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

RE: George and Marjorie Drown
Land Use Permit #7C0950-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to an appeal of Land Use Permit #7C0950 and supporting Findings of Fact, Conclusions of Law, and Order (the Permit) issued to George W. and Marjorie H. Drown (the Permittees) by the District #7 Environmental Commission (the District Commission). The Permit authorizes the Permittees to excavate crushed gravel, sand, and fill with on-site processing of gravel and screening of sand on a 6.1 acre tract; and to use a portion of an adjacent tract of land owned by the Canadian Pacific Railway Company (CP) which is leased to the Town of Lyndon and subleased to the Permittees (the Project). The Project is located in the Town of Lyndon, Vermont. As is explained below, the Environmental Board concludes that the Project, as conditioned by this decision, complies with the criteria on appeal. Accordingly, the Board issues an amended permit (the Amended Permit).

I. SUMMARY OF PROCEEDINGS

On October 28, 1993, the Environmental Board issued Re: Drown Gravel Pit, Declaratory Ruling Request #277, Memorandum of Decision (Oct. 28. 1993). The Board ordered, in part, that if the District Commission issued an Act 250 permit to the Permittees for the operation of the Project, then the Permittees would not contest whether there is Act 250 jurisdiction over the Project.

On May 6, 1994, the District Commission issued the Permit.

On June 3, 1994, Douglas and Karen Noyes, and Kevin and Ann MacKay (the Appellants) appealed from the Permit.

On July 11, 1994, then Board Chair Art Gibb convened a prehearing conference.

On July 25, 1994, Chair Gibb issued a Prehearing Conference Report and Order (the Prehearing Order).

On September 21, 1994, the parties filed prefiled direct testimony. The Permittees also filed a memorandum of law relative to the issue of co-applicancy as identified in the Prehearing Order.

On October 12, 1994, the Permittees filed prefiled rebuttal testimony, and a motion to dismiss or, in the

alternative, a motion to limit the scope of the Appellants' rebuttal testimony.

On October 14, 1994, the Appellants filed prefiled rebuttal testimony.

On October 19, 1994, the Appellants filed a response to the Permittees' motion to dismiss or, in the alternative, motion to limit the scope of rebuttal testimony.

On October 26, 1994, the parties filed evidentiary objections to the prefiled testimony. The Appellants also filed a memorandum of law relative to the issue of co-applicancy as identified in the Prehearing Order.

On November 8, 1994, Chair Gibb convened a second prehearing conference.

On November 9, 1994, the Board convened a hearing in this matter with the following parties participating:

George and Marjorie Drown by John Marshall, Esq.
Douglas and Karen Noyes, and Kevin and Ann MacKay by Steven P. Robinson, Esq.

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

On December 28, 1994, the Permittees and the Appellants, respectively, filed proposed findings of fact and conclusions of law.

The Board deliberated concerning this matter on June 1, 1995, and, on that day, declared the record complete and adjourned. 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. See Petition of Village of Hardwick Electric Department, 143 Vt. 437, 445 (1983).

II. ISSUES

The issues in this appeal are:

1. Whether, pursuant to EBR 10(A), Canadian Pacific Railway Company (CP), the Town of Lyndon, or Mr. Donald Beattie, should be made co-applicants with the Permittees.

2. Whether, pursuant to 10 V.S.A. § 6086(a)(l), the Project will result in undue air pollution.

3. Whether, pursuant to 10 V.S.A. § 6086(a)(4), the Project will cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result.

4. Whether, pursuant to 10 V.S.A. § 6086(a)(5), the Project will cause unreasonable congestion or unsafe conditions with respect to the use of the Red Village Road.

5. Whether, pursuant to 10 V.S.A. § 6086(a)(8), the Project will have an undue adverse effect on aesthetics.

6. Whether, pursuant to 10 V.S.A. § 6086(a)(9)(E), the Project will have an unduly harmful impact upon the environment or surrounding land uses and development.

III. FINDINGS OF FACT

1. The Project is located in the Town of Lyndon, off Red Village Road between U.S. Route 5 and Red Village 'and about 0.35 miles from Route 5.

2. The Project is located on 6.1 acres; in addition, the Project makes limited use of a portion of an adjacent tract of land owned by CP which is leased to the Town of Lyndon and subleased to the Permittees.

3. The Permittees' address in the sublease with the Town of Lyndon is listed as "7845 Moriah Avenue, Brooksville, FL 34613."

