

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

Re: Green Mountain Railroad Corp.

Declaratory Ruling #422

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This Petition for Declaratory Ruling was filed by the Green Mountain Railroad Corporation concerning its proposal to construct improvements at the Riverside rail yard in Rockingham, Vermont, including a rail siding, new roadway, four 22-foot-diameter silos, ramps, and a 12'x 20' office and utility building (the Project).

I. PROCEDURAL SUMMARY

On January 7, 2003, the District # 2 Environmental Commission Coordinator (Coordinator) issued Jurisdictional Opinion 2-173 (JO), in which she determined that the Project constitutes a material or substantial change to the project authorized by Land Use Permit #2W0038 as amended (the Permit) and requires an Act 250 permit amendment.

On February 6, 2003, Green Mountain Railroad Corporation (GMRC) filed a Petition for Declaratory Ruling with the Environmental Board (Board), appealing the JO.

On February 28, 2003, Board Chair Patricia Moulton Powden convened a Prehearing Conference with GMRC, by David Bond, Esq., being the sole participant. A Prehearing Conference Report and Order (PCRO) was issued on March 3, 2003. Among other things, the PCRO provided an opportunity for the parties to waive hearing and file stipulated facts. No such stipulation was filed, and the matter was set for hearing.

On June 25, 2003, the Board convened a public hearing in this matter, admitted exhibits, took official notice of exhibits, and heard testimony and argument, then commenced deliberations immediately after the hearing. The Board also deliberated on July 16, 2003. Subsequent to this deliberation date, Board member Donald Marsh recused himself from this case.

Based upon a thorough review of the record, related argument, and the party's 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. OFFICIAL NOTICE

At the hearing, GMRC requested that the Board take official notice of the following documents:

- A. Site plan (filed with the Petition for Declaratory Ruling), entitled "Green Mountain Railroad, Proposed Silo Layout," by DiBernardo Associates, dated Dec. 6, 2002, drawing #2306-4.
- B. Stipulation between GMRC and the State of Vermont dated October 2002, (filed with the Petition for Declaratory Ruling).

- C. Dash 2 Permit (defined below) and two attached site plans, all marked "Exhibit No. 3," Pages 1-6.
- D. Dash 3 Permit and Commission decision (defined below), marked "Exhibit No. 6," Pages 1-14.

The Vermont Administrative Procedures Act authorizes the Board to take official notice of judicially cognizable facts in contested cases such as Act 250 appeals. 3 V.S.A. § 810(4); *see also*, 3 V.S.A. § 801(b)(2)(contested cases). According 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). The facts presented in these documents are not at issue and official notice is appropriate. Moreover, there was no objection to the Board taking official notice of these documents. Therefore, the Board granted GMRC's request at the hearing and so orders below.

III. ISSUES

The issues on appeal are:

1. Whether the Permit applies to the Project.
2. If the answer to issue #1 is in the affirmative, whether the Project requires a land use permit amendment pursuant to Act 250.
3. If the answer to issue #1 is in the negative, whether the Project requires a land use permit pursuant to Act 250.

IV. FINDINGS OF FACT

To the extent that any proposed findings of fact are included herein, 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). Facts stated and terms defined in the procedural summary are incorporated herein.

5. GMRC proposes to construct four 22-foot diameter cement silos, a 12-foot by 20-foot building, a 22-foot wide access road, and the necessary ramps, to transload cement from rail cars to trucks, on a 71-acre tract of land it owns in Rockingham, Vermont, known as "Riverside" (Project tract).
6. GMRC wishes to build the Project to enable an increase in the freight traffic of cement products and to transport cement products by rail that are currently being transported by truck.
7. The total amount of land to be physically altered for the Project is substantially less than ten acres.

