

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

Re: Sugarbush Resort Holdings, Inc.
Declaratory Ruling #328

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to a petition for declaratory ruling ("Petition") filed by Sugarbush Resort Holdings, Inc. ("Sugarbush") regarding whether a permit was required by 10 V.S.A. §§ 6001-6092 ("Act 2.50") for certain alterations made to an evacuation route in August 1995 for the purpose of allowing bulldozer access to a mired excavator.

As explained below, the Environmental Board ("Board") concludes that the alterations to the evacuation route constitute both a material change and a substantial change to Land Use Permit #5W1045-8 issued to Sugarbush on June 30, 1995 ("Permit") and, as such, require an Act 250 permit pursuant to Environmental Board Rule ("EBR") 34.

I. BACKGROUND

On May 8, 1996, Sugarbush requested a jurisdictional opinion from the District #5 Environmental Commission Coordinator ("District Coordinator") regarding whether certain work performed by Sugarbush on an evacuation route in conjunction with the recovery of a mired excavator during August 1995 in the Towns of Warren and Fayston ("Alterations") constituted a material or substantial change to the Permit.

On May 31, 1996, the District Coordinator issued Jurisdictional Opinion #5-96-1 ("Jurisdictional Opinion") stating that the Alterations were a material change to the Permit for which Sugarbush was required to file an application for amendment pursuant to EBR 34.

On June 28, 1996, Sugarbush filed the Petition contending that the Alterations did not constitute a material or substantial change to the Permit and that the Alterations did not require an Act 250 permit.

On September 24, 1996, Mad River Valley Citizens for Responsible Growth ("MRVCRG") filed a Petition for Party Status with the Board.

On September 24, 1996, Board Chair John T. Ewing convened a preheating conference in Montpelier. The following entities participated: Sugarbush by A. Jay Kenlan, Esq. and Carl G. Spangler; MRVCRG by Harrison Snapp. The conference participants made no objections as to party status.

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On October 10, 1996, Chair Ewing issued a Prehearing Conference Report and Order, which is incorporated herein by reference. Among other things, the Prehearing Conference Report and Order set forth a procedural schedule for this matter. In particular, Sugarbush and MRVCRG (sometimes referred to collectively herein as "the Parties") were required to submit prefiled direct testimony and exhibits on or before October 22, 1996, prefiled rebuttal testimony and exhibits on or before November 5, 1996, and evidentiary objections on or before November 12, 1996. The Board received no objection to the Prehearing Conference Report and Order.

On October 22, 1996, MRVCRG submitted its prefiled direct testimony and exhibits.

By letter dated October 22, 1996, Sugarbush requested an extension of time within which to submit its prefiled direct testimony and evidence. By letter dated October 23, 1996, Sugarbush withdrew its request for an extension of time and stated its intention to submit its prefiled testimony and evidence as rebuttal to MRVCRG's submissions. It also reiterated its position, previously indicated in the Petition, that the Petition was based primarily on the District #5 Environmental Commission ("District Commission") file for the Permit. On November 5, 1996, Sugarbush submitted its prefiled rebuttal testimony and exhibits.

On November 5, 1996, Sugarbush filed an Objection to the Prefiled Testimony and Exhibits of MRVCRG.

On November 21, 1996, the Parties submitted their Proposed Findings of Fact and Conclusions of Law. Also on November 21, MRVCRG filed a Motion to Dismiss the Petition predicated on Sugarbush's decision not to submit prefiled direct testimony or exhibits but, rather, to submit the testimony and exhibits in rebuttal.

On November 25, 1996, Chair Ewing convened a Second Prehearing Conference by telephone. The following parties participated: Sugarbush by A. Jay Kenlan, Esq.; MRVCRG by Stephanie Kaplan, Esq. After opportunity for oral argument, the Chair made the following preliminary rulings:

1. Sugarbush's Objection to MRVCRG's Prefiled Testimony and Exhibits:

The Objection, which was general in nature, was overruled. The Chair indicated that the Objection would be noted and that the Board would give due weight to all relevant testimony submitted in this matter.

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2. MRVCRG's Motion to Dismiss:

Notwithstanding Sugarbush's failure to meet the filing deadlines, the Chair ruled against the Motion to Dismiss. He ruled that the Board would take official notice of the Permit, the supporting Findings of Fact, Conclusions of Law, and Order ("Order"), the District Commission file, and the Jurisdictional Opinion. He granted MRVCRG the opportunity to offer oral testimony in rebuttal to Sugarbush's evidence at the public hearing.

On December 2, 1996, Sugarbush filed its Memorandum in Opposition to the Motion to Dismiss.

On December 4, 1996, a three-member panel of the Board ("Panel") convened a hearing in the Town of Warren. The following parties participated: Sugarbush by A. Jay Kenlan, Esq.; MRVCRG by Jito Coleman. The Panel affirmed the preliminary decisions of Chair Ewing as to the Objection to Prefiled Testimony and Exhibits and the Motion to Dismiss. After taking a site visit, the Panel returned to the hearing room, placed its observations on the record, accepted into the record documentary and oral evidence, and heard closing statements. After recessing the hearing, the Panel deliberated.

Pursuant to 3 V.S.A. § 810(4), the Board has taken official notice of the following documents:

1. The Permit
2. The Order
3. The Land Use Permit Application #5 W1045-8 and all other documents that are part of the District Commission file maintained in connection with the Permit (collectively the "District Commission File")
4. The Jurisdictional Opinion

On January 7, 1997, the Parties submitted supplemental findings of fact and conclusions of law.

