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

Re: Talon Hill Gun Club, Inc. and John Swinington  
Land Use Permit #9A0192-EB (Revocation)

MEMORANDUM OF DECISION

This decision pertains to a motion to dismiss filed by the Permittees on December 9, 1992, and certain requests for party status. On February 8, 1993, the Environmental Board issued a Memorandum of Decision concerning the motion to dismiss and party status of the Petitioners and individuals who live near the gun club. In its February 8 decision, the Board decided to schedule **oral** argument on the motion, based upon the language of Board Rule 18(D).

On February 18, a response to the Memorandum of Decision was filed with the Board by Jon Readnour, attorney for the Petitioners, James and Kim Miner, and the neighbors who sought and obtained party status in this proceeding.<sup>1</sup> Mr. Readnour believes it would be pointless to hold oral argument on the motion to dismiss. He points out that the only ground for the motion advanced by the Permittees is that the issues raised in the revocation petition were already reviewed by the District Environmental Commission and therefore further review is barred by the doctrine of res iudicata, but that res iudicata does not apply because Rule 38(A) provides for a hearing on a revocation petition as a matter of law. Mr. Readnour argues that the issues raised in the revocation petition (one, whether the **Permittee's** application was materially inaccurate, erroneous, or incomplete, and two, whether the Permittee has violated its permit) have not been previously litigated.

On March 3, 1993, the Board decided to reconsider its decision to hold oral argument on the motion to dismiss.

I. DECISION

A. Motion to Dismiss

Rule 18(D) states:

(D) Dismissal. The board may, on its own motion or at the request of a party, consider the dismissal, in whole or in part, of any matter before the board for reasons provided by these rules, by statute, or by law. At the request of a party or on its own motion, the board will entertain oral argument prior to considering any such dismissal;

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<sup>1</sup> By letter dated February 16, 1993, Mr. Readnour informed the Board that he now represents James and Kim Miner and Bruce and Carmelita Brown in addition to the other neighbors.

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such argument shall be preceded by notice to the parties unless dismissal is considered at a regularly convened hearing on the matter. A decision to dismiss shall include a statement of findings of fact and conclusions of law and shall be made within 20 days of the final hearing at which dismissal is considered.

(Emphasis added.)

In its February 8 decision, the Board stated it would schedule oral argument on the motion to dismiss in accordance with Rule 18(D). The Board has determined that oral argument is not required by Rule 18(D) in this proceeding.

The Permittee, Talon Hill Gun Club, Inc., argues that the Board should dismiss the Revocation Petition because the issues raised in the petition were all litigated before the District Commission and were not appealed.

Rule 38(A) provides that a revocation petition may be filed with the Board by, among others, any person who was party to the application and any adjoining property owner whose property interests are directly affected by an alleged violation. A petition for revocation is treated as a contested case, and the notice and hearing procedures of Rule 40 apply. Grounds for revocation include: 1) the submission, willfully or with gross negligence, of inaccurate, erroneous, or materially incomplete information in connection with the permit application; and 2) the violations of a permit or the rules of the Board.

The revocation petition filed in this matter was properly brought by adjoining landowners who were parties to the application. The petition includes the allegations that the Permittees, willfully or with gross negligence, submitted inaccurate, erroneous, or materially incomplete information in connection with the permit application, and that the Permittees have violated the permit. These allegations, if true, would be grounds for revocation of the permit. The issues raised in the revocation petition have not been litigated: the District Commission reviewed the application for a permit to determine whether the project complied with the ten environmental criteria of Act 250, while the Environmental Board will review evidence that proves or disproves the allegations of the Petitioner concerning submission of information to the District Commission and violations of the permit issued by the District Commission.

Accordingly, the Board concludes that the doctrine res judicata does not bar the Board from considering the revocation petition. In fact, the Board is required by law to hold

a hearing on the petition if any of the allegations, if proven, would constitute grounds to revoke the permit.

The Petitioners' allegations include the following:

1. The Permittees did not contact residents of the area to inform them of sound tests; had such residents been contacted and had an opportunity to participate in the sound tests, the District Commission may have denied the permit or imposed additional conditions.
2. The club house is closer to the quarry than as shown in the **approved** plans submitted by **Enman** Engineering dated August 20; 1990. This has resulted in relocation of the shooting stations as well as their orientation. These changes have resulted in increased noise.
2. Shooting stations have been located on the shorelines of the quarry and a building is used for storage on the quarry site. This violates the requirement for a buffer zone around the quarry site, which is a designated wetland. These shooting stations have created significant noise.
3. The project is accessed from the Whiting Road rather than from the Arnold District Road. (The Gun Club does not dispute this allegation. Testimony should be confined to what adverse impacts, if any, use of this access road will create.)
4. The consumption of food and drink at the club house and the failure to install a composting toilet are violations of the wastewater permit issued by the Department of Environmental Conservation.
5. The limits on the hours of operation have not been adhered to.
6. The site plan map submitted to the District Commission incorrectly shows land that is owned by the Petitioners as being owned by John Swinington.

Deviation from the permit conditions or approved plans constitutes grounds for revocation. If the allegations of the Petitioners are true, grounds for revocation would **exist**.<sup>2</sup> The Petitioners are therefore entitled to a hearing on their revocation petition.

Accordingly, the Board denies the Motion to Dismiss.

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<sup>2</sup> Even if grounds for revocation exist, the Board may provide an opportunity to correct the violation prior to revocation taking effect. Rule 38(A)(3).

Rule 18(D) requires oral argument "**prior** to considering any such **dismissal.**" Our interpretation of Rule 18(D) is that it applies only when the Board is considering dismissing a matter. In this case, the Board has determined not to dismiss the revocation petition; therefore, there is no need to have oral argument.

