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

Re: *Raleigh B. Palmer* Declaratory Ruling #424
Isle La Motte Gravel Pit

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Raleigh B. Palmer (Petitioner) filed this Petition for a declaratory ruling concerning the operation of a gravel and sand pit on a 30-acre tract of land located off of School Street in Isle La Motte, Vermont (Project). As set forth below, the Board endorses the Panel's decision that Act 250 jurisdiction applies.

I. PROCEDURAL SUMMARY

On July 16, 2003, the District 6 Environmental Commission Coordinator (Coordinator) issued Jurisdictional Opinion #03-2 (JO) in which he determined that the Project requires a permit pursuant to 10 V.S.A. Ch. 151 (Act 250).

On August 29, 2003, the Coordinator issued Reconsidered Jurisdictional Opinion #03-2 (Reconsidered JO) in which he again determined that the Project requires a permit pursuant to Act 250.

On September 24, 2003, the Petitioner filed a Petition for a Declaratory Ruling with the Environmental Board (Board), appealing the JOs pursuant to 10 V.S.A. § 6007(c). The Petitioner contends that the Project does not require an Act 250 permit.

On October 17, 2003, Board Chair Patricia Moulton Powden convened a Prehearing Conference with the following participants:

Raleigh B. Palmer, by Pietro Lynn, Esq.
Louise Koss, on behalf of herself and Mike Koss

A Hearing Panel of the Board conducted a site visit on October 30, 2003, and made observations on the record.

On February 12, 2004, the Panel convened a hearing, Chair Moulton Powden presiding. The Panel admitted exhibits and heard testimony, and commenced deliberations immediately after the hearing. On February 18, 2004, the Panel reconvened deliberations.

On February 20, 2004, the Panel issued a Hearing Recess Order providing the parties an opportunity to submit additional evidence. The hearing was reconvened on May 13, 2004. The Panel deliberated immediately after the hearing, and again on July 1, 2004.

Based upon a thorough review of the record, related argument, and the parties' proposed findings of fact and conclusions of law, the Panel declared the record complete and adjourned.

On July 2, 2004 the Panel issued its Proposed Findings of Fact, Conclusions of Law, and Order, and the parties were given an opportunity to file objections and make oral argument to the Board.

The Board heard oral argument on the Panel's proposed decision on July 21, 2004, and commenced deliberations later the same day. The Board also deliberated on October 27, 2004.

II. ISSUES

The issues in this case are:

1. Whether the Project is a preexisting development pursuant to 10 V.S.A. § 6081(b) and EBR 2(O).

2. If so, whether there has been a substantial change to the preexisting development pursuant to 10 V.S.A. § 6081(b) and EBR 2(G).

III. 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). Topic headings are for organizational purposes only. Facts stated and terms defined in the procedural summary are incorporated herein.

Background

1. Petitioner owns a 30-acre tract of land in Isle LaMotte, Vermont, located between School Street/Ferry Road and West Shore Drive, where commercial extraction of sand, gravel and earth materials has taken place from the mid-1960's through the fall of 2003.

2. The quarry holes on the Project tract are all closed and reclaimed. Petitioner intends to subdivide and sell the Project tract in separate parcels. There has been no further extraction since the fall of 2003.

3. On May 27, 2003, Petitioner filed a survey dated June 1989 and updated in February and October 1990, with the Isle La Motte land records, showing a seven-lot subdivision of the Project tract, with Petitioner retaining one lot and selling the other six. The survey notes that Petitioner obtained subdivision permit #EC-6-1421-1 from the State of Vermont on June 12, 1987.

4. There is no evidence that Isle La Motte has adopted zoning or subdivision regulations.

5. This case originated as a request for a jurisdictional opinion filed with the Coordinator by Louise and Michael Koss, who own property that adjoins the Project tract and overlooks what is defined below as the Western Pit.

Western Pit/Southern Pit

6. At some point in 1963 or 1964, Oscar LaBombard and his son, Robert LaBombard commenced extraction of sand and gravel on the Project tract near the intersection of School Street/Ferry Road and West Shore Road (Western Pit). At that time the land was owned by John and Doreen Beasley and was also operated as a farm.