The Panel deliberated again on January 22, 1997. Based upon a thorough review of the record, related argument, and the Parties' proposed findings of fact and conclusions of law, the Panel issued a proposed decision on February 7, 1997 which was sent to the

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parties. The parties were allowed to file written objections and request oral argument before the Board. No party filed written objections or requested oral argument.

On February 26, 1997, the Board convened a deliberation concerning this matter, and following a review of the proposed decision and the evidence and arguments presented, declared the record complete and adjourned. The matter is now ready for final decision. To the extent that any proposed findings of fact are included within, they are granted; otherwise, they are denied. See Petition of Village of Hardwick Electric Department, 143 Vt. 437,445 (1983).

II. ISSUE

Whether the Alterations constitute either a “material change” or a “substantial change” in the permitted project and therefore require an Act 250 permit pursuant to EBR 34.

III. FINDINGS OF FACT

1. On June 30, 1995, the District Commission issued the Permit, together with the supporting Order, to Sugarbush.

2. Among other construction activities, the Permit authorized Sugarbush to construct a transportation ski lift (“Transportation Lift”), approximately 10,600 feet in length, running through the Slide Brook area and linking the Sugar-bush North and South ski areas (“Project”).

3. Incidental to construction of the Transportation Lift, the Project anticipated Sugarbush’s use of certain abandoned logging and skidder trails (“Woods Roads”) as emergency evacuation routes from the Transportation Lift. The Woods Roads have been abandoned for approximately 30 years.

4. General Findings 4 through 7 of the Order state:

4. *** [John Gallagher] observed that Slide Brook contains a number of old logging and skidder trails. The majority are overgrown paths that have not been used for years. During the summer months, they are barely discernable as paths and travel on them is very difficult. Some of the logging trails go through the extremely steep and densely forested area to the south of Slide Brook. Access to that area is currently precluded by the difficult terrain and the absence of cleared trails. (Testimony of

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Gallagher).

5. The Slide Brook Basin, and particularly the area south of the Slide Brook, has historically been rarely used by the public, except for occasional hunters. It is not conducive to public use due to the very steep terrain and the lack of negotiable trails or roads. (Testimony of Gallagher).

6. The main access to the Slide Brook area is via a class 4 town road (T.H. 28) off German Flats Road and then onto the work road which crosses through the site. Recently, mountain bikers have begun to use the work road which was constructed in 1994. (Exhibit 2-[Sugarbush] and Testimony of Snapp).

7. The applicant became actively involved in the Slide Brook area during the late summer of 1994. The applicant's representative observed mountain bikers, ATV users, dirt bikers, persons in four wheel drive vehicles, hikers and skiers - using an ad hoc network of trails from Sugarbush North - in the Slide Brook area. However, no hard data was available relative to the levels of use in the area. The representative was also not specific about the extent or density to which the mechanized vehicles traveled into the area. The applicant does not, and will not, encourage access by means of mountain bikes, ATV's or dirt bikes. (Testimony of Spangler).

5. General Finding 10 of the Order states:

10. In order to allow for evacuations from the [Transportation Lift] in the event of emergencies, the applicant will improve several of the existing old logging and skidder trails in the Slide Brook area. These trails will be used for evacuation purposes in addition to the access road under the [Transportation Lift]. Approximately six of the existing trails will be flush cut and widened to allow passage by snow cats. Snow cats are large vehicles and will require seven foot and (sic) wide right-of-ways.

6. Finding 107 of the Order states:

107. The applicant indicated that it will flush cut approximately 6 existing logging and skidder-trails for use as evacuation routes from the transportation lift.

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7. Although the Order discusses only the use of snow cats as emergency evacuation vehicles, other types of emergency evacuation vehicles might travel the Woods Roads during periods of time when snow-making makes skiing possible on the Sugarbush North and South ski areas but there is no snow cover on the Woods Roads.

8. The Slide Brook Basin contains a substantial stand of beech trees and is home for several bears. The bears rely upon the beech nuts as a critical source of food when preparing for hibernation.

9. The Slide Brook area is a necessary wildlife habitat as that term is defined in 10 V.S.A. § 6001(12) and used in Act 250 Criterion 8(A).

10. Findings 70-89 and 91-106 of the Order discuss the black bears and the habitat in the Slide Brook area.

11. Finding 90 of the Order states:

90. The fragmentation of an (sic) regional bear habitat (ie food sources and corridors) through improvident development and / or human intrusions in portions of the overall habitat can result in adverse effects such as in-breeding / genetic weakening and the abandonment of some or all of the remaining habitat area. (Testimony of Hugie and Morse).

12. Findings 118- 122 of the Order state:

118. Bears are extremely wary of human beings and if faced with human intrusions into their habitat areas, bears will cease use of the habitat. (Testimony of Hugie and Willey).

119. Any future additional clearing and human use of the necessary wildlife habitat area will not be positive for the bear population. **The** most wary bears will be the first to "drop out" due to more development impacts. Eventually, bear use of the area would cease. (Testimony of Willey).

120. As found above, Slide Brook is already frequented by people and to date the intensity of the access into the region by means of mechanized equipment appears to not be of such frequency and intensity so as to overwhelm the overall habitat functions of the basin area.

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121. The applicant acknowledges that the evacuation routes could become avenues of access into the interior of the basin by individuals on mechanized equipment and that this would be detrimental to the integrity of the habitat. (Testimony of Hugie).

122. The higher the human presence and interference in a bear habitat area the greater the displacement of bears. Increased human use of the Slide Brook basin habitat should be discouraged. (Testimony of Hugie).

