VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Chapter 151

Re: John Gross Sand and Gravel
Declaratory Ruling #280

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to a petition for declaratory ruling concerning the applicability of 10 V.S.A. Chapter 151 (Act 250) to a sand and gravel extraction operation (the Operation) owned and operated by John Gross Sand and Gravel (the Petitioner) and located in the Town of Roxbury. As is explained below, the Environmental Board reaches the following conclusions:

(a) The Operation constitutes development that is subject to Act 250 unless the Petitioner meets its burden to prove that the Operation is exempt as a pre-existing development.

(b) The Board proposes to conclude that the Petitioner has not met its burden to prove that the Operation is pre-existing because it has not proved an annual extraction rate prior to June 1, 1970.

(c) The Board also proposes to conclude that the Petitioner has not met its burden to produce sufficient information to enable the Board to conclude that a substantial change in the extraction rate has not occurred.

(d) Further, even if the Operation were a pre-existing development, two substantial changes with respect to the Operation have occurred: (1) the addition and use of a crusher and (2) the creation of a new access road and associated destruction of a berm.

(e) The Board proposes to conclude that an Act 250 permit is required for the entire Operation and must be obtained prior to any continuance of the Operation.

(f) In addition, an Act 250 permit was required prior to the addition and use of a crusher and the creation of a new access road and associated destruction of a berm, and remains required prior to any further use of the crusher and the road, and prior to associated activities as set forth in the attached order.

As stated above, the Boards conclusions are rendered as proposed conclusions with respect to only the following: (b) failure to prove exemption as a pre-existing development; (c) failure to produce sufficient information to evaluate

used immediately above.) These proposed conclusions will become final 60 days from the date of this decision unless the Petitioner submits credible information demonstrating the Operation's pre-1970 and post-1970 extraction rates. The remainder of the Board's conclusions are final.

I. BACKGROUND

On September 2, 1992, District #5 Coordinator Edward Stanak issued Advisory Opinion #5-92-17, concerning the John Gross Sand and Gravel extraction operation (the Operation) located off Route 12A in Roxbury. The opinion states that a land use permit was and is required pursuant to 10 V.S.A. Chapter 151 (Act 250) for substantial changes to the operation involving use of a crusher and partial destruction of a berm and related road construction.

John Gross Sand and Gravel appealed the opinion to the Executive Officer. On November 20, 1992, Associate General Counsel Aaron Adler issued Advisory Opinion #EO-92-269, affirming the District Coordinator's opinion.

On December 18, 1992, John Gross Sand and Gravel (the Petitioner) filed a petition for declaratory ruling with the Board. On February 16, 1993, the Board issued a notice that this petition had been filed and that interested parties must file statements of interest. The Board received statements of interest from the following parties: the Town of Roxbury Planning Commission (filed March 1), the Petitioner (filed March 8), Robert and Dolly Swann (filed March 8) and a joint statement from Patricia Swann, Marian Baker, Mary Swann, and Jeff and Tina Young (filed March 10).

On March 11, 1993, the Board issued a notice of prehearing conference. The notice specified that all oppositions to the participation of parties were to be filed by the date of the prehearing conference (March 29). No such oppositions were filed.

On March 26, 1993, General Counsel Stephanie Kaplan convened a prehearing conference in Montpelier. On March 31, the General Counsel issued a prehearing conference report and order. During April, parties filed lists of witnesses and exhibits and summaries of testimony. The Board convened a hearing on May 5, 1993 with the following parties participating:

The Petitioner by Eric G. Parker, Esq.
Robert and Dolly Swan
Mary Swann

Marian Baker
The Agency of Natural Resources by Kurt Janson, Esq.
The Town of Roxbury Planning Commission by Janet Brand

After taking a site visit and hearing testimony, the Board recessed the matter pending filing of proposed findings of fact and conclusions of law, review of the record, deliberation, and decision.

