

State of Vermont
NATURAL RESOURCES BOARD
DISTRICT 6 ENVIRONMENTAL COMMISSION
10 Baldwin Street, Montpelier, Vermont 05602

Act 250 Jurisdictional Opinion 6-017

This is a Jurisdictional Opinion based upon available information and a written request from the Landowner/Agent or Other Person. Any Notified Person or entity will be bound by this opinion unless that person or entity files a request for reconsideration with the District Coordinator (10 V.S.A. § 6007 (c) and Act 250 Rule 3 (b)) or an Appeal with the SUPERIOR COURT, Environmental Division within 30 days of the issuance of this opinion

☒ I hereby request a jurisdictional opinion from the District Coordinator regarding the jurisdiction of 10 V.S.A. Chapter 151 (Act 250) over the project described below: Ben Heath, P.E., Hamlin Consulting Engineers, Inc., 136 Pearl Street, Essex Junction, VT 05452.

Existing Act 250 permit: #6F0252 & related amendments; #6F0230.

Project Type: ☒ Commercial ☐ Residential ☐ Municipal/State ☐ Mixed
 ☐ Agriculture ☐ Silviculture ☐ Other

Has the landowner subdivided before? ☐ Yes ☐ No ☒ N/A

AN ACT 250 PERMIT IS REQUIRED: ☒ **YES** ☐ **NO**

I. PROJECT DESCRIPTION

During the summer of 1981, the Georgia Industrial Development Corporation (GIDC) applied for and was issued Act 250 permits for the construction of a 13-lot industrial park (±67 acres) to be known as the Georgia Regional Dairy Industrial Park (Industrial Park). Permit #6F0252 (RECONSIDERATION) specifically provides the Industrial Park with an “Umbrella Permit” which allows for a limited review under the Act 250 Criteria of any future development within the approved Industrial Park, and within the approved parameters. In March of 1982, following a review under all Act 250 Criteria, a permit amendment was issued authorizing the construction of a 126,000 square-foot infant formula manufacturing facility on approved Lots #6 through 13 (±26.5 acres combined total) of the Industrial Park.

PBM Nutritionals, LLC (Permittee, aka Perrigo Nutritionals), current owners and operators of the now ±220,000 square-foot infant formula manufacturing facility, now proposes to construct a new 3-building, ±372,000 square-foot manufacturing facility on an adjacent ±77-acre parcel. The project also proposes to dissolve the boundary lines of the ±77-acre parcel as well as a third ±41-acre abutting parcel currently under Act 250 jurisdiction via Land Use Permit #6F0230 and amendments (not currently within Industrial Park jurisdictional boundaries) for one new ±145-acre parcel and thereby increasing the total size of the Industrial Park from ±67 acres to ±185 acres.

The Permittee is the owner of all three parcels of land that are relevant to the proposed project and that are the subject of this Jurisdictional Opinion. For the purposes of this analysis, they are identified as follows:

- Parcel 1: ±26.5-acre existing Perrigo facility, which consists of Lots #6-13 of the Industrial Park permitted under #6F0252-2 and related amendments.

- Parcel 2: ±77-acre proposed project lot located between Parcel 1 and 3; a 12.60-acre “Lot 14” identified in local land records falls within this larger parcel.
- Parcel 3: ±41-acre lot permitted under #6F0230 and amendments.

In its request for this Jurisdictional Opinion, the Permittee seeks a determination as to whether the Natural Resources Board (NRB) will “honor the ‘umbrella permit’ conditions” established in the Industrial Park’s original land use permits and therefore review a permit amendment application for the proposed project under the limited scope provided in the umbrella permit rather than full review under all Act 250 Criteria. It is noted for the record that it is not a discretionary decision on behalf of the NRB whether or not to honor the umbrella permit that applies to previously approved lots within the Industrial Park. Rather, the level of review required is a matter of law and this Jurisdictional Opinion answers the following questions: (1) whether the Permittee’s proposed project falls within the approved parameters of the Industrial Park as was contemplated by the District Commission in issuing the umbrella permit and, if so (2) whether the proposed project constitutes a material change to the existing permits and is nonetheless required to undergo a review under all Act 250 Criteria.

