

STATE OF VERMONT  
ENVIRONMENTAL BOARD  
10 V.S.A., Chapter 151

RE: S.G. Phillips Corporation Declaratory Ruling #152  
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This decision pertains to a Petition for Declaratory Ruling filed on April 26, 1984 by S.G. Phillips Corporation concerning the applicability of 10 V.S.A., Chapter 151 (Act 250) to the construction of a fence and the storage of construction materials and equipment on its Waitsfield, Vermont premises.

On May 1, 1984, the Environmental Board ("the Board") notified the parties of its intent to designate its Chairman to act as hearing officer in this matter pursuant to Board Rule 41 and 3 V.S.A. §811. Having received no objection, a public hearing was convened on May 17, 1984 in Montpelier, Vermont, with Margaret P. Garland acting as administrative hearing officer.

The following were present at the hearing:

Petitioner S.G. Phillips by Gregory R. Van Buiten, Esq.;  
Agency of Environmental Conservation, Department of Water  
-Resources by Stephen B. Sease, Esq., Jeffrey R. Cueto and  
Karl L. Jurentkuff.

The hearing was recessed on May 17, pending preparation of a proposal for decision, a review of the record, and deliberation by the full Board. The Petitioner filed exceptions to the proposal for decision on June 6, 1984. The following findings of fact and conclusions of law are based upon the record developed at the hearing.

I. ISSUES RAISED BY THE DECLARATORY RULING PETITION

Petitioner was issued a land use permit pursuant to Act 250 in 1976. That permit has been amended five different times since 1976 to authorize changes to the original project. Petitioner has expanded the use of its premises for the storage of construction equipment and materials and has also constructed a perimeter fence. Petitioner argued that these changes were authorized by its existing permit and amendments. In the alternative, Petitioner argued that the changes are not "substantial" within the meaning of Board Rule 2(G) and do not, therefore, require further approval by the District #4 Environmental Commission ("the Commission").

The Agency of Environmental Conservation ("AEC") argued that Petitioner's changes were not authorized by the existing

land use permit or its amendments and that the changes are "substantial" by virtue of potential impacts under Criteria 1(D) - Floodways, 1(F) - Shorelines, and 8 - Aesthetics.

## II. FINDINGS OF FACT

1. S.G. Phillips Corporation ("Phillips") owns an 11 acre tract of land adjacent to the Mad River and Route 100 in Waitsfield, Vermont ("the premises") on which it has located its corporate headquarters. The premises include an office building, a recreational building, a vehicle repair and maintenance building, an equipment storage building, and outside storage areas. Exhibit #1.
2. Land Use Permit #5W0370 was issued by the Commission on June 29, 1976 authorizing the construction of a **maintenance** barn to be used for the repair of heavy construction equipment owned by Phillips. In addition, the Commission approved two storage areas for heavy equipment incidental to the premises' principal purpose of maintaining and storing Phillips' heavy equipment. As depicted **on plans** submitted by the applicant and approved by the Commission, one storage area was located immediately adjacent to the maintenance barn (and surrounded by a security fence), and the second area (approximately 150' by 200') was located 75' southeast of the barn.
3. The site plan approved by the Commission depicts a "proposed agricultural pond," oval in shape, **directly east** of the barn. The plan also identifies a "stock fence" encircling the eastern half of the premises, presumably intended to confine livestock.
4. On January 10, 1979, the Commission issued Land Use Permit Amendment #5W0370-1 to Phillips authorizing the construction of an employee exercise building on the premises. No reference to additional storage areas, fencing or the agricultural pond was contained in Phillips' application, the Commission decision, or the land use permit issued approving this amendment.
5. A second permit amendment (#5W0370-2) was issued on October 29, 1979 authorizing expansion of the existing maintenance barn to accommodate additional office space. While the Phillips application, the Commission decision, and amended permit address only the office addition, a **site** plan dated October, 1979 and submitted to the Commission with the application, labels a small area to the extreme north end of the premises as a "storage area," and depicts a 200' "board fence." This plan identifies the two previously approved storage areas, the agricultural pond, and the perimeter stock fence in the same locations as the plan accompanying the original 1976 project approval.

6. Three additional amendments have been issued by the Commission:
  - a. #5W0370-3 on September 12, 1980 authorizing the construction of a 30' by 40' building for the storage of construction related materials in the north-central portion of the premises;
  - b. #5W0370-4 on October 1, 1981 authorizing the construction of a two story, 12' by 24' office addition attached to the north end of the existing barn/office complex;
  - c. #5W0370-5 on March 29, 1982 authorizing the construction of a 60' by 80' steel building in the previously approved storage area to the southeast of the barn, for use as a shop and storage facility.

