



LAND USE PERMIT

State of Vermont

Natural Resources Board

District 4 Environmental Commission

111 West Street

Essex Junction, VT 05452

<https://nrb.vermont.gov/>

[phone] 802-879-5614

CASE NO: 4C1343

Dan Rexford
120 Webster Lane
Georgia, VT 05478

LAWS/REGULATIONS INVOLVED

10 V.S.A. §§ 6001 - 6111 (Act 250)

Mazza's Barber Farm Road Properties LLC
c/o Paul Mazza
135 Poor Farm Road
Colchester, VT05446

The District 4 Environmental Commission hereby issues Land Use Permit 4C1343, pursuant to the authority vested in it by 10 V.S.A. §§ 6001-6111. This permit applies to the lands identified in Book 268, Pages 173-175, of the land records of Jericho, Vermont.

This permit specifically authorizes the phased extraction of 225,000 cubic yards of sand over a 20-year period on an approximately 142-acre parcel and the construction of a new access road off VT Route 117. The permit authorizes extraction operations within Phases 1-5 only. The project is located at 308 VT Route 117 in Jericho, Vermont.

Jurisdiction attaches because the project constitutes development pursuant to 10 V.S.A. § 6001(3)(A)(i).

1. The Permittees, and their assigns and successors in interest, are obligated by this permit to complete, operate, and maintain the project as approved by the District 4 Environmental Commission (the "Commission") in accordance with the following conditions.
2. The project shall be completed, operated, and maintained in accordance with: (a) the conditions of this permit, (b) Findings of Fact and Conclusions of Law 4C1343, and (c) the permit application, plans, and exhibits on file with the Commission and other material



representations. In the event of any conflict, the terms and conditions of this permit and the conclusions in the findings shall supersede the approved plans and exhibits.

The approved plans are:

Sheet 0 - "Base Plan," dated 6/1/20, last revision 3/24/22 (Exhibit 013b);

Sheet 0 - "Base Plan," dated 6/1/20, last revision 5/26/22 (Exhibit 013c);

Sheet 1 - "Base Plan," dated 6/1/20, last revision 3/24/22 (Exhibit 014b);

Sheet 2 - "Phasing Plan," dated 6/1/20, last revision 3/24/22 (Exhibit 015b);

Sheet 3 - "Extraction & Reclamation Plan," dated 6/1/20, last revision 3/24/22 (Exhibit 016b);

Sheet 4 - "EPSC Plan," dated 6/1/20, last revision 3/24/22 (Exhibit 017b);

Sheet 5 - "Phase 1-8 Grading Plan," dated 6/1/20, last revision 3/24/22 (Exhibit 018b); and

Sheet 6 - "Phase 9/Overall Grading Plan," dated 6/1/20, last revision 3/24/22 (Exhibit 019b).

3. The Permittees shall comply with all of the conditions of the following Agency of Natural Resources Permit:
 - a. Authorization of Notice of Intent 8929-9020 under Construction General Permit 3-9020 issued on October 5, 2020 by the ANR Watershed Management Division.
4. Any nonmaterial changes to the permit listed in the preceding condition shall be automatically incorporated herein upon issuance by the Agency of Natural Resources.
5. Representatives of the State of Vermont shall have access to the property covered by this permit, at reasonable times, for the purpose of ascertaining compliance with Vermont environmental and health statutes and regulations and with this permit.
6. A copy of this permit and plans shall be on the site at all times throughout the construction process.
7. No change shall be made to the design, operation, or use of this project without a permit amendment issued by the Commission or a jurisdictional opinion from the District Coordinator that a permit is not required.
8. No further subdivision, alteration, and/or development on the tract of land approved herein shall be permitted without a permit amendment issued by the Commission or a jurisdictional opinion from the District Coordinator that a permit is not required.
9. Pursuant to 10 V.S.A. § 8005(c), the Commission or the Natural Resources Board may at any time require that the permit holder file an affidavit certifying that the project is in compliance with the terms of this permit.

10. The conditions of this permit and the land uses permitted herein shall run with the land and are binding upon and enforceable against the Permittees and their successors and assigns.
11. The permit authorizes extraction operations within Phases 1-5, only. Extraction within other phases requires prior written authorization by the Commission.
12. Sand extraction operations shall be allowed only between April 15th and November 15th each year.
13. No Project site preparation, construction, or reclamation activity shall occur within 300 feet of the deer wintering area between November 15th and April 15th.
14. Hours of operation will be limited to 7:00 AM to 4:30 PM Monday through Saturday with no operation on Sundays or federal holidays.
15. The Permittees shall comply with the *Operation & Reclamation Plan* for the project. Exhibit 021a.
16. The sand extraction rate shall not exceed 50,000 cubic yards per year.
17. The project is allowed a maximum of 80 loaded trips per day (160 trip ends).
18. The Permittees shall not allow the operation of rock drills, blasting, crushing operations or screening operations on the property without prior written approval by the Commission.
19. Noise generated from sand extraction operations shall not exceed 55 dBA at any residential property line.
20. The sand extraction area approved herein is not approved for any manufacturing use or the on-site disposal of any process wastes. The Permittees shall apply and receive amended approval from the Commission for any change in the use which involves the storage or handling of any regulated substances or the generation of hazardous wastes.
21. Fueling or maintenance of mobile vehicles (as opposed to stationary or semi-stationary equipment) shall not occur in the active extraction area. Overnight parking of such vehicles shall be outside of the active extraction area. Fueling and maintenance of stationary or semi-stationary equipment on the active extraction area shall be conducted over absorbent pads or with secondary containment.
22. The Permittees shall maintain a three-foot separation zone between extraction activities and the seasonal high groundwater table.
23. The Permittees shall take reasonable precautions to prevent and control fugitive particulate matter (dust) emissions from becoming airborne from facility activities. Reasonable precautions to be taken shall include, but not be limited to, the following

measures or other equally effective measures for facility activities under the Permittees' control or supervision:

