

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

RE: Wildcat Construction Co.,
Inc.
Land Use Permit #6F0283
and #6F0283-1-EB
Appeal and Revocation

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to an appeal filed with the Environmental Board on November 15, 1989 and a Petition for Revocation filed on November 1, 1989. The appeal was filed by Wildcat Construction Co., Inc. (Wildcat) from a decision of the District #6 Environmental Commission dated October 18, 1989 regarding Wildcat's operation of its trucking business on Chubb Street in St. Albans Bay. The Petition for Revocation was filed by neighbors to the Wildcat site: Charles and Katherine Cox, Donald Sullivan, William and Betty Lana, Ronald and Eleanor Shepard, and Sarah Lerner (the-Neighbors). The Petition alleged that Wildcat has violated its Act 250 permits in a number of respects.

I. Backaround

Wildcat received Land Use Permit #6F0283 (the Permit) in 1983, authorizing a newly constructed storage and maintenance garage at the Chubb Street site. On March 26, 1984, Permit Amendment #6F0283-1 (the Amendment) was issued. In May, 1989, the District Commission convened a hearing to evaluate whether additional conditions were required, as provided by Condition 5 of the 1984 amendment. Subsequent to the hearing, the District Commission issued an order requiring Wildcat to relocate "the depot facilities back to the Wagon Wheel, [and to] limit the number of trucks entering and leaving the site to 3 truck trips per day"

A prehearing conference was convened on February 6, 1990, at which the parties agreed to consolidate the appeal and the revocation at one hearing.

In its appeal of the District Commission's decision, Wildcat raised a number of legal issues, including a motion to dismiss for lack of jurisdiction. After the filing of documents and legal memoranda by the parties, the Board issued a Memorandum of Decision on October 10, 1991 denying the motion to dismiss.

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II. SUMMARY OF PROCEEDINGS

An administrative hearing panel of the Board convened a public hearing on January 29, 1991, pursuant to Board Rule 41, with the following parties participating:

Wildcat Construction Co., Inc. by Ronald H. Bartemy, Jr.
The Neighbors by Charles Cox

The hearing was recessed pending the filing of proposed findings and issuance of a proposed decision. Proposed findings were filed by Charles Cox on February 19 and by Ronald Bartemy **on** February 28. The hearing panel conducted deliberations by conference call on Monday, April 29, 1991. A proposed decision was issued on May 15, 1991, and the parties were provided an opportunity to file written objections and to present oral argument before the full Board. Ronald Bartemy requested oral argument by telephone. On May 29 and June 6, Charles Cox and Ronald Bartemy, respectively, submitted responses to the proposed decision. The Board convened a public hearing on June 13, 1991. The Board deliberated concerning this matter on June 27, 1991. On that date, 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.

III. ISSUES IN THE APPEAL AND REVOCATION

A. The Appeal

1. Whether the District Commission had jurisdiction or authority to reopen an adjourned proceeding by conducting additional site visits and public hearings after the permit had been granted.
2. Whether, if the District Commission did have such authority, it was exercised in a timely manner.
3. Whether the operations of Wildcat result in undue air pollution pursuant to 10 V.S.A. § 6986(a)(1).
4. Whether the truck traffic at Wildcat's facility causes unsafe conditions, pursuant to 10 V.S.A. § 6086(a)(5).

5. Whether Wildcat is operating a truck depot at the Chubb Street facility.

B. The Revocation Petition

1. Whether the following activities of Wildcat alleged by the Neighbors existed or exist and constitute a violation:

(a) Continued operation of a truck depot instead of a small maintenance garage. Condition 17 of the Permit required that the use of the Chubb Street facility as a truck depot terminate on October 1, 1983, and Condition 1 of the Amendment **extended** the date to June 1, 1984.

(b) Allowing more than 300 arrivals and departures of trucks per month.

(c) Operating the facility after the hours permitted in Condition 14 of the Permit.

(d) Allowing diesel trucks and refrigeration units to idle during the night, in violation of Condition 13 of the Permit.

(e) Allowing more than ten tractors on the premises at any one time, in violation of Condition 11 of the Permit.