13. The Permit and Order require Sugarbush to undertake certain measures in order to mitigate the effects of human intrusions on the necessary wildlife habitat found in the Slide Brook area. These mitigating measures include the prohibition of skiing on the Woods Roads and the installation of winged farm gates and other barriers across the Woods Roads.

14. The Permit and Order require Sugarbush to install signs at three locations on the entry road from German Flats Road and at both ends of the winter work road stating:

STOP

Please be advised that these lands are owned by Sugarbush Resort and portions have been designated as necessary wildlife habitat for black bear by the State of Vermont. This designation is based on the fact that the Slide Brook Basin contains beech trees which are an important source of food for bears during the fall. Bears also use the area during the spring and summer.

The survival of bears in Vermont depends upon the existence of remote areas free from excessive human intrusion or bears may stop coming to an area altogether.

In order to maintain the value of this land for wildlife and minimize potential destruction of habitat, mechanized vehicles (all terrain vehicles, four wheel drives, dirt bikes and mountain bikes) are prohibited beyond this point. We ask those of you on foot to also refrain from entering the area.

Thank you for your support in this important conservation effort.
Sugarbush Resort.

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15. In its discussion under Criterion 8(A), the Order states in part:

Based on the record before us, the [District] Commission concludes that if the transportation lift is constructed, maintained and operated as materially represented, it will not cause the destruction or significant imperilment of the necessary wildlife habitat present in the Slide Brook area. The land use permit will be conditioned to incorporate mitigating measures.

The Commission believes that the evacuation routes require a more detailed discussion under this criterion and permit conditions to reinforce and refine mitigating measures with which the applicant is in essential agreement.

While the Commission notes that the record demonstrates that people already frequent the Slide Brook area, the Commission is concerned that the evacuation routes could be used over time as very real avenues of increased human intrusion into the basin as the existence of the route becomes more apparent to the public. This would result in greater levels of intrusion into the habitat. At the same time, the Commission does not think it necessary or proper to transform this private property into a park or wildlife preserve nor should people be deprived of reasonable access to the basin as has been allowed over the years by previous owners. As was noted by Department of Fish and Wildlife biologist John Buck, the value of a wildlife habitat is, to an extent, established by the ability of &man beings to recognize and observe the habitat's characteristics. But it is absolutely critical that a balance be struck between the undisturbed use of the habitat by the species and the excessive presence of humans.

The very significant concern is that the reopened logging roads will be used by all terrain vehicles, four wheel drives, dirt bikes and mountain bikes. The applicant has volunteered to attempt to discourage such uses by placing ropes across roads **and** blocking entry by rocks / concrete barriers. The applicant even agreed to install a gate as suggested by party MRVCRG if required to do so by the Commission. Signs would be posted to inform the public of the value of the habitat and to urge cooperation in ensuring that human visits are compatible with the values of the habitat.

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*** The Commission will retain jurisdiction over these access issues so that if the barriers prove to be substantially ineffectual, and there is evidence that the evacuation routes are being used by mechanized vehicles, more substantial measures will have to be taken to curtail access by mechanized vehicles into the basin.

Every bit of testimony pointed to the fact that this is a very important wildlife habitat area. Future incremental development cannot be allowed to compromise it. The Commission notes that the applicant has identified several locations where soils may be suitable for sewage disposal systems. We pass no judgment on such issues but reemphasize our conclusion that any future use of the basin must protect the integrity of the habitat area.

Order at 28-3 1.

16. Condition 1 to the Permit states:

1. The project shall be completed, maintained and operated as set forth in Findings of Fact and Conclusions of Law 5 W1045-8 in accordance with the plans and exhibits on file with the District Environmental Commission, and in accordance with the conditions of this permit. No changes shall be made in the project without the written approval of the District Environmental Commission.

17. Condition 2 to the Permit states in part:

2. By acceptance of the conditions of this permit without appeal, the permittee confirms and agrees for itself and all assigns and successors in interest that the conditions of this permit shall run with the land and the land uses herein permitted, and will be binding upon and enforceable against the permittees and all assigns and successors in interest.

18. Conditions 11-14 of the Permit address barriers to access, signage, and the prohibition on skiing designed to discourage human intrusion into the necessary wildlife habitat.

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19. Condition 12 of the Permit states in part:

12. *** The District Commission retains jurisdiction over all issues with respect to access into the interior of the Slide Brook basin. If the barriers and gates prove ineffectual and there is evidence that the permittee's evacuation routes are being used by mechanized vehicles, the Commission reserves the right to impose more substantial measures to curtail access.

20. The Project Description submitted by Sugarbush in connection with its application for the Permit describes the sequence of work to be performed on the Transportation Lift corridor:

A flush cut access path twelve to fifteen feet wide will be installed along the length of the lift line. This path will first be traveled by a track excavator required to dig tower holes, then traveled by snow machines in winter and ATV type vehicles when there is no snow cover for purposes of inspecting and maintaining the lift and associated equipment. In addition, the access path is part of the evacuation route system in the Sugarbush Resort Lift Evacuation Plan (Exhibit 10). Other emergency evacuation routes (existing logging roads, trails and foot paths created by area residents over the years) are shown on the 1" = 400' project site plan

As the corridor is cut, a survey crew will follow and mark the lift tower locations. A track excavator will follow behind the north and south survey crews digging the lift tower foundation holes, and forming crews will install the concrete forms once the holes are dug. When the north excavator reaches Lockwood Brook, it will install a log headwall for the bridge and return north without crossing the brook if the bridge is not in place. The south excavator will follow the same procedure. It is anticipated the north excavator will finish first. It will access the area between Slide and Lockwood Brooks from the east using: existing logging roads and trails and be used to dig the tower holes and set the remaining headwalls of both bridges and set the log beams in place. A crew will then complete the bridges and install required plant materials in the Slide Brook and Lockwood Brook buffer zone locations consistent with the agreement (Exhibit 6) and as shown in Exhibit 9.