4. The application for the Permit lists the Permittees' address as "7485 Moriah Avenue, Brooksville, FL 34613." The Permit lists the Permittees' address as "7485 Moriah Avenue, Westfield, VT, 05874." The Permittees are residents of Florida and spend a good portion of the year in Florida.

5. The Project contains 180,000 cubic yards of marketable material, of which 75,000 cubic yards will be removed in the first phase, 45,000 cubic yards in the second, and 60,000 cubic yards in the third; the Permit limits the amount that can be excavated in any one year to 15,000 cubic yards. No more than two acres of the Project will be open at any one time.

6. The Permittees do not operate the Project. Currently, Mr. Beattie operates the Project pursuant to an oral agreement. Mr. Beattie has been the operator since 1985 and he will be the person who conducts the excavation and processing operations at the Project. There may be any number of people who will operate the Project.

7. Along its west side, the Project adjoins Red Village Road (Town Highway No. 2); to the north is the former Stoddard gravel pit; to the east, the land slopes up a hill from the pit to Lily Pond Road (Town Highway No. 36); and to the south is the Pine Knoll Nursing Home.

8. On the northeast corner on its eastern side, the Project borders several residential lots located in the Pine Ridge Estates Subdivision, including a lot owned by two of the Appellants, the Noyes, and the point at which two non-contiguous boundaries of the other Appellants, the MacKays, touch the Project's boundary.

9. The principal access is from Red Village Road, at the north end of the Project and approximately 100 feet south of its boundary with the Stoddard pit; there is also an access from Lily Pond Road, which the Permittees use to access fill and remove overburden from above and which has been relocated from a point immediately adjacent to the Noyes' property to a point 50 feet south of the Noyes' line.

10. The Permit expires on May 30, 2014.

11. Condition #6 of the Permit provides:

> By acceptance of the terms and conditions of this permit permittee agrees all use of CP land; other than use of the right-of-way, will cease after April 26, 1995, following necessary reclamation of CP lands, unless the District Commission grants an extension allowing continued use.

There is no evidence of an extension having been granted by the District Commission.

12. Condition #7 provides:

> No excavation of sand and gravel or construction activity will occur at any time on CP lands.

13. During the Summer and early Fall of 1994, and in accordance with the Permit, the Permittees reclaimed the north end of the Project, planting three lines of trees along the Noyes' property (except for telephone-line right-of-way), and establishing two-to-one slopes from near the east and northeast boundaries down to the pit floor, with a 15-foot wide bench located approximately two-thirds of the way up the slope.

14. The Project's three phases will take place in the middle of the 6.1 acre tract.

15. Further development of the Project will occur in three phases. The Permittees' engineering consultant is Mr. Tim Ruggles. Mr. Ruggles prepared Exhibit P2, the Project's site plan. There is no evidence as to whether Mr. Beattie or any other future operators will consult with Mr. Ruggles to ensure that Exhibit P2 is complied with.

16. The Project's first phase requires the removal of overburden estimated to total 15,000 cubic yards, which will be moved toward Lily Pond Road and stored in piles that will be seeded and mulched.

17. Excavation of the first phase will proceed generally in a north-to-south direction.

18. Second-phase excavation will proceed from south to north, excavating gravel and other material between the area excavated in the first phase and the area that has been reclaimed.

19. One goal of the first phase is to open a sufficiently large pit floor to allow all operations, except access and egress, to occur on land owned by the Permittees.

20. Were the Project to be developed from the reclaimed area in the north to the south in the first phase, the open pit face would be visible from the Appellants' properties and there would not be a physical barrier to mitigate the level of noise heard or the amount of dust that blows; by starting the first phase further to the south, the second phase can proceed from south to north so that the open pit face faces away from Appellants' property.

21. In the third phase, the Permittees will remove overburden from the top portion of the pit and push it to the pit

floor for stockpiling in the southwesterly corner of the Project, and excavation will proceed from north to south.

22. Because the Permit requires immediate reclamation of the Project's north end, it is not possible in the first phase to have product stockpiled or processing equipment located on the Permittees' land as there is insufficient room to do so.

23. Instead, the Permittees will locate stockpiles and equipment on land that they sub-let from the Town of Lyndon, stockpiles and equipment that will be moved onto the Permittees' land in the second and third phases.

