

State of Vermont
Water Resources Board

In Re: Appeal of Sunrise
Group from Certification of
Compliance #1R0501-4

3 V.S.A. §2873(4)

Introduction

A hearing regarding the above entitled matter was held by the Water Resources Board with Gary Moore, Chairman, presiding. The hearing convened at 9:30 a.m. February 20, 1985, at the Rutland Area Vocational-Technical Center, Woodstock Avenue, Rutland, Vermont, was recessed at 10:15 p.m. and continued on February 21, 1985 commencing at 1:00 p.m. at the Mid State Regional Library, Berlin, Vermont with the evidence closed at 3:30 p.m.

The following parties and their representatives were present: Sunrise Group by F. Ray Keyser, Jr., Esquire, Keyser, Crowley, Banse and Facey, Rutland; Agency of Environmental Conservation by Stephanie J. Kaplan, Esquire, Attorney General's Office, Montpelier; Sherburne Corporation by Allan R. Keyes, Esquire, Ryan, Smith and Carbine, Ltd., Rutland; Vermont Natural Resources Council and Connecticut River Watershed Council by Robert E. Woolmington, Esquire, Witten and Carter, P.C., Bennington; Agency of Development and Community Affairs by Curt Carter; and the Town of Mendon by Nancy Corsones, Esquire, Corsones and Hansen, Rutland.

A Stipulation of Fact between the Sunrise Group and the Agency of Environmental Conservation dated February 8, 1985 with 31 exhibits was filed with the Water Resources Board with copies to all parties. At the beginning of the hearing, the Chairman asked those parties present who were not signatory to the Stipulation if they objected to its admission as a part of the record upon which the Board could rely in making Findings of Fact. The parties responded that they had no objection.

The rules which regulate the design and construction of on-land sewage disposal systems for Public Buildings (18 V.S.A., Chapter 25) referred to in the Board's findings of fact and conclusions of law are the Vermont Health Regulations, Subchapter 10, Part III ("old rules") and the Environmental Protection Rules ("new rules"). Both the "old rules" and the "new rules" are administered by the Department of Water Resources and Environmental Engineering (Department) which is a component of the Agency of Environmental Conservation (Agency).

The individuals referred to herein by their surnames are as follows:

Agency of Environmental Conservation, Department of Water Resources and Environmental Engineering:

William Brierley, Director, Public Facilities
Jeffrey Cueto, Hydrologist
Canute E. Dalmasse, formerly Director, Protection Division; now Water Resources Staff Assistant
P. Howard Flanders, formerly Chief, Engineering Services; now Environmental Engineering Supervisor - Design, Public Facilities
Peter Garrity, Hydrogeologist
Steve Goldberg, Hydrogeologist
Stephanie Kaplan, Assistant Attorney General, Attorney for the Agency
Reginald LaRosa, Operations Director
Richard Phillips, Environmental Engineering Supervisor, Operations and Maintenance
John R. Ponsetto, formerly Commissioner of the Department
Thomas Willard, Environmental Engineering Supervisor, Water Quality

Hawk Mountain Corporation (Hawk)

Stephen R. Crampton, Attorney for Hawk
David Fretz, Vice President

Sunrise Group (Sunrise)

F. Ray Keyser, Jr., Attorney for Sunrise
John Vihinen, Director of Environmental Planning

Consultants for Hawk and Sunrise:

Wagner, Heindel, & Noyes, Inc. (Hydrogeologists)

Craig Heindel, principal
Jeffrey Noyes, principal
W. Phillip Wagner, principal

Bruno Associates (design engineers)

Bruce Boedtke, P.E.
Timothy Buzzell, P.E.

During the course of this proceeding those documents identified on the attached List of Exhibits were received into evidence. Based upon the Stipulation, testimony of witnesses and exhibits, the Board makes the following :

