

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

Re: Twin State Sand and Gravel, Inc.
Application #3W0711-EB

PREHEARING CONFERENCE REPORT AND ORDER

On April 29, 1993, Environmental Board Counsel Aaron Adler convened a prehearing conference in White River Junction, with the following parties participating:

Twin State Sand and Gravel, Inc. (the Applicant) by John D. Hansen, Esq.
The Town of Hartford Planning Commission (the Appellant) by Steven F. Stitzel, Esq.
The Town of Hartford Board of Selectmen by John W. Brockway, Esq.
The South End Alliance by Joe Alvin (who also represented himself)
Edward and Cathy Willey (adjoiners)
Rose Marie and Roger Henry (adjoiners) by Rose Marie Henry
Scott Willey (neighbor)
John Elison (neighbor)
Maurice Doubleday (neighbor)
Clayton Luce (neighbor)
Percy R. Knott (trucker, contracts with the Applicant)
Lee Adams (trucker, contracts with the Applicant)

I. BACKGROUND

On January 19, 1993, the District #3 Environmental Commission issued Land Use Permit #3W0711, authorizing the Applicant to continue a gravel and sand operation and to quarry and crush up to 122,500 cubic yards of rock per year for 30 years. The project is located in the Towns of Hartland and Hartford.

On February 17, 1993, the Appellant filed an appeal of the permit with respect to 10 V.S.A. § 6086(a)(1) (air pollution), (5) (traffic), (7) (municipal services), (8) (aesthetics and historic sites), (9)(K) (public investments and facilities) and (10) (conformance with regional plan and local capital program).

On February 18, 1993, the Applicant filed a motion to alter. On March 5, the District Commission issued a decision on the motion. On March 31, the Appellant requested that its appeal be activated because its concerns were not addressed by the decision on the Appellant's motion. On April 5, the Applicant filed a cross-appeal that raises issues under all of the criteria raised by the Appellant, as well as Criteria 4 (soil erosion), 9(D) (earth resources), 9(E) (extraction of earth resources). The cross-appeal also challenges various permit conditions.

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II. PARTY STATUS

Concerning those adjoining landowners and other non-statutory parties seeking to participate in this appeal, the following is a list of who was granted or denied party status before the District Commission on the criteria under appeal, and of what criteria they seek to address in this appeal. All of the people listed below made party status requests orally at the prehearing conference.

Ed and Cathy Willey - granted on 5; seek to participate on 1, 5, and 9(D), (E), and (K)

Rose Marie and Roger Henry - granted on 9(E); seek to participate on 1, 5, and 9(D), (E), and (K)

Joe Alvin - granted on 5 and 8; denied on 7 and 9(E); seeks to participate on 1, 5, 8, and 9(D), (E), and (K)

South End Alliance - denied on 1, 5, and 9(K); seeks to participate on 1, 5, 8, and 9(D), (E), and (K)

John Elison - granted on 5; seeks to participate on 1, 5, and 9(D), (E), and (K)

Maurice Doubleday - granted on 5; seeks to participate on 5

Clayton Luce - granted on 5; denied on 7; seeks to participate on 1, 5, and 9(D), (E), and (K)

Scott Willey - granted on 5; seeks to participate on 1 and 5

Percy R. Knott - not a party before the District Commission; did not name specific criteria

Lee Adams - not a party before the District Commission; did not name specific criteria

At the prehearing conference, the Applicant stated that it does not object to parties participating on criteria concerning which the District Commission gave them party status but does object to any expansion of party status to other criteria. The Applicant contends that requests for party status must be made in writing on or before the date of the prehearing conference and that, since no written requests to expand party status have been filed, any such expansion should be

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denied.

The Board Rules require that petitions for party status be submitted in writing on or before the date of the prehearing conference. Rule 14(B)(2). The requirement to submit in writing can be waived by the Chair. Id. Please be advised that Chair Elizabeth Courtney has decided to waive the requirement and to consider as timely all party status requests made orally at the prehearing conference, provided that the requestors submit written petitions for party status in accordance with the schedule agreed on during the conference and set out in the attached order.

Petitions for party status need only address those criteria under appeal on which people seek to participate and on which they did not obtain party status before the District Commission. People will maintain their party status on any criteria under appeal on which the District Commission granted them party status.