7. In 1982, after Oscar LaBombard had passed away and Robert LaBombard had gone out of business, Petitioner entered into an agreement with the Beasleys to mine sand, gravel and/or fill from their property.

8. Petitioner purchased this land from the Beasleys in 1985. At this time, the access road to the Western Pit was near a barn that existed on what is now the property of Michael and Louise Koss.

9. The extraction rate at the Western Pit before 1970 and through the early 1990's was approximately 10,000 cubic yards per year.

10. No more than one acre of land was used for extraction activity at a time.

11. Before 1970 and through the early 1990's, the Western Pit was reclaimed at the end of each extraction season. This practice of reclaiming up to one acre of disturbed land per year began before 1970, to make the reclaimed land available for farming.

12. The Western Pit was reopened each season between the 1960's and early 1990's at a place contiguous to where it had been mined and reclaimed the previous season. The location of the Western Pit migrated from near the northwest corner of the property eastward, then southward toward the rear of the house currently owned by the Olsons, as it was mined and reclaimed each season.

13. Topsoil was removed prior to extraction and stockpiled for subsequent reclamation, on a regular basis beginning before 1970 and continuing until the Western Pit was closed in 2003.

14. At some point in the late 1980's - early 1990's, Petitioner took the barn down and reclaimed and regraded the area of the Western Pit, and sold the parcel currently owned by the Kosses to his nephew, Steven Palmer.

15. Despite the fact that Petitioner reserved a right-of-way across the parcel to access his land and the Western Pit, Petitioner constructed a new access road on his land shortly after selling the parcel to his nephew.

16. Petitioner wanted to minimize the visibility and obtrusiveness of his extraction operations for the people who bought the land.

17. At some time in the early-to-mid 1990's, Petitioner commenced extraction operations at a point south and rear of the Olson house (Southern Pit) and decreased his extraction activities at the Western Pit.

18. There is no persuasive evidence that the Southern Pit was in operation prior to 1993.

19. The Kosses moved into the Stephen Palmer property in 1993, first renting and then purchasing the property.

20. The Kosses did not personally observe any extraction activity at the Western Pit from the time they moved in in 1993 until June 2001. They frequently worked away from home during the day when extraction activities could have occurred.

21. Petitioner continued to extract materials from the Western Pit on an intermittent basis after the Southern Pit was opened, drawing from either or both pits depending on what materials he needed.

22. Robert LaBombard and John Beaulac each hauled materials from the Western Pit for Petitioner between 1993 and 2003.

23. Although Petitioner did reclaim the Western Pit at the end of each season, photographs taken in 1994 and 1996 show that there was some exposed quarry or pit face remaining after this seasonal reclamation.

24. At some time in the late 1990's, Petitioner downsized his business and his need for sand and gravel diminished. From that time through 2003, he extracted approximately 4,500 cubic yards of sand and gravel annually from his property.

25. Records of extraction rates are not readily available, as Petitioner typically billed based upon each entire job, not based upon the quantity of material used.

26. Petitioner was also drawing sand and gravel from pits he did not own, from approximately 1990 through 2003. One of the pits Petitioner patronized was owned by John Koss, a cousin of Mike Koss's, and Mrs. John Koss. Petitioner continued to patronize this pit for some time after John Koss passed away.

27. At some point prior to June 2001, the sand and gravel ran out from the Southern Pit, so Petitioner began using the Western Pit exclusively.

28. Petitioner extracted sand and gravel from the Western Pit in 2001, 2002 and 2003.

29. Petitioner closed and reclaimed the Western Pit in the fall of 2003.

30. Petitioner takes great pride in the quality of his reclamation activities, and the Western Pit was reclaimed in an aesthetically pleasing manner that fits well with, and adds to, its rural residential surroundings.

31. There is no indication that Petitioner's extraction activities at the Western Pit caused any lasting environmental impact.

32. Petitioner did not point out the location of the Southern Pit on the site visit or present photographs or testimonial evidence on how well it was reclaimed.

Eastern Pit

33. In the 1960's, Belgrave Palmer opened a pit on the east side of the property (the Eastern Pit), and extracted materials for road construction on what is now the Alburg Dunes State Park.

