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

Re: Bull's Eye Sporting Center
and
David and Nancy Brooks
Wendell and Janice Brooks
by
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1413 Paine Turnpike – North
Berlin, Vermont 05602

Land Use Permit 5W0743-2-EB (Altered)
(Revocation)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

I. Introduction

This matter is a revocation petition brought on the Environmental Board's ("Board") own motion pursuant to Environmental Board Rule ("EBR") 38. As more fully explained herein, the Board revokes Land Use Permit 5W0743-2-EB (Altered) but provides the holders of the said permit the opportunity to cure the revocation.

II. Procedural History

On February 27, 1997, the Board issued Land Use Permit 5W0743-2-EB ("Permit"), and accompanying Findings of Fact, Conclusions of Law, and Order ("February 1997 Decision"), authorizing a shooting range operated by the Bull's Eye Sporting Center and David and Nancy Brooks and Wendell and Janice Brooks ("Permittees") on a tract of land (approximately 35 acres) owned by Wendell and Janice Brooks in the Town of Orange, Vermont ("Project").

On May 8, 1997, the Board issued Land Use Permit 5W0743-2-EB (Altered) ("Altered Permit"). Accompanying the Altered Permit was the Board's May 8, 1997 *Memorandum of Decision* ("May 1997 Decision"), in which the Board explained its reasoning behind the issuance of the Altered Permit.

Based upon information it had received and pursuant to 10 V.S.A. §6090(c) and EBR 38, the Board, on its own motion, determined that sufficient grounds may exist to revoke the Altered Permit. Therefore, on November 23, 1999, the Board issued a *Notice of Intent to Revoke and Opportunity for Hearing and Order* ("Notice"). This Notice stated that the Board intended to revoke the Altered Permit and provided the grounds on which this proposed action was based. The Notice, however, also provided

the Permittees the opportunity to request a hearing on the proposed revocation before the revocation would become effective.

On December 16, 1999, the Permittees requested a hearing on the Board's proposed action.

On January 25, 2000, Board Chair Marcy Harding convened a Prehearing Conference. At the Prehearing Conference, the Chair stated that, pursuant to 3 V.S.A. § 810(4), the Board would take official notice of the files maintained by the District 5 Environmental Commission ("Commission") and the Board, in particular, the Permit, the February 1997 Decision, the Altered Permit, and the May 1997 Decision. No party or person present at the Prehearing Conference objected to the Board taking official notice as noted above.

This matter came before the Board for hearing and site visit in Orange on May 10, 2000. The Board deliberated on May 10 and June 21, 2000. The record in this matter is now complete, and this case is ready for decision.

III. Issues

As set forth in the Chair's January 28, 2000 Prehearing Conference Report and Order ("Prehearing Order"), § III, *Issues*, the issues in this matter are:

1. Whether the Permittees have violated the terms of Altered Permit, or any condition of the Altered Permit, or its accompanying Findings of Fact and Conclusions of Law by failing to comply with the said permit's conditions concerning:

    (a) the clearing of trees within a vegetated buffer tract described in said permit; and/or

    (b) construction at the shooting stations to limit angles of fire;

2. Whether the Permittees have violated EBR 34 by failing to seek and obtain an amendment to the Altered Permit before trees were cleared within a vegetated buffer tract described in the said permit;

3. If violations of the said permit or EBR 34 have occurred, whether, pursuant to 10 V.S.A. §6090(c) and EBR 38, such violations should cause the Altered Permit to be revoked and declared void; and

4. If the Altered Permit is revoked, whether an opportunity to correct should be provided pursuant to EBR 38(A)(3).

IV. Findings of Fact

To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied. *See Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corporation*, 167 Vt. 228, 241-42 (1997); *Petition of Village of Hardwick Electric Department*, 143 Vt. 437, 445 (1983).

Act 250 Permits/Hearings

1. On September 8, 1983, the Commission issued Land Use Permit 5W0743 to Wendell Brooks to convert a barn into a cat and dog kennel on property owned by him in Orange, Vermont.

2. On July 10, 1991, Land Use Permit Amendment 5W0743-1 was issued to Wendell and Janice Brooks for the construction of an outdoor privy at the previously permitted kennel.

3. On December 14, 1995, the Commission issued Land Use Permit 5W0743-2 (Revised) ("Revised Dash 2 Permit") to Permittees approving previously constructed structures and authorizing the operation of a shooting sports range for archery, sporting clays and other shooting sports on Brooks' Orange property. This permit was appealed to the Board on January 5, 1996.

4. As part of the appeal of Revised Dash 2 Permit to the Board, New England Air Quality Testing performed sound measurements at the Project on March 21, 1996. As a result of the monitoring, David Adams filed prefiled testimony and exhibits before the Board identified as NEAQT 1A-D through 5C-D ("NEAQT Evidence").

5. On February 27, 1997, the Board issued the Permit, with the February 1997 Decision, to the Permittees.

6. In part, the Board relied upon the NEAQT Evidence when it issued the Permit.

7. The Board's Findings of Fact 31- 43 in the February 1997 Decision include findings as to noise testing and noise levels at the Project and at neighboring properties.

