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February 9, 2011

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Subject: Jurisdictional Opinion #8-253; Hart gravel pit, Rt. 7, Pownal

Dear Paul:

## I. BACKGROUND

Responding to inquiries from adjoining neighbors and the Town of Pownal Zoning Administrator, on January 27, 2010 I visited the Hart pit with John Wakefield of the NRB, Mathew Probasco of ANR stormwater, and Steve Hart, owner. We discussed the concept of pre-existing development and the need for information to determine a pre-1970 rate of extraction. On March 1st, you submitted Agency of Transportation exhibits from 1959, as well as a 2009 Appraisal Report by D. Buckley. On May 18th you submitted an email containing information about a 1962-1964 highway reconstruction job in nearby North Adams, MA. On September 2, October 26, and December 11, 2010, we corresponded by email. This matter is now ready for decision.

As explained below, I have concluded that the Hart pit is not exempt as a pre-existing commercial operation since substantial changes in the rate of extraction and operation have occurred since 1970. Accordingly, the site will need an Act 250 permit to continue to operate. As we have discussed the likelihood of this for some time, I encourage your client to prepare the application this winter for review by the District Commission before the summer construction season begins.

## II. ISSUES

- A. Whether, pursuant to 10 V.S.A. §6001(3) and Act 250 Rule 2(A), the Operation constitutes a development.
- B. Whether, pursuant to 10 V.S.A. §6081(b) and Rule 2(C)(8), the Operation constitutes a pre-existing development.
- C. If the Operation constitutes a pre-existing development, whether, pursuant to 10 V.S.A. §6081(b) and Rule 2(C)(7), one or more substantial changes have occurred or are proposed.
- D. If a substantial change has occurred or is proposed, whether any such change permeates the Operation, causing the permit requirement to apply to the whole Operation.

## III. FACTS RELIED UPON

- 1. Steve Hart and his father before him have owned the 110 acres since the 1960's. The owner of record is the Hart Gravel Bank Trust, Steve Hart Trustee.
- 2. The 1942 ortho photograph shows a minor extraction area at this site. Soils mapping shows this site to have Copake gravely loam and deep sand deposits.
- 3. In the 1950's, the Hart pit supplied 25,400 yards of gravel subbase for a one-mile reconstruction of Rt 7 nearby.
- 4. In 1959-1961, the Hart pit supplied 1,000 yards of sand for subbase and an unknown portion of 86,600 yards of gravel subbase to build 4 miles of new Rt 7 from Pownal to Pownal Center. The pit is located at the southern end of this project. Another so-called Walsh pit supplied gravel subbase as well for the same project, and it is not possible to distinguish between the two from the submitted Highway Dept. specifications.
- 5. In 1962, the pit supplied 60,000 yards to build the Pownal track across Rt 7. (Email from Gillies 5/18/10, citing Bruno Angeli, former track manager)

6. In 1962-1964 the pit supplied 9000 yards<sup>1</sup> for reconstruction of Mass Ave. in North Adams, MA.
7. A recent five year period average gross income was \$703,735 per year. (Appraisal Report, page 31, dated 2/15/2009, by D. Buckley)
8. This Appraisal Report also states that in the past ten years **9,350,000** cubic yards have been extracted. The Report estimates another **9.3 million** yards remaining on the western half of the tract. A drainage divide separates the active western half from the remaining tract. I find these figures to be inconsistent with the monetary gain. Elsewhere in the Report, it states the yields have been 100,000 yards/year.
9. Steve Hart stated on our site visit that he'd extracted 120,000 yards in 2009.
10. The pit operation includes a portable crusher and storage shed, with access directly onto Rt.7 across from the Pownal track.
11. The Pownal track owner's representative has reported drainage system impacts due to sediment from the pit site clogging their system. The track lies between the uphill Pit and the Hoosic River. Stormwater drainage from the Pit passes by culverts under Route 7 and onto the track property.
12. Prompted by our site visit, the owner is pursuing a Vt multi-sector general stormwater permit from ANR. The MSGP is pending approval by ANR.
13. Little if any reclamation has occurred on the site which comprises about 26 acres of disturbed area.
14. Pownal has zoning and subdivision regulations. Pownal has never issued any permits for this pit.

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<sup>1</sup> My figure differs from your calculation of 2.94 million yards (12"x35'x7000'=9000 yards)

#### IV. CONCLUSIONS OF LAW

##### A. Development

In relevant part, 10 V.S.A. §6081(a) provides that no person shall commence construction on a development or commence development without an Act 250 permit. 10 V.S.A. §6001(3) provides:

"Development" means the construction of improvements on a tract of 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.

Based on the foregoing facts (commercial pit is on a 110 acre tract), I conclude that the Operation constitutes development.

##### B. Pre-existing Development and Substantial Change

Developments in existence as of the effective date of Act 250 (June 1, 1970) are exempt as "pre-existing developments" unless a substantial change to them has occurred or is proposed. Specifically, 10 V.S.A. §6081(b) provides:

Subsection (a) of this section [requiring an Act 250 permit prior to commencement of development] shall not apply to development which is not also a subdivision, which has been commenced prior to June 1, 1970, if the construction will be completed by March 1, 1971. . .  
Subsection (a) of this section shall apply to any substantial change in such excepted subdivision or development.

To determine whether the Operation is exempt, I must first determine whether it constitutes an excepted development, and second whether there has been or will be a substantial change to the Operation.