Permit Exhibit 25-Sugarbush at 7 and 9 (emphasis supplied).

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21. The Permit was not appealed.

22. In August, 1995, an excavator working along the Transportation Lift corridor ("Excavator") became mired in mud approximately 75 feet to the south of Slide Brook on the side of a steep bank, sloping down towards the brook.

23. Sugarbush believed that the Excavator would tumble or slide down the slope if it was not extricated quickly. Sugarbush determined that swift action was necessary in order to avoid injury to the Excavator operator and other workers in the area, as well as to protect Slide Brook from siltation and erosion.

24. Sugarbush considered allowing the Excavator to continue to slide down the slope onto the bank of Slide Brook, where it could potentially "jumpstart" the engine and move it out of the area under its own power. Sugarbush rejected this option because of the danger it posed to the workers and to Slide Brook.

25. Sugarbush ultimately extricated the Excavator with two D8 bulldozers with winches ("Bulldozer(s)") which pulled the Excavator back up the slope. One of the Bulldozers was anchored approximately 50 feet to the west of the Excavator across the Transportation Lift line. The other Bulldozer was anchored to the east on the Woods Road that is the subject of this Declaratory Ruling ("the Evacuation Route"). Wire ropes extending from the winches of the Bulldozers pulled the Excavator from the mud.

26. The Evacuation Route extends from the Transportation Lift in a northeasterly direction. It is roughly parallel to and to the south of Slide Brook. The Evacuation Route runs quite close to Slide Brook in many places. Slide Brook is roughly parallel to and to the south of Lockwood Brook. The Evacuation Route enters the Transportation Lift corridor to the south of both Slide and Lockwood Brooks. The only Woods Roads that enter the Transportation Lift corridor between Slide and Lockwood Brooks are to the north of the Evacuation Route.

27. The Bulldozers traveled to, and from the site of the Excavator via the Evacuation Route. Once extricated, the Excavator exited the Transportation Lift corridor, under its own power, via the Evacuation Route. Sugarbush performed certain work to the Evacuation Route in order to enable its use by this equipment (previously defined as the "Alterations").

28. The Alterations included erosion control measures to prevent soil erosion and the discharge of silt and soil into Slide Brook. The erosion control measures included the installation of ditching, water bars, culverts, berms, and other grading. The

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culverts were necessary to enable the Bulldozers to travel up the Evacuation Route. Sugarbush has removed most of the culverts but some remain in the higher elevations because it believes that it will cause a greater disturbance to remove them than to let them remain.

29. In order to transport the Bulldozers to the Excavator, Sugarbush widened the Evacuation Route and removed some trees. Some of the trees were uprooted while others were cut down. A small excavator picked up and moved rocks from the path. The width of the Route was determined in part by the decision to install ditches and stable side slopes as erosion control measures.

30. Prior to becoming mired in the mud, the Excavator entered the Transportation Lift corridor via the Evacuation Route. ~~Other construction equipment routinely accessed the corridor via the Woods Roads, including the Evacuation Route,~~ throughout the construction phase. In order to enable the Excavator to travel up the Evacuation Route, Sugarbush improved a wet and washed-out area near the bridge at the bottom of the Route to prevent mud and silt from entering Slide Brook. Other improvements further up the Evacuation Route were necessitated not by construction equipment traveling to the Transportation Lift corridor but by the need to extricate ~~the~~ Excavator by Bulldozers.¹

31. Because it needed to extricate the Excavator, Sugarbush performed more work on the Evacuation Route than it would have done solely to prepare the Evacuation Route for use by snow cats. Some widening and some of the culverts, water bars, ditching, and berming on the downhill slopes were measures undertaken specifically in relation to extricating the Excavator. The increased traffic along the Evacuation Route ~~(the Bulldozers and the Excavator) caused there to be more mud and rutting along the~~ Route than there would have been otherwise.

32. Sugarbush intended to make most of the Alterations, including widening and stabilizing the Evacuation Route, even if the Excavator had not become mired. ---

33. Other Woods Roads identified as part of Sugarbush's emergency evacuation plan do not have the same degree of improvements as the Evacuation Route.

¹ See Footnote 3 infra.

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34. The erosion control measures undertaken as part of the Alterations were performed pursuant to Sugarbush's general erosion and sedimentation control guidelines. Materials in the District Commission File, the Permit, and the Order address erosion control measures to be undertaken by Sugarbush in connection with the Project, and concern only areas other than the Woods Roads.

35. In connection with the Alterations to the Evacuation Route, work crews manually mulched the stream bank and diverted water away from Slide Brook.

36. No gravel was added to the surface of the Evacuation Route as part of the Alterations.

~~37. Sugarbush accomplished the Alterations by a small excavator and by the manual labor of its work crew. In addition, a muskeg transported hay, seed, equipment, and people up and down the Evacuation Route.~~

38. After the Bulldozers and the Excavator left the Transportation Lift area, the surface of the Evacuation Route was smoothed primarily by manual seeding and raking.

