

STATE OF VERMONT
WATER RESOURCES BOARD

Re: Appeal of Albert and Marion Turner

Docket No. 90-08

Authority: 10 **V.S.A. §1024(c)**

INTRODUCTION

On May 8, 1990 Albert Turner (appellant) filed a Stream Alteration Permit Application with the Agency of Natural Resources, Department of Environmental Conservation, Division of Permits and Compliance (Department), seeking to perform a "gravel removal to improve stream flow to protect rock riprap on West and Northerly banks and lessen flood overflow of river." On July 25, 1990, Timothy J. Burke, Commissioner, Department of Environmental Conservation, forwarded a letter to appellant notifying him that the application was denied. This letter was signed for the Commissioner by Barry Cahoon, Stream Alteration Engineer. The basis for the denial was 10 V.S.A. §1021(c). On August 9, 1990, appellant filed a timely appeal under 10 V.S.A. §1024(c). A prehearing conference was held on August 27, 1990 and a proposed prehearing order was issued on December 21, 1990. A final prehearing order was issued on February 27, 1991.

Hearings were held on this matter on April 17, 1991 and June 19, 1991. Board members hearing the matter included David Wilson, Chairperson, Elaine Little, and Mark DesMeules. Appearances were made by the following parties:

- a. Albert Turner, Appellant
- b. Department of Environmental Conservation
- c. George Carpenter, Sr.

The Town of Waitsfield, a statutory party, was given notice of proceedings but did not make an appearance. Attorney Albert A. Raphael, Jr. represented the appellant and Attorney Mark Sinclair represented the Department. George Carpenter, Sr. represented himself.

At the initial hearing the Board considered the comments of Attorney Raphael submitted in writing December 31, 1990.

The Board considered the comments as a Motion to Amend the prehearing order and granted the Motion. The Board then amended the prehearing order, Section 2, Matters at Issue, as follows:

a. Whether the proposed gravel removal is exempt under 10 V.S.A. §1021(f).

b. Whether the proposed gravel removal is "primarily for construction or sale", as proscribed by 10 V.S.A. §1021(c); and, if it is not, whether the proposed project meets the requirements of 10 V.S.A. §1023.

FINDINGS OF FACT

1. Marion and Albert Turner own a farm in Waitsfield, Vermont which lies adjacent to the Mad River. They have owned this farm since 1955 and farmed the land continuously since that time.

2. In response to a major flood event in 1973, in which the appellants lost prime agricultural land, the appellants installed rock **riprap** along the bank of the Mad River in 1974, to prevent erosion and loss of farm land:

3. While the **riprap** has been successful in checking bank erosion, it has experienced damage and is in need of repair. The **riprap** will be capable of withstanding undercutting by the river only if the rock is extended several feet below the toe of the riverbank.

4. The appellants have removed gravel from the river eight times since 1976. The appellants have sold this gravel and have used funds from the sale to pay for the removal of the gravel and periodic repairs to the **riprap**. The appellants state that they are unable to afford to remove the gravel and repair the **riprap** without selling the gravel. The appellants will not use the gravel for backfilling along the **riprap**.

5. The appellants allege that removal of the gravel lessens the river flow, thereby **reducing** the damage caused by flooding, and reduces undercutting of the **riprap**. The appellants provided no technical or expert testimony regarding the effect of gravel removal on river flow and undercutting of the **riprap**.

6. Previous permit approvals of stream alteration applications of the appellants were granted prior to the implementation of the Department's Policy Statement on Stream Gravel Excavation. Since 10 V.S.A. §1021(c) was adopted, one stream alteration permit for removal of gravel was granted to the appellants.

7. The appellants stated that a third purpose of the gravel removal is to sell the gravel to provide funds to repair the rock riprap.

8. The Department performed a hydraulic modeling analysis (HEC-2) of the river site to determine the actual effects of the proposed gravel removal on flood conditions. The appellants agreed to the Department testing procedure. The testing was performed by a Department hydrologist.

9. The Department's testimony regarding the hydraulic modeling methodology and analysis was unrebutted.

10. Proposed gravel excavation will not reduce the river flood stage to a meaningful degree: gravel removal may reduce damage to improved property during flood periods because of reduced flow velocities and reduced scour potential: properly designed and installed riprap should successfully resist scour damage to improved property under normal flood conditions.

11. Flood stages will remain unchanged from present conditions if gravel removal is performed. Extensive dredging downstream of the proposed excavation would be required to reduce flood stages to any significant degree.

12. The appellants provided no technical or expert evidence to indicate that prior gravel removal was effective in stabilizing the streambank and lessening the flood crest.

13. Rehabilitation of the existing riprap is the most effective method to achieve the long term stability of the riprap and the river bank.

