State of Vermont.
WATER RESOURCES BOARD,

In re: Ann and Paul DesLauriers, Docket No. EPR-93-05

Authority: 3 V.S.A. § 2873(c)(4)

MEMORANDUM OF DECISION

On June 16, 1994, Eric Fritzeen ("applicant"), through his attorney Liam L. Murphy of the firm Langrock Sperry & Wool, filed with the Water Resources Board ("Board") a Motion to Correct Decision. On July 5, 1994, the applicant filed with the Board a Motion to Supplement Record of Appeal. For the reasons stated below, the Board denies the applicant's two motions.

I. BACKGROUND

On August 4, 1993, Ann and Paul DesLauriers ("appellants") timely filed a notice of appeal with the Board, seekinggreview of the decision of the Department of Environmental Conservation ("DEC"), Agency of Natural Resources ("ANR"), concluding that Water Supply and Wastewater Permits #WW-4-0261-2 and #WW-4-0261-3 should not be revoked. On August 25, 1994, the applicant, represented by attorney John C. Gravel of the firm Bauer and Gravel, entered a notice of appearance in this appeal. The parties to this proceeding were the appellants, the applicant; and the ANR.

Following briefing by the parties, oral argument, and review of the record in this matter, the Board issued a decision on June 1, 1994. The Board reversed the decision of the DEC and remanded this matter for further revocation proceedings consistent with the conclusions in the Board's decision. In re: Ann and Paul DesLauriers; Docket No. EPR-93-05 (June 1, 1994) ("Decision").

On June 16, 1994, the applicant, represented by new legal counsel, Liam L. Murphy of the firm Langrock Sperry, & Wool, filed with the Board a timely Motion to Correct Decision. In accordance with Rule 29(B), the running of the time in which to appeal the Board's decision to superior court was stayed. On July 5, 1994, the applicant filed with the Board a Motion to Supplement Record of Appeal.

Oral argument on the applicant's two motions was scheduled and noticed for July 22, 1994. The applicant and ANR were provided an opportunity to file written responses to the applicant's motions. On July 13, 1994, the appellants filed with the Board a Memorandum in Opposition to the Motions to Supplement Record and to Correct Decision. The ANR did not file a response.

On July 21, 1994, the applicant filed a Motion to Remand for Further Proceedings, based on alleged deficiencies in the transcript of the ANR proceeding. On July 21, 1994, the appellants filed a Memorandum in opposition to the Motion for Remand. In

order to allow for the production of a corrected transcript and to give the parties ample opportunity to review the record and prepare for argument on all three of the applicant's motions, 'the Board continued oral argument to August 24, 1994.

Those present and offering argument on August 24, 1994, were the applicant and appellants, both represented by counsel. As a preliminary matter, the applicant withdrew his Motion to Remand, having concluded that any deficiencies in the transcript had been corrected. Therefore, argument was confined to the applicant's Motion to Correct Decision and Motion to.Supplement Record of Appeal.

The Board deliberated on August 24 and September 14, 1994; and directed its Chair to issue this decision.

II. ISSUES

1. Whether the decision of the Board, dated June 1, 1994, was in error on the following grounds and therefore should be corrected:

   a. The Board was factually incorrect that there was an impermeable silt layer and therefore the Board was incorrect in concluding that there, was not a three foot vertical separation as required by Environmental Protection Rule ("EPR")-7-07A(1)(e);

   b. The Board was incorrect in concluding that no evidence was presented regarding a change of grade which resulted in sufficient vertical separation to seasonal high ground water; and

   c. The Board was in error in concluding that the record did not contain the required percolation data.

2. Whether the Board should supplement the record on appeal with documents allegedly considered by the ANR in its decision below but not forwarded by the ANR to the Board for its review,.

III. DISCUSSION

A. Motion to Correct Decision

Rule 29(B) of the Board's Rules of Procedure provides that within 15 days of the date of the Board's final decision, a party may file a motion to "correct manifest error in the findings of fact, conclusions of law or order." The applicant filed a timely

motion requesting that the Board correct errors in its decision with respect to three factual determinations.

Rule 30(D) of the Board's Rules of Procedure, governing appellate proceedings; states in relevant part:

> Factual conclusions of the Agency [ANR] shall be upheld by the Board if evidence available to and presented to the Agency [ANR] fairly and reasonably supports those conclusions. The Agency's [ANR's] interpretation of statutes and rules shall be upheld if noterroneous.

In its decision, the Board determined that the record did not reasonably and fairly support the ANR's conclusions that: (1) the three-foot vertical separation distance required by EPR 7-07A(l)(e) between the waste disposal system and the impermeable silt layer had been met; (2) the three-foot vertical separation distance required by EPR 7-07A(1)(c) between the system and the seasonal high groundwater level had been met; and (3) the applicant had submitted'the proper percolation test data demonstrating the system's compliance'with the EPRs.

The Board, reached its conclusions based on the record which consisted primarily of the applicant's own submissions to the DEC. The applicant now asks the Board to reconsider its decision based on three alleged errors. Having considered the applicant's arguments and the appellants' responsive memorandum, the Board denies the Motion to Correct Decision.

1. Vertical separation between system'and impermeable silt layer.

The applicant argues that the Board erroneously concluded that that there is an impermeable silt layer at the site of the proposed leach field having a percolation rate of slower than 60 minutes per inch. Decision at 4. The applicant argues that this finding is not supported by the record. Indeed, he argues that the record supports the contrary conclusion - that the silt layer is permeable. In support of his argument, the applicant points to data allegedly demonstrating permeability of 136.8 feet per day, or a rate faster than 60 minutes per inch;

The Board does, not find the applicant's argument persuasive. The record of the proceeding below does not support the applicant's contention that there is a permeable silt layer. Indeed, the ANR found that "[t]here is no dispute that the silt layer is impermeable." Re: Eric Fritzeen, Petition for Revocation #WW-4-0261-2, Finding 13 at 4 (July 19, 1993). Moreover, the applicant did not contest this finding in arguments before the Board. Rather, the applicant conceded that the silt layer was impervious. See Reply

Memorandum at 9 (February 14, 1994).