8. Condition 1 of the Permit states, in pertinent part:

> 1. The Project shall be completed, operated and maintained in accordance with ... (c) Findings of Fact and Conclusions of Law #5W0743-2-EB (Revised).... No changes shall be made in the Project without the written approval of the District #5 Environmental Commission.

9. The Board's Conclusions of Law in the February 1997 Decision include an extensive discussion on Criterion 8 (aesthetics), 10 V.S.A. §6086(a)(8), relative to the noise produced by the Project. Having found the noise to constitute an adverse effect on the Project's surroundings, the Board then considered whether such effect would be undue. Conducting its analysis under its earlier decision in *Re: Quechee Lakes Corp.* Applications 3W0411-EB and 3W0439-EB, Findings of Fact, Conclusions of Law, and Order (Jan. 13, 1986), the Board wrote, in pertinent part:

> *2. Offensive or Shocking*
>
> The impact or quality of noise is not entirely reflected by a decibel rating. The degree of noise annoyance must also consider the duration and intermittency (sic) of noise. Impulse noises, such as gunshots, are often judged to be 'noisier' or more unwanted than non-impulsive noise having the same total integrated energy. Notwithstanding, the Board concludes that, given the mitigation that is occurring, the noise from the Project is neither shocking nor offensive. The Project, though noisy at certain times, does not significantly diminish the scenic qualities of the area. Accordingly, the Board concludes that the adverse effect is not undue under the second component of the Quechee Lakes test.
>
> *3. Mitigation*
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> ***
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> The Permittees have located the majority of the shooting stations, as well as the towers, on the central portion of the Project Tract and directed the firing stations toward the center of the Project Tract, rather

than toward the neighboring properties. By doing so, the Permittees have reduced the intensity of the noise at the property boundaries. The sheltering of the Project that is achieved by retaining a densely vegetated tract also contributes to noise mitigation at the property boundaries. The presence of this vegetation partially shields both the visual and audible elements of the Project.

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The Board, in part due to the conditions it imposes in the Permit, makes a positive finding under Criterion 8 (Aesthetics/Noise).

February 1997 Decision at 17 - 18.

10. On March 31, 1997, a timely objection to the issuance of the Permit was filed by certain neighbors to the project which the Board considered as a Motion to Alter. On May 8, 1997, the Board responded with both the Altered Permit and the May 1997 Decision.

11. Condition 1 of the Altered Permit states, in pertinent part:

1. The Project shall be completed, operated and maintained in accordance with ... (c) Findings of Fact and Conclusions of Law #5W0743-2-EB (Revised).... No changes shall be made in the Project without the written approval of the District #5 Environmental Commission.

12. Condition 2 of the Altered Permit, which amended and superseded Condition 8 of the Revised Dash 2 Permit, reads, in pertinent part:

During normal operations of the Project, Permittees are limited to using 20 firing stations. Each of these 20 stations shall have a firing platform and uprights, or "swing stops," which shall be designed to confine the angle of fire to 15 degrees left of center and 15 degrees right from center while the shooter's feet remain behind a designated mark. The total allowable angle of fire at any given station is, therefore, 30 degrees. This limitation has been graphically depicted on Appellants' Exhibit 33 and numerous other exhibits. Confinement of the angle of fire ensures that shot does not stray beyond the projected shotfall zones that have been depicted throughout the proceeding.

13. The Altered Permit did not revise any of the Board's earlier findings concerning the vegetated buffer zones. However, at page 7 of the May 1997 Decision, the Board indirectly addressed these zones:

> Condition 1 of the Altered Permit contains a clause that acts as a restraint against any substantial or material changes to the Project. Specifically, it states that "No changes shall be made in the Project without the written approval of the District #5 Environmental Commission." Thus, approval for any significant tree cutting or other means of removing vegetative cover is required where such removal constitutes either a material or substantial change. Such approval is recommended for any cutting activity that may impact vegetative cover that was found to enhance mitigation of noise impacts.

14. In the Commission's Findings of Fact to Land Use Permit 5W0743-2, issued on July 19, 1995, the Commission states, concerning Criterion 8, "[t]he project site is not visible from George Street or nearby residences." This Finding was incorporated into the Altered Permit by function of Condition 1 of the Altered Permit via the Revised Dash 2 Permit.

Tree cutting at the Project site

15. Beginning in the winter of 1996-97, the Permittees did some logging on the Project site. This logging occurred after the sound testing presented in the NEAQT Evidence but before the Board issued the Permit and the Altered Permit.

16. The Permittees logged the Project site more extensively in the winter of 1997-98, cutting a significant number of mature trees.

17. No evidence distinguishes the impacts resulting from the logging done in 1996-97 from the logging done in 1997-98.

18. In the 1997-1998 logging, the Permittees logged the interior section of the Project tract. Within the interior of the Project tract, there is evidence of blowdowns and old cutting, as many of the stumps are covered with moss.

19. In the 1997-1998 logging, the Permittees logged trees in the vegetated buffer zone. The Permittees logged especially along the western boundary of the Project site in the buffer zone, to the west of and around proposed shooting stations C1, C2 and C3, as those stations appear on Exhibit W7.

20. During May 1999 site visits, Commission Coordinator Ed Stanak observed the trunks of substantially sized trees which had been removed, that the buffer zone had been cleared of all mature trees, and that there was no evidence of ice damage on the remaining trees or on the trees on neighboring property.

