

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

RE: Thomas Howrigan Gravel Extraction
Thomas Howrigan and Ivan Charbonneau
[REDACTED]

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This proceeding concerns a petition for declaratory ruling arising from the issuance of Jurisdictional Opinion #JO-6-98-001 ("Opinion"). As explained in more detail below, the Vermont Environmental Board ("Board") concludes that a land use permit was and is required for the extraction of gravel from land owned by Thomas Howrigan in the Town of East Fairfield, Vermont.

I. PROCEDURAL SUMMARY

On January 12, 1998, the Fairfield Fire District #1 ("Fire District") filed a request for a jurisdictional opinion with the Coordinator of the District #6 Environmental Commission ("Coordinator") regarding whether alleged changes in extraction rates at a gravel pit operated by I.H. Charbonneau & Sons ("Charbonneau") on lands owned by Thomas Howrigan in the Town of East Fairfield, Vermont ("Existing Pit") require a land use permit pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250").

On February 12, 1998, the Coordinator issued the Opinion in which he determined that an increase in the extraction rates at the Existing Pit constitute a substantial change to a pre-existing development and, therefore, require an Act 250 permit.

On March 10, 1998, Thomas Howrigan and Ivan Charbonneau ("Petitioners") filed a Petition for Declaratory Ruling with the Board alleging that the Opinion is in error.

On April 13, 1998, Board Chair Marcy Harding convened a prehearing conference with the following participants:

Petitioners by Brian P. Hehir, Esq. and Francis Howrigan
Fire District by Martin Maley, Esq. and Don Kittell

On April 14, 1998, Chair Harding issued a Prehearing Conference Report and Order.

On May 5, 1998, Petitioners filed a Motion to Continue Jurisdictional Appeal.

On May 6, 1998, Chair Harding issued an Order continuing this proceeding for a period of six months.

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On August 27, 1998, Petitioners filed a status report.

On November 6, 1998, Petitioners filed a Motion to Continue Jurisdictional Appeal.

On December 1, 1998, Chair Harding issued an Order continuing this proceeding until February 16, 1999.

On February 16, 1999, Petitioners filed a status report and a Motion for Status Conference.

On March 4, 1999, Chair Harding issued a Notice of Status Conference.

On March 12, 1999, Chair Harding convened a status conference with the following parties participating by telephone:

Petitioners by Brian P. Hehir, Esq. and Peter Cross
Fire District by Martin Maley, Esq.

On March 24, 1999, Chair Harding issued a Status Conference Report and Order which, among other things, re-defined the issues in this proceeding.

On March 31, 1999, Chair Harding issued a Revised Scheduling Order.

In April and May, 1999, the parties filed direct and rebuttal testimony and exhibits and proposed findings of fact and conclusions of law.

On May 25, 1999, Petitioners filed objections to the evidence submitted by the Fire District.

On June 4, 1999, the Chair convened a second prehearing conference with the following individuals and entities participating:

Petitioners by Brian P. Hehir, Esq.
Fire District by Martin Maley, Esq.

At the second prehearing conference, Chair Harding announced her determinations concerning Petitioners' objections to the Fire District's evidence.

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On June 9, 1999, a three-member panel of the Board ("Panel") convened a hearing in East Fairfield, Vermont with the following individuals and entities participating:

Petitioners by Brian P. Hehir, Esq.
Fire District by Martin Maley, Esq.

Chair Harding read her determinations concerning the evidentiary objections into the record. The Panel conducted a site visit, placed their observations from the site visit on the record and provided the parties with the opportunity to supplement these observations, accepted documentary and oral evidence into the record, and heard opening and closing statements regarding the issues on appeal. After recessing the hearing, the Panel deliberated. The Panel deliberated again on June 30 and July 14, 1999.

Based upon a thorough review of the record, related argument, and the proposed findings of fact and conclusions of law, the Panel issued a proposed decision on July 15, 1999, which was sent to the parties. The parties were allowed to file written objections and request oral argument before the Board on or before July 30, 1999.

On July 30, 1999, Petitioners filed a request for oral argument and written objections to the proposed decision.

On August 18, 1999, the Board convened oral argument relative to the appeal with the following individuals and entities participating:

Petitioners by Brian P. Hehir, Esq.
Fire District by Martin Maley, Esq.

The Board deliberated on August 18, 1999. Following a thorough review of the proposed decision and the record, the Board declared the record complete and adjourned. The matter is now ready for final decision.

To the extent that any proposed findings of fact are included within, they are granted; otherwise, they are denied. See Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Com., Docket No. 96-369, slip op. at 13 (Vt. Nov. 7, 1997); Petition of Village of Hardwick Electric Department, 143 Vt. 437,445 (1983).

II. ISSUES

1. Whether there has been an increase in the extraction rate from **the** Existing Pit sufficient to constitute a “substantial change” to pre-existing development and therefore require an Act 250 permit pursuant to 10 V.S.A. §6081(b) and Environmental Board Rule (“EBR”) 2.

2. Whether, pursuant to 10 V.S.A. § 6081, a land use permit is required for operation of the Existing Pit by virtue of the existence of Act 250 jurisdiction over a proposed extraction operation located across the road from the Existing Pit (“Proposed Pit”).

III. FINDINGS OF FACT

1. Thomas Howrigan owns and operates a dairy **farm** in East Fairfield, Vermont. The Howrigan **farm** consists of over **500** acres of land on both sides of Morey Road, **Lapland** Road, Metcalf Pond Road, and Lost Nation Road. All parcels comprising the farm are contiguous.
2. The Howrigan farm on Morey Road was previously owned by D. Francis Howrigan who purchased the property in the early 1960s. He purchased it primarily for its gravel extraction potential. D. Francis Howrigan purchased the so-called Boot Hill Pit later in the 1960s (see Finding 13 below). D. Francis Howrigan conveyed the 500+ acres to Thomas Howrigan in 1991.
3. Gravel pits on the Howrigan farm are located on the north side of Morey Road, the south side of Morey Road, and the east side of Metcalf Pond Road.
4. The Status Conference Report and Order issued March 24, 1999 identified the Existing Pit as being located on the south side of Morey Road. The Existing Pit is comprised of at least two separate and distinct areas of excavation: the “Bread Loaf Pit” and the “Pit South of Morey Road.” **There is also an excavated area on the south side of Morey Road** referred to as the “Landing.”
5. The Pit South of Morey Road is reached by an improved gravel farm road running southerly from Morey Road. The Pit South of Morey Road does not appear **to be in active use at this time**. There are signs of erosion in the pit. There is some vegetation growing on the faces of the pit.

