VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 23-ENV-00078

NEWSVT District Commission Appeal	Decision on Motions

This is an appeal by Don't Undermine Memphremagog's Purity, LLC (DUMP) of a June 1, 2023 permit amendment issued by the District #7 Environmental Commission (District Commission) to New England Waste Services of Vermont, Inc. (NEWSVT) for the construction and operation of a Phase III underdrain (Underdrain III) per- and poly-fluoroalkyl substances (PFAS) treatment system at property NEWSVT owns on Landfill Lane, Coventry, Vermont (the Property). Presently before the Court is NEWSVT's motion to dismiss DUMP's revised Statement of Questions and the pending appeal. DUMP opposes the motion. Further, NEWSVT moves to strike DUMP's sur-reply that was filed without leave of the Court. DUMP opposes the motion.

In this matter DUMP is represented by James A. Dumont, Esq. NEWSVT is represented by Matthew B. Byrne, Esq. and Timothy M. Eustace, Esq. The Natural Resources Board (NRB) is represented by Jenny E. Ronis, Esq. The Agency of Natural Resources (ANR) is represented by Elizabeth F. Lord, Esq.

Legal Standard

The pending motion is made both pursuant to Vermont Rules of Civil Procedure (V.R.C.P.) Rule 12(b)(1) and 12(b)(6). When reviewing a Rule 12(b)(1) motion, we accept "all uncontroverted factual allegations . . . as true and construe [them] in the light most favorable

to the nonmoving party." Rheaume v. Pallito, 2011 VT 72, ¶ 2, 190 Vt. 245 (citing Jordan v. State Agency of Transp., 166 Vt. 509, 511 (1997)).

A Rule 12(b)(6) motion for failure to state a claim may not be granted unless it is beyond doubt that there are no facts or circumstances that would entitle the Appellant to relief. Colby v. Umbrella, Inc., 2008 VT 20, ¶ 5, 184 Vt. 1 (citation omitted). When ruling upon such a motion, we take all well-pleaded factual allegations made by the nonmoving party, as true and "assume that the movant's contravening assertions are false." Alger v. Dep't of Labor & Industry, 2006 VT 115, ¶ 12, 181 Vt. 309 (citation omitted).

When the Court is presented with matters that do not begin with a complaint being filed, the Court will consider the factual allegations without specific limitation to a complaint. In re G & D, LLC Permit Application, No. 125-9-13 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. Div. Nov. 7, 2013) (Walsh, J.). Even so, when considering a Rule 12(b)(1) motion, a court may consider evidence outside of the pleadings. See Conley v. Crisafulli, 2010 VT 38, ¶ 3, 188 Vt. 11 (citation omitted). Conversely, if matters outside of the pleadings are presented in the context of a Rule 12(b)(6) motion, which are not excluded by the Court, "the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." V.R.C.P. 12(b)(7).

Discussion

The pending motion to dismiss follows DUMP's filing of a Revised Statement of Questions, which itself followed a November 8, 2024 Entry Order. The Revised Questions ask:

> 1. Was it error for the District Commission, and would it be error for this Court, to treat an application as a "minor" application under Act 250 Rule 51 even though Appellants raised substantive issues under Criteria 1, 1(B) and 1(G), where: a) there is existing and continuing Act 250 jurisdiction over the project tract; b) there is an ongoing discharge via Underdrain #3 into surface waters on that tract of untreated Arsenic, untreated Cadmium and untreated PFAS; c) the surface waters connect to the Black River and Lake Memphremagog; d) the discharges of Arsenic, Cadmium and PFAS via Underdrain #3 have never been the subject of an Act 250 permit or permit amendment; d) the

Department of Environmental Conservation Watershed Management Division has not issued a permit for the ongoing discharges via Underdrain #3 or for the proposed discharges via Underdrain #3; and e) the tract owner seeks an Act 250 permit amendment to treat some but not all of the pollutants already being discharged via Underdrain #3? The substantive issues are set forth in Questions 2 and 3.

2. Will the development meet applicable Department of Environmental Conservation regulations regarding the disposal of wastes under Criterion 1(B) (Waste Disposal) and in consideration of the provisions of Act 250 Rule 19?