(f) Allowing trucks to operate unsafely by hitting street signs, driving on residents' properties, driving out of the proper lane when turning, and having trailers become disconnected from their trucks, in violation of the District Commission's conclusion that the project will not create unsafe traffic conditions.

C. Wildcat's Agreement With The Town

Apparently an agreement was worked out in 1981 between Ronald H. Bartemy, Sr. and Anna Geraldine Bartemy and the Town of St. Albans. Wildcat appears to believe that the Board is somehow bound by the provisions of the agreement **that** relate to operation of its operation. In clarification of this apparent belief, the Board notes that it was not a party to the agreement and, therefore, is not bound by it. Act 250 requires that, prior to issuing a permit for a project, the Board shall find that unsafe traffic conditions will not result. 10 V.S.A. § 6086(a)(5). 10 V.S.A. § 6087(b) provides that a permit may not be denied for failure to comply with Criterion 5, but that "reasonable conditions and requirements ... may be attached to alleviate the burdens created." In order to find that the

project will not cause unsafe traffic conditions, the Board has determined that certain restrictions are necessary to protect the public safety. Wildcat's recourse is to appeal to the Vermont Supreme Court. 10 V.S.A. § 6089(b).

IV. FINDINGS OF FACT

1. Wildcat operates a trucking business and is authorized by the Permit to operate a maintenance and repair facility for its trucks on an approximately three-acre parcel on Chubb Street in St. **Albans** Bay. A 70-foot by 40-foot garage is located on the parcel.
2. Access to the facility is from Chubb Street, a narrow street that runs off of Route 36 (Lake Street) in St. **Albans** Bay. The primary land uses in the neighborhood are residential, with the Town offices and a church on Lake Street near to its intersection with Chubb Street. The Neighbors in this proceeding all live along Chubb Street, or Lake Street close to Chubb Street. Houses are located on the two corners on either side of Chubb Street at the intersection very close to the street.
3. The garage was constructed in 1982 at an approximate cost of \$100,000. At the time that the Permit was issued, Wildcat had constructed the garage and was using the Chubb Street parcel as a truck depot. The Permit states:

The use of the project area as a truck depot shall terminate on October 1, 1983 when the operation will be moved to the facility near I-89 owned by Wildcat Construction, Incorporated. This facility was previously approved as a truck stop and depot in Land Use Permit #6F0243 on March 19, 1981. The St. **Albans** Bay facility will continue to function as a maintenance and repair garage

4. The Permit contains the following conditions:
 9. The permittee shall seek State of Vermont approval for the installation of two (2) truck-entering signs on Vermont Route 36 on both sides of Chubb Street, the main access road.
 11. Per agreement with the Town of St. **Albans**, no more than ten (10) tractors may be located at the premises at any one time.

12. No truck engine or refrigeration unit shall be allowed to idle outdoors for more than thirty (30) minutes between the hours of seven o'clock (7:00) a.m. to nine o'clock (9:00) p.m. if the decibel level exceeds seventy (70) as measured from any property line.
 13. No tractor engine or refrigeration unit shall be allowed to idle outdoors for any period of time between the hours of nine o'clock (9:00) p.m. to seven o'clock (7:00) a.m. unless there is an emergency.
 14. Normal business hours shall be from seven o'clock (7:00) a.m. to five o'clock (5:00) p.m. on Monday through Friday and from seven o'clock (7:00) a.m. to twelve o'clock (12:00) noon on Saturdays. No tractors will leave nor arrive between the hours of nine o'clock (9:00) p.m. to seven o'clock (7:00) a.m. unless there is an emergency.
 17. The use of this facility as a truck depot shall terminate on October 1, 1983 unless extended by the District Commission.
5. The Amendment authorized an extension of time for use of this site as a truck depot. The Amendment states:
- This permit specifically authorizes an extension of time for use of this project site as a truck depot to October 15, 1984. At that time, the truck depot operation shall be completely moved to the Wagon Wheel Truck Stop ... near Interstate 89 in St. **Albans**, Vermont.
6. The Amendment contains the following conditions:
1. Use of the project site as a truck depot shall cease no later than June 1, 1984 unless extended by the District Commission.
 4. The permittee shall contact the District Highway Engineer to seek State of **Vermont** approval for the installation of two (2) truck entering signs on Vermont Route 36 on

