



June 17, 2011

Andy Weinberg and Joe Desena
Vermont Country Inn, Route 100, Pittsfield, VT, LLC
57 Tweed River Drive
Pittsfield, VT 05762

Re: Jurisdictional Opinion #3-141, Pittsfield
Land Use Permit #3W1024, Condition 16, Death Race 2011

Dear Andy and Joe:

This letter constitutes the Jurisdictional Opinion required by Condition 16 of Land Use Permit #3W1024. Condition 16 states:

Because the Death Race changes course and activities each year, the permittee shall obtain a jurisdictional opinion from the District Environmental Coordinator to determine whether an amendment to this permit is required. In the request for the opinion, the permittee shall provide sufficient information about the race, including, but not limited to, any earth disturbance, any activity within a stream or wetland or buffer, the route of the race, the time and date of the race, and the projected number of participants and spectators and other information related to additional Act 250 criteria [10 V.S.A. § 6086(a)(1) through(a)(10)].

As explained below, this Jurisdictional Opinion concludes that Challenge 10, as described in your Death Race 2011 challenge sheet, is a material change to the permitted project and will require an Act 250 permit amendment. However, if the goldfish carrying part of the challenge is eliminated and participants are required to legally catch a fish, then a permit amendment would not be required because that would not be a material change to the existing permit.

The facts I have relied on are those obtained in various communications between this office, the Agency of Natural Resources (including Rich Kirn, Fisheries Biologist), and yourselves between June 6, 2011, and June 17, 2011, as well as from the Department of Fish & Wildlife publications, a newspaper article, and our files.

FACTS

1. You have scheduled this year's Death Race from Friday, June 24, 2011, until the last participant completes the race on Monday June 27, 2011.
2. You expect 200 participants and 300 spectators.

3. You will be using the Amee Farm (both sides of the road), Riverside Farm, Jennifer Burch house (Hawk Lane), Bordens house (Lower Michigan Road), Colton Camp (Colton Camp Road), Top of Joe's Mountain, and Upper Tweed River Drive, Upper Michigan Road, and Long Trail North. You will be using the same race route as last year.

4. Over the course of the race, each competitor will be required to overcome certain obstacles, perform certain tasks, and navigate certain courses. Each athlete who finishes the race will have faced the same challenges as all others who finish but they may have faced them in a different time and different order. Over the course of the race, competitors will, among other things, carry sandbags, firewood, buckets of rock, buckets of water, split wood, perform certain tasks, tube down the Tweed River, run along existing trails, and overcome mental and physical challenges.

5. There will be no new earthwork.

6. Water activities include retrieving logs from a pond at the Amee Farm and the participants will tube down the Tweed River.

7. Athletes will ford the Tweed River in the same location as they did last year, in the area of the Riverside Farm at an existing access point.

8. One of the trails to be used is a snowmobile/bicycle trail that passes through a wetland area near Joe Fuster's bridge over the Tweed River. Both sides of the trail will be flagged to keep athletes from going off the trail.

9. You have revised Challenge 6 to involve moving rocks or stones that have been obtained from a quarry and are already on Joe Desena's property. Each athlete will not be moving 150 to 200 pounds of rocks from any stream or trail.

10. Challenge 10, scheduled for between 4:00 A.M. and 8 A.M. Sunday, involves athletes carrying a goldfish in a 5-gallon bucket filled with 4.5 gallons of water. The goldfish must be kept alive and if it dies there will be a penalty against the athlete. They will have a second chance to accomplish this challenge. The second time they try, they will carry 32 pounds and 4 gallons of water.

11. The surviving goldfish will be donated to a school after the race.

12. An article in the June 15, 2011, Bennington Banner daily newspaper quotes one of the participants, Travis Buttle, a Vermont Fish & Wildlife Game Warden, as explaining that each participant "has to show up with an ax or a maul, 10 feet of rope, a 10-foot tape measure, a hand drill with a half-inch bit, and one live fish."