A. Under Criterion 1(B), NEWSVT cannot meet its burden of proving that the discharge to surface water resulting from the project will meet applicable statutory and regulatory requirements; and

B. Under Criterion 1(B), NEWSVT cannot meet its burden of proving that the project will not involve the injection of waste materials or toxic substances into ground water or wells; and

C. Under Criterion 1(B), the Court, presiding de novo as if it were the District Commission, should exercise its supervisory authority consistent with the Environmental Board's and Supreme Court's In re Hawk Mountain decisions, 3WO347-EB (August 21, 1985); 149 Vt. 147 (1988) and order NEWSVT to obtain a discharge permit under Chapter 47 of Title 10.

3. Will the development violate the Rules of the Secretary of Natural Resources relating to significant wetlands under Criterion 1(G) (Wetlands) and in consideration of Act 250 Rule 19?

A. The wetland conditional use permit granted to NEWSVT was improvidently issued and does not establish presumptive proof under Act 250 Rule 19 of compliance with Criterion 1(G); and

B. NEWSVT cannot meet its burden of proving that the project will meet applicable statutory and regulatory requirements under Criterion 1(G).

See DUMP Revised Statement of Questions (filed on December 28, 2023).

This is an appeal of a minor permit amendment. At the core of this appeal is DUMP's assertion that this application should have been heard as a major permit amendment and its request for a hearing before the District Commission. Act 250 Rules, Rule 51(D) states that: "Upon receipt of a request for a hearing, the District Commission shall determine whether or not substantive issues have been raised under the criteria and shall convene a hearing if it determines that substantive issues have been raised. If the District Commission determines that substantive issues have not been raised, the District Commission may proceed to issue a decision without convening a hearing." "The burden of making this initial evidentiary showing is placed upon the requesting party, so that the [D]istrict [C]omission (in the first instance) or this court on appeal may 'determine[] that substantive issues have been raised.'" In re RCC Atlantic, Inc., No. 163-7-08 Vtec, slip op. at 8 (Vt. Super. Ct. Envtl. Div. May 9, 2008) (Durkin, J.). The requesting party, here DUMP, must demonstrate that their "concerns have some factual basis and are not solely based on speculation." Id.

Further relevant here, 10 V.S.A. § 6086(d) and Act 250 Rule 19 provide that certain permits create rebuttable presumptions of compliance with certain Act 250 Criteria. These include solid waste or hazardous waste certifications from ANR, Act 250 Rules, Rule 19(E)(1)(f), and a conditional use determination or permit with respect to activities in Class I or II wetlands or their buffer zones issued by ANR under 10 V.S.A. Ch. 37, Act 250 Rules, Rule 19(E)(5)(a), a construction discharge permit or approval for coverage by a general permit for stormwater runoff from construction sites issues by ANR under 10 V.S.A. Ch. 47, Act 250 Rules, Rule 19(E)(6)(a), and stormwater discharge permits issued by ANR, 10 V.S.A. § 6086(d).

NEWSVT has indicated that it is relying upon such permits to create a presumption of compliance with relevant Criteria. These presumptions are rebuttable. See In re Hawk Mountain Corp., 149 Vt. 179, 182 (1988). To rebut the presumptions created by the permits, opponents, here DUMP, must introduce admissible evidence that "allows a rational inference to be drawn" that the project will likely cause undue pollution under Criteria 1. Id. at 185—86. If a presumption is rebutted, "the applicant shall have the burden of proof under

the relevant criteria and the permit . . . shall serve only as evidence of compliance." Act 250 Rules, Rule 19(F).

