



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

September 23, 2019

(sent electronically)

Vermonters for a Clean Environment
c/o John Brabant
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Paul Frank + Collins P.C.
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RE: Jurisdictional Opinion #4-271(Reconsideration) – Chittenden Solid Waste District

Mr. Brabant & Mr. Hall:

In response to a letter from Mr. John Brabant dated May 15, 2019, the District #4 Coordinator issued JO #4-271 on August 9, 2019 concerning jurisdiction of 10 V.S.A. Chapter 151 (Act 250) over the disposal of glass material by the Chittenden Solid Waste District ("CSWD") at a CSWD owned property located off Redmond Road in Williston, Vermont. On September 5, 2019 Mark Hall, Esq. filed a timely request for reconsideration of JO #4-271 on behalf of CSWD.

The issue to be resolved is whether the disposal of glass material requires an Act 250 permit.

Facts

On April 12, 2018 the Agency of Natural Resources ("ANR") Waste Management & Prevention Division issued a Notice of Alleged Violation ("NOAV") letter to CSWD stating that, "Agency staff observed fill areas containing thousands of cubic yards of discarded crushed glass at two locations on Redmond Road, owned by [CSWD] (adjacent to the closed landfill and the compost facility)." ANR indicates that the glass material was generated from the CSWD Materials Recovery Facility ("MRF") located at 357 Avenue C in the Griswold Industrial Park in Williston, Vermont. The NOAV letter classifies the glass material as non-marketable recycled glass and indicates that no approvals have been issued by ANR for the storage or disposal of glass material at these locations.

In a response letter to the NOAV dated April 27, 2018, CSWD contends that the glass material is not solid waste but is a processed glass aggregate ("PGA") and that the material was managed in accordance with ANR's *Acceptable Uses for Processed Glass Aggregate Guidance* (dated 1994, revised 2002) and is exempt from the *Solid Waste Management Rules* (2012). In the April 27, 2018 letter, CSWD indicates that it used the glass material generated at the MRF at its Compost Facility in the south field as a subbase layer placed on a subgrade and covered with backfill, and on the landfill as an embankment to stabilize a northwestern slope, which will ultimately be covered with soil and seeded.

In a letter dated May 15, 2019, Mr. Brabant asserts that disposal of glass material has occurred in excess of a decade. However, after review of available aerial imagery, it appears that glass disposal at the CSWD owned land located off Redmond Road in Williston, Vermont commenced in approximately 2014.¹

In the April 27, 2018 letter, CSWD states that they are no longer placing the material at the Landfill as they have an agreement with a local quarry to accept the material and use it in their aggregate mix for subbase material.

On June 18, 1979 the District Commission issued Land Use Permit (“LUP”) #4C0400 to the Town of Williston for the construction and operation of Phase I of a municipal Landfill located at the terminus of Redmond Road in Williston, Vermont. Act 250 jurisdiction attached to Phase I of the Landfill pursuant to 10 V.S.A. §6001(3)(A)(v) because Phase I of the Landfill involved construction of improvements for a municipal purpose with a disturbance area exceeding 10 acres.

On March 8, 1991 the District Commission issued LUP #4C0400-1 to the Town of Williston for construction and operation of Phase II of the Landfill. On May 24, 1991 the District Commission issued LUP #4C0400-2 to the Town of Williston to extend the operational life of Phase II of the Landfill until December 31, 1992.

On August 13, 1992 the District Commission issued LUP #4C0400-3 to CSWD and the Town of Williston for construction and operation of Phase III of the Landfill until October 1, 1993. LUP #4C0400-3 expired on September 1, 2017. On November 9, 1994 the District Commission issued LUP #4C0400-11 authorizing Phase III of the Landfill to increase the finished elevation and extend operations until April 30, 1995. On April 17, 1995 the District Commission issued LUP #4C0400-11A to further extend operations of Phase III of the Landfill until October 1, 1995. LUP #4C0400-11 and -11A both expired on November 1, 1999. Phase III of the Landfill ceased operations and was closed in 1995.

In 1993, CSWD entered into an agreement with Chittenden Recycling Services (“CRS”), whereby CRS would construct and operate a recycling facility, known as the Materials Recovery Facility (“MRF”) at 357 Avenue C in Williston, Vermont. The purpose of the MRF is to process and market comingled recyclables brought to the MRF from regional transfer stations, recycling centers, and commercial and residential customers. The MRF was constructed between 1992 and 1993.