On May 26, 1993, the Petitioner filed proposed findings of fact and conclusions of law. On June 2, the Planning Commission filed proposed findings of fact and conclusions of law. The Board deliberated concerning this matter on June 16 and July 14. On July 14, following a review of the evidence and arguments presented in the case, the Board declared the record complete and adjourned the hearing. This matter is now ready for decision. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied.

II. ISSUES

a. Whether, pursuant to 10 V.S.A. § 6001(3) and Board Rule 2(A)(2), the Operation constitutes a development.

b. Whether, pursuant to 10 V.S.A. § 6081(b) and Rule 2(O), the Operation constitutes a pre-existing development.

c. If the Operation constitutes a pre-existing development, whether, pursuant to 10 V.S.A. § 6081(b) and Rule 2(G), one or more substantial changes have occurred or are proposed.

d. If a substantial change has occurred or is proposed, whether any such change permeates-the Operation, causing the permit requirement to apply to the whole Operation.

III. FINDINGS OF FACT

1. In 1965, John and Marion Gross purchased a 112-acre tract located off Route 12A in the Town of Roxbury. At the time of purchase, a sand and gravel pit existed on the tract.

2. Mr. Gross owns John Gross Trucking and does business as John Gross Sand and Gravel (the Petitioner). Upon the Grosses' purchase of the tract

in 1965, the Petitioner commenced a commercial sand and gravel operation on the tract (the Operation). The Petitioner claims that it has extracted sand and gravel from the tract continuously since 196.5.

3. Prior to June 1, 1970, workers associated with the Operation consisted of Mr. Gross, occasional part-time help, and two drivers. Mr. Gross would take orders and operate machinery. The machinery at that time consisted of two bucket loaders, three trucks (each with a capacity of seven cubic yards), a sand screen, and a snowplow truck.

4. Robert and Henrietta (Dolly) Swann, Mary Swann, and Marian Baker (the Adjoiners) are adjoining landowners who reside on Route 12A across from the tract on which the Operation is located. Mr. Swann has lived there for approximately 58 years. Dolly Swann has lived there for approximately 37 years. Marian Baker has lived there for over 50 years.

5. The credible evidence is that, prior to June 1, 1970, no crusher was used in connection with the Operation.

6. From 1971 to 1992, Mr. Gross operated a landfill on the tract on which the Operation is located. This landfill was subject to Act 250 and received a land use permit.

7. The Petitioner claims that it kept no records that would show its yearly rate of gravel extraction before or after June 1, 1970. Specifically, it claims that its receipts from the Operation are so commingled and intertwined with Mr. Gross's other businesses that a separate accounting for the Operation cannot be made.

8. From December 8 through 22, 1988, the Petitioner rented a crusher from McCullough Crushing, Inc. This was a portable crusher that McCullough brought onto the site of the gravel pit. McCullough supplied the personnel to operate the crusher. No credible evidence establishes that the Petitioner used a crusher before this date in connection with the Operation.

9. During the summer of 1989, the Petitioner purchased a crusher which it has used on-site in connection with the Operation since purchase. The purpose of the crusher is to crush gravel prior to sale. The Petitioner uses the crusher for this purpose. The Petitioner has operated and will operate the crusher, and the gravel pit, at any time of day and on any day of the

week in response to demand. This operation is intermittent rather than constant because demand fluctuates.

10. The market for gravel has changed over the years. "Bank run" (uncrushed) gravel used to be acceptable to municipalities, businesses, and construction companies, but now gravel has to be crushed in order to sell. This requires the use of a crusher or similar piece of machinery.

11. The Petitioner has sold gravel to the Towns of Roxbury and Northfield over the years. Roxbury has records of gravel and sand purchases from the Petitioner for the years 1981 through 1990. Many of these records note the type of gravel and sand purchased: "bank run," "screened," and "crushed." The first record Roxbury has of purchasing crushed gravel from the Petitioner is during the summer of 1989. Roxbury has no entries showing purchase of crushed gravel from the Petitioner prior to that time. No records have been submitted detailing purchases by Northfield of the Petitioner's sand and gravel.

