



LAND USE PERMIT AMENDMENT

State of Vermont

Natural Resources Board

District 7 Environmental Commission

374 Emerson Falls Road, Suite 4

St. Johnsbury, VT 05819

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

[phone] 802-751-0120

CASE NO: 7C1391-1

Kirby Mulch, LLC

PO Box 204

East Burke VT 05824

LAWS/REGULATIONS INVOLVED

10 V.S.A. §§ 6001 - 6111 (Act 250)

The District 7 Environmental Commission hereby issues Land Use Permit 7C1391-1, pursuant to the authority vested in it by 10 V.S.A. §§ 6001-6111. This permit applies to the ± 25.3 acre parcel of land identified in Book 25 Pages 468-470 of the land records of the Town of Kirby, Vermont, as the subject of a deed to Heath W. Bunnell.

This permit specifically authorizes the Permittees to construct and operate a mulch and wood product processing and sales facility. The project includes a firewood processing area with 12'x20' office and scale house, 32'x100' "quonset hut" chipwood drying building, covered wood storage structure, and propane-fired firewood kiln; annual kiln dried firewood production of ± 3,000 cords annually; wood chip processing and storage; new access drive from U.S. Route 2; a compost and mulch sales area; a compost processing and curing area; a 32'x100' "quonset hut" building for equipment storage; water supply and wastewater disposal systems; stormwater treatment system; exterior signage and lighting; fencing; and landscaping.

The project is located in proximity of 668 U.S. Route 2 in the Town of Kirby, Vermont.

Jurisdiction attaches because the project is a "development" pursuant to §6001(3)(A)(ii).

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 7 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 7C1391-1, 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.
3. All conditions of Land Use Permit #7C1391 are in full force and effect except as further amended herein.
 4. The Permittees shall comply with all of the conditions of the following Agency of Natural Resources Permits:
 - a. Wastewater System and Potable Water Supply Permit WW-7-5265 issued on April 7, 2020 by the ANR Drinking Water and Groundwater Protection Division;
 - b. Authorization of Notice of Intent (NOI # 8884-9020) under Construction General Permit 3-9020 issued on January 14, 2021 by the ANR Watershed Management Division;
 - c. Authorization of Notice of Intent (NOI #8884-9015) under General Permit 3-9015 (Stormwater Discharge General Permit), issued on January 14, 2021 by the ANR Watershed Management Division;
 - d. Authorization to Discharge Stormwater under Multi-Sector General Permit 3-9003 # 8884-9003 authorized on January 14, 2021 by the ANR Watershed Management Division;
 - e. Individual Wetland Permit 2018-72 issued on September 29, 2020 by the ANR Watershed Management Division;
 5. Any nonmaterial changes to the permits listed in the preceding condition shall be automatically incorporated herein upon issuance by the Agency of Natural Resources.
 6. 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.
 7. A copy of this permit and plans shall be on the site at all times throughout the construction process.
 8. 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.
 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 Permittees shall apply and maintain water and/or other agents approved by the Watershed Management Division in the Project's Erosion Prevention and Control Plan on all roadways or disturbed areas within the project during construction and until pavement and/or vegetation is fully established to control dust.

12. No floor drains shall be installed without first obtaining a permit or submitting other necessary documentation, as required by the Vermont Department of Environmental Conservation.
13. The Permittees and all subsequent owners or lessees shall install and maintain only low-flow plumbing fixtures in any buildings. Any failed water conservation measures shall be promptly replaced with products of equal or better performance.
14. 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.
15. The Permittees shall maintain an undisturbed, naturally vegetated riparian buffer zone on the Project Tract along the Moose River, which shall begin at the water's edge at base flow conditions, and shall further extend minimum 50 feet measured inland from, perpendicular to, and horizontally from the Top of Bank and as depicted on Exhibit #003. 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.
16. The Permittees shall maintain an undisturbed, naturally vegetated wetlands and buffer zones on the Project Tract within 50 feet of any wetlands as depicted on Exhibit 003, excepting as otherwise authorized in the Individual Wetland Permit 2018-732 (Exhibit 018), and in the areas proposed for continued farming (Exhibit 032 – Proposed Farming Plan). 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. Farming activities occurring within wetlands identified in the tan polygons of Exhibit 032 – Proposed Farming Plan, shall comply with the Vermont Wetland Rules.
17. The Permittees shall protect 6.3 acres of primary agricultural soils through on-site mitigation, as depicted on Exhibit 032, in order to compensate for the acreage of primary agricultural soils whose agricultural potential has been reduced or eliminated as a result of the project.
18. The protected primary agricultural soils shall be maintained in a manner that will ensure they will be available for economic or commercial agriculture, in perpetuity. Activities, structures, or other non-agricultural improvements that might in any way prevent or reduce the use of the protected soils for economic or commercial agriculture shall be prohibited. If, at any time, open protected soils are not used for an economic or commercial agricultural purpose, the Permittees shall ensure that the soils remain open

and unobstructed through accepted practices such as haying or brush hogging a minimum of once every two years.

