

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

*Re: Vermont Association of Snow
Travelers (VAST)*

Declaratory Ruling #430

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The Vermont Association of Snow Travelers (VAST) has requested a declaratory ruling on whether an Act 250 land use permit is required for approximately two snowmobile trail segments, together approximately 8 miles in length, in the towns of Fayston, Duxbury and Huntington, Vermont (Project). As discussed below, a permit amendment is required for the Project, as VAST conceded during the hearing. Also, the Board concludes that the Project does not trigger original Act 250 jurisdiction because it exists for a state purpose and because each trail segment is a separate project which physically disturbs less than ten acres of land. In addition, the Board declines to apply its rule on Act 250 jurisdiction on lands over 2,500 feet in elevation because the plain language of Act 250 expressly limits such jurisdiction to commercial, industrial or residential uses. In so holding, the Board denies the motion for summary decision filed by the Vermont Natural Resources Council (VNRC).

I. PROCEDURAL HISTORY

On October 21, 1986, the District 5 Environmental Commission (Commission) issued Land Use Permit #5W0905 to New England Land Associates d/b/a Ward Lumber (NELA/Ward Lumber Permit) for the subdivision of a 3,425-acre tract of land in the Town of Fayston. The Vermont Department of Forests, Parks and Recreation acquired title to 2,695 acres of the original project tract in 1995, which includes Phen Basin and the current Project site.

On October 31, 2000, the District 5 Environmental Commission Coordinator (Coordinator) issued a Project Review Sheet (PRS) to the Department of Forests, Parks and Recreation (Department) indicating that an amended land use permit was required for physical actions both undertaken and proposed by the Department and other parties within Phen Basin. These physical actions incorporated various recreational trails including VAST trails. The PRS was not appealed to the Environmental Board. The Department subsequently filed applications 5W0905-6 and -7 for the review of the District Commission. The VAST Trails were purposely excluded from those applications due to an independent jurisdictional determination requested by VAST (Jurisdictional Opinion 5-04-1).

On January 29, 2001, the Coordinator issued a PRS in which he determined that a land use permit was required pursuant to 10 V.S.A. Ch. 151 (Act 250) for the Project. A timely request to reconsider the PRS was filed on February 27, 2001.

On January 7, 2004, after several meetings, continuances, and the issuance of a related land use permit amendment, #5W0905-7, the Coordinator issued

Jurisdictional Opinion 5-04-1 (JO) in which he again determined that a land use permit was required for the Project.

On February 6, 2004, VAST filed a Petition for Declaratory Ruling with the Environmental Board (Board), pursuant to 10 V.S.A. § 6007 and Environmental Board Rule (EBR) 3, appealing the JO. VAST contends that the Project does not require an Act 250 permit. This appeal was suspended pending the Coordinator's resolution of a second request to reconsider, which VAST filed on February 6, 2004. On March 5, 2004, the Coordinator issued a decision denying VAST's Second Request to Reconsider the JO.

On May 7, 2004, Board Chair Patricia Moulton Powden convened a prehearing conference with the following participants:

VAST, by L. Brooke Dingleline, Esq., with Bryant Watson
Agency of Natural Resources (ANR), by Elizabeth Lord, Esq.
James & Clair Lathrop, by George Vince, Esq.
Vermont Natural Resources Council (VNRC), by Kelly Lowry, Esq. and Jamey Fidel, Esq.
Vermont ATV Sportsman's Association (VASA), by Todd Sheinfeld

The Lathrops and VNRC filed petitions for party status at the prehearing conference. VASA does not seek party status. No other person notified the Board that he or she has an interest in participating as a party in this case.

The Board deliberated on the party status issues on June 23, 2004. On July 9, 2004, the Board issued a Memorandum of Decision on Party Status, granting the Lathrops party status pursuant to EBR 14(A)(2) and VNRC party status pursuant to EBR 14(A)(6).