24. The Project involves three products: processed gravel, sand, and fill. The Project's operation causes the emission of fugitive particulate matter, that is, dust.

25. Processed gravel requires a portable crusher/screen, and sand requires screening equipment.

26. The Project's operation will include the use of a bucket loader to remove material for crushing, screening or storage; crushing and screening equipment; and trucks to remove material from the Project.

27. Most of the Permittees' customers are area towns or the State of Vermont, although some private contractors use the Project. The Town of Lyndon has been a customer of the Project.

28. The Permit allows the Project to operate Monday through Friday, 7:00 a.m. to 5:00 p.m., and on weekends only when towns or the State of Vermont need to remove material for emergencies such as Spring wash-outs.

29. To reduce blowing dust, all areas not being actively worked will be reclaimed on a permanent or interim basis, with permanent reclamation involving grading to a two-to-one slope, seeding and mulching, and interim reclamation involving grading, seeding and mulching.

30. The sources of dust from the Project are silt from overburden removal and stockpiling; silt lenses on the pit floor; and dust from the pit face.

31. Typically, the Project will involve the removal of a 50-by-100 foot area of overburden once a year.

32. When the overburden is dug out, it's moist and is not a source of dust. Only after the overburden has dried out does it become a source of dust. While the overburden is seeded and mulched, it takes up to one month during the Summer before the seeding results in grass. During the month while the seed is taking hold, the wind can kick up the overburden into dust.

33. When the pit floor and haul roads are actively worked, calcium chloride should be applied, at a minimum, once every two weeks to stabilize the earthen surface and help minimize wind induced erosion.

34. The protection provided by calcium chloride breaks down only when the pit surface is crossed by vehicles, so such measures are not necessary during periods when the pit is not being actively worked.

35. To minimize dust from the overburden piles before the seed has taken hold, the overburden surface material in the stockpiles should be mixed with short paper fiber before it is seeded and mulched.

36. The Appellants have experienced blowing dust originating from the overburden and the open slope face being excavated. At times, it has interfered with the use and enjoyment of their properties.

37. The Permit prohibits operation of a crusher having a capacity greater than 150 tons per hour, which would be an "air-contaminant source" requiring a permit under Vermont's Air Pollution Control Regulations.

38. The Permit also requires that the noise level at the Project's property lines not exceed 70 decibels at any time, and that any crusher used on the Project must meet the United States Environmental Protection Agency's guidelines for noise control.

39. A 70-decibel limitation is a stringent noise level; many other gravel-pit sites in Vermont have a standard of 85 decibels.

40. The Permit requires that the Permittees seed and mulch reclaimed areas as described in the Permits findings of fact and as recommended in the U.S.D.A. circular entitled "Vegetating Vermont Sand & Gravel Pits," until grass cover is established.

41. Between one and one and one-half acres of the Project contain original topsoil, and the Permittees intend to mix the topsoil with overburden, fertilizer and other material to reclaim excavated areas.

42. The difference between topsoil and regular soil is that topsoil contains organic and biodegradable matter that provides nutrients to grass and other growing matter; if the regular soil is fertilized, then the necessary nutrients will be provided.

43. A representative of the Soil Conservation Service recommends that the Permittees test the soil and, using this information, select an appropriate seeding mixture and fertilizer.

44. The representative recommends use of No. 2 Seeding Mixture, which the Permittees used in reclaiming the north end's pit floor and in the area where the Permit required them to plant trees.

45. On the rest of the north end slope, however, the Permittees hired a contractor who mixed material on the open face with short paper fiber and then used a different mix of seed.

46. The grass has grown to less of a height in this area, which was seeded later than the pit floor and the area in which trees were planted, but the seed is taking well in all locations in the reclaimed area.

47. Most of the trucks used to remove material are ten-wheelers or eight-yard trucks.

48. Because the Permit limits removal each year to 15,000 cubic yards, the number of trips into and from the Project could total no more than 2,000 per year. The Permit limits the trips in and out of the Project each day to 50.

49. At the Project's entrance, the site distances in each direction are a minimum of 600 feet and are adequate for either a 35 or 50 mph zone, and the access point is level, with a very slight grade up to Red Village Road.

50. A turning lane has been built on U.S. Route 5, for traffic turning onto Red Village Road.

51. The Permit requires that a sign be located to warn traffic proceeding north on Red Village Road at a distance of 300 feet south of the entrance; the sign has been installed.