21. At a May 1999 site visit taken by Russ Barrett, the Washington County forester, Barrett noted that a modified "patch cut" - of about an acre - had been taken up to the Project's property line within the buffer area. A "patch cut" involves the removal of all trees within an area. Barrett observed that the cutting was recent – during the winter of 1998 - 1999, because the stumps and branches had fresh color indications. Barrett saw no evidence of dead or dying trees.

22. Some of the spruce trees that had been cut in the patch cut were about 75 years old. Hardwoods had also been removed.

23. The best measurement of how many trees were logged by the Permittees is the reduction in basal area. Basal area is the amount of space taken up by trunks of trees on a per acre basis. Forest understory does not contribute to basal area calculation. Before the Permittees did the logging, the basal area in the buffer zone was 120 to 150 square feet. After the cutting, the basal area in the logged buffer zone is between 40 and 50 square feet.

24. Where the Permittees logged, they took between two-thirds and three-quarters of the trees; normal thinning involves cutting of between one-quarter and one-third of the trees.

25. Within the area west of and around proposed shooting stations C1, C2 and C3, there is evidence of cutting, and there are many stumps (nine stumps within a radius of twenty-five feet) with large diameters (up to twenty inches), indicating that the trees that were cut were mature, older growth trees. Many of these stumps have moss on their sides but no moss growing on the top of the stumps, indicating recent cutting.

26. Within the area west of and around proposed shooting stations C1, C2 and C3, the vegetation is thin, and there is little tree canopy. Some of the trees in this area have dead tops, but there is no evidence of damage from the 1998 ice storm.

27. There is no evidence of ice damage on trees on the adjoining properties.

28. Within the area west of and around proposed shooting stations C1, C2 and C3, there are blowdowns.

29. North of proposed shooting stations C1, C2 and C3, within the buffer area, there is evidence of cutting of mature trees (trees with diameters of twenty inches); again, this cutting is recent, as many of these stumps have moss on their sides but no moss growing on top. There are also blowdowns of trees that were alive when they fell; the cover is very thin. In this area, there is new evergreen growth (trees with diameters of less than two inches).

30. The potential for blowdowns is increased as a direct result of the Permittees' logging of the Project tract.

31. Within the area west and north of and around proposed shooting stations C1, C2 and C3, the foliage on the evergreen trees appears at the top of the trees and not on the lower portions of the trees.

32. Because of the logging, there are no longer extensive tree crowns in the cleared areas.

33. The Permittees logged at least eleven truckloads worth of logs, and numerous loads of firewood. At a minimum, the Permittees cut down 28,890 board feet of logs and pulp.

34. Six truckloads of spruce/fir and mixed hardwoods would yield an average return of $5000.00.

35. The Permittees cut trees for sale in the Project tract. The Permittees did not log in the Project tract because the trees were storm-damaged or dying. The Permittees did not log in the Project tract in order to create space for shooting stations, or to allow the presentation of clay pigeons for these stations, or for the sole purpose of clearing paths to shooting stations, or to stimulate thicker growth in order to insure better noise suppression in the future.

36. The site had evidence of good revegetation in the cut area. The logging which took place was positive from a silvacultural perspective. As a result of the cutting, there will be regrowth, and this regrowth will be thicker than the former growth. However, it will be between fifteen to twenty years before trees and vegetation will grow to the height required to provide the noise and view buffer that existed prior to the cutting.

Impact of cutting on neighbors to the Project

37. Raymond and Judith Letourneau live just south of the Project, approximately 800 feet from the nearest shooting station.

38. George Wild's property adjoins the northeasterly and northwesterly boundaries of the Project site. His house is about 2 miles northwest from the Project Tract.

39. Anita and Charles Paige live less than 1/4 mile away from the Project.

Shooting station swing stops

40. The Permittees are required by Condition 8 of the Altered Permit to have shooting station swing stops to restrict the angle of fire to 30 degrees.

41. Swing stops serve a safety purpose and are intended to restrict shot to a prescribed zone.

42. At a July 20, 1999 site visit to the Project, Environmental Enforcement Officer Kathryn Patch observed that no station had the required construction to limit the angle of fire.

43. The required swing stops to limit the angle of fire have not been installed in any of the shooting stations.

44. The Permittees cannot operate the Project in conformance with the swing stop requirement, because, in order to shoot clay pigeons which cross from one side of a shooter's position to another, a shotgun must move in an arc much wider than 30 degrees.

45. Clay pigeons can be presented to a shooter in a way which will keep most shot within a 30-degree angle of fire. However, in competitions, which sometimes occur at the Project, a variety of presentations is required, including those which present crossing clays. In crossing clay presentations, there is a higher probability that shot will fall outside a narrow angle of fire.

V. Conclusions of Law

A. Issue 1: Violation of Permit terms and conditions

The first issue, as stated in the Prehearing Order, is whether the Permittees' logging of the Project tract or their failure to install the required swing stops violates a term or condition of the Altered Permit.

1. Tree cutting

The Permittees admit to having logged trees throughout the Project site, including the buffer zone. Such logging is evident and established through testimony and the Board's site visit observations.

Condition 1 of the Altered Permit states specifically that "No changes shall be made in the Project without the written approval of the District #5 Environmental Commission." The logging that occurred at the Project is in direct violation of this Condition.

