State of Vermont
ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

Re: Atlantic Cellular Co., L.P. and Rinkers Inc., d/b/a Rinkers Communications
Declaratory Ruling Request # 340

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

In this decision, the Environmental Board ("Board") concludes that it does not have jurisdiction over a 130 foot communications tower and equipment building located on Mount Irish in the Town of Berlin.

I. BACKGROUND

On October 27, 1995, the District #5 Environmental Commission Coordinator ("District Coordinator") issued Jurisdictional Opinion #5-95-4 ("First Jurisdictional Opinion") in which he determined that the construction of a 130 foot communications tower with antennas ("Atlantic Tower") and equipment building ("Building") and the replacement of a 120 foot communications tower with a 180 foot tower ("Rinkers Tower") require a permit application pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250"). The towers are located on a five acre tract ("Project Tract") on Mount Irish in the Town of Berlin. Rinkers Communications ("Rinkers") owns the Project Tract and leases space to Atlantic Cellular Company ("Atlantic").

On November 27, 1995, Rinkers and Atlantic each filed a petition for a declaratory ruling with the Board, appealing the First Jurisdictional Opinion.

While they sought a declaratory ruling from the Board, Atlantic and Rinkers also applied for an Act 250 permit from the District #5 Environmental Commission ("District Commission") for construction of the Atlantic Tower and the Building (collectively, the "Project") On March 14, 1996, the District Commission issued Land Use Permit #5 W 1235 ("Permit"), authorizing construction of the Project on the Project Tract. Atlantic constructed the Project between April, 1996 and July, 1996.

On May 23, 1996, the Board issued a decision in which it concluded that construction of the Atlantic Tower, the Building, and the Rinkers Tower did not require an Act 250 permit application. Re: Rinkers Communications and Atlantic Cellular Company Declaratory Ruling #3 14, Findings of Fact, Conclusions of Law, and Order (May 23, 1996).

On December 19, 1996, the District Coordinator issued Jurisdictional Opinion #5-96-6 ("Second Jurisdictional Opinion") in which he determined that the Project requires an Act 250 permit application based on Atlantic's changes to and use of a temporary access route ("Malone Road") located on a parcel adjacent to the Project Tract. In Declaratory Ruling #3 14, the Board was not presented with evidence of Atlantic's changes to and use of the

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Malone Road. Therefore, the Board did not consider the effect of the Malone Road upon a determination of jurisdiction.

On January 17, 1997, Atlantic filed a petition for declaratory ruling with the Environmental Board, appealing the Second Jurisdictional Opinion. On January 20, 1997, Rinkers filed a cross-appeal with the Board.

On February 24, 1997, Board Chair John T. Ewing convened a prehearing conference in Montpelier, Vermont. The following entities participated: Atlantic by Kimberly M. Butler, Esq. and Elizabeth L. Kohler; Rinkers by L. Brooke Dingledine, Esq. and Karl Rinker; Paul Malone, and Laura Malone Anderson. No requests for nonstatutory party status were made.

On February 28, 1997, Chair Ewing issued the Prehearing Conference Report and Order ("Prehearing Order") which is incorporated herein by reference. Among other items, the Preheating Order provided that the Board would take official notice of the findings of fact in Company:rs Communications and Atlantic Cellular , Declaratory Ruling #3 14, Findings of Fact, Conclusions of Law, and Order (May 23, 1996) unless the parties filed objections by March 12, 1997. Neither party filed objections to the inclusion of such findings in the record. Therefore, the Rinkers findings of fact are included herein by reference. See 3 V.S.A. § 8 1 O(4) (notice may be taken of judicially cognizable facts in contested cases).

On March 12, 1997, Atlantic filed a request to amend certain issues in the Prehearing Order and add a new issue to the Prehearing Order.

On April 16, 1997, Atlantic filed a request for expansion of the time allotment for the site visit from two hours to three hours.

On April 22, 1997, Chair Ewing issued a Chair's Preliminary Ruling which addressed Atlantic's requests of March 12, 1997 and April 16, 1997. The Chair's Preliminary Ruling, which is incorporated herein by reference, provided that it would become final unless a party objected to it on or before May 1, 1997. No such objections were filed.

The parties filed prefiled testimony and exhibits, lists of witnesses and exhibits, and proposed findings of fact and conclusions of law during March and April, 1997. Neither party filed rebuttal evidence or objections to the prefiled evidence.

On May 6, 1997, Chair Ewing convened a second prehearing conference by

telephone. The following entities participated: Atlantic by Kimberly M. Butler, Esq. and Rinkers by L. Brooke Dingledine, Esq. and Karl Rinker.

