective actions set forth herein, it will accept the affidavit as satisfaction of the violations. Parties to this revocation proceeding will have three weeks from the postmark date of this certificate to file any written objection to the certificate.

IV. ORDER

1. The Permittee has violated the permit with respect to the front access driveway culvert; the filling of the wetland located north of the project; and the non-shielding of lights, and use of 300 watt bulbs, on the earthen berm.

2. The permit is revoked subject to correction of the violations as specified in the Board's decision, above.

3. The Permittee shall certify correction of these violations on or before July 9, 1990, in accordance with the Board's decision, above.

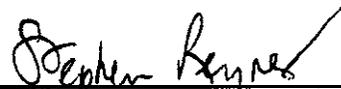
4. Within three weeks of the date the Permittee's certification of compliance is postmarked, any written response to the certification must be filed.

5. The Permittee may operate in accordance with the permit until the Board makes a determination on the certification.

Dated at Montpelier, Vermont this 26th day of June, 1990.

ENVIRONMENTAL BOARD

BY



Stephen Reynes, Chairman
Ferdinand Bongartz
Elizabeth Courtney
Arthur Gibb
Samuel Lloyd
Charles Storrow
W. Philip Wagner

a:sigda.dec (wdl)