52. The Permit requires the Permittees to use flag persons under conditions when six or more trucks could leave the Project in close succession.

53. The Project is located just south of the Stoddard gravel pit and 2200 feet northeast of the Calkins gravel pit.

54. A line of trees along Red Village Road provides partial screening, and the Permit requires the Permittees to plant (in three staggered rows) pine trees of at least four feet in height along the Noyes' boundary, which has been done.

55. A small knoll in the northeast corner of the Project where the trees are located provides further screening between adjacent residences and the active worked area.

56. Most of the excavation, processing and truck traffic occurs during Spring after mud season, and there are many days in the year when the Project does not operate at all.

57. Because of the ongoing interim and final reclamation measures, including, but not limited to, the use of short paper fiber, seeding and mulching, and the planting of trees, the Project is in context with its surrounding areas, which include two other gravel pits, a town highway, a railroad, and a commercial strip on U.S. Route 5.

58. The Project includes a number of measures that protect the environment and surrounding land use and development, including buffer zones; three staggered rows of trees along the Noyes' boundary; restrictions on operating hours to prohibit operation during the weekend (except in limited emergencies) and evenings, nights and early mornings; restrictions on noise levels that can occur at the Project's boundary; requirements for reclamation, seeding and mulching of areas in which excavation has been completed and on which excavation has not yet occurred; application of calcium chloride on pit floors and haul roads; and restrictions on the amount of the pit that can be open at any one time and on the annual level of excavation.

59. The Permit requires the Pennittees to post a bond in the amount of $10,000, which is adequate to fund the necessary grading, seeding, mulching and other activities required to reclaim the maximum amount of the Project that can be open at any one time under the Permit.

60. The pit floor below the slope areas will be suitable for residential or roadside commercial uses after the Project is completed.

IV. CONCLUSIONS OF LAW

A. Motion to Dismiss

The Permittees filed a motion to dismiss asserting that due to the limited nature of the Appellants' prefiled testimony, they have been deprived of any real opportunity to prepare and respond to the Appellants' appeal.

Appeals before the Board are contested cases under Vermont's Administrative Procedure Act (the APA) and are heard de novo. 10 V.S.A. § 6089(a) and 3 V.S.A. Chapter 25.

Under § 809 of the APA, all parties shall be given an opportunity for hearing after reasonable notice. However, the adequacy of an original notice is not the limit of what parties before the Board are entitled to. Basic principles of fairness require that the parties be given an adequate opportunity to prepare and respond to the issues raised in the proceeding. In re Vermont Health Service Corn., 155 Vt. 457, 461 (1990).

The issues, and the deadlines for submitting testimony to address the issues, were established in the Prehearing Order. The Appellants complied with the Prehearing Order, and also were prepared to subpoena Mr. and Mrs. Drown to testify. Finally, the Board held a hearing in this matter. The Board concludes that the Permittees were not deprived of their rights under the APA.

The Permittees cite to a dismissal order issued in Re: Bernard and Suzanne Carrier, #7R0639-EB, Order Dismissing Appeal (June 22, 1987). In Carrier the appellants systematically failed to submit any prefiled testimony or legal memoranda. This case is substantially dissimilar from Carrier because the Appellants have participated and generally complied with the Prehearing Order. Further, the Board's dismissal order in Carrier in 1987 precipitated a lawsuit against the Board the settlement of which resulted in the

Board holding a hearing in the matter. See Re: Bernard and Suzanne Carrier, #7R0639-EB, Findings of Fact, Conclusions of Law, and Order at 1 (Oct. 5, 1990).

Based on the preceding, the Board denies the Permittees' motion to dismiss. With regard to the Permittees' motion to limit the scope of rebuttal, the motion is moot based upon the Chair's rulings relative to the Permittees' evidentiary objections. The Chair's evidentiary rulings as placed on the record at the hearing are incorporated herein.

B. Co-Applicancy

The first issue is whether, pursuant to EBR 10(A), CP, the Town of Lyndon, or Mr. Beattie, should be made co-applicants with the Permittees.