39. Approximately 48 hours elapsed between the time the Excavator became mired in the mud and the time it left the Transportation Lift corridor via the Evacuation Route. All clean-up work, including grading and spreading hay and seed, was completed within one week after extricating the Excavator.

40. Old logging trails and other abandoned woods roads vary in width and accessibility. Portions of these roads may have a barely discernable path, while the path will be quite apparent in other portions. Some portions will be nearly impassible and other portions will be passable.

41. At the time the Permit was issued, the Evacuation Route varied in width and accessibility. Portions of the trail were washed out.

42. -The Evacuation Route diverges in at least one-place from the old Woods Road. -That portion of the old Woods Road that intersects the Evacuation Route has not been altered since the issuance of the Permit. It is a narrow, overgrown path and is in poor condition.

43. After the Alterations, the Evacuation Route still varies somewhat in appearance but has been upgraded from what would normally be considered a typical

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woods road to a relatively smooth and passable route.

44. After the Alterations, the width of the lower third of the Evacuation Route, including the erosion control measures on each side of the traveled surface, generally exceeds 9 feet but does not generally exceed 25 feet. The traveled surface of the road is smooth and is a minimum of 7 feet in width and, in places, is wider.

45. The track of a snow cat, to be used by Sugarbush as part of its emergency evacuation plans, is 7 feet wide at a minimum. It is necessary for the traveled surface of the Evacuation Route to be at least 7 feet wide to allow use by a snow cat.

46. Carl G. Spangler, Vice President of Planning and Development for Sugarbush; testified at the December 4, 1996 hearing on the Petition that Sugarbush orally altered its construction plan during the Permit application hearings before the District Commission. Mr. Spangler testified that the revised plans contemplated that the construction equipment used to construct the Transportation Lift would access the work site via the Woods Roads so that no streams or brooks would be crossed and no bridges would be built along the Lift corridor.

47. Sugarbush submitted proposed findings of fact to the District Commission prior to the Permit application hearings. After the Permit application hearings, Sugarbush neither amended its proposed findings nor submitted additional proposed findings of fact. Nothing in the District Commission File reflects the change in construction plan outlined in Finding 46 above. In fact, there is no written documentation in evidence concerning the construction changes Sugarbush now testifies it made orally at the Permit application hearings.

48. Sugarbush's Project Description anticipated that the north excavator would access the Transportation Lift corridor between Slide and Lockwood Brooks via the Woods Roads that lie to the north of the Evacuation Route (See Finding 20 above). With this one exception, nothing in the Permit, Order, or the District Commission File contemplates that any of the Woods Roads (and particularly the Evacuation Route) would be used for any reason other than for emergency evacuation purposes or by any vehicles other than snow cats needing a seven foot wide right-of-way.

49. Sugarbush did not follow the construction plan set forth in its Project Description. Instead, Sugarbush constructed the Transportation Lift according to the revised plan outlined in Finding 46 above.

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50. Because Sugarbush did not follow the construction plan set forth in the Project Description, bridges were not in place along the Transportation Lift corridor. Because no bridges were in place, when faced with the problem of how best to extricate the mired Excavator, Sugarbush was unable to consider as an option that the Bulldozers would travel via the Lift corridor.

51. On its site visit conducted on December 4, 1996, the Panel walked along the road leading from German Flats Road to the Evacuation Route. It walked for approximately one mile up the Evacuation Route. The Panel observed the beginning of the Woods Road to the north of the Evacuation Route. One of the winged farm gates had been vandalized and was not locked. A small sign was attached to a tree with a logo of a mountain biking club and an arrow pointing down the Evacuation Route.

52. Subsequent to the Alterations, there have been hikers and individuals riding on mountain bikes on the Evacuation Route and in the Slide Brook area. Mountain bike tracks have been observed in the area as well.

IV. CONCLUSIONS OF LAW

A permittee must apply for an amendment for any "material" change or "substantial" change in a permitted project. EBR 34(A).

A. Material Change

"Material change" is defined as "any alteration to the project which has a significant impact on any finding, conclusion, term or condition of the project's permit and which affects one-or more values sought to be protected by the Act." EBR 2(P).

Finding a material change thus involves a two step process: First, the Board must decide whether a physical change or a change in use has occurred or will occur. See e.g., 'Re: David Enman (St. George Property), Declaratory Ruling #326 (Dec. 23, 1996); Re: Mount Mansfield Co., Inc., Declaratory Ruling #269 (July 22, 1992). Second, if there is a change, the Board must determine whether the alteration has a significant impact on any finding, conclusion, term, or condition of the Permit and whether the alteration affects one or more of the values protected by Act 250. Id.; EBR 2(P).

Sugarbush argues that there has been no change to the Project as permitted. See generally Petitioner's Proposed Amended Findings of Fact and Conclusions of Law. It contends that the Alterations made to extract the Excavator involved the same work it would have found necessary to prepare the Evacuation Route for use solely as an

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emergency evacuation route. Id. at 19-20. In support of this argument, Sugarbush states that the Permit made no express finding or condition regarding the precise width of the Woods Roads. Id. at 17. Sugarbush argues that the width of the Woods Roads, and specifically of the Evacuation Route, was not one of the ways in which the District Commission ensured that public access to the area was restricted. Sugarbush also argues that the Permit does not prohibit “construction equipment from entering the Slide Brook Basin or utilizing the evacuation routes for access to the transportation lift, as long as construction activity did not occur between April 15 and June 15 and September 1 and Thanksgiving.” Id. at 19.