12. John and Marion Gross own an approximately three-acre tract located in the Town of Northfield (the Northfield tract) within five miles of the tract on which the Operation is located. There is a gravel pit on the Northfield tract. Subsequent to the Petitioner's purchase of the crusher, Mr. Gross has, from time to time, caused gravel to be trucked from the Northfield tract over to the Operation for crushing. Mr. Gross also has trucked extracted material from the Northfield tract to the tract on which the Operation is located for use in the landfill.

13. Currently, in addition to Mr. Gross, the Operation employs two full-time workers who work on the site of the Operation. In addition to the full-time workers, the Operation has employed as many as five part-time workers in recent years. Mr. Gross also employs four truck drivers who do not work on-site.

14. The following equipment is presently associated with the Operation: a crusher, four tandem trucks with a capacity of 14 cubic yards each, a sand screen, and two bucket loaders.

15. The Operation has been largely seasonal, with the period of greatest activity being in the warmer months of the year.

16. Prior to 1991, the vehicle entrance for the Operation was located on Route 12A across from Mary Swan's house. From there, the entrance road curved south at an angle from Route 12A, running to the extraction area, which was located a substantial distance away from Route 12A and the Adjoiners' residences.

17. Sometime in 1991, the Petitioner broke through a berm located north of the existing entrance road. The berm was right across Route 12A from the home of Robert and Dolly Swann. The berm had been created as part of the landfill operation. The existing entrance road ran south at an acute angle from Route 12A because of this berm.

18. The Petitioner broke through the above-referenced berm to create another entrance road for the Operation at right angles to Route 12A. The Petitioner did create this entrance road in 1991. The entrance road leads beyond the berm to a new extraction area close to Route 12A and the Adjoiners' residences. The Petitioner placed the crusher in this new area.

19. The Petitioner created the new entrance road to provide access to the new extraction area and because the existing entrance road was not safe. The existing entrance road met Route 12A at an angle. While the old seven-yard trucks the Petitioner once used could negotiate this angle, the current, larger 14-yard tandem trucks cannot do so safely.

20. Crusher use associated with the Operation generates noise of between 80 to 90 decibels (dba) at Route 12A. The noise is quite loud at the Adjoiners' residences. Background noise in the area, when none of the equipment associated with the Operation is being used, is 40 dba.

21. The new access road is not paved. The old entrance road was and is paved. Use of the new access road and the new extraction area generates significant amounts of dust that blow onto the adjoiners' property.

22. Because of the destruction of the berm and the associated construction of the new access road, the crusher and new extraction area are highly visible from the adjoiners' residences and Route 12A. The destruction of the berm also increases the audibility of the crusher because the berm is not there to block sound waves coming from the crusher.

23. The Town of Roxbury does not have zoning by-laws.

IV. CONCLUSIONS OF LAW

A. Development

In relevant part, 10 V.S.A. § 6081(a) provides that no person shall commence construction on a development or commence development without an Act 250 permit. 10 V.S.A. § 6001(3) provides:

> "Development" means the construction of improvements on a tract or tracts of land, owned or controlled by a person, involving more than 10 acres of land within a radius of five miles of any point on any involved land, for commercial or industrial purposes. "Development" shall also mean the construction of improvements for commercial or industrial purposes on more than one acre of land within a municipality which has not adopted permanent zoning and subdivision bylaws.

Interpreting the statutory definition of development, Board Rule 2(A)(2) provides that development means:

> The construction of improvements for any commercial or industrial purpose, including commercial dwellings, which is located on a tract or tracts of land of more than one acre owned or controlled by a person. In municipalities with both permanent zoning and subdivision bylaws, this jurisdiction shall apply only if the tract or tracts of involved land is more than ten acres. .. In determining the amount of land, the area of the entire tract or tracts of involved land owned or controlled by a person will-be used.