On June 4, 2004, VAST and VNRC each filed a Motion for Summary Decision. The Board deliberated on these motions on July 21, 2004. On July 30, 2004, the Board issued a Memorandum of Decision consolidating VNRC's motion with the merits, and granting VAST's motion in part and denying it in part.

A hearing was held in this case on October 6, 2004. The parties were given an opportunity to file supplemental proposed findings and conclusions, and reply briefs. The Board deliberated on December 15, 2004, February 2, 2005, and February 23, 2005. Based upon a thorough review of the record and related argument, the Board declared the record complete and adjourned.

II. OFFICIAL NOTICE

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). Official notice may be taken whether requested or not and may be taken at any stage of the proceeding, 3 V.S.A. § 810(4); *In re Nelson Lyford*, Declaratory Ruling #341, Findings of Fact, Conclusions of Law, and Order at 3-4 (Dec. 24, 1997)(citing V.R.E. 201[©]) and (f)). In this case, the Board has taken official notice of the Ward Lumber/NELA Permit, Land Use Permit #5W0905 (as amended).

III. ISSUE

The issue on appeal is 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). Topic headings are only for organizational purposes. Facts stated and terms defined in the procedural summary are incorporated herein.

The Project

1. This case involves two sections of snowmobile trail: the "Six-Mile Trail" on VAST Trail 17, in Fayston, Huntington and Duxbury, Vermont, and the "Loop Trail," also known as VAST Trail 17A, in Fayston.
2. The Six-Mile Trail was built in 1989 to connect a snowmobile corridor known as "corridor 125" over the Huntington Gap, and underwent several improvements in 1991. The construction of improvements on the Six-Mile Trail included clearing, bulldozing, making culverts and water bars, seeding, mulching, and putting up some signage for very difficult terrain.
3. The Six-Mile Trail is approximately 6 miles in length.

4. The Loop Trail was constructed in 1993, to allow snowmobile and groomer operators on the Six-Mile Trail to access a beaver pond, wetland, and an existing picnic area, and to allow groomer operators to avoid a steep hill on the Six-Mile Trail. The Loop Trail improvements involved upgrading and widening a cross-country ski trail, clearing an old log road, installing culverts for two intermittent streams, providing drainage, and grading in places.
5. The Loop Trail is approximately 1.8 miles long.
6. The Loop Trail and the Six-Mile Trail intersect each other but do not overlap.
7. The width of the area physically disturbed by the Project is approximately twelve feet.
8. Portions of the Six-Mile Trail are located above 2,500 feet in elevation.
9. The Loop Trail and most of the Six-Mile Trail are on land that is subject to Land Use Permit #5W0905 (as amended).
10. Portions of the Six-Mile Trail are on land that is not subject to Land Use Permit #5W0905 (as amended).
11. On October 21, 1986, the Commission issued Land Use Permit #5W0905, authorizing the subdivision of a 3,425-acre tract into 4 lots, including a 2,780-acre lot called "Lot G," which includes the land involved in this case.
12. On April 26, 1988, the Commission issued Land Use Permit Amendment #5W0905-1, authorizing the further subdivision of Lot G into a 112-acre parcel ("Lots 14G/B-H") and a 2,668-acre parcel ("Lots 14G/F") and the construction of a single-family home on each lot. Condition 5 of this permit amendment states in part that "the land use of each lot is restricted to the construction of a single-family residence and related driveway access."
13. On April 2, 2001, the Commission issued Land Use Permit Amendment #5W0905-6, which authorizes certain as-built physical actions taken to disallow access into the Phen Basin area by ATV and mountain bike users as well as subsequent corrective work to mitigate associated impacts, on part of the Project tract off Route 17. Condition 6 of this permit amendment "explicitly does not authorize the construction or use of" certain unpermitted VAST and cross-country ski trails on that land, as depicted on the site plan submitted in that matter.