MRVCRG contends that the District Commission envisioned that trees and brush on the Evacuation Route would be “flush cut” to ground level with no construction or soil disturbance and that the Route would be widened no more than 10 feet from disturbance to disturbance. See MRVCRG’s Proposed Supplemental Findings of Fact and Conclusions of Law at 1. MRVCRG argues that these limitations support the District Commission’s general intent to discourage human entry into the black bear habitat. See MRVCRG’s Proposed Findings of Fact and Conclusions of Law at 6-8.

EBR 32(A) states that “[a]ll conditions relating to a permit shall be clearly and specifically stated in the permit.” This requirement ensures that permittees and successors in interest are put on notice as to the parameters of the permit. As a result, the Board has at times been unwilling to find that certain activities required a permit amendment where the underlying permit was either vague or did not address those activities. E.g., Re: George Stump and Joelle Ring, Declaratory Ruling #309 at 8 and 9 (Feb. 29, 1996) (Board refused to read a prohibition of non-dwelling construction into a permit for subdivision where the original permit did little more than authorize lot-lines); Re: Robert Blair and CS Architecture, Declaratory Ruling #241 at 6 (April 29, 1992) (no permit amendment was required for tree-cutting done by the permittee of a subdivision where “no restrictions, conditions or discussion of the areas or numbers of trees to be cut [were] contained in the original permit or any of the permit amendments”).

Nevertheless, the Board has refused to impose the specificity requirement in a rigid fashion. Indeed, even the two cases cited above intimated that a more flexible approach might have been possible if the permits at issue had given more guidance. For example, in Robert Blair the Board stated: “If it was the intention of the District Commission to limit tree-cutting to that which was minimally necessary for completion of the project as approved, it should have made this a condition of the permit or otherwise have given some guidance as to the number of trees that could be removed or the areas in which tree-cutting would be allowed.” Robert Blair at 6 (emphasis supplied).

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Inherent in a less rigid interpretation of EBR 32(A) is the understanding that a permit condition can never be drafted that touches upon all potential future events with specificity. The Board discussed this in some detail in Re: Crushed Rock, Inc., #1R0489-EB and #1R0489-1, Findings of Fact, Conclusions of Law, and Permit Revocation Order (Oct. 17, 1986). In Crushed Rock, the levels of blasting, rock removal, and truck traffic at a gravel pit were higher than described in the permittee's Act 250 application materials. The Board rejected the permittee's argument that none of these activities were specifically limited or conditioned by the permit itself. Relying on general condition 1 of the permit,² the Board stated:

If every detail of a particular application had to be specifically described in a condition of the permit, permits would run hundreds of pages for complicated projects, clogging the land records of Vermont's towns and severely (sic) delaying the process of issuing Act 250 permits. The Board finds that incorporation of the findings and exhibits by reference is an acceptable method of providing notice to permittees and successors in interest.***

A specific condition must be spelled out in a permit whenever the Commission does not accept the application as submitted. *** The Commission may also want to include a specific condition where some issue was particularly controversial during the hearings, even where the Commission has accepted the applicant's position, so all parties know what was decided.

Id. at 11-12. Cf. In re Stowe Club Highlands, Supreme Court Docket #95-341 at 3 (Nov. 8, 1996) (where Act 250 permit for subdivision required that meadow lot be retained for agricultural use, the analysis of permittee's successor -- that the possibility of replacing the abandoned barn with a residence and stable was not raised in the original permitting process -- was "unreasonably narrow" because permit did not address any number of possible uses).

² The permit at issue in Crushed Rock, as the Permit at issue here, incorporates as conditions the supporting findings of fact and conclusions of law, as well as plans and exhibits in the District Commission file, Crushed Rock at 10. The Supreme Court has explicitly approved the general permit condition 1. In re Denio, 158 Vt. 230,241 (1992), cited with approval in In re Kostenblatt, 161 Vt. 292,299 (1994).

1. Alteration

The Board concludes that there has been both a change in use and a physical change to the Evacuation Route from that which the Permit allows:

a. Change in Use

The Permit and Order clearly contemplate that the Woods Roads will be used almost exclusively as part of Sugarbush's emergency evacuation plan. See e.g., Order, General Finding 10 and Finding 107. The only mention of the Woods Roads other than in connection with the emergency evacuation plan arises in the Project Description submitted by Sugarbush as support for its permit application and incorporated as a condition of the Permit by Permit Condition 1. In the Project Description, Sugarbush proposed that the north excavator would access the Transportation Lift corridor between Slide and Lockwood Brooks for construction purposes via "existing logging roads and trails." The only Woods Roads that enter the Transportation Lift corridor between Slide and Lockwood Brooks are to the north of the Evacuation Route. The Evacuation Route enters the Transportation Lift corridor to the south of both brooks. A thorough review of the Permit, the Order, and the District Commission File reveals that this is the only time that it was proposed or implied that construction equipment would travel the Woods Roads for any purpose. It is also the only instance in which a Woods Road was considered for some purpose other than the emergency evacuation of stranded skiers. That the District Commission intended to rigidly restrict the use of the Woods Roads, including the Evacuation Route, is consistent with its obvious concern that the Woods Roads not "become avenues of access to the interior of the basin by individuals on mechanized equipment" to the detriment of the habitat's integrity. See e.g., Order, Findings 119-22; Order at 28-3 1. Given the District Commission's concern, it is impossible to read the Permit as authorizing construction equipment access to the Transportation Lift corridor via the Woods Roads, except in the one specified instance.