19. Pursuant to 10 V.S.A. § 6081(s), no permit amendment is required for farming that will occur on primary agricultural soils preserved in accordance with 10 V.S.A. § 6093 or will not conflict with any condition in this permit.
20. Farming is permitted on lands exempt from amendment jurisdiction pursuant to 10 V.S.A. § 6081(s).
21. The Permittees and all assigns and successors in interest shall continually maintain the landscaping as approved by replacing any dead or diseased plantings within the season or as soon as possible after the ground thaws, whichever is sooner.
22. At the completion of the project, the Permittees shall certify by affidavit from a nursery person or landscape architect that the site improvements have been carried out as described in this permit.
23. The installation of exterior light fixtures is limited to those approved and shall be mounted no higher than 20 feet above grade level. All exterior lighting shall be installed or shielded in such a manner as to conceal light sources and reflector surfaces from view beyond the perimeter of the area to be illuminated.
24. The Permittees shall not erect additional exterior signage 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.
25. Pursuant to 30 V.S.A. § 53, the energy design and construction shall comply with Vermont's Commercial Building Energy Standards (CBES) in accordance with the NRB Criterion 9(F) Procedure effective at the time of construction. (More information on this subject can be found at http://publicservice.vermont.gov/energy_efficiency/cbes and https://nrb.vermont.gov/documents/9f-procedure_2020-09-01.)
26. The Permittees, upon completion of the construction of each commercial building and prior to use or occupancy, shall submit to the District Commission a copy of the certification submitted to the Public Service Department as described under 30 V.S.A. § 53(d).
- 27a. The property is a historic site. As such, any future work on the grounds or the historic buildings should be reviewed by the Vermont Division for Historic Preservation (VDHP). No change shall be made to the design, operation or use of this project without first obtaining a jurisdictional opinion. Any future changes to the site including alterations to the house and carriage house or new construction on the property should be reviewed by VDHP prior to commencing.
- 27b. Prior to the completion of all relevant archaeological investigations, the Applicant, in consultation with the VDHP, shall identify the project area as a not-to-be-disturbed archaeological buffer zone. The archaeological buffer zone shall be marked on all relevant project plans.

- 27c. Topsoil removal, grading, scraping, cutting, filling, stockpiling, logging or any other type of ground disturbance is prohibited within the archaeological buffer zone prior to conducting all appropriate archeological studies. Agricultural production or cultivation consistent with past practice will not be considered ground disturbance.
- 27d. The Permittees shall contract with a qualified archaeological consultant to complete a Phase I surface collection survey and any other necessary archaeological investigation within the project area. The Phase I surface collection survey should be focused on the lower terrace in areas that will be disturbed by the proposed construction.
- 27e. All archaeological studies and assessments must be conducted by a qualified consulting archaeologist and must follow the VDHP Guidelines for Conducting Archaeological Studies in Vermont. The Permittees's archaeological consultant must submit any scope of work to the VDHP for review and approval before commencing the work.
- 27f. Archaeological sites identified within the project area will not be impacted until any necessary mitigation measures have been completed. Mitigation may include further site evaluation, data recovery, redesign of one or more proposed project components, or modification of the buffer zone boundaries or the specific conditions that refer to the same.
- 27g. Any proposed mitigation measures will be discussed with and approved by the VDHP prior to implementation. The archaeological studies will result in one or more reports, as appropriate, that meet the VDHP *Guidelines for Conducting Archeological Studies in Vermont*. A digital copy of all reports resulting from these investigations will be submitted to the VDHP.
28. The Permittees shall provide each prospective purchaser of any interest in this Project a copy of the approved plot plan and the Land Use Permit Amendment before any written contract of sale is entered into.
29. The Permittees shall reference the requirements and conditions imposed by Land Use Permit 7C1391-1 in all deeds of conveyance and leases.
30. Pursuant to 10 V.S.A. § 6090(b)(1), this permit amendment is hereby issued for an indefinite term, as long as there is compliance with the conditions herein. Notwithstanding any other provision herein, this permit shall expire three years from the date of issuance if the Permittees have not commenced construction and made substantial progress toward completion within the three-year period in accordance with 10 V.S.A. § 6091(b).
31. All site work and construction shall be completed in accordance with the approved plans by October 15, 2023, unless an extension of this date is approved in writing by the Commission. Such requests to extend must be filed prior to the deadline and approval may be granted without a public hearing.

