

Vermont Natural Resources Board Notice of Act 250 Jurisdictional Opinion

On October 27, 2020, the District Coordinator issued Act 250 Jurisdictional Opinion #JO-4-278 pursuant to 10 V.S.A. 6007(c) and Act 250 Rule 3(C), in response to a request made in a letter dated August 4, 2020 from Chad Bonanni, Esq. representing Farrell/Antell Properties, LLP. The Jurisdictional Opinion states that Frank W. Whitcomb Construction Corp. is required to amend Act 250 permit series 4C0566 for construction and improvements approved in recent Air Pollution Control Permits issued by the Agency of Natural Resources. Some of the changes include installing a concrete batch plant to produce up to 45,000 cubic yards of concrete per year and increasing the hot mix asphalt production from 225,000 tons per year to 350,000 tons per year for the property located on Whitcomb Street in Colchester, Vermont.

Copies of this jurisdictional opinion have been served on all persons specified in 10 V.S.A. 6007(c) and Act 250 Rule 3(C). The jurisdictional opinion may be viewed at the Natural Resources Board's web site at <https://nrb.vermont.gov/> by clicking on "Act 250 Database" and entering JO 4-278 as the Project Number. A paper copy may be obtained by contacting the District Coordinator at the address/telephone number below. Reconsideration requests are governed by Act 250 Rule 3(C)(2) and should be directed to the District Coordinator at the address listed below.

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 which is \$295.00. 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.

Dated at Essex Junction, Vermont this 27th day of October, 2020.

By: /s/Linda Matteson, District Coordinator
Linda Matteson, District Coordinator
For District #4 Environmental Commission
111 West Street
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October 27, 2020

Chad V. Bonanni, Esq.
Bergeron, Paradis & Fitzpatrick, LLP
34 Pearl Street
Essex Junction, VT 05452

Re: Jurisdictional Opinion 4-278
Frank W. Whitcomb Construction Corp., Land Use Permit series #4C0566

Dear Mr. Bonanni:

This jurisdictional opinion is in response to your written request dated August 4, 2020 for your clients, Farrell/Antell Properties, LLP, regarding whether changes at the Frank W. Whitcomb Facility (the "Facility") requires or required an Act 250 permit. It is my opinion that changes authorized by Air Pollution Control Permit #AOP-18-044 (as amended by AOP-20-016) issued by the Agency of Natural Resources ("ANR") that included installing a concrete batch plant to produce up to 45,000 cubic yards of concrete per year and increasing the hot mix asphalt production from 225,000 tons per year to 350,000 tons per year were material changes to the existing Act 250 permits and therefore, required/require an Act 250 permit amendment.

My opinion is based on information from the Natural Resources Board's public database, <https://anrweb.vt.gov/anr/vtanr/Act250.aspx> (enter "4C0566" as the Project Number and follow the prompts), the Air Pollution Control Permits, and information provided by you.

A. The facts as I understand them:

1. Land Use Permit ("LUP") #4C0566, issued on March 13, 1985, to Frank W. Whitcomb ("FWW" or the "Facility") authorized the construction of a 7.5-ton H&B asphalt batch plant and fabric dust collector on a 200-acre parcel of land. This LUP incorporated the air quality permit issued on Feb. 24, 1984 by the Air Pollution Control Section of the Agency of Environmental Conservation.
<https://anrweb.vt.gov/ANR/vtANR/Act250SearchResults.aspx?Num=4C0566>
2. LUP #4C0566-1, issued on Aug. 27, 1993 authorized the installation of a 300-ton, 85-foot high storage bin to the existing asphalt batch plant; an enclosed slat conveyor and installation of platform truck scales under the silo.
<https://anrweb.vt.gov/ANR/vtANR/Act250SearchResults.aspx?Num=4C0566-1>