A hearing on the allegations in the revocation petition will be held so that the Board may determine whether the allegations of the Petitioners are true.

B. Party Status

Attorney Readnour also seeks to have Mr. and Mrs. DeAngelis' party status requests reconsidered. Mr. Readnour claims that they are also concerned about water pollution and waste disposal issues under Criterion 1 as well as the issues for which they were granted party status.

Upon closer examination of the issues raised in this revocation proceeding, the Board has decided to revise its decision on party status announced in its February 8 Memorandum of Decision.

In revocation proceedings, the rules of the Board governing party status apply. Adjoining property owners and other persons who are or may be affected by virtue of the alleged violations are eligible for party status. Rule 14(A); Rule 14(B)(1)(a). Persons who can materially assist the Board may also be granted party status. Rule 14(B)(1)(b). See : Crushed Rock, Inc., #1R0489-EB, Findings of Fact, Conclusions of Law, and Permit Revocation Order at 3 (Oct. 17, 1986).

The issues in a revocation proceeding, however, are limited to those alleged as grounds for revocation. The effect of the project upon the resources protected by the criteria of Act 250 is not an issue except to the extent that violations have occurred.

James and Kim Miner are adjoining property owners who are **affected** by the violations of the permit alleged in the **petition**. Kenneth and Jane DeAngelis, Bruce and Carmelita Brown, William and Gloria Currie, Donald and Vicki Eddy, Catlin Fox, Robert and Mary Lord, Theresa and John Parker, and Robert and Susan Walsh all live within several miles of the Talon Hill Gun Club. Some of their interests are similar and others are not, but they may all be affected by the alleged violations. The Miners and the other neighbors also allege that the Permittees willfully or with gross negligence submitted inaccurate, erroneous, or materially incomplete information in connection with their application.

The Board grants party status to the Miners and all the neighbors listed above, provided they continue to be represented by one attorney who will present witnesses, **CROSS-**examine, and offer argument on behalf of all the neighbors.

II. ORDER

1. The **Permittee's** motion to dismiss the revocation proceedings is denied.
2. Party status is granted to James and Kim Miner pursuant to Rule 14(A) and to Kenneth and Jane **DeAngelis**, William and Gloria Currie, **Vicki** and Donald Eddy, Catlin Fox, Robert and Mary Lord, Theresa and John Parker, Susan K. Young Walsh and Robert Walsh, and Bruce and Carmelita L. Brown pursuant to Rule 14(B)(1)(a).
3. A hearing on the revocation petition will be held on Wednesday, April 7, 1993, at a time and location to be announced at a later date.
4. On or before Friday, March 19, 1993, parties shall file final lists of witnesses and exhibits and prefiled testimony for all witnesses they intend to present at the hearing. (Samples of prefiled testimony are available on request.)
5. On or before Friday, March 26, 1993, parties shall file prefiled rebuttal testimony and revised lists showing rebuttal witnesses and exhibits.
6. On or before Thursday, April 1, 1993, parties shall file in writing all legal objections to the prefiled testimony, or such objections shall be deemed waived.
7. No individual may be called as a witness in this matter if he or she has not been identified in a witness list filed in compliance with this Order. All reports and other documents that constitute substantive testimony must be filed with the prefiled testimony. If prefiled testimony has not been submitted by the date specified, the witness will not be permitted to testify. Instructions for filing prefiled testimony are enclosed.
8. The Board may waive the filing requirements upon a showing of good cause, unless such waiver would unfairly prejudice the rights of other parties.

9. Parties shall file an original and ten copies of prefiled testimony, legal memoranda, all exhibits which are 8 1/2 x 11 inches or smaller, and any other documents with the Board, and mail one copy to each of the parties listed on the attached Certificate of Service.

Parties are required to file only lists identifying exhibits which are larger than 8 1/2 x 11 inches that they intend to present, rather than the exhibits themselves. Exhibits must be made available for inspection and copying by any parties prior to the hearing.

10. To save time at the evidentiary hearing, the Board will require that parties label their prefiled testimony and exhibits themselves and submit lists of exhibits which the Board can use to keep track of exhibits during the hearing.
11. With respect to labeling, each person is assigned a letter as follows: P for the Permittee and N for the Neighbors. Prefiled testimony and exhibits shall be assigned consecutive numbers: for example, the Permittee will number its exhibits P1, P2, P3, etc. If an exhibit consists of more than one piece (such as a site plan with multiple sheets), letters will be used for each piece, i.e., P2A, P2B, etc. The labels on the exhibits must contain the words ENVIRONMENTAL BOARD, Re: Talon Hill Gun Club, Inc. and John Swinington, #9A0192-EB, the number of the exhibit, and a space for the Board to mark whether the exhibit has been admitted and to mark the date of admission. Label stickers which can be used by the parties are available from the Board on request; parties must complete the information sought on the stickers prior to the hearing.
12. Concerning preparation of lists of exhibits, each list must state the full name of the party at the top and the Board's case number. There must be three columns, from left to right: NUMBER, DESCRIPTION, and STATUS. The list must include exhibits and prefiled testimony.
13. The hearings will be recorded electronically by the Board or, upon request, by a stenographic reporter. Any party wishing to have a stenographic reporter present or a transcript of the proceedings must submit a request by Tuesday, April 6, 1993. One copy of any transcript made of proceedings must be filed with the Environmental Board at no cost to the Board.
14. Pursuant to Board Rule 16, this Order will be binding on all parties who have received notice of the prehearing conference, unless there is a timely objection to the Order, or a showing of cause for, or fairness requires, waiver of a requirement of this order.

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Dated at Montpelier, Vermont, this 4<sup>th</sup> day of March,  
1993.

ENVIRONMENTAL BOARD



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Elizabeth Courtney, Chair  
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