On May 7, 1997, the Board convened a hearing in the City of Montpelier with the following parties participating: Atlantic by Kimberly M. Butler, Esq. and Rinkers by L. Brooke Dingledine, Esq. and Karl Rinker. The Board heard opening statements from the parties. After the opening statements, the Board conducted a site visit and returned to the hearing room to place its observations on the record. In addition, the parties were given an opportunity to place their own observations on the record. The Board then heard testimony and closing arguments from the parties.

At the May 7, 1997 hearing, the Board took official notice of the evidence contained in its official file in Rinkers, supra. The parties did not object. See 3 V.S.A. § 810(4) (notice may be taken of judicially cognizable facts in contested cases).

The Board deliberated on May 7, 1997, June 11, 1997, and July 9, 1997. 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. See Petition of Villa of Hardwick Electric Department, 143 Vt. 437,445 (1983).

II. ISSUES

A. Whether, 'pursuant to 10 V.S.A. § 6001(3) and EBR 2(A)(2), the Project constitutes "development" requiring an Act 250 permit because the Project's "involved land," as defined under EBR 2(F), exceeds 10 acres based on Atlantic's changes to the Malone Road.

B. Whether, pursuant to 10 V.S.A. § 6001(3) and EBR 2(A)(6) ("Road Rule"), the Project constitutes "development" requiring an Act 250 permit based on Atlantic's changes to the Malone Road.

C. Whether, pursuant to 10 V.S.A. $6081(a) and EBR 2(O), the Malone Road is a "pre-existing development."

D. If the Malone Road is a pre-existing development, whether, pursuant to EBR 2(A)(5) and 2(G), a "substantial change" has occurred or is proposed with respect to the road.

E. 1. Whether the Malone Road is nonjurisdictional logging development.

2. If the Malone Road is nonjurisdictional logging development, whether the Project is better analyzed under jurisdictional tests set forth under 10 V.S.A. $608 1 (a) and EBR 2(O).

3. If such jurisdictional tests should apply, whether, pursuant to EBR 2(A)(5) and 2(G), a substantial change has occurred or is proposed with respect to the Malone Road?

F. Whether the Board's decision in Re: Rinkers Communications and Atlantic Cellular Company, Declaratory Ruling #3 14, Findings of Fact, Conclusions of Law, and Order (May 23, 1996) mooted the need for, and the terms of, Land Use Permit #5W1235.

G. Whether the Board should be equitably estopped from asserting jurisdiction over the Project.

H. Whether the Board should be collaterally estopped from asserting jurisdiction over the Project.

III. FINDINGS OF FACT

1. The Board has taken official notice of the findings of fact contained in Re: Rinkers Communications and Atlantic Cellular Company, Declaratory Ruling #3 14, Findings of Fact, Conclusions of Law, and Order (May 23, 1996) and those findings of fact are incorporated herein by reference.

2. Rinkers owns the Project Tract and leases it to Atlantic. Since late 1994, Atlantic has operated a cellular communications site on the Project Tract.

3. In order to improve its service in the region, Atlantic determined that its cellular communications site should be upgraded substantially.

4. Atlantic's proposed upgrade included construction of the Project.

5. Municipal zoning board approval for the Project required removal of the existing Rinkers buildings and consolidation of Rinkers' and Atlantic's equipment in a new building.

6. To accommodate Rinkers' and Atlantic's equipment, Atlantic ordered the Building.

7. T'he Building is 12 feet by 24 feet, prefabricated, and made in one piece to the buyer's specifications. It is designed to house and protect sensitive communications equipment. The Building weighs approximately 28,000 pounds.

8. The Building must be moved over a relatively level surface with gradual turns to avoid tipping and to accommodate the Building's length and single-piece construction.

9. Moving the Building over laud to the Project Tract required a flatbed trailer, pushed by one bulldozer and pulled by another.

10. Under the terms of its lease with Rinkers, Atlantic has the right to use the Rinkers' access easement to the Project Tract (Winkers' Access Road"). Atlantic's employees have been instructed to use the Rinkers' Access Road when they make maintenance visits to the site.

11. The Rinkers' Access Road is rough, narrow, and unimproved. It is very steep in a number of places.

12. Using the Rinkers' Access Road to transport the Building to the Project Tract would have required changing 80 to 90% of the road, including widening the road, cutting down trees, and adding gravel and/or other fill, particularly over ledge areas. Using the Rinkers' Access Road to transport the Building to the Project Tract also might have required Atlantic to use a cable and winch to drag the Building over certain steep areas. Consequently, Atlantic explored alternative access routes for moving the Building to the Project Tract.