Based on statements made at the hearing, it is understood that Mr. Alvin, Ed and Cathy Willey, Scott Willey, the Henrys, Mr. Doubleday, Mr. Elison and Mr. Luce are willing to work through the South End Alliance if the Alliance is granted party status. **If this understanding is in error, please correct it immediately.**

III. ISSUES

A. Scope of Review

The Applicant claims that this application is only for a quarrying and crushing operation and that it has an existing sand and gravel extraction operation. Thus, the Applicant contends, the District Commission and the Board are precluded from imposing permit conditions that act to restrict not only the quarrying and crushing operation but also the sand and gravel operation. For example, the Applicant claims that findings made by the District Commission with respect to air pollution will act to restrict its hours of operation to fewer hours than have been associated with the sand and gravel operation.

Mr. Alvin, the South End Alliance, Ed and Cathy Willey, and Scott Willey contend that there is evidence that the sand and gravel operation was abandoned and is illegal. They therefore dispute the Applicant's contentions regarding limits on the ability to impose permit conditions. In response, the Applicant argues that these claims cannot be raised in this proceeding because it is an appeal of a permit and not an enforcement proceeding.

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During the prehearing, parties agreed to brief the issue raised by the Applicant prior to hearing so that the scope of the Board's review may be determined in advance of taking evidence. The briefing schedule, as agreed at the conference, is contained in the attached order.

In its decision, the District Commission found that Act 250 jurisdiction applies to the quarrying and crushing operation because it constitutes a substantial change to a pre-existing development. 10 V.S.A. § 6081(b); Rules 2(A)(5), 2(G), 2(O). In the context of substantial change, the Environmental Board has previously ruled that an application need only be filed for the change unless it permeates the entire operation. Re: Ronald E. Tucker, Declaratory Ruling #165 at 6-7 (Feb. 27, 1985), cited In re R.E. Tucker, Inc., 149 Vt. 551, 553 (1988). This case appears relevant to the Applicant's claim that there are limits on the conditions that can be placed on its operations.

The Vermont Supreme Court has previously ruled that parties who fail to raise jurisdictional issues during an application are later barred from raising such issues. In re Chester P. and Bertha G. Denio, No. 89-214, slip op. at 4-5 (April 3, 1992); In re Wildcat Construction Co., Inc., No. 91-253, slip op. at 2 (May 3, 1993). These cases may be relevant to the ability of parties to make the arguments discussed above.

B. Issues under the Criteria

1. The Planning Commission

The Planning Commission's appeal raises Criteria 1 (air pollution), 5 (traffic), 7 (municipal services), 8 (aesthetics and historic sites), 9(K) (public investments and facilities) and 10 (conformance with regional plan and local capital program). The Planning Commission's primary concern under all these criteria is truck traffic to be generated by the proposed project. The Planning Commission contends that the Applicant will be putting truck traffic into an already-congested area, sending it along public roads (some of which are old and narrow) through downtown White River Junction. The trucks' destination is a processing facility located in W. Lebanon, New Hampshire.

The Planning Commission is also concerned about noise, dust, and fumes allegedly to be generated by the truck traffic, the adequacy of sight distances along the truck route, road maintenance, impact on plans for revitalizing downtown White River Junction, and the impact of truck traffic on

aesthetics, a downtown historic district,¹ and public moneys that have been invested in downtown White River Junction. The Planning Commission stated that Hartford does not have a town plan but does have a capital program.

The Planning Commission seeks appropriate permit conditions to mitigate the impacts of the proposed project and does not seek denial of the application. The Planning Commission wants to work out alternative routes that avoid congested areas. The Planning Commission contends that there is a railroad running from the quarry site to the processing facility that could be used to transport product from the quarry to the facility.

2. The Applicant

The Applicant contends that the proposed project meets all criteria under appeal or cross-appeal.

With respect to Criterion 1 (air pollution), the Applicant disagrees with the finding made by the District Commission regarding hours of operation (#1g). To protect itself, the Applicant has appealed the incorporation of this finding by the District Commission under Criteria 5 (traffic), 9(D) (earth resources), 9(E) (earth resource excavation) and 9(K) (public investments and facilities). The Applicant also objects to Condition 10 concerning dust control.

