

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

Re: Hale Mountain Fish and Game Club, Inc. Declaratory Ruling #435

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

This appeal has been remanded to the Environmental Board (Board) for supplemental findings of fact on the issues of intensity of use and noise at the Hale Mountain Fish and Game Club in Shaftsbury, Vermont (Project).

I. Procedural Summary on Remand

The Vermont Supreme Court reversed the Board's 2005 decision in this matter, *Re: Hale Mountain Fish and Game Club, Inc.*, Declaratory Ruling #435, Findings of Fact, Conclusions of Law, and Order (Aug. 4, 2005)(Board Decision); see also, Memorandum of Decision on Motion to Alter (October 17, 2005), and remanded for further findings. *In re Hale Mountain Fish & Game Club, Inc.*, 2007 VT 102 (mem.). On November 6, 2007, Board Chair Patricia Moulton Powden convened a status conference. Hale Mountain Fish and Game Club, Inc. (Petitioner) was represented by James P.W. Goss, Esq. Adjoining landowners Owen and Kathy Beauchesne were represented by Paul Gillies, Esq. Adjoining landowner Ann Dailey participated on behalf of herself and adjoining landowners Lorraine and Richard Mattison. The Mattisons were not available to participate. No other parties have participated in this matter at or since the status conference.

On November 9, 2007, the Chair issued a Scheduling Order setting filing deadlines for various motions. The Board deliberated on the motions on January 10, 2008 and February 21, 2008. A Memorandum of Decision on those motions is being issued concurrently with this decision.

Also on January 10, 2008 and February 21, 2008, the Board deliberated on the issuance of supplemental findings in accordance with the Vermont Supreme Court's decision.

II. Issues on Remand

On remand, the Board must make supplemental findings on Project noise and intensity of use. *Hale Mountain*, 2007 VT 102 ¶¶ 8 – 10. The Board is also authorized to make additional findings and rulings concerning proposed findings on other issues, including streams and wetlands, regarding on which extensive evidence and argument were submitted. *Id.* ¶11.

As a preliminary matter, the Board notes as it did in its previous decision that proposed findings included herein are granted and proposed findings not included are denied. See Board Decision at 3 (citing *Secretary, Agency of Natural Resources*

v. Upper Valley Regional Landfill Corp., 167 Vt. 228, 241-242 (1997); *Petition of Village of Hardwick Electric Department*, 143 Vt. 437, 445 (1983)).

III. Supplemental Findings of Fact

A more comprehensive description of the facts in this case may be found in the Board Decision. The following findings are intended to supplement the Board Decision to remedy insufficiencies specified by the Court.

1. The level of shooting activity and noise at the Project site has fluctuated slightly over the years, but there has not been an increase in intensity of shooting and noise after 1970 as compared to pre-1970 levels.
2. The post-1970 improvements to the shooting facilities as described in the findings made in the Board Decision have not caused an increase in use, shooting, or capacity at the Project site sufficient to cause any potential for significant impact under any Act 250 criterion.
3. Henry Salem has been a member of the Hale Mountain Fish and Game Club since the 1940s. He is usually at the Club several days a week and has attended the Club in virtually every season of the year since he joined.
4. Richmond Thurber has been a member of the Hale Mountain Fish and Game Club since the 1940s. He was actively involved in the Club's formation and during its early years.
5. Ralph Bevis has been a member of the Hale Mountain Fish and Game Club since 1949 or 1950 and was actively involved in setting up trap shooting at the Club.
6. In 1978, Richard and Lorraine Mattison moved to a home just west of the Club. Prior to that, they lived farther away from the Club, on Rod and Gun Club Road. Lorraine Mattison rode horses through the Club property on occasion from the mid-1960s to 1970s. The Mattisons operated a busy restaurant in town from approximately 1972 through 1988.
7. Owen and Kathy Beauchesne moved to the area in 1988.
8. Ann Dailey moved to a home adjacent to the Project in 1980. Although Ann Dailey visited the Project site before she moved to the area, she has little personal knowledge of the Project prior to 1980. Ms. Dailey's daughter, Kelly Dailey, was born in 1980 and no longer lives at home year-round.
9. Ann Dailey, Kelly Dailey, Kathy Beauchesne and Lorraine Mattison presented little or no evidence of the pre-1970 levels of use at the Project site.

