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

Re: Hale Mountain Fish and Game Club, Inc. Declaratory Ruling #435

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Hale Mountain Fish and Game Club, Inc. (Petitioner) filed this petition for declaratory ruling to determine whether an Act 250 permit is required for certain changes made to a preexisting fish and game club in Shaftsbury, Vermont (Project). As set forth below, the Board concludes that certain changes made to the Project do require a permit.

I. PROCEDURAL HISTORY

On June 3, 2004, the District 8 Environmental Commission Coordinator (Coordinator) issued Jurisdictional Opinion JO#8-240 in which he determined that the Project requires a permit or a permit amendment pursuant to 10 V.S.A. Ch. 151 (Act 250).

On June 30, 2004, Petitioner filed its petition for Declaratory Ruling with the Environmental Board (Board), pursuant to 10 V.S.A. § 6007(c), appealing the JO. Petitioner contends that the Project does not require an Act 250 permit or permit amendment.

On July 6, 2004, Owen and Kathy Beauchesne filed a cross-appeal and a petition for party status. With the cross-appeal, the Beauchesnes filed a request to continue the prehearing conference in this matter until August 24 or 26, 2004, and Petitioner agreed to such an extension. On July 16, 2004, the Chair issued a Continuance Order granting the Beauchesnes' continuance request.

On August 23, 2004, Ann Dailey filed a petition for party status, as did Richard and Lorraine Mattison.

On August 26, 2004, Board Chair Patricia Moulton Powden convened a Prehearing Conference with the following participants:

Petitioner, by James P.W. Goss, Esq.
Owen and Kathy Beauchesne (Beauchesnes), by David L. Grayck, Esq.
Ann Dailey
Lorraine Mattison
Richmond Hall

Richard Mattison and Mary Hall were unable to attend the prehearing conference, but notified the Board that they are interested in participating as parties.

A Prehearing Conference Report and Order was issued on August 31, 2004 (PCRO) which, among other things, identified issues and set a prehearing and hearing schedule.

On September 3, 2004, Petitioner filed its opposition to Richmond and Mary Hall's party status petition, and requested that PCRO be altered with respect to the order in which the parties were required to prefile evidence. On September 8, 2004, Ann Dailey and Lorraine Mattison filed a memorandum in opposition to Petitioner's objection to the PCRO.

On September 9, 2004, David L. Grayck, Esq. filed a notice of withdrawal, and Stephen A. Reynes, Esq. filed a notice of appearance, on behalf of the Beauchesnes. Also on September 9, 2004, the Beauchesnes filed a reply to Petitioner's request to alter the PCRO, and the Halls filed a reply to the Petitioner's opposition to their petition for party status.

The Board deliberated on preliminary issues on September 15, 2004, and on September 27, 2004, issued a Memorandum of Decision granting party status to Richmond and Mary Hall pursuant to EBR 14(A)(5) and EBR 14(A)(6) and requiring the Petitioner to prefile its direct case first.

On December 8, 2004, the Board conducted a site visit and placed observations on the record.

On February 9, 2005, the Board granted the Motion to Substitute Parties of Kenneth and Mary Kennedy, substituting them for Richmond and Mary Hall.

On March 2, 2005, the Board convened a public hearing in Rutland, Vermont, admitted exhibits, and heard testimony. The public hearing was reconvened on March 16, 2005, at the Board's offices in Montpelier, Vermont.

The Board deliberated on April 13, 2005, May 18, 2005, June 22, 2005 and July 20, 2005. Based on the record, related argument, and the parties' proposed findings of fact and conclusions of law, the Board declared the record complete and adjourned.

II. ISSUES

The issues on appeal are:

1. a. Whether the Project is a preexisting development pursuant to 10 V.S.A. § 6081(b); and
   b. If so, whether a substantial change has occurred to the Project pursuant to EBR 2(A)(1)(e).

2. a. Whether Land Use Permit #8B0204, issued to Pike Industries in 1979, remains in effect; and

b. If so, whether a substantial or material change has occurred to the permitted project pursuant to EBR 34.

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). Facts stated and terms defined in the procedural summary are incorporated herein. Topic headings are used only for organizational purposes and do not limit the applicability of any particular finding.

Project Tract; Petitioner

1. Petitioner Hale Mountain Fish and Game Club, Inc. owns and operates a shooting range off Rod and Gun Club Road in Shaftsbury, Vermont. The original 200-acre tract was acquired by the Bennington Rod and Gun Club, Inc. in 1947.

2. In 1969, the Bennington Rod and Gun Club merged with the Shaftsbury Rod and Gun Club to form Hale Mountain Fish and Game Club, the Petitioner in this case.

3. In 1989, Petitioner purchased an additional fifteen-acre parcel of land, to the west of and adjacent to the original 200-acre parcel, making the current Project tract approximately 215 acres in size.

Natural Resources and Other Criteria

4. Prior to 1947 the Project site was a sheep farm and was largely unforested below elevations of 1,000 feet. Natural growth, aided by a strong forest management plan undertaken by Petitioner's members in the 1950s and 1960s, resulted in noticeable forestation on the Project site by the late 1960s and early 1970s.

5. A stream runs through part of the rifle range, through part of the Project tract and westward, down-gradient toward the property of Ann Dailey, and eventually flows to the Paran Creek, which is a tributary to the Walloomsac River. There is also a stream channel that was constructed on the Project tract, leading from the most easterly mapped Class Two wetland to the constructed pond area.

6. There is a pond on the Project tract that is roughly rectangular in shape, in a mapped Class Two wetland south of the interior road. There are two other mapped Class Two wetlands on the Project tract. There is an additional wet area located roughly midway up the length of the firing range and associated with the stream noted above, but it is not mapped.

7. There has been no formal delineation of the current, actual boundaries of the wetlands on the Project tract.

8. The watershed area of the stream that crosses the rifle range is less than one square mile.

9. The soil behind the caretaker's trailer and clubhouse is mapped as Stockbridge Loam soil. Typically, Stockbridge Loam soils are not highly absorbent.

