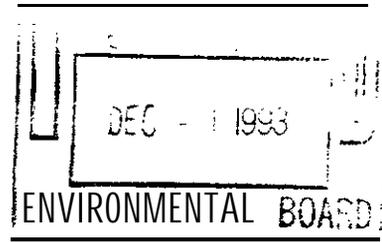


VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Chapter 151



Re: Ravmond. James, and Leslie Rowley
Application #4C0534-1-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to an appeal of conditions issued with respect to a sand pit located in the Town of Milton. As is explained below, the Environmental Board alters the conditions in Land Use Permit #4C0534-1 to allow that loaded trucks may be uncovered between December 1 and April 1; to allow that up to 3,100 loaded truck trips may leave the pit in any given year; to lower a limit on the number of loaded truck trips leaving the pit on any given day from 60 to 40; to raise a limit on the average number of loaded truck trips per day from 12 to 20; and to require that the limit on average daily trips be calculated on a seasonal basis. By "seasonal," the Board refers to the busy and slow seasons for the pit.

I. SUMMARY OF PROCEEDINGS AND FINDING OF JURISDICTION

On January 22, 1993, the District #4 Environmental Commission issued Land Use Permit #4C0534-1, approving an application described as the renewal of Land Use Permit #4C0534 to allow for the continued operation of a sand extraction business on a 316-acre tract of land on West Milton Road in Milton, Vermont. A permit is required for this operation pursuant to 10 V.S.A. §§ 6001(3), 6081(a), 6091(a).

On February 5, 1993, the Applicants filed a motion to alter. On February 19, District #4 Coordinator Louis Borie sent the Applicants a letter stating that the District Commission found that the issues raised in the motion were not appropriate for a motion to alter.

On March 3, 1993, the Applicants filed an appeal which did not comply with Environmental Board Rule 40 in a number of respects, including that it was not served on all parties to the District Commission's proceeding. By letter of March 17, Board Counsel Aaron Adler notified the Applicants of the noncompliance with Rule 40. On March 22, the Board received a filing from the Applicants mailed on March 19 to the Board and all parties. This filing cured the noncompliance with the rule.

On April 5, 1993, Anna Vreman, Bernard Lukeheart, Kenneth Riddle, and Ronald Jordan (the Neighbors)', who were parties before the District Commission, filed a cross-appeal and motion for a stay.

'Other parties before the District Commission were named on the cross-appeal but later decided that they did not wish to participate

{Docket #577}

On April 15, 1993, Board Chair Elizabeth Courtney convened a prehearing conference. On April 19, the Chair issued a prehearing conference report and order. During late April and early May, parties filed memoranda on preliminary issues.

On May 12, 1993, the Board issued a memorandum of decision concerning preliminary issues which is incorporated by reference. In that decision, the Board accepted a withdrawal by the Neighbors of their stay motion and dismissed it, dismissed the Neighbors' cross-appeal as untimely, and concluded that some of the issues raised by the cross-appeal were within the scope of the Applicants' appeal, and others were not within such scope.

During June 1993, parties filed prefiled and rebuttal testimony and exhibits. On June 17, the Applicant filed written evidentiary objections. A panel of the Board convened a hearing in the Town of Milton on June 23, 1993, with the following parties participating:

The Applicants by Robert J. Perry, Esq.
The Neighbors, pro se

After taking a site visit and hearing testimony, the panel recessed the matter pending filing of proposed findings of fact and conclusions of law, review of the record, deliberation, and decision.

On July 14, 1993, the Applicants and the Neighbors filed proposed findings of fact and conclusions of law. A proposed decision was sent to the parties on September 21, and the parties were provided an opportunity to file written, ' objections and to present oral argument before the full Board. On September 29, the Applicants requested oral argument. On September 30, the Neighbors submitted a letter concerning the proposed decision. On October 25, the Applicants submitted a memorandum with respect to that decision. On October 27, the Neighbors filed a memorandum.' The Board convened a public hearing in the Town of **Swanton** on November 11, with the Applicants and the Neighbors participating. At argument, the Neighbors were represented by William Roper, Esq. After hearing argument, the Board deliberated concerning this matter. On November 11, following a review of the proposed decision and the evidence and arguments presented in the case, the Board declared the record complete and adjourned the hearing. This matter is now ready for decision. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied.

II. ISSUES

1. Whether, pursuant to 10 V.S.A. § 6086(a)(1) (Criterion 1 - air

pollution), undue air pollution in the form of dust will be created if loaded trucks from the proposed project are allowed to be uncovered between December 1 and April 1.

