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

Re: Richard and Elinor Huntley Declaratory Ruling #419

Memorandum of Decision

This proceeding involves a Petition for Declaratory Ruling to the Environmental Board (Board) filed by Richard and Elinor Huntley (Huntleys) from a jurisdictional opinion which concludes that the Huntleys' gravel pit remains subject to the jurisdiction of 10 V.S.A. Ch. 151 (Act 250).

I. History

On May 21, 1986, the District 3 Environmental Commission (Commission) issued Land Use Permit #3W0473 (Permit) to the Huntleys' predecessor in title, authorizing extraction from a five-acre gravel pit on a 110-acre tract of land off Cleveland Brook Road in the Town of Bethel, Vermont (Project).

On July 26, 1995, the Commission issued Land Use Permit #3W0473-1 (Dash 1 Permit) to the Huntleys authorizing the use of a portable screener and extending the completion date of the Project.

On December 17, 2002, in response to a November 13, 2002 letter from Richard Huntley, the Commission's Coordinator (Coordinator) issued Jurisdictional Opinion #3-84 (JO). The JO concluded that the Project remains subject to Act 250 jurisdiction, even after it has been reclaimed in accordance with the requirements of 10 V.S.A. §6086(a)(9)(E)(ii).

On January 14, 2003, the Huntleys filed a Petition for Declaratory Ruling with the Board, appealing the JO.

On February 26, 2003, Board Chair Patricia Moulton Powden issued a Prehearing Conference Report and Order which set forth the issue to be determined in this matter as follows:

> Does a sand and gravel extraction project remain subject to Act 250 jurisdiction when the project's land use permit has expired pursuant to 10 V.S.A. §6090(b)(1); and where the project tract has been reclaimed in accordance with the requirements of 10 V.S.A. §6086(a)(9)(E)(ii); and where said reclamation results in there being no potential for future environmental impacts from the prior sand and gravel extraction project?

Following the submission of a memorandum from the Huntleys (no other parties having appeared), the Board deliberated on the issue before it on May 21 and June 18, 2003.

II. Facts [1]

1. On May 21, 1986, the Commission issued the Permit to Christopher 0. Flanagan (the Huntleys' predecessor in interest), specifically authorizing Flanagan to establish a small gravel extraction area of approximately 5 acres on Flanagan's 97 ± acre farm.

2. Permit Condition 11 contained the following language:

> This permit shall expire on July 1, 1995, unless extended by the District Commission...

3. The Commission's Findings of Fact, Conclusions of Law and Order issued in connection with the Permit contain the following relevant provisions:

> A. "The soils are gravelly and, therefore, not highly susceptible to erosion." (Finding No. 4(B)).
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> B. "The gravel extraction will take place in three phases, each of which involves an area somewhat less than two acres in size. Only one phase will be exposed at any given time. For example, when Phase I is completed it will be reclaimed according to the recommendations in Exhibit *5* and stabilized prior to proceeding to Phase II." (Finding No. 4(C)).
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> C. "The applicant will develop the pit according to Exhibits Nos. *5,* 6 and 7 which results in a "bowl" effect with no outlet for surface water runoff. Sufficient gravel material will be left undisturbed along the west side of the project to allow water to percolate naturally into the soil." (Finding No. 4(E)).

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[1] These are the facts submitted by the Huntleys; no hearing was held and no evidence was taken in this matter. The Board assumes the Huntleys' submissions to be true for purposes of this decision, cognizant of the *caveat* that a Declaratory Ruling is "only as good as the facts upon which it is based." *Re*: *Dexter and Susan Merritt,* Declaratory Ruling #407, Memorandum of Decision at 6 (Jun. 20, 2002), *appeal dktd.* No. 2002-306 (Vt. S. Ct.); *Re: GHL Construction, Inc. PAK Construction, Inc*., #2S1124-EB and Declaratory Ruling #396, Findings of Fact, Conclusions of Law, and Order at 14 (Dec. 27, 2001); *Catamount Slate, Inc. et al.,* Declaratory Ruling #389, Memorandum of Decision at 11 (Jun. 29, 2001), *app. dcktd.*, No. 2002-142. (Vt. Sup. Ct.)

