

In the Matter of the Application for
a Mined Land Reclamation Permit
pursuant to Article 23 of the
Environmental Conservation Law for a
proposed mine in the Town of Milan,
Dutchess County,

**Ruling on Motion to
Reopen Issues Conference
Record**

by

RED WING PROPERTIES, INC.,

DEC #3-1336-00049/00001

Applicant.

April 29, 2008

SUMMARY

This ruling grants the request of the Town of Milan (Town) to include three additional exhibits in the issues conference record.

PROCEEDINGS

On February 29, 2008, I released my Ruling on Issues and Party Status in this matter. For more information regarding the proceedings prior to this date, please see this ruling.

Since the issues ruling, the issues conference participants, Staff of the Department of Environmental Conservation (DEC Staff), the applicant (Red Wing Properties, Inc.), the Town, and a citizens' group called Milan Concerns, have filed appeals and replies which are currently pending before the Commissioner.

DISCUSSION

By papers dated March 31, 2008, the Town of Milan moved to reopen the issues conference record to include three additional exhibits. These three exhibits are: (1) a copy of Milan Local Law #12 of 2006; (2) a copy of Town of Milan Local Law #2 of 2006; and (3) a copy of Milan Local Law #6 of 2006. Copies of these three local laws were provided with the motion papers.

The rationale provided by the Town for the inclusion of these three exhibits in the issues conference record is that by decision dated March 24, 2008, State Supreme Court Justice James V. Brands had declared null and void: (1) the Town's 2007 Comprehensive Plan; (2) the Town's local zoning law (Local Law #6

of 2007); and (3) the Town's local wetlands law (Local Law #7 of 2007). According to the Town, the effect of Justice Brands' decision was to cause the three 2006 local laws, which it seeks to enter into the issues conference record, to once again come into effect. Without the inclusion of these three laws in the issues conference record, there would not be an accurate reflection of the current law in the Town.

By papers dated March 31, 2008, Milan Concerns joined the Town in supporting the motion to include these three new exhibits.

A conference call occurred on April 7, 2008 with the ALJ and the issues conference participants. During this call a schedule was established for the applicant to file papers in opposition to the Town's motion as well as for the Town to respond. Also during this call, the participants agreed that the copies of the local laws attached to the Town's motion papers were accurate copies of the local laws.

By papers dated April 11, 2008, the applicant filed a letter in opposition to the Town's motion. In its letter, the applicant stated that the Town's argument was "both unconscionable and specious at best" and that the Town is legally and equitably estopped from asserting that the 2006 local laws are current law in Milan.

By papers dated April 18, 2008, both the Town and Milan Concerns responded. The Town argues the applicant misapprehends the law in this matter and contends that the three exhibits it seeks to have placed in the issues conference record are the current law in Milan. Milan Concerns echoes the Town's arguments.

By email dated April 21, 2008, the applicant requested an opportunity to respond to the April 18, 2008 submissions. By email dated April 23, 2008, I granted the request.

By papers dated April 25, 2008, the applicant filed another letter in opposition to the Town's motion.

RULING

Procedurally, the issues conference in this matter is completed and unless the Commissioner directs it to be reopened, the ALJ is finished with the issues conference record. Only the pending appeals will rely on the issues conference record. In essence the applicant is asking that the ALJ not include

information in the issues conference record so that the Commissioner cannot review it, although it is likely the Commissioner could review this information by taking official notice of the local laws (6 NYCRR 624.9(a)(6)).

I decline to limit the issues conference record in this fashion. The applicant's arguments go to the weight that should be given these local laws, not to their admissibility. The question of what is the local law in Milan at this time is not agreed among the participants and additional litigation on this point is not unlikely. The inclusion of these local laws in the issues conference record, as well as the arguments presented by the issues conference participants, will inform the Commissioner about this dispute as it currently exists, if it is relevant to deciding the issues conference appeals.

Participants are again reminded to keep the ALJ informed of all developments in this litigation as well as the other lawsuits that are ongoing regarding this proposed project.

Attached to this ruling is the revised issues conference exhibits list.

April 29, 2008
Albany, NY

/s/

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Administrative Law Judge

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ISSUES CONFERENCE EXHIBIT LIST
APPLICATION OF RED WING PROPERTIES, INC
DEC # 3-1336-00049/00001
(revised 4/25/08)

I/C Exh. #	Description
1	DEC Draft Permit 7/13/07 (to be superceded)
2	11 pages of aerial photos (approx location of MC members addresses)
3	1 page Town of Milan Population Figures
4	1 page (dbl sided) memo from R. Williams to Milan Town Board
5	16 pages (5 memos) from DC Dept of Planning and Development to Milan Town Board dated 8/8/05, 10/11/05, 1/24/06 (2), and 12/4/06
6	Town of Milan Comprehensive Plan 2007
7	4 pages (2 letters) from J.V. Talmage to R. Akeley dated 8/15/07
8	29 page Local Law #6, 2007: Town of Milan certified 8/13/07
9	1 page K. Wersted "experience summary"
10	1 page memo from K. Wersted to P. Griggs "sight distance comments" 8/14/07
11	2 page memo from P. Griggs to K. Bernstein "emission estimates" 8/10/07
12	1 page photo of "Stormville Turbo Sweep"
13	5 page excerpt from "Noise and Vibration ..." (including p. 113, 128, 129)
14	4 page (color) info on backup alarms from "BRIGADE"
15	6 page email (w/att) from Woodin to K. Bernstein dated August 8, 2007
16	1 page memo from J.P. Cowan to T.M. Mathes dated August 14, 2007
17	Undated aerial photo of 660 Turkey Hill Rd (Google) noise receptors
18	3 page letter from DEC Staff (Biegel) to F.J. Doherty dated May 28, 2004
19	Revised Draft Permit 8/24/07 6 pages
20	Town of Milan Local Law #12 of 2006
21	Town of Milan Local Law #2 of 2006
22	Town of Milan Local Law #6 of 2006