2. Whether, pursuant to Criterion 1 and 10 V.S.A. § 6086(a)(5) (Criterion 5 - traffic safety and congestion), undue air pollution in the form of dust and noise, or unsafe conditions or unreasonable congestion with respect to use of the highways, will be created if the proposed project is allowed to have an average of 12 loaded trips per day calculated on a yearly rather than a monthly basis.

III. FINDINGS OF FACT

1. On November 6, 1982, the District #6 Environmental Commission issued Land Use Permit #4C0534 to Raymond L. Rowley, authorizing him "to open a sand and gravel pit operation" on "property located off Mayo Road" in the Town of Milton. Condition #8 of that permit states that it expires on November 9, 1992 unless extended by the District Commission.
 2. During the period that the pit was operating under the 1982 permit, the number of loaded trucks associated with the pit averaged approximately 3,100 per year.
 3. On November 9, 1992, Raymond, James, and Leslie Rowley (the Applicants) filed an application for renewal of Land Use Permit #4C0534. The Applicants seek to continue operation of a sand extraction business on a 316-acre tract located on West Milton Road in the Town of Milton. As part of this application, the Applicants seek to continue to operate at a rate of 3,100 loaded trips per year.
 4. On January 22, 1993, the District #4 Environmental Commission issued Land Use Permit #4C0534-1 to the Applicants, authorizing them to operate the sand extraction business described in Finding 3, above.
 5. Permit #4C0534-1 contains the following conditions that are relevant to this appeal:
 10. The number of loaded trucks leaving the pit shall not exceed 60 during any single day of operation.
 11. The average number of loaded trucks leaving the pit shall not exceed 12 per day. "Average" shall mean the total number of loaded trucks leaving the pit per month divided by the number of days in that month the pit was open for business.
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13. All loaded trucks leaving the sand pit entrance shall be fully covered with a tarp or equivalent covering to prevent sand from leaving the truck while on route to the truck's destination.
6. The pit is located on West Milton Road, a town highway which runs south of the pit into the Town of Colchester. In Colchester, the name of the road becomes Mayo Road.
7. Mayo/West Milton Road is 20 to 21 feet wide and does not have paved shoulders.
8. State of Vermont Agency of Transportation traffic counts taken in the vicinity of the sand pit indicate that daily traffic on the Mayo/West Milton Road is approximately 1,000 vehicles. This figure includes trucks and passenger cars.
9. At maximum permitted operation under Condition 10 of Permit #4C0534-1, the sand pit will contribute approximately 10 percent to the traffic on the Mayo/West Milton Road. The Applicants represent that it is rare for the number of loaded trucks leaving their pit to reach the 60-trip maximum allowed under Condition 10.
10. The pit's hours of operation are Monday through Friday, 7:00 a.m. to 5:00 p.m. Given such hours, at maximum permitted operation under Condition 10 of Permit #4C0534-1, truck trips on the Mayo/West Milton Road associated with the pit will average one trip every five minutes. If the maximum limit on loaded trucks is reduced to 40, then truck trips on the Mayo/West Milton road will average one trip every seven and a half minutes on the busiest days. At average permitted operation under Condition 11 of Permit #4C0534-1, truck trips on the Mayo/West Milton Road associated with the pit will average one trip every 25 minutes. If the limit on the average number of loaded trucks is raised to 20, then truck trips on the Mayo/West Milton Road associated with the pit will average one trip every 1.5 **minutes. These** calculations assume that, **for each** loaded trip out of the pit, one unloaded truck enters the pit to be loaded with sand, and that such truck travels on the Mayo/West Milton Road to reach the pit **entrance**, which is on that road.
11. The trucks associated with the pit are large dump trucks that weigh approximately 25,000 pounds when empty and as much as 65,000 pounds when loaded.
12. Trucks leaving the sand pit head both south and north on West Milton Road. Those trucks heading south pass through a populated area that is

zoned rural-residential. In the one and one-half mile area south of the pit, there are approximately 112 homes on West Milton Road and side streets, with 57 of the homes on West Milton Road. Many of these homes existed before the sand pit became operational.

