



Natural Resources Board
District #4 Environmental Commission
111 West Street
Essex Jct., Vermont 05452

April 14, 2011

Bryan Wright
Chittenden Solid Waste District
1021 Redmond Road
Williston, VT 05495

RE: Jurisdictional Opinion #4-227
CSWD Burlington Compost Transfer Station, Burlington Vermont

Dear Bryan:

This jurisdictional opinion is written pursuant to your written request of December 6, 2010 regarding the applicability of Act 250 jurisdiction over the proposed use of a portion of the Burlington Electric Dept. facility on Intervale Road in Burlington as a transfer station for compostable waste. I have based my analysis on your Jurisdiction Opinion request submittals, files in our office and subsequent discussions with ANR technical staff. For the reasons set forth below, I have determined that an Act 250 permit is not required for construction of the transfer station as proposed.

Facts

1. Chittenden Solid Waste Division ("CSWD") proposes to expand the yard waste bunker at the McNeil Generating Station on Intervale Road. Currently the Burlington Electric Department ("BED") and CSWD have an Agreement where BED operates a depot that collects two different materials, clean waste wood that is process (ground) to be used as fuel for the generating plant and yard waste that is aggregated in a bunker and later transported by CSWD to the formerly nearby compost facility.
2. The current 28' x 15' yard waste bunker is proposed to be replaced with a new one measuring 80' x 40'. The bunker will be constructed on the existing ground surface using 2' x 2' x 6' interlocking concrete blocks. The opening of the bunkers would be located away from the direction of flow of floodwater which should minimize the chances that material stored in the bunkers would wash downstream. The term of the lease is at least five years.
3. The Joseph C. McNeil Generating Station's Certificate of Public Good was approved by the Vermont Public Service Board on September 14, 1981. The McNeil Station is now jointly owned by BED (50 percent), Central Vermont Public Service (20 percent), Vermont Public Power



Supply Authority (19 percent) and Green Mountain Power (11 percent). The tract of land is almost 200 acres. Land Use Permits #4C0516 and #4C0516-EB-1 were issued on August 5, 1982 and April 13, 1983, respectively to the City of Burlington. The permits authorized the construction of a resource recovery facility to convert municipal refuse to hot water on the McNeil property. Those permits were abandoned on December 2, 2002.

4. On January 29, 2007, The District #4 Coordinator issued JO #4-207 stating that an Act 250 permit was required for the construction at the Intervale Compost facility (“ICP”), located across the road from the McNeil plant. Subsequent to the triggering event for Act 250 jurisdiction at ICP, an expansion of the facility occurred, with permission, on land owned by BED, located north of ICP. JO #4-207 Reconsideration 2 was issued on May 5, 2007 and established that the entire Rena Calkins Farm (ICP land and other parcels) plus the contiguous parcels of the City of Burlington on which ICP operations were occurring are subject to Act 250 jurisdiction. Subsequently, LUP #4C1206 was issued on November 19, 2008 for construction of stormwater treatment facilities, show gardens and a pedestrian path which established Act 250 jurisdiction on the involved lands.
5. On October 5, 2010, the District #4 Commission issued LUP #4C0400-19 to CSWD to construct an Organic Material Processing Facility (“WOMPF”) on a 11-acre parcel at the CSWD property on Redmond Road in the Town of Williston. This facility is located approximately 6½ miles from the McNeil plant.
6. According to the Preliminary Chittenden County Digital Flood Insurance Rate Map, the area is located in, but at the fringe of, the inundation floodplain - zone AE.
7. The proposed Project area consists of fill placed on top of the original surface during the construction of the McNeil Generating Station. Improvements to the area for the compost transfer station will not impact any soil layers present below the fill. Therefore, the Division for Historic Preservation concluded that this project will have no effect on any historic sites listed on or eligible for the State Register of Historic Places.
8. The ANR Solid Waste Division has circulated a draft Solid Waste Management Facility Certification #CF-075 with an end of the public comment period on April 28, 2011. That permit specifies that all food residuals shall be stored in covered containers and that all food residuals shall be processed and/or transported at a minimum of two times per week. The frequency shall be increased to minimize odors or other nuisance conditions.

Issues

Does the proposed use of a portion of the Burlington Electric Dept. facility on Intervale Road in Burlington as a transfer station for compost waste require an Act 250 permit or amendment?

Analysis

Act 250 jurisdiction is triggered by either “development” or “subdivision”. “Development” is defined, in part, as “The construction of improvements on a tract or tracts of land, owned or controlled by a person,

involving more than 10 acres of land within a radius of five miles of any point on any involved land, for commercial or industrial purposes in a municipality that has adopted permanent zoning and subdivision bylaws.” (10 V.S.A. § 6001(3)(A)(i)).