EBR 10(A) provides:

> An application shall be signed by the applicant and any co-applicant, or an officer or duly-appointed agent thereof. The record owner(s) of the tract(s) of involved land shall be the applicant(s) or co-applicant(s) unless good cause is shown to support waiver of this requirement. The application shall list the name or names of all persons who have a substantial property interest, such as through title, lease, purchase or lease option, right-of-way or easement, in the tract or tracts of involved land by reason of ownership or control and shall describe the extent of their interests. The district commission or board may, upon its own motion or upon the motion of a party, find that the property interest of any such person is of such significance that the application cannot be accepted or the review cannot be completed without their participation as co-applicants.

The Project, in part, is to be conducted on land owned by CP and leased to the Town of Lyndon. In turn, the Town of Lyndon has subleased the land to the Permittees. Under EBR 10(A), both CP and the Town of Lyndon are required to be co-applicants unless good cause is shown to support waiver of this requirement.

One of the purposes of EBR 10(A) "is to ensure the enforceability of permit provisions by requiring the record owners of involved land to sign the application." Re: Tanser, #3W0125-3-EB, Memorandum of Decision at 2 (Aug. 29, 1989). "The enforceability of a permit must not depend upon the ability of the permit holder to secure the consent of another landowner." Re: Flanders Building Supply, Inc., #4C0634-EB, Findings of Fact, Conclusion of Law and Order at 5 (Oct. 18, 1985). Co-permittees, however, do not always share equal responsibility for permit violations. Rather, the determination of individual liability is the responsibility of the Environmental Law Division, and that court must analyze the circumstances of each party individually when assessing penalties. Secretary, Vermont Agency of Natural Resources v. Handy Family Enterprises and Taft Corners Associates, Inc., ___ Vt. ___, #93-367, slip op. at 11-12 (Vt., Apr. 14, 1995).

1. CP

For the duration of the Project, the Permittees may use CP's property for access and egress. All other uses must cease after April 26, 1995, subject to a permit amendment being obtained. There is no evidence of such an amendment. Regardless, no excavation or construction activity will occur on CP's property. Given the limited use of CP's property, the enforceability of the Permit will not be enhanced if CP were made a co-applicant. While it may be operationally convenient to use CP's property, the Permittees may access their Project from Lilly Pond Road for purposes of completing reclamation measures, if necessary. Thus, even if CP were to terminate its lease with the Town of Lyndon, the Permit's enforceability does not depend upon the Permittees obtaining CP's consent.

Based on the preceding, the Board concludes that there is good cause to waive the requirement that CP be made a co-applicant.

2. Town of Lyndon

The Town of Lyndon's involvement in the Project is no different than that of CP. Making the Town of Lyndon a co-applicant would not serve the purposes of permit enforceability under EBR 10(A). As is the case with CP, the Board concludes that there is good cause to waive the requirement that the Town of Lyndon be made a co-applicant.

3. Mr. Beattie

The Permittees do not operate the Project. Rather, Mr. Beattie is the Project's current operator pursuant to an oral agreement with the Permittees. The Permittees contend that the "verbal license" between the Permittees and Mr. Beattie is not the type of interest that warrants making Mr. Beattie a co-applicant, even assuming the license constitutes a property "interest" within the meaning of EBR 10(A).

The Board concludes that Mr. Beattie has a significant property interest in the Project regardless of whether he lacks an interest in the 6.1 acres owned by the Permittees. See Toussaint v. Stone, 116 Vt. 425, 428 (1951).

Mr. Beattie's interest is that of Project operator since 1985. The day-to-day and long-term avoidance of unduly harmful impacts will depend upon Mr. Beattie's conduct as the Project's operator. Mr. Beattie will be the one who excavates the Project and processes the material into marketable products. Ultimately, making Mr. Beattie a co-applicant makes him legally responsible for the Project's operation. Given that the Permittees are residents of Florida, it is imperative that Mr. Beattie--and all other future operators--be made a co-applicant with the Permittees. The Board concludes that good cause does not exist to waive the requirement that Mr. Beattie be made a co-applicant. Therefore, the Board will add a condition to the Amended Permit that all Project operators be made co-applicants under EBR 10(A) pursuant to EBR 34(D), administrative amendments to permits.[1]

C. Criteria on Appeal

1. Burden of Proof

Under 10 V.S.A. § 6088(a), the Permittees have the burden of proof on Criteria (1), (4), and (9)(E).

Under 10 V.S.A. § 6088(b), opponents have the burden of proof under Criteria (5) and (8). However, the Permittees must provide sufficient information for the Board to make affirmative findings. In re Denio, 158 Vt. 230, 236 (1992);

[1]As explained in its discussion of Criterion 9(E), the Board also concludes that a second, independent basis exists for requiring Mr. Beattie and all other future Project operators to be made co-applicants.