- a. The unpaved traffic and parking areas at the project shall be periodically maintained by the application of water and/or generally accepted chemical treatments, such as calcium chloride unless otherwise restricted, which are applied at a rate and frequency to effectively limit visible dust emissions;
 - b. Any paved traffic and parking areas at the project shall be periodically maintained as necessary to prevent buildup of material that may generate fugitive dust emissions. Sweeping shall be performed in a manner to minimize fugitive dust air emissions, and may include lightly wetting the paved surface immediately before sweeping, or preferably by the use of a vacuum, regenerative, or high-efficiency sweeper;
 - c. All trucks owned, operated or under the control of the Permittees shall be securely covered when operated on public roadways and when loaded with materials that may generate fugitive dust;
 - d. Active storage piles shall be periodically maintained by application of water and/or generally accepted chemical treatments, such as calcium chloride unless otherwise restricted, which are applied at a rate and frequency to effectively limit visible dust emissions. Inactive storage piles and exposed surfaces shall be revegetated as soon as reasonably practicable.
 - e. The Permittees shall ensure that any dust control measures taken in accordance with the conditions listed above are in compliance with all other state and federal requirements.
24. Immediately upon initial clearing, grading, or excavation a stabilized construction entrance must be installed and maintained as shown on Exhibit 017. At a minimum, this entrance must be constructed and maintained in accordance with the specifications as described in the Vermont Department of Environmental Conservation's *Low Risk Site Handbook for Erosion Prevention and Sediment Control* (February 2020). No further clearing or construction may occur until the stabilized construction entrance is complete.
25. The sand extraction area shall not exceed a maximum of 2 acres of disturbance at any time.
26. The Permittees shall comply with Exhibits 005, 015b, 016b and 017b for erosion prevention and sediment control. The Permittees shall prevent the transport of any sediment beyond that area necessary for construction approved herein. All erosion prevention and sediment control devices shall be periodically cleaned, replaced, and maintained until vegetation is permanently established on all slopes and disturbed areas.
27. All mulch, siltation dams, water bars and other temporary devices shall be installed immediately upon grading and shall be maintained until all roads are permanently

surfaced and all permanent vegetation is established on all slopes and disturbed areas. Topsoil stockpiles shall have the exposed earth completely mulched and have siltation checks around the base.

28. All areas of disturbance must have temporary or permanent stabilization within 14 days of the initial disturbance. After this time, any disturbance in the area must be stabilized at the end of each workday. The following exceptions apply: i) Stabilization is not required if work is to continue in the area within the next 24 hours and there is no precipitation forecast for the next 24 hours. ii) Stabilization is not required if the work is occurring in a self-contained excavation (i.e., no outlet) with a depth of 2 feet or greater (e.g., house foundation excavation, utility trenches).
29. All disturbed areas of the site shall be stabilized, seeded, and mulched immediately upon completion of final grading. All disturbed areas not involved in winter construction shall be mulched and seeded before October 15. Between the periods of October 15 to April 15, all earth disturbing work shall conform with the "Requirements for Winter Construction" standards and specifications of the Vermont Department of Environmental Conservation's *Low Risk Site Handbook for Erosion Prevention and Sediment Control* (February 2020).
30. In addition to conformance with all erosion prevention and sediment control conditions, the Permittees shall not cause, permit, or allow the discharge of waste material into any surface waters. Compliance with the requirements of this condition does not absolve the Permittees from compliance with 10 V.S.A. (§§ 1250-1284) Chapter 47, Vermont's Water Pollution Control Law.
31. The Permittees shall maintain undisturbed, naturally vegetated riparian zones on the project tract, which shall begin at the water's edge at base flow conditions, and shall further extend 50 feet measured inland from, perpendicular to, and horizontally from the Top of Bank as depicted on Exhibit 013c. The term "undisturbed" means that there shall be no activities that may cause or contribute to ground or vegetation disturbance or soil compaction, including but not limited to construction, earth-moving activities, storage of materials, tree trimming or canopy removal, tree, shrub, or groundcover removal, plowing or disposal of snow, grazing or mowing.
32. The Permittees shall maintain an undisturbed, naturally vegetated Class II wetland and 50-foot wetland buffer zone on the project tract as depicted on Exhibit 013c. The term "undisturbed" means that there shall be no activities that may cause or contribute to ground or vegetation disturbance or soil compaction, including but not limited to construction, earth-moving activities, storage of materials, tree trimming or canopy removal, tree, shrub, or groundcover removal, plowing or disposal of snow, grazing or mowing.