13. In exploring alternative access routes, Atlantic discovered that there were existing logging roads on a 396 acre parcel adjacent to the Project Tract which was owned by Paul Malone and Laura Malone. Anderson ("Malones") and accessible from a Town of Berlin public road.

14. Atlantic contacted the Malones and negotiated an agreement in the form of a letter ("Agreement") which allowed Atlantic to access the Project Tract temporarily over the Malone's property ("Malone Property") during Atlantic's Project construction period. An Atlantic agent and Paul Malone mapped out a route across the Malone Property which begins at a Town of Berlin public road, crosses existing logging roads on the Malone Property ("Malone Road"), and ends at the Project Tract.

15. The Agreement states:

Atlantic Cellular Company, L.P. ("Atlantic") agrees to pay Paul Malone and Laura Malone Anderson (jointly, "Grantor") the sum of One Thousand Dollars ($1,000) as an upfront, one-time payment in consideration of Grantor's grant of a temporary right-of-way over, across and upon Grantor's land located on Mount Irish in the Town of Berlin, Vermont, as more fully detailed below.

Grantor understands and agrees that Atlantic's temporary right-of-way shah commence at Darling Hill Road and continue over Grantor's land to land now owned by Rinkers Communications and shall include the right to use any and all logging roads upon Grantor's land for the purpose of transporting equipment and building supplies to Atlantic's construction site on land on Mount Irish owned by Rinkers Communications, which use may include use by cement trucks, trucks trailering equipment, including communications tower sections and one 12-foot by 24-foot equipment building, and use by all such other vehicles and/or personnel connected with Atlantic's project construction.

Grantor and Atlantic agree that this right-of-way shall terminate upon Atlantic's completion of its construction project. Upon such completion, Atlantic will return the temporary right-of-way to as close as possible to the natural condition existing prior to Atlantic's use of the temporary right-of-way, with the exception of such tree stump clearing and tree branch limbing required to allow Atlantic to move its equipment building to the Rinkers' site. Atlantic further covenants to abide by and be responsible for compliance with the terms and conditions of any Act 250 permit issued to Atlantic in connection with Act 250 Application #5W1235 as such terms and conditions may apply to Atlantic's use of the temporary right-of-way.

Grantor has been given the opportunity to consult with legal counsel. Grantor understands that this agreement is subject to approval and acceptance by Atlantic, which acceptance shall be signified by Atlantic's counter-signature of the agreement.

16. The Malones signed the Agreement on March 18, 1996. John P. Kelly, President and General Manager of Atlantic, signed the Agreement on March 29, 1996. The Agreement is not acknowledged by a notary public.

17. Atlantic did not record the Agreement in the land records of the Town of Berlin because it does not view the Agreement as an easement or as a document giving Atlantic any real property rights in the Malone Property.

18. Atlantic crossed the Malone Property during its use of the Malone Road but it did not

travel on areas of the Malone Property outside of the Malone Road.

19. From the intersection of the public Town of Berlin road and the Malone Road, the Malone Road runs approximately 1.8 miles to the Project Tract. It consists of a series of existing logging roads; no new roads were built.

20. The Malone Property was logged during 1994, 1995 and part of 1996, including the first part of the winter of 1995- 1996. At that time, excavators, bulldozers and dump trucks created logging roads, including the Malone Road.

21. The Malone Property is below 2500 feet in elevation.

22. The logging was not in anticipation of developing or subdividing the Malone Property.

23. Skidders used on the Malone Property were 10 to 11 feet wide. As a result, the logging roads created were at least that wide and generally wider.

24. During logging on the Malone Property, 18-wheel logging trucks were able to drive approximately half-way up the Malone Road to a main staging area located at an elevation of approximately 2,130 feet.

25. During logging on the Malone Property, 14-wheel logging trucks were able to drive within one-half mile of the Project Tract.

26. During logging on the Malone Property, skidders were able to drive all over the Malone Property, including all the way up the Malone Road.

27. During dry periods in 1995, Paul Malone was able to drive his four-wheel-drive truck all over the Malone Property and was able to drive his passenger car to the staging area approximately half-way up the Malone Road.

28. At the end of logging on the Malone Property, the Malone Road was relatively flat, although it did have some stumps in the road bed.