D. "As indicated on Exhibit No. *5,* the excavation will take place in three phases with each phase being completed excavated and reclaimed prior to proceeding to the next phase. Topsoil will be removed from the surface and stockpiled for further use to reclaim the site." (Finding No. 9(E)(i)).

4. Based upon the Permit and accompanying Findings of Fact, Conclusions of Law and Order, the project consisted of the development of a small gravel extraction area yielding small quantities of material per year (4,000 cubic yards) with no appreciable environmental impacts. In addition, the Commission approved a complete reclamation and site rehabilitation plan which included ongoing reclamation of the site during any period of excavation.

5. During the 1993 legislative session, the Vermont legislature amended 10 V.S.A. §6090, entitled "Recording; duration and revocation of permits", to provide that Act 250 permits granted for, *inter alia,* the extraction of mineral resources shall be granted for a "specified period" of time. The same statutory amendment provided that expiration dates contained in other permits issued prior to July 1, 1994 are to be extended for an indefinite term as long as there is compliance with the conditions of the permit.

6. On July 26, 1995, the Commission issued the Dash 1 Permit to the Huntleys. Condition 4 of the Dash 1 Permit states:

> All excavating, associated construction and reclamation on this project must be completed by October 1, 2002.

7. In accordance with Condition 4 of the Dash 1 Permit, the Huntleys have ceased all excavation and extraction activities on their property and have fully and completely reclaimed and rehabilitated the property in accordance with all permit requirements.

8. On December 17, 2002, the Commission's Coordinator issued the JO. The JO concluded that notwithstanding that: the Huntleys' permit had expired, all mineral extraction operations had ceased, and the site had been fully and completely reclaimed, jurisdiction nevertheless continues over the Huntleys' entire 97-acre parcel of land.

9. On January 14, 2003, the Huntleys appealed the JO by filing a Petition for Declaratory Ruling with the Board.

III. Discussion

A. Precedent

The Vermont Supreme Court has held that, as a general rule, once Act 250 jurisdiction is triggered, subsequent events will not lift or dissolve such jurisdiction. *In Re John Rusin*, 162 Vt.185, 189 (1994), affirming, *Re: John Rusin*, #8B0393-EB, Findings of Fact, Conclusions of Law, and Order at 5 (Jun. 10, 1993); *In Re Wildcat Construction*, 160 Vt. 631, 632 (1993), affirming, *Re: Wildcat Construction Co., Inc.*, #6F0283-1-EB, Findings of Fact, Conclusions of Law, and Order (Nov. 4, 1991).

1. *In Re John Rusin*, 162 Vt. 185 (1994)

In *Rusin*, the Vermont Supreme Court addressed a claim that Act 250 jurisdiction should no longer apply to Rusin's construction project.

In May 1989, the District 8 Environmental Commission issued Rusin a land-use permit, authorizing the creation of a four-lot housing development in Manchester. Act 250 jurisdiction was based on the now-repealed "road rule," which, at the time, applied to land involved in the construction of roads exceeding 800 feet and intended to provide access to a parcel of more than one acre.

Rusin's original plan called for a 740-foot access road, ending in a cul-de-sac; from the cul-de-sac, two spur roads were drawn to provide access to the four lots.[2] The lots were cleared, the ponds constructed, and the roadways built. The 740-foot portion was built as planned, but the spur serving lots one and two was shortened and another roadway was reduced in width, but otherwise built as planned. (Rusin narrowed this roadway because he intended to combine lots two and three, and needed access only to lot four, where he constructed his personal residence.) Thus, a total of 796 feet of roadway provided access to more than one lot: lot one and the lot created from the combination of lots two and three. A section originally intended to serve lots three and four provided access to lot four only.