Findings of Fact and Conclusions of Law

1. In order to develop condominium units, a Public Building Permit must be obtained in accordance with rules adopted under the authority of 18 V.S.A., Chapter 25. At all times relevant to this proceeding the Public Building Permit program has been administered by the Department. In reviewing applications for such permits the Department reviews, among other things, the proposed method of sewage disposal. A Public Building Permit may be issued, when a Land Use Permit (10 V.S.A., Chapter 151) is also required, in the form of a Certificate of Compliance.
2. If a Land Use Permit is also required, the proper procedure for formally applying for both a Land Use Permit and a Public Building Permit is to file a Master Land Use Permit application form with the required detailed technical information and the required fee with the appropriate district environmental office. Section 5-593 and Appendix 7 of the "old rules" and Section 2-02A and Appendix 7-E of the "new rules" list the technical information required for filing a formal application for a Public Building Permit. The district coordinator and the district engineer review the application. If the application involves proposed sewage disposal facilities with a design capacity exceeding 40,000 gallons per day (gpd), the application is sent to the Agency's central office in Montpelier for review of the Public Building Permit application.
3. At all times relevant to this proceeding it was the Department's practice to review Public Building Permit applications following a two step process. The first step was a preliminary review which occurred prior to the submittal of a formal application. The second step was a final review which occurred after the filing of a formal application.
4. At all times relevant to this proceeding it was the Department's practice to treat an initial contact by the applicant or the applicant's consultants as initiating the preliminary review process.
5. As part of this preliminary review process, an applicant was required to obtain the Department's approval at key stages in the development of the detailed technical information required to file a formal application. The preliminary review process includes obtaining approval of specific testing methods to be used, conducting extensive on-site testing, periodically providing opportunities for the Department to review the results of such tests in the

field; all of this, prior to the applicant preparing the highly detailed technical information required for the filing of a formal application in order to initiate the final review process. As a result of the Department's practice, the filing of a formal application for a Public Building Permit, particularly for a large or complex development project, often does not occur until after an extensive preliminary review has occurred. It is not unusual for the filing of a formal application to occur near the end of the Public Building Permit application review process.

6. At all times relevant to this proceeding prior to September 10, 1982, the design and construction of sewage disposal systems for Public Buildings were regulated under the "old rules" which were adopted by the Secretary of the Agency of Human Services.
7. During the winter, spring, and summer of 1982, the Secretary of the Agency of Environmental Conservation as successor in authority to the Secretary of the Agency of Human Services was in the process of amending the "old rules" in accordance with the provisions of the Vermont Administrative Procedure Act (3 V.S.A., Chapter 25). During this period, public hearings were held at which drafts of the proposed amendments to the "old rules" were reviewed.
8. During the period when the "old rules" were being amended, Hawk and its consultants received drafts of the proposed amendments.
9. Since September 10, 1982, the design and construction of on-land sewage disposal systems for Public Buildings have been regulated by the "new rules" adopted by the Secretary of the Agency. The "new rules" superceded the "old rules."
10. Under the "old rules", applicants were required to do the same soil testing and to submit the same detailed technical information to file a formal application as they are required to do under the "new rules".
11. Section 7.03 of the "new rules" provides that a Discharge Permit (10 V.S.A. §1263) is required for any Public Building Permit application which proposes an on-land sewage disposal system with a design capacity exceeding 40,000 gpd unless the applicant can demonstrate compliance with several criteria. These criteria, initially developed as a result of an application involving the Mt. Mansfield Company, are sometimes referred to as the "Mansfield criteria" but are more commonly referred to today as the "threshold criteria."

12. The threshold criteria are contained in the "new rules" and were not in the "old rules".
13. The fundamental difference between the "old rules" and the "new rules" is the addition of the threshold criteria by which it is determined whether a proposed method of on-land sewage disposal also requires a Discharge Permit.
14. In order to obtain a Discharge Permit, an applicant must, in addition to other requirements, comply with the Vermont Water Quality Standards. These Standards prohibit the discharge of any sewage, regardless of the degree of treatment provided, except into Class C waters.
15. Hawk has conducted the business of land development in central Vermont for over twenty years. It has developed residential communities in the towns of Pittsfield, Rochester, Norwich and Plymouth and, in addition, has a construction division and provides a property management service to owners.
16. On January 4, 1980, Hawk purchased the Green parcel, so called, being a 69 acre wooded lot of land in the Bear Mountain area of the Town of Sherburne which is zoned as a ski village district. The purchase price was \$200,000 and, in addition, Hawk agreed to pay the seller \$2,000 per unit constructed thereon in excess of 100 units.
17. On April 23, 1980, Fretz, Bruno and Wagner met with Flanders to discuss Hawk's preliminary analysis of the Green parcel's potential for on-land sewage disposal. All participants at the meeting agreed that the Green parcel was not suitable for on-site sewage disposal and that the development of the Green parcel would require off-site sewage disposal.
18. Immediately following the meeting with Flanders, Hawk made a preliminary review of off-site sewage disposal alternatives and began discussions with the Sherburne Corporation, (Sherburne), for use of its land.
19. The discussions with Sherburne continued into 1982, and on May 4, 1982, an agreement was executed between Sherburne and Hawk, providing Hawk with a right-of-way from the Roaring Brook East Town Highway across Sherburne's lands to the Green parcel and the commitment of Sherburne to cooperate with Hawk in making its lands available for on-land sewage disposal.
20. On March 25, 1982, Fretz wrote to Dalmasse, advising that Hawk had recently begun the process of designing an on-land sewage disposal system for a condominium project on the Green parcel and requested a letter confirming that the