8. The town of Rockingham has duly adopted zoning and subdivision regulations.
9. The railroad right of way is approximately 66' wide on average.
10. The first land use permit issued for the Project tract, #2W0038, was issued by the District 2 Environmental Commission (Commission) on January 24, 1972 to the Steamtown Foundation, a nonprofit educational organization and museum, for the construction of a 60-foot by 200-foot maintenance building for locomotives.
11. The first amendment to this permit, #2W0038-1, was issued on October 28, 1993, to Anthony Cersosimo, who owned the Project tract at that time. The permit authorized the subdivision of the tract and extended the permit expiration date.
12. On June 24, 1997, Mr. Cersosimo conveyed the Project tract to GMRC.
13. On August 18, 1997, the Commission's Assistant Coordinator issued a Project Review Sheet (PRS) concluding that Act 250 jurisdiction applied to a proposed forest products transfer facility, including a 20-foot by 30-foot office building on the Project tract because these activities were a material change to the previously permitted project.
14. No appeal was taken from the August 18, 1997 PRS.
15. The second amendment to this permit, #2W0038-2 (Dash 2 Permit), was issued on November 12, 1997, for the activities at issue in the August 18, 1997 PRS: construction of a 20-foot by 30-foot office building for five employees and the operation of a forest products distribution yard using rails and trucks.
16. The Dash 2 Permit was issued to both GMRC and PMI Lumber Transfer, Inc. (PMI) as permittees. At the time, PMI was leasing an approximately 13-acre portion of the Project tract from GMRC. GMRC did not have any financial interest in PMI, and PMI was not a railroad entity. PMI ceased operations in 1998.
17. GMRC President Jerome Hebda was present and participated in the district commission hearings on the Dash 2 Permit.
18. Condition #14 of the Dash 2 Permit provides that the "permittees shall maintain a 100-foot undisturbed, naturally vegetated buffer strip with no mowing or cutting of vegetation between the top of the bank of the Connecticut River and any disturbed areas."

19. Condition #24 of the Dash 2 Permit provides that "[a]ll conditions of Land Use Permit #2W0038 and amendments shall remain in effect except as amended herein."
20. The next permit amendment, #2W0038-3 (Dash 3 Permit), was issued to GMRC on January 13, 1999, for construction and operation of a 100-foot by 300-foot salt storage shed, conveyer pit, rail siding and truck scale.
21. Condition #16 of the Dash 3 Permit provides for protection of a Class II wetland "by an undisturbed naturally vegetated buffer of 70 feet as measured from the wetland and any disturbance." Condition #16 also requires GMRC "to take all necessary precautions to prevent contamination of the wetland from salt."
22. Condition #18 of the Dash 3 Permit provides that GMRC "shall not disturb the existing vegetation east of the area to be raised with fill and shall maintain at least a 15-foot landscaping buffer along the southern and northerly property lines."
23. Condition #21 of the Dash 3 Permit provides that "[a]ll conditions of Land Use Permit #2W0038 and amendments shall remain in effect except as amended herein."
24. Condition #23 of the Dash 3 Permit provides that it "shall expire three years from the date of issuance if the permittee has not commenced construction and made substantial progress toward completion within the three year period in accordance with 10 V.S.A. Section 6091(b)(Amended June 21, 1994)."
25. In 1999, after the issuance of the Dash 3 Permit, GMRC constructed a salt storage shed that was different from and in a different location than that authorized by the Dash 3 Permit. This construction violated the Dash 3 Permit.
26. On October 14, 1999, GMRC filed another permit amendment application, #2W0038-3B (Dash 3B) for the salt storage shed as built. Subsequently, GMRC challenged the Commission's jurisdiction to issue a land use permit for the as-built salt shed and sought to withdraw its application.
27. On March 6, 2000, the Coordinator issued a PRS concluding that the as-built salt shed was a material change to the previously permitted project and therefore the new activities were subject to Act 250 jurisdiction pursuant to Environmental Board Rules (EBR) 2(A)(5) and 2P.
28. No appeal was taken from the March 6, 2000 PRS.
29. The Commission denied GMRC's request to withdraw the Dash 3B application, and issued the Dash 3B Permit and accompanying Findings of

