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

Re: F.W. Whitcomb Construction Co.
Declaratory Ruling Request #408

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

F.W. Whitcomb Construction Co. (Petitioner) filed this petition for a declaratory ruling concerning its proposal to excavate the F.W. Whitcomb stone quarry from 170 feet above sea level down to 70 feet above sea level, on three adjoining parcels in Colchester and Winooski, Vermont. The parcels were acquired by the Petitioner in 1975 (1975 Parcel), 1976 (1976 Parcel), and 1984 (1984 Parcel), respectively. Petitioner's appeal concerns the proposal to expand operations on the 1975 Parcel only (Project).

I. PROCEDURAL SUMMARY

On March 19, 2002, the District #4 Environmental Commission Coordinator (Coordinator) issued Jurisdictional Opinion #4-177 (JO) pursuant to Petitioner's written request of March 13, 2002. The Coordinator determined that the proposed expansion on the 1976 Parcel and 1984 Parcel does require a land use permit amendment pursuant to 10 V.S.A. §§ 6001-6092 (Act 250), and that the proposed expansion on the previously exempt 1975 Parcel requires a permit unless Petitioner could show that the expansion would not be a substantial change pursuant to Environmental Board Rule (EBR) 2(G).

On April 12, 2002, Petitioner filed a Petition for Declaratory Ruling with the Environmental Board (Board), appealing the JO pursuant to 10 V.S.A. § 6007(c) and EBR 3. The Petitioner acknowledges that a permit amendment is required for the 1976 and 1984 Parcels, but contends that no permit is required for the 1975 Parcel.

On May 9, 2002, Board Chair Marcy Harding convened a Prehearing Conference with the following participants:

> Petitioner, by John Ponsetto, Esq., with Robert Greene and Michael Bailey
> City of Winooski and Winooski Planning Commission, by Gerry Myers
> Margaret Ticehurst (by telephone).

Simonne Gratton did not participate in the prehearing conference, but notified the Board in writing of her interest in this case.

On May 10, 2002, Chair Harding issued a Prehearing Conference Report and Order (PCRO). Among other things, the PCRO identified the parties and the issue on appeal, and set a schedule to allow the parties an opportunity to stipulate to facts.

On June 26, 2002, Petitioner filed a request to continue the deadline for filing the stipulation of facts and related materials. The Chair issued a Continuance Order granting the request to continue on June 27, 2002.

On July 3, 2002, the parties filed a stipulation of facts and a joint waiver of hearing.

On July 17, 2002, the Board heard oral argument and deliberated. The Board also deliberated on August 14, 2002.

On August 28, 2002, the Board issued a Memorandum of Decision setting the matter for hearing on October 9, 2002.

On September 4, 2002, Petitioner filed a request to continue the hearing until November 2002. On September 5, 2002, Chair Harding issued a Continuance Order granting this request and rescheduling the hearing for November 13, 2002.

On November 13, 2002 the Board convened a public hearing in this matter, took testimony and evidence from the parties, and conducted a site visit. The Board commenced deliberations the same day and also deliberated on December 18, 2002.

Based upon a thorough review of the record, related argument, and the parties' proposed findings of fact and conclusions of law, the Board declared the record complete and adjourned. The matter is now ready for final decision.

II. ISSUE

Whether a land use permit is required pursuant to 10 V.S.A. §§ 6001-6092, for the extraction of stone from 170 feet above sea level down to 70 feet above sea level within the 1975 Parcel.

III. OFFICIAL NOTICE

Under 3 V.S.A. § 810(4), notice may be taken of judicially cognizable facts in contested cases. An Act 250 appeal is a contested case under the Administrative Procedures Act. 3 V.S.A. § 801(b)(2); see also, 10 V.S.A. § 6007(c). Pursuant to the Vermont Rules of Evidence, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." V.R.E. 201(b); *see also*, 3 V.S.A. § 810(1) (rules of evidence apply in contested cases); *In re Handy*, 144 Vt. 610, 612 (1984). Official notice may be taken whether requested or not and may be done at any stage of the proceeding. 3 V.S.A. § 810(4); V.R.E. 201(c) and (f).

At the request of Petitioner, and without objection from other parties, the Board takes official notice of the April 9, 1993, Advisory Opinion #4-103.

IV. FINDINGS OF FACT

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 Corp.*, 167 Vt. 228, 241-242 (1997); *Petition of Village of Hardwick Electric Department*, 143 Vt. 437, 445 (1983).