13. Those trucks heading north pass through a less populated area that contains a trailer park of more than 200 units.
 14. Sand and small stones blow off the loaded trucks. Some of the sand and stones goes on the road and stays there and some is blown around, onto, and occasionally into the houses along the road. Another source of sand that affects residents is road sanding by the Town of Milton during the winter. This sand is kicked up by all trucks that travel the West Milton Road.
 15. Anna Vreman lives on West Milton Road south of the pit about 1000 feet from the pit entrance. About 200 feet south of the house, West Milton Road curves upward and makes a sharp right turn. It then climbs a steep hill.
 16. To climb this hill, trucks, including those associated with the pit, accelerate until they reach the bottom of the hill and then start climbing, downshifting as they go. When trucks (including those associated with the pit) come down the hill, the drivers are often heavy on the brakes. Accelerating, climbing, and braking of trucks cause significant amounts of exhaust and noise.
 17. Ronald Jordan lives on West Milton Road about a quarter-mile south of the pit. Bernard Lukeheart lives on West Milton Road about four-tenths of a mile south of the pit. Kenneth Riddle lives on West Milton Road about a half-mile south of the pit.
 18. West Milton Road is used by local residents, including children, for walking, biking, jogging, and other non-vehicular uses. This use is heaviest from May to October.
 19. The Road is a school-bus route. There have been incidents in which children have come close to being injured by trucks using the Road. At least one such incident involved a truck associated with the sand pit.
 20. The pit's busiest months of operation are May through October. This is when demand for the pit's product is highest. The pit also operates during the rest of the year except during the coldest winter days. It also does not operate during mud season without the approval of the Town of Milton.
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21. The pit is the only source of sand approved by the State of Vermont for winter road maintenance, state highway construction, or mound-type wastewater disposal systems in northern Chittenden County. The pit is the closest source of sand for towns, and for mound **and** bedding sand for contractors, in Grand Isle County. One use the towns make of the sand is for winter road maintenance.
22. If the daily average limit is calculated in accordance with Permit #4C0534-1, the Applicants' ability to meet demand during the busiest months will be significantly restricted.
23. The pit operator is Martin Bessette. He and truck drivers have experienced problems covering trucks during freezing weather because tarps are stiff and often frozen. When cold, the tarps rip easily.
24. The purpose of the tarps is to keep sand from blowing out of the trucks. During late-fall and winter, there are fewer trucks associated with the pit traveling on the West Milton Road, sand tends to be damper and less susceptible to blowing, and the roads are more likely to be wet. The occurrence of airborne dust caused by loaded trucks will therefore be significantly reduced during the winter.

IV. CONCLUSIONS OF LAW

The appeal raises issues concerning Conditions 11 and 13 of the permit. The appeal states that the issues relate to Criteria 1 (air pollution) and 5 (traffic safety and congestion).

10 V.S.A. § 6086(a)(1) provides that, before granting a permit, the Board must find that a development "will not result in undue . air pollution." The burden of proof under this criterion is on the Applicants. 10 V.S.A. § 6088(a).

10 V.S.A. § 6086(a)(S) provides that, prior to issuing a permit, the Board must find. that the proposed project "[w]ill not cause unreasonable congestion or unsafe conditions with respect to use of the highways .". The Board may not deny a permit pursuant to Criterion 5 and may issue conditions to alleviate the burdens created. 10 V.S.A. § 6087(b). The burden of proof is on the opponents under this criterion, but the Applicants must provide sufficient information for the Board to make affirmative findings. 10 V.S.A. § 6088(b); Re: Killington, Ltd. and International Paver Realty Corn., #1R0584-EB-1, Findings of Fact and Conclusions of Law and Order (Revised) at 21 (Sep. 21, 1990).

10 V.S.A. § 6086(c) provides, in relevant part:

A permit may contain such requirements and conditions as are allowable within the proper exercise of the police power and which are appropriate with respect to (1) through (10) of subsection (a) [the Act 2.50 criteria] ...

The Applicants request that loaded trucks from the proposed project be allowed to be uncovered between December 1 and April 1. Based on the foregoing findings of fact, the Board concludes that undue air pollution in the form of dust will not be created if the Applicants' request is granted. The Board therefore will alter Condition 13 of Permit #4C0534-1 as appropriate.

The Applicants also request that the daily average of 12 loaded trucks be calculated on a yearly rather than a monthly basis. The Board analyzes this request to determine whether it complies with Criteria 1 and 5.

Based on the foregoing findings of fact, the Board concludes loaded trucks from the pit do cause air pollution in the form of dust and noise and do present a potential traffic safety problem.

Since the Applicants' operation is busiest during May through September, and is least busy during other months, use of an annual basis will enable the Applicants to factor in the least busy months in calculating the daily average.

Further, Condition 10 allows a daily maximum of 60 loaded truck trips, which constitutes the equivalent of one truck trip from the pit every five minutes, and a contribution of 10 percent to traffic on the Mayo/West Milton Road.

Thus, if the least busy months are factored in to the daily average, then the Applicants will be able to run at the daily maximum more often during the busiest months.

This could result in a concentration of the impacts of the trucks under Criteria 1 and 5 during the busiest months. The Board concludes that a condition allowing such a concentration is not a reasonable mitigation measure and therefore is not appropriate under 10 V.S.A. § 6086(c).

One source of this concentration of impacts is the 60-trip daily maximum allowed under Condition 10. If this maximum is reduced to 40 loaded trips per day, such a reduction will significantly diminish the rate at which trucks pass local residences on the pit's busiest days.