29. Atlantic had planned on moving the Building to the Project Tract during the winter of 1995-1996. However, the District Commission issued the Permit in mid-March and Atlantic encountered spring runoff on the Malone Road which necessitated maintenance work.

30. When Atlantic began work on the Malone Road in late April of 1996, there were downed trees and stumps along the Malone Road and disturbances in the areas adjacent to the side of the road. Additionally, the Malone Road was very wet and there was erosion and runoff damage caused by the logging, spring runoff, and use of the road by four wheel drive trucks.

31. In order to dry out the Malone Road, Atlantic cleaned out existing water bars, installed ditches alongside the road, and installed a culvert with a 6-inch PVC pipe in the road. Additionally, Atlantic installed silt fences and hay bales to control existing erosion, removed 20-30 stumps from the roadbed, and removed ledge outcroppings in four areas which were then spread on the road near the ledge areas to help stabilize the roadbed. In twelve areas, Atlantic leveled the roadbed by moving soil from one side of the road to the other.

32. Atlantic did not pave or put gravel on the Malone Road.

33. Normal use of logging roads may require the removal of ledge from logging roads to level the road or remove obstacles that could cut vehicle tires or cause vehicle tipping.

34. Atlantic made a number of efforts to limit the work that was done and any changes to the Malone Road to accommodate the Building. For example, Atlantic stationed a man on top of the Building as it was moved up the Malone Road, he pushed trees and branches out of the Building's path so those trees and branches would not have to be cut.

35. Atlantic did not decide to obtain access rights across the Malone Property as part of any plan to develop the Malone Property.

36. Atlantic did not widen the Malone Road.

37. The Malone Road is presently beginning to show signs of erosion, particularly on the lower part of the road.

38. Atlantic has no present or ongoing rights to use the Malone Road.

39. Atlantic no longer maintains the Malone Road.

40. The Malone Road is in similar condition to other logging roads on the Malone Property.

41. Atlantic used the Malone Road to access the Project Tract from late April, 1996 through the end of July, 1996 during its construction of the Project. Atlantic also used the Malone Road once or twice in November and December, 1996 for follow-up construction. Atlantic employees have been instructed not to use the Malone Road to access the Project Tract.

IV. CONCLUSIONS OF LAW

A. Whether the Project Constitutes Development Under EBR 2(F)

The issue is whether the Project constitutes "development" requiring an Act 250 permit because the Project's "involved land," as defined under EBR 2(F), exceeds 10 acres based on Atlantic's changes to the Malone Road.

Act 250 requires that a land use permit be obtained prior to commencing construction on a development or prior to commencement of development. 10 V.S.A. § 6081(a). In towns with permanent zoning and subdivision bylaws, such as the Town of Berlin, "development" is defined as the construction of improvements for commercial purposes on tract or tracts of land, owned or controlled by a person, involving more than ten acres of land. 10 V.S.A. § 6001(3); EBR 2(A)(2). Therefore, the Project will constitute development if it involves construction of improvements on more than ten acres of land.

[1] EBR 2(D) defines "construction of improvements" as "any physical action on a project site which initiates development for any purpose enumerated in [EBR] 2(A)." In this case, the initial construction of the Malone Road is exempt from Act 250 jurisdiction because it was for logging purposes below the elevation of 2500 feet. See 10 V.S.A. § 6001 (the word "development" shall not include construction for farming, logging or forestry purposes below the elevation of 2500 feet).

[2-3] The question is whether Atlantic's work on the Malone Road, which occurred after logging on the Malone Property, is the construction of improvements or whether it is repair or routine maintenance. Repair or routine maintenance does not alter an existing development but "prevents or eradicates alteration to an existing development which has occurred or would otherwise occur over time through normal wear and tear." In re Vermont Agency of Transportation (Rock Ledges), Declaratory Ruling #296, Findings of Fact, Conclusions of Law, and Order (3d Rev.) at 10 (March 28, 1997). The following activities are not repair or routine maintenance: altering median and side rock ledges along Interstates 89 and 91, Id. at 11; new pavement, guardrail placement and elimination or decrease in pulloffs, Re: Agency of Transportation (Route 73), Declaratory Ruling #298, Findings of Fact, Conclusions of Law, and Order at 4 (May 9, 1995); an upgrade to an historic condition

Re: Town of Wilmington, Declaratory Ruling #258, Findings of Fact, Conclusions of Law, and Order at 12 (June 30, 1992); widening a road surface, clearing a five foot roadside buffer strip, and laying a subbase and gravel road surface; Re: Town Highway #37. Middlesex, Declaratory Ruling #156, Findings of Fact, Conclusions of Law, and Order at 4 (Dec. 19, 1984); widening U.S. Route 7 to create a 30 foot wide clear zone, Re: Agency of Transportation (Leicester Route 7), Declaratory Ruling #153, Findings of Fact, Conclusions of Law, and Order (June 28, 1984) and replacing leach fields with a different sewage disposal system for a correctional facility. Re: Windsor Correctional Facility, Declaratory Ruling #151, Findings of Fact, Conclusions of Law, and Order at 6 (May 9, 1984).