10. The Shaftsbury Town Plan (Ex. B28), provides in part that:

> The natural appearance of Shaftsbury's numerous hillsides, ridgelines, and mountains are fundamental to the Town's rural character and appeal . . . . These scenic upland areas also tend to be environmentally fragile due to prevalent steep slopes, poor soils, and inadequate infrastructure. Such lands should be regulated to minimize the potential for substantial changes in topographic features, destruction of vegetation, or other visual/aesthetic degradation, and to minimize erosion, pollution of ground or surface waters, and flooding in lowland areas.

Section 5.2, Paragraph 10, page 14.

Membership

11. Petitioner's membership has fluctuated over time. In the mid 1950s the club had more than 300 members. That membership declined during the early 1960s to just over 100 members, and peaked in approximately 1975 at 376 members. By 1980, membership had dropped to below 300 members. Membership rose to approximately 300 members in 1981. As of 2004, the Club had just under 300 members.

Project Features

12. As of June 1, 1970, the Project included:

    a. a clubhouse with well and septic system

b. a rifle and pistol range
c. trap-shooting facilities, including two trap houses, two trap fields and a practice field
d. an unpaved road and parking area
e. a large rectangular pond on the southwest part of the Project tract
f. a wooden garage on concrete blocks with dirt floor
g. two lean-tos
h. a sign.

Clubhouse, Caretaker's Trailer, Water and Septic System

13. The clubhouse and original well and septic system were installed shortly after the original 200-acre parcel was acquired in 1947.

14. The original well was located to the southeast of the clubhouse and south of the shooting range.

15. The clubhouse has been a place of public use and assembly since it was built.

16. In the early 1950s, there was a caretaker living in a trailer behind the clubhouse.

17. Ralph Bevis, Richmond Thurber and Henry Salem were members of the club dating back to the 1950s, and recall that a caretaker's trailer has been behind the clubhouse off and on since the 1950s. Other than Mr. Bevis's specific recollection of the trailer having been there in the early 1950s when he used to mow the lawn for the club, these witnesses could not recall when and for how long a trailer was in use prior to 1971.

18. As indicated by the minutes for the September 25, 1966 meeting of the club's directors, there was no resident caretaker trailer, or water supply, at that time:

> Also discussed was the question of water and a resident caretaker. The water is a must for summer activities and a permanent resident if decided upon. A decision should be made at the Oct. meeting to either dig for a usable spring or drill a well . . . . In regards to permanent resident a retired couple with a trailer could be set up.

19. As indicated by the minutes for Petitioner's August 3, 1970 meeting, there was no resident caretaker at that time.

20. In 1971 a caretaker's trailer was installed, and work was done on the water supply and wastewater disposal system serving the clubhouse and trailer. A new well was dug to the north of the clubhouse and trap shooting range, tile was put in, and it was connected to the old pipeline. A new 750-gallon septic tank and drywell were installed, and the water line was extended to the trailer in back of the clubhouse.

21. On June 28, 1971, Petitioner obtained a zoning permit for the caretaker's 12' x 60' mobile home, with a well and septic tank listed on the application as private water and sewer facilities.

22. From mid-1971 through at least January of 1978, the caretaker's trailer was in place and occupied fairly consistently, as indicated by the club's minutes and other documents, including zoning permits from 1973 and 1977, and an aerial photograph from 1974.

23. There was no caretaker's trailer in use on the Project tract from approximately 1978 through 1981 or 1982, a gap of approximately 3-4 years.

24. In 1981, Petitioner installed a new well to the south of the clubhouse and trap shooting range, in the location of the original well. Petitioner then discontinued the use of the well to the north of the clubhouse and trap shooting range, and replaced the original pipeline.

25. A trailer was in place behind the clubhouse on August 16, 1982, as indicated by an aerial photo.

26. In 1983, Ann Dailey's sister moved into the caretaker's trailer with her family.

27. In 1983, Petitioner replaced the 750-gallon septic tank with a 1,000-gallon septic tank, and replaced the previously installed drywell with a 500-gallon drywell, to serve the clubhouse and trailer. There is no record of the capacity of the drywell installed in 1971.

28. Petitioner did not obtain a potable water supply and wastewater system permit from the Agency of Natural Resources for the work done in 1983, or for any other water supply or wastewater system improvements or installations.

29. In 2002, the well was improved by removing tile and installing a galvanized steel cover. A culvert was also installed.

30. There is a caretaker's trailer behind the clubhouse now.

31. The caretaker's trailer is a single-family residence on the same lot as the clubhouse; it is not a single-family residence on its own lot.

32. Drywells are tanks with holes in them, which can be used in place of a leach field or other wastewater dispersal system, to disperse wastewater effluent that remains after the solids settle out in a septic tank.

33. Drywells cause more concentrated, less dispersed, loading of wastes into the soil than leach fields. Greater dispersion of wastes allows the wastes to access more soil, which permits more effective filtration by soil and more effective decomposition of waste by soil microorganisms.

34. William E. Dailey, Inc. installed the various water supply and wastewater system improvements for Petitioner. Otherwise, there is no evidence of how or where these improvements were installed.

Shooting Facilities: Rifle Range, Pistol Range, Trap Fields

35. Before 1970, Petitioner removed trees within the shooting range to approximately 200 yards up Hale Mountain from the shooting station. At that time, Petitioner leveled the shooting station, and changed its position slightly. Also, during the 1960s, berms were constructed at the 100 yard and 200 yard points on the range.

36. In April 1971, Petitioner began allowing the state police to use the range for qualifying and practice.

37. In 1972, Petitioner formed a shooting activities committee to generate more use of the club facilities such as the trap range and rifle range, to organize and put on shoots, and to try to spark more interest and participation in club activities.

