



PRE-HEARING CONFERENCE REPORT & ORDER

State of Vermont
Natural Resources Board
District 7 Environmental Commission
374 Emerson Falls Road, Suite 4
St. Johnsbury, VT 05819
<https://nrb.vermont.gov/>

[phone] 802-751-0120

CASE NO: 7R1377-2

LAW/REGULATIONS INVOLVED

10 V.S.A. §§ 6001 – 6111 (Act 250)

Boardwalk, LLC
c/o J. Hutchins, Inc.
88 Rogers Road
Richmond, VT 05447

I. Introduction

On March 27, 2020, Boardwalk, LLC filed application #7R1377-2 for a project described as a replacement asphalt plant with “blue smoke” air pollution controls, and addition of Air Pollution Control Permit to Construct and Operate, issued by the Air Quality & Climate Division of the Agency of Natural Resources. The project is located at 928 Vermont Route 58E in Irasburg, VT. A copy of the application and plans for this project are available for review online at the Natural Resources Board web site (<http://nrb.vermont.gov>) by clicking on "Act 250 Database" and entering project number 7R1377-2.

The Commission convened a prehearing conference for this application on May 29, 2020, for the purpose of identifying contested facts and legal issues, discussing party status, and determining a hearing schedule. Pursuant to Executive Order 01-20 and associated Addenda and Directives issued by Governor Scott based upon the coronavirus (COVID-19) emergency, this prehearing conference was conducted remotely via Microsoft Teams video conferencing software. The prehearing conference was conducted pursuant to Act 250 Rule 16, with Chair Eugene Reid presiding.

III. Party Status

1. The following persons are entitled to party status pursuant to 10 V.S.A. § 6085(c)(1):
 - A. The **Applicant**, by Jeff Hutchins and Liam Murphy, who attended the prehearing;
 - B. The **Town of Irasburg Planning Commission (Town PC)**, by Judith Jackson and Michael Sanville, who attended the prehearing and indicated that the Town PC would be participating under Criterion 1, 5, 6, 8, and 10;
 - C. The **Vermont Agency of Natural Resources**, by Karin McNeil, who attended the prehearing and expressed availability to assist with answering questions relevant to air emissions, Criterion 1;
 - D. The **Town of Irasburg**, by David Lahar and Mike Booth, who attended the prehearing, and expressed that the Town was monitoring the application;
 - E. The regional planning commission, **Northeastern Vermont Development Association**, by David Snedeker and Doug Morton, who attended the prehearing and indicated that Criteria 1, 5, and 10 appeared to be of interest
2. The following persons were present at the prehearing conference and through their written petitions and/or testimony requested party status. The Commission makes the following preliminary determinations concerning their party status, based upon the information received:
 - F. **Sean and Stephanie Harper** (525 Holy Moly Heights, Irasburg): Granted preliminary party status under Criteria 1, 5, and 8.
 - G. **Cindy Sanville** (1792 Vermont Route 58, W Irasburg): Granted preliminary party status under Criteria 1 and 8. Denied party status under Criteria 5 and 6 (failure to demonstrate a sufficiently particularized interest). Denied party status under Criterion 9(D) and 9(E) (scope of application does not encompass the quarry or earth extraction to which these criteria are relevant).
 - H. **Ashley Cleveland** (2224 Back Coventry Road, Irasburg): Granted preliminary party status under Criteria 1, 5, and 8.
 - I. **Patricia Lackie** (22 Walnut Drive, Irasburg): Granted preliminary party status under Criteria 1 and 8. Denied party status under Criteria 5 (failure to demonstrate a sufficiently particularized interest).
 - J. **Katharine M. Ellis Feuti and Mark A. Feuti** (84 Route 58 East, Irasburg): Granted preliminary party status under Criteria 1, 5, and 8.
 - K. **Louis and Mona Piette**, by L. Brooke Dingledine, Esq. (590 Holy Moly Heights, Irasburg): Granted preliminary party status under Criteria 1, 5, and 8.