Sometime in April 1992, Rusin requested an amendment to his wastewater permit from the Agency of Natural Resources (ANR), based on the consolidation of lots two and three into a single building lot. ANR issued an amended permit on May 5, 1992, authorizing the elimination of lot three.

Rusin then requested a ruling from the District 8 Commission that he had abandoned his land use permit, thereby releasing the land from Act 250 jurisdiction.

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[2] The permit was amended in March 1990 to authorize the construction of two ponds.

The Commission denied Rusin's request, and, on appeal, the Board held that Act 250 jurisdiction continued over the project.

Rusin advanced two theories to support his contention that Act 250 jurisdiction did not extend to his new, three-lot project. Rusin's first argument - that his reconfigured project turned "roads" into "driveways" (and thus not subject to the road rule computations) was rejected both by the Board and the Court.

Rusin's second purported basis for termination of Act 250 jurisdiction was based on a claim that he had abandoned his land-use permit through nonuse. 10 V.S.A. § 6091(b). Rusin contended that he never "used" his permit within the meaning of the statute because any construction actually performed could have been done without a permit, or was not substantial enough to qualify as "use" under §6091(b).[3] The Court found otherwise:

> Once jurisdiction is established, 10 V.S.A. § 6081(a) mandates a land-use permit before commencement of *any* construction on a development. The record shows that Rusin cleared the land, constructed the roadways and two ponds, and built his private residence after securing the permit and two amendments to it. According to § 6081(a), none of this work could have been done without the permit. The work was conducted under the authority of the permit, and therefore the permit was "used" within the meaning of §6091(b).

In Re John Rusin, 162 Vt. at 191.

2. *In Re Wildcat Construction*, 160 Vt. 631 (1993)

In *Wildcat,* the Permittee (Wildcat Construction) challenged the Board's exercise of Act 250 jurisdiction over its trucking operations site in St. Albans.

Wildcat Construction had operated its St. Albans trucking operations site since it acquired the property in 1970. In 1983, the District 6 Environmental Commission issued Wildcat Construction an Act 250 permit containing conditions on the use of the property, including restrictions on its hours of operation and limits on truck traffic. Wildcat Construction did not appeal the permit or challenge Act 250 jurisdiction at that time.

Following its 1989 finding that Wildcat Construction was not in compliance with its 1983 permit, the District 6 Environmental Commission recommended that the Board revoke Wildcat Construction's permit, as amended. The Board declined to do so; instead, it issued an amended permit imposing more extensive restrictions on the use of the property. Wildcat Construction then appealed the imposition of additional conditions

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[3] Rusin also repeated his claim that the project modifications brought the development outside of Act 250 jurisdiction under the road rule, but the Court noted that this argument failed because jurisdiction had remained viable under the road rule.

on the permit.

Before the Vermont Supreme Court, Wildcat Construction contended that even if jurisdiction were proper for the 1983 permit, such jurisdiction dissolved, as a matter of law, upon adoption by St. Albans of permanent zoning and subdivision bylaws by 1987, and the permit became void. The Court disagreed, noting:

> No provision of Act 250 allows for subsequent adoption of bylaws to remove the Board's jurisdiction over a preexisting development. The issue of Act 250 jurisdiction is determined at the commencement of the project. *In re Agency of Administration,* 141 Vt. 68, 79, 444 A.2d 1349, 1354 (1982). Once jurisdiction attaches, and a permit conditioning land use is issued, that permit and its conditions will remain in force even if the town subsequently adopts zoning bylaws that would have preempted Act 250 jurisdiction from attaching had the project commenced on the date of adoption. To retroactively divest the Board of its jurisdiction by automatically dissolving all Act 250 permits in existence when a town adopts bylaws would frustrate the purposes of the protection afforded by Act 250. Doing so would place the projects formerly regulated under Act 250 in an administrative limbo between dissolved Act 250 jurisdiction and the application of the newly enacted regulations, *and would be inconsistent with the legislature's scheme of control over development*.