None of the applications, Commission decisions or amended permits in these cases makes specific reference to changes in approved storage areas! fencing or the agricultural pond. However, each of these amendments made reference to site plans, all dated October, 1979, apparently identical to that described in Finding #5, above, with the exception that each successive plan depicts the new structures approved by way of permit amendment.

7. At some time between 1979 and the present, Phillips relocated the "agricultural pond" from the location depicted on approved amendment plans to an area in the southeast portion of the premises. The relocation involved a kidney-shaped excavation 6' to 8' deep and the filling of the existing pond. In addition, Phillips added fill in the vicinity of the defunct pond, increasing the surface elevation of the central portion of the premises five feet. Exhibits #1 and #2.
8. The newly-filled central area and the northern portion of the premises are now used for the storage of a variety of construction materials and equipment including prefabricated concrete items (manholes, catch basins, etc.) steel ductile pipe, plastic pipe, as many as twelve bright orange construction trailers, compressors, and similar items. These materials are stored in a swath approximately 100' wide and 550' long. Construction vehicles are apparently stored primarily in the area adjacent to the shop and storage building approved in amendment #5W0370-5.
9. A wooden fence has been installed, screening much of the material storage area (see Finding #8, above) from view when looking toward the premises from the northeast. The northern-most 200' segment of the fence was installed first

and is 6' to 8' high. The remaining segment (approximately 450') is 10' in height. A 400' portion of the fence lies within approximately 25' of the Mad River which forms the easterly boundary of the premises. The fence is immediately visible to recreational users of the Mad River. Construction materials on the premises are visible from Route 100, Town Highway #8 (adjacent to the **premises** on the north) and from other surrounding areas.

10. The 450' segment of 10' fence, excavation of the new agricultural pond, filling of the existing pond, raising the central storage area by the addition of 5' of fill, and use of the raised area for materials storage purposes are not depicted on any plans submitted for Commission review, are not described in any amendment application filed by Phillips, and **are not** approved in any decision or permit issued by the Commission. Furthermore, the shorter, 200' **fence** segment and the northern-most storage area are identified on site plans submitted to the Commission in relation to the second, third, fourth, and fifth amendments but they were not described in any of the amendment applications and were not identified as approved improvements in any Commission decision or permit.
11. The Secretary of AEC has designated the 100 year flood boundary depicted on U.S.. Department of Housing and Urban Development, Federal Insurance Administration, National Flood Insurance Program, "Flood Boundary and Floodway Maps" ("Flood Maps") as the "floodway" for the purposes of 10 V.S.A. §6001(6). The Flood Map prepared for **the Town** of Waitsfield depicts substantial portions of the Phillips premises as within the 100 year flood boundary, including sections of the fence and portions of the area now used for equipment storage in the north and central portions of the project site. See Exhibit\* #5.
12. The 100 year flood elevation of the Mad River adjacent to the premises is approximately 645' and large portions of the newly filled equipment **storage area** lie at or below that elevation. The elevation of this area before filling was 640'. See Exhibit #5 (Flood Profile 01P) and Exhibit #1. During a 1976 flood of the Mad River, water reached a depth of 5' in the area of the premises just west of the southerly-most storage area. Commission concerns with encroachment on the floodway were reflected in Finding #5 of its original permit decision and resulted in the incorporation, through permit Condition #4, of revised construction plans for the lower storage area southeast of the maintenance barn.
13. Relocation of the agricultural pond, filling of the existing pond, introduction of 5' of fill, and the storage of materials within the floodway could have an impact on

water velocity within the floodway, could affect the ability of the area to store water during flood periods, and could increase the Mad River flood level.

### III. CONCLUSIONS OF LAW

10 V.S.A. §6081(a) requires that a land use permit be secured prior to the commencement of "development." The latter term is defined by Board Rule 2(A) to mean, inter alia:

Any construction of improvements which will be a substantial change or addition to or expansion of an existing development over which the board has jurisdiction . . .

-The term "substantial change" is defined by Board Rule 2(G) to mean:

"Substantial change" means any change in a development or subdivision which may, result in significant impact with respect to any of the criteria specified in 10 V.S.A. section 6086(a) (1) through (a) (10).

We have found at **least the** following changes:

- 1) excavation of a new agricultural pond;
- 2) filling of a pre-existing agricultural pond;
- 3) introduction of fill sufficient to raise the central portion of the site from 640' in elevation to 645';
- 4) use of the newly filled area and the northern portion of the site for storage of construction materials;
- 5) erection of an approximately 650' long wooden perimeter fence.