Assuming, *arguendo,* that there is no specific permit term or condition which prohibits tree cutting, Findings of Fact, Conclusions of Law, and approved plans and exhibits constitute permit conditions - beyond those that appear on the face of the Altered Permit alone - that are binding on the Permittees. As the Supreme Court wrote in *In re Denio*, 158 Vt. 230, 241 (1992):

> The necessary result of detailed environmental review, as contemplated by Act 250, is that restrictions on land use will not be simple to state or even to ascertain. That concern is addressed in part by the requirement that permits, including their conditions, be recorded in the land records. 10 V.S.A. §6090(a). Persons coming upon this permit will know that they have to also look at the findings, conclusions and plans.

It is clear from the Conclusions in the February 1997 Decision (*see* Finding 9, *supra*) that the existence of the uncut vegetative buffer played a major role in the Board's ability to make a positive finding on the visual and auditory impacts of the Project under Criterion 8.

Further, the May 1997 Decision which accompanied Altered Permit also noted the existence of the buffer and stated that "approval for any significant tree cutting or other means of removing vegetative cover **is required** where such removal constitutes

either a material or substantial change. Such approval is recommended for any cutting activity that may impact vegetative cover that was found to enhance mitigation of noise impacts." (Emphasis added).

For all of the above reasons, the Permittees' argument that there is no prohibition in the permit against tree cutting is therefore without merit, and the Board concludes that the Permittees have violated the prohibition.

2. Shooting station swing stops

With respect to the limit on angles of fire, Altered Permit Condition 8 requires that there be shooting stops at each shooting station which limit the angle of fire to 30 degrees. The Permittees admit that such shooting stops have never been installed. They further admit that they cannot operate the Project in conformance with the Altered Permit, because swing stops prevent the broad arc movement required for some presentations of clay pigeons.

Based on the evidence, the Permittees have failed to comply with Altered Permit Condition 8.

B. Issue 2: EBR 34

The second issue presented by the Prehearing Order is whether the Permittees' logging violates EBR 34.

Under EBR 34, a permit amendment is mandatory for either a substantial or material change.

1. Substantial change

EBR 2(G) defines "substantial change" as "any change in a development or subdivision which may result in significant impact with respect to any of the 10 Act 250 criteria."

The Board's substantial change test involves a two-step analysis. First, there must be a cognizable change (i.e. physical change) to the project. *Developer's Diversified Realty Corp.,* Declaratory Rulings ##364, 371 and 375, Findings of Fact, Conclusions of Law, and Order at 16 (March 25, 1999); *Re: Village of Ludlow*, Declaratory Ruling #212, Findings of Fact, Conclusions of Law and Order (Dec. 29, 1989). Second, the change must have the potential to impact significantly on one or more of the ten Act 250 criteria. *Id.* The Vermont Supreme Court has upheld the

Board's test. *In re Barlow*, 160 Vt. 513, 521-22 (1993); *In re Manosh Corp.*, 147 Vt. 367, 369 (1986); *In re Orzel*, 145 Vt. 355, 360-361 (1985).

In considering the issue of substantial change, the Board has stated:

> In deciding whether Act 250 jurisdiction applies . . . , the appropriate consideration is whether the potential for significant impact is raised. This consideration does not require an in-depth review of possible impacts, but simply a determination that significant impacts may occur.

Village of Ludlow, supra, at 9 (*quoting Re: City of Montpelier*, Declaratory Ruling #190, Findings of Fact, Conclusions of Law, and Order at 7 (Sept. 6, 1988)).

The Permittees have physically changed the Project by logging trees. These physical changes have the potential to significantly impact Criterion 8 in terms of increased noise from the shooting. The logging is therefore a substantial change.

2. Material change

EBR 2(P) defines "material change" as an "alteration to a project which has a significant impact on any finding, conclusion, term or condition of the project's permit and which affects one or more values sought to be protected by the Act."

As with the substantial change analysis, finding a material change involves a two step process. First, the Board must decide whether a physical change or a change in use has occurred or will occur. *Developer's Diversified, supra,* at 18. Second, if there is a change, the Board must determine whether the alteration has a significant impact on any finding, conclusion, term, or condition of the Altered Permit and whether the alteration affects one or more of the values protected by Act 250. *Id.*.

Again, the logging conducted by the Permittees is a physical change to the Project. The Board also concludes that the change significantly impacts the Board's Conclusions as to Criterion 8, with respect to the mitigating effects of the vegetative buffer on noise emanating from the Project . The logging is therefore a material change.

Because the Board concludes that the Permittees' logging at the Project constitutes both a material and substantial change, a permit amendment was and is required. Because no permit amendment was obtained prior to the tree cutting, the Board concludes that the Permittees have violated EBR 34.

C. Issue 3: Revocation under EBR 38

As provided in the Prehearing Order, the third issue is whether, because violations of the Altered Permit and EBR 34 have occurred, such violations should cause the Altered Permit to be revoked, pursuant to 10 V.S.A. §6090(c) and EBR 38.

Under EBR 38(A)(2)(a) and (b), the Board may, after hearing, revoke a permit if it finds that:

> (a) the applicant or representative willfully or with gross negligence submitted inaccurate, 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 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.