6. The Bread Loaf Pit is approximately 400' south of the Pit South of Morey Road. The pits are separated by a meadow. The Bread Loaf Pit and the Pit South of Morey Road are part of a contiguous gravel deposit. The improved farm road that leads to the Pit South of Morey Road continues along the eastern edge of that pit to the Bread Loaf Pit. The road encircles the Bread Loaf Pit.
7. There appears to have been recent excavation activity at the Bread Loaf Pit. Piles of gravel lie on the flat floor of the pit, with excavated faces rising all around. There was no machinery in the pit at the time of the June 9, 1999 site visit.
8. The Landing lies between the Bread Loaf Pit and the Pit South of Morey Road. Equipment has sometimes been located at the Landing which has served as a "staging area" for the extraction operation.
9. A small gravel pit known as Area 2 lies adjacent to the north side of Morey Road. It covers an area of approximately 1-2 acres. It is connected to a gravel pit owned by W.H. Morey ("Morey Pit"), which lies immediately to its north. Area 2 is covered with trees and other vegetation. Debris has been deposited in Area 2. There is no evidence that excavation has occurred recently in Area 2.
10. A pit known as Area 1 lies to the north of Area 2 and the Morey Pit. Area 1 is approximately 2-3 acres. Area 1 is covered with vegetation and has trees growing from its faces. Refuse has been deposited in Area 1, including portions of a wooden building, the cribbing for a bridge, and a truck-bed. There is no evidence that excavation has occurred recently in Area 1.
11. The Proposed Pit lies to the east of the Morey Pit. Both the Proposed Pit and Area 1 are accessed by a gravel road running northerly from Morey Road to the east of the Morey Pit. There is little vegetation in the excavated area of the Proposed Pit. It appears to have been recently excavated.
12. The Howrigan farm along Morey Road has a rolling topography with abrupt changes at each gravel pit. Most of the land adjacent to each pit is open meadow or pasture.
13. Thomas Howrigan owns another gravel pit, the Boot Hill Pit, that lies on the southeast side of the intersection of Metcalf Road and Lost Nation Road. The Boot Hill Pit covers approximately 3-4 acres and has faces that are at least 30'-40' high. At its eastern end, the Boot Hill Pit connects to a pit not owned by Thomas

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Howrigan. Limited vegetation is growing in the pit. There appears to have been recent excavation activity at the Boot Hill Pit. Piles of screened material lie in the bottom of the pit and on one side of its upper rim.

14. The pits on the Howrigan farm vary from approximately 2 to 5 acres in area and from 10' to 60' in depth.
15. Gravel has been extracted from the Howrigan farm since at least the 1940s. Aerial photographs from the United States Soil Conservation Service indicate that gravel was extracted from Area 1, Area 2, and the Pit South of Morey Road prior to June 1, 1970.
16. D. Francis Howrigan extracted gravel from various locations on the Howrigan farm as a regular activity in the 1960s. He extracted gravel from Area 1, Area 2, and the Pit South of Morey Road. Although extraction did not occur on each day of the year, extraction occurred every year primarily for the repair, maintenance, and construction of local roads. The State of Vermont used large quantities of Howrigan gravel in 1962 and 1968. D. Francis Howrigan personally used at least 2,844 cubic yards ("CY") during the 1960s on various small projects. Extraction also occurred at the Boot Hill Pit prior to June 1, 1970. There was no extraction of gravel from the Proposed Pit prior to June 1, 1970.
17. The Howrigans extracted small quantities of gravel from the southern and western edges of the area that is now the Bread Loaf Pit prior to June 1, 1970.
18. The Vermont Agency of Transportation ("AOT") project plans from 1959 and 1968 reference use of the "Howrigan Pit" for AOT projects undertaken in those years.

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19. Based upon contour drawings made from aerial photographs dated May 10, 1962 and May 20, 1974, Petitioners' consultant estimated that approximately 184,000 CY of gravel were extracted from three locations on the Howrigan farm during the intervening twelve years, as follows:

LOCATION	VOLUME EXTRACTED 5/10/62-5/20/74
Area 1	24,700 CY
Area 2	15,378 CY
Pit South of Morey Road (also called Area 3)	<u>-144,301 CY</u>
TOTAL	184,379 CY
AVERAGE/YEAR for all 3 areas	15,365 CY
AVERAGE/YEAR for Pit South of Morey Road	12,025 CY

20. The contour drawings made from the 1962 and 1974 aerial photographs depict the northern portion of the Bread Loaf Pit. The contour drawings do not reveal evidence of extraction from that portion of the Bread Loaf Pit.
21. Petitioner's expert defined Area 1, Area 2, and the Pit South of Morey Road/Area 3 as three distinct pits because Areas 1 and 2 are separated by the intervening pit owned by W.H. Morey and because Areas 1 and 2 are separated from the Pit South of Morey Road/Area 3 by the intervening publicly owned Morey Road.

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22. Extraction records indicate that at least 185,846 CY of gravel were extracted from Area 1, Area 2, the Pit South of Morey Road, and the Boot Hill Pit from 1950 through 1970. It is reasonable to assume that this number is conservative because extraction records exist only for large projects and because no records exist for the years 1952-1954. The yearly extraction totals are as follows:

YEAR	TOTAL EXTRACTION in CY
1950	5,391
1951	10,375
1952	no data provided
1953	no data provided
1954	no data provided
1955	27,606
1956	1,208
1957	96
1958	3,928
1959	3,030
1960	5,635
1961	7,082
1959-1964 misc.	2,190
1962	22,964
1963	11,002
1964	7,400
1965	5,626
1966	9,042
1967	7,039
1968	30,698
1969	9,306
1970	8,614
1962-1970 misc.	<u>7,614</u>
TOTAL	185,846
AVERAGE/YEAR	10,325

23. At least 119,305 CY of gravel were extracted from pits on the Howrigan farm from 1962 through 1970. Based upon these records, the average yearly extraction was 13,256 CY from 1962 until 1970, which is roughly equivalent to the

estimated yearly extraction rate of 15,365 CY/year calculated from aerial maps for the period 1962-1974 (see Finding 19 above).