system would be reviewed under the "old rules". The letter stated that the Hawk condominium project would have a maximum of 360 units built over a ten-year period with estimated total average sewage flow of 162,000 gpd and that spray irrigation was the only feasible method for sewage disposal.

21. On April 21, 1982, Dalmasse wrote to Fretz and set forth two general principles which the Department would consider when determining whether an application would be reviewed under the "old rules" or the as yet unadopted "new rules". Dalmasse stated that at that time he could not make a commitment as to which rules would apply to the Hawk condominium project because insufficient information had been provided regarding when that project was started, how much work had been done to date in reliance on the "old rules" and when a formal application would be submitted. Dalmasse further stated that if Hawk proceeded with design based on existing rules and filed a formal application within the next six months, the existing rules would apply unless Hawk felt that it would be to its benefit to have the "new rules" apply. Dalmasse suggested that if Hawk needed a more definite or long term commitment, they should submit more information on what they had done to date and what they planned to do and he would then consider it.
22. On April 21, 1982, Wagner and Fretz investigated lands in and adjacent to the area zoned as a ski village district, working out in concentric circles to identify potential spray irrigation sites. This investigation involved evaluating soils using a hand auger, determining slopes with an inclinometer, identifying bedrock outcroppings, surface waters and mapping the locations of potential spray irrigation sites.
23. On April 23, 1982, Wagner submitted a report to Fretz identifying thirteen potential sites designated as sites 1 through 13 and estimating their capacity for spray irrigation.
24. On June 9, 1982, Wagner and Fretz investigated lands owned by International Paper Realty (IPR) in the adjacent Town of Mendon for the possibility of spray irrigation. As a result of this investigation, five additional spray irrigation sites designated as sites A through E were identified as worthy of further evaluation.
25. On June 15, 1982, Wagner submitted to Fretz a written report as an addendum to his prior report of April 23, 1982 which identified, described and mapped sites A through E. By letters dated June 16, June 23 and July 7, 1982, Fretz obtained permission to conduct tests on lands owned by Sherburne and by IPR.

26. Between July 12, 1982 and July 22, 1982, Wagner and employees of his firm together with Fretz, performed a test pit survey of four sites, including sites A and B. Test pits involve excavations at numerous locations up to ten feet deep, following which a hydrogeologist analyzes soil conditions, the location of bedrock, and the level of ground water in the soil, to determine suitability for spray irrigation, which data is recorded in field notes.
27. Between July 19, and July 22, 1982, Wagner, Heindel and an employee of their firm conducted a feasibility study of 28 other potential spray irrigation sites in the Killington mountain area.
28. On July 20, 1982, Wagner and Bruno met with Flanders and Garrity to inspect the test pits previously dug at sites A and B. It was agreed that these sites had some capacity for spray irrigation.
29. On July 26, 1982, a report by Wagner entitled "Hawk Mountain, Test Pit Log and Capacity Summary, July 26, 1982" covering four sites, including sites A and B, was submitted to the Department at a meeting between Wagner, Boedtke, Fretz, Flanders, Garrity, Phillips, and Goldberg. The testing methods being used by Hawk's hydrogeologists were approved at the meeting.
30. On July 27, 1982, Wagner wrote to Dalmasse requesting a "clear and official statement of the Agency's rules and regulations regarding the Hawk Mountain Spray Application Project, occasioned by the meeting with Flanders and Phillips on July 26." In this letter Wagner asked the following questions:
 - 1) Is the idea of utilizing effluent seepage vertically into the pan soils and not just seepage on top of the pan conceptually appropriate?
 - 2) Is a spray application of effluent in excess of 2"/week acceptable?
 - 3) Do the special criteria developed for flows in excess of 40,000 gpd apply for spray irrigation systems?"
31. On August 20, 1982, Dalmasse acknowledged receipt of Wagner's letter of July 27, 1982. Dalmasse stated that schedules and workload made it difficult to respond with the promptness he would like, that he would respond as soon as he could. Dalmasse never responded directly to Wagner's letter.