- L. **Charles and Jane Fisher** (5810 Burton Hill Road, Irasburg): Granted preliminary party status under Criteria 1 and 8.
- M. **Justin Veysey** (201 Royer Drive, Irasburg): Granted preliminary party status under Criteria 1, 5, and 8 as it relates to potential for impact on Mr. Veysey's three minor children who attend the Irasburg Village School.
- N. **Evan Gentler** (336 Scott Lane, Barton): Granted preliminary party status under Criteria 1 and 8 as it relates to potential for impact on Mr. Gentler's minor daughter who attends the Irasburg Village School. Denied preliminary party status for his wife who is a teacher at the school and did not request party status.
- O. **Teresa Piette** (2419 Route 14, Irasburg): Denied preliminary party status under Criteria 1 and 8 (failure to demonstrate a sufficiently particularized interest, noting that Ms. Piette did not demonstrate a current relationship to the Irasburg Village School, for example Ms. Piette does not have family members who work or attend school at that location).
- P. **Lake Region Union Elementary-School District**: Granted preliminary party status under Criteria 1 and 8 as it relates to potential for impact on student and staff health due to air pollution emissions from the project, corresponding to the District's Irasburg Village School property. It is noted that the District's petition for party status (Exhibit 021) was untimely, was not objected to by the Applicant, and the Commission found cause to grant late preliminary party status, for the specific circumstances identified by the District, and in consideration of the current status of application review.

Pursuant to 10 V.S.A. § 6085(c)(6), the Commission will re-examine its party status decisions prior to the close of the hearing and will state its final party status decisions either in the decision it issues on the case or in a separate memorandum. Rule 5(d)(1) of the Vermont Rules for Environmental Court Proceedings sets out how a party or person denied party status may take an interlocutory appeal of a District Commission decision on party status.

Friends of the Commission: in all cases where the Commission denied party status, as identified above, the person is admitted to participate under the noted criteria, as a Friend of the Commission pursuant to 10 V.S.A § 6085(c)(5), and each is granted the rights of full participation allowed under 10 V.S.A § 6085(c)(5).

IV. Preliminary Issues

The following relevant issues have been identified, on which the applicant and all parties (for those criteria on which they have been preliminarily granted party status) should be prepared to provide testimony or submit supplemental documentary evidence prior to the hearing scheduled for **November 19, 2020**:

Air Pollution, Criterion 1 and 8: regarding emissions attributable to the new asphalt plant, particularly in comparison to the previously permitted plant.

The Commission notes its understanding that the new plant, which is the subject of this pending application, has already been installed and is operating, and this activity involves some initial plant “calibration” and some startup emissions testing.

The Commission is requesting assistance from the Agency of Natural Resources, to aid the Commission’s understanding of the Air Permit, and the air emissions from the new plant, and requests that one of its air quality experts please attend the Commission’s hearing.

The Commission has the following preliminary questions, for the Applicant, and for the ANR expert:

- (a) How do the air pollutant emissions from the new plant differ from the air pollutant emissions from the previously permitted plant, in terms of the specific pollutants, and the quantity and quality of pollutants emitted? Please include available test data.
- (b) Since the new plant has a higher production capacity (in comparison to the previously permitted plant), will there be a corresponding increase in the rate of air pollutant emissions (from the new plant, in comparison to the previously permitted plant), during plant operation for asphalt production, that would be attributable to the higher production capacity?
- (c) What are the primary sources of odors from the asphalt plant, that may be detected off-site, and what measures or technologies are available and recommended to control these odors?

In addition, the Commission has the following question for the Applicant:

- (d) When did operation of the new plant commence? (May 14, 2020? Other date(s)?) Please identify key dates for commencement of operations and testing of the new plant, so that interested parties can align this information with air quality information that the Commission understands has been collected by these other parties, for the new plant.

Traffic, Criterion 5:

The Commission has the following preliminary question, for the Applicant:

- (e) Since the new plant has a higher production capacity, explain why there is not a projected increase in peak hour traffic and/or any new traffic-safety-related impacts, resulting from increased rates of truck traffic, particularly near the Village of Irasburg School, or the village of Irasburg (where bicycle and pedestrian travel may occur)?

Aesthetics, Criterion 8:

The Commission has the following preliminary question, for the Applicant:

- (f) The project design includes additional plantings on the berm adjacent to the public road. The berm and proposed additional trees are not taller than those previously permitted, however the new asphalt plant is taller. Explain how the proposed measures are sufficient to visually buffer the increased height attributable to the new plant, in comparison to the old plant. Assess the need for additional visual buffering for other public viewshed points, from where the project might be seen, for example the Irasburg Village School or the village of Irasburg.

Parties and preliminary parties may ask other questions at the hearing. The Commission reserves the right to request additional evidence from the parties.

The Applicant shall provide a written response to question (a) to (f) above, on or before November 6, 2020.