34. Petitioner took over extraction activities at the Eastern Pit by lease agreement in 1982, as set forth above.

35. The annual extraction rate for the Eastern Pit, which was open from the 1960's through the early 1990's, was between 5,000-10,000 cubic yards, except when the pit was used for large projects.

36. The Eastern Pit has been used primarily for large projects.

37. One such large project occurred in 1991 when material from the pit was used for Champlain Village. Another large project occurred in 1992-1993, when material from the Eastern Pit was used cap the town's landfill.

38. Approximately 100,000 cubic yards of material were extracted from the Eastern Pit from approximately 1991-1993, resulting in an average annual extraction rate of 33,333 cubic yards for each of those three years.

39. One of the materials that Petitioner extracted from the Eastern Pit was a blue clay that was used to cap the local landfill in 1992-1993.

40. The Eastern Pit was closed and reclaimed at some point in 1993 or 1994.

41. As with the Western Pit, Petitioner did an excellent job of reclaiming the Eastern Pit. The area appears completely naturalized and is part of a municipal park.

42. As with the Western Pit, there is no evidence of any lasting environmental impact from Petitioner's extraction activities at the Eastern Pit.

IV. CONCLUSIONS OF LAW

The question is whether an Act 250 permit is required for past extraction of sand and gravel from pits on Petitioner's property in Isle La Motte. This case originated as a request for a jurisdictional opinion from Michael and Louise Koss, whose property adjoins Petitioner's property and overlooks the Western Pit, and who contend that the Western Pit was not used for several years from the time they moved there in 1993 until June 2001. Petitioner counters that the Western Pit was used continuously from the time that it was opened in 1964 until it was closed and reclaimed in 2003. There are also questions about two other quarry holes, the Eastern Pit and the Southern Pit, addressed below.

Under Act 250, "development projects preexisting June 1, 1970 are exempt from the Act's permitting requirements," but "lose their exempt status if they are abandoned or they substantially change." *In re Catamount Slate*, 2004 VT 14, ¶ 2 (2004)(citing 10 V.S.A. § 6081(b); *In re Orzel*, 145 Vt. 355, 359 (1985)). Thus, the first question is whether the gravel pit was preexisting or whether it was abandoned. If it was abandoned, a permit is necessary because the project is not considered preexisting. If it was not abandoned and is considered a preexisting development, the second question is whether a substantial change occurred that would trigger Act 250 jurisdiction.

A. Standard of Review

A petition for declaratory ruling is heard *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 6089(a)(3); EBR 3(D) and 40(A); *Re: Vermont Institute of Natural Science*, Declaratory Ruling #352, Findings of Fact, Conclusions of Law, and Order at 20 (Feb. 11, 1999). This means that the Board must hear the evidence anew and reach its own conclusions as though no action had been taken by the Commission or Coordinator below. *In re Killington, Ltd.*, 159 Vt. 206, 214 (1992)(citing *In re Green Peak Estates*, 154 Vt. 363, 372 (1990), and cited in *Re: Champlain College, Inc.*, #4C0515-6-EB, Memorandum of Decision at 3 (Jun. 28, 2002)); *see also, Re: Unifirst Corporation*, Declaratory Ruling # 348, Findings of Fact, Conclusions of Law, and Order at 8 (Jan. 30, 1998). Therefore, the JO and any exhibits submitted to the Coordinator are not part of the evidentiary record unless they are offered by a party and admitted into evidence in this proceeding, or unless they are officially noticed. In this case, the parties have submitted the JOs, JO requests, and certain other materials from the Coordinator's file as exhibits. In addition, the Board has taken official notice of two oversized aerial photographs from the Coordinator's file. This decision is based only on these items and the evidentiary record created in this case, which also includes a site visit, two days of hearing, and other exhibits admitted at the hearing.

B. Burden of Proof

A party seeking the benefit of Act 250's exemption for preexisting developments bears the burden of proving that it applies. *Re: F.W. Whitcomb Construction Co.*, Declaratory Ruling #408, Findings of Fact, Conclusions of Law, and Order at 8 (2002)(citing *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. *Whitcomb*, Findings, Conclusions and Order at 9. "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).