14. On July 15, 2003, the Commission issued Land Use Permit Amendment #5W0905-7, which authorized an as-built recreational trail system in the Phen Basin area, plus 200 feet of mountain bike trail, 1,000 feet of cross-country ski trail, and three ski bridges, and required relocation of the trail on part of what is referred to herein as the Loop Trail, along the western and southern edges of the wetland, to ensure that project's compliance with Criterion 8(A)(necessary wildlife habitat). The Commission noted that:

two snowmobile trail corridors have also been created through the project tract without benefit of issuance of an amendment to land use permit 5W0905. The snowmobile trails, which are under the control of the Vermont Association of Snowmobile Travelers ("VAST"), are the subject of an independent jurisdictional opinion which was pending during the District Commission's review of this present application. Although the Commission prefers not to take a piecemeal approach, the Commission determined that the questions and issues raised by the Application (as amended) could be resolved without VAST's inclusion. The Commission also notes that a portion of VAST trail 17 is shared with Catamount Trail Association and that other trail systems which are part of this application connect to or through the VAST trails. To the extent that the trail is shared, the Commission has considered the impacts of the non-VAST uses in evaluating the impacts under the 10 criteria.

Re: Department of Forests, Parks and Recreation, #5W0905-7, Findings of Fact, Conclusions of Law, and Order at 1 (District 5 Environmental Commission Jul. 15, 2003). The condition requiring relocation of trail portions near the wetland has been appealed to the Board. A site visit in that appeal is scheduled for June 1, 2005.

15. VAST submitted a map, marked and admitted as Exhibit V-3, which depicts the VAST trails in question with numbered dots along the trails denoting significant points and landmarks along the trails.
16. The Six-Mile Project appears on Exhibit V-3 from Points 8 B 42, and Points 63 B 73.
17. Part of the Six-Mile Trail is in the Huntington Gap Wildlife Management area, and is below 2,500 feet in elevation (Points 8 B 15.25, approximately).
18. Part of the Six-Mile Trail is on land owned by the Big Basin Corporation (Forest Trust), and is above 2,500 feet in elevation (Points 15.25 B 18, approximately).

19. Part of the Six-Mile Trail is on land owned by James Lathrop (Points 18 B 28, approximately, and a small portion of land between Points 69 and 70, approximately). Some of this trail is above 2,500 feet in elevation. VAST has obtained an easement from James Lathrop for use of his property for parts of the Six-Mile Trail. The Six-Mile Trail improvements on the Lathrop property include a stream crossing and waterbars.
20. The rest of the Six-Mile Trail is located in the Phen Basin block of Camel's Hump State Park, with the segment from Point 28 B 33 located above 2,500 feet in elevation. This land is subject to Land Use Permit #5W0905 (as amended).
21. The Loop Trail appears on Exhibit V-3 from Points 42- 63.

Vermont Trails System and Statewide Snowmobile Trails Program

22. The Statewide Snowmobile Trails Program is a cooperative program between the State of Vermont and VAST. Under this program, VAST and ANR's Department of Forests, Parks and Recreation operate a network of snowmobile trails throughout Vermont known as the Statewide Snowmobile Trail System (SSTS). This is accomplished through a Cooperative Grant Agreement and Memorandum of Understanding that outline the responsibilities of both parties and that generally is renewed annually.
23. The Statewide Snowmobile Trails Program provides funding to local snowmobile clubs for constructing, improving, maintaining or grooming sections of the snowmobile trail system, and is wholly financed by snowmobile registration fees.
24. The SSTS is located on state, federal, municipal and privately owned lands. Approximately 85% of the trail system is on private land. There are some rights-of-way that have been purchased by VAST, such as the one over James Lathrop's land in this matter due to a mistake in location of the trail, but VAST generally obtains rights-of-way by agreement rather than by purchase.
25. The network of VAST trails, including the Six-Mile Trail and the Loop Trail, was recognized by ANR's Department of Forests, Parks and Recreation and the Greenways Council as part of the Vermont Trails System in 1995, pursuant to the Vermont Trails Act, 10 V.S.A. §§ 441-449.
26. VAST is authorized to develop and maintain these trails, pursuant to the Vermont Trails Act.