Based on the foregoing findings of fact, the Board concludes that the Operation constitutes development. Since the Petitioner claims that the Operation is a development that is exempt from the permit requirement as a pre-existing development, the Board will go on to evaluate this claim.

B. Pre-existing Development and Substantial Change

Developments in existence as of the effective date of Act 250 (June 1, 1970) are exempt as "pre-existing developments" unless a substantial change to them has occurred or is proposed. Specifically, 10 V.S.A. § 6081(b) provides:

> Subsection (a) of this section [requiring an Act 250 permit prior to commencement of development] shall not apply to development which is not also a subdivision, which has been commenced prior to June 1, 1970, if the construction will be completed by March 1, 1971. ... Subsection (a) of this section shall apply to any substantial change in such excepted subdivision or development.

To determine whether the Operation is exempt, the Board will first determine whether it constitutes an excepted development, and second whether there has been or will be a substantial change to the Operation.

The Board has previously ruled that the burden of proof to show that a development is exempt is on the person claiming the exemption. Re: Weston Island Ventures, Declaratory Ruling #169 at 5 (June 3, 1985), citing Bluto v. Employment Security, 135 Vt. 205 (1977).

The Board also has ruled that the burden of proof consists of the burdens of production and persuasion. Re: Pratt's Propane, Findings of Fact, Conclusions of Law and Order #3R0486-EB at 4-6 (Jan. 27, 1987). The Board further has ruled that, with respect to whether a development is a pre-existing development, the person claiming the exemption has both the burdens of production and persuasion. Re: Champlain Construction Co., Declaratory Ruling Request #214, Memorandum of Decision at 2-4 (Oct 2. 1990). The person claiming the exemption also has burden to produce information concerning the scope of the pre-1970 operation and the post-1970 operation sufficient for the Board to determine whether a substantial change has occurred. However, the burden of persuasion with respect to substantial change lies with those who contend that a permit is required. Id.

1. Pre-existine Development

Interpreting Section 6081(b), the Board has issued Rule 2(O), denominating the excepted developments as "pre-existing developments" and stating:

> "Pre-existing development" shall mean any development in existence on June 1, 1970 and any development which was commenced before June 1, 1970 and completed by March 1, 1971.

The Board concludes that, to maintain the exemption under 10 V.S.A. § 6081(b) and Rule 2(O), a gravel pit owner or operator claiming the exemption

must not only assert that the gravel pit was in existence as of June 1, 1970 but also must prove what the pre-existing annual rate of extraction was.

The reason for this conclusion is that the exemption applies to pre-existing "development," which is defined in relevant part as the "construction of improvements." 10 V.S.A. § 6001(3). As the latter phrase is defined, the primary improvement at a gravel pit is the extraction of earth resources. Rule 2(D). In order to evaluate whether a development is pre-existing, one must define what the development was prior to June 1, 1970, and this involves determining what improvements were constructed. In the case of a gravel pit, this means defining the scope of extraction by the annual extraction rate.

Further, Section 6081(b) states that the exemption does not apply to excepted developments which have substantially changed. Since extraction is the heart of a gravel pit operation, an annual pre-existing rate must be defined in order to show at what level extraction may continue without a permit and when extraction is no longer exempt. This interpretation of the statute is fair because the owner or operator of the gravel pit is the one most likely to possess information on extraction rates and because the owner or operator is the one seeking to continue extraction without having to obtain a permit.

With respect to the Operation, the Petitioner has not provided sufficient information to allow the Board to find a pre-existing annual extraction rate. Specifically, the Petitioner states that it cannot do so because its records concerning the Operation do not provide a basis for doing so.

This statement amounts to a claim that, since the Petitioner cannot or will not produce the information, it should not be required to produce it. The difficulty in production, however, is of the Petitioner's own creation. Further, the Board believes that a reasonably prudent business person would keep the records of his or her various businesses separate.