3. LUP #4C0566-2 and Findings of Fact, Conclusions of Law, and Order (“FFCLO”) #4C0566-2, issued on April 26, 1996 authorized the expansion and operation of a stone quarry within a 151-acre tract of land adjacent to its pre-existing quarry.
<https://anrweb.vt.gov/ANR/vtANR/Act250SearchResults.aspx?Num=4C0566-2>
4. Finding #2 of FFCLO #4C0566-2 states: L.A. Demers began operation of the quarry in 1954 and it has been in continuous use since then. Demers conveyed the quarry and 74 acres to FWW on Sept. 31, 1975 (“the 1975 parcel”); that conveyance included seven stone crushers, five screens and bins, assorted conveyors, as well as a salt shed, scale building and maintenance shop. On Oct. 4, 1976, FWW acquired an adjacent 101 acres from Roland, Maurice, and Emile Thibault et ux. (“1976 parcel”). On Oct. 4, 1984, FWW acquired another adjacent 50-acre parcel from Robert and Leonard Thibault (“the 1984 parcel”). The three tracts of land are contiguous and the quarry is now operated within all three parcels, with the crushers, screens, bins, conveyors and buildings still all located on the 1975 parcel.
5. LUP #4C0566-2A, issued on May 9, 1997 authorized the construction of a stormwater management system to include construction and use of sedimentation/ infiltration ponds and once a year pumping of stormwater from the sump at the lower end of the quarry to an unnamed tributary of Sunderland Brook.
<https://anrweb.vt.gov/ANR/vtANR/Act250SearchResults.aspx?Num=4C0566-2A>
6. LUP #4C0566-3 (the “-3 permit”) issued on July 20, 1998 authorized constructing a second 300-ton, 85-foot tall by 14-foot diameter storage silo, replacing existing asphalt cement storage tanks with two 20,000-gallon, 30-foot tall by 12-foot diameter upright tanks, installing and maintaining new landscaping improvements. Additionally, the restriction for asphalt plant operation hours as required by Condition #16 of LUP #4C0566 was removed and replaced with the following Condition #16 of the -3 permit: The District Commission reserves the right to reexamine and impose additional conditions on the hours of operation to mitigate for excessive noise generated by nighttime asphalt plant operations, should legitimate complaints be registered with the Commission.

Condition #15 of the -3 permit states: The asphalt plant hours of operation shall be confined to those established in the Agency of Natural Resources Air Pollution Control permit as follows:

The hours of operation of the asphalt batch plant shall at no time exceed 1000 hours as calculated monthly based on a rolling twelve (12) calendar month period.

<https://anrweb.vt.gov/ANR/vtANR/Act250SearchResults.aspx?Num=4C0566-3>

7. Amended Air Pollution Control Permit #AP-88-030h, issued on July 24, 1998 modified condition #7 of the Air Pollution Control Permit #AP-88-030g by eliminating the limitation of daily hours of operation for the hot mix asphalt batch plant to

address the increased demand of nighttime paving operations. The modified AP condition #7 also stated that: "If the District #4 Environmental Commission amends Land Use Permit #4C0566-3 to further limit hours of operation of the asphalt plant in order to mitigate excessive noise generated by nighttime asphalt plant operation, such amended restrictions shall apply as a condition of this [the AP] Permit."
<https://anrweb.vt.gov/ANR/vtANR/Act250SearchResults.aspx?Num=4C0566-3>

8. LUP #4C0566-4 issued on Oct. 6, 1999 administratively authorized construction of a sewer and water line extension to connect the existing maintenance shop, hot mix plant and scale house to the municipal water and sewer services and to build a new super pave laboratory.
<https://anrweb.vt.gov/ANR/vtANR/Act250SearchResults.aspx?Num=4C0566-4>
9. LUP #4C0566-3A issued on May 19, 2006 authorized the addition of machinery (drum mixer, bin, screens, bucket elevator, and conveyors) to an existing hot mix asphalt plant which will allow the plant to use recycled asphalt pavement ("RAP") in the manufacturing of hot mix asphalt.
<https://anrweb.vt.gov/ANR/vtANR/Act250SearchResults.aspx?Num=4C0566-3A>
10. Condition 10 of LUP #4C0566-3A incorporated Air Pollution Control Permit Amendment #AOP-06-002 issued on May 5, 2006 by the ANR Air Pollution Control Division. Condition 10 included: Any subsequent nonmaterial changes to this permit shall be automatically incorporated herein upon issuance by the ANR. Subsequent amendments involving material changes to the Act 250 permit shall not be constructed prior to review and approval of the District Coordinator or the District Commission under applicable Environmental Board Rules.
11. AOP-06-002 – in addition to renewal of the existing facility Operating Permit the project includes burning up to 400,000 gallons of specification waste oil annually, to cap the previously unlimited use of No. 2 fuel oil to a maximum of 550,000 gallons per year; and installation of a drum mixer and associated equipment to allow the Facility to utilize recycled asphalt pavement. The drum mixer utilizes the existing rotary dryer for aggregate but mixes the aggregate with the RAP and asphalt in a separate mixer drum from the HMA (hot mix asphalt) plant's pugmill. Emissions from the drum mixer will be directed to the rotary dryer burner, and then exhaust through the Facility's existing fugitive air handling system.
12. LUP #4C0566-2B and FFCLD #4C0566-2B issued on Oct. 29, 2008 authorized excavating the existing quarry downward from 100-feet to 70-feet asl.
<https://anrweb.vt.gov/ANR/vtANR/Act250SearchResults.aspx?Num=4C0566-2B>

