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STATE OF VERMONT
ENVIRONMENTAL BOARD
MONTPELIER, VERMONT 05602
802-828-3309

DR # 264

December 5, 1991

Scott A. Whitted, Esq.
Assistant Attorney General
Agency of Transportation
133 State Street
Montpelier, VT 05633

Re: Advisory Opinion #EO-91-245
Audley Sand Extraction, **Brigante** and
Lomartire Lands, Colchester

Dear Scott:

I am responding to your request dated September 26, 1991 for an executive officer advisory opinion concerning the applicability of Board Rule 11, Fees, to an application for sand extraction by R.S. Audley, Inc. from lands owned by Cosimo **Brigante** and Alice Lomartire located in Colchester, Vermont. You are appealing Advisory Opinion #4-093, issued by Chief Coordinator Michael Zahner on September 13, 1991.

I have reviewed the Chief Coordinator's opinion and concluded that it is correct. I incorporate its facts and conclusions. Pursuant to Board Rule 11, an application fee is required for the project.

At issue here is whether the extraction should be considered exempt from the fee requirement because all or much of it will occur in connection with a State project, the Chittenden County Circumferential Highway (CCCH). The Agency of Transportation (AOT) is a co-applicant with respect to the extraction application.

The Chief Coordinator concluded that, notwithstanding **AOT's** involvement, the project is a commercial one undertaken by private individuals through private agreement for remuneration and therefore not a State project. This is consistent with the Environmental Board's conclusions in Re: Department of Corrections, Declaratory Ruling #93 (Aug. 15, 1978), in which the Board concluded that the involvement of the State of Vermont in the erection of a microwave dish on Mount Mansfield did not make it a State project because private organizations would construct, own, and operate the dish and receive fees for its use. Id. at 3-4.

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In your appeal, you contend that all of the sand extraction will occur in connection with the CCCH. You assert that, while the parties engaging in the extraction have made statements in the past that they will extract for non-State-oriented commercial purposes, they no longer intend to do so. You argue that this means that the project should be considered a fee-exempt State project.

Your contentions do not persuade me that extraction on the site will always be solely for State purposes. A road will be constructed to enable extraction on the site which will form infrastructure available and useful for future commercial extraction. The site also contains 2,000,000 cubic yards of material which will be available for extraction by way of the road.

Further, even if extraction on the site were done solely for State purposes, it is not being done by the State but for the State on private land by a private party who will receive remuneration. In this regard, I believe that the Board Rules make a distinction between projects done by the State and projects done for State purposes by private parties.

As you know, 10 V.S.A. § 6081(a) requires that Act 250 permits be obtained 'for developments. In relevant part, 10 V.S.A. § 6001(3) defines development to include the construction of improvements for commercial, industrial, State, or municipal purposes. Rule 2(E) provides that State and municipal projects include:

Projects which are undertaken by or for the state, county or municipality and which are to be used by the state, county, municipality, or members of the general public.

(Emphasis added.) Thus, a project may need an Act 250 permit if it is undertaken by the State or by a private party for the State.

The Board is authorized to charge fees for Act 250 applications. 10 V.S.A. §§ 6025(a), 6083(a)(3). Concerning fees, the Board has adopted Rule 11(B) which provides:

Fees shall not be required for projects undertaken by municipal agencies or by State governmental agencies, except for publication and recording costs.

(Emphasis added.)

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Thus, on the one hand, Rule 11(E) provides that State and municipal projects may include not only those done by the State but also those done for the State by private parties. On the other hand, Rule 11(B) provides only that projects undertaken by State agencies are exempt from fees. In contrast to Rule 2(E), Rule 11(B) makes no provision for extending the exemption to projects undertaken for State agencies by private parties.

Accordingly, I conclude that the Board did not, in promulgating Rule 11(B), intend to apply the fee exemption to projects undertaken for the State but only those projects undertaken by the State. The sand extraction at issue is a project done by a private party for private gain on private land for AOT. It is not being done by AOT itself. The fee requirement therefore applies.

By copy of this letter, I am informing all parties of my jurisdictional opinion. Any party disagreeing with my opinion may petition the Environmental Board for a declaratory ruling pursuant to Board Rule 3(C). Any such petition must be filed on or before Monday, January 6, 1992.

Sincerely,

Stephanie Kaplan

Stephanie Kaplan
Executive Officer

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