II. PROCEDURAL & PERMIT HISTORY

- **May 27, 1980:** Permit #6F0230 issued to Express Foods, Inc. and Vermont Whey Pollution Abatement Authority specifically authorizing modification of an existing whey processing facility and effluent treatment facility in order to resume operations (Phase I) and to construct a new effluent treatment facility and building additions for whey ultra-filtration and protein drying (Phase II).
- **July 8, 1981:** Permit #6F0252 issued to the Georgia Industrial Development Corporation and Town of Georgia specifically authorizing the construction of a 13-lot (±67 acres) industrial park, encompassing construction of a 2100’ road, two cul-de-sacs, and a water treatment and distribution system on Skunk Hollow Road in Georgia. Exhibit 3 to the permit is “Georgia Regional Dairy Industrial Park Design Specifications.”
- **July 8, 1981:** #6F0252 Findings of Fact issued.
 - “On May 28, 1981, an application for an Act 250 permit was filed by Georgia Industrial Development Corporation. . . for a project generally described as the creation of a 13-lot industrial park subdivision on 67 acres of land, encompassing a 2,100 foot road, two cul-de-sacs, and a water treatment and distribution system on Skunk Hollow Road in Georgia, Vermont. The tract of land consists of 67.3 acres with 67.3 acres involved in the project area.”
 - “The application for this project requests a review under the so-called “Umbrella Permit” policy established by the Environmental Board. Unless so stated in our findings, any occupant in this industrial park will be presumed to be in compliance with those standards set forth by the Act’s ten criteria.”
- **August 31, 1981:** Permit #6F0252 (RECONSIDERATION) issued specifically removing in its entirety Condition #13 as set forth in Land Use Permit #6F0252, which states, “The District Environmental Commission shall review all proposals for lots under criteria #1 (air), 1(B), 5, 8 (building design, lighting and specific lot landscaping) and 10.” This permit also includes the following relevant conditions:
 - Condition 4: Prior to the construction of any improvements on any lot in this industrial park by a tenant industry, the permittees shall supply the District Commission with the following information:
 - A – A clear and concise statement as to the class and category of the proposed tenant.
 - B – The Lot location, location of utilized waste disposal area(s); the amount of remaining waste capacity as per the maximum parameters set forth in Land Use Permit #6F0252.

- C – The number of parking spaces and vehicle trips per day required by each tenant and the remaining capacity of same as per the maximum parameters set forth in land use Permit 6F0252.
 - D – A description of specific tenant proposals as to building design, lighting program and typical lot landscaping plan.
 - E – An affidavit of certification that the proposed tenant conforms to the terms, certification, plans and material representations as made in proceedings for both Land Use Permit #6F0252 and #6F0252 (RECONSIDERATION).
 - Condition 5: Park tenants are specifically limited to the class and category set forth in Exhibit #2 – RECONSIDERATION. The category “Etc.” contained in said Exhibit is specifically deleted from that approval herein made by the District Commission. Any tenant industry differing substantially from the class and category herein approved shall require the review and approval of the District Commission prior to construction and occupancy at this park.
 - Condition 8: The Certification of Compliance by the Division of Protection, Agency of Environmental Conservation made pursuant to Vermont State Board of Health Regulations, Chapter 5, Sanitary Engineering, Subchapter 1, Public Buildings shall function as the administrative procedure whereby this District Commission will issue an amended land use permit incorporating each tenant industry in the Terms of Land Use Permit #6F0252.
 - Condition 9: Any substantial change in the designs, utility use or material representations set forth in Findings of Fact #6F0252 or 6F0252 (RECONSIDERATION) shall require the review and approval of this District Commission.
- **August 31, 1981:** Permit #6F0252 (RECONSIDERATION) Findings of Fact and Conclusions of Law Issued, including the following statement, “The facts we have relied upon are contained in the documents on file identified as Exhibits #1-4 Permittees and #1-2 State of Vermont, and the evidence received at a hearing held on August 13, 1981.”
 - **July 9, 1981:** Central Vermont Public Service Corporation (CVPSC), Grantor, and Richmond Cooperative Association, Inc., Grantee, execute sale of 77.52 acres of land; to convey a portion of said lands consisting of 12.60 acres to the Town of Georgia Industrial Development Corporation (GIDC) and to accept a reconveyance of the same 12.60 acres in order that said parcel may be incorporated within the Town of Georgia Regional Dairy Industrial Park. (Town of Georgia Land Records, Book 47, Pages 89-93)
 - **July 9, 1981:** Warranty Deed executed between Richmond Cooperative and State of Vermont, Grantors, conveying to GIDC 12.60-acre parcel; this conveyance is made for the purpose of annexing this parcel as Lot #14 in the Georgia Regional Dairy Industrial Park. (Town of Georgia Land Records, Book 47, Pages 101-102)
 - **July 9, 1981:** Quit Claim Deed executed between GIDC, Grantor, conveying to Richmond Coop. 12.60-acre parcel; Said lands and premises constitute all of Lot No. 14 as annexed, or to be annexed, to the Town of Georgia Regional Dairy Industrial Park. (Town of Georgia Land Records, Book 47, Pages 107-109)
 - **September 9, 1981:** letter from Georgia Industrial Development Corporation advising of plan to file an amendment to #6F0252 to add an additional Lot #14 to the Park.
 - “Lot #14 will be a parcel of land consisting of 12 acres, more or less, and will be subject to all the terms and conditions of the above permit #. The Richmond Cooperative plans to erect on Lot #14, its new cheese plant. When erected, the plan will be supplied domestic and fire water through the Park’s water treatment system.”