The Environmental Board has previously ruled that the burden of proof to show that a development is exempt is on the person claiming the exemption. Re: Weston Island Ventures, Declaratory Ruling #169 at 5 (June 3, 1985), citing Bluto V. Employment Security, 135 Vt. 205 (1977).

The Board also has ruled that the burden of proof consists of the burdens of production and persuasion. Re: Pratt's Propane, Findings of Fact, Conclusions of Law and Order #3R0486-EB at 4-6 (Jan. 27, 1987). With

respect to whether a development is a pre-existing development, the person claiming the exemption has both the burdens of production and persuasion. Re: Champlain Construction Co., Declaratory Ruling Request #214, Memorandum of Decision at 2-4 (Oct. 2, 1990). The person claiming the exemption also has the burden to produce information concerning the scope of the pre-1970 operation and the post-1970 operation sufficient for me to determine whether a substantial change has occurred. Id.

1. Pre-existing Development

Act 250 Rule 2(C)(8) defines "pre-existing developments" as:

"Pre-existing development" mean any development in existence on June 1, 1970 and any development which was commenced before June 1, 1970 and completed by March 1, 1971.

In order to maintain the exemption under 10 V.S.A. §6081(b) and Rule 2(C)(8), a gravel pit owner claiming the exemption must not only assert that the gravel pit was in existence as of June 1, 1970 but also must prove what the pre-existing annual rate of extraction was.

The reason for this is that the exemption applies to pre-existing "development," which is defined in relevant part as the "construction of improvements." 10 V.S.A. §6001(3). As the latter phrase is defined, the primary improvements at a gravel pit is the extraction of earth resources. In order to evaluate whether a development is pre-existing, one must define what the development was prior to June 1, 1970, and this involves determining what improvements were constructed. In the case of a gravel pit, this means defining the scope of extraction by the annual extraction rate. \_\_\_\_\_

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Further, Section 6081(b) states that the exemption does not apply to excepted developments which have substantially changed. Since extraction is the heart of a gravel pit operation, an annual pre-existing rate must be defined in order to show at what level extraction may continue without a permit and when extraction is no longer exempt.

Accordingly, I conclude from the available information that the Hart pit had a pre-1970 extraction rate of 60,000 yards in 1962 when it supplied material for the construction of the Pownal Track. Remaining highway projects from the 1950's and 1960's are not year specific

enough or greater in quantity than this 1962 figure. It may well not be appropriate to use a single highest year to establish the pre-existing rate. A fairer approach would be to average several years of extraction. Nevertheless, as explained further below, this historic rate has been greatly exceeded in modern years.

2. Substantial Change

10 V.S.A. §6081(b) and Rule 2(A) state that a permit is required for a substantial change in a pre-existing development. Rule 2(7) defines substantial change as any change which may result in a significant adverse impact with respect any of the criteria specified in 10 V.S.A. §6086(a)(1) through (a)(10).

Past Board rulings define the question of substantial change as a two-stage inquiry. First, I must evaluate whether there has been or will be a cognizable physical change to the pre-existing development. Here, the expanded extraction area is a physical change, as is the installation of a crusher and storage shed.

Second, I must determine whether the change may result in a significant adverse impact with respect to any of the criteria.

a. Extraction Rate Increases

The evidence reveals that in recent years, over 100,000 yards has been extracted each year. Steve Hart represented that he'd extracted 120,000 yards in 2009.

The historic evidence reveals something closer to a high of 56,000 yards in 1959/61, and 60,000 yards in 1962. Accordingly, the increase in rate of extraction constitutes a substantial change.

An increase in the extraction rate from a gravel pit of more than 10 percent in excess of the pre-existing range could be a substantial change if accompanied by other potential impacts to the Act 250 criteria. Howard A. Manosh, DR #163, FCO at 6 n.2 (8/1/84)(cited in Dale E. Percy, Inc., DR #251 (3/26/92)).

Here at the Hart pit, the expanded extraction area may adversely impact neighbors due to noise from the crusher, dust particles blowing

off 26 acres of open extraction area, while stormwater discharges adversely affect the Pownal track drainage system.

b. Crusher

The addition of a rock crusher at the gravel pit constitutes a substantial change. Thomas Howrigan Gravel Extraction DR #358 (8/30/99).

c. Lack of Reclamation

Currently the disturbed area covers over 26 acres. None of this has been reclaimed to a vegetative cover. Criteria 9D/E seeks to ensure reclamation occurs so that suitable future uses of the landscape may occur, e.g., tree farm, pasture, home sites.

C. Applicability of Permit Requirement to Entire Operation

Based on the language of 10 V.S.A. §6081(b), the Board has previously stated that, in the context of substantial change, a permit is not required for an entire operation unless the change permeates the operation. Re: Ronald E. Tucker, Declaratory Ruling #165 at 7 (Feb. 27, 1985). In that decision, the Board concluded that a substantial change in the extraction rate at a gravel pit permeates the entire project. Here at the Hart pit, the expanded extraction area is directly related to increases in dust, noise and stormwater runoff, therefore, the change permeates the entire operation.

In summary, the Hart sand/gravel pit required an Act 250 permit when it exceeded 60,000 yards per year, and it requires one now to continue to operate.

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February 17, 2011  
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Sincerely,

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Warren Foster  
District Coordinator

This is a jurisdictional opinion issued pursuant to 10 V.S.A. § 6007(c) and Act 250 Rule 3(A).

**Reconsideration requests** are governed by Act 250 Rule 3(B) and should be directed to the district coordinator at the above address within 30 days of the date of this opinion.

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.