In Re Wildcat Construction, 160 Vt. at 632 – 633 (emphasis added); *accord, Re: McDonald's Corporation*, #1R0477-5-EB, Memorandum of Decision at 6 (May 3, 2000).

Board precedent has likewise held that subsequent events will not terminate jurisdiction. As the Board stated in *Re: Bernard and Suzanne Carrier*, Declaratory Ruling #246, Findings of Fact, Conclusions of Law, and Order at 26 (Dec. 7, 1995), "The underpinning of this principle is that Act 250 permits are issued for both construction and land use associated with construction."

3. *Board decisions*

In *Re: Black River Valley Rod and Gun Club, Inc.*, #2S1019-EB, Memorandum of Decision at 3-5 (Jul. 12, 1996), the Board held that once a person had constructed improvements (which, as "substantial changes" triggered jurisdiction over a preexisting development, see EBR 2(O)), the subsequent removal of those improvements would not likewise remove Act 250 jurisdiction.

In *Re: Bernard and Suzanne Carrier*, *supra,* the creation of a subdivision and development thereon triggered Act 250 jurisdiction, and the subsequent denial of a Land Use Permit for such activity did not relieve the land of such jurisdiction. [4]

In *Re: Charles and Barbara Bickford*, #5W1186-EB, Findings of Fact, Conclusions of Law, and Order at 25 (May 22, 1995), once jurisdiction had attached to the permittees' entire 192-acre tract as "involved land," the subsequent subdivision of that tract into a tract containing the 26-acre project site and a separate tract did not dissolve jurisdiction over the 192 acre tract. *But see, Re: Stonybrook Condominium Owners Association*, DR #385, Findings of Fact, Conclusions of Law, and Order at 9 - 18 (May18, 2001).

In *Re: City of Barre Sludge Management Program*, Declaratory Ruling #284, Findings of Fact, Conclusions of Law, and Order at 13-14 (Oct. 11, 1994); the Board determined that jurisdiction would continue over a city's 15-acre waste treatment facility, even when subsequent information indicated that the city had not disturbed more than ten acres of land, a fact which would cause the facility not to be subject to jurisdiction.

In *Re: U.S. Quarried Slate Products, Inc.*, Declaratory Rulings #279 and #283, Findings of Fact, Conclusions of Law, and Order at 18) (Oct. 1, 1993), the petitioner had commenced construction on a quarrying project on a 92-acre tract, thus triggering Act 250 jurisdiction. Even though he subsequently purchased only 9.9 acres of that tract, and it is on this 9.9-acre tract that his quarry sits, this subsequent subdivision did not divest Act 250 jurisdiction over his quarry.

In *Re: Richard Farnham*, Declaratory Ruling #250, Findings of Fact, Conclusions of Law, and Order at 7 (Jul. 17, 1992); the Board held that once construction had commenced on a housing project that was subject to Act 250 jurisdiction, such jurisdiction was not divested due to the sale of the property to an individual who would not have required a permit had the construction begun under his ownership.

B. Analysis of the present question

Here, there is no question that Act 250 jurisdiction was valid originally and over the life of the gravel pit through reclamation. The question raised by this matter is whether there are circumstances - after a gravel pit has been reclaimed in accordance with the requirements of 10 V.S.A. §6086(a)(9)(E)(ii) - under which Act 250 jurisdiction over such pit should cease, recognizing, of course, that the gravel pit can never be returned to its status before gravel extraction occurred.

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[4] Indeed, to have found otherwise would create the exceptionally anomalous situation where a parcel that triggered jurisdiction could be relieved of such jurisdiction upon the denial a permit to approve of the activity that caused jurisdiction to attach.