As set forth in the Findings herein, the two D8 Bulldozers traveled to and from the Excavator via the Evacuation Route. Once extricated, the Excavator left the Transportation Lift corridor via the Evacuation Route as well.³ Sugarbush accomplished

³ At the December 4, 1996 hearing on the Petition, Sugarbush testified that the Excavator entered the Transportation Lift corridor via the Evacuation Route and that other construction equipment routinely accessed the corridor via the Woods Roads throughout the construction phase. Because this Declaratory Ruling concerns the Alterations, which were conducted in August 1995, the Board merely notes this use and does not base its

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the Alterations to the Evacuation Route by a small excavator and by a muskeg that transported hay, seed, equipment, and people up and down the Route. The Board concludes that nothing in the Permit, the Order, or the District Commission File permitted, or even contemplated, use of the Woods Roads by construction vehicles except in the one narrow exception outlined in the Project Description. Such use of the Evacuation Route is a change in use from the use authorized by the Permit.

b. Physical Change

The Permit and Order authorized Sugarbush to “flush cut and widen[]” the Woods Roads to allow travel by snow cats as part of the emergency evacuation plan. Snow cats need a 7 foot wide right-of-way. Throughout the Order and Permit, the District Commission extensively discussed the black bear habitat. It repeatedly expressed its concern that the Woods Roads not be altered, initially or incrementally, in a manner that encouraged increased human entry into the remote interior of the Slide Brook basin and thus the imperilment of the necessary wildlife habitat. See e.g., Order at 28-3 1. Although the District Commission acknowledged that people already frequent the Slide Brook area and that it did not think it “necessary or proper to transform this private property into a park or wildlife preserve,” it was “concerned that the evacuation routes could be used over time as very real avenues of increased human intrusion into the basin as the existence of the route becomes more apparent to the public. This would result in greater levels of intrusion into the habitat.” Id. at 28-29. “The very significant concern is that the reopened logging roads will be used by all terrain vehicles, four wheel drives, dirt bikes and mountain bikes.” Id. at 29. The District Commission stated:

Every bit of testimony pointed to the fact that this is a very important wildlife habitat area. Future incremental development cannot be allowed to compromise it. * * * We ... reemphasize our conclusion that any future use of the basin must protect the integrity of the habitat area.

Id. at 3 1. That the Permit and Order require Sugarbush to take several measures, such as specific signage and barriers, in order to discourage recreational use of the Woods Roads does not negate the Permit and Order’s overriding concern that the Woods Roads be developed to the minimum extent necessary. It was not necessary for the Permit and Order specifically to describe every detail of the Project. Cf. Crushed Rock, supra; In Stowe Club Highlands, supra in the entirety, it is clear that the Permit and Order authorized only minimal physical changes to the Woods Roads in preparation for use as

conclusions of law on it.

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emergency evacuation routes.

As part of the Alterations, a small excavator picked up and moved rocks. Sugarbush also performed erosion control measures to prevent soil erosion and the discharge of silt and soil into Slide Brook, including the installation of ditching, water bars, culverts, berms, and other grading. Sugarbush has removed most of the culverts but some remain in the higher elevations. In order to transport the Bulldozers to the Excavator, Sugarbush widened the Evacuation Route and removed some trees by uprooting them. The widening occurred in part because of Sugarbush's decision to install ditches and stable side slopes as erosion control measures. Some widening and some of the culverts, water bars, ditching, and berming on the downhill slopes were measures undertaken specifically in relation to extricating the Excavator and would not have been done to prepare the Evacuation Route for use by snow cats. The increased vehicular traffic in connection with retrieving the mired Excavator caused the Route to be muddy and rutted. Work crews manually mulched the stream bank and diverted water away from Slide Brook. After the equipment left the Transportation Lift area, the surface of the Evacuation Route was smoothed primarily by manual seeding and raking. Other Woods Roads do not have the same degree of improvements as the Evacuation Route.

On its site visit, the Panel observed that the Evacuation Route varied somewhat in width, ruggedness, and ease of accessibility, but noted that it had been substantially upgraded from what would normally be considered a typical woods road to a relatively smooth and passable route. The lower third of the Route, including the erosion control measures on each side of the traveled surface, was on average wider than 9 feet but did not exceed 25 feet. The Board concludes that the Alterations constitute a physical change from the minimal intrusion authorized by the Permit.

2. Significance of Impact

Because the Board concludes that there has been an "alteration" to the project as permitted, it must next determine whether the Alterations have a significant impact on any finding, conclusion, term, or condition of the Permit and whether the Alterations affect one or more of the values protected by Act 250. The Board concludes that the second prong of the material change test has been met.

Condition 1 of the Permit incorporates as a condition all plans and exhibits on file with the District Commission in connection with the Project. Among the exhibits is the Project Description, submitted by Sugarbush, which sets forth the ways in which construction equipment would access the Transportation Lift corridor. Given the District Commission's pervasive concern that use of the Woods Roads not imperil the necessary

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wildlife habitat, if the District Commission intended to permit any other use of the Woods Roads, then it would have specifically stated so in the Permit. Crushed Rock, ~~is not~~ it is not possible to infer that the Permit contemplates any other use. If Sugarbush intended to alter its proposed construction plan in order to use the Woods Roads as a primary means of construction access to the Transportation Lift corridor, then it was incumbent upon Sugarbush to ensure that the Permit authorized the use. Sugarbush could have supplemented or amended its proposed findings to the District Commission, submitted an amended Project Description, or appealed the Permit and Order which made no mention of its altered plan. Sugarbush did none of these. Use of the Evacuation Route by construction equipment in connection with the extrication of the Excavator was a change in use which significantly impacted upon the Project Description as incorporated into the Permit by Condition 1.