10. Ralph Bevis, Richmond Thurber and Henry Salem are knowledgeable and credible on the historic background of the Project for purposes of comparing pre- and post-1970 use. Their testimony is more thorough, credible and persuasive on these facts than that of the neighbors who moved in near the Project after 1970.
11. There are used clay pigeons and some evidence of spent ammunition on the grounds at the Project site. Some of these waste materials are found near streams and wet areas. Such deposition of clay pigeons and spent ammunition has occurred since before June 1, 1970, without an increase in deposition or accumulation rates since that time.
12. The testimony of Ralph Bevis, Richmond Thurber, and Henry Salem that a caretaker's trailer has been in place behind the clubhouse off and on since the 1950s is credible and persuasive.
13. Despite some minor gaps in use over the years, and a replacement of the trailer in 1971, a caretaker's trailer has been in use behind the clubhouse off and on since the 1950s.
14. Club membership levels are not an accurate indicator of intensity of shooting at the Project, because the Project can be used by non-members, and because there can be widely varying levels of use among members.
15. Petitioner has not kept records of levels of shooting or use, and instituting such a practice now would not help determine use levels dating back to or before June 1, 1970.
16. The trap area, rifle range, and pistol range accommodate the same approximate number of users as before 1970, and other changes such as covering the shooting range and shifting from private to town plowing during the winter have not affected the amount of use of the Club.
17. Petitioner's own efforts to increase participation at the Project have done little more than maintain participation within levels that existed before 1970.

IV. Discussion

In its decision remanding this matter to the Board, the Vermont Supreme Court adopted the standard applied in *Re: Black River Valley Rod & Gun Club, Inc.* as the standard for analysis of this case. *Hale Mountain*, 2007 VT 102 ¶15 (citing *Re: Black River Valley Rod & Gun Club, Inc.*, #2S1019-EB, Findings of Fact, Conclusions of Law, and Order, 1997 WL 453353 (Vt. Env'l Bd. 1997)). As discussed below, application of *Black River* does not change the Board's conclusions in this appeal.

In *Black River*, the Board held that a new pavilion and lighting at a trap shooting range were substantial changes that necessitated Act 250 review of all shooting at the trap range. *Id.* at 12. This holding was based on testimony from neighbors to the project that indicated a substantial increase in trap shooting above historic levels due to these new project features, and on the fact that the increase in shooting could not be differentiated from the historic trap shooting and reviewed separately. *Id.* at 12. Also, the Board ruled that the rifle range on the same project site remained grandfathered because shooting there could be differentiated from the shooting that increased due to the new lights and pavilion. *Id.* at 16-17.

In this appeal, unlike *Black River*, the Board finds that the gun club's witnesses are more credible, knowledgeable and persuasive on the question of Project use and activity going back to 1970 and earlier than the neighbors' witnesses. The Board is persuaded that the trap area, rifle range and pistol range accommodate the same number of users as before 1970, and that other changes such as covering the shooting range and shifting from private to town plowing during the winter have not affected the amount of shooting at Hale Mountain Fish and Game Club. As noted above, the Club's own efforts to increase participation have done little more than maintain participation within pre-1970 levels. We conclude that there has been no significant increase in shooting activity at the Project, and no significant increase in noise or other impacts, over pre-1970 levels.

Thus, the only substantial changes to this grandfathered shooting range that require an Act 250 permit are the discrete changes found in the Board Decision:

- Installation of the new well and wastewater disposal system in 1983 without required health and environmental conservation approval.
- Installation of the replacement garage and the new clay target storage trailer in the vicinity of mapped Class Two wetlands.
- Improvements constructed for the Beagle Club that remain on the Project tract, including pens, fencing, a culvert and portable toilet.