13. LUP #4C0566-2B (the “-2B permit”), Condition 10, incorporated Air Pollution Control Permit to Construct and Operate #AP-04-031 issued on Dec. 20, 2006 by the Air Pollution Control Division, ANR. Condition #10 also included: Any subsequent nonmaterial changes to this permit shall be automatically incorporated herein upon issuance by the ANR. Subsequent amendments involving material changes to the Act 250 permit shall not be constructed prior to review and approval of the District Coordinator or the District Commission under applicable Environmental Board Rules.
14. Condition 19 of the -2B permit requires that the rate of extraction from the quarry shall not exceed one million tons per year.
15. LUP #4C0566-5, issued on September 26, 2014 authorized the construction of a 28-foot by 48-foot combined office space and materials testing lab in a two-story building with five parking spaces.
<https://anrweb.vt.gov/ANR/vtANR/Act250SearchResults.aspx?Num=4C0566-5>
16. AOP-18-044 (the “2019 AOP Permit” – Exhibit 002) issued on July 23, 2019 by the ANR Air Pollution Control Division authorized the Facility:
 - to install a concrete batch plant at the existing Facility. The batch plant may produce up to 45,000 cubic yards of concrete per year;
 - to increase the permitted hot mix asphalt production limit from 225,000 tons per year to 350,000 tons per year;
 - to install additional crushing and screening equipment with associated diesel generators for the aggregate crushing and screening operation. Equipment includes an Astec jaw crusher, cone crusher, and screen deck, three conveyors with one engine, a stacker with one engine, and two ancillary diesel generators;
 - to replace the existing 406 bhp natural gas generator with a 2007 566 bhp natural gas generator equipped with a catalyst;
 - approval for shredding and grinding of recycled asphalt shingles (RAS) as needed, which will utilize wet suppression to minimize volatile emissions;
 - to remove portable recycled asphalt pavement (RAP) crushing plant #1;
 - to retain portable RAP crushing plant #2 and allow its primary jaw crusher to supplement the virgin aggregate crushing operation as needed;
 - to remove equipment associated with the cold mix asphalt production operation except the diesel generator which will be utilized elsewhere at the Facility; and
 - to install and operate a recycled asphalt pavement (RAP) drier and preheater system prior to the 2020 operating season.
17. AOP-20-016 (“the 2020 AOP permit” – Exhibit 003), issued on July 2, 2020 by the ANR Air Pollution Control Division authorized revisions to AOP-18-044 (“the 2019 permit”).

18. AOP-18-044, (Exhibit 002), the 2019 AOP permit, was appealed to the Environmental Division of the Superior Court and the appeal was dismissed pursuant to a settlement agreement on April 30, 2020. As part of the settlement agreement, in lieu of the RAP drier and preheater system, FWW will install a drum mixer system that, in addition to providing an operational increase in hourly processing capacity, will be equipped with an emission capture system with organic and particulate emissions ducted back to the hot mix asphalt (HMA) burner to be combusted. The 2020 AOP permit (Exhibit 003) requires that FWW also capture and control emissions from the hot conveyors and silos resulting from use of the new drum mixer. The drum system will be operational by the beginning of the 2021 operating season. (See Exhibit 005 - Application AOP-20-016).
19. The 2020 AOP permit relocates the concrete plant approximately a half mile west of the previously approved location in the 2019 AOP permit. The 22-foot by 7-foot diameter post mixer will be installed on the southern side of the hot mix asphalt plant near the current truck load out. The future truck load out will be in the eastern area of the Facility near the silos. (See pages 56, 58 and 59 of 61, Exhibit 005).
20. The application for the 2020 AOP permit, page eleven, at 6, in part, requires that, “by July 31, 2019 the stack for the exhaust gases from the hot mix asphalt plant drier exhaust shall be raised to a minimum of 98 feet above the stack base grade elevation from the previously required minimum stack height of 75 feet above stack base grade elevation.” Exhibit 005.