- both sides of Chubb Street, the main access road. This must be accomplished by June 1, 1984.
5. The District Commission retains the right to schedule site visits and public hearings to evaluate and to impose additional conditions with respect to air and noise pollution, landscaping, general aesthetics and traffic safety and circulation. This right shall commence June 1, 1984 and shall expire June 1, 1989.
 6. All pertaining conditions of Land Use Permit #6F0283 not affected by this amendment shall remain in full force and affect [sic].
 7. A truck consists of a tractor and a trailer. Refrigeration units are mounted on trailers and have their own motors which run on diesel fuel.
 8. Wildcat owns or leases all the trucks that are worked on at the site. Ten trucks are registered and Wildcat owns 14 trailers. Both tractors and trailers are brought to the site to be serviced and cleaned between each trip. The trailers are not loaded at the site.
 9. Usually only unloaded trailers are brought to the site, but sometimes a loaded trailer is brought to the site to be worked on before it can be unloaded. Loaded trucks are generally stored at the Wagon Wheel site near Interstate 89 that is owned by Ronald **Bartemy's** brother Dean; loaded trucks have been stored at this site also.
 10. The number of trucks that are worked on each day varies, ranging from one to nine. An employee of Wildcat can work on eight to nine trucks a day. The trucks are worked on inside the garage; the trucks outside the garage are waiting to be worked on.
 11. On December 24, 1990 there were 14 vehicles parked at the site. These included eight tractors and six trailers.
 12. Sometimes tractors and trailers stay at the site for several days but there are never more than 10 tractors at one time. Trucks are not kept inside the garage but are taken into the garage when they are serviced. The drivers' personal trucks often park at the site for several days while they are driving a tractor-trailer. A
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frequency procedure is that a driver comes to the site, leaves his personal vehicle, drives a tractor to the Wagon Wheel where he picks up a loaded trailer, and, after finishing the trip, returns to the site to leave the tractor and pick up his vehicle until the next trip. Or a driver might drive the tractor-trailer to the site, leave the trailer, and drive the tractor to pick up another loaded trailer somewhere else.

13. Sometimes trucks are stored at the site on weekends. Two tractors are broken down and have been on the site for three or four months.
14. Trucks engines are not run inside the garage because of the exhaust; therefore, they are idled outside when they need to be calibrated or checked.
15. Refrigerator units are mounted on trailers and powered by their own diesel. They need to be idled to calibrate them and frequently run for a half hour at a time. The noise level of two refrigeration units idling is approximately 60 decibels; three units idling at high speed would create up to 70 decibels of noise. Unsafe noise levels begin at around 90 decibels.
16. Refrigerator units have run on Saturday afternoons, on Sundays, and after 9 p.m.
17. Trucks frequently leave or arrive at the site between the hours of 9:00 p.m. and 7 a.m. and on Saturday afternoons and Sundays. One reason trucks come to the garage on weekends is for an emergency repair, such as a flat tire that has to be fixed immediately.
18. Between March 25, 1989 and May 1, 1989, 294 trucks were observed arriving at and departing the site. Of those, 63 trucks were observed outside of the authorized hours of operation.
19. Between December 9, 1990 and January 27, 1991, 37 trucks were observed arriving at **or** leaving the site on Saturday afternoons and Sundays.
20. Between August 18, 1990 and **November** 25, 1990, 49 trucks were observed arriving at or leaving the site during unauthorized hours.