Where the question is one of substantial change to a preexisting development, the party claiming the preexisting development 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. *Re: Thomas Howrigan Gravel Extraction*, Declaratory Ruling #358, Findings, Conclusions and Order at 14 (Aug. 30, 1999). "There is no presumption that a substantial change either has or has not occurred since the enactment of Act 250." *Re: Lake Champagne Campground*, Declaratory Ruling Request #377, Chair's Preliminary Ruling, at 4 (Feb. 2, 2000).

C. Merits Issues: Preexisting Development and Substantial Change

Petitioner claims that the Project is exempt from Act 250 under the grandfather clause, which exempts certain development commenced prior to June 1, 1970. 10 V.S.A. § 6081(b); *see also,* EBR 2(O)(defining "preexisting development"). To establish that the gravel pit is exempt as a preexisting development, Petitioner must demonstrate that it has not been abandoned since June 1, 1970. *Re: Champlain Marble Corp. (Fisk Quarry)*, Declaratory Ruling #319, Findings of Fact, Conclusions of Law, and Order (Oct. 2, 1996).

> to qualify for exemption as a pre-existing development, one must establish that the particular land use has not been abandoned. This is because a development cannot be considered to have been in existence on June 1, 1970 if the use was abandoned prior to that date. Further, if it is abandoned after that date, then the pre-existing development has ceased to exist.

Re: U.S. Quarried Slate Products, Inc., Declaratory Ruling #279, Findings of Fact, Conclusions of Law, and Order (Reconsidered) at 22 (Oct. 1, 1993)(citing *In re Orzel*, 145 Vt. 355, 359 (1985)(abandonment is relevant to whether development is exempt as preexisting); *Re: Weston Island Ventures*, Declaratory Ruling #109 at 4-5 (June 3, 1985)); *see also, Re: Champlain Marble Corp. (Fisk Quarry)*, Declaratory Ruling #319, Findings of Fact, Conclusions of Law, and Order (Oct. 2, 1996).

If the Project is a preexisting development, the Board must consider whether a substantial change in operations has occurred since 1970. 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). A determination of whether there has been a "substantial change" involves a two-step process: First, there must be a cognizable physical change to the permitted project. Second, the change must have the potential for significant impact under one or more of the ten Act 250 criteria. *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 Board considers each pit in turn, below.

1. The Eastern Pit

Extraction activities at the Eastern Pit commenced prior to June 1, 1970. The Eastern Pit was used continuously until it was closed and reclaimed in the early 1990's, so it is a preexisting development.

The next question is whether any substantial change was made to the Eastern Pit since 1970. 10 V.S.A. § 6081(b)(permit required for any substantial change to a preexisting development). Evidence of the "levels of historical extraction or removal . . . serve as the baseline" against which the Board must determine whether a project continues to be grandfathered as a preexisting development. *Fisk Quarry*, Findings, Conclusions and Order at 10. In this case the Petitioner established an average annual extraction rate of 5,000 - 10,000 cubic yards at the Eastern Pit, except for large jobs. *See, e.g.*, *Norwich Assocs./Farrell Gravel*, Findings, Conclusions and Order at 6-7 (finding credible testimony of extraction rates sufficient absent evidence that extraction records had been destroyed, tampered with or withheld by the petitioner or any of its agents); *compare, Re: John Gross Sand and Gravel*, Declaratory Ruling #280, at 4 (Dec. 2, 1993)(holding that allowing a gravel pit owner to avoid Act 250 jurisdiction by not keeping and producing records on extraction rates "would be contrary to the stated purpose" of Act 250)(citing 1969 Vt. Laws No. 250 §1 (Adj. Sess.). Petitioner also established that the extraction rate rose sharply from 1991-1993, when approximately 100,000 cubic yards of material (or approximately 33,333 cubic yards annually) was removed.

A substantial change to a preexisting development is a cognizable physical change with the potential for significant impact under any Act 250 criterion. *Fisk Quarry*, Findings, Conclusions and Order at 10 (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)).