Advisory Opinion #4-102, dated March 5, 1993, concluded that the MRF was subject to Act 250 jurisdiction given that the MRF, the Landfill and the drop off centers function as interdependent parts of a system to manage and dispose of solid waste and given that these facilities have common ownership, planning, and funding sources.

On May 19, 1993 the District Commission issued LUP #4C0400-4 authorizing the after-the-fact construction of the MRF and for MRF operations until June 1, 2023 including the processing of up to 100 tons per day of recyclable materials. The District Commission issued LUP #4C0400-4A to alter the MRF hours of operation and issued LUP #4C0400-4B for a minor boundary line adjustment. On December 26, 2002 the District Commission issued LUP #4C0400-4C authorizing a 7,650 sf addition to the MRF for additional storage, a 3,850 sf building addition to the tipping area, increasing the size of the glass pulverizing and storage area and altering the flow of on-site traffic. On March 18, 2009 the District Commission issued LUP #4C0400-4D increasing the processing tonnage of recyclable materials to 200 tons per day.

¹ 2011, 2014 and 2016 NAIP aerial images, USDA Farm Service Agency.

On October 5, 2010 the District Commission issued LUP #4C0400-19 authorizing CSWD to construct a composting facility on approximately 11-acres off Redmond Road in Williston, Vermont. On May 10, 2011 the District Commission issued LUP #4C0400-19A authorizing CSWD to increase the size of the compost pad and relocate the proposed bagging building. On January 24, 2013 the District Commission issued LUP #4C0400-19B authorizing CSWD to construct a small greenhouse near the existing compost facility.

On September 5, 2019 Mark Hall, Esq. filed a timely request for reconsideration of JO #4-271 on behalf of CSWD. In the reconsideration request, CSWD asserts that (1) the Coordinator mischaracterizes the glass material as solid waste, and (2) the placement of the glass material on an embankment of the Landfill is covered under the solid waste certification as post-closure care and was completed as a preventative and protective measure used to, "...control erosion and prevent failure or breach of the roadway adjacent to the landfill."

Decision

Once Act 250 jurisdiction has attached, it does not "detach" from a parcel unless the permit has expired *In re Eustance*, No. 13-1-06 Vtec, Decision at 11 (2/16/07), Judgment Order (3/16/07)(citing *In re Huntley*, 2004 VT 115, ¶12; 177 Vt. 596, 5999 (2004)), *aff'd*, 2007-156 (Vt. S. Ct. 3/13/09). Until 1996 all permits had expiration dates but amendments were made to 10 V.S.A. §6090 such that expiration dates contained in permits issued before July 1, 1994 (involving developments that are not for extraction of mineral resources, operation of solid waste disposal facilities, or logging above 2,500 feet) are extended for an indefinite term, as long as there is compliance with the conditions of the permits. 10 V.S.A. §6090(b)(1) has been amended to read, "any permit granted under this chapter for extraction of mineral resources, operation of solid waste disposal facilities, or logging above 2,500 feet, shall be for a specified period determined by the Board in accordance with the rules adopted under this chapter as a reasonable projection of time during which the land will remain suitable for use if developed or subdivided as contemplated in the application, and with due regard for the economic considerations attending the proposed development or subdivision. Other permits issued under this chapter shall be for an indefinite term, as long as there is compliance with the conditions of the permit."

The Compost Facility is subject to Act 250 jurisdiction under LUP series #4C0400-19. As this Compost Facility is not a solid waste disposal site, the LUPs issued for the Compost Facility are issued for an indefinite term pursuant to 10 V.S.A. §6090. The storage and/or disposal of glass material at the Compost Facility constitutes a material change to a permitted development and requires a permit amendment pursuant to Act 250 Rule 34.

Phase III of the Landfill was authorized under LUP #4C0400-3. The expiration date of LUP #4C0400-3 is recorded as September 1, 2017. The expiration date of Phase III of the Landfill was revised to November 1, 1999 under LUPs #4C0400-11 and -11A. Disposal of the glass material commenced in approximately 2014.

If the permit for Phase III of the Landfill expired on September 1, 2017 pursuant to LUP #4C0400-3, then Phase III of the Landfill was still under Act 250 jurisdiction at the time disposal of the glass material commenced; therefore, the disposal of that material constituted a material change to a permitted development and required an Act 250 permit pursuant to Act 250 Rule 34. If the permit for Phase III of the Landfill expired on November 1, 1999 pursuant to LUPs #4C0400-11 and -11A, then Phase III of the Landfill should have ceased operations and the acceptance of waste prior to the disposal of the glass material at the Landfill. At a minimum, the storage and/or disposal

of any material at the Landfill post-closure constitutes an Act 250 violation pursuant to 10 V.S.A. §6081(a).