21. Between December 30, 1989 and April 15, 1990, 100 trucks were observed arriving at or leaving the site during unauthorized hours.
 22. According to Wildcat's records, an average of 19 trucks are serviced each week. A limit of three truck trips a day entering and leaving the site would result in the closing of the operation because more trucks tend to need servicing close to the weekend so they will be ready to go back out the next week.
 23. At one time for a short period all operations were moved to the Wagon Wheel site. Ronald Bartemy claims it would not be feasible for Wildcat to move its service and maintenance operations to the Wagon Wheel at this time because of his relationship with his brother and because of his investment in the garage on Chubb Street.
 24. In order to maneuver through the turn onto or out of Chubb Street, tractor-trailers have to take up both lanes of Lake Street and Chubb Street and sometimes have to go onto the parking lot of the Town Hall. Trucks sometimes drive onto the lawns of the houses on the corners of Chubb Street and Lake Street, and on several occasions have actually hit the houses.
 25. Wildcat's trailers have become detached from their tractors in the vicinity of Chubb Street and Lake Street at least four times. At least one time the trailer spilled its load when it disconnected. Disconnection occurs because drivers have not adequately checked the connection.
 26. A number of families in the neighborhood have small children. An elementary school is located less than one-quarter mile away from the site; many of the children who walk home from school pass the intersection of Chubb Street and Lake Street. Some parents walk with their children because they are concerned about the unsafe conditions caused by the trucks. Children also ride bicycles in the area but Chubb Street is not safe for children to ride bikes because of the Wildcat trucks. Parents in the neighborhood are afraid for their children's safety.
 27. Motorists driving on Lake Street do not expect large tractor-trailer trucks to emerge from the barely perceptible side street at this location. A sign
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indicating a curve has been placed on Lake Street near Chubb Street, but no signs to warn motorists of trucks have been installed.

28. Webster's New Collegiate Dictionary defines a depot as "a place for storing goods or motor vehicles."
29. Wildcat apparently is more diligent in complying with its permit conditions when there is an Act 250 hearing scheduled, but lapses into violating the conditions after the hearing is over.

V. CONCLUSIONS OF LAW

A. The Appeal

1. Reopening of the Hearing by the District Commission

Condition 5 of Land Use Permit Amendment #6F0283-1, dated March 26, 1984, reserves to the District Commission the right "to schedule site visits and public hearings to evaluate and to impose additional conditions with respect to air and noise pollution, landscaping, general aesthetics and traffic safety and circulation. This right shall commence June 1, 1984 and shall expire June 1, 1989." Wildcat claims that the District Commission had no authority to reopen adjourned hearings to ensure compliance with a permit. Moreover, Wildcat contends, even if the District Commission did have the authority to reopen the hearing, the right to schedule hearings and site visits expired on June 1, 1989, a week prior to the District Commission's site visit.

The Board concludes that the District Commission did have the authority to reopen the hearings in this matter pursuant to Condition 5 of the Amendment. Permittees are bound by conditions in a permit unless they are appealed. Condition 5 of the Amendment was not appealed. Therefore, the right to challenge the condition is forfeited. Moreover, a review of the history of this case indicates that Condition 5 was imposed because of the Commission's concern about the conflicts with neighbors that had occurred and were occurring as a result of Wildcat's trucking operation on Chubb Street. If, in the Commission's opinion, additional conditions might need to be imposed to ensure compliance with the criteria of Act 250, the Commission was properly exercising its authority to reserve the right to reopen the hearings.

The Board also concludes that such authority was exercised in a timely fashion. The District Commission scheduled the hearing and site visit prior to June 1, 1989, the date when its authority to schedule hearings and site visits expired. The Commission acted within the deadline for scheduling additional hearings and site visits.

Notwithstanding the Board's conclusions that the District Commission acted within its authority to reopen the hearings, the District Commission failed to amend the permit to conform with its findings dated October 18, 1989. Accordingly, the Board will amend Land Use Permit #6F0283-1 consistent with the Findings of Fact and Conclusions of Law herein.

2. Criterion 1 (air pollution)

The Board concludes that no undue air pollution will result from this project. Although substantial and credible evidence established that the refrigerator units have run outside of permitted hours and that this has disturbed some of the neighbors, the level of noise is not of the degree that constitutes air pollution. The maximum decibel levels have apparently been considerably lower than the 90 decibel level that would raise safety concerns. Moreover, if Wildcat operates within its permit conditions, the only idling of trucks will take place during the day when there is some level of noise in the neighborhood anyway.