B. Relevant Statutes and Rules

1. Act 250 Rule 34(A) - *Material change to a permitted development or subdivision*, in part states that “a permit amendment shall be required for any material change to a permitted development or subdivision, or administrative change in the terms and conditions of a land use permit.”
2. Act 250 Rule 2(C)(6) - “*Material change*” means, in part, any cognizable change to a development or subdivision subject to a permit under Act 250 which has a significant impact on any finding, conclusion, term or condition of the project’s permit or 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).

C. Issue

Whether the improvements approved by the issuance of Air Pollution Control Permit #AOP-18-044 (as amended by AOP-20-016) allowing the Facility to increase its hot mix asphalt production and approving the construction and operation of a concrete batch plant constituted a “material change” thereby requiring a land use permit amendment.

D. Discussion

A permit amendment is required for any material change to a permitted development or subdivision [Act 250 Rule 34(A)]. A “material change” is any cognizable change to a development or subdivision subject to a permit under Act 250 which has a significant impact on any finding, conclusion, term or condition of the project’s permit or 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) [emphasis added]. Act 250 Rule 2(C)(6).

Cognizable changes to the Facility subject to Act 250 permit series 4C0566 include installing a concrete batch plant with a maximum production of 45,000 cubic yards of concrete per year; adding crushing and screening equipment; installing a drum mixer system; and raising the exhaust stack for the hot mix asphalt plant by more than 20 feet. Other material changes include increasing the production of hot mix asphalt from 225,000 tons per year to 350,000 tons per year; and other improvements.

The material changes noted may have a significant adverse impact with respect to Criteria 5 Traffic; 8 Aesthetics and Noise; and 9(K) Impact on Public Investments.

E. Conclusion

It is my opinion that the improvements approved with the issuance of the Air Pollution Control Permits issued by the Agency of Natural Resources in 2019 and 2020 constitute material changes and require/required a land use permit amendment.

Best regards,



Linda Matteson
District 3 Coordinator
Linda.Matteson@vermont.gov

cc: See Certificate of Service
Attachments: see Exhibit List

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. 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(b)(1) (2015), which is \$295.00. 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 VRECP.



Exhibit List



Application #	JO 4-278 (10/22/20)
Applicant(s)	
Landowner(s)	
Project Town(s):	

No.	Date Received (Office Use Only)	Document Name/Description	Submitted By (Office Use Only)
000			
001	10/22/20	001 JO Request by Chad Bonanni, Esq., Bergeron, Paradis, Fitzpatrick (8/4/20)	
002	10/22/20	002 AOP 18-044	
003	10/22/20	003 AOP 20-016	
004	10/22/20	004 Application AOP 18-044 FW Whitcomb	
005	10/22/20	005 Application AOP 20-016 FW Whitcomb	
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CERTIFICATE OF SERVICE

I hereby certify on this 27th day of October 2020, a copy of the foregoing JURISDICTIONAL OPINION #4-278 FOR FARRELL/ANTELL PROPERTIES, C/O CHAD BONANNI, ESQ., BERGERON PARADIS & FITZPATRICK, RE FRANK W. WHITCOMB CONSTRUCTION CORP., COLCHESTER, VT, 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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FOR YOUR INFORMATION

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ADJOINING LANDOWNERS/INTERESTED PARTIES

Available via:
<https://anrweb.vt.gov/PubDocs/ANR/Planning/JO%204-278/List%20of%20adjoining%20property%20owners.pdf>

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Dated at Essex Junction, Vermont, this 27th day of October, 2020.



Natural Resources Board Technician
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