32. 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.
33. Failure to comply with any condition herein may be grounds for permit revocation pursuant to 10 V.S.A. sec. 6027(g).

Dated this 8th day of April, 2021.

By /s/ Eugene Reid
Eugene Reid, Chair
District 7 Commission

Members participating in this decision:

Keith Johnson

Nicole Davignon

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.

CERTIFICATE OF SERVICE

I hereby certify that I, Gina St Sauveur, Natural Resources Board Technician, District #7 Environmental Commission, sent a copy of the foregoing document Act 250 Findings of Fact & Conclusions of Law & Order and Land Use Permit #7C1391-1 for Kirby Mulch, LLC, Kirby VT and Heath Bunnell, Kirby VT by U.S. Mail, postage prepaid to the following individuals without e-mail addresses and by e-mail to the individuals with e-mail addresses listed, on this 8th day of March, 2021.

Note: Any recipient may change its preferred method of receiving notices and other documents by contacting the District Office staff at the mailing address or e-mail below. If you have elected to receive notices and other documents by e-mail, it is your responsibility to notify our office of any e-mail address changes.

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Town of Kirby
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Town of Kirby Planning Commission
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For Your Information

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Gina St Sauveur
Natural Resources Board
Technician



FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

State of Vermont
Natural Resources Board
District 7 Environmental Commission
374 Emerson Falls Road, Suite 4
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CASE NO: 7C1391-1

Kirby Mulch, LLC
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Kirby, VT 05824
and
Heath Bunnell
6277 Kirby Mountain Road
Kirby, VT 05

LAWS/REGULATIONS INVOLVED

10 V.S.A. §§ 6001 - 6111 (Act 250)

I. INTRODUCTION

On November 12, 2020, Kirby Mulch, LLC and Heath Bunnell, 6277 Kirby Mtn. Road, Kirby, VT 05851 filed application number 7C1391-1 for a project generally described as construction and operation of a mulch and wood product processing and sales facility. The project includes a firewood processing area with 12'x20' office and scale house, 32'x100' "quonset hut" chipwood drying building, covered wood storage structure, and propane-fired firewood kiln; annual kiln dried firewood production of ± 3,000 cords annually; wood chip processing and storage; new access drive from U.S. Route 2; a compost and mulch sales area; a compost processing and curing area; a 32'x100' "quonset hut" building for equipment storage; water supply and wastewater disposal systems; stormwater treatment system; exterior signage and lighting; fencing; and landscaping. The project is located in proximity of 668 U.S. Route 2 in the Town of Kirby, Vermont.

The application, first submitted on August 31, 2020, was determined to be incomplete under Act 250 Rule 10(D) for reasons stated in a letter from the District Coordinator to the Applicants dated September 24, 2020. The application was deemed complete on November 12, 2020 upon receipt of the required supplemental information. Following a Minor process under Rule 51, the Commission held a hearing on this application under Criterion 9(B) on March 11, 2021. The Commission adjourned the hearing on April 5, 2021 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 is a material change to a permitted development or subdivision, and thus requires a permit amendment pursuant to Act 250 Rule 34.

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). The Commission takes official notice of the District 4 (D4) Commission’s decision in application 4C1144-5, issued on November 9, 2017, and a related site plan. Accordingly, official notice is hereby taken of this D4 decision (Exhibit 039) and D4 project site plan (Exhibit 040) 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. 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 attended the hearing are:

The Applicants by Nathan Sicard, P.E., and Heath Bunnell

The State of Vermont Agency of Agriculture Food & Markets (AAFM), by Ari Rockland-Miller.

The State of Vermont Division for Historic Preservation, by Yvonne Benney-Basque
Kenneth Bozarth from the Attorney General's office (in attendance to observe).