An increase in extraction rates of more than 10% over pre-1970 extraction rates is a cognizable physical change that, generally has been held to have the potential for significant impact under Act 250. *See, Fisk Quarry*, Findings, Conclusions and Order at 10 (citing *Re: Robert and Barbara Barlow*, Declaratory Ruling #234 at 11 (Sept. 20, 1991)("Board need only find that a change may result in significant impact, not that a change has resulted or will result in such impacts."), *aff'd*, *In re Barlow*, 160 Vt. 513, 521-22 (1993)(upholding validity of EBR 2(G) by finding that an impact can be potential as long as it may be significant and affirming Board determination that an increase in the extraction rate and frequency of use of a gravel pit was a substantial change)); *see also*, *Percy,* Findings, Conclusions and Order at 6 (citing *Re: H.A. Manosh*, Declaratory Ruling #163, Findings of Fact, Conclusions of Law, and Order at 6 n.2 (Aug. 29, 1984)).

However, the Eastern Pit has been closed and reclaimed for over ten years, and it has been turned into an aesthetically pleasing, naturalized wet area and public park. There is no evidence of significant Act 250 impact from Petitioner's past quarrying activities at the Eastern Pit. Therefore, it makes no sense to ask whether there were potential Act 250 impacts at this point. The Board concludes that there was no substantial change and the Eastern Pit is exempt from Act 250 review as a preexisting development.

2. The Western Pit

Like the Eastern Pit, the Western Pit was opened before 1970. It was used continuously and contiguously from that time until it was closed in 2003, although use became more sporadic between 1992 or 1993 and 2001.

The first question is whether the Western Pit was abandoned. A substantial period of nonuse renders an otherwise preexisting quarry abandoned. There is no bright-line test for what constitutes a substantial period of nonuse. Seasonal use is not abandonment. *See, U.S. Quarried Slate*, Findings, Conclusions and Order at 23 (noting that seasonal use is intermittent use and rejecting argument that industry custom of 20-30-year cycles of quarry use justify long period of non-use). Thus, the fact that Petitioner reclaimed and reopened the Western Pit on an annual basis for many years is not problematic for Petitioner's claim of continuous use. *See also, Orzel*, 145 Vt. at 359 ("No evidence presented, nor finding made, indicates that the operations, although intermittent, were abandoned at any time.").

An important factor in the abandonment analysis is the reasonable expectations of neighboring property owners. In *U.S. Quarried Slate*, the Board

rejected the argument that leaving a quarry hole unused for years at a time was consistent with industry cycles and custom, noting that "the cycles and custom being argued in this case do not do justice to the legitimate expectations of property owners who reside nearby." *U.S. Quarried Slate*, Findings, Conclusions and Order at 22. Also, in *Fisk Quarry*, the Board noted that significant periods of nonuse "allowed a quiet, residential neighborhood to develop in the area surrounding the Fisk Quarry, . . . and it has fostered the reasonable expectation among neighbors that extraction, blasting, and large scale excavating would not be occurring." *Fisk Quarry*, Findings, Conclusions and Order at 8.

In this case, Petitioner testified that when he sold some of his property to his nephew, he began hauling materials from the back, or south, side of his land to minimize the visibility and obtrusiveness of his extraction operation to people. The Kosses, who have a direct view of the Western Pit from their property, observed no extraction activity from the time they moved there in 1993 until some time in 2001. Petitioner claims that the pit has been in use during that time, however, and presented testimony from two witnesses who hauled material from the Western Pit at various times between 1993 and 2001.

Photographs submitted by the Kosses show that the face of the Western Pit was visible from their property in 1994 and 1996. While these photographs do not record active excavation, they do indicate the presence of a sand and gravel pit. Unlike the quarry in *U.S. Quarried Slate*, which filled with water and trees and other indicia of abandonment, there is no evidence here that the Kosses had a reason to expect that there would be no further quarrying activity at the Western Pit.

The Board concludes that the Western Pit was not abandoned before it was reclaimed in 2003, and that it constitutes a preexisting development.