33. The Permittee shall retain, to the extent possible, mature hemlock trees greater than 35 feet in height where clearing occurs adjacent to the Deer Wintering Area as identified on Exhibit 013b. The Vermont Fish & Wildlife Department considers these direct impacts on the Deer Wintering Area an insignificant intrusion, per the *Guidelines for the Review and Mitigation of Impacts to White-Tailed Deer Winter Habitat in Vermont* (1999).
34. The Permittees shall implement the following measures regarding historic sites:
 - a. The Permittee has identified Native American Site VT-CH-1247 and its associated archaeological buffer zone in extraction Phases 6 and 7 on the Base Plan, dated 6/1/20, last revised 5/26/22 (Exhibit 013c), Site Plan, dated 6/1/20, last revised 3/24/22 (Exhibit 014b), and all other relevant site plans.
 - b. Extraction activity, topsoil removal, grading, scraping, cutting, filling, stockpiling, logging, or any other type of ground disturbance is prohibited within the VT-CH-1247 buffer zone prior to the completion of all necessary archaeological investigation. Agricultural cultivation consistent with past practices shall not constitute ground disturbance.
 - c. All relevant archaeological studies to identify, evaluate, or mitigate impacts to archaeological sites shall be carried out by a qualified consulting archaeologist. All such studies and associated reports shall follow the *VDHP Guidelines for Conducting Archaeological Studies in Vermont* (2017). The Permittee's archaeological consultant must submit any scope of work to the VDHP for review and approval before commencing the work. A digital copy of the final report shall be submitted to the VDHP and the Commission. Any archaeological reports submitted to the Commission shall have specific archaeological site locational information redacted in accordance with 22 V.S.A. § 761(b) and 1 V.S.A. § 317(c) (20).
 - d. Proposed mitigation measures must be approved by the VDHP prior to implementation. Mitigation may include but is not limited to further site evaluation, data recovery, or modification of the buffer zone boundaries or the specific conditions that refer to the same.
35. Any extracted stumps shall be disposed of on-site above the seasonal high water table and not in any wetland, or at a state-certified stump and inert waste disposal facility, so as to prevent groundwater pollution.
36. The Permittees shall not erect exterior signage or lighting without prior written approval from the District Coordinator or the Commission, whichever is appropriate under the Act 250 Rules. Signage includes banners, flags, and other advertising displays, excepting temporary real estate marketing signs and temporary Grand Opening signs.
37. Should the Town at any time agree to accept any private utilities being then operated by the Permittees and/or its assigns and successors in interest, the Permittees and/or its

- assigns and successors in interest shall be responsible to improve the same to Town specifications and shall deed all lands involved with said improvements to the Town. Such improvements may require a land use permit amendment.
38. The Permittees shall provide each prospective purchaser of any interest in this Project a copy of the Land Use Permit and the Findings of Fact before any written contract of sale is entered into.
 39. The Permittees shall reference the requirements and conditions imposed by Land Use Permit 4C1343 in all deeds of conveyance and leases.
 40. This permit shall expire on **July 1, 2042**, unless that date is extended in writing by the Commission.
 41. Extraction operations shall cease on or before **July 1, 2042**. Any subsequent request to renew this permit shall be made with the filing of a complete application pursuant to 10 V.S.A. § 6091(A) and shall be subject to the threshold review required in Act 250 Rule 34(E).
 42. Reclamation of all earth extraction area within Phases 1-5 shall be completed no later than **November 15, 2042** or within six months of the end of extraction, whichever is earlier. Permittee shall submit a written report of completion of reclamation, with photographs, within 30 days of such completion. Permittee's reclamation report must specifically document how the required reclamation work has been completed in accordance with (a) the conditions of this permit, (b) Findings of Fact and Conclusions of Law 4C1343, and (c) the permit application, plans, and exhibits.
 43. Act 250 jurisdiction shall remain in effect until the District Coordinator issues a written jurisdictional opinion which concludes that reclamation has been completed, and that the project or tract is no longer subject to Act 250 jurisdiction.
 44. The Permittees shall file a Certificate of Actual Construction Costs, on forms available from the Natural Resources Board, pursuant to 10 V.S.A. § 6083a(g) within one month after construction has been substantially completed. If actual construction costs exceed the original estimate, a supplemental fee based on actual construction costs must be paid at the time of certification in accordance with the fee schedule in effect at the time of application. Upon request, the Permittees shall provide all documents or other information necessary to substantiate the certification. Pursuant to existing law, failure to file the certification or pay any supplemental fee due constitutes grounds for permit revocation. The certificate of actual construction costs and any supplemental fee (by check payable to the "State of Vermont") shall be mailed to: Natural Resources Board, 10 Baldwin Street, Montpelier, VT 05633-3201; Attention: Certification.
 45. Failure to comply with any condition herein may be grounds for permit revocation pursuant to 10 V.S.A. sec. 6027(g).

Dated this 13th day of June 2022.

By /s/ Thomas Little
Thomas A. Little, Chair
District 4 Commission

Members participating in this decision:

Kate Purcell

Scott Baldwin

Any party may file a motion to alter with the District Commission within 15 days from the date of this decision, pursuant to Act 250 Rule 31(A).

Any appeal of this decision must be filed with the Superior Court, Environmental Division within 30 days of the date the decision was issued, pursuant to 10 V.S.A. Chapter 220. The Notice of Appeal must comply with the Vermont Rules for Environmental Court Proceedings. The appellant must file with the Notice of Appeal the relevant entry fee required by 32 V.S.A. § 1431.

The appellant must also serve a copy of the Notice of Appeal on the Natural Resources Board, 10 Baldwin Street, Montpelier, VT 05633-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings.

Decisions on minor applications may be appealed only if a hearing was held by the district commission. Please note that there are certain limitations on the right to appeal, including appeals from Administrative Amendments and interlocutory appeals. See 10 V.S.A. § 8504(k), 3 V.S.A. § 815, and Vermont Rule of Appellate Procedure 5.

For additional information on filing appeals, see the Court's website at:

<http://www.vermontjudiciary.org/GTC/environmental/default.aspx> or call (802) 951-1740. The Court's mailing address is Vermont Superior Court, Environmental Division, 32 Cherry Street, 2nd Floor, Suite 303, Burlington, VT 05401.



FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

State of Vermont

Natural Resources Board

District 4 Environmental Commission

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CASE NO: 4C1343

LAW/REGULATIONS INVOLVED

10 V.S.A. §§ 6001 – 6111 (Act 250)

Mazza's Barber Farm Road Properties, LLC
c/o Paul Mazza
135 Poor Farm Road
Colchester, VT 05446

Dan Rexford
120 Webster Lane
Georgia, VT 05478

I. INTRODUCTION

On January 31, 2022, Mazza's Barber Farm Road Properties, LLC and Dan Rexford filed application 4C1343 for a project generally described as the phased extraction of 225,000 cubic yards of sand over a 20-year period on an approximately 142-acre parcel and the construction of a new access road off VT Route 117. The project is limited to extraction operations within Phases 1-5 only. The project is located at 308 VT Route 117 in Jericho, Vermont. The Applicant's legal interest is ownership in fee simple described in a deed recorded in Book 268, Pages 173-175 of the land records of Jericho, Vermont.

The application was determined to be incomplete under Act 250 Rule 10(D) for reasons stated in a letter from the District Coordinator to the Applicant dated February 14, 2022. The application was deemed complete on April 8, 2022, after the receipt of supplemental evidence.

The District 4 Commission (the "Commission") held a hearing on this application on May 6, 2022. Just prior to the hearing, the Commission conducted a site visit and placed its observations on the record. At the end of the hearing, the Commission recessed the proceeding pending the submittal of additional information. The Commission adjourned the hearing on June 13, 2022, after receipt of the additional information, an opportunity for parties to respond to that information, and the completion of Commission deliberations.

As set forth below, the Commission finds that the project complies with 10 V.S.A § 6086(a) (Act 250).

II. JURISDICTION

Jurisdiction attaches because the project constitutes a development pursuant to 10 V.S.A. § 6001(3)(A)(i).

III. OFFICIAL NOTICE

Under 3 V.S.A. § 810(4) of the Administrative Procedure Act (“APA”), notice may be taken of judicially cognizable facts in contested cases. See 10 V.S.A § 6007(c) and 3 V.S.A. § 801(b)(2). Under § 810(1) of the APA, “[t]he rules of evidence as applied in civil cases . . . shall be followed” in contested cases. Under the Vermont Rules of Evidence, “(a) judicially noticed fact must be one not subject to reasonable dispute in that it is . . . (2) 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.601, 613 (1984).

The Commission may take official notice of a judicially cognizable fact whether requested or not and may do so at any stage of the proceeding. See V.R.E. 201(c) and (f). Under 3 V.S.A. § 809(g), the Commission may make findings of fact based on matters officially noticed. A party is entitled, upon timely request, to an opportunity to be heard as to the propriety of taking official notice and the tenor of the matter noticed. See V.R.E. 201(e).

Accordingly, official notice is hereby taken of ANR’s *Guidelines for Review & Mitigation of Impacts to White-Tailed Deer Winter Habitat in Vermont* (1999). subject to the filing of an objection on or before thirty days from the date of this decision pursuant to Act 250 Rule 6.

IV. AMENDMENT APPLICATION - RULE 34(E)

The threshold question on an amendment application is “whether the applicant proposes to amend a permit condition that was included to resolve an issue critical to the issuance of the permit.” Act 250 Rule 34(E)(1).

In this application, the applicant does not seek to amend such a critical permit condition, so the Commission may consider the merits of the amendment application without conducting the rest of the Rule 34(E) analysis.

V. Motions

On May 26, 2022, the Applicants submitted a motion requesting that the Commission approve all nine (9) Phases of earth extraction proposed; or in the alternative, to render partial findings of fact for all nine (9) Phases of earth extraction with the exception of Criterion 8 (historic sites) given

that there is an archaeological site within Phases 6 and 7 that requires additional analysis. Exhibit 026.

The Commission noticed a hearing for this application on April 18, 2022, and that notice limited the review for the application to Phases 1-5 only. It is clear that the law does not authorize the Commission to now expand the review of the project without re-noticing the application and holding a second hearing. The Applicants' motion is denied.

The Commission notes that the Applicants have paid a fee for this application covering 226,000 cubic yards of earth extraction. If and when the Applicants submit an application for Phases 6-9, the Applicants may submit a partial fee waiver request pursuant to 10 V.S.A. § 6083a(f) for the Commission to consider at that time.

VI. PARTY STATUS AND FRIENDS OF THE COMMISSION

A. Parties by Right

Parties by right to this application pursuant to 10 V.S.A § 6085(c)(1)(A)-(D) who participated in the hearing are:

1. The **Applicants**, by Dan Rexford and Bryan Currier and Shawn Cunningham of O'Leary Burke Civil Associates.
2. The **Vermont Agency of Natural Resources ("ANR")**, through an entry of appearance dated May 5, 2022, and at the hearing by Jennifer Mojo.
3. The **Vermont Division for Historic Preservation ("VDHP")**, through an entry of appearance dated March 7, 2022, by Scott Dillon.

B. Interested Parties

No other persons were present at the hearing and no requests for party status or Friends of the Commission status were made.

Prior to the close of hearings, the Commission re-examined the preliminary party status determinations in accordance with 10 V.S.A § 6086(c)(6) and Act 250 Rule 14(E) and found no reason to change its preliminary determinations.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Applicants have met the burden of proving compliance with the following criteria through submittal of the application. Therefore, the application shall serve as the Findings of Fact on these criteria.

- | | |
|---|---------------------------------------|
| 1 - Water Pollution | 8 - Aesthetics |
| 1(A) - Headwaters | 8 - Natural Areas |
| 1(C) - Water Conservation | 9(A) - Impact of Growth |
| 1(D) - Floodways | 9(B) - Primary Agricultural Soils |
| 1(E) - Streams | 9(C) - Productive Forest Soils |
| 1(F) - Shorelines | 9(D) - Earth Resources |
| 1(G) - Wetlands | 9(F) - Energy Conservation |
| 2 - Water Supply | 9(G) - Private Utility Services |
| 3 - Impact on Existing Water Supplies | 9(H) - Costs of Scattered Development |
| 5(A) - Transportation Congestion & Safety | 9(J) - Public Utility Services |
| 5(B) - Transportation Demand Management | 9(K) - Effects on Public Investments |
| 6 - Educational Services | 9(L) - Settlement Patterns |
| 7 - Municipal Services | 10 - Local and Regional Plans |

The findings of fact are based on the application, exhibits and other evidence in the record. Findings made in this decision are not limited to the specific criterion in which they appear and may apply to other sections of the decision. To the extent that any proposed findings of fact are included in this decision, they are granted; otherwise, they are denied.