In 1985, the Legislature ratified the Board's rules, including EBR 38, such that they have "effectively become part of the Act 250 legislative scheme codified at chapter 151 of Title 10." *In re Barlow*, 160 Vt. 513, 521 (1993); *In re Spencer*, 152 Vt. 330, 336 (1989).

1. Inaccurate, erroneous or incomplete information

Under prior Board precedent, "willfully" has been defined as "done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done." *Re: Lawrence White*, #1R0391-EB, #1R0391-3-EB, #1R0391-4-EB, #1R0391-5-EB, #1R0391-5A-EB, #1R0391-6-EB (Revocation), Findings of Fact, Conclusions of Law, and Order at 14 and case cited therein (Sept. 17, 1996), appeal docketed, No. 98-391 (Vt. Sup. Ct).

In *Re: H.A. Manosh, Inc.*, #5L1290-EB (Revocation), Findings of Fact, Conclusions of Law, and Order at 28 (Feb. 3, 1999), the Board analyzed gross negligence by referring to *Shaw v. Moore*, 104 Vt. 529, (1932), which states in part:

> Gross negligence is substantially and appreciably higher in magnitude and more culpable than ordinary negligence. . . . Gross negligence is manifestly a smaller amount of watchfulness and circumspection than the circumstances require of a prudent man. But it falls short of being such reckless disregard of probable consequences as is equivalent to a willful

> and intentional wrong. Ordinary and gross negligence differ in degree of inattention, while both differ from willful and intentional conduct which is or ought to be known to have a tendency to injure.

Id. at 531-32. EBR 38(A)(2)(a) therefore "clearly contemplates a class of conduct falling between ordinary negligence and willful misconduct." *H.A. Manosh, supra,* at 29.

The cases in which the Board has addressed questions of inaccurate, erroneous and materially incomplete information have concerned instances in which such information was submitted in connection with the permit application. *See H.A. Manosh, Inc., supra,* 24 - 26; *Lawrence White, supra* at 14; *Synergy Gas Corp.*, #9A0204-EB (Revocation), Findings of Fact, Conclusions of Law, and Order at 13 (June 8, 1995); *Putney Paper Co., Inc.*, #2W0436-6-EB (Revocation), Findings of Fact, Conclusions of Law, and Order at 17 - 21 (June 30, 1995); *Montpelier Broadcasting, Inc.*, #5W0396-EB (Revocation), Findings of Fact, Conclusions of Law, and Order at 17 - 18 (Feb. 17, 1994); *Talon Hill Gun Club., Inc. and John Swinington*, #9A0192-EB (Revocation), Findings of Fact, Conclusions of Law, and Order at 11 - 12 (Oct. 8, 1993). There appear to be no revocation decisions which address instances where events subsequent to the submission of the application, hearing and site visit have rendered inaccurate the information which was accurate at the time it was submitted.

At the time that this case was presented to and heard by the Board and the site visit occurred, the NEAQT Evidence was accurate, as the logging had not occurred. Thus, were EBR 38(A)(2)(a) to be read to apply only to situations where, at the time the application was filed – or during the application/hearing process – false information is given to the Commission or Board, which information formed the basis for the grant of the permit, the instant situation would not fall neatly within the Rule.

Here, however, the project described in the application presented by the Permittees to the Board was not the same project which existed at the time the Board issued the Permit and Altered Permit. Because the Permittees relied on trees for purposes of the NEAQT Evidence sound test, those trees helped establish the factual basis for the sound testing and became part of the Project's basic design. The Board, in turn, relied on the sound testing to issue the Permit and, eventually, the Altered Permit. By logging off some of the trees relied upon for NEAQT Evidence sound testing, the Permittees' application did not reflect the true state of affairs that existed at the time the permit was issued.

There is a compelling reason to read EBR 38 to encompass the present scenario. The Rule allows for revocation for only two reasons: (a) inaccurate,

erroneous, or materially incomplete information, or (b) a violation of the terms of the permit or any permit condition, the approved terms of the application, or the rules of the Board. If no permit has been issued as of the time that alterations to a project occur, then there is no violation of a permit and the second ground for revocation cannot be invoked. If the first ground for revocation applies only to instances where false information is affirmatively submitted to a Commission or the Board, then the Permittees could argue that the application, at the time it was filed, and the NEAQT Evidence, at the time it was presented, were both accurate. The present instance would therefore escape sanction.

The Board declines to read EBR 38(A)(2)(a) so narrowly as to apply it only to information affirmatively submitted to the Commissions or the Board -- to "sins of commission" and not "sins of omission." Such a narrow reading would contravene public policy and a sensible interpretation of the Rule. The Board therefore holds that, where circumstances change following the submission of an application, which circumstances cause the information in the application to become inaccurate, erroneous, or materially incomplete, the applicant has an affirmative obligation to bring such circumstances to the attention of the Commission or the Board, and that failure to do so may result in grounds for revocation under the provisions of EBR 38(A)(2)(a).