V. Order

1. The Commission discussed the possibility of a remote hearing, in lieu of an “in-person” hearing, at the prehearing conference. The applicant, by Liam Murphy, stated its expectation that pre-filing of evidence and testimony, or presentation of evidence during a remote hearing, would likely be difficult. The Commission agrees that displaying and referencing new evidence during a remote hearing will likely be challenging, due to technology limitations etc. Attorney Brooke Dingleline stated her belief that the hearing could occur remotely, with pre-filing of evidence prior to the hearing, and the hearing focused on cross-examination, and emphasizing that it will be important to ensure that specific essential information is disclosed in advance, to thus allow for analysis and filing of her client’s evidence, prior to the hearing; the Commission has included question (d) above, in direct response to Ms. Dingleline’s request. If there is other essential information needed by Ms. Dingleline, in advance of the hearing, she should please submit the specific questions, in writing.
2. The hearing will be held via Microsoft Teams video conferencing software.
3. The video-conferenced merits hearing is scheduled for **November 19, at 6:00 PM**. The Commission intends to narrow the scope of the hearing to Criteria 1 (Air), 5 (Traffic), 8 (Aesthetics), and 10 (Town Plan), unless that scope is expanded by the Commission at the hearing.

The following persons or organizations may participate in the hearing for this project:

- a. **Statutory parties:** The municipality, the municipal planning commission, the regional planning commission, any adjacent municipality, municipal planning commission or

regional planning commission if the project lands are located on a town boundary, and affected state agencies are entitled to party status.

- b. Those persons granted preliminary party status, or friends of the Commission status, in section II above, on the criteria with respect to which each has been preliminarily granted party status.

To receive a Microsoft Teams invitation to the merits hearing videoconference via email, please email the State Coordinator (kirsten.sultan@vermont.gov) no later than November 12, 4:30 PM. If you are unable to participate using the Microsoft Teams platform, you may still call in to the conference with the following information:

- **Dial: 802-828-7667**
- **Enter Conference ID: 126 947 032 #**

During the merits hearing, should any hearing participant have technical difficulty using Microsoft Teams, or with the above phone conference option, please call the Coordinator at 802-751-0126.

4. A site visit will be held on **October 8, 2020 at 9:30 AM** with an initial meeting point commencing at the project site, which is located at 928 Vermont Route 58E in Irasburg, Vermont, from where private means of transportation may be required for potential travel to other locations. All site visit participants shall be required to observe the following protocol prior to, and during the site visit:
 - a. **On or before 4:30 PM on October 2, 2020, all prospective attendees must submit the following information, in writing (which may be via email to the Coordinator (kirsten.sultan@vermont.gov):**
 - (i) **the name and intent to attend the site visit;**
 - (ii) **that they will abide by the following protocol:**
<https://nrb.vermont.gov/documents/covid19-statement7>
 - (iii) **the exact location of points of interest, if any, that they request that the Commission travel to, during the site visit (which may include locations on the development tract and/or other off-site locations), and a brief description of what they want the Commission to observe from each such identified location. The location shall be identified as a street address, with a written description of the location where the Commission is to stand and observe, and may be supported by a map for additional clarification, if desired. The person requesting travel to any specific locations during the site visit is responsible for ensuring access permission from the landowner, in the case of any travel onto private property, noting that all site visit**

participants may travel to the identified points of interest, and thus may include persons other than the Commission and Act 250 staff.

- b. No more than 25 people may attend the site visit. If this attendance limit is reached, or expected to be reached, the Commission will limit site visit attendance to the Commission and Act 250 staff, and will provide notice to all of the prospective attendees, of this site visit limitation.
- c. If any portion of the site visit will be conducted inside, all occupancy limits established by the Agency of Commerce and Community Development must be followed even if that results in a limit of less than 25 people. See <https://accd.vermont.gov/content/maximum-retail-occupant-load-during-covid-19> (last visited September 17, 2020).
- d. No one may attend the site visit who has displayed the following CDC-recognized symptoms of COVID-19: cough, shortness of breath, difficulty breathing, fever, chills, muscle pain, sore throat, and/or new loss of taste or smell.
- e. No one may attend the site visit if they have had contact with a person diagnosed with COVID-19 unless they have self-quarantined for 14 days following such contact or 7 days followed by a negative COVID-19 test.
- f. All who attend the site visit must be in compliance with the current requirements for cross-state-travel. See <https://accd.vermont.gov/covid-19/restart/cross-state-travel> (last visited September 17, 2020)
- g. All who attend the site visit must observe strict social distancing of six feet.
- h. All who attend the site visit must wear face coverings over their nose and mouth when in the presence of others.
- i. All who attend the site visit must have access to either a hand washing station, consisting of soap and water, or hand sanitizer.
- j. All who attend the site visit must have completed a VOSHA-approved and employer-sponsored training program regarding COVID-19. Additional information about VOSHA-approved training may be found on the Vermont Agency of Commerce and Community Development's website. See <https://accd.vermont.gov/covid-19/business/restart> (last visited September 17, 2020).
- k. No more than three people shall occupy any single vehicle traveling to or from the site visit.
- l. All who attend the site visit must refrain from touching communal objects, including but not limited to site plans, unless they are cleaned and disinfected between each touch.