14. The primary result of the proposed project will be the sale of gravel for the purpose of funding riprap repair.

15. Stream gravel excavation is not an accepted agricultural practice (AAP) as that term is defined by the Commissioner of Agriculture.

16. The Department did not investigate whether the proposed gravel excavation (1) will adversely affect the public safety by increasing flood hazards, (2) will significantly damage fish life or wildlife, or (3) will significantly damage the rights of riparian owners. The section of the Mad River in question is not designated outstanding resource waters.

17. The appellants did not provide any technical or expert evidence that demonstrated that the gravel excavation would not (1) adversely affect flood hazards and public safety, (2) significantly damage fish or wildlife, or (3) significantly damage the rights of riparian owners. Appellants offered an opinion regarding the requirements of 10 V.S.A. §1023(a).

CONCLUSIONS OF LAW

18. Stream gravel excavation from the section of the Mad River adjacent to the property of the appellants is a change, alteration or modification of the course, current or watercourse within the boundaries of this state as defined in 10 V.S.A. §1021(a).

19. The drainage area of the Mad River at the appellants' property is greater than ten square miles.

20. Stream gravel excavation as proposed by the appellants is not an emergency protective measure necessary to preserve life or to prevent severe imminent damage to public or private property.

21. Stream gravel excavation as proposed by the appellants is removal of gravel from a watercourse primarily for construction or for sale in violation of 10 V.S.A. §1021(c).

22. The appellants' argument that they will not earn a "profit" from the sale of the gravel, because they will spend more on riprap repair than they receive from gravel sale proceeds, is not a relevant factor to the consideration of the proscription of 10 V.S.A. 51021(c).

23. An initial finding by the Secretary that a proposed removal of gravel from a watercourse is primarily for construction or for sale does not require the Secretary to make a written report concerning the effect of the proposed change in the watercourse as required by 10 V.S.A. §1023.

DECISION

Title 10 V.S.A. was amended in 1987 to add §1021(c) to Chapter 41, requiring that:

(c) "No person shall remove gravel from any watercourse primarily for construction or for sale."

The clear intent of this section is to prevent gravel removal unless there is some primary reason for the removal beyond use of the gravel for construction or for sale. Appellants have not offered any evidence to indicate that the proposed project is an emergency protective measure necessary to preserve life or to prevent severe imminent damage to public or private property. Title 10 v.s.a. §1021(b) is not in issue here.

The burden of showing the primary purpose for removing

gravel is upon the petitioner (here, appellants). Appellants have identified three reasons why gravel excavation is necessary: (1) lessening of the river flow velocity; (2) lessening of undercutting of the **riprap**; and (3) sale of the gravel to provide funds for **riprap** repair. The appellants have failed to meet their burden of proving that the primary result of removal of the gravel would be a lessening of the river flow velocity or a lessening of the undercutting of the **riprap**.

The Department offered testimony which was largely un rebutted that the gravel removal would not necessarily lessen river flow velocity measurably or lessen the undercutting of the **riprap**. Although Department testimony indicated that flow velocity may be temporarily decreased by as much as 10%, buttressing appellants' claims, a decrease in flow velocity would not necessarily contribute to a **lessening** of the undercutting of the **riprap**. This can only be accomplished through the proper repair and rehabilitation of the existing **riprap**.

Although the Board recognizes that the appellants' claim (that removal of the gravel will lessen flow velocity) is not totally unfounded, it also recognizes that removal of gravel will not accomplish the ultimate result that appellants seek, **i.e. permanent** protection of their property along the river bank.

Appellants, on the other hand, admitted that the gravel removed would be sold and the proceeds used to pay for **riprap** repair. Although the Board realizes that permitting the appellants to remove and sell the gravel might enable the necessary repairs to be performed on the **riprap**, such a decision would be contrary to the proscriptions of Title 10 V.S.A. §1021(c).

Further, although riprapping of farm fields is an acceptable agricultural practice, steps taken to protect that **riprap** are not necessarily acceptable agricultural practices. Not only will the gravel proposed to be removed not be used to shore up the existing **riprap**, but stream gravel excavation has been explicitly determined by the Commissioner of Agriculture to not be an acceptable agricultural practice. Hence, no exemption from the proscriptions of §1021 is available to the appellants.

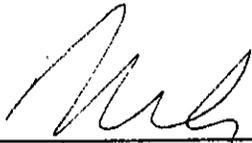
ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the Water Resources Board finds that the Department's denial of the appellants' stream alteration permit application

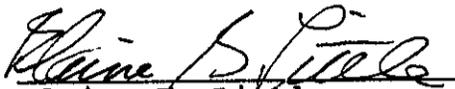
was proper.

Dated this 24 day of October, 1991.

The Water Resources Board



David M. Wilson, Chair



Elaine B. Little



Mark DesMeules