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

Re: Town of Windsor
Declaratory Ruling #255

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision, dated July 30, 1992, pertains to whether a permit was required pursuant to 10 V.S.A. Chapter 151 (Act 250) prior to the construction of a storage bunker for sludge from the Town of Windsor's wastewafer treatment plant and prior to land application of sludge taken from the storage bunker. The primary issue is whether a farm on which the sludge is spread constitutes "involved land" with the storage bunker. As is explained below, the Environmental Board concludes that the farm is not land involved with the bunker and that a permit is not required.

I. SUMMARY OF PROCEEDINGS

On February 13, 1990, the Town of Windsor (the Petitioner) filed land use permit application #2S0846 with the District #2 Environmental Commission. The application is for land application of sludge at a farm owned by co-applicant George Redick located off Route 5 in Windsor. The application includes construction on the farm site of a sludge storage bunker. The sludge is to come from the Petitioner's sewage treatment plant, which was initially constructed prior to Act 250's effective date. The sludge is to be stored in the bunker and then applied to the land.

On July 12, 1990, at the Petitioner's request, the District Commission recessed the hearing pending a determination of whether an Act 250 permit is required for the project.

On August 21, 1990, the Petitioner filed a jurisdictional request with the Board which was treated as a request for an advisory opinion from the Executive Officer. In that request, the Petitioner stated that the planned location of the storage bunker had been changed from the farm site to the site of the Town's existing sewage treatment plant.

During the period of consideration by the Executive Officer, the Petitioner constructed the storage bunker and began land application at the farm site. On August 12, 1991, the Executive Officer issued Advisory Opinion #EO-90-219, concluding that an Act 250 permit is required for the project.

On August 30, 1991, the Petitioner filed a request for a declaratory ruling with the Board. On September 23, the Vermont League of Cities and Towns (VLCT) filed a written

petition for party status. On that date, Environmental Board Chair Elizabeth Courtney convened a prehearing conference in Ludlow.

On October 31, 1991, the Board issued a prehearing conference report and order. In that report, the Board scheduled two hearing days: January 22 and April 22, 1992. During November and December 1991, the Petitioner filed lists of witnesses and exhibits, prefiled testimony, and proposed findings of fact and conclusions of law.

The Board convened a hearing in Windsor on January 22, 1992, with the Petitioner participating. The following Board members heard the matter on January 22: Charles F. Storrow (Acting Chair), Ferdinand Bongartz, Lixi Fortna, Arthur Gibb, Samuel Lloyd, Steve Wright, and alternate member Rebecca J. Day. After taking testimony, the Board recessed the hearing and conducted a deliberative session.

On January 28, 1992, the Petitioner filed a memorandum of law. On February 3, VLCT filed a memorandum of law. On February 6, the Petitioner filed a further memorandum of law.

The Board deliberated on February 12, 1992. On February 21, the Board's Assistant Executive Officer set a memorandum to parties stating that the April 22 hearing day would not be needed. The Board deliberated again on March 12. On March 31, the Assistant Executive Officer sent a memorandum to parties stating that the Board was deadlocked concerning this matter and that the members who heard the case intended to ask other regular members to review the record and participate in the decision. The Assistant Executive Officer: (1) identified an issue concerning whether alternate member Day could continue to participate if additional regular members joined the case and (2) offered an opportunity to parties to submit comments on this issue.

On April 15, 1992, the Petitioner and VLCT submitted responses to the Assistant Executive Officer's March 31 memorandum. The parties did not object to member Day's continued participation but rather insisted that she continue to participate. Instead, the parties objected to the participation of any Board members who did not attend the January 22 hearing.

The Board deliberated on April 22, 1992. On May 21, Acting Chair Storrow issued a memorandum in response to the objections which the Board incorporates by reference as its decision thereon. The May 21 memorandum stated that Board members Terry Ehrich and William Martinez would participate in this matter and would review the record, including the tape of the January 22 hearing and the written memoranda and prefiled testimony filed by the parties. The May 21 memorandum set a date for oral argument before the Board.

On June 4, 1992, the Board convened oral argument, with the Petitioner participating. Members Ehrich and Martinez were present at the argument. After hearing argument, the Board recessed the matter and conducted a deliberative session. This matter is now ready for decision. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied.