Unlike the Eastern Pit, there was no increase in average annual extraction rates at the Western Pit. To the contrary, the annual rate was approximately 10,000 cubic yards per year before 1970, and dropped in the 1990's. Nor is there is any evidence of any other cognizable change in this case, such as the addition of new equipment, *Re: Champlain Marble Corp. (Fisk Quarry)*, Declaratory Ruling #319, Findings of Fact, Conclusions of Law, and Order (Oct. 10, 1996)(cited in *Re: Thomas Howrigan Gravel Extraction*, Declaratory Ruling #358, Findings of Fact, Conclusions of Law, and Order at 12 (Aug. 30, 1999)), installation of an 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, *Re: Ronald Tucker*, Declaratory Ruling #165, Findings of Fact, Conclusions of Law, and Order, at 4 (1985), *aff'd in relevant part*, *In re Tucker*, 149 Vt. 551, 555 (1988), or a change in neighboring residential land use coupled with an increase in extraction, *Re: Orzel*, Declaratory Ruling #174, Findings of Fact, Conclusions of Law, and Order at 6 (Oct. 2, 1986), *aff'd, In re Orzel*, 145 Vt. 355 (1985)(cited in *Fisk Quarry*, Findings, Conclusions and Order at 12), that had any significant Act 250 impact.

The Western Pit was a preexisting development, and there was no substantial change, so it is exempt from Act 250 jurisdiction.

3. The Southern Pit

Petitioner opened the Southern Pit in the 1990's, on the western part of his land but to the south of the Olson house. The Western Pit and Southern Pit are not parts of the same pit because, unlike the Western Pit's slow migration across the Project tract, the South Pit was not the result of contiguous excavation along the same vein or lens of gravel. *Compare, Re: Norwich Assocs., Inc. (Farrell Gravel Pit)*, Declaratory Ruling #275, Findings of Fact, Conclusions of Law, and Order at 7 (1996)(finding that all extraction since 1970 has been in pre-1970 pit or an expansion thereof); *see also, Re: Dale E. Percy*, Declaratory Ruling #251, Findings of Fact, Conclusions of Law, and Order at 5 (Mar. 26, 1992)(concluding that contiguous expansion of excavation is not a change because it is the nature of gravel pits to expand while following a gravel deposit). Moreover, Petitioner's excavation of topsoil from the land between the two pits does not constitute continuous extraction of the same vein or deposit of earth materials where extraction of sand and gravel are concerned.

In short, there is no evidence that the Southern Pit was in use prior to June 1, 1970, so it is not a preexisting development. The Project tract is over ten acres in size, and there is no dispute that at least some of the materials extracted from the Southern Pit were used for commercial purposes. *See*, 10 V.S.A. § 6081(a)(permit required prior to development); *see also*, 10 V.S.A. § 6001(3)(defining development to include the construction of improvements for commercial purposes on a tract of land more than 10 acres in size); EBR 2(F)(defining involved land as the entire tract or tracts of land). As such, the Board has no alternative but to conclude that the Southern Pit is subject to Act 250 jurisdiction.

While requiring a permit at this juncture may seem impractical, Petitioner did not present evidence on the quality of his reclamation of the Southern Pit as he did with the other pits and it is not clear how well this pit was reclaimed. More important, the Board is bound to apply the law and the law requires a permit. To hold otherwise would set bad precedent and provide incentive for individuals to commence commercial extraction activities without a permit. This Petitioner takes great pride in the quality of his reclamation activities, but the Board cannot assume that other quarry and gravel pit operators will be as diligent.

V. ORDER

1. The Board takes official notice of the two oversized aerial photographs from the District 6 Environmental Commission Coordinator's file.

2. The Eastern Pit and the Western Pit are preexisting developments pursuant to 10 V.S.A. § 6081(b) and EBR 2(O). The first merits issue is answered in the affirmative with respect to these pits.

3. With respect to the Eastern Pit and the Western Pit, there has been no substantial change to the preexisting development pursuant to 10

V.S.A. § 6081(b) and EBR 2(G), and the second merits issue is answered in the negative.

4. The Southern Pit is not a preexisting development pursuant to 10 V.S.A. § 6081(b) and EBR 2(O), and the first merits issue is answered in the negative with respect to the Southern Pit.

5. With respect to the Southern Pit, since the first merits issue is answered in the negative, the second merits issue is dismissed.

6. An Act 250 permit is required for the Southern Pit.

DATED at Montpelier, Vermont this 4th day of November, 2004.

ENVIRONMENTAL BOARD

/s/Patricia Moulton Powden
Patricia Moulton Powden, Chair
George Holland
Samuel Lloyd
W. William Martinez
John Merrill
Alice Olenick
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Jean Richardson
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