With regard to Criterion 4 (soil erosion), the Applicant disagrees with a finding made by the District Commission concerning the distance between the quarry perimeter and the property boundaries. The Applicant also objects to Condition 9 (as revised by the District Commission's decision on the Applicant's motion to alter) because it imposes a setback requirement which the Applicant claims is inconsistent with the erosion control plan. Other conditions objected to by the Applicant that appear to relate to Criterion 4 are 14 (on-site inspections), 15 (erosion plans maintained on-site during construction), 16 (prohibition on discharge into surface waters), and 20 (filing affidavit that reclamation has been carried out).

¹

During the prehearing, the Applicant stated that the Planning Commission did not raise the historic district issue before the District Commission but also conceded that the Planning Commission may raise the issue before the Board. The Planning Commission stated that the District Commission processed this application too quickly for full evaluation and preparation of a case.

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The Applicant further disagrees with findings made and conditions imposed under Criterion 5 limiting the number of truck trips generated by the proposed project and placing requirements on the trucks and their drivers. The Applicant contends that it cannot be held responsible in this way because it does not employ the truckers; rather, they are independent contractors. The conditions protested by the Applicant with respect to Criterion 5 are Conditions 5 (limit on truck trips), 6 (truck loading and covering), 7 (vehicle dust), 8 (driver education), and 12 (requirements for amendment to increase truck trip rate).² To protect itself, the Applicant also has appealed the incorporation of these findings and conditions under Criteria 7 (local governmental services), 9(D), 9(E), and 9(K).

Additionally, the Applicant appeals Conditions 26 (construction completion by 10/1/2023) and 27 (permit expiration on 10/1/2025). The Applicant contends that the two dates should be the same. The evaluation of appropriate dates for construction completion and permit expiration will be made in accordance with the factors set forth in Rule 32(B).

Finally, the Applicant appeals several general conditions in the permit, including 2 (allowance of government personnel onto property), 4 (continuing jurisdiction of District Commission), 24 (written approval of District Commission prior further subdivision or development of tract), and 25 (maintaining copy of permit and plans on-site). The Applicant contends there is no place on-site to maintain the permit and the approved plans.

3. Selectboard

The Board of Selectmen is concerned about traffic and the days and hours of operation. It seeks to work with the parties to solve any problems.

4. South End Alliance

The South End Alliance consists of residents in the area of the proposed project. The Alliance is concerned about the impacts of the project with respect to traffic, noise, dust, bird nesting sites, and the placement of an industrial operation in what it contends is a rural area. The Alliance has retained a traffic expert. The Alliance seeks denial of the application but also seeks, if a permit is issued, appropriate conditions.

²Condition 12 also appears to relate to Criteria 1, 7, and 9(K).

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5. Other Parties

Most of the other parties attending the prehearing conference are members of the Alliance. Some individually made statements relating to compliance with the criteria. For example, Mr. Luce stated that he would like to reach some type of agreement with the Applicant to mitigate the impacts of the proposed project. In addition, Scott Willey stated that he was concerned about impacts of trucks from the project on the Connecticut River Road because children play at a place where that road runs under Interstate 91. Ed Willey stated that truck traffic could and should be routed through Hartland. He contends that most of the proposed project is actually in Hartland.

C. Adequacy of Notice of Appeal

During the prehearing conference, the Applicant contended that the Planning Commission's notice of appeal does not comply with Rule 40 because it does not state the reasons why the District Commission was in error. The Applicant requests that the Planning Commission be required to comply with the rule.

Board Rule 40(A) does state that notices of appeal shall state such reasons. In this case, neither the appeal nor the cross-appeal states the reasons why the District Commission was in error.

However, the appeal and cross-appeal do provide reasonable notice of what is at issue in this appeal. Moreover, as summarized above, the Planning Commission and the Applicant each explained and clarified their appeals at the prehearing conference. Thus, it is unnecessary to require strict compliance with Rule 40(A).

IV. WITNESSES AND EXHIBITS

The Planning Commission

Five to seven expert witnesses
One or two fact witnesses
Photographs and plans

Applicant

Five to seven witnesses

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South End Alliance

Three to four witnesses
Roger Dickinson, traffic expert
Possibly a video

The Henrys

Will call Mr. Dickinson if the Alliance is not granted party status.

Mr. Luce

May call one or two witnesses

Parties agreed that three days should be set aside, and will be sufficient, for hearing in this case. Parties also were informed that, if they want to show the Board a video, they must bring their own equipment and must make the video available to other parties for inspection and copying prior to hearing.