II. ISSUES

The basic issue in this case is whether an Act 250 permit was and is required for the sludge storage bunker and associated land application of sludge. Based on tne way the Board has evaluated municipal jurisdiction in the past, there are two questions to resolve in determining this issue: (1) whether the project meets the definition of "development" at 10 V.S.A. § 6001(3), and (2) whether the project is a "substantial change" to a pre-existing development (also known as a "grandfathered" development) under 10 V.S.A. § 6081. Under this procedure for evaluating jurisdiction, a permit is required if the answer to either one of these questions is affirmative. See, e.g., Re: Village of Waterbury Water Commissioners, Declaratory Ruling #227 (Feb. 5, 1991).

The parties have raised two additional issues. The first issue concerns the Board's treatment of a municipal exemption set forth at 10 V.S.A. § 6081(d). That issue is discussed below with respect to the applicability of the definition of development. The second issue concerns whether Act 250 jurisdiction is precluded by the fact that another state agency, the Agency of Natural Resources, has jurisdiction over land application of sludge. This issue was raised initially by VLCT but the Board does not reach it because, in its memorandum of law filed February 3, VLCT acknowledged that this argument is not correct.

III. FINDINGS OF FACT

1. The Town of Windsor (the Petitioner) completed construction of a primary wastewater treatment plant on December 1, 1965. The amount of land involved with the plant was and is 8.6 acres. The plant was constructed on a tract within the Town of Windsor.

2. The Petitioner replaced the primary treatment plant with a secondary wastewater treatment plant constructed between 1989 and 1991. Limited operation of the secondary treatment plant commenced on August 13, 1990. The secondary treatment plant was constructed on the same tract as the primary treatment plant. In January 1988, the Petitioner received a project review sheet from Assistant District #2 Coordinator Jeffrey Powers stating that no Act 250 permit is needed for the secondary treatment plant.

3. In 1990, the Petitioner constructed a concrete sludge storage bunker on the same tract on which it constructed the primary and secondary treatment plants discussed above. The construction of the bunker involved the disturbance of less than ten acres of land.

4. The Petitioner stores sludge from the secondary treatment plant in the bunker. On occasion, it takes sludge from the bunker and delivers it to George Redick at a farm which he owns. The farm is located off Route 5 in Windsor between Route 5 and the Connecticut River. Mr. Redick spreads the sludge on 100 acres of his farm. No land is physically disturbed as part of the placement of sludge on that farm.

IV. CONCLUSIONS OF LAW

A. Development

10 V.S.A. § 6081(a) requires that an Act 250 permit be obtained prior to commencing development. 10 V.S.A. § 6001(3) provides that development includes:

> [T]he construction of improvements on a tract of land involving more than 10 acres which is to be used for municipal or state purposes. In computing the amount of land involved, land shall

be included which is incident to the use such as lawns, parking areas, roadways, leaching fields and accessory buildings.

See also Board Rule 2(A)(4).

The primary question in this case has been whether the 100-acre Redick farm is involved land with the storage bunker because it is incident to the use of the bunker. We have previously stated that, for municipal and state projects, "incident to the use" applies only to land which is physically changed or altered because of a proposed project. This ruling is based on policy considerations attendant to municipal and state projects. See Town of Rutland, Declaratory Ruling #207 at 5 (May 5, 1989).

No physical change or alteration occurs or will occur to the Redick farm by reason of the placement of sludge on the ground. Accordingly, the farm is not incident to the use of the storage bunker. Thus, since the bunker itself involves the disturbance of less than 10 acres, the bunker does not constitute a development.

In making this ruling, we note the Petitioner's argument that the spreading of sludge on the Redick farm constitutes exempt farming pursuant to 10 V.S.A. § 6001(3) and (22). However, the farming exemption requires that there be construction for farming purposes and no construction for such purposes is presented by the facts of this case.

We also note arguments filed by the parties to the effect that the Board should apply 10 V.S.A. § 6081(d) in evaluating whether the storage bunker and sludge application constitute development. In relevant part, 10 V.S.A. § 6081(d) provides:

> For purposes of this section, the following municipal projects shall not be considered to be substantial changes, regardless of the acreage involved, and shall not require a permit as provided under subsection (a) of this section:
>
> (1) essential municipal wastewater treatment facility enhancements that do not expand the capacity of the facility by more than 10 percent.

In the Waterbury Water Commissioners case cited above, we concluded that this section applies to the issue of whether a project constitutes a substantial change, which is the second part of our analysis. We re-affirm that ruling for the reasons stated therein.

