

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

Re: Green Crow Corporation

Land Use Permit #3R0903-EB
Docket No. 845

MEMORANDUM OF DECISION

This decision addresses the Motion to Alter, Motion to Dismiss, and Motion to Allow Appeal from Interlocutory Order, filed by Green Crow Corporation (Permittee). As set forth below, the Board denies Permittee's Motion to Alter and Motion to Dismiss and dismisses the Motion to Allow Appeal for lack of subject-matter jurisdiction.

I. PROCEDURAL SUMMARY

Green Crow Corporation (Permittee) appeals from Land Use Permit #3R0903 (Permit) and accompanying Findings of Fact, Conclusions of Law, and Order (Decision), which authorize the harvest of timber on 184 acres of 508 acres above 2,500 feet in elevation, on a 1,281-acre tract of land located off Route 100 in Granville, Vermont (Project).

On February 24, 2004, the District 3 Environmental Commission issued the Permit and Decision to Permittee. Permittee filed an appeal with the Environmental Board (Board) from the Permit and Decision on March 23, 2004. Permittee also filed a Motion to Continue the prehearing conference, which was granted. Permittee claims that the Commission erred in its conclusions on 10 V.S.A. § 6086(a)(1), (a)(1)(A), (a)(1)(E), (a)(4), (a)(8)(A), and (a)(9)(K)(Criteria 1, 1(A), 1(E), 4, 8(A) and 9(K)), challenges Conditions 5-12 and 14-16 of the Permit as unauthorized, and seeks to challenge any regulation of land below 2,500 feet in elevation.

On September 9, 2004, Board Chair Patricia Moulton Powden convened a Prehearing Conference with the following participants:

Permittee, by David L. Grayck, Esq., with Nicholas Brunet
Agency of Natural Resources (ANR), by Elizabeth Lord, Esq.

A Prehearing Conference Report and Order was issued on September 14, 2004 (PCRO). Among other things, the PCRO identified issues and allowed time for ANR to determine whether it would contest the jurisdictional issues Permittee seeks to raise in this appeal, and set a deadline for motions for summary decision.

In accordance with the PCRO, ANR notified Permittee that it would contest the jurisdictional issues on October 7, 2004. On November 3, 2004, the Permittee filed a Motion for Summary Decision. On December 6, 2004, the Chair granted ANR's request to continue the reply deadline to December 10, 2004.

The Board deliberated on the Permittee's Motion for Summary Decision on December 15, 2004. On January 7, 2005, the Board issued a Memorandum of Decision (MOD) denying summary decision on the preliminary issue of subject-matter jurisdiction over the question of Act 250 jurisdiction, and dismissing the motion on the jurisdictional issue. In accordance with the MOD the Chair issued a Scheduling Order the same day, which set the remaining merits issues for hearing.

On January 14, 2005, Permittee filed a Notice of Appeal from the MOD to the Vermont Supreme Court, and an Objection to Scheduling Order requesting that the hearing and prehearing deadlines be stayed pending resolution of the Vermont Supreme Court appeal. The Board deliberated on February 2, 2005. On February 8, 2005, the Board issued a Memorandum of Decision denying Permittee's request to continue the hearing and prehearing deadlines.

On February 22, 2005, the Permittee filed a Motion to Alter, Motion to Dismiss, and Motion to Allow Appeal from Interlocutory Order. The Board deliberated on March 16, 2005.

II. DISCUSSION

Permittee requests that the Board alter its decision not to continue the prehearing and hearing dates in this matter; in the alternative, Permittee moves to dismiss its appeal of the merits issues. If neither of those motions is granted, Permittee requests permission to bring the interlocutory appeal it filed in January 2005.

A. Motion to Alter

Permittee moves to alter the Board's February 8, 2005 Memorandum of Decision, to continue the hearing and the deadlines for prefiling evidence in this matter until the Vermont Supreme Court decides the pending appeal, *In re Green Crow Corp.*, No. 2005-036. In that appeal, the Permittee challenges the Board's ruling that it lacks subject-matter jurisdiction to consider the question of Act 250 jurisdiction over land below 2,500 feet in elevation.

In support of its motion, Permittee argues that the hearing schedule should be delayed because it "no longer contests" the challenged permit conditions "with respect to its logging operations above 2,500 feet in elevation." (Motion at 4.) The merits issues in this case, as defined in the September 14, 2004 Prehearing Conference Report and Order (PCRO), concern whether the Project complies with certain Act 250 criteria without the challenged permit conditions. There is no limitation with respect to elevation. Therefore, to the extent that the Permittee still contests these conditions as they may apply to land below 2,500 feet in elevation, these issues remain ripe.

Permittee also argues that there is no need for the Board to hear the merits issues before the Vermont Supreme Court appeal is resolved, and that it “should not be forced to litigate the merits.” (Motion at 8.) The Board notes that it was the Permittee who raised these merits issues, and the Permittee who filed the interlocutory appeal with the Court on the question of subject-matter jurisdiction. Nothing in Board rules or other applicable law requires that the Board delay a permit appeal under these circumstances.

In short, the Permittee’s Motion to Alter does not present any reason to delay the hearing or prefiling deadlines. The Board declines to alter its decision.

B. Motion to Dismiss

In the alternative, the Permittee asks that the Board consider its Motion to Dismiss.