Moreover, proof of a pre-existing annual extraction rate does not have to be from documentary evidence such as the business records of the owner or operator. While such records are preferable and are the most credible, testimony of credible witnesses and records obtained from purchasers may be used. The Board cannot state that such evidence will always be persuasive, but that depends on the particular evidence.

Accordingly, the Board concludes that the Petitioner has not met its burden to prove that the Operation is exempt because it has not proved the

Operation's pre-existing annual extraction rate. The Board therefore concludes that an Act 250 permit it required for the entire Operation and must be obtained prior to any continuance of the Operation.

The Board also has determined to make the above conclusions "proposed" rather than final to allow the Petitioner an additional opportunity to meet its burden of proof. Within 60 days, the Petitioner may file credible evidence (in the form of prefiled testimony and exhibits) as to the pre-existing annual extraction rate and move to re-open the hearing. Should the Petitioner fail to do so within the time prescribed, these conclusions will become final.

2. Substantial Change

Even though the Board has concluded that the Petitioner has not met its burden to prove a rate of extraction at which the Operation is exempt, the Board goes on to address the substantial change question in the event that the Petitioner is later able to provide such proof.

10 V.S.A. § 6081(b) and Board Rule 2(A)(5) state that a permit is required for a substantial change in a pre-existing development. Board Rule 2(G) defines substantial change as any change which has the potential for significant impact upon one or more of the Act 250 criteria enumerated at 10 V.S.A. § 6086(a). The validity of Rule 2(G) has been upheld by the Vermont Supreme Court. In re Orzel, 145 Vt. 355, 360-361 (1985).

Past Board rulings define the question of.substantial change as a two-stage inquiry. First, the-Board evaluates whether there has been or will be a cognizable physical change to the pre-existing development. Second; the Board determines whether the change has the potential for significant impact with respect to one or more of the Act 250 criteria. Re: L.W. Havnes, Declaratory Ruling #192 at 7 (Sep. 5, 1987). With respect to identifying the potential for significant impacts, the Board has stated that the question is not whether the impacts will occur, but whether they may occur. Re: Robert and Barbara Barlow, Declaratory Ruling #234 at 11 (Sep. 20, 1991).

The following potential substantial changes are at issue in this matter: (a) extraction rate increases, (b) use of a crusher, (c) construction of a new access road and associated destruction of a berm, and (d) the bringing in of material from another pit to be crushed at the site of Operation. The Board will first review the issue of extraction rates and then will turn to the other alleged substantial changes.

a. Extraction Rate Increases

As demonstrated by the foregoing findings of fact, the Board does not have enough information to assess whether, since June 1, 1970, there has been an increase in the Operation's extraction rate and whether any such increase has the potential for significant impact on one or more of the Act 250 criteria.

The main reason the Board does not have this information is the Petitioner's claim that the records concerning Mr. Gross's various businesses are commingled and intertwined. For the reasons discussed above with respect to the burden to prove the pre-existing extraction rate, the Board believes that this situation does not excuse the Petitioner from meeting its burden of production. Further, without information on the post-1970 extraction rates, the Board cannot evaluate whether the extraction rate has substantially changed. Since such information is most likely to be possessed by the owner or operator of a gravel pit, it is fair to require that such person bear the burden to produce it.

Accordingly, the Board concludes that the Petitioner has not met its burden to produce sufficient information to enable to Board to conclude that a substantial change in the extraction rate has not occurred. This conclusion is proposed rather than final under the same terms as the above conclusions regarding the pre-existing extraction rate and the applicability of Act 250 to the entire operation.

b. Other Alleged Substantial Changes

The Board previously has concluded that use of a crusher and road construction can constitute substantial changes. Re: Clifford's Loam and Gravel, Declaratory Ruling #90 at 3 (Nov. 6, 1978); Weston Island Ventures at 5.

Based on the foregoing findings of fact, the Board concludes that cognizable physical changes have occurred at the pit with respect to the use of a crusher and the construction of new access road and associated destruction of a berm.