1. Petitioner owns and operates a rock quarry on a 225 acre tract of land. Except for a small portion of land in Winooski that is not part of the quarry operation in question, all of Petitioner's property is located in Colchester.

2. There are two entrances to the quarry. The primary access is on Route 2 and 7 near Exit 16 of I-89. There is an emergency access on Malletts Bay Avenue.

3. Operation of the quarry involves mining of dolomite and quartzite rock by drilling and blasting and then reduction of the "shot rock" to stone products which are used for various purposes. The stone is crushed and then screened to smaller sized pieces from five inches to very fine material for use in ready-mix concrete, hot-mix asphalt, site and building fill materials, and highway base and drainage material. Of the total stone mined at the quarry, approximately 60% is referred to as "primary" production, because it is manufactured through the initial crushing process. This material comprises highway construction aggregate, including base, drainage and site materials. The remaining 40% of material is referred to as "finish," an aggregate which is further reduced in size through the finish process for the production of construction aggregates in ready-mix or Portland Cement concrete and hot-mix asphalt. The finished product is then hauled by truck to sites where it will be used.

4. L.A. Demers (Demers) began operation of the quarry in 1954. The quarry has been in continuous use since then. Demers conveyed the quarry and 74 acres to Petitioner on September 31, 1975 (1975 Parcel).

5. When Petitioner acquired the property, the Demers quarry occupied about 50 acres of the tract.

6. During the 1960s because of the construction of the Interstate highway, more of the product was "primary" for the use in the base of the highway and drainage. Demers supplied a significant quantity of the stone material used in the construction of the Interstate from Middlesex through Colchester during the early 1960s.

7. Demers' annual extraction rate in the late 1960s and early 1970s was within a range of between 750,000 and 1,000,000 tons, all within the 1975 Parcel. Based on the company's records, Petitioner's annual extraction rate has run

from a low of 301,936 in 1976 to a high of 989,753 tons in 1991. Petitioner's annual average extraction rate from 1976 to 2002 is 686,077 tons. Petitioner plans to extract no more than 1,000,000 tons per year in the future from the entire quarry (1975 Parcel, 1976 Parcel and 1984 Parcel). An average 58% of the stone will be removed from the grandfathered parcel.

8. Demers conveyed the following equipment to Petitioner with the 1975 Parcel: Simplicity Feeder, 3042 Universal Jaw & Motor, Tolsmith 66's Gyro & Motor, 400 TPL Syntron Feeder, 7x18 H.R. Screen (3 deck), 5x14 Syntrol Screen (2 deck), Tolsmith 48's Gyro & Motor, Tolsmith 36 FC Gyro & Motor, 200 TPH Syntron Feeder, Jaw Frame, 66" Frame & Crane, 48" S Frame & Crane, 48 FC Frame & Crane & Bin, 36 FC Frame & Crane & Bin, 31 Conveyor Jaw -66, 42 Conveyor 66 - surge pile, 53 Conveyor - Pile to 7X18 screen, 54 Conveyor - under 48s, 45 & 46 Parallel Feed, 5x14, 37 Horizontal, 38 Plant Mix, 39 Feed 48 FC, 310 Under 48 FC, 311 Short One, 312 Feed 36, 513 under 36 to screen. Demers' equipment was included with the conveyance of the land. Demers' equipment included six stone crushers, including a portable stone crusher, five screens, seven bins, and fifteen associated conveyors.

9. Demers had more crushing and screening equipment in 1970 than was sold to Petitioner in 1975. For instance, Demers took the portable crusher when it left the quarry in 1975.

10. Today, Petitioner's equipment includes six stone crushers, nine screens, eight bins, and thirty-one conveyors. The capacity of this equipment is about the same as that of Demers'. Although Petitioner has more conveyors than Demers did, this has the benefit of significantly reducing the number of trucks moving stone in the quarry.

11. On October 4, 1976, Petitioner acquired an adjacent 101-acre tract of land from Roland, Maurice and Emil Thibault *et. ux.* (1976 Parcel). In April 1984, Petitioner acquired another adjacent 50-acre parcel from Robert and Leonard Thibault (1984 Parcel). The three tracts of land are contiguous and the quarry is now operated within all three parcels, with the crushers, screens bins, conveyors and buildings still all located on the 1975 Parcel.

12. Crushing (except for the occasional use of a portable crusher), screening, and storage of mined stone occurs entirely within the 1975 Parcel. Operation within the 1976 Parcel and 1984 Parcel includes drilling, blasting, and hauling of stone, stockpiling of overburden (topsoil), occasional use of a portable crushing machine, use and maintenance of an emergency road access to Malletts Bay Avenue and maintenance of a 20' berm, signage, fencing and open land in agricultural use.