- **September 15, 1981:** joint application filed for #6F0252-1 & 6F0256.
 - Project Description: Richmond Cooperative will be building a 50,000 square foot cheese plant in Georgia, adjacent to Express Foods and the G.I.P. This application is for the entire 77-acre parcel, with the center portion (approximately 12.60 acres) to be designated as Lot 14 within with the Georgia Industrial Park. All restrictions in permit #6F0252 will be applicable to lot 14 along with all covenants of the Georgia Industrial Park.
- **September 16, 1981:** Act 250 Hearing Notice issued stating that both projects will be evaluated in accordance with the 10 environmental criteria of Act 250.
 - Application #6F0256: requests permission to construct a 50,000 square foot cheese plant with an on-site waste disposal system and other related improvements.
 - Application #6F0252-1: requests permission to increase the area of the Georgia Dairy Industrial Park by 12± acres and to be known as Lot #14. Lot #14 will be the location of the aforementioned cheese manufacturing facility. Additionally, water needs for the Richmond Cooperative project will be supplied from that system previously approved in Land Use Permit #6F0252.
- **October 1, 1981:** hearing convened and recessed with unresolved issues; co-applicant Richmond Coop requested to reconvene hearing; essential purpose of the hearing to review evidence and plans relative to Criterion 1B and other criteria which may be affected by the proposed waste flows and treatment system involved in this project.
 - Second hearing scheduled for January 7, 1982 and then rescheduled for January 21, 1982.
- **January 21, 1982:** hearing for 6F0256 Richmond Coop & 6F0252-1 Georgia Ind. Dev. Corp. reconvened for “waste disposal and related criteria.”
 - The hearing was recessed and there is no record of either permit being issued, denied, or withdrawn.
- **March 15, 1982:** Permit #6F0252-2 Permit issued specifically authorizing co-permittees (Wyeth Nutritionals, Inc. and Georgia Industrial Development Corporation) to commence preliminary site preparation at their own risk on Lots #6 through 13 of the Regional Dairy Industrial Park in Georgia, Vermont; provides preliminary approval for the construction of the 126,000 square-foot infant formula manufacturing facility on Lots #6 through 13 (±26.5 acres) in the Regional Dairy Industrial Park and an underground utility tunnel to Express Foods, Inc.
 - Exhibit #17, Site General Arrangement Plan [Lots 6,7,8,9,10,11,12 & 13 in the Regional Dairy Industrial Park]
 - Dated January 25, 1982; Stamped “Approved by Environmental Board District Environmental Commission #6 on March 3, 1982”
 - Depicts 30’ Pipe Line Easement Across “Lot 14” connecting Express Foods Process Bldg. to proposed Infant Formula Facility (Wyeth International Limited)
 - General Note 1: The plant coordinate system uses as its basis the property plot of “The Regional Industrial Dairy Park” prepared by Donald L. Hamlin, Consulting Engineers, Inc., Essex Junction, Vermont.
- **July 16, 1982:** Town of Georgia Industrial Development Corporation, Grantors, sell to Wyeth Nutritionals, Inc. a 26.97-acre parcel (Industrial Park Lots #6-13). (Town of Georgia Land Records, Book 48, Pages 554-557)
- **January 17, 1984:** Richmond Cooperative Association, Inc. and Eastern Milk Producers Cooperative Association, Inc. enter into agreement and articles of merger whereby Eastern acquired Richmond. (Town of Georgia Land Records, Book 53, Pages 128-129)