The Court understands that the Questions DUMP presents seek both to: (a) argue that "substantive issues" exist to warrant a hearing (Question 1), and (b) rebut the presumptions created by the series of permits that NEWSVT has provided with respect to both the Property and the project (Questions 2 and 3).[1]

The present motion functionally argues the crux of the case: that DUMP cannot and has not shown a substantive issue that would warrant a hearing as a major permit application as required by Act 250 Rules, Rule 51 and DUMP cannot and has not rebutted the presumption of compliance with Act 250 Criteria 1 created by the various permits NEWSVT has provided. In connection with its Motion to Dismiss, NEWSVT provides a series of permits for the Property. In response, DUMP provides additional proposed exhibits. While the Court understands that the motion is one for dismissal, considering the substantial exhibits presented outside of the scope of the pleadings, and the fact that the motion functionally argues the substantive merits of the case as a matter of fact and law, the Court exercises its discretion under V.R.C.P. Rule 12(b) to convert the matter to one for summary judgment.[2]

In issuing this Entry Order, the Court reminds the parties of its conclusion set forth in the November 8, 2023 Entry Order that:

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[1] None of the Questions expressly state this issue. The issue is, however, clearly intrinsic to the Questions presented, particularly when viewed within the context of the briefing provided. See In re Jolley Assocs., 2006 VT 132, ¶ 9, 181 Vt. 190 (concluding that the Court can consider matters intrinsic to a Statement of Questions).

[2] The motion is one for dismissal under Rule 12(b)(1) and 12(b)(6). The motion does not fully parse out which arguments are made pursuant to Rule 12(b)(1) and which are presented pursuant to 12(b)(6) and the Court understands the arguments to be fully connected in this regard such that complete conversion of the motion is warranted. We further note that NRB argued that conversion of the pending motion was warranted here, and no party has objected thereto, despite four subsequent filings on the motion and related motion to strike.

Further, in reaching the conclusion that the pending motion must be converted, the Court has reviewed all filings to fully understand the scope of the dispute, including DUMP's disputed sur-reply and NEWSVT's opposed motion to strike and/or sur-sur-reply. Thus, NEWSVT's motion to strike is **DENIED**. The Court does, however, consider all filings as a part of the pending motion to dismiss.

> An Act 250 permit was previously issued for this discharge [from Underdrain III]. See NEWSVT Ex. 4. Thus, the extent that DUMP seeks to address the existence of the Underdrain 3 and the preexisting discharge, that is not before the Court in this appeal as it has been previously permitted and is final and binding.

In re NEWSVT Dist. Commission Appeal, No. 23-ENV-00078, slip op. at 4 (Vt. Super. Ct. Envtl. Div. Nov. 8, 2023) (Walsh, J.).

DUMP's opposition to the pending motion seeks to reject or challenge this Court's previous conclusion and argue that previous permits either did not address Underdrain III or did not address the pollutants DUMP's present appeal address. None of these assertions, however, argue that the pollutants at issue in the pending appeal were not present at the time that the previous permits were issued and instead seem to argue that the permits were insufficient because they did not address the at-issue pollutants. While the Court does not finally decide the issue in the pending motion, the Court struggles to understand how this assertion does not collaterally attack the sufficiency of the previously issued Act 250 permits, which is prohibited. 24 V.S.A. § 4472.[3] In any event, the Court restates its conclusion that the discharge from Underdrain III has been previously permitted by Act 250.

Because we convert the present motion to a motion for summary judgment, the parties must, by May 29, 2024, 30 days from the date of this Entry Order, present to the Court all material pertinent to such a motion, including statements of undisputed material facts and supporting materials. Any responses thereto must be filed 10 days after the initial filing.

[3] In its sur-reply, DUMP argues that § 4472 and the prohibition on collateral attacks is inapplicable in the Act 250 context. This assertion is inconsistent with Vermont law. The bar against collateral attacks has been applied to Act 250 permits since at least 1993. See In Taft Corners Assocs., Inc., 160 Vt. 583, 593 (1993); see also In re Champlain Parkway Wetland Conditional Use Determination, 2018 VT 123, ¶ 30, 209 Vt. 105 (noting that the doctrine of finality and the bar against collateral applies to municipal permits, Act 250 permits, and ANR permits) (citations omitted). Thus, DUMP may not collaterally attack the previously issued Act 250 permits as well as the previously issued ANR permits.

Given the extensive briefing that has been completed thus far on the pending motion, no subsequent filings will be allowed. At that time, the Court will deem the matter under advisement.

Electronically signed this 29th day of April 2024 pursuant to V.R.E.F. 9(D).

Thomas G. Walsh, Judge
Superior Court, Environmental Division