13. Petitioner's modern stone processing machines are quieter and are equipped with air pollution control devices required by the terms of an Agency of Natural Resource's Air Pollution Control Permit and amendments which regulate operation of the machinery under Vermont and Federal air quality standards for mining operations.

14. Petitioner's operation is also regulated under Colchester's Quarry Ordinance.

15. Demers' operation was unregulated.

16. Petitioner estimates that the quarry has a useful life of approximately 75 years.

17. On July 22, 1994, Petitioner entered into an agreement (Agreement) with the City of Winooski, Town of Colchester, and 45 neighbors to the quarry. Margaret Ticehurst, a party to this declaratory ruling proceeding, signed the Agreement. The Agreement establishes conditions on the operation of the entire quarry, including the grandfathered 1975 Parcel.

18. By the terms of the Agreement:

    a. The rate of extraction of stone from the entire quarry shall not exceed 1,000,000 tons per year;

    b. Petitioner shall comply with a blasting plan which establishes limits on the size of explosives, sound levels, and hours and days of drilling and blasting and general quarry operation;

    c. Petitioner shall monitor all water supply wells within 3,000 feet of the quarry to determine whether water quality or quantity is adversely affected by blasting operations. The well owned by Simonne M. Gratton, a party to these proceedings, is one of the wells monitored. Petitioner shall remediate any deficiency caused thereby.

19. The Agreement also establishes limits on the areas of extraction ("Final Quarry Limits"), requires construction and maintenance of a 20' berm along quarry property lines, fencing, signage, establishment of emergency search and rescue procedures, creation of a community relations office, and enforcement of blasting damage assessment procedures.

20. Future operations within the 1975 Parcel shall comply with the Agreement including the conditions referred to in Fact #18 and #19.

21. The number of blasts within the quarry, including the 1975 Parcel, has declined over the years. Between 1984 and 1997, on average there were 115 blasts per year with a range of between 154 (1984) and 46 (1987). From 1997 through 2001, there was a total of 230 blasts, an average of 46 per year.

22. Petitioner will continue to use the main entrance to the quarry on to Routes 2 and 7 near the exit and entrance ramps of Exit 16 of Interstate 89. A permit from the town of Colchester allows the occasional emergency only use of the westerly access road to Malletts Bay Avenue.

23. When Exit 16 was constructed provision was made for a cross-hatch area adjacent to the access drive for the quarry so that U.S. 7 traffic would not block the access drive.

24. Expansion of the quarry, including the grandfathered 1975 Parcel, will not increase the amount of material that will be removed on an annual basis over what has historically been removed. Therefore, there will not be an increase in the number of trucks traveling to and from the facility over historic levels of 195 loads per day on average.

25. On April 9, 1993, District Commission #4 Coordinator issued Advisory Opinion #4-103(AO). The AO concluded that expansion of the quarry from the 1975 Parcel into the 1976 Parcel and 1984 Parcel resulted in a substantial change to the quarry, and therefore, an Act 250 Land Use Permit was required for operation of the quarry within the 1976 Parcel and 1984 Parcel, but the quarry within the original 1975 Parcel remained "grandfathered."

26. On April 26, 1996, District Commission #4 issued Land Use Permit #4C0566-2 (Dash 2 Permit). The City of Winooski, Town of Colchester, and 45 neighbors, including Margaret Ticehurst, were parties to the permit proceedings. The Land Use Permit was not appealed and is final.

27. Condition 19 of the Dash 2 Permit provides that "[n]o water will be pumped out of the extraction area of the quarry without the prior written approval of the District Commission."

28. Petitioner plans to continue to mine stone within the entire quarry, including within the 1975 Parcel, from its current elevation of 170' above mean see level (AMSL) to 70' AMSL. Mining throughout the quarry, including the 1975 Parcel, involves the continuing excavation since 1954 of stone from continuous strata in the quarry.

29. Petitioner's application for the Dash 2 Permit for the operation within the 1976 Parcel and 1984 Parcel said "[t]he plan for the foreseeable future of the

Quarry is to remove rock to an average elevation of approximately 170' above mean sea level in the next 20-year period of operation."

30. Future mining operations will not involve an increase in the current annual volume of stone extracted, the number of blasts per year, the number of vehicles entering and exiting the quarry and will not require an amendment to the Agreement.

31. Mining of stone below 170' AMSL within the 1976 Parcel and 1984 Parcel requires an amendment to the Dash 2 Permit which limits current operation to 170' AMSL.

