



Natural Resources Board
District #7 Environmental Commission
374 Emerson Falls Road, Suite 4
St. Johnsbury, VT 05819

July 30, 2020

Subject: Jurisdictional Opinion (JO) #7-303
10 V.S.A. § 6007(c)
Act 250 disclosure statement; jurisdictional determination

Town of Albany Sand and Gravel Pit
Act 250 Permit #7R1042 as Amended

To: All parties identified on the attached Certificate of Service

This jurisdictional opinion is written in response to a request received from Claudine C. Safar on April 29, 2020.

I. Summary of Questions Raised in JO Request

At the property that is the site of the Town of Albany municipal sand and gravel pit, which is currently operational and not fully reclaimed, and located on Delano Road, Albany, identify:

- (1) If the property was improperly subject to Act 250 jurisdiction in December 1998;
- (2a) If Act 250 jurisdiction will continue to attach if and when (i) the site is fully reclaimed in accordance with the Act 250 permit and (ii) the permit has expired;
- (2b) If, after the events identified in 2a have occurred, Act 250 jurisdiction would attach to renewed (i.e. re-opened, post-full-reclamation) municipal sand and gravel pit operations on the project tract.

II. Summary of Opinion

The property remains subject to Act 250 permit #7R1042 (issued on December 18, 1998, expiring on December 18, 2023) as amended (#7R1042-A, issued September 13, 1999 for change in ownership, and #7R1042-1, issued May 30, 2012 for increase in extraction rate), the "Permits".



The following responses correspond to the numbered items in the above summary of questions:

(1) The site remains under Act 250 jurisdiction. The Permits were all issued more than 30 days ago, were not appealed, and remain in effect. It is noted that the property was formerly under private ownership (Beaudry) when earth extraction occurred, and there is no evidence that the Town exercised effective control of the land when earth extraction was commenced, and when Act 250 jurisdiction was determined.

(2a) If the site is fully reclaimed in accordance with the Permits, and the Permits expire (and the project is in compliance with all terms and conditions of the Permits), then, under current statute and legal precedent (citing *In re Huntley*, 2004 VT 115, ¶12, 177 Vt. 596, 599 (2004)) the site would no longer be subject to Act 250 jurisdiction. Since the Permits do not expire until 2023, and since reclamation work has not yet occurred, it will be necessary to verify applicability of Act 250 jurisdiction when these circumstances may actually occur in the future (and when the rules and statute and legal precedent may be different).

(2b) If (i) the events identified in 2a occur, i.e. Permits expired and site fully reclaimed in accordance with the Permits (and with Permits compliance), and (ii) the Town recommences earth extraction on the property, and (iii) providing the new earth extraction does not involve 10 acres or more of involved land, then such a municipal purpose project involving less than 10 acres would not be a “development” (again, under current statute and rules) pursuant to 10 V.S.A. § 6001(3)(A)(v). The involved land would encompass all areas used (to be physically disturbed) for such recommenced earth extraction project. Since the Permits do not expire until 2023, since reclamation work has not yet occurred, and since a specific plan to recommence municipal sand and gravel pit operations has not been provided for review, it will be necessary to verify if Act 250 jurisdiction applies, or not, when these circumstances may actually occur in the future (and when the rules and statute and legal precedent may be different).

III. Facts and Documents

In reaching the conclusions identified above, I relied upon the facts supplied by a representative for the primary landowner, supplemented with additional information obtained from public record.

Exhibits 001-009 can be found on the Act 250 Database at the link below, in reverse chronological order:

<https://anrweb.vt.gov/ANR/vtANR/Act250SearchResults.aspx?Num=JO%207-303>

Following is a summary of Project history and facts:

1. Act 250 permit application #7R1042 was filed on July 14, 1997, by the Town of Albany and co-applicant landowner Florence Beaudry, requesting approval of a sand and gravel pit located on a ± 6 acre portion of a 20 acre tract of land, in the Town of Albany off the Delano Road, with an annual extraction rate of 6500 cubic yards per year.

2. According to documents in the #7R1042 file (Exhibit 8), the pit had been in operation for approximately 8 years prior to Act 250 permitting, and a Notice of Alleged Violation (NOAV) issued on July 3, 1997 identifies the violation as "Operation of a commercial gravel pit without an Act 250 permit" (Exhibit 9).
3. Act 250 permit #7R1042 was issued on December 18, 1998 to Co-Permittees Florence Beaudry and the Town of Albany (Exhibit 2). Permit #7R1042 describes the approved project as follows (Exhibit 2, page 1), emphasis added:

*This permit applies to the lands identified in Book 42, Page 32 and Book 41, Page 442 of the land records of Albany, Vermont, as subject of a deed to Florence Beaudry, the "permittee as grantee". This permit specifically authorizes the permittee to **bring into compliance a commercial gravel pit** with an annual extraction rate of 4,000 cy of gravel and 2,500 cy of sand over a 25 year period. The pit shall be operated for the sole use of the Town of Albany. The project occupies six acres of a twenty acre tract on Delano Road off Route 14 in Albany, Vermont.*

4. Act 250 permit #7R1042 specifically identifies the basis of Act 250 jurisdiction as follows (Exhibit 2, page 1), emphasis added:

*Jurisdiction is conferred by 10 V.S.A. Section 6086 (a) and Environmental Board Rule 2(A)(2) as the project is a **commercial development** on more than one acre of land.*

5. The #7R1042 decision followed a decision on a Motion for Interlocutory Appeal, and a resulting decision by the Environmental Board (Exhibits 8 and 7, respectively), concerning party status.
6. Following issuance of the District 7 Commission's permit and findings of fact and conclusions of law and order on application #7R1042, the Commission received a timely motion to alter (Exhibit 5).
7. The Commission issued its decision on the motion to alter, on April 28, 1999 (Exhibit 4).
8. The Commission's December 18, 1998 and April 28, 1999 decision on Act 250 permit application #7R1042 was not appealed, and the decision became final and binding on all parties after 30 days.
9. Act 250 permit #7R1042 expires on December 18, 2023.
10. Act 250 permit #7R1042-A was issued on September 13, 1999 to document a change in ownership of the project tract, i.e. transfer from Florence Beaudry to the Town of Albany (Exhibit 3).