V. SCHEDULING

During the prehearing, Counsel presented parties with the schedule for filing prefiled testimony and for a hearing set out in the attached order. The Applicant stated that it believed that prefilled testimony should be filed earlier. The Planning Commission stated that it would like more time to prepare its case because it wants to perform a traffic study that may take more time than is allowed under the schedule in the attached order. The Planning Commission also requested consideration of a schedule in which the first hearing day is devoted to issues to which the study is not pertinent, thus allowing later filing of evidence regarding the study. This would result in two sets of filing dates.

Please be advised that the Chair has reviewed the schedule in the attached order and concluded that it is fair and that the Planning Commission's suggestion of two sets of dates is not practical and could lead to confusion. Should the Planning Commission continue to seek a different schedule, it should file an objection with the full Board within two weeks in accordance with the last paragraph of the attached order.

VI. THE HEARINGS

The hearings in this matter will begin with a brief overview, not to exceed

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15 minutes, from the Applicant stating the essential facts of what is proposed. The Board will then take a site visit. Following the site visit, the Board will return to the hearing room to take testimony.

The site visit will begin at the quarry site. After inspecting such portions of the site as appear relevant, the Board will travel the trucking route in question. **By copy of this report, the Hartford Board of Selectmen is requested to investigate the possibility of providing a school bus for use by the Board and parties' representatives in traveling the route. Please let the Board know in writing well in advance of the hearing date if the local school board could, through the selectmen, provide a bus.**

With respect to the order of taking evidence, parties are requested to file suggestions by the date set out in the attached order.

VII. ORDER

1. **On or before May 26, 1993**, all persons shall file written petitions for party status if they seek to participate on any of the criteria under appeal concerning which they did not have party status before the District Commission. No later than May 26, parties shall file memoranda of law concerning the issues identified in the "Scope of Review" section of the above report.
2. **On or before June 9, 1993**, parties shall file: (a) any oppositions to party status petitions, (b) any responses to the memoranda of law on "Scope of Review," and (c) suggestions for the order in which evidence should be taken.
3. The Board will deliberate concerning party status and "Scope of Review" during its meeting scheduled for June 16, 1993 and will issue a written decision afterward.
4. **On or before August 16, 1993**, parties shall file final lists of witnesses and exhibits and prefiled testimony for all witnesses they intend to present.
5. **On or before September 7, 1993**, parties shall file prefiled rebuttal testimony and revised lists showing rebuttal witnesses and exhibits.
6. **On or before September 15, 1993**, parties shall file in writing all objections to the prefiled testimony and exhibits previously identified, or such objections shall be deemed waived.
7. The Environmental Board will convene hearings in this matter on **September 22 and October 6 and 7, 1993**, to be confirmed by subsequent notice with location.
8. No individual may be called as a witness in this matter if he or she has not been identified in a witness list filed in compliance with this order. All reports and other documents that constitute substantive testimony must be filed with the prefiled testimony. If prefiled testimony has not been submitted by the date specified, the witness will not be permitted to testify. Instructions for filing prefiled testimony are attached.
9. The Board may waive the filing requirements upon a showing of good cause, unless such waiver would unfairly prejudice the rights of other parties.

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10. Parties shall file an original and ten copies of prefilled testimony, legal memoranda, all exhibits which are 8½ by 11 inches or smaller, and any other documents with the Board, and mail one copy to each of the parties listed on the attached Certificate of Service.

Parties are required to file only lists identifying exhibits which are larger than 8½ by 11 inches that they intend to present, rather than the exhibits themselves. Exhibits must be made available for inspection and copying by any parties prior to the hearing.

11. The hearings will be recorded electronically by the Board or, upon request, by a stenographic reporter. Any party wishing to have a stenographic reporter present or a transcript of the proceedings must submit a request by **July 14, 1993**. One copy of any transcript made of proceedings must be filed with the Board at no cost to the Board.

12. Pursuant to Board Rule 16, this report and order will be binding on all parties who have received notice of the prehearing conference, unless an objection to the report and order is filed within two weeks, or there is a showing of cause for, or fairness requires, waiver of a requirement of this order.

Dated at Montpelier, Vermont this 20th day of May, 1993.

ENVIRONMENTAL BOARD

Aaron Adler, Counsel

Attachment