Natural Resources Board
District #5 Environmental Commission
5 Perry Street, Suite 60
Barre, VT 05641-4267

January 8, 2009

Dale E. Percy, Inc.
Attn: Chip Percy
269 Weeks Hill Road
Stowe Vermont 05672

Re: Jurisdictional Opinion 5-02
Percy Inc. Gravel/Sand Extractions and Quarry, Town of Morristown

Dear Chip:

This letter constitutes a Jurisdictional Opinion pursuant to the provisions of 10 V.S.A. 6007 and Natural Resources Board Rule 3. Inquiry relative to jurisdiction under Act 250 was initially made on April 23, 208 by Town of Morristown resident Alton McFarlane and a subsequent request for a Jurisdictional Opinion was made by Agency of Natural Resources Environmental Enforcement Officer Sean McVeigh. A proposed Jurisdictional Opinion was circulated on May 21, 2008 for comments to you, the town, the Lamoille County Planning Commission, the Agency of Natural Resources and Alton McFarlane on the factual content and jurisdictional analysis. Comments were requested by June 2, 2008. Your comments are set out in a letter dated June 3, 2008. No other person filed comments. The facts relied upon in the issuance of this proposed Jurisdictional Opinion are those obtained by the investigation of Environmental Enforcement Officer McVeigh and provided in your letter.

This Jurisdictional Opinion concludes that 1) there are inadequate facts to establish an average annual "pre-existing" extraction rate of more than 17,500 cubic yards 2) by 1970 an increase in the average annual extraction rate to 25,102 cubic yards and the introduction of a crusher at the site in 1977 triggered the need for a land use permit and 3) the commencement of blasting and rock processing in 1980 also triggered the need for a land use permit.

FACTS

1. On June 30, 1971, Dale Percy and Paul Percy acquired from Howard Manosh a tract larger than 10 acres in area off Cochran Road in the Town of Morristown.

2. The tract is a portion of what was a larger property of approximately 100 acres owned by Winston and Gloria Cochran since at least 1968.

3. A segment of the property was utilized for gravel and sand extractions prior to 1970. A USDA orthophoto from 1963 appears to show an extraction area in the southeastern corner of the tract in the approximate area of a current stockpile area and a stump dump referenced below in this jurisdictional opinion.

4. Percy, Inc. has maintained records of material extracted from the tract. The following extraction volumes took place from 1968 to 1971:

Year		Volume
1968	-	16,791 cubic yards
1969	-	18,336 cubic yards
1970	-	25,102 cubic yards
1971	-	23,569 cubic yards

5. Percy, Inc. contends that it was one of three companies that hauled from the pit prior to 1971. While Percy, Inc. asserted that its extractions during the years 1968-1971 were less than half of the total extraction during those years, no proof of that assertion has been provided. The only available proof of extraction rates at this tract is that performed by Percy, Inc.

6. Percy, Inc. has estimated that since acquisition of the tract, the average annual minimum extraction rate of gravel and sand was 50,000 cubic yards. The sources of gravel and sand have now been largely exhausted.

7. Extraction of stone, and related blasting, began on the tract in approximately 1980. The estimated minimal annual extraction rate for stone is 5,000 cubic yards. In 1984, the extraction rate for stone was 15,000 cubic yards.

8. Stone extraction at the quarry was essentially dormant from 1995 to 2000. Percy, Inc. records reflect that a total of approximately 75,000 cubic yards of stone has been extracted from the site since 1980.

9. The quarry operation on the tract involves approximately 2 acres. The majority of the 50 acre tract has been cleared of vegetative cover over the years.

10. Equipment in use on the site as of April 2008 included heavy earth moving equipment and a crusher. A drilling rig and associated equipment is employed for blasting.

11. The tract is also utilized as a stump dump which is the subject of a Categorical Disposal Certification issued on March 13, 2007 by the Department of Environmental Conservation.

12. The Department of Environmental Conservation issued authorization on May 25, 2007 for discharge of stormwater on the site pursuant to the Multi-Sector General Permit.

13. A mobile home park with approximately 30 units is situated across Cochran Road from the project site. The park does not appear on a 1963 USDA orthophoto; it is shown on a 1974 orthophoto.

14. At a date uncertain, the Department of Environmental Conservation designated a source protection area (SPA) for the well serving the mobile home park. The SPA was depicted on an Agency of Natural Resources orthophoto and it encompassed most of the Percy tract, including the quarry area. That SPA was replaced in early 2008 with a SPA apparently with limited involvement of the Percy, Inc. site.

15. A review of orthophotos from the period 1963 through 2006 indicates that while project expansion across the tract was continual, incremental site reclamation or rehabilitation did not result.

16. The Town of Morristown has both duly adopted zoning and subdivision bylaws.

CONCLUSIONS

The extraction of earth resources for a commercial purpose requires a land use permit as "development" under Act 250. [10 V.S.A. 6081(a); Agency of Natural Resources vs. Duranleau 159 Vt 233 (1992)]. Exempt from this statutory requirement are developments commenced

prior to June 1, 1970 unless the development has undergone a “substantial change” [10 V.S.A. 6081(b)].