27. The current Cooperative Agreement was executed in 2004.
28. During the 2003-2004 snowmobiling season, there were 39,000 individuals who purchased "Trail Maintenance Assessments" or "TMAs." The cost of each TMA was \$65 for residents and \$95 for non-residents.
29. Trails in some areas, such as wetlands, can be used in winter when frozen but are not suitable for access in other seasons.
30. Snowmobiles are registered by the state. VAST is authorized by the Vermont Department of Motor Vehicles to register snowmobiles. Some town clerks can renew registrations. Two snowmobile clubs have registration agents.
31. Of the 27 snow-belt states, Vermont is the only state in which a non-profit organization administers the statewide snowmobile trails program. The other 26 snow-belt state systems are run by the states themselves.
32. No person may operate a snowmobile on VAST trails unless he or she has paid a TMA and dues to a local VAST-affiliated snowmobile club, or unless he or she obtains written permission from the owner of the land over which he or she wishes to operate a snowmobile.

VAST

33. VAST is a private, non-profit corporation qualified as a charitable organization by the IRS under Section 501(c)(3) of the Internal Revenue Code. It has six employees.
34. VAST is the only statewide organization of snowmobile operators, and includes 14 county clubs and 151 affiliate local clubs.
35. VAST receives 85% of all snowmobile registration fees each year and a small percentage of the state gasoline tax via the Vermont Trails Fund. VAST also receives grants from the state and federal government.
36. VAST spends \$100,000 to \$150,000 annually on law enforcement services to police the trails. No funding is provided by the state for this purpose. VAST has a cooperative agreement with the Department of Public Safety (State Police), the Vermont Department of Fish and Wildlife and the Vermont Sheriff's Association to provide law enforcement on the trails. The State Police, the Department of Fish and Wildlife and the Sheriffs' Department patrol the trails on snowmobiles and issue tickets to violators.

V. CONCLUSIONS OF LAW

The Board must determine whether Act 250 jurisdiction attaches to two segments of VAST trails in Duxbury, Fayston and Huntington. At the hearing VAST conceded that the Project requires a permit amendment because it constitutes a substantial and material change to the project authorized by Land Use Permit #5W0905 (as amended), also referred to as the Ward Lumber/NELA Permit, which includes most of the Project. As discussed below, the Board also concludes that original Act 250 jurisdiction¹ is not triggered by the Project because it exists for a state purpose and does not disturb more than 10 acres of land.

A. Development based on acreage

Construction of improvements for commercial purposes constitutes development for purposes of Act 250 if it occurs “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” in a town with zoning and subdivision. 10 V.S.A. § 6001(3)(A)(I). Construction of improvements for municipal, county or state purposes constitutes development for purposes of Act 250 if 10 or more acres of land will be physically disturbed, including land incident to the use of the project. EBR 2(F)(2). Thus, the first question is whether these VAST trails exist for a commercial purpose or a state purpose.

1. Commercial Purpose or State Purpose?

¹ There are two types of Act 250 jurisdiction: original jurisdiction and amendment jurisdiction. Original jurisdiction is triggered by any project that constitutes a development or subdivision under Act 250 and Board rules. See 10 V.S.A. § 6081(a)(permit required for development or subdivision); *id.* § 6001(3)(defining “development”); EBR 2(A)(defining “development”). Amendment jurisdiction applies when there is a substantial or material change to any permitted project. See EBR 34(A)(amendment required for any substantial or material change to permitted project). Both types of jurisdictional issues are involved in this case.

VAST argues that the VAST trail network exists for a state purpose rather than a commercial purpose. The Vermont Trails Act (Act) provides in part that “[t]he development, operation, and maintenance of the Vermont trails system is declared to be a public purpose.” 10 V.S.A. § 441[©]). The Act authorizes the Agency of Natural Resources (ANR) to acquire rights to land to develop and maintain the trails system, 10 V.S.A. § 444(1)-(2), and to “[a]ssign responsibilities for any trail . . . to another governmental entity or not-for-profit agency upon agreement by such entity or agency to maintain and manage it for purposes consistent with this chapter,” *id.* § 441(3). The Act also provides that “[t]he Vermont trails system shall consist of those individual trails recognized by the agency of natural resources with the advice of the greenways council.” 10 V.S.A. § 443.