11. Act 250 permit #7R1042-1 was issued on May 30, 2012 and authorizes an increase in the maximum annual extraction rate, from 6,500 cubic yards per year, to 10,000 cubic yards per year (Exhibit 2).
12. Sand and gravel pit operations have continued annually, before and since issuance of Act 250 permit #7R1042, and the project has not yet been fully reclaimed.
13. On February 12, 2020, the Town of Albany filed application #7R1042-2 for a project generally described as continued operation of the existing sand and gravel pit including 20-year extension (expiration date extended to October 2043) and addition of winter operations, December to April. A neighbor opposes the #7R1042-2 extension; a prehearing was convened on April 22, 2020; a hearing has not yet been convened; and the Commission has not yet reached a decision on this pending application. The #7R1042-2 file is available on the Act 250 Database at the following link:

<https://anrweb.vt.gov/ANR/vtANR/Act250SearchResults.aspx?Num=7R1042-2>
14. On April 29, 2020, the Town of Albany submitted a request for this JO (Exhibit 1).
15. The Town of Albany has not adopted permanent zoning and subdivision bylaws.

IV. Relevant Law

Under 10 VSA § 6081(a) No person shall [...] commence construction on a subdivision or development, or commence development without a permit.

Under Act 250, various types of land uses which qualify as “development” are subject to jurisdiction, and include:

(ii) The construction of improvements for commercial or industrial purposes on more than one acre of land within a municipality that has not adopted permanent zoning and subdivision bylaws.

(v) The construction of improvements on a tract of land involving more than 10 acres that is to be used for municipal, county, or State purposes. In computing the amount of land involved, land shall be included that is incident to the use such as lawns, parking areas, roadways, leaching fields and accessory buildings.

Rule 2c(4):

"Commercial purpose" means the provision of facilities, goods or services by a person other than for a municipal or state purpose to others in exchange for payment of a purchase price, fee, contribution, donation or other object or service having value.

Rule 2c(5):

"Involved land" includes:

(b) Those portions of any tract or tracts of land to be physically altered and upon which construction of improvements will occur for state, county, or municipal purposes including land which is incidental to the use such as lawns, parking lots, driveways, leach fields, and accessory buildings, bearing some relationship to the land which is actually used in the construction of improvements, such that there is a demonstrable likelihood that the impact on the values sought to be protected by Act 250 will be substantially affected by reason of that relationship. In the case where a state, county or municipal project is to be completed in stages according to a plan, or it is evident under the circumstances that the project is incidental to or a part of a larger undertaking, all land involved in the entire project shall be included for the purposes of determining jurisdiction.

V. Analysis and Conclusion

The following responses correspond to the numbered items in the above summary of questions:

(1) The site remains under Act 250 jurisdiction. The Act 250 Permits were all issued more than 30 days ago, were not appealed, and remain in effect. It is noted that the property was formerly under private ownership (Beaudry) when earth extraction occurred, and there is no evidence that the Town exercised effective control of the land when earth extraction was commenced, and when Act 250 jurisdiction was determined. Moreover, the privately owned pit had been in operation for approximately 8 years before an Act 250 application was filed after an NOAV was issued.

(2a) If the site is fully reclaimed in accordance with the Permits, and the Permits expire (and the project is in compliance with all terms and conditions of the Permits), then, under current statute and legal precedent (citing *In re Huntley*, 2004 VT 115, ¶12, 177 Vt. 596, 599 (2004)) the site would no longer be subject to Act 250 jurisdiction. Since the Permits do not expire until 2023, and since reclamation work has not yet occurred, it will be necessary to verify applicability of Act 250 jurisdiction when these circumstances may actually occur in the future (and when the rules and statute and legal precedent may be different).

(2b) If (i) the events identified in 2a occur, i.e. Permits expired and site fully reclaimed in accordance with the Permits (and with Permits compliance), and (ii) the Town recommences earth extraction on the property, and (iii) providing the new earth extraction does not involve 10 acres or more of involved land, then such a municipal purpose project involving less than 10 acres would not be a "development" (again, under current statute and rules) pursuant to 10 V.S.A. § 6001(3)(A)(v). The involved land would encompass all areas used (to be physically disturbed) for such recommenced earth extraction project. Since the Permits do not expire until 2023, since reclamation work has not yet occurred, and since a specific plan to recommence municipal sand and gravel pit operations has not been provided for review, it will be necessary to verify if Act 250 jurisdiction applies, or not, when these circumstances may actually occur in the future (and when the rules and statute and legal precedent may be different).

VI. Right to Appeal

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. As of May 31, 2016, with the passage of Act 150, Act 250 Rule 3(C) (Reconsideration by the Board) is no longer in effect. Instead, 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 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.

Anyone should please feel free to contact me with any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read 'K. Sultan', is written over a light blue horizontal line.

Kirsten Sultan, Coordinator
District #7 Environmental Commission
Natural Resources Board