Natural Resources Board Rule 2(c)(7) defines “substantial change” as “any change in a pre-existing development or subdivision which may result in significant impact with respect to any of the criteria specified in 10 V.S.A. Section 6086(a)(1) through (a)(10)”.*

Persons who seek exemption from statutory permitting requirements bear the evidentiary burden of proof to qualify for such an exemption [Re John Gross Sand and Gravel Declaratory Ruling 280 (July 28, 1993)].

Gravel and Sand Extractions

Increases in the pre-existing extraction rate at an earth resource project is a factor - but not the sole determining factor - in whether a project has undergone a “substantial change”. A ruling of “substantial change” cannot be based solely on an increase in the extraction rate where it is unlikely that the increase significantly contributed to impacts under the Act 250 criteria [Dale E. Percy, Inc. Declaratory Ruling 251 (March 26, 2991)], although an increase of more than 10% in excess of the pre-existing range could be a “substantial change” if accompanied by other potential impacts under the criteria [Howard A. Manosh Declaratory Ruling 163 (August 1, 1984)]. It has been held that an increase in the extraction rate of a pit, along with the addition of a gravel crusher, constituted a “significant change” requiring a permit [Rick Harootunian Declaratory Ruling 198 (March 2, 1988)]

A fundamental consideration is the pre-existing extraction rate. Without establishing that rate, it cannot be determined whether a future operation will constitute a “substantial change” [In re: Tucker Inc. 149 Vt 551 (1988)]. In order to maintain pre-existing status, a gravel pit operation must not only assert that the pit was in existence as of June 1, 1970 but must also prove what the pre-existing annual rate of extraction was. (Gross supra)

The evidence available for issuance of this Jurisdictional Opinion demonstrates that the average annual rate of gravel and sand extraction prior to 1970 was approximately 17,500 cubic yards. In 1970 the extraction rate was 25,102 cubic yards, an increase of 6,766 cubic yards or 38%. The evidence further shows that following 1977, the average annual extraction rate was 50,000 cubic yards and that a crusher was in use at the site.

Applying the above referenced Environmental Board precedents to the available facts, the following conclusions are reached relative to sand and gravel extractions at this tract:

1. That facts have been established to qualify for a pre-existing average annual extraction rate of approximately 17,500 cubic yards.

2. That by the end of 1970, the annual extraction rate had increased by 6,766 cubic yards, or 38%.

3. That following 1977 the average annual extraction rate of 50,000 cubic yards and the use of a crusher constituted changes in the operation with potential significant impacts under at least criterion 9(E) and possibly criterion 3.

* Natural Resources Board Rule 2(C)(7) was promulgated in 2007 and is the successor of Environmental Board Rule 2(G). The provisions in both rules are identical except for the insertion of “pre-existing” in 2007. Thus, case precedents cited below which relied on Rule 2(G) remain valid despite adoption of Rule 2(C)(7).

Therefore, "substantial changes" with potential significant impact under at least criterion 9(E) have resulted under the provisions of Natural Resources Board Rule 2(C)(7) and, accordingly, a land use permit was required for extractions on this site by at least 1971 pursuant to 10 V.S.A. 6081(b).

Stone Quarry Operation

Over the course of more than 30 years, the Environmental Board issued a line of jurisdictional decisions dealing with changes at pre-existing earth extraction sites that were found to be "substantial" under what was then Rule 2(G). Such changes included the addition of a rock crusher (Howrigan, supra), addition of a rock splitter [Carrara and Sons 1R0589-3-EB (February 2, 1994)], addition of mechanized equipment "and dramatic increase in extraction rate" [Manosh Corporation Declaratory Ruling 164 (April 17, 1985)], and installation of alternative access road, settling lagoons, and wash plant [Tucker Declaratory Ruling 165 (February 27, 1985)].

The Board apparently never had cause to specifically consider whether the commencement of blasting and related quarry operations at a pre-existing gravel pit constituted "substantial change". The District 5 Environmental Commission has adjudicated the potential impacts of blasting and related rock processing at quarry sites in contested application cases and has stated findings and conclusions that such impacts are recognized under at least criteria 1 (Air) (dust), 3 (existing water supplies), 8 (noise from drilling) and 9(E) (overall effects, including propelled rock debris) [See Bickford 5W1186 (1993); Rivers 5W1455 (2007); Moretown Landfill, LLC 5W0164-32 (2008)].

Thus, it is reasonable to conclude that the commencement of blasting and related stone quarrying operations at the Percy site constituted "substantial changes" with potential significant impacts under at least criteria 1 (Air), 3, 8 and 9(E). A land use permit was and is required pursuant to 10 V.S.A. 6081(b).

Please contact this office with any questions or for assistance in filing necessary application submittals.

Sincerely,

/s/ Edward Stanak
Edward Stanak
District Coordinator

cc: See Attached Certificate of Service

This is a jurisdictional opinion issued pursuant to 10 V.S.A. § 6007(c) and Natural Resources Board Rule 3(A).

Reconsideration requests are governed by Natural Resources Board 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., National Life Drive, Montpelier, Vermont 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. The address for the Environmental Court is: Environmental Court, 2418 Airport Rd., Suite 1, Barre, VT 05641-8701. (Tel. # 802-828-1660)

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