Further, a reduction in the intensity of impacts on the pit's busiest days will allow for an increase in the daily average. If this average is increased from 12 to 20, the Applicants' goal of achieving up to 3,100 trips per year will be feasible

under Criteria 1 and 5 because the reduction in the maximum number of trips will provide a limit on the intensity of the impacts caused by trucks associated with the pit.

While the Board does believe that a reduction in the maximum number of trips on any given day will allow for an increase in the daily average, the Board will require that the daily average be calculated based on the Applicants' busy and slow seasons, rather than yearly as the Applicants request. The reason for this requirement is that, in a scenario involving calculation of the average based on a year, that calculation becomes another source for intensifying the impacts. As stated above, use of the slow season in calculating the average will allow the Applicants to run at the daily maximum more often during the busy season, which is also the season during which pedestrian and vehicular use of Mayo/West Milton road increases. To help minimize the potential for air pollution, and for unsafe conditions arising out of conflict between trucks from the pit and other road users during the busy season, the Board will require that the average be calculated based on the season itself. The Board will treat the slow season in the same manner by requiring calculation of the daily average on a seasonal basis.

The Board notes that, with a daily average of 20 calculated on a seasonal basis, the Applicants will be able to create up to 2600 trips during the busy season. (This is based on a May through October busy season, assuming operation five days per week. See Findings 10 and 20, above.)

Accordingly, the Board will revise Conditions 10 and 11 to reduce the daily maximum from 60 to 40 loaded trips, to increase the daily average from 12 to 20, to require that the daily average be calculated on a seasonal basis, and to allow that up to 3,100 loaded trips may leave the pit in any calendar year. The Board believes that such revisions will serve to lessen the concentration of impacts that could result from using an annual basis while at the same time allowing the Applicants a greater opportunity to meet demand.

Parties may question whether the Board has jurisdiction in this appeal to change Condition 10 because that condition was not specifically named in the Applicants' appeal, and because, while the condition was named in the Neighbors' cross-appeal, that cross-appeal was dismissed as untimely. However, in the memorandum of decision issued by the Board on May 12, 1993, dismissing the cross-appeal, the Board ruled that Condition 10 is within the scope of the Applicants' appeal because that condition relates to Criterion 5 and the Applicants' appeal raises that criterion. This is based on the direction of the Supreme Court in the case of In re Taft Corners Associates, Inc., No. 92-215, slip op. at 8 (April 30, 1993). In that case, the Court ruled that, once an Act 250 criterion is noticed for appeal, "issues generally within the scope of the criterion are properly before the Board."

At oral argument before the full Board, the Applicants raised another issue that is arguably within the scope of the criteria before the Board. Specifically, the Applicants raised a concern about Condition 12 of Permit #4C0534-1. This condition requires the Applicants to report monthly to the District Commission stating the number of loaded trucks which exited the pit during each day of the month, any days on which the pit was operated outside the approved hours of 7:00 a.m. to 5:00 p.m., and any weekend days on which the pit was operated. The Applicants argue that they should not have to file such a report because, if they do so, information will become available to the public showing how close the Applicants are to the limits on loaded truck trips contained in their land use permit. This, they claim, will place them at a competitive disadvantage with other gravel pit owners and operators who may not have such limits or who may not be subject to Act **250**.

While this issue may be within the scope of the criteria before the Board, the issue was raised for the first time at oral argument before the full Board on November 11. This is too late. No evidence supporting the Applicants' claim was submitted to the hearing panel which took evidence on June 23. Because the Board is required by 3 V.S.A. § 809(g) to make its findings and conclusions based on evidence, the Board believes that it therefore cannot rule on the Applicants' claim. Further, in any case the Applicants' pit is the only approved source of sand for winter road maintenance, state highway construction, or mound-type wastewater disposal systems in northern Chittenden County.

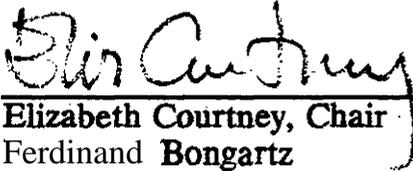
Based on the foregoing, the Board concludes that the application complies with Criteria 1 and 5 with respect to the number of loaded truck trips.

V. ORDER

Land Use Permit #4C0534-1-EB is hereby issued. Jurisdiction over this matter is returned to the District #4 Commission.

Dated at Montpelier, Vermont this 1st day of December, 1993.

ENVIRONMENTAL BOARD


Elizabeth Courtney, Chair
Ferdinand Bongartz
Terry Ehrich
Lixi Fortna
Arthur Gibb
Samuel Lloyd
William Martinez
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