13. The Tweed River is currently managed as a wild trout fishery and the Vermont Department of Fish & Wildlife does not recommend stocking of fish into these waters.

14. Goldfish are a restricted species in Vermont, meaning they cannot be transported into Vermont from other states and cannot be stocked (released) into any waters of the state including private ponds.

15. In the wild, goldfish will compete with native fish species for food and habitat. They thrive in warm water environments, they can easily survive the cold temperatures and low oxygen conditions found under the ice during a Vermont winter. Page 34 of *Baitfish of Vermont* published by the Vermont Fish & Wildlife Department.

16. As an alternative to using goldfish, you have revised Challenge 10 to require that each participant legally catch a fish.

Act 250 Rules

Rule 3, Jurisdictional Opinions

(A) Any person seeking a ruling as to whether an activity constitutes a development or a subdivision subject to the jurisdiction of 10 V.S.A. Chapter 151 (Act 250) may request a jurisdictional opinion (JO) from a district coordinator in the environmental district where the potential development or subdivision is located pursuant to the provisions of 10 V.S.A. § 6007(c).

Rule 2(C) Definitions

(6) "Material change" means any change to a permitted development or subdivision which has a significant impact on any finding, conclusion, term or condition of the project's permit or which **may** result in a significant adverse impact with respect to any of the criteria specified in 10 V.S.A. § 6086(a)(1) through (a)(10). [Emphasis added].

Conclusion

If each athlete is to carry around a goldfish during a segment of the race, there is the potential of one of 200 or so of the goldfish being released into the Tweed River or a tributary to the Tweed River. Even if the objective of the race is to return the goldfish to the race officials at the end of the race so that the goldfish could be donated to a school, there is still the chance that one or some of the participants unintentionally, or intentionally, releasing one or more goldfish into the waters of the state. The use of goldfish or any other species of fish brought to the site in one of the challenges for the Death Race is a material change to the existing permitted project (Land Use Permit 3W1024) because it "**may** result in a significant adverse impact with respect to" Criteria 1(E) Streams and/or 8A Wildlife Habitat. The reason for this is goldfish could negatively affect native species and also the Department of Fish & Wildlife does not recommend releasing even native fish in this river system which is being managed as a "wild trout fishery".

This decision means that if you want to use goldfish or any other species of fish brought from off site in your Death Race, you would need to amend the Act 250 permit so that the District Environmental Commission could review the application, hear evidence, and if convinced that there would be no adverse impact, then a permit would be issued with conditions protecting the fish habitat.

Jurisdictional Opinions are made by the coordinator, not the District Environmental Commission (Commission). The Commission issued Land Use Permit #3W1024 with a condition that required you to ask me for an opinion for the Death Race each year. If goldfish were released into the Tweed River or a tributary and ended up decimating the wild trout population, it would be impossible to "put the toothpaste back in the tube." Our wild and natural fish populations are important to Vermonters.

If you eliminated the goldfish part of the challenge and required the athletes to legally catch a fish, then there would be no material change and a permit amendment would not be required for this year's Death Race. This does not imply that other permits or licenses may be required.

Sincerely,



Linda Matteson
District Coordinator

cc: Service List

Reconsideration requests are governed by Act 250 Rule 3(B) and should be directed to the district coordinator at the above address.

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 (VRECP). The appellant must file with the Notice of Appeal the entry fee required by 32 V.S.A. § 1431 and the 5% surcharge required by 32 V.S.A. § 1434a(a), which is \$262.50 as of January 2011.

The appellant must also serve a copy of the Notice of Appeal on the Natural Resources Board, National Life Records Center Building, Montpelier, VT 05620-3201, and on other parties in accordance with VRECP 5(b)(4)(B).

For additional information on filing appeals, see the Court's website at: <http://www.vermontjudiciary.org/GTC/environmental/default.aspx> or call (802) 828-1660. The Court's mailing address is: Superior Court, Environmental Division, 2418 Airport Road, Suite 1, Barre, VT 05641-8701.