Under Act 250, projects are reviewed for compliance with the ten criteria of Act 250, 10 V.S.A § 6086(a)(1)-(10). Before granting a permit, the Commission must find that the project complies with these criteria and, therefore, is not detrimental to the public health, safety, or general welfare. The burden of proof under Criteria 1 through 4 and 9 and 10 is on the applicant, and the burden is on the opponent under Criteria 5 through 8, and 9A if the municipality does not have a duly adopted capital improvement program.

Criterion 1 - Air Pollution; and Criterion 9(E) – Extraction of Earth Resources:

Findings of Fact

1. The project is located on a 142-acre parcel. Currently, the project site is primarily used for farming activities.
2. The project includes the extraction of 225,000 cubic yards of sand over a 20-year period with the construction of access roads and associated site improvements.
3. A curb cut will be constructed off VT Route 117. Exhibit 009. The new access road will proceed up a steep hill and across the northwestern edge of an existing farm field to connect to an existing farm access road which leads to the extraction site. Exhibit 013c. The access road will be gated near the curb cut on VT Route 117.

4. This decision only contemplates extraction from Phases 1-5. By permit condition, the Commission will require that extraction in other phases requires prior authorization by the Commission.
5. The Applicants have developed an *Operation & Reclamation Plan* for the project. Exhibit 021a.
6. The Applicants represent that the sand extraction rate will not exceed 50,000 cubic yards per year. Exhibit 021a. The Applicants represent that the project will include up to 80 loaded trips per day (160 trip ends). Exhibit 021a.
7. The Applicants represent that hours of operation will be limited to 7:00AM to 4:30PM Monday through Saturday. Exhibit 021a.
8. The proposed yearly operation will run April through mid-November. Exhibit 011a.
9. In its application for Conditional Use Review by the Jericho Development Review Board (DRB), the applicant proposed "no or limited operation during the winter months." Exhibit 011a.
10. A seasonal restriction on site preparation, construction, reclamation, and extraction activities from December 15 - April 15 is the main habitat protection strategy to avoid indirect impacts to wintering deer at this site. It appears that the Applicants may have an interest in varying from winter restrictions when snow levels happen to be non-existent or low. The Vermont Fish and Wildlife Department does not support moving to this type of ad hoc, case-by-case approach. (Exhibit 028) The Commission agrees with the Department in this regard.
11. The Applicants represent that the project will not include the operation of rock drills, blasting, crushing, or screening operations. By permit condition, the Commission will not authorize the use of rock drills, blasting, crushing operations or screening operations without prior written approval by the Commission.
12. The Commission will by permit condition require that noise generated from sand extraction operations shall not exceed 55 dBA at any residential property line.
13. An Air Pollution Control Permit issued by ANR is not required for this project.
14. ANR requests and the Commission approves the following permit condition related to Criterion 1 for Air Pollution and Criterion 9E for Extraction of Earth Resources (Exhibit 025):

- a. The Permittees shall take reasonable precautions to prevent and control fugitive particulate matter (i.e., dust) emissions from becoming airborne from facility activities. Reasonable precautions to be taken shall include, but not be limited to, the following measures or other equally effective measures for facility activities under the Permittees' control or supervision:
 - i. The unpaved traffic and parking areas at the project shall be periodically maintained by the application of water and/or generally accepted chemical treatments, such as calcium chloride unless otherwise restricted, which are applied at a rate and frequency to effectively limit visible dust emissions;
 - ii. Any paved traffic and parking areas at the project shall be periodically maintained as necessary to prevent buildup of material that may generate fugitive dust emissions. Sweeping shall be performed in a manner to minimize fugitive dust air emissions, and may include lightly wetting the paved surface immediately before sweeping, or preferably by the use of a vacuum, regenerative, or high efficiency sweeper;
 - iii. All trucks owned, operated or under the control of the Permittees shall be securely covered when operated on public roadways and when loaded with materials that may generate fugitive dust;
 - iv. Active storage piles shall be periodically maintained by application of water and/or generally accepted chemical treatments, such as calcium chloride unless otherwise restricted, which are applied at a rate and frequency to effectively limit visible dust emissions. Inactive storage piles and exposed surfaces shall be revegetated as soon as reasonably practicable.
 - v. The Permittees shall ensure that any dust control measures taken in accordance with the conditions listed above are in compliance with all other State and Federal requirements.
15. The extraction activities and reclamation will be phased in accordance with Exhibits 005, 017b and 021a. These exhibits are considered to be the Reclamation Plan for the project site.

Conclusions of Law

Under Criterion 1 (Air Pollution), a permit will be granted if the subdivision or development will not result in undue air pollution.

Under Criterion 9(E), a permit will be granted for the extraction or processing of mineral and earth resources, including fissionable source material: (i) when it is demonstrated by the applicant that, in addition to all other applicable criteria, the extraction or processing operation and the disposal of waste will not have an unduly harmful impact upon the environment or surrounding land uses and development; and (ii) upon approval by the Commission of a site rehabilitation plan which insures that upon completion of the extracting or processing operation the site will be left by the applicant in a condition suited for an approved alternative use or development. A permit will not be granted for the recovery or extraction of mineral or earth resources from beneath natural water bodies or impoundments within the State, except that the gravel, silt, and sediment may be removed pursuant to the rules of the Agency of Natural Resources, and natural gas and oil may be removed pursuant to the rules of the natural gas and oil resource board.