32. On July 28, 1982, Fretz wrote to IPR requesting permission to test sites C, D and E. On August 17, and 18, 1982 Heindel, an employee of his firm, Boedtke, and Fretz dug and analyzed various test pits on site D, and on August 19th through August 23, 1982, Heindel, an employee of his firm, Boedtke, and Fretz, dug and analyzed test pits on site C.
33. On August 23, 1982, Boedtke and an employee of Wagner, Heindel and Noyes identified site F as a separate site and dug test pits on that site.
34. On August 26, 1982, Bruno and an employee of Wagner, Heindel and Noyes met with Garrity and accompanied him on an inspection of sites C, D and F, which included reviewing the test pits dug on those sites. Garrity requested the test pit logs and field information as soon as they were available.
35. On September 1, 1982, Heindel did a hydrogeological evaluation of the test pits on site F. He also prepared more legible test pit logs of sites C and D from prior field notes.
36. On September 7, 1982, Wagner, Boedtke and Fretz met with Phillips, Garrity and Brierley, to review the results of the tests conducted on sites A, B, and F. It was at this meeting that Hawk first learned that the threshold criteria of the "new rules" might apply to spray irrigation. Previously, at a meeting on July 26, 1982, Dalmasse had expressed his view that those criteria would not apply to spray irrigation.
37. On September 16, 1982, Garrity wrote to Boedtke informing him that the threshold criteria would apply to spray irrigation systems.
38. On October 20, 1982 three additional test pits were dug on site F in order to further evaluate the subsurface soils geology. On October 21 through October 26, 1982, nine permeability trench tests were conducted on that site by Heindel and other employees of his firm.
39. In addition to permeability trench tests, Heindel, and employees of his firm conducted 43 auger hole K tests on site F during the period of October 21 through November 3, 1982, and on October 22, 1982, Wagner and employees of his firm conducted similar auger hole K tests on site B.
40. On October 25, 1982, Noyes and an employee of his firm met with Cueto at the spray irrigation sites under consideration, to allow Cueto to observe the stream gauging techniques and to review the results to date.

41. On November 1, 1982, Heindel submitted to Garrity test pit logs for site F.
42. On November 14, 1982, Noyes wrote to Cueto for approval of the analytical technique which he proposed to use in order to determine whether spray irrigation sites A through F would comply with certain aspects of the threshold criteria and questioned how the threshold criteria would be applied.
43. On November 17, 1982, Wagner, Heindel and Noyes submitted a hydrogeological report entitled "Site F Sewage Disposal by Spray Irrigation for Hawk Mountain Corporation/I.P. Realty" to the Department.
44. On November 30, 1982, Garrity sent a memorandum to Dalmasse summarizing his technical review of the hydrogeologic report for Site F in which he stated that, "Based on an estimated 60 days of no spraying on winter days colder than 10° F, the annualized daily site capacity is 260,000 gpd."
45. On December 3, 1982, Phillips wrote a memorandum to Dalmasse attaching the technical review of the hydrogeological report for site F and advising that the Department did not require additional soils data at present and concurred with the analysis that the site had a substantial hydrologic capacity for spray irrigation. He also stated that the major issue which needed to be resolved in order to move ahead on the Hawk condominium project was how the threshold criteria were to be applied.
46. On December 20, 1982, Commissioner Ponsetto issued a memorandum explaining the Department's interpretation of the threshold criteria. Dalmasse subsequently wrote to Fretz on January 3, 1983 advising him of the Department's interpretation. He advised Fretz to contact Brierley if there were further questions regarding policy or the review of the Hawk condominium project.
47. In a telephone conference on January 12, 1983, Fretz told Brierley that he would like the Hawk condominium project to be grandfathered so that the threshold criteria would not apply. He indicated that he would send a letter outlining his concerns.
48. On February 8, 1983, Fretz wrote to Brierley that extensive work had been undertaken on the Hawk condominium project since April, 1982 and that spray irrigation methods of waste disposal should not be subject to the threshold criteria.
49. On February 24, 1983, Fretz wrote to Brierley submitting the final hydrogeologic study regarding site F prepared by Wagner, Heindel and Noyes. He requested the Department to confirm the report's evaluation of the capacity of Sites A,

B, and F for spray irrigation. The second paragraph of the letter stated: "You will note in the report that our investigations and work began in April, 1982. We feel that this situation meets both of the criteria set forth by Canute Dalmasse in his letter of April 21, 1982, and therefore request that this entire project be reviewed under regulations existing at that time." (i.e. the "old rules").