Re: Pratt's Propane, #3R0486-EB, Findings of Fact, Conclusions of Law, and Order at 4-5 (Jan. 27, 1987).

2. Criterion 1 - Air Pollution

Pursuant to 10 V.S.A. § 6086(a)(l), before granting a permit, the Board shall find that the development will not result in undue air pollution. The key issues are noise and dust.

Noise is considered air pollution under Criterion 1 when it poses a threat of physical harm (primarily hearing loss); noise is also considered under Criterion 8 for its effect on the aesthetic sensibilities. See Re: John and Joyce Belter, #4C0643-6R-EB, Findings of Fact, Conclusions of Law, and Order at 13 (May 28, 1991); Re: Sherman Hollow, Inc., #4C0422-5-EB, Findings of Fact Conclusions of Law and Order (Revised) at 30 (Feb. 17, 1989); Re: Juster Development Co., #1R0048-8-EB, Findings of Fact, Conclusions of Law and Order at 24 (Dec. 19, 1988).

The Permit requires that the noise level at the Project's property line not exceed 70 decibels at any time, and that any crusher used must meet the United States Environmental Protection Agency's guidelines for noise control. The Board concludes that the Project will not cause undue air pollution relative to noise.

Dust is also an issue under Criterion 1. Re: Elwood and Louise Duckless, #7R0882-EB, Findings of Fact, Conclusions of Law, and Order at 7 (June 11, 1993). The Project's operation causes the emission of dust. To reduce blowing dust, the Permittees' strategy is to reclaim all areas not being actively worked on a permanent or interim basis, with permanent reclamation involving grading to a two-to-one slope, seeding and mulching, and interim reclamation involving grading, seeding and mulching.

The sources of dust from the Project are silt from overburden removal and stockpiling; silt lenses on the pit floor; and dust from the pit face.

Typically, the Project will involve the removal of a 50-by-100 foot area of overburden once a year. When the overburden is dug out, it's moist and is not a source of dust. Only after the overburden has dried out does it become a source of dust. While the overburden is seeded and mulched, it takes up to one month during the Summer before the seeding

results in grass. During the month while the seed is taking hold, the wind can kick up the overburden into dust.

When the pit floor and haul roads are actively worked, the Permittee,s' engineer recommends that calcium chloride be applied at least once every two weeks (and more often if necessary) to prevent airborne silt. The Board will require this as a condition in the Amended Permit.

The protection provided by calcium chloride breaks down only when the pit surface is crossed by vehicles, so such measures are not necessary during periods when the pit is not being active1y worked.

To minimize silt blowing from overburden piles before vegetation has taken, the Permittees' engineer recommends that overburden surface material in the stockpiles be mixed with short paper fiber before it is seeded and mulched. The Board will require this as a condition in the Amended Permit.

The Perm t prohibits operation of a crusher having a capacity grea er than 150 tons per hour, which would be an "air-contamin nt source" requiring a permit under Vermont's Air Pollution a Control Regulations.

Based on the preceding findings of fact, and the two conditions which shall be made a part of the Amended Permit under Criterion 1, the Board concludes that the Project will not result in undue air pollution relative to dust. Without these two conditions being made part of the Amended Permit, the Board would deny the Project under Criterion 1 relative to air pollution caused by dust.

3. Criterion 4 - Soil Erosion

Pursuant to Criterion 4, Soil Erosion, before granting a permit, the Board must find that the development will not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result.

The Permit requires that the Permittees seed and mulch reclaimed areas as described in its findings of fact and as recommended in the U.S.D.A. circular entitled "Vegetating Vermont Sand & Gravel Pits," until grass cover is established.

Between one and one and one-half acres of the Project contain original topsoil, and the Permittees intend to mix the

topsoil with overburden, fertilizer and other material to reclaim excavated areas.

The difference between topsoil and regular soil is that topsoil contains organic and biodegradable matter that provides nutrients to grass and other growing matter; if the regular soil is fertilized, then the necessary nutrients will be provided.

A representative of the Soil Conservation Service recommended that the Permittees test the soils and, using this information, select an appropriate seeding mixture and fertilizer.