The Huntleys raise a series of arguments in support of their claim that Act 250 jurisdiction over their gravel pit should cease. The Board will address each argument in turn:

> *1. the combination of 10 V.S.A. §§6086(a)(9)(E)(ii) and 6090(b)(1) must be read as evidence of legislative intent that, when remediation is complete, both the permitted activities and jurisdiction over the project will cease*
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> *a. 10 V.S.A. §6086(a)(9)(E)(ii)*

The Permit for the Huntleys' gravel pit includes remediation provisions, as required by 10 V.S.A. §6086(a)(9)(E). Subsection 9(E) states:

> E) Extraction of earth resources. A permit will be granted for the extraction or processing of mineral and earth resources, including fissionable source material:
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> (i) when it is demonstrated by the applicant that, in addition to all other applicable criteria, the extraction or processing operation and the disposal of waste will not have an unduly harmful impact upon the environment or surrounding land uses and development; and
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> (ii) *upon approval by the district commission or the board of a site rehabilitation plan which insures that upon completion of the extracting or processing operation the site will be left by the applicant in a condition suited for an approved alternative use or development.* A permit will not be granted for the recovery or extraction of mineral or earth resources from beneath natural water bodies or impoundments within the state, except that gravel, silt and sediment may be removed pursuant to the regulations of the water resources board, and natural gas and oil may be removed pursuant to the rules of the natural gas and oil resources board.

(Emphasis added.) [5]

Section 6086(a)(9)(E)(ii) is the *only* provision within Act 250 in which the Legislature has specifically *required* that, once the permitted activity is completed, the site on which that activity has occurred must undergo remediation. Before a permit may be granted for the extraction of earth resources, the Commission or Board must

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[5] There is no dispute that the Huntleys have completed the remedial steps which §6086(a)(9)(E)(ii) requires.

approve "a site rehabilitation plan which insures that upon completion of the extracting or processing operation the site will be left by the applicant in a condition suited for an approved alternative use or development." [6]

The Board reads §6086(a)(9)(E)(ii) to be indicative of two related but different considerations.

First, the Legislature inserted the word "approved" before the phrase "alternative use or development." Since statutory surplusage is not to be presumed, *In re Munson Earth Moving Corp*., 169 Vt. 455, 465 (1999), and "[i]n construing a statute, every part of the statute must be considered, and every word ... given effect if possible." *In re Eastland, Inc*., 151 Vt. 497, 499 (1989), quoting *State v. Stevens*, 137 Vt. 473, 481 (1979), any construction of §6086(a)(9)(E)(ii) must give meaning to the word "approved." Since the Legislature was aware that some earth extraction projects would not be subject to local zoning regulations, *see* 10 V.S.A. §6001(3)(A)(ii), it must have meant approval of "use or development" by a District Commission or the Board. And the only way that such approval would be required after a site had been remediated would be if Act 250 jurisdiction over the site were to continue.

Second, the remediation requirement is evidence of a special legislative concern regarding earth extraction activities: because of the particularly serious impact that can result from such projects, remediation must occur. Thus, if anything, such projects must be subject to greater scrutiny and control than other, less environmentally significant acts.

b. 10 V.S.A. §6090(b)(1)

A similar legislative concern can also be found in the 1994 amendments to §6090.

Before 1994, 10 V.S.A. §6090(b)(1) read:

> Any permit granted under this chapter shall be for a specified period determined by the board in accordance with the rules adopted under this chapter as a reasonable projection of the time during which the land will remain suitable for use if developed or subdivided as

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[6] Prior Board decisions have required, as permit conditions, the posting of bonds to ensure that this remediation occurs after the extraction has been concluded. *See, Re: Alpine Stone Corporation, ADA Chester Corporation, and Ugo Quazzo*, #2S1103-EB, Findings of Fact, Conclusions of Law, and Order at 38 (Feb. 4, 2002) (project must set up escrow account to cover costs of reclamation, with annual, declining payments over quarry's life), and cases cited therein.

contemplated in the application, and with due regard for the economic considerations attending the proposed development or subdivision.