- **March 9, 1984:** Richmond Cooperative dissolved.
- **September 18, 1984:** Warranty Deed executed between Eastern Milk Producers Cooperative Association, Inc., Grantor, and Express Foods, Inc., Grantee, conveying: “Being all and the same lands and premises acquired by Eastern Milk Producers Cooperative Association, Inc. pursuant to an Agreement and Articles of Merger dated January 17, 1984 between Richmond Cooperative Association, Inc. and Eastern Milk Producers Cooperative Association, Inc. which became effective on March 9, 1984 as recorded in Book 53 at Page 128 of the Georgia Land Records, and being all and the same land and premises shown as containing 77.52 acres, more or less...” (Town of Georgia Land Records, Book 54, Pages 461-467)
- **January 29, 1988:** Express Foods, Inc. filed an Amendment to Articles of Association with the Vermont Secretary of State changing its name to Vermont Whey Company. (Book 98, page 155)
- **August 31st, 1994:** Warranty Deed was conveyed by Vermont Whey Company, Grantor, to Wyeth Nutritionals, Grantee, for a 77-acre parcel. (Town of Georgia Land Records, Book 98, Pages 154-155)
- **January 10, 2005:** Wyeth Nutritionals, Grantor, conveys Deed to PBM Nutritionals, Inc. for 26.5-acre Parcel 1 and 77-acre Parcel 2. (Town of Georgia Land Records, Book 167, Pages 765 -766)
- **2010:** Perrigo Company, PLC acquires PBM Nutritionals, Inc. and its assets.

III. ISSUES

The issue that this Jurisdictional Opinion addresses is whether the proposed project is entitled to the limited scope of review afforded to Lots #1 through 13 of the Industrial Park under the “Umbrella Permit” issued to GIDC authorized in Land Use Permits #6F0252 and #6F0252 (RECONSIDERATION). In order to make this determination, the following questions must be addressed: (1) whether the parcel of land upon which the project is proposed falls within the parameters of the Industrial Park as permitted; and, if so (2) whether the proposed project constitutes a “material change to a permitted development” pursuant to Act 250 Rule 34(A). An umbrella permit may be re-examined for conformance with applicable Act 250 criteria when there is a material change to the project approved in the umbrella permit. *In re Taft Corners Assocs., Inc.*, 160 Vt. 593 (1993).

A. Scope of Industrial Park “Umbrella Permit”

The existing infant formula manufacturing facility on Parcel 1 (Industrial Park Lots #6-13) was issued Act 250 approval in March 1982. Prior to this permit being issued however, a joint Act 250 application was filed by Richmond Cooperative and GIDC (#6F0252-1 & #6F0256) to simultaneously incorporate a “Lot 14” into the existing Industrial Park and authorize the construction of a 50,000 square-foot cheese plant upon it, to be subject to the restrictions in Permit #6F0252 and amendments as well as all covenants of the Georgia Industrial Park. A hearing for both applications to be evaluated in accordance with the ten Act 250 Criteria was scheduled and publicly warned for October 1, 1981. A second hearing on both applications was eventually convened on January 21, 1982. Following recess of the second hearing, however, there is no record of either permit ever being issued, denied, or otherwise withdrawn. Therefore, Act 250 review of the 77-acre Parcel 2 and the 12.6-acre “Lot 14” within Parcel 2 was incomplete and “Lot 14” was not issued Act 250 permit amendment approval for incorporation into the Industrial Park.

Furthermore, the following facts are known:

1. The proposed 50,000 square-foot cheese plant was never built or permitted;
2. Land Use Permit #6F0252-2, after review under all Act 250 Criteria, was issued less than two months later on March 15, 1982 authorizing construction of the existing infant formula manufacturing facility and an underground utility tunnel across Parcel 2/"Lot 14" where the cheese plant was to be located to Express Foods, Inc. located on Parcel 3. Exhibit #17 Site Plan (approved in Permit #6F0252-2) does not acknowledge or identify a "Lot 14" within the Industrial Park;
3. Richmond Cooperative merged with and was acquired by Eastern Milk Producers Cooperative Association, Inc. (Eastern Milk) in January 1984;
4. Richmond Cooperative subsequently dissolved in March 1984;
5. Express Foods, Inc., owner of Parcel 3, acquired the 77-acre Parcel 2 from Eastern Milk in September 1984;
6. Wyeth acquired the 77-acre Parcel 2 from the Vermont Whey Company (formerly Express Foods) in August 1994;
7. PBM Nutritionals acquired Parcel 1 and Parcel 2 from Wyeth Nutritionals in January 2005;
8. Perrigo acquired PBM Nutritionals and its assets in 2010.

Although it is clear from the Town of Georgia Land Records that a proposed "Lot 14" was carved out of the 77-acre Parcel 2 for the purposes of incorporation into the Industrial Park, the act of establishing "Lot 14" at the local level is not sufficient on its own to incorporate it into the Industrial Park for Act 250 purposes. It is noted that, although the 77-acre parcel 2 may have become "involved land" to the permitted Perrigo parcel once it came under common ownership in 2005, the parcel is not afforded the benefits of the Act 250 review of the originally permitted parcel 1 simply upon its acquisition.