Notwithstanding the expiration date of LUP #4C0400-3, the MRF is under Act 250 jurisdiction under LUP series #4C0400-4. As the MRF is not a solid waste disposal site, the LUPs issued for the MRF are issued for an indefinite term pursuant to 10 V.S.A. §6090. Pursuant to Act 250 Rule 2(C)(5), the disposal areas at the Landfill and Composting Facility are determined to be involved land to the MRF because (1) the disposal areas are located within 5 miles of the MRF, (2) the glass material was generated at the CSWD owned MRF and disposed of at the CSWD owned Landfill and Composting Facility thus providing a relationship between generation site and disposal sites, and (3) there is a demonstrable likelihood that the disposal of the glass material would substantially affect the values sought to be protected by Act 250.

In the reconsideration request dated September 5, 2019, CSWD asserts that the Coordinator characterizes the glass material as “solid waste.” The Coordinator takes issues with this analysis. Nowhere in the JO #4-271 did the Coordinator opine as to whether the glass material is a solid waste or, for that matter, whether it is a PGA. The make-up of the material is not a central issue in determining whether a material change to an existing development has occurred. The placement of the glass material at the Compost Facility and Landfill meet the definition of a material change pursuant to Act 250 Rule 2(C)(6), because, at a minimum, they are both considered a cognizable change which may result in a significant adverse impact with respect to any of the Act 250 criteria.

In the reconsideration request, CSWD also asserts that the placement of glass material on an embankment of the Landfill is covered under the solid waste certification as post-closure care and was completed as a preventative and protective measure used to, “...control erosion and prevent failure or breach of the roadway adjacent to the landfill.” The Coordinator takes issues with this analysis. First, the 2013 and 2014 annual engineering inspection reports provided by CSWD in support of this assertion include descriptions of “minor ponding” or “tire rutting” along the access road on the southwestern side of the Landfill and the mitigation recommended for this area is described as “typical housekeeping” measures. The engineering reports do not include observations of large-scale erosion issues on the southwestern side of the access road that would warrant mitigation in CSWD’s opinion to, “...control erosion and prevent failure or breach of the roadway adjacent to the landfill.” Second, after a review of the records on file for Phase III of the Landfill, it was determined that any repair maintenance activities are required to be completed in accordance with the application materials. There is no convincing evidence in the Facility Management Plan, Post-closure Care Plan or other exhibits in the Act 250 record that the use of glass material is allowable or was even contemplated for repair maintenance activities. Therefore, the Coordinator finds that the quantity, extent and type of material placed at the Landfill was not authorized by prior Act 250 permits.

Accordingly, the request for reconsideration is denied.

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 Superior Court, Environmental Division (32 Cherry Street, 2nd Floor, Ste. 303, Burlington, VT 05401) 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 relevant entry fee required by 32 V.S.A. § 1431. The appellant also must serve a copy of the Notice of Appeal on the Natural Resources

Board, 10 Baldwin Street, Montpelier, VT 05633-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings.

If you have any questions regarding this jurisdictional determination, please contact me at 802-879-5658 or rachel.lomonaco@vermont.gov.

Sincerely,



Rachel Lomonaco
District #4 Coordinator

cc: Sarah Reeves, CSWD General Manager
Greg Boulbol, NRB General Counsel
Evan Meenan, NRB Associate General Council

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CERTIFICATE OF SERVICE

I hereby certify on this 23rd day of September, 2019, a copy of the foregoing JURISDICTIONAL OPINION #4-271(RECONSIDERATION) – CHITTENDEN SOLID WASTE DISTRICT, was sent by U.S. mail, postage prepaid to the following individuals without email addresses and by email to the individuals with email addresses listed.

Note: any recipient may change its preferred method of receiving notices and other documents by contacting the District Office staff at the mailing address or email below. If you have elected to receive notices and other documents by email, it is your responsibility to notify our office of any email address changes. All email replies should be sent to NRB.Act250Essex@vermont.gov

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Dated at Essex Junction, Vermont, this 23rd day of September, 2019.

Chittenden County Regional Planning Commission
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