October 26, 2006

James McCandless
520 Nut Plains Road
Guilford, CT 06437

Dear Mr. McCandless:

Re: JO #2-241 Land Use Permit #2W0551 and Amendments - Hamm Mine, Windham

As per your request, this is a jurisdictional opinion regarding the applicability of Act 250 to the Hamm Mine in Windham. As outlined below, I have concluded that Act 250 jurisdiction still attaches to the property because the development has not been successfully completed and reclaimed. The following information is relevant to this opinion:

1. The permits covering the former Hamm Mine are #2W0551, 2W0551-A, 2W0551-1, and 2W0551-2. The first permit was issued on March 15, 1985, and the last on November 15, 1995. All of the permits in this series concerned the operation of a talc mine in Windham, Vermont, with the last permit held by Luzenac America, Inc. Each of the permits carried the following condition: "This permit shall expire on October 15, 2002, *unless extended by the District Environmental Commission.*" (Emphasis added).

2. On October 2, 2002, Howard Clay, Environmental and Community Affairs Manager for Luzenac America, Inc., wrote Assistant Coordinator, Linda Matteson, a letter "intended to provide an overview of Luzenac's plans for this property and our compliance with the above permit conditions." In this letter, Mr. Clay made the following representations:

> · We intend to allow the existing permit to expire and will not be applying for renewal.
>
> · We are engaged in good faith negotiations to sell the entire 87+/- acre parcel.
>
> ...
>
> · Condition 10 states that "All conditions of Land Use Permit #2W0551 and amendments shall remain in effect except as amended herein." **To our knowledge we have complied with all conditions of the original permit and subsequent amendments.** (Emphasis in original).

3. On December 10, 2002, Assistant Coordinator, Patrick Dakin, issued a Jurisdictional Opinion (JO) #2-169 on the question of whether Act 250 jurisdiction

continues on the Hamm Mine property subject to Land Use Permits #2W0551 and amendments, despite the fact that the expiration date for the permits had passed. He also issued an accompanying letter in response to a request for a "statement regarding the reclamation of the site according to the terms of its Land Use Permit." This request was made by Tatha Wells, Esq. on behalf of Sean Reese who had entered into a purchase and sales agreement to purchase the property from Luzenac America, Inc.

4. Assistant Coordinator Dakin's JO contained the following fact which appears to rely upon the Howard Clay letter which is the most "current information" available in the permit files:

> 3) The Permittee has completed reclamation as required by the permits, and based on current information, the project *appears* to be in compliance with the expired permits. (Emphasis added)

5. Assistant Coordinator Dakin concluded, based on his reading of current case precedent, that jurisdiction remained over the property despite the fact that permits had expired. His discussion section and conclusion note the following:

> When a Land Use Permit for an extraction project expires, it means simply that the project is finished; *the terms of the permit, including reclamation, must have been complied with,* and that particular operation is no longer permitted. It does not, by extension, extinguish Act 250 jurisdiction over the tract of land . . . Although the permit may have expired, jurisdiction over this parcel remains in effect. Any subsequent activity on this land will need to be reviewed and may require a permit. (Emphasis added).

6. On December 17, 2002, Ms. Wells requested reconsideration of JO #2-169. On December 26, 2002, Assistant Coordinator Dakin wrote Ms. Wells conveying his decision not to reconsider the opinion. This jurisdictional opinion was not appealed. Soon after issuance of this jurisdictional opinion, which was not appealed, Mr. Reese acquired the property.