The project will comply with the Applicants' *Operation & Reclamation Plan* (Exhibit 021a) and the project site will be reclaimed in phases for future farming use. Additionally, the Applicant has agreed to mitigating conditions regarding the control of fugitive particulate matter, and seasonal and daily operating hours, among other mitigating conditions.

As conditioned herein, the Commission concludes that the project complies with Criterion 1(Air Pollution) and Criterion 9(E).

Criterion 1(B) - Waste Disposal; and Criterion 4 - Soil Erosion:

Findings of Fact

16. Waste generated by the project will include stormwater runoff and stumps generated by site clearing.
17. The soils on the project site are mapped as Adams and Windsor loamy sands, Hartland very fine sandy loam, Hadley very fine sandy loam and Colton and Stetson soils.
18. The Applicants have developed an *Operation & Reclamation Plan* for the project. Exhibit 021a. A plan has been developed to show the areas of the site that will be used for extraction and reclamation phasing. Exhibit 017b and 021a.
19. This decision only contemplates extraction from Phases 1-5. By permit condition, the Commission will require that extraction in other Phases requires prior authorization by the Commission.
20. A Multi-Sector General Permit issued by ANR is not required for this project. Exhibit 006.

21. Authorization of Notice of Intent 8929-9020 under Construction General Permit 3-9020 was issued on October 5, 2020, by the ANR Watershed Management Division. Exhibit 005.
22. Proposed erosion control measures to be used during construction are shown on the site-specific erosion prevention and sediment control plans and are detailed in the Construction General Permit 829-9020. Exhibits 005, 015b, 016b, and 017b.
23. The extraction activities and reclamation will be phased in accordance with Exhibits 005, 015b, 016b, 017b and 021a. Sand extraction will begin at Phase 1A and continue through Phase 5.
24. No more than 2 acres of land will be disturbed at any one time. Exhibits 005 and 021a.
25. Stormwater runoff from active extraction areas will be directed inward to the extraction area floor to prevent erosion.
26. Topsoil will be stripped from the active extraction phase and stockpiled on-site. A silt fence shall be placed continuously around the base of each topsoil stockpile. Once extraction activities are complete in each extraction phase, the land will be regraded with slopes no more than 3H:1V, and topsoil from the stockpiles will be spread a minimum of 4 inches thick and crops planted to complete the reclamation of the extraction phase. Exhibits 016b, 017b, 018b, 019b and 021a.
27. By permit condition the Commission will require that the Applicants will dispose of any extracted stumps on-site above the seasonal high groundwater table, and not in any wetland, or at a State-certified stump and inert waste disposal facility, so as to prevent groundwater pollution.
28. ANR requests and the Commission approves the following permit condition related to Criterion 1(B) for Waste Disposal (Exhibit 025):
 - a. Fueling or maintenance of mobile vehicles (as opposed to stationary or semi-stationary equipment) shall not occur in the active extraction area. Overnight parking of such vehicles shall be outside of the active extraction area. Fueling and maintenance of stationary or semi-stationary equipment on the active extraction area shall be conducted over absorbent pads or with secondary containment.
 - b. The Permittees shall maintain a three-foot separation zone between extraction activities and the seasonal high groundwater table.
29. The Project will not affect the capacity of soil on the project site to hold water.

30. The project will not involve the injection of waste materials or any harmful or toxic substances into groundwater or wells.

Conclusions of Law

Under Criterion 1(B), a permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the project will meet any applicable Health and Environmental Conservation Department regulations regarding the disposal of wastes and will not involve the injection of waste materials or any harmful or toxic substances into ground water or wells.

Under Criterion 4, a permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the project will not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result.

The ANR stormwater permit creates a presumption under Act 250 Rule 19 that stormwater runoff authorized by this permit will not cause unreasonable soil erosion or reduction in the capacity of the land to hold water. Technical determinations made by ANR are entitled to substantial deference. No evidence was presented to rebut the presumption or challenge the technical determinations made by ANR.

Given the nature of the project, it is imperative that construction and operation of the project is undertaken in strict compliance with the Construction General Permit 8929-9020 (Exhibit 005), the site-specific erosion prevention and sediment control plans (Exhibits 015b, 016b and 017b), the final grading plans (Exhibits 018b and 019b) and the *Operation & Reclamation Plan* (Exhibit 021a). The Commission will by permit condition require the project to comply with these permits and plans. In addition to traditional row crops, the Commission shall accept a robust crop of hay or Vermont conservation mix grass seed to complete the reclamation of each extraction phase (see Exhibit 017b).

As conditioned herein, the project will meet all applicable Department of Environmental Conservation regulations on waste disposal and will not involve the injection of waste materials or any harmful or toxic substances into groundwater or wells. Therefore, the Project complies with Criterion 1(B).

As conditioned herein, the project will not cause unreasonable soil erosion or a reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result. Therefore, the Project complies with Criterion 4.