- Fact, Conclusions of Law, and Order on August 23, 2001. On October 19, 2001, the Commission denied a Motion to Reconsider filed by GMRC.
30. On November 7, 2001, GMRC appealed the Commission's Dash 3B Permit and the two corresponding Commission decisions to the Board. Subsequently, GMRC moved to withdraw its appeal. The Board granted that motion on March 22, 2002, in *Re: Green Mountain Railroad Corp.*, #2W0038-3B-EB, Findings of Fact, Conclusions of Law, and Order (Mar. 22, 2002).
 31. GMRC and the State of Vermont are parties to litigation in federal court to determine whether Act 250 is preempted by the Federal Interstate Commerce Commission Termination Act. By stipulation dated October 31, 2002, GMRC and the State agreed that GMRC may seek a jurisdictional opinion, declaratory ruling, and permit amendment regarding the Project without waiving certain rights and positions, among other things.
 32. On January 7, 2003, the Coordinator issued the JO, in which she determined that the Project constitutes a material or substantial change to the project subject to Land Use Permit #2W0038 as amended and requires an Act 250 permit amendment.
 33. GMRC filed the instant petition for Declaratory Ruling on February 6, 2003.
 34. Currently, there are approximately 20-25 truck trips per day from the Project site. The Project would add over 1800 truck trips out of the Project per year, based on the shipment of 40,000 tons of cement product at 22 tons per truck, which comes to 3,600 trip ends.
 35. The Project site adjoins the Connecticut River, and is approximately ten to fifteen feet higher in elevation than the river.
 36. Under the current Project proposal, trucks could drive within fifty feet of the Connecticut River. There are no plans for prevention of cement spills.
 37. The PMI project permitted by the Dash 2 Permit did not produce significant amounts of noise, but the rail car shaking necessary for the current cement transfer proposal produces significant amounts of noise.
 38. GMRC tried cement interloading in the past without silos, but neighbors complained about the noise. GMRC adjusted its operating hours to address the neighbors' concerns, but then was unable to meet its customers' demands due to restrictions on early morning truck loading.
 39. GMRC intends to use the silos to store cement products on-site until trucks can be loaded for transport. Thus, the rail car shaking can be done during regular working hours to address the neighbors' concerns. Cement products

will be available for truck loading and transport at other hours, that will not require rail car shaking.

V. CONCLUSIONS OF LAW

GMRC proposes to build four 22-foot diameter cement silos, a 22-foot wide road, ramps, and a new office and utility building in Rockingham, Vermont. The tract of land on which GMRC proposes to build the Project is the same tract of land that is governed by the Permit.

GMRC concedes that the Project requires a permit amendment if the Permit applies, but argues that the Permit does not apply. GMRC also argues that no new land use permit would be required for the Project if the Permit does not apply. These issues are addressed below.

A. Whether the Permit applies to the Project.

GMRC argues that the Permit does not apply to the Project. First, GMRC argues that the Dash 3 Permit was abandoned. Under Act 250 and Board rules, a permit is abandoned if it is not used for three years after it is issued, but a permit is not abandoned if construction is commenced and substantial progress towards completion within that time. 10 V.S.A. § 6091(b); EBR 38(B). In this case it is uncontested that GMRC built a salt shed in a different location and of a different design than the salt shed authorized by the Dash 3 Permit, within a year of the date that the Dash 3 Permit was issued. GMRC contends that this did not amount to commencement of construction or substantial completion of the exact project authorized by the Dash 3 Permit, and that the Dash 3 Permit was abandoned.

To allow a permittee to abandon a permitted project by building a nonconforming project would effectively reward noncompliance with Act 250. The Board cannot sanction such a result because it is contrary to the purposes of Act 250. See, 1969 Vt. Laws, No. 250 § 1 (Adj. Sess.)(Board and district commissions are charged to protect and conserve the lands and environment of the state)(cited in *Re: Green Mountain Railroad Corp.*, #2W0038-3B-EB, Findings of Fact, Conclusions of Law, and Order at 8 (Mar. 22, 2002)); see *also*, 10 V.S.A. § 8001(4).

Furthermore, Board rules establish a process under which permittees may petition the Commission to determine a permit void for non-use. GMRC has not filed such a petition for abandonment of the Dash 3 Permit with the Commission. EBR 38(B)(cited in *Re: Rutland Gas & Oil Co. d/b/a Rutland Fuel Company*, Declaratory Ruling Request #410, Chair's Proposed Dismissal Order at 2-3 (Jul. 10, 2002)). Because there is no Commission decision on this issue, the Board lacks jurisdiction to consider it.