38. In May 1973, Petitioner started weekly shoots on Wednesdays, from 6:30 p.m. to dusk, starting May 16, 1973, and Sundays from 2:30 until dark.

39. In 1973, Petitioner had earthwork done to create a berm to separate a pistol shooting range from the rifle and shotgun shooting range. Pistol shooting had taken place at the shooting range before 1970, and certainly before this berm was constructed. By the late 1980s, the berm had eroded away.

40. In September 1973, Petitioner had its caretaker, Mrs. Quackenbush, file a card with the post office so Rod and Gun Club Road would be plowed up to the clubhouse and caretaker's trailer in the winter. Prior to 1970, the clubhouse and facilities were open year-round, but members and other users would have to plow the road themselves if needed. Until 1973, winter meetings were generally not held at the clubhouse.

41. In 1974, trap shoots were being held every Wednesday at 6:30 p.m. and every Sunday at 1:00 p.m., and these trap shoots were earning profits, as indicated in the club's minutes.

42. In 1975, Petitioner voted to allow state police from the Shaftsbury barracks use the range as long as it did not interfere with club activities.

43. Petitioner allowed the state police to shoot at night until approximately 1996.

44. In 1977, the rifle range was widened to approximately 300 yards out from the shooting station.

45. In the 1980s, Petitioner installed a pole stand with a cover at the rifle range shooting station.

46. In 1981, the local sheriff's and police departments' use of the pistol range for qualification had increased the club's membership to approximately 300 members, as indicated in the minutes.

47. Earthwork was done at various times to maintain the rifle range and to rebuild berms that had worn down. For instance, the rifle range was cleared and shaped by Wm. E. Dailey, Inc. in 1986, and the rifle range was graded again in 1987.

48. Sometime between 1989 and 1991, a freestanding cover was constructed over the rifle range shooting station.

49. In 1991, trees and vegetation within the rifle range were removed to approximately 437 yards out from the shooting station.

50. In 1992, a 12-foot-by-14-foot enclosed storage unit was built into the rifle range shooting station.

51. In 1995, a cover was installed over the pistol range shooting station. Around this time, in the mid-1990s, berms were erected on three sides of the pistol range.

52. In 1999, wooden walls were constructed around part of the rifle range shooting station.

53. Shortly before January 11, 2004, Petitioner posted a flyer at Wal*Mart advertising trap shooting on Sundays starting on January 11, 2004.

54. Prior to 1970, Petitioner had two trap houses and two trap fields.

55. In 1971, Petitioner took down the old trap house and sold two trap machines for $600.

56. In 1972, Petitioner built a new trap house and installed new automatic trap machines. A trap house was also replaced in 1986.

57. In 1991, the asphalt trap house pads were replaced with concrete. At that time, there were three trap machines in use, with portable trap machines that could be located along a sidewalk and shooting stations that could be repositioned to vary the shooting and target angles.

58. Also in 1991, Petitioner replaced a temporary, pole-supported, plywood roofed trap field pavilion with a new, pole-supported structure approximately eight feet high, over a concrete pad.

59. In 2002 or 2003, Petitioner purchased new, 5-stand trap machines.

60. Neighbor Kathy Beauchesne, who moved into a home near the Project tract in 1988, testified that shooting noise from the Project has increased significantly since 1988 due to an increase in shooting frequency.

61. Neighbor Lorraine Mattison, who moved into her current home near the Project tract in 1978 and operated a restaurant through 1988, testified that the shooting noise got much worse in the mid-1990s. She testified that her family stopped having outdoor gatherings because of the increased noise, and that the Petitioner did agree to stop the night shooting as a result of discussions with her and other neighbors.

Roads and Parking Area

62. The Project has a gravel driveway or road that runs due east off Rod and Gun Club Road. This road runs to the south of the clubhouse, trap houses, rifle range, and pistol range, and to the north of the beagle pens. At the east end of the road, a woods road continues in an easterly direction

and across a culvert. From there, another woods road or cleared pathway extends due south.

63. Since 1970, the road has been improved with gravel from time to time, including improvements made in 1974.

64. The parking lot was widened in 1980.

Pond

65. In the 1950s, Petitioner built a pond measuring 90 x 200 feet and running from four to twelve feet deep at the club and stocked it with fish. Fishing derbies and other activities have been conducted at the pond, before and after 1970.

66. In 1973 Petitioner had the pond bulldozed and backhoed out. It remains in place today.

Garage

67. A garage was constructed on the Project tract, south of the road, before June 1, 1970. The original garage was wooden and sat on concrete blocks.

68. This garage was replaced in 1998 with a 24' x 24' garage on a slab, in a slightly different location. Earthwork was done, and crushed stone was put in, to install the garage.

69. The area near the garage is wet, and has hydrophytic vegetation. The mapped Class Two wetland may be within 50 feet of the area disturbed by the installation of the new garage.

Trailer for Storing Clay Targets

70. In 1988, a trailer was installed to the south of the driveway for storing clay targets. Earthwork was done to move rocks behind the trailer.

71. The clay target storage trailer was replaced in 1997, in substantially the same location as the original trailer. Installation of this trailer involved tree clearing, earthwork, and fill.

72. The area near the target storage trailer is wet, with hydrophytic vegetation. The mapped Class Two wetland may be within 50 feet of the area disturbed by the installation of the new target storage trailer.

Beagle Club Improvements and Activities

73. In 1979, Petitioner allowed the Pittstown Beagle Club to use the Project tract for beagle running.

74. The Beagle Club installed chicken-wire fencing around two areas where beagles could be run, and installed kennels. The fencing is at least six feet high.

75. In 1982, Petitioner obtained a zoning permit for fencing for approximately 35 acres of wooded area for training beagles.

76. The Beagle Club also constructed rabbit pens on the Project tract. In 1992, Petitioner voted to allow the Beagle Club to erect a 150-square-foot pen behind the garage area.

77. Also in 1992, Petitioner extended a culvert to accommodate road improvements for the Beagle Club that were made later that same year.

