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

Re: Ray G. & Lynda J. Colton — Land Use Permit Application
Docket #804 — #3W0405-5(Revised)-EB

MEMORANDUM OF DECISION AND REMAND ORDER

Ray G. & Lynda J. Colton (Permittees) appeal Land Use Permit Amendment #3W0405-5(Revised) (Permit), accompanying Findings of Fact, Conclusions of Law (Decision), and the Memorandum of Decision on the Permittees' Motion to Alter. This Memorandum of Decision addresses the parties' Land Use Appeal Settlement Agreement (Agreement).

I. PROCEDURAL SUMMARY

On April 5, 2001, Permittees filed an application for the Permit with the District #3 Environmental Commission (Commission) seeking authorization to store up to 1000 cords of logs on-site, reclaim topsoil from the log storage area at least once annually, grind and store wood bark, occasionally chip wood, increase daily truck traffic, replace the existing generator with a 210-kW generator, operate year-round and extract gravel from the Tweed River (Project). The Project is located on 7 acres of land on Route 100 in the Town of Pittsfield, Vermont.

On October 15, 2001, the Commission issued the Permit and Decision.

On January 29, 2002, the Commission issued a Memorandum of Decision on the Permittees' Motion to Alter (MOD).

On February 25, 2002, the Permittees filed an appeal with the Environmental Board (Board) from the Permit, Decision, and MOD alleging that the Commission erred in its conclusions with respect to 10 V.S.A. § 6086(a)(8) (Criterion 8) for Permit Conditions 8 and 14. The appeal was filed pursuant to 10 V.S.A.§ 6089(a) and Environmental Board Rules (EBR) 6 and 40.

On March 6, 2002, Sarah Gray filed a cross appeal from the Permit, Decision, and MOD on Criterion 10.

On March 26, 2002, Board Chair Marcy Harding convened a prehearing conference and on March 28, 2002 she issued a Prehearing Conference Report and Order (PCRO).

On July 17, 2002, the Board issued a Memorandum of Decision on preliminary issues and the objections to the PCRO.

On September 4, 2002, mediator Robert O'Donnell submitted the Agreement signed by all the parties.

On September 18, 2002, the Board deliberated on the parties' proposed settlement.

II. DISCUSSION

The Board contracted with Robert O'Donnell to mediate cases before the Board at the request of the parties. The parties met with Robert O'Donnell and on September 4, 2002, he submitted the Agreement signed by the parties. The Board commends the parties for reaching a settlement agreement.

Any settlement agreement between parties must be reviewed to determine whether findings of fact and affirmative conclusions of law can be made under all criteria on appeal. The Board is not obligated to accept a settlement agreement if the necessary findings of fact and conclusions of law cannot be made. *Faucett Builders Inc*., #4C0763-2-EB Findings of Fact, Conclusions of Law, and Order at 6 (Aug. 6, 1996).

In a Memorandum of Decision issued on July 17, 2002, the Board held that the test established by the Board in *Re: Stowe Club Highlands*, #5L0822-12-EB (Jun. 20, 1995), *aff'd* 166 Vt. 33 (1996), should apply to the amendment application. Under *Stowe Club Highlands*, three kinds of changes may justify the alteration of a permit condition. These are: (a) changes in factual or regulatory circumstances beyond the control of a permittee; (b) changes in the construction or operation of the permittee's project, not reasonably foreseeable at the time the permit was issued; or (c) changes in technology. *Stowe Club Highlands, supra*, 166 Vt. at 38. If one or more of such changes favoring flexibility is found the Board then considers the finality element of *Stowe Club Highlands*. *Re: Richard Bouffard,* #4C0647-6-EB, Findings of Fact, Conclusions of Law, and Order at 15 (Oct. 23, 2000).

The Agreement supports the conclusion that the Project is a change in operation of Permittees' business which was not reasonably foreseeable at the time Land Use Permit #3W0405 was issued. Since the Permittees have satisfied the first part of the *Stowe Club Highlands* test, the Board will proceed to balance flexibility versus finality.

The Agreement is evidence of the cross-appellants' concession that flexibility outweighs finality. Since there is no other counter balancing evidence weighing towards finality, the Board concludes that flexibility outweighs finality and will proceed to the merits of the amendment application.

Depending on the nature of the changes, projects that undergo changes while before the Board may have to be remanded for review by the district commission. Settlement agreements typically change not only the project at issue but its impacts. If a settlement agreement does not create impacts to new parties or new impacts on Criteria not at issue before the Board, the Board can retain jurisdiction and decide the matter. See *Design Contempo, Inc.*, #3W0370-2-EB Findings of Fact, Conclusions of Law, and Order (Dec. 20, 2001); *Brewster River Land Co., LLC*, #5L1348-EB Findings of Fact, Conclusions of Law, and Order (Feb. 22, 2001); *Otter Creek Development, LLC* #1R0535-3-EB Findings of Fact, Conclusions of Law, and Order (Apr. 19, 2001); *Andrew and Peggy Rogstad*, #2S1011-EB Findings of Fact, Conclusions of Law, and Order (Dec. 19, 1996).

However, when a project is changed on appeal and the changes may create impacts to new parties or new impacts on Criteria not at issue before the Board, the matter should be remanded back to the district commission. *Spear Street Associates*, #4C0489-1-EB Memorandum of Decision at 4. (Apr. 4, 1984). Even if the changes to the project are a result of a settlement agreement, the district commission should review any increase in the project's impacts or impacts to new parties. When a case is remanded, the district commission can determine whether it is necessary to hold a new hearing to review the impacts of the project under the settlement agreement and provide notice to potential parties who may now be impacted by the project.

In the instant case the Agreement proposes permit conditions concerning trucks using a new driveway, the direction the trucks can turn from the Project, and trucks turning around on Route 100. These proposed permit conditions may increase impacts from the Project or impact parties who are not part of the Agreement and may have not previously been impacted by the Project. Therefore, in light of the changes to the Project, the Board concludes that the matter should be remanded to the Commission to consider the Agreement and whether it is necessary to schedule a new hearing.

The Board also notes that the Agreement does not contain sufficient factual support for the Board to issue findings of fact and conclusions of law.

Therefore, remand is also appropriate because the Commission is more familiar with the facts since it has already conducted a site visit and a hearing and issued findings. *Angelo DeCicco* #2W0612-1-EB Memorandum of Decision at 2 (May 24, 1991).

III. ORDER

1. The Project meets the test articulated in *Stowe Club Highlands*.

2. Land Use Permit Application #3W0405-5-(Revised)-EB is remanded and jurisdiction is returned to the District #3 Environmental Commission to consider whether the Project under the Agreement complies with Criteria 8 and 10 and whether it impacts any new parties or Criteria not on appeal before the Board.

3. The hearing scheduled for Wednesday, October 23, 2002, is canceled.

Dated at Montpelier, Vermont this 2nd day of October, 2002.

ENVIRONMENTAL BOARD

_/s/Marcy Harding_____
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