50. On February 24, 1983, Wagner, Heindel, Boedtger, Fretz and Crampton met with Brierley, Flanders and Dalmasse. As agreed at [the previous day's] that meeting, Crampton wrote to Brierley on February 25, 1983 requesting clarification of which rules would apply to the Hawk condominium project and stating that Hawk had expended considerable time, effort and money on the assumption that the "old rules" would apply.
51. On March 3, 1983 Fretz wrote to Brierley requesting that sites A, B, C, D and F be grandfathered because substantial work had been done on those sites.
52. On March 4, 1983, Commissioner Ponsetto, replied to Crampton's letter of February 25, 1983 setting forth the Department's conclusion that Hawk had initiated the Public Building Permit application process with regard to on-land sewage disposal by spray irrigation in conjunction with its condominium project under "old rules." Commissioner Ponsetto's letter noted that the Department's records indicated that the informal review process had been initiated with regard to sites A, B, C, D, E, and F prior to the effective date of the "new rules," and therefore all of these sites could be considered "grandfathered." The letter stated:

"In summary, we find that the Bear Mountain project is grandfathered from the September 10, 1982 rules and will be reviewed under the earlier part III rules. Spray site areas A, B, C, D, E, and F will be considered to be grandfathered and those sites will not be subject to evaluation under the 'Mt. Mansfield criteria provided spray irrigation disposal is employed in accord with the part III rules.

We do not consider any other areas of the Hawk Mountain, Bear Mountain project, to be grandfathered and any future projects in this area or any subsequent phases of this project will be reviewed subject to the September 10, 1982 rules."

53. In February, 1982, Hawk and IPR began discussing a joint venture development in the Bear Mountain area. The parties signed a letter of intent in August of 1982, and initialed a partnership agreement in February 1983.

54. In May, 1983, Hawk and IPR executed a partnership agreement forming the Sunrise Group (Sunrise) in the knowledge of and reliance upon the March 4, 1983 letter of Commissioner Ponsetto.
55. Pursuant to the partnership agreement, on October 27, 1983, Hawk conveyed the Green parcel to Sunrise, and on November 15, 1983, IPR conveyed a contiguous parcel of land to Sunrise.
56. Sunrise has established banking and financial relationships, including a loan commitment from the Bank of New York in the amount of \$80,000,000, a portion of which Sunrise has borrowed under the loan commitment.
57. On May 12, 1983, Vihinen wrote to Commissioner Ponsetto requesting the allocation of a portion of the assimilative capacity of the Ottaquechee River noting that the Sunrise condominium project was for approximately 550 condominium units generating in excess of 200,000 gpd of sewage to be built over a period of ten years. Vihinen further stated: "We are very close to requesting approval of the spray area "F". . ."
58. On May 26, 1983, Buzzell wrote to Brierley submitting a preliminary report outlining the wastewater treatment and disposal technology proposed for the Sunrise condominium project. Buzzell also noted that at that time the Sunrise condominium project would consist of 550 housing units at buildout, with Sunrise seeking a permit to proceed with construction of an initial 120 (plus or minus) units to be built over two years, and that the total Sunrise condominium project would generate 210,000 gpd of sewage.
59. On June 8, 1983, there was a meeting between Boedtke, Noyes, Vihinen, Willard and Flanders. During the meeting, the capacity of site F for spray irrigation was discussed. The results of the meeting were confirmed in a letter from Vihinen to Flanders dated June 8, 1983, detailing his understanding of the necessary steps leading to the issuance of a Public Building Permit.
60. On June 14, 1983, Brierley wrote to Vihinen in response to Fretz's letters of March 25, 1982 and March 3, 1983 and Crampton's letter of February 25, 1983 indicating that the Department had determined that the capacity of sites A, B, and F for the disposal of secondarily treated sanitary wastes by spray irrigation were 0 gpd, 4,143 gpd and 240,000 gpd respectively, provided that compliance with all other provisions of the "old rules" could be shown.