78. The Beagle Club conducted several events per year from 1979 to 2003. These events were large, with many participants camping on the Project site in tents and some in recreational vehicles or mobile trailers.

79. The Beagle Club was allowed to use the clubhouse, including water and toilets.

80. The Beagle Club had a portable toilet placed on the Project tract. That portable toilet remains today, as do many of the other improvements made for the Beagle Club.

81. At various times Petitioner allowed the Beagle Club to cut trees in the area the Beagle Club was using. For instance, Petitioner authorized the Beagle Club to cut approximately two acres of trees in 1988, and allowed removal of red pines in 1992.

82. Beagles did not live permanently on the Project site, but were brought to the facility to run.

83. In September 2003, Petitioner terminated the Beagle Club's use of its property. Two lawsuits in which the Petitioner and Beagle Club are adverse parties remain pending in U.S. District Court for the District of Vermont, and in Bennington Superior Court. Petitioner anticipates that the fences, kennels and portable toilet will be removed from the Project tract.

Sign, Lean-Tos

84. As of June 1, 1970, there was a sign for the Project, visible from Rod and Gun Club Road. The sign has been in continuous use since then and remains today.

85. As of June 1, 1970, there were two lean-tos on the Project tract. These structures have not been removed or changed and remain in place today.

Pike Permit

86. The Commission issued the Pike Permit, Land Use Permit #8B0204, to Pike Industries, Inc. on April 12, 1979, authorizing a quarrying operation on northeastern part of the Project tract. The Pike Permit "specifically authorizes the permittee to conduct a quarrying operation, including a crusher, stockpile and road in the vicinity of the Hale Mountain located westerly of the intersection of Holysmoke and East Roads in the Town of Shaftsbury, Vermont."

87. The Findings of Fact, Conclusions of Law, and Order issued by the Commission concurrently with the Pike Permit (Pike Commission Decision) provide in part that the Petitioner conveyed "quarrying rights and rights of way over a portion of the property to William E. Dailey and Donald J. Dailey who are principals in William E. Dailey, Inc." in 1979, and that Pike Industries arranged through William E. Dailey, Inc., "for the use of these rights in connection with its construction work on the new U.S. Route 7."

88. The Pike Commission Decision provides that the permitted project:

> consists of four principal components: a temporary quarry approximately 600' long, 250' wide and with an average depth of 50'; a temporary stone crusher; a temporary stock pile area; and a roadway for transporting crushed stone from Hale Mountain to the job site.

89. Condition 4 of the Pike Permit provides that "[t]here shall be no further quarrying on the entire tract . . . than that which is permitted by this Land Use Permit 8B0204, that is a quarry hole approximately six hundred (600) feet long by approximately two hundred and fifty (250) feet wide with an average depth of approximately fifty (50) feet."

90. An aerial photograph from 2003 shows a rectangular cleared space in the northeast portion of the Project site, with the approximate length and width of the quarry hole authorized by the Pike Permit.

91. Condition 12 of the Pike Permit states that the permit "shall expire and all quarry operations shall cease by December 31, 1979" and that "[t]he quarry and associated lands shall have been shaped and treated as specified in Application 8B0204 by that date."

92. Condition 6 of the Pike Permit requires the permittee to replace certain water supplies destroyed or materially reduced in quantity or quality as a direct result of the quarrying operation, and provides that the condition applies until December 31, 1980.

93. The Pike Permit and Pike Commission Decision were appealed to the Board by a group of neighbors including Richard and Lorraine Mattison on April 30, 1979. That appeal was withdrawn on May 31, 1979.

94. A second appeal was filed by the Town of Shaftsbury and the Shaftsbury Planning Commission on May 10, 1979, and a third appeal, having to do with party status, was filed by Pike Industries, Inc. on May 16, 1979.

95. On December 20, 1979 the remaining appellants filed a stipulation for dismissal of the remaining appeals, which provided in part that:

> Except as is necessary for Pike Industries, Inc. to complete its performance of U.S. Route #7 improvement project F019-1(14) Bennington – Sunderland and F319-1(15) Arlington – Sunderland, that neither Pike Industries, Inc., nor the Town of Shaftsbury shall conduct any future quarrying operations on Hale Mountain.

96. The Board approved the parties' stipulation and dismissed the remaining appeals on January 14, 1980.

IV. CONCLUSIONS OF LAW

A. *De Novo Review;* Burden of Proof

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). Thus, the Board must take its own evidence and reach its own conclusions as though no prior decision had been made. *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).

The issues in this case are whether the Project is a preexisting development, whether there has been substantial change thereto, and whether there has been a substantial or material change to the quarrying project permitted by the Pike Permit. A party seeking the benefit of Act 250s 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))).

Once a development is shown to be preexisting, the burden of persuasion shifts to the party who claims that a substantial change has occurred. *Re: Howrigan*, Findings, Conclusions and Order at 9 (Aug. 30, 1999)(citing *Champlain Construction Co.*, Memorandum of Decision at 2-4). While the Petitioner does not bear the burden of persuasion, it does bear the burden of producing sufficient evidence for the Board to determine whether a substantial change has occurred. *Whitcomb*, Findings, Conclusions and Order at 9. The Petitioner also bears the burden of producing enough evidence for the Board to decide the Pike Permit question.

B. Official Notice

The Board may take official notice of judicially cognizable facts in any contested case. 3 V.S.A. § 810(4). Judicially cognizable facts are those which are "not subject to reasonable dispute [and] capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." V.R.E. 201(b); *see In re Handy*, 144 Vt. 610, 612 (1984). Official notice may be taken whether requested or not and at any stage of the proceeding. 3 V.S.A. § 810(4); V.R.E. 201(c) and (f). Accordingly, the Board takes official notice of the following documents from the Board's file in the Pike Permit appeals, *In re Pike Industries,* #8B0204-EB: The Board's Order dated January 14, 1980, and a site plan dated February 14, 1979, and captioned: "Location Map, Pike Industries, Inc., Proposed Hale Mtn. Quarry Site, Shaftsbury, Vermont," designed by Jim Davis and Brian Fowler.