32. During Demers' operation of the quarry, water was accumulated in a pond site on the 1975 parcel. Once full, the pond was pumped into the City of Winooski's sewer system. This practice was continued into 1990. Today, water accumulated in the pond is pumped into an unnamed tributary of Sunderland Brook pursuant to a discharge permit number 3-1429 (Discharge Permit) issued by the Agency of Natural Resources.

33. The Discharge Permit authorizes quarry dewatering discharge at a rate of 2 million gallons per day.

34. There is a fractured water bearing zone along the western wall of the quarry, trending to the north northeast.

35. Test drilling to date does not indicate a potential for water output from this fractured zone to exceed the present ANR discharge permit for the quarry operation.

36. Petitioner conducted a hydrogeologic study of the quarry to determine how dewatering of the quarry as its depth is increased to 70' AMSL may affect private water supplies in the area.

37. The study included the installation of one test well within the 1975 Parcel and two observation wells and performing a twenty-four hour pumping test on the test well.

38. Potential impact to groundwater users was limited to properties west of the quarry on Malletts Bay Road as all other properties in the vicinity of the quarry are serviced by municipal water.

39. Quarry operations to date have not extended below the water table. Consequently, no significant impacts on groundwater have been documented as a result of quarry operations.

40. A twenty-four hour constant rate aquifer pumping test at a rate of 350 gallons per minute was performed on the test well on May 20, 2002. This test was selected as a worst-case scenario.

41. Measuring of draw down was conducted at the pumping well, the two new observation wells and four pre-existing observation wells.

42. Based on the pumping test, no impacts are indicated or expected to any of the groundwater users in the area of quarry dewatering.

43. A previous study conducted on October 30, 1997, shows that the total depth of a majority of private wells is below the 70' AMSL future quarry bottom elevation. Thus, they are deeper than the 95' AMSL elevation of the Winooski River and Lake Champlain.

44. The nearest private water supply well is approximately 1300' west of the quarry and is located a considerable distance beyond the zone of influence of the proposed quarry dewatering.

V. CONCLUSIONS OF LAW

A. Scope of Review and Burden of Proof

Petitions for declaratory ruling are heard *de novo*. *See* 10 V.S.A. §§ 6007(c) and 6089(a)(3); EBR 40(A). Therefore, the JO, and any exhibits and testimony submitted to the Coordinator are not part of the evidentiary record because they have not been submitted by a party and admitted into evidence in this proceeding, and have not been officially noticed by the Board.

A party seeking the benefit of Act 250's exemption for preexisting developments, or "grandfather clause," bears the burden of proving that it applies. *Re: Thomas Howrigan Gravel Extraction*, Declaratory Ruling #358, Findings of Fact, Conclusions of Law, and Order at 9 (Aug. 30, 1999)(citing *Re: Champlain Construction Co.*, Declaratory Ruling #214, Memorandum of Decision at 2-4 (Oct. 2, 1990)). The burden of proof consists of the burden of producing the evidence, and the burden of persuading the Board. *See, Director, Office of Workers' Compensation Programs, Department of Labor v. Greenwich Collieries*, 512 U.S. 267, 272-274 (1994)(discussing burden of production and burden of persuasion); *Howrigan*, Findings, Conclusions and Order at 9 (Aug. 30, 1999)(citing *Champlain Construction Co.*, Memorandum of Decision at 2-4). The party claiming the exemption also has the burden to produce sufficient evidence on the pre-1970

operation and the proposed expansion 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." *Howrigan*, Findings, Conclusions and Order at 9 (Aug. 30, 1999)(citing *Champlain Construction Co.*, Memorandum of Decision at 2-4).

In this case, therefore, Petitioner bears the burden of producing enough information for the Board to decide the substantial change issue, but the burden of persuasion is on those who claim that an Act 250 permit is required.

B. Substantial Change to Preexisting Quarry Development

There is no dispute that the 1975 Parcel is a preexisting quarry development, pursuant to 10 V.S.A. § 6081(b). The question is whether the extraction of stone from 170' AMSL down to 70' AMSL within the 1975 Parcel constitutes a "substantial change" requiring an Act 250 permit. 10 V.S.A. § 6081(b)(permit required for any substantial change to a preexisting development). A "substantial change" is "any change in a development or subdivision which may result in significant impact with respect to any of the criteria specified in 10 V.S.A. § 6086(a)(1) through (10)." EBR 2(G).