In 1994, the Legislature amended §6090(b)(1) to require that, unlike permits for other projects, permits for earth extraction projects must be for finite periods:

> (b)(1) Any permit granted under this chapter for extraction of mineral resources, operation of solid waste disposal facilities, or logging above 2,500 feet, shall be for a specified period determined by the board in accordance with the rules adopted under this chapter as a reasonable projection of the time during which the land will remain suitable for use if developed or subdivided as contemplated in the application, and with due regard for the economic considerations attending the proposed development or subdivision. Other permits issued under this chapter shall be for an indefinite term, as long as there is compliance with the conditions of the permit. [7]

The 1994 amendments to §6090(b)(1) came at about the 20 year mark of Act 250, at a time when permits which had been issued in the early 1970s were expiring, as many had been issued for 20 year periods. People who lived in permitted subdivisions suddenly found the permits for their homes expiring, and this, naturally, set off a legal time bomb to which the legislature responded. The legislature therefore revised §6090 to make it clear that permits for most types of projects would *not* expire under normal circumstances. However, the legislature again was careful to ensure that certain types of projects - those which involved activities of particular environmental concern (the extraction of mineral resources, operation of solid waste disposal facilities, and logging above 2,500 feet) - would be governed by permits which include expiration dates. 10 V.S.A. §6090(b)(1).[8]

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[7] The Huntleys note that, contrary to the provisions of 10 V.S.A. §6090, the Dash 1 Permit (Condition 5) included no expiration date. While the permit may be in error, this fact is not significant to the particular question presented here, as permit expiration dates (or the lack thereof) and whether jurisdiction should continue after remediation are two separate matters.

[8] The dissent finds support for its position in the fact that the amendments to §6090(b)(1) came in the Legislative session immediately following the Supreme Court's *Wildcat* decision, the inference being that the amendments were in response to that decision. But had the Legislature thought that *Wildcat* was wrongly decided, we believe that its response would have been more direct: the Legislature would have amended the law to specifically terminate continuing jurisdiction, as it did in 2001 with the amendments to 10 V.S.A. §6086(e), *see infra.* Its response would not have been to require permit expiration for some activities and indefinite permits for others, issues that never arose in the *Wildcat* case.

In effect the Huntleys assert that because they are engaged in a project which the legislature has decided to subject to special permitting requirements (remediation and expiration) that are designed to protect the environment, they should obtain a benefit that less intrusive developments or subdivisions cannot have -- that Act 250 jurisdiction should cease once their pit is closed and remediated. The Board find this argument to be illogical; the 1994 amendment of §6090(b)(1) represents a saving provision for certain types of projects; it is not a provision that lifts jurisdiction over other projects - those with potentially greater environmental impacts - upon the expiration of their permits.

The result advocated by the Huntleys is not one which follows an analysis of §§6086(a)(9)(E)(ii) and 6090(b)(1); indeed, these provisions demand a result *precisely the opposite* from that advanced by the Huntleys.

> *2. the Board's Rules measure Act 250 oversight (i.e. jurisdiction) by the economical useful life of a project and the need for the Commission or Board to maintain accountability over a permittee;*

Nothing in the Board's Rules or prior case precedent ties the useful life of a project (e.g. how many years a vein of gravel will last at a given extraction rate) to *jurisdiction* over that project. Rather, the life is usually tied to the duration of the permit. Permit duration and jurisdiction are two different concepts.

Further, as noted above, the use of the word "approved" in §6086(a)(9)(E)(ii) indicates a Legislative desire that accountability and control over the land which was the site of an earth extraction project be maintained.

> *3. where extraction has ceased and remediation has occurred there is no need for continuing accountability*

The analysis of this argument depends, at least in part, on what possible impacts may remain from the Project after cessation and remediation. The original Permit for the Project includes provisions that require that it be screened by a vegetative buffer; it also includes, as required by §6086(a)(9)(E), site reclamation. *Re: Christopher O. Flanagan*, Land Use Permit #3W0473, Condition 10 and accompanying Findings of

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When the Legislature wishes to respond to an Act 250 Supreme Court decision with which it disagrees, it generally does so clearly, For example, the amendments to 10 V.S.A. §6086(a)(10) which followed the Court's decision in *In re Kisiel*, 172 Vt. 124 (2000), spoke directly to the holding in that case. By contrast, the amendments to §6090(b)(1) represent a somewhat roundabout way to express disagreement with the *Wildcat* opinion.