In addition, the physical changes made to the Evacuation Route have a significant impact upon the conditions of the Permit and the findings and conclusions of the Order. Although the District Commission recognized that people have long frequented the Slide Brook area for recreational purposes, the Permit and Order clearly evince the Commission's concern that the Woods Roads not be developed in a way that invites increased human use. The Permit and Order discuss at great length the characteristics of the necessary wildlife habitat and the need to discourage access to the Slide Brook basin. They impose certain specific measures designed to discourage recreational use, such as the installation of signs and gates. On its site visit, the Panel observed that the Evacuation Route had been upgraded from a typical woods road into a smooth and passable route. It also observed that one of the winged farm gates had been vandalized and was not locked. The Panel further noted a small sign attached to a tree with a logo of a mountain biking club and an arrow pointing down the 'Evacuation Route. Hikers, mountain bikers, and mountain bike tracks have been observed on the Evacuation Route and in the Slide Brook area generally since the Alterations were made. The Alterations make the Evacuation Route considerably more evident, accessible, and inviting to the public. As such, the Alterations are a physical change that have a significant impact upon the conditions, findings, and conclusions of the Permit and Order which seek to limit recreational access into the necessary wildlife habitat.

Both the change in use and the physical change are significant impacts which, independently, affect the Act 250 value of protecting and preserving a necessary wildlife habitat. The Board concludes that the Alterations constitute a material change to the Project as permitted.

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B. Substantial Change

“Substantial change” is defined as “any change in a development ... which may result in significant impact with respect to any of the criteria specified in” Act 250. EBR 2(G).

Finding substantial change involves a two step process. First, there must be a “cognizable” (i.e. physical) change to the permitted project. See, e.g., Enman, supra: Re: Village of Ludlow, Declaratory Ruling #212 (Dec. 29, 1989). Second, the change must have the potential to impact significantly on one or more of the ten Act 250 criteria. Id.; EBR 2(G). In considering the issue of substantial change, the Board has stated:

In deciding whether Act 250 jurisdiction applies ..., the appropriate consideration is whether the potential for significant impact is raised. This consideration does not require an in-depth review of possible impacts, but simply a determination that significant impacts may occur.

Village of Ludlow at 9 (quoting Re: City of Montpelier, Declaratory Ruling #190 at 7 (Sept. 6, 1988)). See also In re Barlow, 160 Vt. 513, 521-22 (1993) (upholding validity of EBR 2(G) by finding that an impact can be potential as long as it is significant and affirming Board determination that an increase in the extraction rate and frequency of use of a gravel pit was a substantial change); Re: Taft Corners Associates, Inc., #4C0696-11-EB(R), 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 1 O(town / regional plan)); Re: Village of Ludlow, supra (substantial change to an existing sewage treatment plant found where new parts were added and others were replaced with parts that were physically different because additional traffic and noise impacted Criteria 1 (air), 5(traffic), and 8(aesthetics)).

1. Cognizable Change

For the reason set forth in section IV.A.1 .b. above, the Board concludes that, as a result of the Alterations, there has been a cognizable change to the Evacuation Route as permitted.

2. Potential for Significant Impact on Act 250 Criteria

Because the Board concludes that there has been a cognizable change in the permitted project, it must next consider whether the Alterations are ones “which may

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result in significant impact [on] any of the [Act 250] criteria.” EBR 2(G). The Board concludes that the physical changes occasioned by the Alterations to the Evacuation Route have the potential to result in a significant impact upon Criterion 8(A). During the site visit, the Panel observed that the Evacuation Route was a smooth and passable route that, on average, exceeded nine feet in width. The Evacuation Route as changed by the Alterations may invite increased recreational use both by individuals on foot and on mechanized vehicles. That the route was attractive to such individuals was corroborated by the presence of a small sign attached to a tree with a logo of a mountain biking club and an arrow pointing the way down the Evacuation Route. The Board also finds the vandalism of one of the winged gates and the observation of hikers and mountain bikers in the area to be significant in determining that the Evacuation Route, as a result of the Alterations, has the potential to become more inviting to recreational use. Increased recreational use of the Evacuation Route, particularly by mechanized vehicles such as mountain bikes, may result in a significant impact upon Criterion 8(A), which seeks to avoid the destruction or significant imperilment of necessary wildlife habitat.

The Board concludes that the Alterations constitute a substantial change to the Project as permitted.

V. ORDER

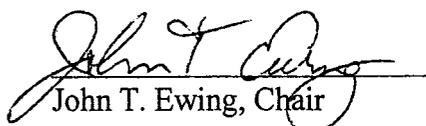
1. The Alterations were and are both a material change and a substantial change to the permitted project. Sugar-bush was and is required to apply for an amendment to the Permit.

2. Because the Board is concerned that the Alterations are an invitation to increased recreational use that may destroy or significantly imperil the necessary wildlife habitat in the Slide Brook basin, the Board believes that the District Commission should review these issues as part of the permit amendment application required by this decision and should impose more substantial measures to curtail access.

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Dated at Montpelier, Vermont this 27th day of February, 1997.

ENVIRONMENTAL, BOARD*



John T. Ewing, Chair

Arthur Gibb

Samuel Lloyd

William Martinez

Rebecca M. Nawrath

Steve E. Wright

* Board Members Robert Page, M.D. and Robert H. Opel did not participate in the deliberations concerning this matter. Board Member Marcy Harding recused herself from this proceeding.

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