We consider the CSWD to be a person, pursuant to 10 V.S.A. § 6001(14). The property is greater than 10-acres in size. CSWD is a commercial purpose. However, CSWD is also considered a municipality because it is a governmental incorporated unit, pursuant to 1 V.S.A. § 126 and Act 250 Rule 2(C)(14). Therefore, development is treated under 10 V.S.A. § 6001(3)(v) and the trigger is whether the construction of improvements on a tract of land involves more than 10 acres that is to be used for the municipal purposes. Since the proposal would involve less than one acre of disturbance, jurisdiction is not triggered under this statute definition of development.

There is a second way that jurisdiction on this property could be triggered. If the proposed project is a material change to CSWD’s permit for the Williston Organic Materials Processing Facility (“WOMPF”) which was issued Land Use Permit #4C0400-19. Act 250 Rule 3(C)(6) defines a material change as 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 an impact with respect to any of the criteria specified in 10 V.S.A. § 6086(a)(1) through (a)(10). The concept of transfer stations was not part of the WOMPF application nor is it instrumental to WOMPF’s operations. The Burlington transfer station is located more than 5 miles from the WOMPF facility and therefore cannot be considered involved land, pursuant to Act 250 Rule 2(C)(5). The main criteria where the transfer station could have an impact are Criteria 1, 1D and 8. The State’s technical staff has either determined that there is little to no potential for impacts under these criteria or has proposed conditions in a decision such that there is little chance of an impact. Since the transfer station is not a change which has a significant impact on any finding, conclusion, term or condition of the project's permit, I determine that construction of the Burlington transfer station is not a material change to the WOMPF permit (LUP #4C0400-19).

In this case, there is a second permit to which this Project may be considered a material change. Act 250 jurisdiction attached to BED land that was *involved* (Act 250 Rule 2(C)(5)) with the ICP project. However, the McNeil plant parcel is located across Intervale Road from the involved BED land. Therefore, it is not considered contiguous because they are not physically adjacent parcels. *In re: Rivers Dev. Act 250 Appeal*, 68-3-07 Vtec, Decision on the Merits at 66-67 (3/25/10); *Keith Van Buskirk*, Declaratory Ruling #302, Findings of Fact, Conclusions of Law and Order at 6 (Vt. Env. Bd. August 15, 1995). Since the McNeil parcel is not contiguous to BED land on which there is Act 250 jurisdiction, it is not involved land and there is not Act 250 jurisdiction on the McNeil parcel. Therefore, construction of the transfer station on the McNeil parcel cannot be considered a material change to the issued ICP project permit.

Another way that the Project could trigger Act 250 jurisdiction could be if the project is a substantial change to a pre-existing development. Act 250 Rule 3(C)(7) defines substantial change as any change in a pre-existing development or subdivision 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). *In re: Taft Corners Associates, Inc.*, 160 Vt. 583, 592 (1993). However, the McNeil plant is not a pre-existing development. Although constructed in the early 1980s, it is an exempt development. *In re: Glebe Mountain Wind Energy, LLC*, No. 234-11-05 Vtec. This decision stated that the Legislature intended that the Public Service Board, not

Act 250, review Section 248 projects, like the McNeil plant. Since McNeil is not a pre-existing development, the construction of the transfer station cannot be a substantial change to that development.

Conclusions

Therefore, I conclude that the construction of the Burlington compost transfer station does not trigger the need for an Act 250 permit amendment.

This is a jurisdictional opinion issued pursuant to 10 V.S.A. § 6007(c) and Act 250 Rule 3(B). 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 clerk of the Environmental Court within 30 days of the date of issuance, pursuant to 10 V.S.A. Chapter 220. The appellant must attach to the Notice of Appeal the entry fee of \$225.00, payable to the State of Vermont. The appellant must also serve a copy of the Notice of Appeal on the Natural Resources Board, National Life Records Ctr. Bldg., Drawer 20, Montpelier, VT, 05620-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings.

For further information, see the Vermont Rules for Environmental Court Proceedings, available on line at www.vermontjudiciary.org. For further information, see the Vermont Rules for Environmental Court Proceedings, available on line at www.vermontjudiciary.org. The address for the Environmental Court is: Environmental Court, 2418 Airport Rd., Suite 1, Barre, VT 05641-8701. (Tel. # 802-828-1660)

If you have any questions regarding this jurisdictional determination, please call me at (802) 879-5658.

Sincerely,

/s/ Peter e. Keibel
Peter E. Keibel
District #4 Coordinator

cc: Lou Borie, Executive Director, NRB
John Hasen General Counsel, NRB
Cathie Jamieson, ANR Solid Waste Division
Scott Dillon, Division of Historic Preservation
Paul O'Leary, O'Leary-Burke Civil Associates