7. On November 26, 2003, Linda Matteson wrote Sean Reese a letter reminding him that the property was still under jurisdiction and indicated it was Mr. Reese's responsibility to address the impact from quarry discharge which was now topping the banks of the pond. The letter includes the following information and directive:

> Even though the permit may be expired, the project remains under Act 250 jurisdiction and it is necessary to ensure impacts from the quarry discharge are appropriately addressed.
>
> Land Use Permit (LUP) #2W0551, Findings of Fact (FF) #2W0551 issued in 1982, at FF #1(B)(2) states:

> Water from the mine up to 40 gpm will be pumped from a settling basin in the mine to a holding pond. The pond will provide 2 to 3 day holding time to settle out any suspended solids. The pond will be cleaned out as needed taking care to keep the settled solids out of the natural drainage. Exhibit #2R. The applicant has agreed to install a gate valve to reduce potential sedimentation in the natural drainage during clean out periods.

I believe you mentioned that there no longer appears to be either a pump or pipe leading to this holding pond. I would suggest you consult with a professional engineer to determine how to best solve the problem of the overflow from the quarry hole as it appears the water level has not resulted in a stable "lake" as anticipated.

8. LUP #2W0551, Exhibit 3, includes the following statements:

> A stormwater discharge permit application has been filed with the Agency of Natural Resources.
>
> This new development will not result in unreasonable soil erosion.
>
> Mining at this location should continue for a couple of decades as the initial work is followed by underground mining and the tunnels are interconnected with those of the present mine. When mining is completed and pumping stops, the tunnels and entrances will fill up with water *to the level of the natural water table.* This will create a pond at the site of this development which will be available as a town reservoir. (Emphasis added)

9. Findings of Fact and Conclusion of Law and Order for Land Use Permit #2W0551(1982) under Criteria 9(D&E) state the following:

> (2) The applicant will be extracting the talc (Exhibit #2). The plan for opening the mine is the final grade for closing of the mine. The project is planned to have shallow slopes to the water level of a pond in the open portion of the mine. The resulting pond can be used for recreation or for a fire pond. The project cannot be deeded over to the town under present circumstances. Exhibit 3.

10. Findings of Fact and Conclusion of Law and Order for Land Use Permit #2W0551(1982) Criterion 4, finding "E" reads as follows:

> E. In response to Mr. Dietrich's concerns about runoff onto his property the applicant agreed to come back for an amendment if there is any work

that will change the quantity or quality of the runoff in the direction of Mr. Dietrich's property. [1]

11. The Permittee's compliance with the findings and associated representations were critical to the issuance of the permit.

12. The McCandless family (Byron and Mary McCandless) was a party to Land Use Permit #2W0551-1 (issued 6/21/1985) under Criteria 8 Aesthetics and 9(B) Primary Agricultural Soils.

13. James McCandless has informed the District Environmental Commission staff that water discharging from the quarry is now discharging across the family's open field and causing damage and creating a situation where fields which have traditionally been mowed are turning into wet areas.

14. Water from the mine is flowing across the McCandless property, into Shady Brook, and discharging into Saxton's River. The water has been overtopping the mining pond since 2003 and a storm surge washed much of the town road, White Road, into the McCandless lower field.

15. The professional engineer hired by the Town of Windham, Robert Stevens, PE, of Stevens and Associates, is very concerned that the present lack of a stable pond is a public safety threat. (Personal communication with Robert Stevens). Mr. Stevens has indicated that the pond, which is approximately eight to nine acres in size and overtopping its bank, has the potential in a storm event, to reach its erosion potential and create a flood of several feet of water across White Road which would have the depth and velocity to sweep away cars and pedestrians.

16. Upon information and belief, the purchase and sales agreement between Mr. Reese and Luzenac America, Inc. made clear that any future problems with the pond/mining project would be the responsibility of Mr. Reese and not that of Luzenac America Inc.

17. The Town of Windham and the McCandless family have initiated legal action against the owner of the mine and the case has been recently heard in Windham

[1] Findings of Fact and Conclusion of Law and Order for Land Use Permit #2W0551 includes the following, "B.W McCandless was denied party status because he was not at the first hearing."

District Court.

18. The current owner and permittee, Sean Reese, was mailed a copy of Mr. McCandless's request for a jurisdictional opinion on August 30, 2006, allowing him until September 15, 2006, to provide any counter argument to the facts as presented in Mr. McCandless's letter or to provide any other relevant information and/or legal argument as to why Act 250 should or should not apply to the property.