Taken together it is concluded that, from the Act 250 perspective, neither "Lot 14" nor the encompassing 77-acre Parcel 2 lot were ever incorporated into the Industrial Park and therefore are not entitled to the "Umbrella Permit" review that is afforded to Industrial Park Lots #1 through 13 under Permits #6F0252 and #6F0252 (RECONSIDERATION). Therefore, similar to the originally proposed Richmond Cooperative cheese plant facility for this parcel, any proposed development on Parcel 2 is required to be evaluated in accordance with the 10 Criteria of Act 250.

B. "Material Change to a Permitted Development"

Given the above analysis regarding "Lot 14," a "material change" analysis is not necessary in determining the scope of review that is required of the currently proposed project, however that question is addressed in this Jurisdictional Opinion nonetheless. Act 250 Rule 34(A) states that, "A permit amendment shall be required for any material change to a permitted development." The Vermont Supreme Court has adopted a two-part test for determining when a proposed project constitutes a material change: (a) whether the proposed project will make a cognizable change (physical change or change in use); and (b) whether that change has a significant impact on any finding, conclusion, term or condition of the project's permit, or may have an adverse effect under one or more Act 250 criteria. *In re Request for Jurisdictional Opinion re: Changes in Physical Structures and Use at Burlington International Airport for F-35A*, 2015 VT 41 ¶ 25 (3/6/15) (mem.) (citing Act 250 Rule 2(C)(6)).

Even assuming, hypothetically, that Parcel 2 upon which the project is proposed were currently covered by the #6F0252 (RECONSIDERATION) umbrella permit, the proposed project would constitute a "material change" to a permitted development in several ways. First, the proposal to dissolve the boundaries of Parcels 2 and 3 and merge

them with Parcel 1 constitutes a material change to Permit #6F0252 and #6F0252 (RECONSIDERATION) in that the project proposes to increase the permitted ± 67 -acre Industrial Park by ± 118 acres to ± 185 acres and to construct cognizable changes thereon, which have significant impact on the terms and conditions of the original permits.

Second, the proposed project is also a material change to Permit #6F0252-2 and related amendments in that the project proposes to increase the permitted ± 26.5 -acre Parcel 1 by ± 118 acres to create a new ± 144.5 -acre Industrial Park lot, more than quintupling its size, also creating a significant impact on the terms and conditions of the permit series.

Third, the proposal to dissolve the boundaries of Parcel 3 likewise constitutes a material change to Permit #6F0230. Fourth, it is conceivable that the cognizable changes proposed by the project may adversely impact a number of Act 250 Criteria including, but not limited to: 1B for stormwater and construction waste disposal, 1G for wetlands, Criterion 2 and 3 for water supply, Criterion 4 for Soil Erosion, Criterion 5 for new roadway and additional parking spaces, Criterion 8 for aesthetics from increased building height to be visible from Interstate 89, Criterion 8A for potential impacts on wildlife and endangered species, and 9B for potential impacts on Primary Agricultural Soils.

Lastly, Exhibit 3 to Permit #6F0252 sets forth design specifications for all future development in the Georgia Regional Dairy Industrial Park, two of which the proposed project far surpasses: (1) the project proposes construction of new manufacturing structures totaling 372,000 square feet, whereas the Design Specifications establish a limit of 300,000 square feet and (2) the project proposes to increase the size of the Industrial Park to ± 185 acres, whereas the Design Specifications establish a total park acreage of 67.3 acres. Individually and together, these changes present significant impacts on the terms and conditions of the Industrial Park's original permit.

In all five instances, the project the Permittee proposes presents material and significant changes such that it constitutes a new and different development than what was contemplated and authorized in the original permits, thereby necessitating a new review under all Act 250 criteria. *Comtuck LLC East Tract Act 250 JO Appeal (JO #2-305)*, #54-5-17 Vtec., Revised Decision on the Motions (3/29/19).

IV. CONCLUSION

For the foregoing reasons, this Jurisdictional Opinion concludes that the project as proposed by the Permittee is not entitled to the same "Umbrella Permit" review under Act 250 as is afforded to the originally permitted Lots #1 through 13 of the Georgia Regional Dairy Industrial Park. Therefore, the proposed project is required to undergo a full review under all 10 Criteria of Act 250.

Dated at Montpelier, Vermont this 25th day of June 2019.

BY: 

Josh Donabedian, District Coordinator
District #6 Commission
10 Baldwin Street, Montpelier, VT 05602
802-879-5657
joshua.donabedian@vermont.gov

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 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.