C. Preexisting Development and Substantial Change

1. Preexisting Development

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)). To establish that the Project is exempt as a preexisting development, Petitioner must demonstrate that it was in existence before, and 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).

With respect to abandonment of a development that existed before 1970, the Board has stated that:

> 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).

The Petitioner has shown that, as of June 1, 1970, the Project included:

a. a clubhouse with well and septic
b. a rifle and pistol range
c. trap-shooting facilities, including two trap houses, two trap fields and a practice field
d. an unpaved road and parking area
e. a large rectangular pond on the southwest part of the Project tract
f. a wooden garage on concrete blocks with dirt floor
g. two lean-tos
h. a sign.

Moreover, Petitioner has shown that these Project features have been in continuous use and have not been abandoned. The Project, with these features, is a preexisting development.

There is no evidence that the caretaker's trailer was in use on the Project tract on June 1, 1970. However, a trailer has been in use in the same general location off and on dating back to the 1950s. The gaps in use of the caretaker's trailer are not sufficient to constitute abandonment in this case. *Cf. Re: U.S. Quarried Slate Products, Inc.,* Declaratory Ruling 283, Findings of Fact, Conclusions of Law, and Order at 22 (Oct. 1, 1993)(quarry was abandoned where it had been reported as closed in 1975, was unused for seventeen years, and had water in it and trees growing in portions of it). Accordingly, the caretaker's trailer is also a preexisting development.

2. Substantial Change to Preexisting Development

The next question is whether a substantial change has occurred since June 1, 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).

The substantial change question involves a two-part inquiry: 1. whether there has been a cognizable physical change to the preexisting project; and if so, 2. whether the change has 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)).

As the Vermont Supreme Court has noted, the fact that "a development is exempt at one time does not mean it will always be exempt." *In re Orzel*, 145 Vt. at 361. On grandfathering, the Board has stated that:

> the Legislature's intent was to allow activities that had begun prior to the enactment of Act 250 to continue without a permit, but only to the extent that they remained the same or increased solely because of an expansion inherent to the development.

Re: Browning Ferris Industries, Declaratory Ruling 188, Findings of Fact, Conclusions of Law, and Order at 12 (Oct. 11, 1988).

The Board has held that the legislature intended to exempt preexisting developments only to the extent that there is no significant increase in environmental

impacts. In *Re: Orzel*, Declaratory Ruling #174, Findings of Fact, Conclusions of Law, and Order, at 4 (Oct. 2, 1986), the Board stated that the legislature intended to allow "a person to continue operating a preexisting 'development' . . . without the necessity of an Act 250 permit, so long as the impacts of the operation upon the environment or upon the community are no greater after June 1, 1970, than before that date." *Id.*

The Board has held that the purpose of grandfathering is "to avoid the unfairness of suddenly imposing a permit requirement on existing businesses," and that the need for this diminishes over time. *Re: John Gross Sand and Gravel*, Declaratory Ruling #280, Memorandum of Decision at 4 (1993). The Board stated then, that: "Specifically, the existence and possible applicability of Act 250 should not be a surprise to anyone involved in commerce in Vermont, since Act 250 has been in effect for over 23 years." *Id.* This principle would apply with greater force today.

It has been over thirty five years since Act 250 and its grandfather clause took effect. With the passage of time, it has become increasingly difficult for owners and operators of preexisting developments to produce sufficient, credible evidence. Memories fade, ownership and management changes, and witnesses with personal knowledge of pre-1970 operations are getting harder to find as the years go by. This was particularly apparent in this case. Nonetheless, we are obliged to apply Act 250's grandfathering rules as they exist today.

a. Cognizable Change

Several improvements, additions and other changes have been made to the Project since 1970, including:

- improvements to the water supply and wastewater disposal system
- removal of trees and vegetation within the rifle range
- berming to separate out the pistol range
- covering shooting stations on both ranges
- building a storage unit and installing walls on the rifle range shooting station
- upgrading the trap shooting facility
- replacement of the garage
- installation of a trailer for storage of clay targets
- improvements and activities related to the beagle club including cutting trees, installation of fencing and a portable toilet, and holding of beagle events
- other improvements to the road and parking lot

The Petitioner argues that the improvements are not cognizable, physical changes because they are "in-kind replacement of existing equipment

with substantially similar equipment," *In re F.W. Whitcomb Construction Co.*, Declaratory Ruling 408, Findings of Fact, Conclusions of Law, and Order at 10 (Dec. 19, 2002)(citing *In re Tucker, Inc*, 149 Vt. 551, 556 (1988)), or "repair or routine maintenance," *Re: Agency of Transportation (Leicester Route 7),* Declaratory Ruling 153 at 4 (June 28, 1984) and *Re: Windsor Correctional Facility*, Declaratory Ruling #151 at 6 (May 9, 1984). It is true that in-kind replacements necessitated by normal wear and tear, and repairs and routine maintenance, generally are not cognizable changes. The Board has previously held that the following activities are not repair or routine maintenance: new pavement, guardrail replacement and elimination or decrease in pull-offs, *Re: Agency of Transportation*, Declaratory Ruling 298 (May 9, 1995); an upgrade to a historic condition, *Re: Town of Wilmington*, Declaratory Ruling 258 at 12 (June 30, 1992); replacement of leach fields with a different sewage disposal system for a correctional facility, *Re: Windsor Correctional Facility*, Declaratory Ruling 151 at 4 (May 9,1984); and the widening of U.S. Route 7 to create a 30-foot clear zone, *Re: Agency of Transportation (Leicester Route 7*), Declaratory Ruling 153 (June 28, 1984). By contrast, the restoration of a washed-out road to its original condition is repair or routine maintenance. *Re: Productions, Ltd*., Declaratory Ruling #168 (April 10, 1985).