61. As of the date of this appeal, the specific capacity, if any, of sites C, D, and E for the disposal of secondarily treated sanitary wastes by spray irrigation had not been determined.
62. On June 15, 1983, Brierley wrote to Buzzell concerning the preliminary report submitted on May 26, 1983 indicating that the treatment processes and disposal alternatives referred to in that report were being reviewed under the "old rules" as agreed to in Commissioner Ponsetto's letter of March 4, 1983.
63. On June 23, 1983, Brierley wrote to Boedtger that the project had been grandfathered by Commissioner Ponsetto's letter of March 4, 1983 and that the project would be reviewed against the technical requirements of the "old rules", which do not make specific provision for innovative approvals.
64. On August 11, 1983, Sunrise filed its first application for a Public Building Permit in conjunction with its condominium project. This application was for a model condominium unit and reception center and did not require the approval of any sewage disposal facilities.
65. On November 7, 1983, Sunrise filed its second application for a Public Building Permit. This application was for the construction of 136 condominium units generating 57,900 gpd of sewage to be disposed of by spray irrigation on the Gondola site.
66. In response to Sunrise's November 7, 1983 application, the Department issued Certificate of Compliance No. 1R0501-3 on January 17, 1984 which approved under the "old rules" the following: construction of 112 condominium units containing 306 bedrooms, an off-site public water supply, a community wastewater treatment system consisting of a 9 million gallon combined treatment and effluent storage lagoon, 12,500 feet of effluent force main and an 11 acre spray irrigation site, all located in the Town of Sherburne, Vermont.
67. The 11 acre spray irrigation site, known as the Gondola site, had been previously grandfathered from the "new rules" at the request of Sherburne.
68. On April 20, 1984, Sunrise filed its third application for a Public Building Permit. This application was for the use of 100,000 gpd of site F's previously determined spray irrigation capacity. The Department commenced review of this application under the "old rules" in accordance with Commissioner Ponsetto's letter of March 4, 1983.

69. On June 4, 1984, Vihinen wrote to Flanders confirming Sunrise's understanding that the Department had agreed to separate the Certification of Compliance approving the use of 100,000 gpd of site F's capacity from the Certification of Compliance approving minor revisions to the sewage treatment plant itself and that a draft of Certification of Compliance #1R0501-4 approving site F could be picked up Friday, June 8, 1984.
70. Vihinen received a draft of Certification of Compliance #1R0501-4 on June 11, 1984. Paragraph 51 of that draft indicated that site F would be approved for 100,000 gpd of its capacity. The draft Certification of Compliance further indicated that the April 20, 1984 application was being reviewed under the "old rules".
71. On June 12, 1984, Vihinen and Brierley discussed by telephone the fact that the June 11th draft of Certification of Compliance #1R0501-4 did not refer to the previously approved Gondola site.
72. On June 14, 1984, Flanders wrote Vihinen on behalf of Brierley confirming that, at Vihinen's request, Certification of Compliance #1R0501-4 would not be issued as drafted on June 11th and that it would be amended to refer to both the Gondola site, previously approved on January 17, 1984 in the amount of 57,800 gpd, and site "F" in the amount of 100,000 gpd. The only reason that Certification of Compliance #1R0501-4 was not issued as drafted on June 11, 1984 was because of the request made by Vihinen on June 12, 1984, for some ministerial drafting changes not related to site F or the issue of whether the "old rules" or the "new rules" applied.
73. On June 21, 1984, Commissioner Ponsetto wrote a memorandum to Schultz advising him that the Department should ask for an opinion from the Office of the Attorney General regarding its position on the so-called grandfathering issue. He also inquired as to the status of Sunrise's pending application and whether the Department should hold the draft Certification of Compliance for site F until advice was received from the Attorney General's Office.
74. After consultation with the Attorney General's Office, at some time between June 21 and 25, 1984, the Department changed its previous administrative practice regarding how it determined when a Public Building Permit application should be considered to have been initiated for purposes of determining whether the "old rules" or "new rules" apply. The Department's new administrative practice was to rely on the date that a formal application for a Public Building Permit was filed and accepted as complete as determining whether the "new rules" apply.