Fact, Conclusions of Law, and Order at 5 – 6 (May 21, 1986). There is no indication that the vegetative screen need only exist for the duration of the gravel extraction. Were the Board to lift jurisdiction over this Project, nothing would prevent the Huntleys from ignoring the permit's requirements as to vegetative screening, nor would they be required to ensure that the positive aspects of the reclamation plan remained in force. The need for continuing accountability thus remains.

4. a permit "runs with the land" only during its term

Again, permit duration and jurisdiction are two different concepts. The fact that a permit may have expired is irrelevant to the question of whether jurisdiction over the lands that are or were the subject of the permit continues.

5. prior precedent is distinguishable from the present case

The specific facts of the cited precedent differ from the present matter. But their holding - that subsequent events do not lift or dissolve jurisdiction – remains applicable to this case.

6. there is neither a reason nor public policy justification that supports continuing jurisdiction, once an extraction permit has expired

To address this contention, the Board finds guidance in two places -- its Rules and other Act 250 provisions.

a. Environmental Board Rule 2(B)

The Board has recently promulgated an amendment to EBR 2(B) which allows, in limited circumstances, Act 250 jurisdiction to be lifted from a subdivision, even after it has been "created:"

> (B) "Subdivision"
>
> (3) shall cease to exist if it is found, in a final jurisdictional determination issued pursuant to Rule 3(C) or 3(D), to have been retracted or revised below jurisdictional levels *at any time prior to the construction of improvements on the subdivision*. Examples of activities or events that may justify a determination that a retraction or revision of a subdivision below jurisdictional levels has occurred may include, but are not limited to the following:
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> (a) the filing of a complete application or subsequent revision to an application for a municipal subdivision or zoning permit, showing the revision or retraction, or the withdrawal of a subdivision;

> (b) the filing of a complete application or subsequent revision to an application for a state subdivision permit or a potable water supply and wastewater system permit showing the revision or retraction, or the withdrawal of a subdivision;
>
> (c) the filing of a plot plan in town land records showing the revision or retraction of a subdivision following a rescission of conveyed lots.

EBR 2(B)(3) (emphasis added)

Significantly, this Rule applies only to times "prior to the construction of improvements on the subdivision." In effect, the Rule states that, *if there has been no physical change to the land*, and consequently no environmental impact, then jurisdiction may be lifted.[9]

Here, the Huntleys or their predecessors have used their permit. *See, Rusin*, 162 Vt. at 191 ("The work was conducted under the authority of the permit, and therefore the permit was 'used' within the meaning of [10 V.S.A.] §6091(b).") While the Huntleys may have remediated the site, they made physical changes to the Project tract - gravel was removed and the contours of the land were altered - and they cannot return the site to the status that it held before gravel was extracted. Thus, the present matter cannot obtain the advantages - even by analogy - of the philosophy behind EBR 2(B)(3).

b. 10 V.S.A. §6089(e)

Further guidance to the policy considerations raised in this case may be found by examining these questions from the direction that the quarry is, at most, a temporary use of the land. Once this temporary use is over, should jurisdiction should be lifted?

The legislature has spoken to the issue of continuing Act 250 jurisdiction over temporary uses, and has seen fit, at this time, to exempt only land used for television or movie construction. A 2001 amendment reads:

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[9] These changes to EBR 2(B) might therefore cause a different result were the facts of *Re: Nelson Lyford*, Declaratory Ruling #341, Findings of Fact, Conclusions of Law, and Order at 27 (Dec. 24, 1997) (landowner cannot "withdraw" his project and avoid Act 250 jurisdiction, when jurisdiction over the project had already been triggered by subdivision), to be presented today.