The replacement of lines for water and wastewater, removal of trees and vegetation from the shooting range, and the parking lot and driveway improvements, would fit the routine maintenance or repair category. However, most of the other changes Petitioner has made over the years without the benefit of a permit are cognizable changes that must be reviewed for possible Act 250 impacts.

Petitioner asserts that tree-cutting, even clearing of many acres of trees, has been held not to constitute a substantial change. (Petitioner's Proposed Findings at 30 (citing *Re: Robert Blair and CS Architecture*, Declaratory Ruling #241, Findings of Fact, Conclusions of Law, and Order at 6 (Apr. 29, 1992).) In *Blair*, the question was whether clearing trees was a substantial change to a previously permitted housing subdivision. The permit in that case indicated that some clearing would be needed for construction, but did not specify how much. The Board held that:

> because some tree-cutting had to have been anticipated for road construction and installation of utilities and sewage systems, and because no restrictions, conditions or discussion of the areas or numbers of trees to be cut is contained in the original permit or any of the permit amendments, the Board cannot conclude that the tree cutting that occurred is a change from the project as permitted.

Blair, Findings, Conclusions and Order at 6. The baseline in this case is not a permit that contemplates clearing; it is the Project site as it existed on June 1, 1970. At that

time much of the Project tract was still unforested. It was the Petitioner's successful forest management plan which resulted in most of the growth that was removed to maintain the rifle range, and to facilitate the Beagle Club's activities.

Although *Blair* does not apply in this case, Petitioner's removal of trees and other vegetation from within the rural, hillside rifle range, and to make room for the beagle pens and activities, are not cognizable, physical changes from the preexisting development.

b. Potential for Significant Act 250 Impact

Because the improvements in this case have already been made, it is particularly important to bear in mind that the law requires a permit where significant impact "may" occur, so a showing of actual impact is not required. EBR 2(G); *Re: City of Montpelier*, Declaratory Ruling #190, Findings of Fact, Conclusions of Law, and Order at 7 (Sept. 6, 1988)(Act 250 permit is required if significant impacts may occur); *see also In re Barlow*, 160 Vt. 513, 521-22 (1993) (upholding Board rule requiring potential significant impact); *Re: Taft Corners Associates, Inc.*, #4C0696-11-EB (Remand), Findings of Fact, Conclusions of Law, and Order (Revised) (May 5, 1995)(substantial change found where increase in size of project involving retail and warehouse buildings would, without certain improvements to existing roads, have a potential for significant impact on Criterion 10 (town and regional plan)).

To require a showing of actual impacts in this case would make it easier to avoid Act 250 jurisdiction by building before inquiring about Act 250 jurisdiction. The person who requests a jurisdictional opinion before building would remain subject to the "potential" significant impact test. It is only fair to apply the same test to the Petitioner as that which applies to any proposed change to a grandfathered project. Doing so also ensures that there is no incentive or advantage to constructing improvements to grandfathered projects before requesting a jurisdictional opinion.

Water Supply and Wastewater Disposal System Improvements

Since 1970, Petitioner has made several improvements to the Project's water supply and wastewater disposal systems, including installation of a new well, septic tank and drywell in 1971, and installation of a larger septic tank and new drywell in 1983. The question is whether any of these actions had the potential for significant impact.

Criterion 1(B) requires compliance with applicable health and environmental conservation regulations. 10 V.S.A. § 6086(a)(1)(B). Thus, by the plain terms of the statute, regulatory compliance is a prerequisite for satisfying Criterion 1(B).

Under current DEC rules, a permit would likely be required for these improvements. Environmental Protection Rules, Chapter 1, Wastewater System and Potable Water Supply Rules § 1-402(a)(requiring a permit prior to the construction of new, or modification or replacement of an existing, potable water supply or wastewater system)(eff. Jan. 1, 2005); *see also, id.* at § 1-201(38)(minor repair or replacement does not normally include a new well or distribution system such as drywell). The rules in effect in 1971, which took effect in 1965, were somewhat less clear with respect to their applicability in this case. *See,* Vermont State Board of Health Regulations, Chapter 5, Subchapter 3, Public Building Regulations § 5-651 (eff. Apr. 15, 1965)(requiring preapproval of "all new work, alterations or repairs on public buildings"). Thus, we are not inclined to apply them here.

The applicable rules in effect in 1983, however, clearly apply to places of public assembly like the Hale Mountain Fish and Game Club. *See,* Vermont Environmental Protection Rules, Chapter 4, Public Buildings, § 4-03 (eff. Sept. 10, 1982)(requiring preapproval for water supply, sewage disposal, and plumbing "additions or alterations to public buildings"); *id.* at § 4-02(A)(defining "public building" to include "places of public assembly").

The Petitioner's failure to obtain DEC preapproval for the new well, septic and drywell installed in 1983 is not merely a question of technical noncompliance – it also has environmental implications. The septic tank and drywell dispose of wastes through the soil, and the soils in which these improvements were installed tend not to be very absorbent. The Board has no evidence of how these improvements were put in, except that they were put in by the William E. Dailey company. The regulations that applied in 1983 imposed requirements and guidelines for installation of such improvements, including: maximum volume; soil and site testing, to include seasonal high groundwater evaluation to determine the suitability of the soils for the placement of an on-site septic system; certain minimum setbacks and isolation distances from wells, streams, drainage swales, property lines and trees; and placement of six inches of crushed stone around any approved drywell. *See id.* § 7-08C. These requirements protect the efficacy of the wastewater disposal system, as well as the environment, and there is no indication on the record that these requirements were met.

Installation of the new well and wastewater disposal system in 1983 without preapproval required under applicable health and environmental conservation rules had a potential for significant impacts on the values protected by Criterion 1(B). Accordingly, they require an Act 250 permit.