75. On June 25, 1984, the Department applied this new administrative practice retroactively to Sunrise's April 20, 1984 application when it issued a second draft of Certification of Compliance #1R0501-4.
76. The second draft limited the approved capacity of site F to 40,000 gpd and indicated that the April 20, 1984 application was subject to review under the "new rules".
77. On July 6, 1984, Fretz and Keyser met with Commissioner Ponsetto, Brierley, Flanders, LaRosa and Kaplan.
78. On July 23, 1984, the Department issued Certification of Compliance #1R0501-4 in accordance with the second draft (June 25, 1984) along with a covering letter from Brierley which advised Fretz of the Department's decision to apply the "new rules" to the application for site F.
79. In his July 23, 1984 letter Brierley stated that the Department had reviewed the Gondola site and had issued Certification of Compliance #1R0501-3 under the "old rules" and that in the opinion of the Department this action fulfilled any obligation to Sunrise or Hawk arising from Commissioner Ponsetto's letter of March 4, 1983.
80. The Commissioner Ponsetto's letter of March 4, 1983 did not mention the Gondola site but rather referred only to sites "A, B, C, D, E and F.
81. During the period between Commissioner Ponsetto's letter of March 4, 1983, and June 25, 1984, the Department consistently indicated that applications for Public Building Permits involving sewage disposal by spray irrigation on sites A through F would be reviewed under the "old rules".
82. Sunrise and its predecessor undertook extensive work and incurred substantial expenses in evaluating the capacity of several potential spray irrigation sites both prior to March 4, 1983 and between March 4, 1983 and June 25, 1984.
83. The Vermont Administrative Procedure Act provides in pertinent part, that (3 V.S.A. §845(a)) "rules shall be prima facie evidence of the proper interpretation of the matter they refer to" and that (3 V.S.A. §845(b)):

No agency shall grant routine waivers of or variances from any provisions of its rules without either amending the rules, or providing by rule for a waiver or variance procedure. The duration of the waiver or variance may be temporary if the rule so provides.

84. The Secretary of the Agency adopted the "new rules" without any provision for granting waivers or variances from the applicability of those rules.
85. The Vermont Administrative Procedure Act at 3 V.S.A. §845(d) provides in pertinent part, that:

Rules adopted under this chapter shall take effect 15 days after adoption is complete or at a later time provided in the text of the rule or on its adopting page.
86. The Secretary of the Agency adopted the "new rules" without at the same time delaying their effective date. Thus no provisions were made for applications being prepared while the proposed amendments to the "old rules" were under consideration.
87. The Secretary decided to have the "new rules" take effect on September 10, 1982.
88. As adopted by the Secretary the "new rules" mandate, without qualification, that applications made after the effective date of September 10, 1982 are subject to review under those rules.
89. At all times relevant to this proceeding the Department under the supervision of Commissioner Ponsetto was the agency with the authority and duty to administer both the "old rules" and the "new rules".
90. In his capacity as administrator, Commissioner Ponsetto did not have the authority to change either the effective date of the "new rules" or their applicability to applications made after their effective date.
91. The Vermont Administrative Procedure Act defines (administrative) "practice" (3 V.S.A. §801(b)(7)) as:

a substantive or procedural requirement of an agency, affecting one or more persons who are not employees of the agency, which is used by the agency in the discharge of its powers and duties. The term includes all such requirements, regardless of whether they are stated in writing.
92. Administrative practices are sometimes not stated in writing and by their very nature are subject to change from time to time.
93. The Vermont Administrative Procedure Act establishes procedures by which an interested person may seek to have administrative practices adopted as either a written procedure or a formal rule.

94. The specific requirements of the Dalmasse letter, while illustrative of some of the practices followed by the Department in administering the Public Building Permit program, were superseded by subsequent acts and decisions made by the Commissioner and is therefore irrelevant to resolving this appeal inasmuch as any relevant reliance made by Sunrise at the time of the application in question was on the basis of Commissioner Ponsetto's letter of March 4, 1983.
95. The time and expense associated with the informal review process required by the Department's administrative practices and the extent of detailed technical information required to file a formal application for a Public Building Permit distinguishes that application process from other application processes where review occurs on a more conceptual level such as in zoning permit applications.
96. Commissioner Ponsetto was the duly authorized agent of the State charged with the duty of enforcing the rules. Concomitant with that duty is the charge of knowing the law and properly advising the public. My Sister's Place v. City of Burlington, 138 Vt. 602, 609 (1981).
97. At all times relevant to this proceeding Commissioner Ponsetto had the authority to review Public Building Permit applications in accordance with the applicable rules.
98. The authority to review applications includes the authority to interpret and apply the applicable rules. This authority includes determining whether or not an application was made on or before the date upon which the "new rules" became effective.
99. Insofar as he was determining the extent to which Hawk had initiated the application process as required by established Departmental practice (for the purpose of determining whether Hawk should be considered to have an application pending prior to the effective date of the "new rules") Commissioner Ponsetto was acting within the scope of his authority when he wrote his letter dated March 4, 1983 "grandfathering" sites A through F.
100. Commissioner Ponsetto's letter of March 4, 1983 is not a Declaratory Ruling in that it does not comply with the requirements of 3 V.S.A. §§808 and 809 and because the Commissioner lacks the authority to issue such a ruling regarding rules adopted by the Secretary of the Agency.
101. While the doctrine of estoppel must be applied with great caution when the government is the involved party, nonetheless when a government agent acts within his or her authority, the government can be estopped by the actions of that government agent.