> This subsection shall apply with respect to a development that consists of the construction of temporary physical improvements for the purpose of producing films, television programs, or advertisements. These improvements shall be considered temporary improvements if they remain in place for less than one year, unless otherwise extended by the permit or a permit amendment, and will not cause a long-term adverse impact under any of the 10 criteria after completion of the project. In situations where this subsection applies, jurisdiction under this chapter shall not continue after the improvements are no longer in place and the conditions in the permit have been met, provided there is not a long-term adverse impact under any of the 10 criteria after completion of the project; except, however, if jurisdiction is otherwise established under this chapter, this subsection shall not remove jurisdiction. *This termination of jurisdiction in these situations does not represent legislative intent with respect to continuing jurisdiction over other types of development not specified in this subsection.*

10 V.S.A. §6086(e) (Added 2001) (emphasis added)

Two points from the adoption of §6086(e) are important. First, when the Legislature wishes to terminate Act 250 jurisdiction, it knows how to do it. And, as the Vermont Supreme Court has clearly stated:

> Where the Legislature has demonstrated that it knows how to provide explicitly for the requested action*, we are reluctant to imply such an action without legislative authority*. See *In re Spencer*, 152 Vt. 330, 340, 566 a.2d 959, 965 (1989) (under Act 250, automatic issuance of permit in one part of statute and absence of same provision in another part of the statute shows that *Legislature did not intend* automatic issuance in the latter)….

Daniels v. Vermont Center for Crime Victims Services, 173 Vt. 521, ___, 790 A.2d 376, 379 (2001) (emphasis added); and see *Longe v. Boise Cascade Corp., et al.,* 171 Vt. 214, 223 (2000); *State v. LeBlanc*, 171 Vt. 88, 92 (2000).

Second, the last sentence of §6086(e) states that no one should read into §6086(e) any legislative intent to lift jurisdiction over developments other than temporary construction for films, television programs, or advertisements. Such a clear legislative statement - a particular and specific codification of the Supreme Court's common law noted immediately above – convinces the Board that it cannot lift jurisdiction in this matter.[10]

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[10] While jurisdiction must continue over the gravel pit, the Board notes that, under EBR 34(A), only material or substantial changes to the permitted project require a

IV. Order

The Issue is answered in the affirmative. The Project remains subject to Act 250 jurisdiction.

Dated at Montpelier, Vermont this 3rd day of July 2003.

ENVIRONMENTAL BOARD

/s/ Patricia Moulton Powden
Patricia Moulton Powden, Chair
George Holland
Samuel Lloyd
Donald Marsh
* Patricia A. Nowak
* Richard C. Pembroke, Sr.
Jean Richardson
* Christopher D. Roy

* Board Members Nowak, Pembroke, and Roy, dissenting: In *In re Wildcat Constr. Co., Inc.*, 160 Vt. 631 (1993) (mem.), the Vermont Supreme Court expressly correlated dissolution of Act 250 permits with divestment of Act 250 jurisdiction in describing the outcome it wished to prevent in that case. See *id*. at 633. In the specific cases governed by 10 V.S.A. §6090(b)(1), we would rule that the legislature intended the provision to end Act 250 jurisdiction upon dissolution of an Act 250 permit. In further support of this conclusion, we would note that §6090(b)(1) was amended to read as it does during the legislative session that immediately followed issuance of the *Wildcat* decision. Any other conclusion leads to retention of Act 250 jurisdiction over land for jurisdiction's sake alone, since no independent, environmental basis for continuing jurisdiction exists after the expiration of the permit and its conditions, and after proper reclamation of the land.

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permit amendment. In this case, the "permitted project" presently is the 97-acre parcel on which the gravel pit sits, but the Board notes that, under its decision in *Re: Stonybrook Condominium Owners Association*, *supra*, the Huntleys can request the Commission to limit the extent of the "permitted project" to the area impacted by the pit, and thereby limit the possible need for permit amendments in the future.