19. The letter to Mr. Reese was returned to our office as undeliverable and it was then faxed to Mr. Reese's attorney. Ms. Matteson subsequently learned the letter was not forwarded to Mr. Reese by his attorney and allowed Mr. Reese until October 23, 2006, to respond to filings submitted by Mr. McCandless in the JO request and /or provide additional information or legal argument.

20. In 2005, Attorney William Dakin requested a jurisdictional opinion for a client interested as to whether the Act 250 permits issued for the Hamm Mine "spread from the so-called Hamm parcel to the Yeager parcel." Attorney Dakin represented a client interested in purchasing acreage which is ***not*** part of the 84+/- acres identified in the Act 250 permit applications, although it was owned by Luzenzac America, Inc. and is contiguous to the Hamm Mine parcel. In response to Attorney Dakin's *specific* request regarding the *Yeager* parcel, and not the question of the Act 250 jurisdiction over the Hamm Mine, Ms. Matteson issued an unnumbered jurisdictional opinion which stated:

> From information provided by you, George McNaughton, Esq., and files in the District Environmental Commission's Office, I offer the following:
>
> > US Talc (a.k.a. Vermont Talc Division, OMYA; Cyprus Windsor Minerals, Corp.; Luzenac America) acquired three contiguous parcels in Windham. The Hamm parcel with 84 acres, was conveyed from the Hamms to OMYA on 7/31/81 in Book 21, Page 24; the Staceys conveyed 15+/- acres to OMYA on 8/3/81 by a separate deed; and the Yeagers conveyed 39+/- acres to OMYA on 8/18/80 in Book 20, Page 371. Act 250 permit #2W0551, issued 10/20/82 to OMYA was to open a new surface mine for talc on the Hamm parcel.
>
> A letter dated December 10, 2002, from Patrick Dakin, Assistant District Coordinator, regarding the Hamm parcel (LUP #2W0551 and amendments) wrote that "The Permittee has completed reclamation as required by the permits, and based on current information, the project appears to be in compliance with the expired permits." The Vermont Supreme Court, in the recent *Huntley* decision, determined that "the land was no longer subject to Act 250 jurisdiction" because the gravel pit was reclaimed and the permit had expired."

Do not hesitate to contact me at 885-8843 if you have questions.

Mr. Reese was sent a copy of this opinion because of his status as an abutter to the Yeager parcel.

Conclusion

Issue to be determined

1. Does an earth extraction project remain subject to Act 250 jurisdiction when the project's land use permit has expired pursuant to 10 V.S.A. § 6090(b)(1) and the project has not been reclaimed in accordance with the representations of the Permittee and the requirements of the permit and § 6086(a)(9)(E)(ii) and the ongoing impacts of the development are resulting in significant environmental impacts and a serious threat to public safety?

It is my opinion that the project covered by Land Use Permit #2W0551 and amendments remains subject to Act 250 jurisdiction. In an Entry Order Opinion, the Vermont Supreme Court recently addressed the issue of sand and gravel extraction and expiration dates. *In re Huntley,* 2004 VT 115 (Nov. 9, 2004). In that case the issue before the Court, as framed by the Environmental Board was:

> Does a sand and gravel extraction project remain subject to Act 250 jurisdiction when the project's land use permit has expired pursuant to 10 V.S.A. § 6090(b)(1): and where the project tract has been reclaimed in accordance with the requirements of § 6086(a)(9)(E)(ii); and where said reclamation results in there being no potential for future environmental impacts from the prior sand and gravel project? *Id*. at ¶ 4.