B. Substantial Chanae to a Pre-existing Development

10 V.S.A. § 6081(b) provides:

> [The permit requirement of subsection] (a) of this section shall not apply to development which is not also a subdivision, which has been commenced prior to June 1, 1970, if the construction will be completed by March 1, 1971. ... Subsection (a) of this section shall apply to any substantial change in such excepted subdivision or development.

This provision exempts what are commonly referred to as pre-existing developments. In order to qualify for this exemption, a project must meet the definition of development at 10 V.S.A. § 6001(3) and thus the permit requirement would apply but for the fact that the project was in existence on June 1, 1970 or that constructed on the project commenced before that date and was completed by March 1, 1971. See Board Rule 2(O); Town of Rutland, supra at 6. If the Board concludes that a project is a pre-existing development, it then examines whether proposed changes to that project are "substantial changes." See lo V.S.A. § 6081(d) and (e); Board Rule 2(G); Waterburv Water Commissioners, supra at 15-18.

In this case, construction of the Petitioner's primary treatment facility was completed in 1965. But the Board cannot conclude that, if built today, the wastewater treatment plant would constitute a development under 10 V.S.A. § 6001(3) because the plant involved less than 10 acres when it was built. Accordingly, the primary treatment facility does not constitute a pre-existing development and the Board does not reach the question of substantial change. Thus, there is no need for the second hearing called for in the prehearing report, the purpose of which was to take evidence relevant to that question.

V. ORDER

An Act 250 permit is not required for the sludge storage bunker constructed at the Petitioner's wastewater treatment facility in Windsor or for the land application of sludge by the Petitioner on the Redick farm. __

Dated at Montpelier, Vermont this 30th day of July, 1992.

ENVIRONMENTAL BOARD

Charles F. Storrow, Acting Chair

Members favoring this decision:	Members dissenting:
Ferdinand Bongartz	Charles F. Storrow
Lixi Fortna	Rebecca J. Day
Arthur Gibb	Terry Ehrich*
Samuel Lloyd	Steve E. Wright
William Martinez*	

Dissenting opinion attached.

*Members Ehrich and Martinez did not attend the hearing on April 22 but reviewed the record in accordance with the Acting Chair's memorandum of May 21, 1992.

Dissenting opinion of Acting Chair Charles F. Storrow and members Rebecca J. Day, Terry Ehrich, and Steve E. Wright:

We concur the majority's conclusions of law except in one important respect. We dissent with regard to the conclusion that the Redick farm is not involved land with the sludge storage bunker.

We see no sense in the conclusion that the farm is not "incident to the use." The majority makes much of the purported lack of a physical alteration or change to the farm as a result of the sludge application. We believe that the sludge application in and of itself is a physical change which is occurring and will occur on that land. The sludge will physically be placed there. That is all that is necessary. In support of our conclusion, we note that, in the case cited by the majority, absolutely nothing whatsoever was done to or placed on land which was ruled not to be incident to the use. Town of Rutland, supra at 6.

Moreover, both the statute at 10 V.S.A. § 6001(3) and Rule 2(A)(4) state that certain types of land are incident to the use, including lawns. The physical "changes" which occur on lawns are mowing and seeding. We see no meaningful distinction between mowing and seeding on the one hand and placement of sludge on the other hand.

Finally, the majority has ignored Board Rule 2(F)(3), which we have previously applied to municipal and state projects. Re: Village of Ludlow, Declaratory Ruling #212 at 7-8 (Dec. 29, 1989). Rule 2(F)(3) defines involved land to include:

> Those portions of any tract or tracts of land within a radius of five miles owned or controlled by the same person or persons, which bear some relationship to the land actually used in the construction of improvements, such that there is a demonstrable likelihood that the impact on the values sought to be protected by Act 250 will be substantially affected by reason of that relationship.

All of the elements of this rule are met in this case. The Petitioner does own the bunker and it controls the 100-acre spreading area on the Redick farm through a contract between the Petitioner and Mr. Redick which is in our

record. There is a relationship between the bunker and the 100-acre spreading area on the Redick farm: Sludge is taken from the bunker and spread on the loo-acre area. Further, there is a demonstrable likelihood that this relationship will substantially affect the values Act 250 protects: The sludge which is spread comes from a plant that treats human, commercial, and industrial waste and the spreading area is near the Connecticut River. A significant potential for water pollution is thus presented.

For these reasons, we conclude that the bunker construction and land application constitute one project involving more than ten acres and therefore that an Act 250 permit is required.

windsor.dec (awp5)