The representative recommended use of No. 2 Seeding Mixture, which the Permittees used in reclaiming the north end's pit floor and in the area where the Permit required them to plant trees.

Based on the preceding, the Board concludes that the Project will not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result.

4. Criterion 5 - Traffic

Criterion 5 of 10 V.S.A. § 6086(a) requires the Board to find that the Project will not cause unreasonable congestion or unsafe conditions with respect to the use of highways. The burden of proof is on any party opposing the Project.

The Permit limits removal each year to 15,000 cubic yards. The number of trips into and from the Project can total no more than 2,000 per year. The Permit limits the trips in and out of the Project each day to 50.

At the Project's entrance, the site distances in each direction are a minimum of 600 feet and are adequate for either a 35 or 50 mph zone, and the access point is level, **with a very slight grade up to Red Village Road.**

A turning lane has been built on U.S. Route 5, for traffic turning onto Red Village Road. The Permit requires that a sign be located to warn traffic proceeding north on Red Village Road at a distance of 300 feet south of the entrance; the sign has been installed. Finally, the Permit requires the Permittees to use flag persons under conditions when six or more trucks could leave the Project in close succession.

Based on the preceding, the Board concludes that the Project will not cause unreasonable congestion or unsafe conditions with respect to the use of highways.

5. Criterion 8 - Aesthetics

10 V.S.A. § 6086(a)(8) requires that, prior to issuing a permit for the proposed project, the Board must find that the project "[w]ill not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas."

The Board uses a two-part test to determine whether a project will result in an undue adverse effect on aesthetics. First, it determines whether the project will have an adverse effect. Second, it determines whether the adverse effect, if any, is undue. Re: Quechee Lakes Corp., Applications #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law and Order at 18-19 (January 13, 1986).

i. adverse

With respect to the analysis of adverse effects on aesthetics and scenic beauty, the Board looks to whether a proposed project will be in harmony with its surroundings or, in other words, whether it will "fit" the context within which it will be located. In making this evaluation, the Board examines a number of specific factors, including the nature of the project's surroundings, the compatibility of the project's design with those surroundings, the suitability for the project's context of the colors and materials selected for the project, the locations from which the project can be viewed, and the potential impact of the project on open space. Id. at 18.

The Project is located just south of the Stoddard gravel pit and 2200 feet northeast of the Calkins gravel pit. A line of trees along Red Village Road provides partial screening, and the Permit requires the Permittees to plant (in three staggered rows) pine trees of at least four feet in height along the Noyes' boundary, which has been done. A small knoll in the northeast corner of the Project where the trees are located provides further screening between adjacent residences and the active worked area. Most of the excavation, processing and truck traffic occurs during Spring after mud season, and there are many days in the year when the Project does not operate at all.

Because of the ongoing interim and final reclamation measures, including, but not limited to, the use of short paper fiber, seeding and mulching, and the planting of trees, the Project is in context with its surrounding areas, which include two other gravel pits, a town highway, a railroad, and a commercial strip on U.S. Route 5.

Based on the preceding, the Board concludes that the Project will not have an adverse effect on the aesthetics of the area, including the area along Lilly Pond Road where the Appellants live. Because the Board concludes that there is no adverse effect on aesthetics, we do not consider the second part of the Quechee analysis.

6. Criterion 9(E) - Extraction of Earth Resources

Criterion 9(E) requires the Board to find that the extraction of earth resources "will not have an unduly harmful impact upon the environment or surrounding land uses and development," and that "upon completion of the extracting . . . operation the site will be left by the applicant in a condition suited for an approved alternative use or development."

The Permittees' engineering consultant is Mr. Tim Ruggles. Mr. Ruggles prepared Exhibit P2, the Project's site plan. There is no evidence as to whether Mr. Beattie or any Other future operators will consult with Mr. Ruggles to ensure that Exhibit P2 is complied with.

The Project contains 180,000 cubic yards of marketable material, of which 75,000 cubic yards will be removed in the first phase, 45,000 cubic yards in the second, and 60,000 cubic yards in the third. The Permit limits the amount that can be excavated in any one year to 15,000 cubic yards. If operated at its maximum capacity, the Project could be completed in twelve years; the Permit authorizes the Project for up to twenty years.

The Project's first phase requires the removal of overburden estimated to total 15,000 cubic yards, which will be moved toward Lily Pond Road and stored in piles that will be seeded and mulched. Excavation of the first phase will proceed generally in a north-to-south direction.