In contrast, restoring a washed out road to its original condition, including tilling a washed out area with a bulldozer and backbladmg the road to create a clear travel surface, is repair or routine maintenance. Re: Productions, Ltd., Declaratory Ruling #168, Findings of Fact, Conclusions of Law, and Order at 3 (April 10, 1985).

[4] The nature of Atlantic's work on the Malone Road is analogous to that performed on the road at issue in Re: Productions., supra. At the end of logging on the Malone Property during the winter of 1995-1996, the Malone Road was at least 11 feet wide and was relatively flat, although there were some stumps in the road bed. Atlantic encountered spring runoff and existing erosion on the Malone Road which necessitated maintenance work. To address these conditions, Atlantic cleaned out existing water bars, installed ditches alongside the road, and installed a culvert in the road. Additionally, Atlantic installed silt fences and hay bales to control existing erosion, removed 20-30 stumps from the roadbed, and removed ledge outcroppings in four areas which were then spread on the road near the ledge areas to help stabilize the roadbed. Atlantic did not pave or put gravel on the Malone Road. Atlantic did not widen the Malone Road.

Atlantic's work on the Malone Road was not an upgrade to the road. Rather, it was an effort to correct the effects of the spring runoff and erosion caused by previous logging. Because Atlantic's use of the Malone Road was confined to a three month period, the scope of the work on the road was limited; it focused on the original condition of the Malone Road and not on improving the road. Further, Atlantic does not maintain the Malone Road which presently shows signs of erosion and appears to be in similar condition to the other logging roads on the Malone Property. The Board concludes that Atlantic's work on the Malone Road was repair or routine maintenance; it did not rise to the level of construction of improvements. Because Atlantic's work on the Malone Road was not the construction of improvements; the Project does not constitute development under EBR 2(A)(2). The Board cautions that its conclusion in this case is fact specific. If the Board had concluded that the work on the Malone Road was the construction of improvements, the entire Malone Property would have been considered as involved land under EBR 2(F)(1) and the Project would have

constituted development.

B. Whether the Project Constitutes Development Under the Road Rule

The issue is whether, pursuant to 10 V.S.A. § 6001(3) and EBR 2(A)(6), the Project constitutes "development" requiring an Act 250 permit based on Atlantic's changes to the Malone Road.

EBR 2(A)(6), commonly known as the Road Rule, states that an Act 250 permit is required for:

> [t]he construction of improvements for a road or roads, incidental to the sale or lease of land, to provide access to or within a tract 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. For the purpose of determining jurisdiction, any parcel of land which will be provided access by the road is land involved in the construction of the road. This jurisdiction shall not apply unless the road is to provide access to more than five parcels or is to be more than 800 feet in length. For the purpose of determining the length of the road, the length of all other roads within the tract of land constructed within any continuous period of ten years commencing after the effective date of this rule shall be included.

EBR 2(A)(6).

[5] The Road Rule is not applicable in this case. In order to apply, the Road Rule requires the construction of improvements for a road or roads. Id. As stated above in section IV., A., the Board concludes that Atlantic's changes to the Malone Road are not the construction of improvements. Therefore, the Project does not constitute development under the Road Rule.

The Board cautions that its conclusion in this case is fact specific and that the use of logging roads incidental to a plan to develop or subdivide land may trigger jurisdiction. If any further changes to or use of the Malone Road occur in the future, including use by temporary right-of-way, then such changes may be reevaluated pursuant to 10 V.S.A. § 6007(c) and EBR 3(C).

C. Pm-existing Development

The issue is whether the Malone Road is a pre-existing development pursuant to 10

V.S.A. § 6081(b) and EBR 2(O). An Act 250 permit is not required for a pm-existing development. 10 V.S.A. § 6081(b). EBR 2(O) defines pre-existing development as any development in existence on June 1, 1970 and any development which was commenced before June 1, 1970 and completed by March 1, 1971.