The applicant asks the Board to consider testimony of his engineer contained in an affidavit supporting his Motion to Correct Decision as supporting the conclusion that the silt layer is in fact permeable. The Board declines to do so because this testimony is'not properly a part of the record on appeal and, additionally, because it is not relevant. The trench test referred to in the affidavitwas not designed to evaluate permeability of the silt layer but rather to evaluate permeability of the entire soil profile.

Therefore, the Board does not find manifest error in its factual determination that the silt layer in question is impermeable for purposes of complying with the vertical separation distance required by EPR 7-07A(1)(e).

2. Separation between system and seasonal high groundwater level.

The applicant argues that the Board was incorrect in determining that there was no evidence presented regarding a change of grade which resulted in sufficient vertical separationto seasonal high ground water. The applicant directs the Board to differences in *contours* and test pits identified *on* the'1988 and 1991 maps to support the conclusion that the site had been regraded, thereby bringing the disposal system into compliance with EPR 7-07A(1)(c).

The Board acknowledges that there are discrepancies between the 1988 and 1991 maps and that there was some testimony by the applicant's engineer in the hearing below regarding site'grading between 1988 and 1991 at the property in question. However, the applicant's, plans contain no fixed benchmarks, such *as* elevation to sea level, by which changes in elevation vis-a-vis specific test pits and observation wells in the area-of the waste dispose1 system can be compared. See Decision at 8-9. Moreover, the applicant did not supply necessary data to the DEC **in conformance with EPR 7-14 and obtain its prior approval for the location of a disposal system within a modified site. Therefore, site grading was.not a permitted method of bringing the applicant's site into compliance with the EPRs. See Decision at 9, fn. 2. In conclusion, what evidence there is regarding changes in site grade at the applicant's property do not disturb the Board's determination that the record before the ANR failed to fairly and reasonably support the conclusion that the'separation between the system and the seasonal high** *ground' water level* satisfies the requirement of EPR 7-07A(1)(c).

Therefore, the Board does not find manifest error in its determination, based on the record on appeal, that there is inadequate separation between the system and seasonal high groundwater level.

3. Percolation test data.

The applicant argues that the Board erred in finding that the record did not contain the required percolation data. The applicant directs the Board to permeability calculations from trench tests not in the record on appeal, but allegedly available to the ANR for its review.

Therefore, the Board declines to find manifest error in its determination that the applicant failed to provide the ANR with the percolation data required by the EPRs, specifically EPR 7-07A(1), Appendix 7-C, and EPR 7-08.

B. MOTION TO SUPPLEMENT RECORD OF APPEAL

The applicant asks the Board to supplement the record on appeal with documents allegedly considered by the ANR in its decision below but not forwarded by the ANR to the Board for its review. The Board finds that the applicant's request is untimely and not supported by good cause.

Rule 30(A) of the Board's Rules of Procedure states:

> The record on appeal shall consist of all documents and materials review or considered by the Agency [ANR] in making itsdecision. A list of documents and a copy of each shall be provided to the Board by the Agency [ANR] at the Board's request. Any party may supplement the record, with the Board's approval, with any materials which were before the Agency [ANR] but omitted from the Agency [ANR] document list or any material offered to the Agency [ANR] prior to and in respect to its decision but not considered by the Agency [ANR].

On October 21, 1993, the Board's staff circulated to all of the parties to this appeal a list of documents forwarded by the ANR to the Board as the record on appeal and informed them of the supplementation provision in Rule 30(A). At the prehearing, the parties were once again informed about the supplementation provision and provided an opportunity to file requests for supplementation by December 8, 1993. No party filed such a request by the stated deadline. Therefore, the record on appeal considered by the Board was limited to the documents and tapes forwarded by the ANR in October 1993.

The applicant claims that the documents it would have the Board now consider were "a part of the Agency's file." While these documents may have been a part of the entire set of records kept

by the ANR respecting the parcel of land now owned by the present applicant, they do not appear to have been a part of the record considered in the revocation proceeding which gave rise to this specific appeal. The applicant cannot expand the record on, review to includeevidence that was not-part of the official record of the contested case proceeding below. See 3 V.S.A. § 809(e),(g).

The applicant has not asserted that the evidence he would like included in the record is "newly discovered" nor has he offered other reasons which would require the requested relief such as evidence of misrepresentation or fraud. Rather, he has indicated that he was under the misapprehension that the Board had all of the documents available in the ANR files, and he offers in support an affidavit suggesting that his misapprehension was connected with the fact that he was represented by three different attorneys throughout this proceeding.

The Board does not find applicant's request supported by good cause. Therefore, the Board denies his Motion to Supplement Record of Appeal.[1]

IV. **ORDER**

The applicant's Motion to Correct Decision and Motion to Supplement Record of Appeal are hereby denied.

Dated at Montpelier, Vermont, this 14th day of September? 1994.

Water Resources Board,
by its Chair

William Boyd Davies

Concurring:

William Boyd Davies
Stephen Dycus
Ruth Einstein
Jane Potvin

[1] The applicant's motion included a request. that a transcript of the ANR's revocation.proceeding be made a part of the record on appeal. The tapes of the proceeding had been forwarded to the Board in October 1993 and are a part of the record. A corrected transcript of those tapes was prepared at the Board's request and is deemed a part of the record in this proceeding.