The Board, therefore, rejects GMRC's argument that it abandoned the Dash 3 Permit.

Even if GMRC had abandoned the Dash 3 Permit, the Dash 2 amendment, the preceding amendment, and the original permit, would remain in force. GMRC argues that the Dash 2 amendment should not apply to the Project because it was issued to a non-railroad lessee of GMRC's. GMRC acknowledges that permits run with the land, regardless of who owns that land, see, *In re Estate of Swinington*, 169 Vt. 583, 585 (1999)(mem.)(citations omitted), but GMRC claims that when the legislature amended 10 V.S.A. § 6001(3) in 1994, it intended that railroads be exempted from permits issued to non-railroad entities.

The amended statute reads:

In the case of a project undertaken by a railroad, no portion of a railroad line or railroad right-of-way that will not be physically altered as part of the project shall be included in computing the amount of land involved. In the case of a project undertaken by a person to construct a rail line or rail siding to connect to a railroad's line or right-of-way, only the land used for the rail line or rail siding that will be physically altered as part of the project shall be included in computing the amount of land involved.

10 V.S.A. § 6001(3)(C)(iv).

This language is part of the statutory definition of "development," which governs original Act 250 jurisdiction. If a new project is a "development" it requires an Act 250 permit. 10 V.S.A. § 6081(b). Generally, development is "the construction of improvements on a tract or tracts of land, owned or controlled by a person, involving more than 10 acres of land within a radius of five miles of any point on any involved land, for commercial or industrial purposes." 10 V.S.A. § 6001(3). The 1994 amendment raised the bar for Act 250 jurisdiction over certain railroad projects by reducing the amount of land that is included as involved land. It did not lift Act 250 jurisdiction from existing developments.

The Vermont Supreme Court recently noted that the second sentence in the amended portion of Section 6001(3) was intended to keep undisturbed railroad tracks and rights of way out of the involved land calculation, to level the playing field between rail and trucking. *In re MacIntyre Fuels, Inc.*, 2003 VT 59 ¶¶ 9-12 (Jun. 30, 2003). The same is true of the first sentence, which applies to railroads. There is no evidence of any legislative intent to exempt railroads from the requirements of Act 250 permits that already applied to their land, whether those permits were issued to the railroad, to a non-railroad lessee like PMI, or to another entity like Anthony Cersosimo or Steamtown, Inc.

Moreover, the Board notes that GMRC was a co-applicant on the Dash 2 Permit, and that Mr. Hebda participated in the permitting proceedings. GMRC's argument that it should not be bound by the Dash 2 amendment, the Dash 1 amendment, or the original permit, is unavailing. Subject to Board rules such as EBR 34(E), GMRC may seek to amend the Permit further to revise or delete any conditions it believes are no longer appropriate for the Project site given its current use.

As the Board noted recently in *Re: Richard and Elinor Huntley*, Declaratory Ruling #419, Memorandum of Decision (Jul. 3, 2003), "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." *Huntley*, Memorandum of Decision at 4 (citing *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)). Nothing in the 1994 amendments modified this rule with respect to railroads.

The Board concludes that the Permit applies to the Project.

B. Whether the Project requires a land use permit amendment pursuant to Act 250.

As stated above, GMRC concedes that a permit amendment is required if the Permit applies to the Project.

C. Whether the Project requires a land use permit pursuant to Act 250.

The third merits issue is conditioned on a finding that the Permit does not apply to the Project. Because the Permit does apply to the Project, this issue is not before the Board.

VI. ORDER

1. GMRC's Motion for Official Notice is GRANTED, and the Board takes official notice of the documents listed in Section II of this decision.
2. Land Use Permit #2W0038, as amended, applies to the Project, and the Project requires a land use permit amendment.
3. The first merits issue is answered in the affirmative.
4. The second merits issue is answered in the affirmative.
5. The third merits issue need not be addressed because the first merits issue is answered in the affirmative.

DATED at Montpelier, Vermont this 5th day of August, 2003.

ENVIRONMENTAL BOARD

/s/Patricia Moulton Powden
Patricia Moulton Powden, Chair
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