5. If the applicants or parties intend to present supplemental documentary evidence at the hearing, the applicants and parties shall provide those documents to the Commission by no later than **4:30 PM, November 6, 2020**. Those documents shall then be uploaded to the Act 250 database, so that all parties may review them in advance of the hearing, and refer to them online during the hearing, as necessary.

For each submission, the Commission requests that the above documentation be provided to all parties listed on the attached certificate of service and that one (1) digital version of the documentation be submitted to the District Commission Office. The Commission requests that the Commission's digital version be supplied as an email to the District inbox (NRB.Act250StJ@vermont.gov) or, if larger than 3 MB in size, uploaded to the NRB ftp site (<http://nrb.vermont.gov/documents/application-guide-act-250>). Any upload to the NRB ftp site should be followed up with an email to the District inbox and to the District Coordinator informing that the files have been uploaded.

This Prehearing Conference Report and Order is issued pursuant to Rule 16(C) and is binding on all parties unless a written objection is filed by **September 29, 2020 at 4:30 PM**.

Questions regarding this Prehearing Conference Report and Order can be directed to Kirsten Sultan, Coordinator, at 802-751-0126 or kirsten.sultan@vermont.gov

Dated this 18th day of September, 2020.

By /s/Eugene Reid
Eugene Reid, Chair
District 7 Commission

Other Commissioners participating in this decision:

Keith Johnson

Nicole Davignon

Any party may file a motion to alter with the District Commission within 15 days from the date of this decision, pursuant to Act 250 Rule 31(A).

Any appeal of this decision must be filed with the Superior Court, Environmental Division within 30 days of the date the decision was issued, pursuant to 10 V.S.A. Chapter 220. The Notice of Appeal must comply with the Vermont Rules for Environmental Court Proceedings. The appellant must file with the Notice of Appeal the relevant entry fee required by 32 V.S.A. § 1431.

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The appellant must also serve a copy of the Notice of Appeal on the Natural Resources Board, 10 Baldwin Street, Montpelier, VT 05633-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings.

Decisions on minor applications may be appealed only if a hearing was held by the district commission. Please note that there are certain limitations on the right to appeal, including appeals from Administrative Amendments and interlocutory appeals. See 10 V.S.A. § 8504(k), 3 V.S.A. § 815, and Vermont Rule of Appellate Procedure 5.

For additional information on filing appeals, see the Court's website at:

<http://www.vermontjudiciary.org/GTC/environmental/default.aspx> or call (802) 951-1740. The Court's mailing address is: Vermont Superior Court, Environmental Division, 32 Cherry Street, 2nd Floor, Suite 303, Burlington, VT 05401.

CERTIFICATE OF SERVICE

I hereby certify that I, Gina St Sauveur, Natural Resources Board Technician, District #7 Environmental Commission, sent a copy of the foregoing document Act 250 Pre-Hearing Conference Report & Order and Hearing Notice for Application #7R1377-2 Boardwalk, LLC c/o Jeff Hutchins, Inc., Irasburg VT by U.S. Mail, postage prepaid to the following individuals without e-mail addresses and by e-mail to the individuals with e-mail addresses listed, on this 18th day of September, 2020.

Note: Any recipient may change its preferred method of receiving notices and other documents by contacting the District Office staff at the mailing address or e-mail below. If you have elected to receive notices and other documents by e-mail, it is your responsibility to notify our office of any e-mail address changes.

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A handwritten signature in dark ink, appearing to read "Gina St Sauveur". The signature is fluid and cursive, with the first name "Gina" written in a slightly larger, more prominent script than the last name "St Sauveur".

Gina St Sauveur
Natural Resources Board Technician