The Board has discretion to reject a withdrawal or dismissal of an appeal if it would prejudice the public interest that the agency is charged to protect. *Re: Dexter and Susan Merritt*, Declaratory Ruling 407, Dismissal Order at 2 (Oct. 2, 2002)(citing *Re: Ronald L. Saldj*, #5W1088-1-EB, Memorandum of Decision at 3 (Oct. 1, 1996); *Re: Rockwell Park Associates and Bruce J. Levinsky*, #5W0772-5-EB, Dismissal Order (Feb. 17, 1994); *Re: H.A. Manosh Corp.*, Declaratory Ruling 247 (Dec. 13, 1991)); see also *Re: Champlain College Business Center and Student Life Complex*, #4C0515-6(Remand)-EB, EB #822 and #4C0515-7-EB, DO at 2 (Apr. 17, 2003)(where appellant seeks to withdraw its appeal and no party objects, dismissal does not prejudice public interest). There is no opposition to this motion and dismissal of this appeal would leave the permit in force, with the challenged conditions, so it would appear that dismissal would not conflict with the public interests protected by Act 250. If the Permittee were asking to withdraw its appeal on all remaining merits issues, Board precedent would support granting this request.

However, Permittee requests dismissal of the merits issues only insofar as they concern land and operations at elevations above 2,500 feet. In its motion, Permittee notes that: “If it is the Board ruling that the permit conditions identified in issues #1-#6 do apply to [Permittee’s] land and operations below 2,500 feet, [Permittee] contests whether such conditions can apply as a matter of law . . . and the Board should grant the motion to appeal interlocutory, and allow [Permittee] to pursue its Supreme Court appeal” (Motion at 11 n.5.) This indicates that the Permittee seeks dismissal only to the extent that the challenged permit conditions apply to lands and activities above the 2,500-foot elevation point. In doing so, Permittee asks that the Board decide, as a threshold matter, whether the challenged permit conditions apply to lands and activities below 2,500 feet in elevation. The Board does not decide the applicability of Act 250 in permit appeals, as held in the MOD Permittee has appealed to the Vermont Supreme

Court. *See also*, 10 V.S.A. § 6007(c)(person may request jurisdictional opinion to determine applicability of Act 250).

Since it is not entirely clear that the Permittee seeks to withdraw all remaining merits issues, dismissal is not warranted. If the Permittee wishes to withdraw all remaining merits issues, it may file another, more comprehensive, request to dismiss.

C. Motion for Permission to File Interlocutory Appeal

Because the Motion to Dismiss and the Motion to Alter are denied, Permittee requests permission to file the interlocutory appeal it filed in January, 2005. As the Permittee points out, appeals from Board decisions to the Vermont Supreme Court are governed by the Administrative Procedures Act (APA), 3 V.S.A. §§ 800-849, which provides in relevant part that an interlocutory order “is immediately appealable under those rules if review of the final decision would not provide an adequate remedy, and the filing of the appeal does not itself stay enforcement of the agency decision.” 3 V.S.A. § 815(a).

The Permittee is also correct that there is no requirement that it seek the Board’s permission to file an interlocutory appeal (Motion, at 10), unlike interlocutory appeals from trial court decisions, VRAP 5 (requiring parties in Vermont trial courts to request permission from trial court to file interlocutory appeal). In fact, there is nothing in applicable law that authorizes the Board to issue such a decision. The Board does not have subject-matter jurisdiction to decide whether Permittee’s interlocutory appeal is proper under the APA. Permittee’s Motion to Allow Interlocutory Appeal, therefore, must be dismissed for lack of subject-matter jurisdiction.

III. ORDER

1. Permittee’s Motion to Alter is DENIED.
2. Permittee’s Motion to Dismiss is DENIED.
3. Permittee’s Motion to Allow Interlocutory Appeal is DISMISSED for lack of subject-matter jurisdiction.
4. The schedule in this matter is modified as follows:
 - a. Any request for a site visit, pursuant to Paragraph 1 of the Scheduling Order, shall be filed on or before **Wednesday, April 6, 2005**.

- b. Permittee's direct evidence, pursuant to Paragraph 2 of the Scheduling Order, shall be filed on or before **Thursday, April 14, 2005.**
- c. Other direct evidence, pursuant to Paragraph 3 of the Scheduling Order, shall be filed on or before **Thursday, April 21, 2005.**
- d. Rebuttal evidence, pursuant to Paragraph 4 of the Scheduling Order, shall be filed on or before **Thursday, May 5, 2005.**
- e. Evidentiary objections and proposed findings, pursuant to Paragraphs 5 and 6 of the Scheduling Order, shall be filed on or before **Thursday, May 19, 2005.**
- f. Replies to evidentiary objections, pursuant to Paragraph 7 of the Scheduling Order, shall be filed on or before **Thursday, June 2, 2005.**
- g. The second prehearing conference, pursuant to Paragraph 8 of the Scheduling Order shall be held on **Tuesday, June 7, 2005, at 2:00 p.m.** Requests to participate by telephone shall be made on or before **Monday, June 6, 2005, at noon.**
- h. The hearing, pursuant to Paragraph 9 of the Scheduling Order, shall be held on **Wednesday, June 15, 2005, at 9:00 a.m.**

5. All other provisions of prior orders remain in effect.

DATED at Montpelier, Vermont this 29th day of March, 2005.

ENVIRONMENTAL BOARD

/s/Patricia Moulton Powden

Patricia Moulton Powden, Chair

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