102. The test of estoppel in this jurisdiction is whether in all the circumstances of the case, conscience and the duty of honest dealing should deny one the right to repudiate the consequences of his or her representations or conduct. Dutch Inn, Inc. v. Patten, 131 Vt 187 (1973).
103. At the time Commissioner Ponsetto wrote his letter of March 4, 1983, the Department knew the facts regarding the field work conducted by Hawk, as predecessor to Sunrise, on sites A through F.
104. The Board is unable to find that the Department's apparent confusion regarding the extent of the field work related to the review process conducted on sites A through F during various time periods is attributable to any deception by Sunrise or its predecessors.
105. Commissioner Ponsetto intended that his letter of March 4, 1983 be relied upon. Between March 4, 1983 and June 25, 1984 the Department repeatedly and consistently acted in such a manner that Sunrise had the right to believe that the Department intended Sunrise to rely on Commissioner Ponsetto's letter of March 4, 1983.
106. Sunrise had the right to expect that its April 20, 1984 application would be reviewed in accordance with the Department's administrative practices in effect at the time that application was formally filed and accepted as complete by the Department.
107. The Board concludes that the Department is estopped from applying its new administrative practice (regarding how it determines when a Public Building Permit application should be considered to have been initiated for purposes of determining whether the "old rules" or the "new rules" apply) to formal applications which were filed and accepted by the Department as complete prior to this change in administrative practice.
108. The Board concludes that the Department is estopped from applying its new administrative practice to Sunrise's April 20, 1984 application because that application had been filed, accepted as complete, and acted upon by the Department prior to the change in administrative practice.
109. Although Commissioner Ponsetto's letter of March 4, 1983 can be interpreted as exempting the amount of development necessary to completely utilize the combined waste disposal capacity of sites A through F from review under the "new rules," Sunrise cannot reasonably expect that such a determination, even if it were within Commissioner Ponsetto's authority, would apply for all time.

110. Regulatory programs, particularly those dealing with the complex problems of environmental protection, are constantly changing as new information becomes available. On that basis Sunrise could not reasonably expect that the test of fair dealing would allow them to forever utilize sites A through F to their potential capacity under the "old rules."
111. Regardless of what rules apply at any given point in time, the State is not prevented from subsequently enacting new rules that will apply to existing spray irrigation sites as long as such rules are fairly applied.
112. The Department has the authority to change its administrative practices.
113. Sunrise has no basis in law to expect that the Department's administrative practices for determining when a Public Building permit application should be considered to have been initiated for purposes of determining whether the "old rules" or the "new rules" apply would remain unchanged for the estimated ten year duration of either the Hawk condominium project or the Sunrise condominium project.
114. Sunrise has no basis for asserting estoppel on the basis of Commissioner Ponsetto's letter of March 4, 1983 for sites A through E or for site F in excess of the first 100,000 gpd of its capacity because no formal application for these sites had been filed or accepted as complete before the change in administrative practice.
115. To the extent they are not incorporated in the foregoing all Findings of Fact and Conclusions of Law proposed by the parties are hereby denied.

Done this 25th day of April, 1985, at Montpelier, Vermont.

Vermont Water Resources Board



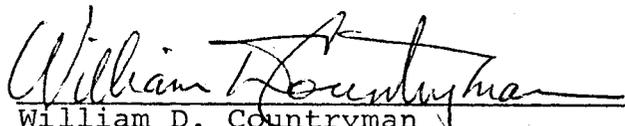
Gary W. Moore, Chairman



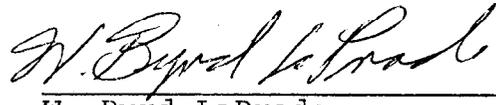
William Boyd Davies



Catharine B. Rachlin



William D. Countryman



W. Byrd LaPrade

Water Resources Board members
in favor of this decision:

Gary W. Moore, Chairman
William Boyd Davies
Catharine B. Rachlin
William D. Countryman
W. Byrd LaPrade

Water Resources Board members
opposed to this decision:

None