The Board also finds, however, that the Permittee's actions in this case do not rise to the level of willfulness or gross negligence as defined in Board precedent. The logging that was done in the winter of 1996 – 1997 was not extensive, the impacts from that logging cannot be readily discerned from the impacts of the logging that occurred in the winter of 1997 – 1998, and there is no evidence to suggest that it was conducted "with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done." *Lawrence White, supra; Synergy Gas Corp, supra.* Nor is there evidence to suggest that the Permittee's engaged in "willful and intentional conduct which is or ought to be known to have a tendency to injure." *Shaw v. Moore, supra.*

The Board is reluctant to revoke a permit when it is doubtful or uncertain about the grounds for revocation. *Potwin, supra* at 14; *Re: Stokes Communications Corp.*, #3R0703-EB (Amendment Application Revocation), Memorandum of Decision at 9 (Mar. 20, 1996). The Board therefore declines to revoke the Permittees' Altered Permit based upon an application of EBR 38(A)(2)(a).

2. Violation of permit terms, conditions, or Board rules

The Board comes to a different conclusion, however, in its application of EBR 38(A)(2)(b) to this case.

Under Condition 1 of the Altered Permit and the Conclusions in the February 1997 Decision which are incorporated into the Altered Permit as conditions, *In re Denio, supra*, the Permittees were precluded from logging within the uncut vegetated tract. They did such logging in violation of their permit conditions. *See, Synergy Gas Corp, supra,* at 16 – 18; *Montpelier Broadcasting, Inc., supra,* at 18 – 19; *Talon Hill Gun Club., Inc. and John Swinington, supra*, at 12 – 15; *Crushed Rock, Inc.*, #1R0489 and 1R0489-1, Findings of Fact, Conclusions of Law, and Permit Revocation Order at 9 - 12 (Oct. 17, 1996), *vacated and remanded*, 150 Vt. 613 (1988).

The Board has also found that the logging was both a substantial change and a material change and that the Permittees were therefore required to obtain a permit amendment before the logging occurred. The logging is thus a violation of EBR 34(A), which is a further ground for revocation. *Lawrence White, supra,* at 17.

As to the shooting station stop-posts, the Permittees admit that they have not complied, and cannot comply, with Condition 8 of the Altered Permit. *See Talon Hill Gun Club., Inc. and John Swinington, supra*, at 14 (once permittee realized it could not comply with permit condition, it should have sought amendment).

Pursuant to EBR 38(A)(2)(b), the Board therefore revokes the Altered Permit.

D. Issue 4: Opportunity to Cure

As provided in the Prehearing Order, the fourth issue is whether, if the Altered Permit is revoked, whether an opportunity to correct or cure should be provided pursuant to EBR 38(A)(3). *See Lawrence White, supra,* at 21.

If the Board determines that a violation exists, then it must give the permit holder a reasonable opportunity to correct the violation prior to any order of revocation becoming final, 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." EBR 38(A)(3). Further, "In the case where a permit holder is responsible for repeated violations, the board may revoke a permit without offering the opportunity to correct a violation." *Id.* Even where repeated violations have occurred, however, the Board has the discretion to allow the opportunity to cure. *H.A. Manosh, Inc., supra*, at 30.

1. Opportunity to cure

Wild and Letourneau argue that the violations committed by the Permittees have resulted in irreparable harm to public health, safety, and the general welfare, and to the environment. First, they note the harm and annoyance which they assert have resulted from the cutting. Second, they claim that the logged trees cannot be put back in place, and that no berm can be built to contain the noise, and that, therefore, there is nothing the Permittees can do to remedy the cutting. This, they claim, is the essence of irreparable harm in Act 250. *Citing Re: Montpelier Broadcasting, Inc., supra* (Road erosion resulting from permit violation was clear threat of irreparable harm to the environment since stabilization to prevent further erosion would be very difficult, if not impossible).

Wild and Letourneau also argue that there have been repeated violations, such that the Permittees are barred from an opportunity to cure under EBR 38. *H.A. Manosh, supra,* at 30.

The Board will provide the Permittees with the opportunity to cure the violations noted herein. The harm caused by the tree cutting, while certainly a harm to the public's general welfare and the environment, is not irreparable.

The failure to install the shooting stops does cause the Board some concern, as the stops represent a safety measure designed to prevent shot from leaving clearly delineated angles and zones. Nonetheless, there was no evidence presented that shot has actually left the Project tract, and the Board believes that, while this matter is pending before the Commission on the question of cure, the Commission can condition the operation of the Project to prevent the problems which the shooting stop condition was meant to address. *See Talon Hill Gun Club., Inc. and John Swinington, supra*, at 16 – 17.

The Board exercises its discretion to allow an opportunity to cure despite alleged repeated violations. *Compare, Felix Callan*, #5W0550-EB, Memorandum of Decision and Revocation Order at 2 (Sept. 20, 1988) (no opportunity to cure provided when there were repeated violations over long time period); *Crushed Rock, Inc., supra,* at 14 (same).

2. The nature of the allowable cure

EBR 38(A)(3) states that, if the opportunity to cure is to be provided,

> the Board must 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 an escrow account, to assure compliance with the Board's order.

a. Tree cutting

Merely because there was cutting in the vegetated buffer zone on the western and northern boundaries of the Project tract, the Board does not believe that all operations at the Project must cease. Archery activities, for example, may continue without limitation. Further, shooting activities may also be permitted in areas where trees were not cut.