24. Charbonneau has extracted gravel from pits on the Howrigan farm since 1992. The total extraction from the Howrigan pits was approximately 88,486 CY for the seven years from 1992 through 1998. This includes amounts extracted by Charbonneau and by other haulers.

YEAR	CHARBONNEAU	OTHERS	TOTAL
1992	1,204 CY	2,100 CY	3,304 CY
1993	8,993	820	9,813
1994	8,855		8,855
1995	15,953		15,953
1996	16,023		16,023
1997	16,310		16,310
1998	15,818	2,410	18,228

25. No figures were presented regarding extraction rates for the years 1975 through 1991. Extraction from Howrigan pits occurred on a regular basis during this period.
26. Between 1962 and 1974, extraction from the Pit South of Morey Road occurred in a westerly direction.
27. When Charbonneau began to extract gravel from the Howrigan farm, it initially extracted from the Pit South of Morey Road and in the Landing. The Landing was not a large enough area for Charbonneau's needs. Charbonneau's excavation was limited in these areas because it soon began to extract primarily from the Boot Hill Pit. When excavation at the Boot Hill Pit began to come close to the road, Charbonneau returned to the area south of Morey Road. Charbonneau determined that it would interfere with Thomas Howrigan's agricultural land if it continued to excavate the Pit South of Morey Road in a southerly direction. Charbonneau decided to excavate further to the south, in the Bread Loaf area, which is now the Bread Loaf Pit. The Bread Loaf area was a treed area rising into a shape resembling a loaf of bread. At the time that Charbonneau decided to excavate the Bread Loaf Pit, in approximately 1994 or 1995, Thomas Howrigan was unable to use it for agriculture. A United States Soil Conservation Service aerial photograph reveals that the Bread Loaf Pit area was heavily forested on May 12,

1992. A 1995 aerial photo reveals that the western half of the Bread Loaf area was cleared of trees. Another aerial photograph reveals that the area was entirely cleared of trees by the spring of 1999.

- 2s. In **1998**, gravel extraction on Howrigan land occurred primarily at the Bread Loaf Pit. Charbonneau conducted limited extraction in one corner of the Pit South of Morey Road in 1998. Charbonneau also extracted gravel from the Proposed Pit in 1998. It is possible that some extraction occurred at the Proposed Pit prior to 199s.
29. Charbonneau extracted “significant amounts” from the Boot Hill Pit, although there has been limited extraction from that pit since at least May, 1998. Beginning at least as early as 1998, gravel has been delivered from the Bread Loaf Pit and the Proposed Pit to be processed at a screener located at the Boot Hill Pit. The screener was powered by a diesel motor driving an hydraulic pump. Petitioner’s witness Todd Merchant testified at the hearing that the screener screened gravel on a daily basis. The screener operated in the Bread Loaf Pit area in the autumn of 1997 and probably for one or two years prior. In approximately June, 1998, a rock crusher was installed on the Boot Hill Pit site and is used sporadically to reduce accumulated piles of oversized rocks.
30. During the 1960s, the equipment used at the **Howrigan pits** included a gravel screen, single and tandem axle trucks to haul gravel **from** the site, a gravel washer, and possibly a fuel filling tank. Some operators may have used equipment such as rock crushers.
31. Since 1992, the equipment used at the Howrigan pits has included a gravel screen, tandem axle trucks to haul gravel from the site, a fueling tank, a loader, and a rock crusher.
32. All extraction operations at the Howrigan farm ceased on December 5, 1998 pursuant **to a stipulation reached by Petitioners and the State of Vermont.**
33. **Charbonneau** generally conducted extraction operations in the late spring, summer, and fall. In 1998, extraction occurred through at least the end of November.
34. Charbonneau conducted extraction operations during “normal business hours,” five “solid” days per week and “quite often” on Saturday mornings. At least one

East Fairfield resident reports seeing loaded Charbonneau trucks in the vicinity of the Howrigan farm on Sundays in 1998. These trucks may have been obtaining gravel for the truck operator's personal use.

35. During 1998, the operator who ran the screener arrived at the Boot Hill Pit at 6:30 a.m. to be ready to begin at 7:00 a.m. Although the operator's contractual work-day ended at 3:30 p.m., he often continued to work until 4:30 p.m.
36. During 1998, at least one Charbonneau truck worked all day loading gravel from the Bread **Loaf** Pit and bringing it to be screened at the Boot Hill Pit. On some days, as many as four or five Charbonneau trucks worked this route. Trucks that were not part of the Charbonneau operations also hauled gravel from the Bread Loaf Pit. One truck-load of gravel is considered to be 14 CY, although the trucks can hold 15 or 16 CY.
37. Thomas Howrigan has obtained a local zoning permit to begin extraction of gravel at the Proposed Pit.
38. The Fire District is a municipal corporation established to provide drinking water for the residents of East Fairfield, Vermont. The well that provides the water for the Fire District's system is located on the Howrigan farm to the south of Morey Road (the "Well"). The Well is approximately 1000' east of the Pit South of Morey Road, 1000' northeast of the Bread Loaf Pit, and 300' east of the Landing. The land from the west slopes downward to the Well area and is agricultural in nature.
39. In the early 1980s, D. Francis Howrigan granted an easement to the Fire District that allowed the Fire District to construct the Well.
40. The Well is located within a "wellhead protection area." No activities unrelated to the Well are permitted in Zone 1, a 200' area surrounding the Well. Some limitations are imposed on activities occurring in Zones 2 and 3, which are located to the west of the Well. Signs indicating "Public Watershed Protection Area" are located on Morey Road and on Metcalf Pond Road.
41. Water is pumped from the Well to a reservoir located approximately two and one-half miles away on Route 36 and is gravity fed to 78 homes, including two farms. The Well is a shallow dug well that is approximately 32' deep. It is capable of producing 18,000 gallons per day. The water is of very high quality.