The Board further concludes that, with respect to the crusher, the scope of the change includes the bringing in of product from Mr. Gross's Northfield pit to be crushed at the Operation site. The Board also concludes that, with respect to the road construction and berm destruction, the scope of the change includes the use of 14-yard capacity tandem axle trucks replacing seven-yard single axle trucks, since such use was part of the reason the change occurred.

Based on the foregoing findings of fact, the Board concludes that the noise, dust, and visual impacts associated with the use of the crusher and the road construction and berm destruction had and have the potential for significant impacts under 10 V.S.A. § 6086(a)(l) (air pollution) and 8 (aesthetics). Accordingly, the use of a crusher and the road construction and berm destruction constitute substantial changes for which an Act 250 permit was and is required. The permit requirement therefore extends to those activities ruled immediately above to be within the scope of these changes.

C. Applicability of Permit Reauirement to Entire Oaeration

Based on the language of 10 V.S.A. § 6081(b), the Board has previously stated that, in the context of substantial change, a permit is not required for an entire operation unless the change permeates the operation. Re: Ronald E. Tucker, Declaratory Ruling #165 at 7 (Feb. 27, 1985). In that decision, the Board concluded that a substantial change in the extraction rate at a gravel pit permeates the entire project. The Board also concluded that changes such as the construction of a new road or the use of new equipment do not so permeate. Accordingly, the project is not permeated by the use of the crusher and the road construction and berm destruction. However, the Boards proposed conclusion that the Operation is not exempt necessarily means that a permit is required for the entire Operation.

V. ORDER

1. The Operation constitutes development.

2. The Board proposes to conclude that:

   (a) The Petitioner has not met its burden to prove the Operation is exempt as a pre-existing development;

   (b) An Act 250 permit is required prior to further extraction of sand and gravel on the tract on which the Operation is located.

3. The Board also proposes to conclude that, even if the Petitioner had proved that the Operation is exempt, the Petitioner has failed to produce information sufficient to enable to Board to conclude that a substantial change has not occurred with respect to the extraction rate.

4. Within 60 days of the date of this decision, the Petitioner may file credible evidence in the form of prefiled testimony and exhibits, and lists of witnesses and exhibits, and may move to re-open the hearing. Such testimony, exhibits, and hearing shall be limited to the Operation's pre-existing annual extraction rate and annual extraction rate after June 1, 1970. If the Petitioner does not make the above-mentioned filing within the time prescribed, paragraphs two and three of this order shall become final. The Board retains jurisdiction to receive such testimony and exhibits, to hold a further hearing on them, and to receive such other relevant rebuttal testimony and evidence as parties may offer.

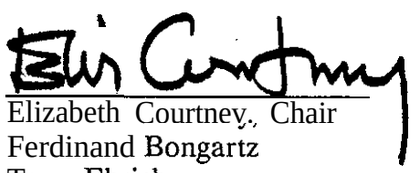
5. Even if the Operation is exempt as a pre-existing development, an Act 250 permit was required prior to use of crusher on the tract on which the Operation is located and prior to the 1991 construction of a new access road and associated destruction of a berm on that tract.

6. Even if the Operation is exempt as a pre-existing development, an Act 250 permit remains required prior to any further use of the crusher, the access road, and trucks larger than seven cubic yard single axle trucks (where used in connection with the Operation), and prior to any further bringing onto the Operation site of earth resources from Mr. Gross's Northfield pit for crushing.

7. Only paragraphs two and three of this order contain proposed conclusions. The remaining paragraphs of the order are final.

Dated at Montpelier, Vermont this 28th day of July, 1993.

ENVIRONMENTAL BOARD



Elizabeth Courtney, Chair
Ferdinand Bongartz
Terry Ehrich
Lixi Fortna*
Arthur Gibb*
Samuel Lloyd
Jean Richardson
Steve E. Wright

*Members Fortna and Gibb concur with all of this decision except that they dissent with respect to the conclusion that a permit is required for the new access road.

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