Second-phase excavation will proceed from south to north, excavating gravel and other material between the area excavated in the first phase and the area that has been reclaimed.

In the third phase, the Permittees will remove overburden from the top portion of the pit and push it to the pit floor for stockpiling in the southwesterly corner of the Project, and excavation will proceed from north to south.

The Project will include a number of measures that protect the environment and surrounding use land and development, including buffer zones; three staggered rows of trees along the Noyes' boundary; restrictions on operating hours to prohibit operation during the weekend (except in limited emergencies) and evenings, nights and early mornings; restrictions on noise levels that can occur at the Project's boundary; requirements for reclamation, seeding and mulching of areas in which excavation has been completed and on which excavation has not yet occurred; application of calcium chloride on pit floors and haul roads; and restrictions on the amount of the; pit that can be open at any one time and on the annual level of excavation.

The Permit requires the Permittees to post a bond in the amount of $10,000, which is adequate to fund the necessary grading, seeding, mulching and other activities required to reclaim the maximum amount of the Project that can be open at any one time under the Permit.

The pit floor below the slope areas will be suitable for residential or roadside commercial uses after the pit's development is completed.

Despite the Permittees' best efforts at controlling dust, the Appellants have experienced blowing dust originating from the overburden and the open pit face. At times, it has interfered with the use and enjoyment of their properties.

Based on the preceding, the Board concludes that the Project will have an unduly harmful impact upon the surrounding land uses and development. However, the Board concludes that this impact can be alleviated by conditions.

First, under Criterion 1, the Board has already determined that new conditions relative to the application of calcium chloride and the use of short paper fiber will be required to help prevent dust. The Board concludes that, based on the preceding evidence, these conditions are also necessary under Criterion 9(E).

Second, the Board will require as a condition under Criterion 9(E), in addition to its analysis under co-applicancy, that Mr. Beattie, and all future operators, be

made co-permittees. Fundamental to the Board's conclusion is that the day-to-day and long-term avoidance of unduly harmful impacts will depend upon the conduct of the third party or parties that operate the Project for the Permittees.

The Board has found, through the testimony of Mr. Ruggles, that the Project will be conducted in three phases based on a detailed set of plans designed by Mr. Ruggles, and that this three-phased approach will include mitigation and reclamation measures during the course of the Project's operation. Mr. Ruggles' credibility is the underpinning to these findings.

Despite the Permittees' extensive reliance upon Mr. Ruggles, there is no evidence that Mr. Ruggles has consulted with Mr. Beattie relative to mitigation measures, that he will be retained by the Permittees to monitor the Project as it progresses, or that he will consult with the Project's subsequent operators should the Permittees terminate Mr. Beattie's license. The indefinite nature of Mr. Ruggles connection to the Project, despite his extensive involvement with its design, when coupled with the Permittees' residency in Florida, would cause the Board to deny the Project under Criterion 9(E).

By requiring Mr. Beattie and all future Project operators to be co-permittees, however, the Board can conclude that such operators will become familiar with and adhere to the comprehensive site plans prepared by Mr. Ruggles. When the operator is a co-permittee the very person who operates the Project becomes responsible for it, and in this regard, such person will have sufficient incentive to become familiar with and abide by the plans prepared by Mr. Ruggles. Ultimately, compliance with the plans is the cornerstone of preventing unduly harmful impacts.

Based on the preceding findings of fact, and the conditions which shall be made part of the Amended Permit under Criterion 9(E), the Board concludes that the Project will not have an unduly harmful impact upon the environment or surrounding land uses and development, and that the Project will be left in a condition suited for an approved alternative use or development. The affirmative finding under Criterion 9(E) is based upon the conditions required under Criterion 9(E) being made part of the Amended Permit. Without these conditions, the Board would deny the Project under Criterion 9 relative to unduly harmful impacts.

V. O R D E R

Land Use 'Permit #7C0950-EB is hereby issued. Jurisdiction is returned to the District #7 Environmental Commission.

Dated at Montpelier, Vermont, this 19th day of June, 1995.

ENVIRONMENTAL BOARD

Art Gibb, Acting Chair*
Samuel Lloyd
William Martinez
John Farmer
Marcy Harding

*On February 1, 1995, John T. Ewing became Chair of the Board. Art Gibb has continued as Acting Chair on this case at Mr. Ewing's request.

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