To determine whether a change to a preexisting development is a substantial change, the Board first determines whether there is a cognizable physical change to the preexisting quarry development, and if so, whether the change has the potential for significant impact under any Act 250 criterion. *Re: Champlain Marble Corp. (Fisk Quarry)*, Declaratory Ruling #319, Findings of Fact, Conclusions of Law, and Order at 10 (Oct. 2, 1996)(citing *Re: L.W. Haynes,* Declaratory Ruling #192, Findings of Fact, Conclusions of Law, and Order at 7 (Sept. 5, 1987), *aff'd, In re Haynes*, 150 Vt. 572 (1988)); *see also, Re: Stonybrook Condominium Owners Ass'n,* Declaratory Ruling #385, Findings of Fact, Conclusions of Law, and Order at 9 (May 18, 2001)(citing *Re: Hiddenwood Subdivision,* Findings of Fact, Conclusions of Law, and Order at 9 (Jan. 12, 2000)).

The general rule is that continued expansion within a preexisting quarry tract is not a cognizable change. The Board has stated:

> contiguous expansion of the excavation 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.

Re: Dale E. Percy, Declaratory Ruling #251, Findings of Fact, Conclusions of Law, and Order at 5-6 (Mar. 26, 1992)(citing *Re: Clifford's Loam and Gravel*, Declaratory Ruling #90, Findings of Fact, Conclusions of Law, and Order at 3 (Nov. 6, 1978)).

However, gradual expansions may entail other changes which are cognizable physical changes. *See, e.g., Re: Ronald Tucker*, Declaratory Ruling #165, Findings of Fact, Conclusions of Law, and Order, at 4 (Feb. 27, 1985)(no significant increase in extraction rates, but installation of alternative access road, excavation of settling lagoons, withdrawal of water from river, installation of wash plant, and installation of truck scale and scale house are cognizable and substantial changes), *aff'd*, *In re Tucker*, 149 Vt. 551, 555 (1988).

Accordingly, in order to decide whether a cognizable physical change has occurred, the Board must examine whether the excavation operation is being "expanded and operated in essentially the same manner as it was before June 1, 1970." *Percy*, *supra*.

The extraction rate and equipment in use today, and that which will be used during the proposed expansion, is essentially the same as the rate and equipment used before June 1, 1970. Some of the existing equipment is the result of in-kind replacement. The Board does not, however, view the in-kind replacement of existing equipment with substantially similar equipment as a cognizable change for substantial change considerations.[1]

As the quarry deepens, extraction to an ultimate depth of 70' AMSL will necessitate extraction of stone below the water table and will require that groundwater be pumped from the extraction area. Today, water within the quarry is accumulated in a pond site at the 1975 parcel. This water is pumped into an unnamed tributary of Sunderland Brook pursuant to the Agency of Natural Resources Discharge Permit. Quarry dewatering required by the proposed Project will not exceed the limits imposed by the Discharge Permit. Accordingly, as

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[1] The Vermont Supreme Court supported this policy of the Board in *In re R. E. Tucker, Inc.*, *supra* at 556, where the Court affirmed the validity of a Board permit condition which required written notice of installation or use of new equipment, but not in-kind replacement of equipment. Additionally, there is considerable legislative support for this policy. One example is 10 V.S.A. Section 6081(h)(i) which states that "[t]he repair or replacement of railroad facilities used for transportation purpose, as part of a railroad's maintenance, shall not be considered to be substantial changes ... provided that the replacement or repair does not result in the physical expansion of the railroad's facilities."

Petitioners have had in place a system and permit for quarry dewatering prior to the proposal to quarry to 70' AMSL, the Board does not find that the additional dewatering and associated discharge to be a change in operation, physically or otherwise.

Because the Board finds no cognizable physical change, the Board does not go on to determine whether any change has the potential for significant impact under any Act 250 criterion. The Board does, however, note that the Agreement, the existing Act 250 permits, and any necessary amendments to the permits will provide protection against potential adverse impacts resulting from quarry operations. This should help to allay any concerns of those living in the vicinity of the quarry.

VI. ORDER

1. The Board takes official notice of the April 9, 1993, Advisory Opinion #4-103.

2. The extraction of stone from 170 feet above mean sea level down to 70 feet above mean sea level within the 1975 Parcel does not constitute a substantial change under Act 250. A Land Use Permit is therefore NOT required for the Project.

DATED at Montpelier, Vermont this 19th day of December, 2002.

ENVIRONMENTAL BOARD

/s/Marcy Harding
Marcy Harding, Chair
Jack Drake
George Holland
William Martinez
Samuel Lloyd
Jean Richardson
Alice Olenick
Donald Sargent