The Board is persuaded that the VAST trails in question are part of the Vermont Trails System, and that these trails exist for a public purpose by operation of the statute, 10 V.S.A. § 441[©]). VNRC argues that this does not mean that the trails exist for a “state purpose” under Act 250. VNRC is correct that the Vermont Trails Act did not use the word “state” in describing the trails’ purpose. However, a “public purpose” in the context of a state legislative act B particularly one called the “Vermont Trails System Act” -- is tantamount to a state purpose where Act 250 jurisdiction is concerned. To rule otherwise would leave the VAST trails in a separate, “public purpose” category, not addressed by Act 250. The Board declines to interpret the law in this manner.

The facts that VAST and its local clubs collect fees and dues, respectively, and that only persons who have paid those dues and fees or obtained written permission from the landowner may operate snowmobiles on these trails, do not persuade the Board that VAST trails exist for a commercial purpose. “Commercial purpose” is defined as “the provision of facilities, goods or services by a person other than for a municipal or state purpose to others in exchange for payment of a purchase price, fee, contribution, donation or other object having value.” EBR 2(L); *In re Spring Brook Farm Foundation, Inc.*, 164 Vt. 282, 285 (1995), affirming *Spring Brook Farm Foundation, Inc.*, Declaratory Ruling #290 (May 20, 1994) (not-for-profit foundation can engage in an exchange of services within the meaning of “commercial purpose”). Although it is clear that VAST and its clubs are providing facilities such as trails and services such as maintenance of those trails, in exchange for payment of a fee, the rule expressly excludes provision of facilities in exchange for payment for a state purpose. EBR 2(L). As set forth above, the Project exists for a state purpose because it is part of the Vermont Trails System. 10 V.S.A. § 441(c)(maintenance of Vermont Trails System deemed to be a public purpose). This conclusion is also consistent with the definition of “[s]tate, county or municipal purposes” in Board rules, which includes projects “undertaken by or for the state, county or municipality and which are to be used by the state, county, municipality, or members of the general public.” EBR 2(E).

Vermont has a unique mechanism for the registration of snowmobiles and the development and maintenance of its statewide network of snowmobile trails pursuant to the Vermont Trails System. But the fact that the state has delegated authority to this private, non-profit corporation pursuant to the Vermont Trails Act does not change the public purpose of this Project.

Because the Project exists for a state purpose, the question of original Act 250 jurisdiction turns on the area of land that has been physically disturbed.

2. Land

A state project such as this one requires an Act 250 permit if it physically alters or disturbs more than 10 acres of land. EBR 2(A)(1)(d); EBR 2(F)(2). Where a state project is “incidental to or a part of a larger undertaking, all land to be physically altered in the entire project shall be included for the purposes of determining jurisdiction.” EBR 2(A)(1)(d).

The trail segments in question disturbed an area of land approximately 12 feet in width. With 43,560 square feet in one acre, and 5,280 feet in one mile, 6.875 miles of trail would amount to 10 acres of disturbed area. The Six-Mile Trail is approximately six miles long, and the Loop Trail is approximately 1.8 miles long. Together, these trail segments disturb over ten acres of land, but separately, neither segment does.

On the question of whether the trail segments should be considered separately or together, Board rules provide, in relevant part, that:

In the case where a state, county or municipal project is to be completed in stages according to a plan, or it is evident under the circumstances that a project is incidental to or part of a larger undertaking, all land to be physically altered in the entire project shall be included for the purposes of determining jurisdiction.

EBR 2(A)(1)(d).