We conclude that none of the above activities was approved by the Commission in Land Use permit #5W0370 or the five subsequent amendments to that permit. Phillips argued that the northernmost storage area and an original 200' segment of the fence were depicted on **plans submitted** to the Commission in respect to all but the first permit amendment and, therefore, the Commission approved those additions when it approved the last four permit amendments.

We conclude that an inconspicuous notation on a site plan does not result in approval of a project change when the change is not described in an amendment application, is not referred to in

a **commission's** findings of fact, and is not identified in the **amended** permit. It is the applicant's responsibility to disclose changes to the Commission in a manner calculated to assure a **knowing** review and approval of those changes. The Commission cannot be held responsible for conducting an **exhaustive** search through all application documents to assure that an applicant's representations are consistent with all written materials submitted for review.

Phillips concedes that the other activities listed above were not presented **to the** Commission in any form and have not been approved by the Commission. We conclude that all of these activities are changes to the approved project. All except the fourth item involve significant construction activities. The storage of materials is a change because of the substantial **portion of** the site now dedicated to that use and because the **Commission** never-approved the on-going storage of construction **materials** on the site; the original permit only approved the storage of heavy construction equipment (vehicles)..

We further conclude that these changes are "substantial" by virtue of at least the following potential impacts:

Criterion 1(D) Floodways. We conclude that **major** portions of the fence, the equipment storage areas and the agricultural pond fall within the Mad River Floodway, as that area has been designated by the Secretary of the Agency of Environmental Conservation. We further conclude that these improvements could well influence the flow of flood waters, resulting in an impact on the health, safety or welfare of the public or riparian owners. The extent of the improvements' impact on flood waters is a matter left to determination by the Commission after the presentation of substantially more factual information than was presented in this proceeding.

Criterion 1(F) Shorelines. We conclude that changes to the approved development may **well have** resulted in significant impacts under this Criterion: Phillips has not indicated the necessity of locating its materials storage operation adjacent to the Mad River; it is not clear that pre-existing recreational opportunities have been preserved: it is clear from Exhibit #3 **that vegetative** screening has not been provided. We reject as groundless Phillips' contention that this Criterion is inapplicable to the development because no activity has occurred between the mean high and low water marks of the Mad River. The definition of the term "shoreline" found in 10 V.S.A. §6001(17) includes **all** land "adjacent" to a river. "Shoreline" is defined **to include** land between the mean high and **low water marks**; it is **not limited** to that narrow area. **Dictionary defines** the word "adjacent" to mean "not distant: nearby." We conclude that the entire project site is adjacent to the Mad River.

Criterion 8 Aesthetics. The perimeter fence and materials stored on the site are readily visible from Vermont Route 100, Town Highway #8, the banks of the Mad River, and surrounding areas. The lower portion of the site is a negative visual **intrusion** on a quite scenic portion of the Mad River Valley. We conclude that project changes have a significant impact under this Criterion, especially when viewed in comparison with the tastefully designed and carefully maintained office complex on the upper portion of the site.

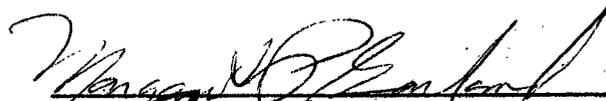
Project changes may well affect additional criteria. We leave a comprehensive evaluation of impacts to the Commission. However, the implications of the project changes in respect to Criteria 1(D), 1(F), and 8 are sufficient to conclude that "substantial changes" to the development as approved have occurred.

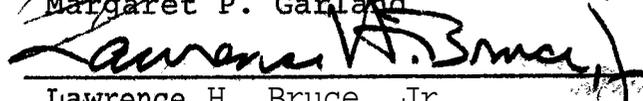
IV. Order

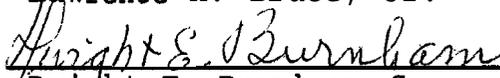
Filling of the existing agricultural pond, excavation of a replacement pond, introduction of **five feet of fill material**, use of the central and northern portions of the premises for **storage of construction materials**, and erection of the perimeter fence **have not** been approved by the Commission in Land Use **Permit #5W0370 and its five amendments**. Furthermore, all of those activities constitute "substantial changes" to the existing development, requiring approval by the District Commission.

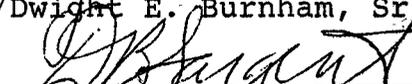
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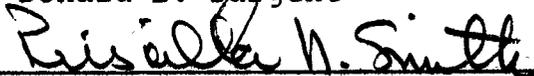
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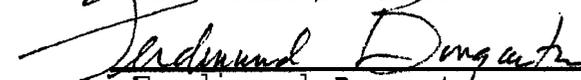
  
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