With the addition of the supplemental findings and discussion herein, the Board Decision remains unchanged. An Act 250 permit is required only for each substantial change, not for the entire Project.

DATED at Montpelier, Vermont this 26th day of February, 2008.

ENVIRONMENTAL BOARD



Patricia Moulton Powden, Chair * †
George Holland**
W. William Martinez**
John Merrill††
Patricia Nowak**
Alice Olenick*
Karen Paul* §
Richard C. Pembroke, Sr.**
Christopher D. Roy

* Chair Moulton Powden and Members Olenick and Paul DISSENT in part, as stated in the Board Decision.¹

¹ Chair Moulton Powden and Members Olenick and Paul dissented in the Board Decision as follows:

We concur in the majority's decision that an Act 250 permit is required, but would add more fundamental grounds for that decision. In our opinion, Petitioner's improvements to the shooting facilities -- covering the rifle range, and covering and berming the pistol range -- had the potential to increase shooting activities at the Project, and result in a significant increase in noise. The improvements also facilitated the use by law enforcement agencies, which is a new and increased use. Viewed together, these improvements clearly had the potential for significant Act 250 impacts. See, Re: *Robert Barlow*, Declaratory Ruling 234, Findings of Fact, Conclusions of Law, and Order at 11 (Sept. 20, 1991)(holding that certain physical changes to quarry project, taken together, had the potential for significant Act 250 impacts), *aff'd*, *In re Barlow*, 160 Vt. 513 (1993).

In addition, there is credible evidence of actual increases in noise levels since these improvements were made. Several neighbors testified that noise at the Project site has increased markedly since the mid-1990s. Unlike the Petitioner's witnesses, who did not live near the Project, Ms. Beauchesne, Ms. Mattison and Ms. Dailey were in a position to observe changes in noise levels over time. Even without objective noise measurements, we would conclude that actual impacts have occurred.

Moreover, the Act 250 impacts of a significant increase in shooting activity would permeate the entire Project. Accordingly, we would hold that these improvements to the rifle and pistol range triggered Act 250 jurisdiction over the Project.

We respectfully dissent from this part of the Board's decision.

‡ Chair Moulton Powden CONCURS, as stated in the Board Decision.²

** Members Holland, Martinez, Nowak, and Pembroke DISSENT in part, as stated in the Board Decision.³

‡# Alternate Member Merrill ABSTAINS, as follows:

I have reviewed the record and participated in Board deliberations on this matter, but must now abstain from joining in any part of the supplemental findings. There is ample evidence on both sides of the question of increased use and noise at the Project site, so the supplemental findings required on remand would appear to come down to a determination regarding witness credibility. Because I did not participate in the hearings on this matter several years ago, and therefore did not observe the witnesses first hand, I am at a significant disadvantage. I cannot gauge adequately the credibility of each witness from his or her audio recorded testimony and written prefiled testimony. Therefore, I must abstain.

§ Board member Karen Paul was unable to attend the February 21, 2008 deliberations, but has reviewed and joins in decision as stated herein.

² Chair Moulton Powden concurred in the Board Decision as follows:

Except as indicated above, I concur in the Board's decision. As the majority indicates, these "grandfathering" cases grow increasingly difficult to decide (and for landowners to prove) with the passage of time. Landowners with preexisting developments would be well-advised to preserve and maintain records of pre-1970 and post-1970 activities to avoid these difficulties. It may even be advisable for such persons to "lock in" their preexisting status by requesting a jurisdictional opinion, providing the appropriate district environmental coordinator with all the necessary information. The passage of time can only make it more difficult to produce enough information to retain exempt status.

Board Decision at 26.

³ Board members Holland, Martinez, Nowak and Pembroke dissented from the Board Decision as follows:

We dissent from the majority's decision that an Act 250 permit is required. In our opinion, none of the changes Petitioner made to this Project had the potential for significant Act 250 impacts. The Project is grandfathered and should remain exempt from the Act 250 permitting requirement.

Board Decision at 26.