Criterion 8 - Historic Sites:

Findings of Fact

31. A Phase I archaeology site identification survey was completed for the project site. Exhibit 010. Archaeological sites VT-CH-1245, VT-CH-1246, VT-CH-1248, and VT-CH-1247 were designated based on the results of the surveys. Three sites were determined not significant. However, the fourth site (VT-CH-1247), located in extraction Phases 6 and 7, requires additional analysis. Exhibit 010.
32. This decision only contemplates extraction from Phases 1-5. By permit condition, the Commission will require that extraction in other Phases requires prior authorization by the Commission.
33. VDHP recommended and the Commission accepts the following conditions to be included in any permit issuance (Exhibit 027):
 - a. The Permittee has identified Native American Site VT-CH-1247 and its associated archaeological buffer zone in extraction Phases 6 and 7 on the Base Plan, dated 6/1/20, last revised 5/26/22 (Exhibit 013c), Site Plan, dated 6/1/20, last revised 3/24/22 (Exhibit 014b), and all other relevant site plans.
 - b. Extraction activity, topsoil removal, grading, scraping, cutting, filling, stockpiling, logging, or any other type of ground disturbance is prohibited within the VT-CH-1247 buffer zone prior to the completion of all necessary archaeological investigation. Agricultural cultivation consistent with past practices shall not constitute ground disturbance.
 - c. All relevant archaeological studies to identify, evaluate, or mitigate impacts to archaeological sites shall be carried out by a qualified consulting archaeologist. All such studies and associated reports shall follow the VDHP *Guidelines for Conducting Archaeological Studies in Vermont* (2017). The Permittee's archaeological consultant must submit any scope of work to the VDHP for review and approval before commencing the work. A digital copy of the final report shall be submitted to the VDHP and the Commission. Any archaeological reports submitted to the Commission shall have specific archaeological site locational information redacted in accordance with 22 V.S.A. § 761(b) and 1 V.S.A. § 317(c) (20).
 - d. Proposed mitigation measures must be approved by the VDHP prior to implementation. Mitigation may include but is not limited to further site evaluation, data recovery, or modification of the buffer zone boundaries or the specific conditions that refer to the same.

Conclusions of Law

The Commission uses a three-part test to determine whether the Project meets the portion of Criterion 8 relating to historic sites. The Commission determines: (1) whether the project site is or contains a historic site; (2) whether the proposed project will have an adverse effect on the historic site; and (3) whether the adverse effect will be undue. *Re: Steven L. Reynolds and Harold and Eleanor Cadreact, 4C1117-EB, Findings of Fact, Conclusions of Law, and Order at 5 (Vt. Env'tl. Bd. May 27, 2004); Re: Manchester Commons Associates, 8B0500-EB Findings of Fact, Conclusions of Law, and Order at 18 (Vt. Env'tl. Bd. Sept. 29, 1995).*

1. Whether the proposed project site is or contains a historic site.

“Historic site” is defined as “any site, structure, district or archeological landmark which has been officially included in the National Register of Historic Places and/or the State Register of Historic Places or which is established by testimony of the Vermont Advisory Council on Historic Preservation as being historically significant.” 10 V.S.A § 6001(9).

Listing on the National and State Registers is a question of fact. *Re: Manchester Commons, supra, at 19.* If a structure is listed on the State Register as a historic site, Act 250 has no discretion to declare such structure not to be historic. *Re: Stonybrook Condominium Owners Association, Declaratory Ruling 385, Findings of Fact, Conclusions of Law, and Order at 9 (Vt. Env'tl. Bd. Sep. 18, 2001); Re: OMYA, Inc. and Foster Brothers Farm, Inc., 9A0107-2-EB, Findings of Fact, Conclusions of Law, and Order at 39 (Vt. Env'tl. Bd. May 25, 1999), aff'd, OMYA Inc. v. Town of Middlebury, 171 Vt. 532 (2000).*

Even if a site has not been listed on the National or State Register, 10 V.S.A § 6001(9) allows the Commission to declare it to be a “historic site” if it is established by testimony of the Vermont Advisory Council on Historic Preservation as being historically significant. Accordingly, the Commission must consider whether such testimony establishes a site, structure, district, or archeological landmark as historically significant. The Commission is not bound by the opinion provided by the Council, but rather, must weigh the testimony and make the determination. *Re: Manchester Commons, supra, at 20.*

Phase I and a Phase II archaeological investigations were completed. Four archaeological sites were designated based on the results of the surveys. Exhibit 010. Consequently, the Commission has determined that the project site contains historic sites.

2. Whether the proposed project will have an adverse effect on the historic site

The next question is whether the project will have an adverse effect on the historic site, or whether the project is in harmony with or fits the historic context of the site.

Important guidelines in evaluating this question include the following: (1) whether there will be physical destruction, damage, or alteration of those qualities which make the site historic, such

as an existing structure, landscape, or setting; and (2) whether the proposed project will have other effects on the historic structure, landscape, or setting which are incongruous or incompatible with the site's historic qualities, including, but not limited to, such effects as isolation of an historic structure from its historic setting, new property uses, or new visual, audible or atmospheric elements. *Re: Middlebury College, 9AO177-EB, Findings of Fact, Conclusions of Law and Order at 10 (Vt. Env'tl. Bd. Jan. 26, 1990)*; cited in *Re: OMYA, Inc. and Foster Brothers Farm, Inc., 9A0107-2-EB, Findings of Fact, Conclusions of Law, and Order at 39 (Vt. Env'tl. Bd. May 25, 1999)*, *aff'd, OMYA Inc. v. Town of Middlebury, 171 Vt. 532 (2000)*.

It was determined that three of the archaeological sites were not significant. However, the fourth site, located in extraction Phases 6 and 7, requires additional analysis. Exhibits 010 and 027. This fourth site will be buffered with a not-to-be-disturbed zone.

As conditioned herein with the mitigation conditions proposed by VDHP, the Commission concludes that the project will not have an adverse impact on historic sites. Therefore, the Commission concludes that the project complies with Criterion 8 for historic sites.