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42. The Bread Loaf Pit, the Pit South of Morey Road, and the Landing are within some zone of the wellhead protection area for the Well. They are not located within Zone 1.
43. The Howrigans and Charbonneau have avoided activity near the Well. There is no evidence that they have ever operated equipment within Zone 1.
44. At one point between 1987 and 1990 some fuel tanks not associated with gravel extraction were discarded in the area of the Well. A small amount of fuel leaked from the tanks into the soil and contaminated the Well.
45. In 1996, several East Fairfield residents observed burned debris, including paint cans, in the northeast corner of the Bread Loaf Pit area.
46. In 1997, several East Fairfield residents observed that Charbonneau had set up its screening operation and had positioned a fuel tank within approximately 300' of the Well in the Landing. The screener was leaking oil onto the soil. The oil was cleaned from the area and the screener and fuel tank were removed within a 48 hours after the Fire District notified Thomas Howrigan or Charbonneau of the problem.
47. Donald **Kittell**, a certified water system engineer for the Fire District, inspects the Well at least once and sometimes twice daily. He tests the water on a weekly basis. He stays at the Well site for at least one hour daily.
48. Mr. **Kittell** has lived in Fairfield for 72 years. Based upon Mr. Kittell's observations, gravel extraction at the Existing Pit has historically been sporadic. Mr. **Kittell** has observed that the rate of extraction expanded beginning in approximately 1994 or 1995. During the last two years he has observed the extraction rate continue to increase. He has sometimes seen four to five tandem dump trucks repeatedly coming to and leaving the Bread Loaf Pit between 7:00 a.m. and 5:00 p.m. For the period of approximately October through early December, 1998, Mr. **Kittell** observed that Charbonneau conducted its operations at Bread Loaf Pit all day, seven days per week.
49. William Morey has lived in East Fairfield for 57 years. He currently resides on Morey Road, adjacent to the Howrigan Farm. He can recall that several small pits were operated on the Howrigan property in the 1940s and 1950s, predominantly on the north side of Morey Road. He observed that the pits were used

sporadically when sand and gravel was needed for road construction and repair. Since approximately 1996, Mr. Morey has noticed increased traffic from the Howrigan property.

50. Patrick Winegar has been a Prudential Committee Member of the Fire District since 1991. He has observed four to six Charbonneau gravel trucks on Vermont Route 36 every morning and evening from the late spring to the autumn for approximately the last four or five years.
51. Craig Lumbra has lived on New Street in East Fairfield, Vermont since 1987. His home is positioned in a way that he can observe traffic on Vermont Route 36 throughout the year. He has observed a significant increase in the amount of gravel truck traffic in the late 1990s.
52. James Boucher has resided on Mill Street in East Fairfield since April, 1986 where he operates a repair business from his home. During the summer of 1989, Mr Boucher spent many hours reconstructing the roof of his home. No gravel was transported past his house on most days during that summer. On a high volume day, Mr. Boucher observed approximately three gravel-hauling trips. Since 1996, Mr. Boucher has become concerned with an increase in the truck noise and activity traveling by his home.
53. The Fire District filed the request for a jurisdictional opinion with the Coordinator of the District #6 Environmental Commission because it was concerned that the extraction activities occurring on the south side of Morey Road would contaminate or otherwise degrade the Well.

IV. CONCLUSIONS OF LAW

A. Scope of Review and Burden of Proof

A petition for declaratory ruling is conducted de novo to determine the applicability of any statutory provision or of any rule or order of the Board. 10 V.S.A. § 6007(c) and EBR 3(D). Although the petition may come to the Board as an appeal of a jurisdictional opinion, the issue in a declaratory ruling proceeding is not whether a jurisdictional opinion, or any part thereof, is correct. Thus, facts stated or conclusions drawn in the jurisdictional opinion are not considered by the Board. Provided a petition is timely filed, the only issue is the applicability of any statutory provision or of any rule or order of the Board over the project described in the opinion.

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B. Substantial Change to Pre-Existing Development

Act 250 requires that a land use permit be obtained for any substantial change to a pre-existing development. 10 V.S.A. § 608 1(b); EBR 2(A)(5).

[W]ith 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 the 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.

Re: John Gross Sand and Gravel, Declaratory Ruling #280, Findings of Fact, Conclusions of Law, and Order at 8 (July 28, 1993).

1. Identity of Pits

The issues on appeal, as set forth in the March 24, 1999 Status Conference Report and Order, contemplated that there was one pit at issue in this proceeding, the Existing Pit, and that the Existing Pit was located across the road from the Proposed Pit. As the Board reviewed the pre-filed evidence submitted in this matter, it became apparent for the first time that there are at least six separate areas from which Petitioners have extracted gravel on the Howrigan farm, two of which are located across Morey Road from the Proposed Pit -- the Bread **Loaf** Pit and the Pit South of Morey Road. It also became apparent that Petitioners considered all six areas of excavation to be one pit for purposes of this declaratory ruling.

Petitioners allege that the Bread Loaf Pit and the Pit South of Morey Road are one pit because they are part of a continuous gravel deposit. The Board's findings of fact support the conclusion that these pits are separate **and** distinct areas of excavation. **It** is true that if the pits share the same gravel deposit, then the Bread Loaf Pit could potentially be excavated in a northerly direction and the Pit South of Morey Road in a southerly direction until the two excavated areas meet. Nevertheless, the fact remains that the two pits are not contiguous. They are divided by a meadow that is approximately 400 feet wide. They are also separated by the road that encircles the Bread Loaf Pit. Although they may share a gravel deposit beneath the surface farmland, there is simply no evidence that supports a conclusion that they are the *same pit*. Accordingly, the Board

concludes that the Bread Loaf Pit and the Pit South of Morey Road are **separate and distinct** pits that must be analyzed separately. Cf. Re: Clifford's Loam and Gravel, Inc. Declaratory Ruling #90, Findings of Fact, Conclusions of Law, and Order at 3 (Nov. 6, 1978).¹

The Board similarly concludes that each of the four remaining areas of excavation are separate and distinct pits -- from each other and from the Bread Loaf Pit and the Pit South of Morey Road. The three pits to the north of Morey Road (Area 1, Area 2, and the Proposed Pit) are not contiguous. They are separated from the other pits on the Howrigan farm by a substantial distance and by intervening publicly owned roadways. Cf. id. Also cf. Re: Maida Maxim, Declaratory Ruling #196, Findings of Fact, Conclusions of Law, and Order at 3 (Jan. 14, 1988) (because a town's intervening property interest creates a de facto subdivision of the land owned on either side of a road, petitioner does not create a "lot" for purposes of Act 250 when she transfers land located on the south of a road and retains land to the north). The Boot Hill Pit is also separated from the other Howrigan pits by great distance and intervening ownership.