3. Criterion 5 (traffic)

Criterion 5 requires the Board to find that a project will not cause undue congestion or unsafe conditions with respect to traffic. 10 V.S.A. § 6086(a)(5). The Board cannot deny a permit for lack of compliance with this criterion, but may impose reasonable conditions to alleviate the burdens created. 10 V.S.A. § 6087(b).

The Board concludes that the project creates unsafe traffic conditions. Tractor-trailers driving on Chubb Street, a narrow side street, have created a number of problems -- trucks driving over the yards of the houses on the corner, trucks hitting the houses, tractors disconnecting from trailers. The dangers posed by these trucks is especially serious because this is a residential neighborhood that contains a church and an elementary school in addition to residences. Moreover, the closeness of the houses on Chubb Street to the street increases the likelihood of an accident causing injury or property damage.

Even if a project creates unsafe traffic conditions, the Board may not deny a permit. 10 V.S.A. § 6087(b). However, in such a situation the Board has the authority and the obligation to impose conditions to alleviate burdens created by unsafe traffic conditions. Id. The Board will therefore impose conditions a) limiting the number of total trucks to 25 per week; b) strictly prohibiting any trucks from arriving at or leaving the site between noon on Saturdays and 7:00 a.m. on Mondays; c) requiring truck drivers to certify that they have inspected the connection between their tractors and trailers before leaving the garage; and d) requiring Wildcat to install a fence on the neighbors' yards that front on Chubb Street that is acceptable to the neighbors. The Board will also impose a condition requiring that no more than ten trailers, in addition to tractors, may be on the site at one time; trailers include refrigeration units. Since this permit authorizes a garage for repairing and maintaining trucks, the Board will strictly prohibit the storing of any vehicles at this site for more than seven days for any reason.

B. The Revocation

Board Rule 38(A) provides:

Revocation for violations. A petition for revocation of a permit under 10 V.S.A. § 6090(c) may be made to the board by any person who was party to the application, by any adjoining property owner whose property interests are directly affected by an alleged violation, by a municipal or regional planning commission, or any municipal or state agency having an interest which is affected by the development or subdivision. The petition shall consist of an original and 10 copies of the petition which shall include a statement of reasons why the petitioner believes that grounds for revocation exist. The board may also consider permit revocation on its own motion.

The Board concludes that the following violations of the Permit or the Amendment have occurred:

(a) Wildcat sometimes stores tractors or trailers at the garage in violation of the permit that authorizes the operation of a maintenance garage.

(b) Wildcat has frequently operated the business after the hours permitted in Condition 14 of the Permit by allowing trucks to drive in and out of the site at night and on weekends.

(c) Wildcat has allowed diesel trucks and refrigeration units to idle during the night, in violation of Condition 13 of the permit.

(d) Wildcat has allowed trucks to operate unsafely in violation of the Permit and Amendment which authorize operation of this business only if it does not create unsafe traffic conditions.

Rule 38 provides that the Board may provide an opportunity to correct violations before a permit revocation becomes final. Accordingly, the Board will revoke this permit but will allow Wildcat an opportunity to correct the violations by adhering to the conditions in the permit amendment issued with this decision. Notice is provided hereby that further violation will subject the permittee to revocation of the permit without further opportunity to correct and comply.

IV. ORDER

1. This project, if operated in strict conformance with the conditions of Land Use Permit #6F0283 and its amendments, will not result in undue air pollution.

2. This project, if operated in strict conformance with the conditions of Land Use Permit #6F0283 and its amendments, will not result in unsafe traffic conditions.

3. Land Use Permit Amendment #6F0283-1-EB is hereby issued.

4. Land Use Permits #6F0283 and 6F0283-1 are revoked. Revocation will not become final, however, if the violations referred to on pages 11 and 12, above, are corrected. **Any** further violation of any of the conditions of Land Use Permit #6F0283 or its amendments will result in revocation.

5. Wildcat shall submit monthly affidavits to the District #6 Environmental Commission that it is operating in strict conformance with the conditions of Land Use Permit #6F0283 and its amendments. After one year, if there has been full compliance with the permits, Wildcat shall submit such affidavits of compliance on a quarterly basis.

Dated at Montpelier, Vermont this 4th day of October, 1991.

ENVIRONMENTAL BOARD



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