The cure that the Board contemplates in this case is not, therefore, a wholesale cessation of activities throughout the Project tract. However, any cure that is permitted by the Commission must prohibit shooting or the use of firearms in the areas along the western and northern boundaries of the Project tract until such time as the forest growth is equivalent (in terms of sound attenuation) to the growth that existed prior to any cutting which occurred in 1996 – 1998, or a period of ten years, whichever last occurs. How far into the Project this "no-shooting zone" should extend is left to the Commission's discretion.

b. Shooting stops

The Permittees contend that they can accomplish the purpose of the shooting stops - to ensure "that shot does not stray beyond the projected shotfall zones," Altered Permit, Condition 2 - by the "presentation" of the clay pigeons at the shooting stations. The Board does not believe that the cure to the Permittees' failure to install the required shooting stops lies solely in restrictions on the presentation of the target clays. Too many variables in such restrictions exist, and the Permittees themselves noted that, in order to conduct shooting competitions, clays must be presented at many angles and from many directions. Further, enforcement of a permit condition related to presentation would be virtually impossible, and "[t]he Board will not write a permit condition which it believes is unenforceable at the time it is written." *Old Vermonter Wood Products and*

Richard Atwood, #5W1305-EB, Findings of Fact, Conclusions of Law, and Order at 16 (Aug. 19, 1999), *citing, In re Denio,* 158 Vt. at 240.

Rather, the Board believes that it is the placement of the shooting stations that dictates where shotfall will occur, and that, even if the angle of fire is as broad as 180 degrees, the stations can be located in such positions as to insure that shot does not leave the Project tract or fall in Baker Brook. This may mean that the number of stations must be reduced and the placement of the stations reconsidered. Again, the Board leaves it to the Commission's discretion to determine how to accomplish the above goals.

3. Application of Stowe Club Highlands to proceedings before the Commission

It is apparent to the Board that, because any cure in this case will require the Permittees to obtain an amended permit, questions as to the applicability of the *Stowe Club Highlands* decision to this case will arise. The Board finds that *Stowe Club Highlands* is inapplicable to an amendment application in this matter.

In *In re Stowe Club Highlands*, 166 Vt. 33 (1996), the Supreme Court affirmed the Board's denial of a permit amendment application for a project to develop a lot previously set aside as undeveloped land by permit conditions under Criteria 8 and 9(B). While the Supreme Court overruled the Board's use of collateral estoppel as the analytical framework, the Court concluded that "the Board addressed certain policy considerations that it considered relevant in deciding whether to grant the permit amendment." 166 Vt. at 38. The Court stated:

> The Board framed its discussion as weighing the competing values of flexibility and finality in the permitting process. If existing permit conditions are no longer the most useful or cost-effective way to lessen the impact of development, the permitting process should be flexible enough to respond to the changed conditions. The board recognized three kinds of changes that would justify altering a permit condition:
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> > (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.

Id. The Supreme Court concluded that the Board was justified in denying the permit amendment application based upon the balancing of the policies of finality and flexibility. Id. at 40.

The *Stowe Club Highlands* doctrine has been applied in a number of other cases, all involving permit amendment applications sought by the permittee. *See, e.g., Re: Nehemiah Associates, Inc.*, #1R0672-1-EB, Findings of Fact, Conclusions of Law, and Order (April 11, 1997), *aff'd* 168 Vt. 288 (1998); *Re: Town of Hinesburg*, #4C0681-8-EB, Findings of Fact, Conclusions of Law, and Order (Sept. 23, 1998). More recently, in the case of *Re: MBL Associates, LLC*, #4C0948-3-EB, Findings of Fact, Conclusions of Law, and Order at 15 (Oct. 20, 1999), the Board wrote:

> The principal of finality is derived from the consequences of a permit being issued without any subsequent appeal. Once a permit has been issued and the applicable appeal period has expired, the findings, conclusions, and permit are final and are not subject to attack in a subsequent application proceeding. . . . "To hold otherwise would severely undermine the orderly governance of development and would upset reasonable reliance on the process." *In re Taft Corners Associates*, 160 Vt. 583, 593 (1993), *citing Levy v. Town of St. Albans Zoning Bd. Of Adjustment*, 152 Vt. 583, 593 (1989). . . .
>
> [In contrast, t]he principle of flexibility is derived from the consequences of the development process. "[O]nce a permit has been issued it is reasonable to expect the permittee to conform to those representations unless circumstances or some intervening factor justify an amendment." *Re: Department of Forests and Parks Knight Point State Park*, Declaratory Ruling #77 at 3 (Sept. 6, 1976). . . . In a permit amendment application proceeding, the central question is "not whether to give effect to the original permit conditions, but under what circumstances those permit conditions may be modified." *In re Stowe Club Highlands.*

Citing Re: Nehemiah Associates, Inc., supra at 21-22.