In that case, the Court concluded that the property was no longer subject to jurisdiction, however, the facts of the instant case are readily distinguished from the facts and the issue presented to the Court in the *Huntley* case. The paramount difference is that unlike the *Huntley* case, this is a situation where the approved reclamation has *not* been completed and environmental impacts *directly attributable to the permitted quarry operation* are continuing to occur. In the course of approval of the Hamm Mine, the District Environmental Commission relied upon numerous representations by the Applicant that the operation and the state of the reclaimed operations would not result in environmental impacts under the criteria outlined in § 6086(a)(1)-(10). These representations were included to show compliance with the Act 250 criteria including protection of the town's investment in the town road (Criterion 9(K) Impact on Public Investments) and to protect any potential receiving waters and neighboring lands from undue water pollution from excessive runoff (Criterion 1 Undue Water Pollution) and compliance with the reclamation requirements of Criterion 9(E) Earth Extraction.

The *Huntley* case involved extraction of gravel from a 5-acre segment of a 97-acre farm in Bethel and as the Environmental Board notes, "the project consisted of the development of a small gravel extraction area yielding small quantities of material per year (4,000 cubic yards) *with no appreciable environmental impacts*." *Re: Richard and Elinor Huntley* Declaratory Ruling #419 Memorandum of Decision at 3 (Jul. 3, 2003) (Emphasis added).

The Huntleys' predecessors in interest applied for and received a permit which required that all extraction and reclamation be completed by July 1, 1995, unless the permit was extended. The Huntleys subsequently filed for minor changes and to extend the reclamation date until October 1, 2002. The Environmental Board concluded that all reclamation had, in fact, been completed in compliance with the permit and there was no question of failure to comply with the approved plans. ("There is no dispute that the Huntleys have completed the remedial steps which § 6086(a)(9)(E)(ii) requires.") *Id*. at 8. There also were no allegations with respect to failures to comply with permit conditions, findings of fact and representations made part of the District Environmental Commission record relied upon in issuing the permit. Moreover, there was *no evidence* that serious, ongoing environmental impacts could result as a consequence of a failure to appropriately implement or monitor the reclamation plan.

In *the Huntley* case, the Court made clear that because the Huntleys had ceased the sand and mining operation and reclaimed the land, they were not conducting any activity that constituted development and "the Board has no enforcement authority over the Huntley's land because **no development is taking place**." (Emphasis added) *Id.* at ¶ 9.

In the case of the Hamm Mine, although the permittee represented that the reclamation was completed and chose to "allow the permit expire," the development is, in fact, not completed and the impacts of development are ongoing. The reclamation plan presented by the Applicant and relied upon by the District Environmental Commission and by Assistant Coordinator Dakin in his jurisdictional opinion, [2] was not achieved and developmental impacts addressed in the permit are significant. The aspect of the Jurisdictional Opinion relating to the completion of the reclamation was

[2] A Jurisdictional Opinion or a Declaratory Ruling is "only as good as the facts upon which it is based." *Re*: *Dexter and Susan Merritt,* Declaratory Ruling #407, Memorandum of Decision at 6 (Jun. 20, 2002), *appeal dktd.* No. 2002-306 (Vt. S. Ct.); *Re: GHL Construction, Inc. PAK Construction, Inc.*, #2S1124-EB and Declaratory Ruling #396, Findings of Fact, Conclusions of Law, and Order at 14(Dec. 27, 2001); *Catamount Slate, Inc. et al.,* Declaratory Ruling #389, Memorandum of Decision at 11 (Jun. 29, 2001), *app. dcktd.*, No. 2002-142. (Vt. Sup. Ct.)

clearly based on faulty and incomplete evidence provided by the Permittee. Reclamation was to create a stable pond with the water level sustained at "the level of the natural water table."

In the instant case, the permit addressed environmental impacts of large scale mining, as opposed to removing a small amount of sand and gravel from a small portion of a farm field. Luzenac America, Inc., the permittee, made *specific* representations with respect to handling interception and retention of groundwater and stormwater, including how this would be continued after reclamation. The intercepted groundwater and stormwater collected was to form a stable lake at the level of the natural water table ("When mining is completed and pumping stops, the tunnels and entrances will fill up with water *to the level of the natural water table.* This will create a pond at the site of this development which will be available as a town reservoir.") (Emphasis added). Instead of creating a stable lake which was to be an asset to the Town of Windham as a potential reservoir for fire fighting needs, the town's stormwater system along the road is being overwhelmed and the road itself is being damaged and the current situation represents a serious public safety threat.