There is no indication that VAST had any sort of master plan to complete the trail improvements in stages, and the Board concludes that the Loop Trail is not incidental to, or part of, the larger Six-Mile Trail project. Accordingly, the area of disturbed land involved in each trail is considered separately. EBR 2(A)(1)(d). On this point the record is clear: Neither the Loop Trail nor the Six-Mile Trail has sufficient disturbed land to trigger Act 250 jurisdiction. The Project, therefore, does not constitute a development based on the area of disturbed land.

B. Development based on Elevation/VNRC's Motion for Summary Decision

There is no dispute that certain portions of the Six-Mile Trail are at elevations above 2,500 feet, and VNRC argues that this is sufficient to establish jurisdiction over the Project. VNRC's motion was consolidated with the merits hearing, to allow further examination of this important policy question. As discussed below, the Board denies VNRC's motion based on the plain language of the statute.

Board rules define "development" to include the "construction of improvements, for any purpose, above the elevation of 2,500 feet." EBR 2(A)(1)(a). However, the statute defines "development" more narrowly, to include only the "construction of improvements for commercial, industrial or residential use above the elevation of 2500 feet." 10 V.S.A. § 6001(3). The Board rule at issue, EBR 2(A)(1)(a), is more broad than the statute because the rule effectively requires a permit for construction of improvements over 2,500 feet for any purpose, whereas the statute, 10 V.S.A. § 6001(3), expressly limits this requirement to commercial, industrial or residential purposes.

"An administrative agency may not use its rule-making authority to enlarge a restrictive grant of jurisdiction from the legislature." [*In re Agency of Admin.*, 141 Vt. 68, 76 \(1982\)](#) (cited in *In re Vermont Verde Antique International, Inc.*, 174 Vt. 208, 210-211 (2002)("It is, of course, axiomatic that an administrative body may promulgate only those rules within the scope of its legislative grant of authority.")). This is not a case in which an administrative agency has promulgated a rule to clarify and complement its enabling legislation. Instead, this is a case in which the rule conflicts with the plain language of the statute and, in doing so, impermissibly exceeds the statutory grant of authority. In this way, EBR 2(A)(1)(a) is very different from the rules upheld by the Court in prior cases, such as *In re Spencer*, 152 Vt. 330 (1989) and *In re Barlow*, 160 Vt. 513 (1993).

Although the Board indicated early on that it intended to regulate development above 2,500' in elevation for any purpose, *see, e.g., Declaratory Ruling M* (Jul. 13, 1971)(Act 250 permit required for Green Mountain Club trails above 2,500 feet in elevation), and although Board rules have reflected this intent for many years, the statute is undeniably clear. It may be prudent policy to require an Act 250 permit for any construction at these elevations, however, the Board declines to do so from this point forward unless and until the legislature adds this requirement to the statute by eliminating the words, "for commercial, industrial or residential use." The Board cannot expand its authority beyond the plain language of the statute.

VNRC's Motion for Summary Decision is denied.

C. Amendment Jurisdiction: Substantial or Material Change

A permit amendment is required for “any material or substantial change in a permitted project.” EBR 34. 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 “material change” is “any alteration to a project which has a significant impact on any finding, conclusion, term or condition of the project's permit and which affects one or more values sought to be protected by the Act.” EBR 2(P).

To determine whether there has been a substantial or material change, the Board must first determine whether there has been a cognizable physical change to the permitted project. Second, the Board must determine whether the change has the potential for significant impact under one or more of the ten Act 250 criteria (substantial change), or has a significant impact on any finding, conclusion, term or condition of the permit with an impact under one or more criteria (material change). *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 permitted project in this case is the subdivision of the original 3,425-acre tract into 4 lots (Permit #5W0905, issued October 21, 1986), including a 2,780-acre lot called “Lot G,” which includes the land involved in this case, and the further subdivision of Lot G into a 112-acre parcel (“Lots 14G/B-H”) and a 2688-acre parcel (“Lots 14G/F”) for the construction of a single-family home on each lot. (Land Use Permit Amendment 5W0905-1, issued April 26, 1988.) This permit expressly provides that “the land use of each lot is restricted to the construction of a single-family residence and related driveway access.” Condition 5, #5W0905-1. On April 2, 2001, the Commission issued Land Use Permit Amendment 5W0905-6, which authorizes certain as-built physical actions taken to disallow access into the Phen Basin area by ATV and mountain bike users as well as subsequent corrective work to mitigate associated impacts, on part of the Project tract off Route 17. This permit amendment “explicitly does not authorize the construction or use of” certain unpermitted VAST and cross-country ski trails on that land, as identified in the site plan in that case. Condition 6, #5W0905-6.