The basic tenet of the *Stowe Club Highlands* doctrine is that a permittee should not obtain a permit based on one set of representations and restrictions, and then later, except under limited circumstances, seek an amendment which relieves it of those restrictions and therefore grants it greater benefits or advantages than those initially obtained. *E.g. Stowe Club Highlands* (amendment not allowed where, to obtain permit,

permittee agreed to condition requiring an open lot and later sought amendment in order to develop that lot); *Nehemiah Associates* (same); *Re: Bernard and Suzanne Carrier*, Land Use Permit Application #7R0639-1-EB, Findings of Fact, Conclusions of Law and Order (Aug. 19, 1999) (same); *Re: Donald and Diane Weston*, #4C0635-4-EB, Findings of Fact, Conclusions of Law, and Order (March 2, 2000) (same); *MBL Associates, LLC*, *supra* (amendment denied where permittee obtained permit based on representations that certain housing units would remain affordable in perpetuity and then sought to be relieved of such requirement). As the *Stowe Club Highlands* Board wrote in discussing the need for finality in the permitting process:

> The district commissions also rely on these representations in rendering their decisions. In those cases where a permit is issued, very often the applicant's representations are the basis for permit conditions. The purpose of permit conditions is to alleviate adverse effects that would otherwise be caused by the project. Those adverse effects would require a conclusion that a project does not comply with the criterion at issue unless the condition is followed.
>
> > If conditions to mitigate impacts can simply be ignored and not complied with, and instead re litigated at a future date, the protection of the public and the environment from the impacts those conditions are designed to remedy is less likely to occur. In such a circumstance, the Act 250 decision-making process will become less one of making decisions which are adhered to, and more one of picking the time and composition of Act 250 tribunal most favorable to one's interest.

Stowe Club Highlands, #5L0822-12-EB, Findings of Fact, Conclusions of Law, and Order at 10 (June 20, 1995), *quoting, Re: Cabot Creamery Cooperative*, #5W0870-13-EB, Memorandum of Decision at 11 (Dec. 23, 1992).

As Wild and Letourneau rightly argue, the Permittees should not be allowed to use this revocation petition as a vehicle for relitigating already-imposed permit conditions. *See Re: Roger and Beverly Potwin*, #3W5087-1-EB (Revocation), Findings of Fact, Conclusions of Law, and Order at 12 (July 15, 1997). The Board recognizes the apparent irony in the present situation; the Permittees have violated the conditions of their permit and have not requested an amendment to those conditions, and yet the Board will permit them to cure the subsequent revocation through a permit amendment application.

Certainly, the Permittees should not be allowed to sidestep *Stowe Club Highlands* through the revocation process. The instant case, however, does not involve an instance where a permittee, having obtained a permit with conditions based on one set of representations, now seeks to amend its permit to relieve it of previously imposed obligations or restrictions, and thereby realize a gain at the expense of the reliance by the Board, the Commission, or its neighbors. Here, the Permittees will achieve no advantage as a result of an amendment to the Altered Permit; indeed, it is apparent that the Permittees will lose certain aspects of their operations - they will not be allowed to shoot firearms from their previously approved shooting stations in the west and north border areas of the Project tract - and, in order to increase the angle of fire at their remaining stations, they will likely have to relocate many of those stations and may end up with fewer stations than the Altered Permit allowed.

Further, the Board believes that its decision in this matter will not encourage others to attempt to circumvent the strictures of *Stowe Club Highlands* by violating their permits, being subject to revocation, and then seeking to cure the violation by a permit amendment. First, such permittees have no guarantee that the Board will allow them the opportunity to cure; rather, the revocation may become final. Second, as here, the cure may be harsher than compliance with the original permit. And third, the Board may choose to seek substantial penalties for permit violations. 10 V.S.A. Chs. 201 and 211.

VI. Order

1. Permittees have violated the Altered Permit as set forth above. The Altered Permit is revoked subject to Permittees' opportunity to correct each of the violations, on or before thirty (30) days from the date of this decision, (a) by filing a statement with the Board detailing the manner in which they have corrected the violations and have complied with the requirements of the Altered Permit and/or (b) by filing a complete amendment application with the Commission seeking authorization for any of the activities constituting violations that Permittees do not or cannot correct pursuant to subsection (a) of this paragraph.

2. Any permit amendment issued by the Commission shall include a prohibition against the use of shooting stations for firearms in the north and west areas of the Project tract until such time as the forest growth is equivalent (in terms of sound attenuation) to the growth that existed prior to any cutting which occurred in 1996 – 1998, or a period of ten years from the date of this decision, whichever is greater. The precise size, placement, and description of this "no-shooting zone" are left to the Commission's discretion.

3. Regardless of which option Permittees pursue under paragraph 1 above, Permittees may operate the Project on an interim basis until such time as (a) they file an affidavit with the Board that they are in compliance with the Altered Permit as set forth in paragraph 1(a) above and/or (b) the Commission either issues a permit or denies Permittees' application for a permit amendment filed pursuant to paragraph 1(b) above, *provided that, during this interim period:*

i. there shall be no shooting of firearms within 400 feet of the west and north boundaries of the Project tract north of Baker Brook; and

ii. all terms and conditions of Land Use Permit 5W0743-2 (Altered) shall remain in full force and effect. Permittees shall comply with such terms and conditions.

Dated at Montpelier, Vermont, this 23rd day of June 2000.

ENVIRONMENTAL BOARD

by: Marcy Harding
Marcy Harding, Chair
John Drake
George Holland
Samuel Lloyd
W. William Martinez
Rebecca Nawrath
Alice Olenick
Gregory Rainville

Board Member Robert Opel participated in the hearing and preliminary deliberations in this case but did not participate in the final deliberative session.

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