Accordingly, the Board concludes that for the purposes of determining whether there is Act 250 jurisdiction, it will consider the six above-identified areas of excavation as separate and distinct pits.²

- 2. Pre-Existing Development

A development is "pre-existing" if it was in existence on June 1, 1970 or if construction commenced before that date and was completed by March 1, 1971. 10 V.S.A. § 6081(b) and EBR 2(O). Petitioners have the burden of proof (both production

¹ See Section IV.B.4. below for more information regarding Clifford's Loam and Gravel.

² Alternatively there are at a minimum at least three separate pit areas: those north of Morey Road (Area 1, Area 2, and the Proposed Pit), those south of Morey Road (the Pit South of Morey Road and the Bread Loaf Pit), and the Boot Hill Pit. It is significant to note that identifying the pits as separate or contiguous is not dispositive. As the following alternative analyses demonstrate, the Board has determined that the Howrigan pits have triggered Act 250 jurisdiction regardless of whether it reviews the Pit South of Morey Road and the Bread Loaf Pit as distinct pits or as one pit. Similarly, the Board has determined that each of the Howrigan pits have triggered Act 250 jurisdiction regardless of whether it analyzes extraction rates on a pit-by-pit basis or in the aggregate.

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and persuasion) regarding whether the pits on the Howrigan farm constitute pre-existing development. Gross. supra at 8.

The Board's findings of fact support the conclusion that gravel was extracted from the Pit South of Morey Road, Area 1, Area 2, and the Boot Hill Pit prior to June 1, 1970. The findings of fact also support the conclusion that a very limited amount of extraction occurred at the western and southern edges of the Bread Loaf Pit. In addition, the findings of fact support the conclusion that no extraction occurred at the Proposed Pit prior to June 1, 1970.

Accordingly, the Board concludes that Petitioners have met their burden of proof to demonstrate that the Pit South of Morey Road, Area 1, Area 2, and the Boot Hill Pit are pre-existing development pursuant to 10 V.S.A. § 6081(b) and EBR 2(O). Although extraction occurred on a very limited basis at the Bread Loaf Pit, the Board will conclude for the purposes of its analysis that it also pre-existed Act 250. In contrast, the Board concludes that the Proposed Pit is not pre-existing development. Therefore, an Act 250 permit is required for extraction operations at the Proposed Pit and has been required since the time extraction began at that location.

3. Abandonment of Pre-Existing Development

"In order to be entitled to the statutory exemption afforded to pre-existing development, the party who is claiming the exemption[, Petitioners herein,] must show that such pre-existing development has not been abandoned since the enactment of Act 250 and that it should therefore retain its status as a pre-existing development." Re: Champlain Marble Corp. (Fisk Quarry), Declaratory Ruling #319, Findings of Fact, Conclusions of Law, and Order at 11 (Oct. 2, 1996) (citing Re: U.S. Slate Products, Inc. / Re: Victor Genier, Declaratory Rulings #279 and #283, Findings of Fact, Conclusions of Law, and Order (Reconsidered) at 22-23 (Oct. 1, 1993)).

No evidence was provided concerning extraction *rates* for the years 1974 to and including 1991. Nevertheless, Petitioners presented credible evidence that extraction from the Howrigan pits (excluding the Proposed Pit) occurred on a regular basis from 1974 to 1992.

Charbonneau has extracted gravel from the Pit South of Morey Road, the Bread Loaf Pit, and the Boot Hill Pit since 1992. Both the Bread Loaf Pit and the Boot Hill Pit appear to have been excavated recently. Although there are signs of erosion and

vegetation is growing on the faces of the Pit South of Morey Road, the Board cannot conclude that it has been abandoned. The Board concludes that the Pit South of Morey Road, the Bread Loaf Pit, and the Boot Hill Pit have not been abandoned.

No evidence was presented regarding extraction operations at Areas 1 and 2 since 1974. Furthermore, there is vegetation, including trees, growing in Areas 1 and 2. Debris has been deposited in these areas. The Board concludes that Areas 1 and 2 have been abandoned.

Accordingly, the Board's findings of fact support the conclusion that the Pit South of Morey Road, the Bread Loaf Pit, and the Boot Hill Pit have not been abandoned and therefore retain their status as a pre-existing development. In contrast, the findings of fact support the conclusion that the pits known as Area 1 and Area 2 have been abandoned. Therefore, Area 1 and Area 2 do not retain their pre-existing status and an Act 250 permit must be obtained before further extraction operations could commence at these locations.

4. Substantial Change

"Substantial change" is defined as "*any* change in a development ... which may result in *significant impact with* respect to any of the" ten Act 250 criteria. EBR 2(G)(emphasis supplied). Thus, the test for substantial change involves a two stage inquiry: (i) has there been a cognizable change to the pre-existing development and, if so, (ii) does the change have the potential for significant impacts with respect to Act 250 criteria?

In order to maintain pre-existing status under § 608 1 (b) and EBR 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 must also prove what the pre-existing annual rate of extraction was." Gross. supra at 8-9. Petitioners must also produce evidence regarding the post- 1970 operation. The Fire District carries the burden of persuading the Board that a substantial change has occurred. *Id.*

A "change" occurs when there is an increase in extraction rate or a change from sporadic to daily operation. Re: Robert and Barbara Barlow, Declaratory Ruling #234, Findings of Fact, Conclusions of Law, and Order at 11 (Sept. 20, 1991), aff'd In re. Barlow, 160 Vt. 5 13 (1993). The Board has previously concluded that "a substantial change in a gravel pit operation occurs when there is an increase of more than 10 percent over the pre-1970 extraction rates accompanied by the potential for significant impacts."