[6-7] The Malone Road was built between 1994 and 1996 during logging on the Malone Property. Therefore, it is not a pre-existing development. EBR 2(O); See also 10 V.S.A. § 6001(3) (logging roads below the elevation of 2500 feet are not "development").

D. Substantial Change

[8] Since the Malone Road is not a pre-existing development, the Board need not consider whether, pursuant to EBR 2(A)(5) and 2(G), a "substantial change" has occurred or is proposed with respect to the road. See Re: David Enman (St. George Property), Declaratory Ruling #326, Findings of Fact, Conclusions of Law, and Order at 11 (Dec. 23, 1996) (before the Board determines whether the project is a substantial change, it must first ascertain whether them is either a pre-existing development or subdivision on the project tract. If there is neither, then the Board has no basis to determine whether the project is a substantial change to a pre-existing development or subdivision).

E. Jurisdictional Analysis

Atlantic requested the Board to address the issue of whether, because the Malone Road is nonjurisdictional logging development, the Project is better analyzed under jurisdictional tests set forth under 10 V.S.A. § 6081(b) and EBR 2(O) (substantial change to a pm-existing development). In a Chair's Preliminary Ruling, the Chair split Atlantic's requested issue into 2 subissues: whether the Malone Road is nonjurisdictional logging development and, if so, whether the Project is better analyzed under jurisdictional tests set forth under 10 V.S.A. § 6081(a) and EBR 2(O).

1. Whether the Malone Road is nonjurisdictional logging development.

Act 250's definition of "development" does not include construction for farming, logging or forestry purposes below the elevation of 2500 feet. 10 V.S.A. § 6001(3). The Malone Road is a logging road below the elevation of 2500 feet. Therefore, the Malone Road is not development. Additionally, the Board concludes, in sections IV., A. and B. above, that the Malone Road is not a development pursuant to EBR 2(F) or the Road Rule. Therefore, the Malone Road is not "development" as defined by Act 250.

2. If the Malone Road is nonjurisdictional logging development, whether the Project is better analyzed under jurisdictional tests set forth under 10 V.S.A. § 6081(b) and EBR 2(O).

The Board concludes, in section IV., E., 1. above, that the Malone Road is not a development. The Board concludes, in section IV., C. above, that the Malone Road is not a pre-existing development. The jurisdictional tests under 10 V.S.A. § 6081(b) and EBR 2(O) apply only to pre-existing developments. Under such tests, substantial changes to pre-existing developments require an Act 250 permit. 10 V.S.A. § 6081(b); EBR 2(A)(5). Since the Malone Road is not a pre-existing development, the substantial change jurisdictional tests under 10 V.S.A. § 6081(b) and EBR 2(O) do not apply to the Malone Road. Re: David Enman (St. George Property), supra, at .

3. If such jurisdictional tests should apply, whether, pursuant to EBR 2(A)(5) and 2(G), a substantial change has occurred or is proposed with respect to the Malone Road?

The Board concludes above that such jurisdictional tests do not apply. Therefore, the Board will not analyze whether a substantial change has occurred or is proposed with respect to the Malone Road.

F. Validity of Permit #5W1235

Atlantic asks the Board to declare that the Board's decision in Rinkers mooted the need for, and the terms of, the Permit. On October 27, 1995, the District Coordinator issued the First Jurisdictional Opinion in which he determined that the Project is subject to Act 250. On November 27, 1995, Rinkers and Atlantic each tiled a petition for a declaratory ruling with the Board, appealii the First Jurisdictional Opinion. At the same time, Rinkers and Atlantic filed an application (as co-applicants) with the District Commission for an Act 250 permit for the Project.

On March 14, 1996, the District Commission issued the Permit to Atlantic and Rinkers, authorizing the construction of the Project.

[9] On May 23, 1996, the Board issued the Rinkers decision in which it determined, among other things, that an Act 250 permit is not required for the Project. Because the Board determined that the Project does not require an Act 250 permit, the Permit became void on May 23, 1996.

G. Equitable Estoppel and Collateral Estoppel

Atlantic and Rinkers argue that even if the Board concludes that the Project requires an Act 250 permit, the Board should be equitably or collaterally estopped from asserting Act 250 jurisdiction over the Project. Because the Board concludes that the Project does not require an Act 250 permit, the Board does not reach the issue of whether it should apply equitable or collateral estoppel in this case.

V. ORDER

1. An Act 250 permit is not required for the Project.

2. The Permit is void as of May 23, 1996.

Dated at Montpelier, Vermont this 1 lth day of July, 1997.

ENVIRONMENTAL BOARD

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