Criterion 8(A) - Wildlife Habitat and Endangered Species:

Findings of Fact

34. The project site contains a mapped deer wintering area. Exhibit 013b. Deer wintering areas serve as necessary habitat for the survival of white-tailed deer by providing shelter that allows deer to minimize energy expenditures during winter months, thus maximizing their chance of survival. Exhibit 025.
35. The Vermont Fish & Wildlife Department reviews project for conformance with the *Guidelines for Review & Mitigation of Impacts to White-Tailed Deer Winter Habitat in Vermont* (1999). Exhibit 025.
36. The Department of Fish & Wildlife staff visited the project site on May 4, 2022, to assess the quality of the deer wintering area and the proposed impacts from the project. Exhibit 025.
37. All phases of the project are within 300 feet of functioning deer wintering areas. Exhibit 025.
38. The project proposes impacts to the deer wintering areas consisting of tree clearing along the edge of the extraction area and other impacts to the 300-foot buffer. Exhibits 013b, 025, and 028.

39. ANR requests the following permit conditions related to Criterion 8(A) for Wildlife Habitat (Exhibit 028):
 - a. The Permittee shall retain to the extent possible mature hemlock trees greater than 35' in height where clearing occurs adjacent to the deer wintering areas (DWA) as identified on Exhibit # 013c. The VFWD considers these direct impacts on the DWA an insignificant intrusion, per the Guidelines for the Review and Mitigation of Impacts to White-Tailed Deer Winter Habitat in Vermont (1999).
 - b. No Project site preparation, construction, or reclamation activity shall occur within 300 feet of the DWA from December 15 to April 15.
40. Finding 20 of the Town of Jericho Development Review Board's Conditional Use decision for the proposed project states that the proposed yearly operation will run April through mid-November. Exhibit 011a

Conclusions of Law

Necessary wildlife habitat is defined by Act 250 as "concentrated habitat which is identifiable and is demonstrated as being decisive to the survival of a species or wildlife at any period in its life including breeding and migratory periods." 10 V.S.A § 6001(12).

Criterion 8(A) involves a three-part test: (1) whether the proposed project will impact any "necessary wildlife habitat" or endangered species; (2) if so, whether the proposed project will destroy or significantly imperil such habitat or species; and (3) if so, whether one or more of sub-criteria (i) through (iii) is satisfied.

The sub-criteria are as follows: (i) the economic, social, cultural, recreational, or other benefit to the public from the development or subdivision will not outweigh the economic, environmental, or recreational loss to the public from the destruction or imperilment of the habitat or species, or (ii) all feasible and reasonable means of preventing or lessening the destruction, diminution, or imperilment of the habitat or species have not been or will not continue to be applied, or (iii) a reasonable acceptable alternative site is owned or controlled by the applicant which would allow the development or subdivision to fulfill its intended purpose. 10 V.S.A § 6086(a)(8)(A).

Re: Gary Savoie d/b/a WLPL and Eleanor Bemis, 2W0991-EB, Findings of Fact, Conclusions of Law, and Order (Vt. Envtl Bd. October 11, 1995). If the project will destroy or significantly imperil necessary wildlife habitat, and if any of the sub-criteria apply, then the permit must be denied. Southview Associates, 153 Vt. 171 (1989).

1. *Whether the proposed project will impact and necessary wildlife habitat or endangered species.*

The project site contains mapped deer wintering areas. Exhibit 013b. Deer wintering areas serve as necessary habitat for the survival of white-tailed deer by providing shelter that allows deer to minimize energy expenditures during winter months, thus maximizing their chance of survival. Exhibit 025. The project proposes impacts to the mapped deer wintering areas consisting of tree clearing along the edge of the extraction area and other impacts to the 300-foot buffer. Exhibits 013b, 025, and 028.

2. Whether the proposed project will destroy or significantly imperil such habitat.

The project complies with Criterion 8A because it will not destroy or significantly imperil necessary wildlife habitat or endangered species. However, mitigating conditions are necessary to ensure that operation of the project will not adversely impact overwintering deer. The Commission will condition the permit in accordance with the Applicant's representations to the DRB and with ANR comments to limit operations during the overwintering period.

As conditioned, the Commission concludes that the project complies with Criterion 8A.

VIII. SUMMARY CONCLUSION OF LAW

Based upon the foregoing Findings of Fact, the Commission concludes that the project, if completed and maintained as represented in the application and other representations of the Applicants, and in accordance with the findings and conclusions of this decision and the conditions of Land Use Permit 4C1343, will comply with the Act 250 criteria. 10 V.S.A § 6086(a).

IX. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, Land Use Permit 4C1343 is hereby issued.

Dated this June 13, 2022.

By /s/ Thomas Little
Thomas A. Little, Chair
District 4 Commission

Commissioners participating in this decision:

Kate Purcell

Scott Baldwin

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Any party may file a motion to alter with the District Commission within 15 days from the date of this decision, pursuant to Act 250 Rule 31(A).

Any appeal of this decision must be filed with the Superior Court, Environmental Division within 30 days of the date the decision was issued, pursuant to 10 V.S.A. Chapter 220. The Notice of Appeal must comply with the Vermont Rules for Environmental Court Proceedings. The appellant must file with the Notice of Appeal the relevant entry fee required by 32 V.S.A. § 1431.

The appellant must also serve a copy of the Notice of Appeal on the Natural Resources Board, 10 Baldwin Street, Montpelier, VT 05633-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings.

Decisions on minor applications may be appealed only if a hearing was held by the district commission. Please note that there are certain limitations on the right to appeal, including appeals from Administrative Amendments and interlocutory appeals. See 10 V.S.A. § 8504(k), 3 V.S.A. § 815, and Vermont Rule of Appellate Procedure 5.

For additional information on filing appeals, see the Court's website at:

<http://www.vermontjudiciary.org/GTC/environmental/default.aspx> or call (802) 951-1740. The Court's mailing address is Vermont Superior Court, Environmental Division, 32 Cherry Street, 2nd Floor, Suite 303, Burlington, VT 05401.