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Re: Dale E. Percy, Declaratory Ruling #251, Findings of Fact, Conclusions of Law, and Order at 6 (March 26, 1992) (citing Re: H.A. Manosh, Declaratory Ruling #163, Findings of Fact, Conclusions of Law, and Order at 6 n.2 (Aug. 29, 1984)). The addition of new equipment is also considered a substantial change if it has the potential for impacts under the Act 250 criteria. Re: Champlain Marble Corp. (Fisk Quarry), Declaratory Ruling #319, Findings of Fact, Conclusions of Law, and Order (Oct. 10, 1996). The Board has stated that “there are some reasonably clear guidelines for determining when a substantial change has occurred. For example ...:

1. Acquisition of and removal of gravel on additional land;
2. Opening a new area a substantial distance from the pre-existing area;
3. Changing the nature of the operation as might occur by the addition of a stone crusher; or
4. Removal of gravel ... across a public highway, where it might be argued that the intervening ownership defined the limits of the pre-existing operation.”

Clifford’s Loam and Gravel, Inc., *supra* at 3. Note, however, that “contiguous expansion of the excavation area within the pre-existing tract is not a change, provided that the excavation operation is expanded and operated in essentially the same **manner** as it was before June 1, 1970. It is in the nature of gravel pits to continue to expand the extraction area while following the gravel vein. ... [Thus, a] tree cutting ‘increase’ [has been considered] a natural outgrowth of the excavation area expansion. Land must be cleared prior to extraction.” Re: Dale E. Percy, Inc., Declaratory Ruling #251, Findings of Fact, Conclusions of Law, and Order at 5-6 (Mar. 26, 1992).

The Board will consider whether there has been a substantial change to the annual historic activity at the Pit South of Morey Road, the Bread Loaf Pit, and the Boot Hill Pit. The Board will not analyze the extraction at the Proposed Pit, Area 1, and Area 2 because, as explained above in Sections IV.B. 2 and 3, these pits do not have pre-existing status.

Petitioners provided two types of evidence of pre- 1970 extraction rates: (i) the individual average annual rates for the Pit South of Morey Road, Area 1, and Area 2 based upon aerial photographs from 1962 and 1974 (see Finding 19 above) and (ii) the yearly rates for extraction from all six undifferentiated Howrigan pits based upon records

kept by the Howrigans and other sources (see Finding 22 above).

a. Pit South of Morey Road

As stated above in Section IV.B.1., each of the six extraction areas on the Howrigan farm constitute a distinct pit that must be analyzed separately. Although the average extraction rates based upon aerial photographs provide the most meaningful information for this analysis (because they provide the only pre-1970 extraction information for individual pits), such evidence was provided for only one of the three pits currently being analyzed -- the Pit South of Morey Road. The average pre-1970 extraction rate for the Pit South of Morey Road, based upon aerial photographs, is 12,025 CY per year. See Re: Norwich Assocs., Inc. (Farrell Gravel Pit), Declaratory Ruling #275, Findings of Fact, Conclusions of Law, and Order (Apr. 3, 1996) (where no documentary evidence was available regarding pre- 1970 extraction rates, Board calculated the average pre-existing yearly extraction rate based upon "credible evidence" of the total yardage of gravel extracted between 1935 and 1970).

Petitioners provided documentary evidence of the combined extraction rates for the Pit South of Morey Road, the Bread Loaf Pit, and the Boot Hill Pit for the years 1992-1998. No evidence was provided regarding how much of the total gravel was attributable to each of the three active pits. In addition, no evidence was provided concerning extraction rates for the years 1975- 199 1.

Even if all extraction in 1992 through 1994 occurred at the Pit South of Morey Road, annual extraction in those years did not exceed the historic rate at that pit. The highest recorded levels of extraction after 1970 occurred in the years 1995-1998. The Board's findings support the conclusion that extraction in 1998, and probably in 1995-1997 as **well, occurred** almost exclusively at the Bread Loaf Pit. Therefore, the Board concludes that for the years 1992-1998, the rate of extraction was not more than 10% greater than the historic extraction at the Pit South of Morey Road.

The Boards analysis of the Pit South of Morey Road does not end here, however. The Board has found that extraction occurred on "a regular basis" during the years 1975 through 199 1. Nevertheless, Petitioners provided no data concerning the *rate* of extraction from the Pit South of Morey Road, or from any Howrigan pit, during these seventeen years. As a result, the Board is unable to determine whether, during the years 1975-1991, there was a substantial change in the extraction operation at the Pit South of

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Morey Road.³ Petitioners have failed to sustain their burden of production regarding post- 1970 operations. Therefore, the Board cannot conclude that post- 1970 extraction (specifically during the years 1975- 199 1) did not exceed pre-1970 extraction rates by more than 10%.⁴

A change in the rate of extraction creates the potential for impacts under a number of Act 250 criteria, including Criteria 1, 2, 3, 4, 5,8,9(D), 9(E), and 9(K). The Board concludes that there has been a substantial change to the Pit South of Morey Road pursuant to EBR 2(G). Accordingly, the Pit South of Morey Road has lost its “grandfathered” status and a land use permit is required for all future extraction activity at that pit.

b. Bread Loaf Pit

The Howrigans extracted limited amounts of gravel from the southern and western edges of the Bread Loaf Pit prior to 1970. No pre- 1970 extraction rates have been provided for this site. Both testimony and aerial photographs confirm that extensive extraction did not occur at the Bread Loaf Pit until the mid-1 990s. In 1998, gravel extraction occurred primarily at the Bread Loaf Pit, when 18,228 CY were removed by Charbonneau and other haulers.

³ The Board notes that there were three years that significantly exceeded the 10% threshold during the previous fifteen years for which data was produced. In other words, for the period 1962-1974, the historic rate was exceeded once every five years.

⁴ After issuance of the Panel’s proposed decision, Petitioners requested the opportunity to provide evidence concerning extraction rates for the years 1975-199 1. The Board denies this request. First, Petitioners bear the burden of production. It was incumbent upon them to provide the Panel with the evidence necessary to reach a conclusion in Petitioners’ favor. Second, as demonstrated by the multiple alternative analyses conducted by the Board below, the Pit South of Morey Road is subject to Act 250 jurisdiction even if Petitioners provided evidence that extraction did not exceed historic rates during the years 1975-1991. See, e.g., Sections IV.B.4.b. and IV.B.4.d. Therefore, it would be a waste of Petitioners’ and the Board’s resources to permit the request at this time. Furthermore, because the Board reaches the identical result regardless of whether it analyzes the facts under the method proposed by Petitioners (IV.B.4.d) or by looking at each pit separately, the Board does not need to determine which of the two analytical methods is more appropriate.