Improvements to Shooting Facilities

Petitioners have made various physical improvements to the rifle, pistol and trap shooting facilities since 1970, including:

- removal of trees and vegetation within the rifle range
- installing a cover, walls, and a storage unit for the rifle range shooting stations
- berming out a separate pistol range
- covering the pistol range shooting stations
- replacing old trap facilities with new, 5-stand trap facilities
- installing a culvert

The Neighbors' witnesses testified that noise and traffic increased significantly after these improvements were made. Petitioner's witnesses, however, testified that the level of activity at the Club has remained fairly constant since 1970. Membership is not an accurate indicator of shooting activity levels, since the Club can be used by non-members, and since there can be widely varying levels of use among members. This is not the sort of business that would keep records of levels of use, and instituting such a practice now would not help determine use levels dating back to before June 1, 1970. The Board is not persuaded that these improvements actually resulted in any significant increase in use of the Project.

The question before the Board, however, is not whether actual levels of use increased, but whether the improvements Petitioner made had the potential to increase use and thereby increase noise and traffic. To eliminate grandfathering protection, the noise and traffic would not only need to increase, but increase to a significant extent. Otherwise, normal ebbs and flows in the use of any preexisting development would unavoidably trigger Act 250 jurisdiction. The Board is not persuaded that any of the improvements Petitioner made to its shooting facilities had the potential for significant noise, traffic, or other impacts beyond those of the preexisting development. These changes do not require an Act 250 permit.

Installation of New Garage and Clay Target Storage Trailer

Petitioner installed a new 24' x 24' garage, to replace a preexisting wooden shed up on blocks, and also installed a new trailer for the storage of clay targets. Both of these improvements involved earthwork and disturbance in the vicinity of a mapped Class Two wetland. The Vermont Wetland Rules require a Conditional Use Determination (CUD) for any disturbance within fifty feet of a Class Two wetland. Vermont Wetland Rules § 6.3. The garage and trailer are in an area with wet soils and vegetation characteristic of wetlands, and from the available evidence they may be within fifty feet of this mapped wetland. The Board recognizes that actual wetland

boundaries may differ from mapped boundaries, but the error may occur in either direction, and neither party has had the wetlands delineated.

As the parties claiming that a permit is required, the Neighbors bear the burden of persuading the Board that a substantial change has occurred. *Re: Howrigan*, Findings, Conclusions and Order at 9 (Aug. 30, 1999)(citing *Champlain Construction Co.*, Memorandum of Decision at 2-4). However, Petitioner bears the burden of providing sufficient evidence for the Board to make this determination. *Whitcomb*, Findings, Conclusions and Order at 9. Without other evidence of the wetland boundary, the record indicates that the new garage and clay target storage trailer are potentially within the fifty-foot buffer, and thus have the potential for significant impacts under Criterion 1(G). The garage and trailer constitute substantial changes that require an Act 250 permit.

Installation of the Culvert and Other Improvements Related to the Beagle Club

The Pittstown Beagle Club used the Project tract for running beagles beginning in 1979, and made several improvements, including installation of fencing and pens, installation of a culvert, and installation of a portable toilet. These improvements facilitated large events at the Project site, and had the potential for significant Act 250 impact under criteria such as Criterion 1(B) and Criterion 8(noise and aesthetics). Therefore, these improvements require an Act 250 permit.

Beagle Club activities no longer take place on the Project tract, and there was testimony from Petitioner's witnesses that most of these improvements will likely be removed in the future. The improvements remaining on the Project site, however, require an Act 250 permit. This will ensure that there are no lasting Act 250 impacts from these improvements or their removal.

Summary

Thus, the only substantial changes to this grandfathered shooting range that require an Act 250 permit are:

- Installation of the new well and wastewater disposal system in 1983 without required health and environmental conservation approval.
- Installation of the replacement garage and the new clay target storage trailer in the vicinity of mapped Class Two wetlands.
- Improvements constructed for the Beagle Club that remain on the Project tract, including pens, fencing, a culvert, and portable toilet.

c. Whether Substantial Change Permeates Entire Project

Even if a substantial change has occurred, unless it permeates the entire project, only the change would require a permit and the preexisting activity would remain grandfathered. *Re: Robert and Barbara Barlow*, Declaratory Ruling 234, Findings of Fact, Conclusions of Law, and Order (Sept. 20, 1991), *aff'd, In re Barlow*, 160 Vt. 513 (1993); *Re: H.A. Manosh Corporation*, Declaratory Ruling #164, Findings of Fact, Conclusions of Law, and Order (April 17, 1985), *aff'd, In re H.A. Manosh Corp.*, 147 Vt. 367 (1986). For instance, a preexisting gravel quarry could add a crusher and require a permit only for the crusher, as long as the extraction rates did not increase significantly. If extraction rates increase significantly, the Board has held that the related increase in impacts such as traffic, noise, and dust permeate the entire project and the permit requirement cannot be limited. *Re: Ronald E. Tucker*, Declaratory Ruling #165, Findings of Fact, Conclusions of Law, and Order at 7 (Feb. 27, 1985)(cited in *Re: Champlain Construction,* Declaratory Ruling #214, Findings of Fact, Conclusions of Law, and Order at 9 (Sept. 14, 1992)).

In this case the changes are distinct and isolated. None of them permeates the entire Project. Therefore, an Act 250 permit is required only for each substantial change, not for the entire project.

B. Substantial or Material Change to Permitted Project

The second set of merits issues concerns whether and when the Pike Permit expired, and whether any substantial or material change occurred to that permitted quarry project such that a permit amendment was required.

In a recent memorandum opinion, the Vermont Supreme Court ruled that Act 250 jurisdiction over a quarry project expires with the Act 250 permit's expiration date. *In re Huntley,* 2004 VT 115 ¶ 10 (Nov. 9, 2004)(mem.)("Because the Huntley's permit expired, the Board has no authority to enforce the terms and conditions of the expired permit."). The expiration date of the Pike Permit, however, is less than clear.