It is undisputed that a permit amendment is required for the construction and use of the snowmobile trail segments on the land subject to Permit #5W0905 as amended. Some of the Loop Trail is in close proximity to a beaver pond and wetland, and some of the Six-Mile Trail involves stream crossings, culverts and/or waterbars. The Project clearly constitutes a substantial and material change to the permitted projects because the trail improvements involved physical changes with real potential for significant Act 250 impacts as well as significant impact on the permit conditions that expressly do not authorize the use of the land for VAST trails.

A permit amendment is required because the Project constitutes a substantial and material change to the permitted project.

VI. ORDER

1. The Project requires an amendment to Land Use Permit #5W0905 (as amended) because it constitutes a substantial and material change to the permitted project.
2. The Project does not trigger original Act 250 jurisdiction because it does not constitute development.
3. VNRC's Motion for Summary Decision is DENIED.
4. The Board takes official notice of Land Use Permit #5W0905 (as amended).

DATED at Montpelier, Vermont this 11th day of March, 2005.

ENVIRONMENTAL BOARD

/s/Patricia Moulton Powden
Patricia Moulton Powden, Chair
George Holland
Samuel Lloyd*
William Martinez
Alice Olenick*
Richard C. Pembroke, Sr.
Jean Richardson*†

* Members Olenick, Richardson and Lloyd CONCUR in part and DISSENT in part, as follows:

We respectfully dissent from the Board's conclusion that the Project does not disturb ten or more acres of land. While there is no indication that VAST had a master plan to complete the trail improvements in stages, it is evident under the circumstances that the 1993 Loop Trail is incidental to, and part of, the improvements to the Six-Mile-Trail, which first took place in 1989 and then in 1991. There was credible testimony that the Loop Trail was added to allow VAST groomers to avoid a hill on the Six-Mile Trail, and to provide access to snowmobile operators to the trail around the beaver pond and wetland.

This is not a case where an extension is made at some distance away - the Loop Trail is contiguous to and for the immediate benefit of users and groomers of the Six-Mile Trail. The Loop Trail is not a separate project, but because of the implied dependency for safety issues, it is incidental to and part of the Six-Mile Trail. See Re: Village of Waterbury Water Commissioners, Declaratory Ruling #227, Findings of Fact, Conclusions of Law, and Order at 14-15 (Feb. 5, 1991).

Applying EBR 2(A)(1)(d), "if it is evident under the circumstances that a project is incidental to or a part of a larger undertaking, all land to be physically altered in the entire project shall be included for the purposes of determining jurisdiction," the disturbed area involved in both trails must be considered in determining whether jurisdiction attaches. This language "incidental to or part of a larger undertaking" is critical to striking the appropriate balance of Act 250 jurisdiction related to VAST trails. It is in the few instances when, after carrying out a master plan, it is found that later changes or additions are required, these incidentals would have the most potential to affect criteria that Act 250 was established to protect. Even in those few instances, jurisdiction would attach only if the total area of disturbed land reached the requisite acreage, in this case a corridor almost seven miles long.

Because the total area of disturbed land exceeds ten acres, we would hold that the Project constitutes a development and requires an Act 250 permit. Because the Project exists for a state purpose, however, this jurisdiction is limited to the area of land that has been physically disturbed. Therefore, jurisdiction does not extend to all of the Lathrop property, but only to the portion within the trail corridor or otherwise physically disturbed

[†] Board member Jean Richardson was unable to attend deliberations on February 23, 2005 but joins in the Board's decision.