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In order to conclude that the 18,228 CY of gravel extracted in 1998 was not a substantial change, the Board calculates that the historic pre-1970 rate of extraction from the Bread Loaf Pit would have had to exceed 16,570 CY per year (18,228 is 10% higher than 16,570). Similarly, the Howrigans historically would have had to extract between 14,500 CY and 14,800 CY annually from the Bread Loaf Pit before 1970 to avoid the conclusion that extraction in 1995- 1997 constituted a substantial change. There is simply no evidence before the Board to support a conclusion that extraction from the Bread Loaf Pit was even close to these amounts prior to 1970. Indeed, all evidence supports the conclusion that far less than these amounts was extracted annually from the Bread Loaf Pit prior to 1970. An analysis of aerial photographs reinforces the conclusion that little extraction occurred there prior to 1992. The Board concludes that extraction for the years 1995- 1998 exceeded the historic rate of extraction at the Bread Loaf Pit by far more than 10%.

The Board has determined that the Bread Loaf Pit and the Pit South of Morey Road are distinct pits that must be **analyzed** separately. *Even if* the Board were to consider that the two pits are one pit for the sake of this analysis (as Petitioners urge), the Board cannot reach a conclusion that is favorable to Petitioners. The Board has found that the majority of extraction in 1998 occurred at the Bread Loaf Pit. If the two pits are considered to be one pit for this analysis, the Howrigans would have had to extract at least 4,500 CY annually from the Bread Loaf Pit prior to 1970 for the 1998 extraction rate to remain within 10% of the historic rate.⁵ There is simply no evidence to support a finding of fact that anything close to **that** level of extraction occurred at the Bread Loaf Pit prior to 1970. Indeed, all evidence supports the conclusion that far less than 4,500 CY was extracted annually from the Bread Loaf Pit prior to 1970. Therefore, even if the Board were to consider that the Pit South of Morey Road and the Bread Loaf Pit are one pit for the sake of this analysis, the Board cannot reach a conclusion that is more favorable to Petitioners. Based on the evidence before it, the Board concludes that there **would** have been a “change” in the extraction rates from the Pit South of Morey Road and

⁵ 18,228 CY (1998) is 10% greater than 16,570 CY. 16,570 CY minus 12,025 CY (Pit South of Morey Road) equals 4,545 CY. The Howrigans would have had to extract 4,545 CY per year from the Bread Loaf Pit prior to 1970 for the 1998 extraction (18,228 CY) to be no more than 10% higher than the combined historic extraction from the Pit South of Morey Road (12,025 CY) and the Bread Loaf Pit (4,545 CY). Pre-1970 extraction from the Bread Loaf Pit would have to have been even higher than 4,545 CY for the 1998 extraction to fall below the 10% threshold for determining whether there has been a substantial change.

the Bread Loaf Pit even if they are viewed as a single pit.

The Board concludes that the extraction rate at the Bread Loaf Pit in 1995 through 1998 exceeded the historic extraction rate by more than 10%. In addition, the Board's findings of fact support the conclusion that the nature of extraction operations changed from a sporadic to a daily operation. These changes have the potential for impacts under a number of Act 250 criteria, including Criteria 1,2,3,4,5,8,9(D), 9(E), and 9(K). Accordingly, a land use permit was and is required for extraction operations at the Bread Loaf Pit.

c. Boot Hill Pit

No evidence was provided regarding the pre- or post-1970 rates of extraction at the Boot Hill Pit as a separate pit distinct from the other Howrigan pits. As a result, as with the Pit South of Morey Road, the Board is unable to calculate whether there has been a substantial change. Petitioners have failed to sustain their burden of production. ~~Gross, supra~~, at 8-9. The addition of the rock crusher in June 1998, although used sporadically, is a change to the pre-existing operation at the Boot Hill Pit. Chamnlain Marble, ~~These~~ changes have the potential for impacts under a number of Act 250 criteria, including Criteria 1 and 8. Accordingly, a land use permit was and is required for extraction operations at the Boot Hill Pit.

d. Petitioners' Analysis

Petitioners mistakenly assumed that all pits on the Howrigan farm were one pit for the purpose of the substantial change analysis. Because of this assumption and because neither pre- nor post- 1970 annual extraction records differentiate among the various pits, the Board will compare the 1998 extraction rate with the historic annual rate for all Howrigan pits.

Records for the years 1950 through 1970 reveal a range in extraction from a low of 96 CY in 1957 to a high of 30,698 CY in 1968. Petitioners argue that the 1968 level should be considered the historic rate of extraction against which all post-1970 activity is measured. The Board does not agree.

The Board generally measures post-1970 rates against the *range* of pre-1970 rates, e.g. Percy and Barlow, supra, but individual years prior to 1970 are excluded from the range if the Board considers them to be an anomaly. Re: John Gross Sand and Gravel, Declaratory Ruling #280 (Supplementary), Findings of Fact, Conclusions of Law, and

Order at 5 (July 28, 1994). In Gross, the Board considered whether the 1956 extraction of 36,000 CY should be discounted as an anomaly when considering the pre-existing range. The Board reasoned that a high level of 36,000 CY extracted in a single year was within a reasonable range of the **average** annual rate of 28,000 CY for the period 1949-1970 and should not be discounted. The Board concluded that no substantial change would occur if petitioner did not extract more than 36,000 CY per year.

In contrast with Gross, the findings of facts in the present case support the conclusion that the three highest years of pre-1970 extraction are each an anomaly. **Annual** extraction exceeded 12,000 CY in only three years during the period 1950 to 1970 -- in the years 1955, 1962, and 1968 in which 27,606 CY, 22,964 CY, and 30,698 CY were extracted **from** the undifferentiated **Howrigan** pits. Annual extraction was less than 8,000 CY in more than one-half of the years during the period 1950 to 1970.

The Board concludes that extraction for the years 1955, 1962, and 1968 so far exceed the average extraction rate that each year must be considered an **anomaly**.⁶ The average of all data for the eighteen years between 1950 and 1970 for which extraction volumes are available, **including the three years** of high extraction, is 10,325 CY per year. The volumes extracted in 1955, 1962, and 1968 are 167%, 122%, and 197% greater than the average yearly pre-1970 volume. Clearly each of **these** years is an anomaly in terms of the historic, pre-1970 extraction activity on the Howrigan farm.⁷ Accordingly, the Board concludes that extraction volumes for the years 1955, 1962, and 1968 cannot be considered to be part of historic pre-1970 extraction. These volumes must be excluded from the range of pre-1970 extraction rates against which the 1998 extraction of 18,228 CY is measured in the substantial change analysis.