The Pike Permit was issued on April 12, 1979, and called for quarry operations to cease by December 31, 1979. Pike Permit, Condition 12. However, at least one other condition expressly applied until December 31, 1980. Pike Permit, Condition 4.

In the Board's January 14, 1980 Order in *Re: Pike Industries, Inc.,* #8B0204-EB, the Board dismissed several appeals of the Pike permit based on the settlement of the parties. The Board noted that, "[o]n December 20, 1979 the Town of Shaftsbury and the Shaftsbury Planning Commission and the applicant, Pike Industries, Inc., filed a stipulation for dismissal of their appeals."

Id. As quoted in that Order, the stipulation provided in part that "except as is necessary for Pike Industries, Inc. to complete its performance of U.S. Route #7 improvement project F019-1(14) Bennington – Sunderland and F319-1(15) Arlington – Sunderland, that neither Pike Industries, Inc., nor the Town of Shaftsbury shall conduct any future quarrying operations on Hale Mountain." *Id.* In effect, the Board's consent decree extended the Pike Permit's quarrying activities until the last date necessary for the Route 7 improvements contemplated by the permit.

Therefore, a permit amendment would be required if any change that took place on the Project tract between April 1979 and the last date necessary for the Route 7 improvements had the potential for significant Act 250 impact (substantial change) or a significant impact on any finding, conclusion, term, or condition of the permit and which affects one or more of the values protected by Act 250 (material change). *Re: Hiddenwood Subdivision*, Declaratory Ruling #378, Findings of Fact, Conclusions of Law, and Order at 7 (Jan.12, 2000)(citing *Re: Vermont Institute of Natural Science*, Declaratory Ruling #352, Findings of Fact, Conclusions of Law, and Order at 26 (Feb. 11, 1999); *Re: Sugarbush Resort Holdings, Inc.*, Declaratory Ruling #328, Findings of Fact, Conclusions of Law, and Order (Feb. 27, 1997); *Re: David Enman*, Declaratory Ruling #326, Findings of Fact, Conclusions of Law, and Order (Dec. 23, 1996); *Re: Mount Mansfield Co., Inc*., Declaratory Ruling #296, Findings of Fact, Conclusions of Law, and Order (July 22, 1992); *In re Greg Gallagher*, 150 Vt. 50, 51 (1998)).

Nothing in the record indicates that the Pike Permit remained in effect beyond 1980, or that there was any substantial or material change to the permitted quarry it authorized before the permit expired. Accordingly, no amendment to the Pike Permit is necessary.

V. ORDER

1. The Project is a preexisting development, but an Act 250 permit is required for certain substantial changes the Petitioner has made to the Project since June 1, 1970, namely:

    a. Installation of the new well and wastewater disposal system in 1983 without required health and environmental conservation approval.
    b. Installation of the replacement garage and the new clay target storage trailer.
    c. Improvements constructed for the Beagle Club beginning in 1979 that remain on the Project tract, including pens, fencing, a culvert, and portable toilet.

2. The Pike Permit has expired, and no substantial or material change to the project permitted by the Pike Permit occurred while that permit was in effect. No Act 250 permit amendment is required.

DATED at Montpelier, Vermont this 4th day of August, 2005.

ENVIRONMENTAL BOARD

/s/Patricia Moulton Powden___
Patricia Moulton Powden, Chair *‡
George Holland**
W. William Martinez**
Patricia Nowak**
Alice Olenick*
Karen Paul*
Richard C. Pembroke, Sr.**
A. Gregory Rainville
Christopher D. Roy

* Chair Moulton Powden and Members Olenick and Paul DISSENT in part, as follows:

We concur in the majority's decision that an Act 250 permit is required, but would add more fundamental grounds for that decision. In our opinion, Petitioner's improvements to the shooting facilities -- covering the rifle range, and covering and berming the pistol range -- had the potential to increase shooting activities at the Project, and result in a significant increase in noise. The improvements also facilitated the use by law enforcement agencies, which is a new and increased use. Viewed together, these improvements clearly had the potential for significant Act 250 impacts. *See, Re: Robert Barlow,* Declaratory Ruling 234, Findings of Fact, Conclusions of Law, and Order at 11 (Sept. 20, 1991)(holding that certain physical changes to quarry project, taken together, had the potential for significant Act 250 impacts), *aff'd, In re Barlow,* 160 Vt. 513 (1993).

In addition, there is credible evidence of actual increases in noise levels since these improvements were made. Several neighbors testified that noise at the Project site has increased markedly since the mid-1990s. Unlike the Petitioner's witnesses, who did not live near the Project, Ms. Beauchesne, Ms. Mattison and Ms. Dailey were in a position to observe changes in noise levels over time. Even without objective noise measurements, we would conclude that actual impacts have occurred.

Moreover, the Act 250 impacts of a significant increase in shooting activity would permeate the entire Project. Accordingly, we would hold that these improvements to the rifle and pistol range triggered Act 250 jurisdiction over the Project.

We respectfully dissent from this part of the Board's decision.

** Members Holland, Martinez, Nowak, and Pembroke DISSENT in part, as follows:

We dissent from the majority's decision that an Act 250 permit is required. In our opinion, none of the changes Petitioner made to this Project had the potential for significant Act 250 impacts. The Project is grandfathered and should remain exempt from the Act 250 permitting requirement.

‡ Chair Moulton Powden CONCURS, as follows:

Except as indicated above, I concur in the Board's decision. As the majority indicates, these "grandfathering" cases grow increasingly difficult to decide (and for landowners to prove) with the passage of time. Landowners with preexisting developments would be well-advised to preserve and maintain records of pre-1970 and post-1970 activities to avoid these difficulties. It may even be advisable for such persons to "lock in" their preexisting status by requesting a jurisdictional opinion, providing the appropriate district environmental coordinator with all the necessary information. The passage of time can only make it more difficult to produce enough information to retain exempt status.