Unlike the *Huntley* case, development and its impacts are continuing at the Hamm Mine property. When District Environmental Commissions set expiration dates for permits, they do so based on a "reasonable projection of the time during which the land will remain suitable for use *if developed or subdivided as contemplated in the application*." (Emphasis added) 10 V.S.A. § 6090 Recording: duration and revocation of permits. The application represented that the intercepted groundwater and stormwater would be successfully addressed and be left in a stable situation by 2002. The applicant further represented that if runoff became a problem for one neighbor, that they would apply for an amendment.

In 2002, Luzenac America contacted the District Environmental Commission staff indicating its intention to sell the property to a private owner and again represented that the planned reclamation, which included the result of a stable lake at the natural water level would be achieved, was completed. Each of the relevant permits issued for the Hamm Mine contained the condition, "This permit shall expire on October 15, 2002, **unless extended by the District Environmental Commission**." Had the Commission known that the stable lake was not, in fact, going to be achieved (and water would be very significantly overflowing its banks in less than a year) and that consequently the reclamation was not completed according to the permit, the Commission could have simply required extending the length of the permit to ensure the development was truly completed.

Upon reliance of the Permittee, the Commission did not extend the permit, the permit expired in 2002 and the land transferred from a mining company to a private landowner. **In less than a year,** discharge from the mine was overflowing, overwhelming the town's stormwater system for the town road, damaging the road, and flowing onto neighboring properties and into waters of the state**.**

Mr. Reese chose to purchase a property with a long permitting history and did not appeal Jurisdictional Opinion #2-169 which went final indicating that Act 250 jurisdiction continued to apply despite the expiration of the permit and the *apparent* reclamation. Upon information and belief, the purchase and sales agreement between Mr. Reese and Luzenac America Inc., made clear that Mr. Reese was responsible for any future problems with the development and not Luzenac America, Inc. Mr. Reese also chose to ignore Assistant Coordinator Linda Matteson's directive issued on November 26, 2003, "to ensure impacts from the quarry discharge are appropriately addressed . . . consult with a professional engineer to determine how to best solve the problem of the overflow from the quarry hole as it appears the water level has not resulted in a stable "lake" as anticipated."

In conclusion, it is my opinion that Act 250 jurisdiction over the Hamm Mine covered by Land Use Permit #2W0551 and amendments is still in effect as the development is not completed and it is necessary for the current owner to apply for an extension of the permit and apply for a revised reclamation plan to address the issues outlined in this opinion and, most importantly, the risk to public safety caused by the failure to create a stable pond.

Best regards:

April Hensel
District Coordinator

cc: Certificate of Service

This is a jurisdictional opinion issued pursuant to 10 V.S.A. § 6007(c) and Act 250 Rule 3.

Reconsideration requests are governed by Act 250 Rule 3(C) and should be directed to the district coordinator at the above address. Any appeal of this decision must be filed with the clerk of the Environmental Court within 30 days of the date of issuance, pursuant to 10 V.S.A. Chapter 220. The appellant must attach to the Notice of Appeal the entry fee of $225.00, payable to the State of Vermont. The appellant must also serve a copy of the Notice of Appeal on the Natural Resources Board, National Life Records Center Building, Drawer 20, Montpelier, VT 05620-3201, in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings.

For further information, see the Vermont Rules for Environmental Court Proceedings, available on line at www.vermontjudiciary.org. The Environmental Court mailing address is: Environmental Court, 2418 Airport Road, Suite 1, Barre, VT 05641-8701. (Tel: 802-828-1660)