⁶ Although the Board does not conclude that 29% is necessarily the benchmark for determining whether an individual year is an anomaly, in Gross the Board determined that an increase of 29% was not an anomaly.

⁷ If the average pre-1970 rate is calculated by excluding the three highest and three lowest yearly figures (7,536 CY per year average), extraction rates in 1955, 1962, and 1968 represent even greater anomalies. In fact, these three years remain anomalies even if they are measured against the evidence of pre-1970 extraction that is most favorable to Petitioners which is the average annual rate of 15,365 CY as determined from the contour drawings based on aerial photos. Comparison to 15,365 CY results in increases in 1955, 1962, and 1968 of 79%, 49%, and 99% respectively.

Excluding extraction volumes for the years 1955, 1962, and 1968 results in an historic range for the period 1950-1970 of a low of 96 CY (1957) to a high of 11,002 CY (1963). Extraction in 1998 was 66% higher than in 1963 -- dramatically higher than the 10% increase which the Board concluded was a substantial change in Morey, supra. The percentage increase is even higher when measured against the average of the recorded volumes for *all years* between 1950 and 1970.⁸ The percentage increase in extraction remains significantly greater than 10% even when compared against the average of the recorded volumes for all years between 1950 and 1970 excluding the three highest and three lowest years⁹ or against the average based upon aerial photographs from 1962 and 1974.¹⁰ The Board concludes that even if it accepts Petitioners' premise that the Board should compare the post 1970 extraction to the pre- 1970 figures for all extraction occurring on the Howrigan farm, extraction in 1998 far exceeded the historic pre- 1970 rate of extraction.

Accordingly, the Board concludes that even if all Howrigan pits are considered one pit for this analysis, there has been a substantial change to the pre-existing operations at the Bread Loaf Pit, the Pit South of Morey Road, and the Boot Hill Pit such that an Act 250 permit is, and was, needed for any extraction in these areas because post-1970 extraction exceeds 10% of historic levels. In addition, the Board's findings of fact support the conclusion that the nature of extraction changed from a sporadic to a daily operation. Furthermore, the addition of the rock crusher, although used sporadically, can be viewed as a change to the pre-existing operation. These changes have the potential for impacts under a number of Act 250 criteria, including Criteria 1, 2, 3, 4, 5, 8, 9(D), 9(E), and 9(K).

⁸ 76.5% increase; 18,228 CY extracted in 1998 versus 10,325 CY average recorded extraction for all years between 1950 and 1970

⁹ **142% increase;** 18,228 CY extracted in 1998 versus 7,536 CY average recorded extraction for all years between 1950 and 1970 excluding three highest and three lowest years

¹⁰ **52% increase;** 18,228 CY extracted in 1998 versus 12,025 CY average extraction based upon aerial photographs from 1962 and 1974

5. Summary of Conclusions

The Board's findings of fact support its conclusion that there are at least six, separate and distinct gravel pits on the Howrigan farm. The Board does not need to determine whether it is more appropriate to analyze extraction rates on a pit-by-pit basis or in the aggregate as urged by Petitioners (IV.B.4.d.) because the Board concludes that an Act 250 permit is required for extraction on the Howrigan farm regardless of which analytical method it employs.

a. An Act 250 permit is required for extraction operations at the Proposed Pit and has been required since the time extraction began at that location. The Board's findings of fact support the conclusion that the Proposed Pit does not pre-exist Act 250 and it is thus not entitled to the statutory exemption afforded to pre-existing development.

b. An Act 250 permit would be required for any future extraction operations in Area 1 and Area 2. The Board's findings of fact support the conclusion that Area 1 and Area 2 have been abandoned and thus do not do not retain their pre-existing status.

c. An Act 250 permit is required for extraction operations at the Pit South of Morey Road because Petitioners failed to produce evidence regarding the rate of extraction for the years 1975-1991 that would enable the Board to conclude that there has not been a substantial change to the pre-existing operations of that pit.

d. An Act 250 permit is required for extraction operations at the Bread Loaf Pit and has been required since at least 1995 because the Board concludes that there has been a substantial change to the pre-existing operations of that pit.

e. An Act 250 permit is required for extraction operations at the Boot Hill Pit because (i) Petitioners failed to produce evidence regarding the pre- and post 1970 rates of extraction that would enable the Board to conclude that there has not been a substantial change to the pre-existing operations of that pit and (ii) the addition of a rock crusher to the site constitutes a substantial change.

f. Even if the combined 1998 rate of extraction from the Pit South of Morey Road, the Bread Loaf Pit, and the Boot Hill Pit is compared with the historic annual rate of extraction for all Howrigan pits, the Board concludes that there has been a substantial change to the historic operations at those three pits.

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C. Effect of Proposed Pit on Existing Pit

The second issue on appeal is:

Whether, pursuant to 10 V.S.A. §608 1, a land use permit is required for operation of the Existing Pit by virtue of the existence of Act 250 jurisdiction over a proposed extraction operation located across the road from the Existing Pit ("Proposed Pit").

Neither party addressed this issue directly in their evidence or in their proposed findings of fact and conclusions of law. Nevertheless, the Board determines that it is unnecessary to reach this issue because it has determined above that (i) the Proposed Pit requires an Act 250 permit and (ii) each of the other five pits on the Howrigan farm require an Act 250 permit for reasons not related to the existence of the Proposed Pit.

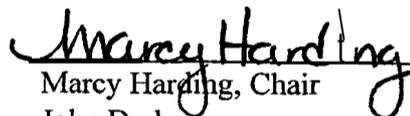
V. ORDER

1. An Act 250 permit is required for future extraction operations at the Proposed Pit, the Bread Loaf Pit, the Pit South of Morey Road, the Boot Hill Pit, Area 1 and Area 2 for the reasons and as explained in more detail above.

2. An Act 250 permit was required for extraction operations that have already occurred at the Proposed Pit, the Bread Loaf Pit, the Pit South of Morey Road, and the Boot Hill Pit for the reasons and as explained in more detail above.

Dated at Montpelier, Vermont this 30th day of August, 1999.

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