B. Interested Parties

Any person who has a particularized interest protected by Act 250 that may be affected by an act or decision of the Commission is also entitled to party status. 10 V.S.A § 6085(c)(1)(E). The District Commission did not receive any request for Party Status or Friends of the Commission.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The District Commission initiated the review process on this application as a Minor application under Act 250 Rule 51 on November 25, 2020. The Commission distributed a notice and proposed permit establishing a deadline of December 15, 2020 by which parties, or the Commission on its own motion, could request a hearing on this matter. The Commission received timely comments from the Agency of Natural Resources, from the Vermont Division for Historic Preservation, and from the Agency of Agriculture Food & Markets (AAFM). Following unresolved substantive questions concerning the plan for on-site mitigation of 9(B) soils under Act 250 Criterion 9(B), the Commission convened a hearing to address Criterion 9(B), on March 11, 2021. Pursuant to Act 250 Board Rule 51(F), the Commission need only prepare Findings of Fact and Conclusions of Law on those criteria or sub-criteria at issue during the hearing. Therefore, the following Findings of Fact are limited to Criterion 9(B).

The findings of fact are based on the application, Exhibits 001 - 040, 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 District 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 9(B) - Primary Agricultural Soils:

Findings of Fact

1. The Project Tract contains 8.6 acres of mapped NRCS Prime soils (Podunk Fine Sandy Loam) and 16.7 acres of mapped NRCS Statewide soils (5.6 acres of Cabot Silt Loam, and 11.1 acres of Rumney Fine Sandy Loam), total 25.3 acres of mapped NRCS Prime and Statewide soils, as summarized and further detailed in Exhibit 038.
2. 3.5 acres of the mapped soils referenced in the above finding have been previously disturbed by existing improvements and related disturbance.

3. A portion of the 25.3 acres of mapped NRCS Prime and Statewide soils are concurrently classified as Class II wetland as defined under 10 V.S.A. Ch. 37. Within the total 25.3 acres of NRCS Prime and Statewide soils, 12.65 acres feature Class II wetlands or buffer areas.
4. Although wetlands and wetland buffers are present, the property has been used for farming (most recently by a local farmer, Gary Olcott), and 11.5 acres will remain available for continued farming comprised of a 6.8 acre Southern (S) area and a non-contiguous 4.7 acre Northwesterly (NW) area. The areas to remain available for farming are located minimum 50 feet from the top of bank of the Moose River, and feature available access from U.S. Route 2, as identified in Exhibit 031. Investment in continued farming has included reseeding of the East area in ± 2017 and reseeding of the West area in 2020. The agricultural potential of the soils supports or contributes to an economic or commercial agricultural operation.
5. The Applicants, in their “Ag Soil Mitigation Plan” revised December 11, 2020 (Exhibit 032) propose a total of 6.30 acres of mitigation on-site, contained in two “areas” that are not fully contiguous. The 6.30 acres is comprised of a 4.3 acre NW “area” (within the 4.7 acre NW active farm field), and a 2.0 S “area” (within the 6.8 acre SE active farm field).
6. The 4.3 acre NW mitigation “area” is comprised of 3 non-contiguous land areas, in that a Class II wetland area is located across the middle part of the 4.7 acre active farm field, as illustrated in Exhibit 032. Likewise the 2.0 acre S area is comprised of 2 non-contiguous land areas, in that a Class II wetland is located across a portion of the 6.8 acre active farm field, as illustrated in Exhibit 032. The 4.3 acre and 2.0 acre mitigation acreage (comprised of 5 different areas separate by Class II wetlands, as noted above) omits the Class II wetlands located through the active farm field, but includes some Class II wetland buffer areas, in addition to other upland areas. The wetland buffer areas within the NW and S areas are ±1.5 acres and ±1.1 acre, respectively, as estimated by the Agency of Agriculture, Food & Market (AAFM), as further detailed below.
7. AAFM has reviewed the project, including the Criterion 9(B) soils impact, and the on-site mitigation proposal. AAFM prefers a single block of mitigation land to meet the Applicant’s burden under Criterion 9(B), and its practice is that on-site mitigation land areas must be at least 2 contiguous acres and must have areas with at least 100’ width to accommodate a typical tractor turning radius. The AAFM project review letter (Exhibit 023) includes the following information and positions:
 - (a) *“having at least two acres of contiguous soils is necessary to ensure that land used for on-site mitigation will be “capable of supporting or contributing to an economic or commercial agricultural operation” consistent with Section 6093(a)(2). Fragmented soils are far less economical and viable for commercial farming”, and*
 - (b) *“Class I/II wetlands and their buffers are not sufficient on-site mitigation – even if in agricultural use, mapped wetland areas can revert to wetland if farming is discontinued, and these soils do not meet the higher standard under Vermont law for soils that not only meet the*

PAS definition [10 V.S.A. §6001(15)] but are suitable for on-site mitigation pursuant to 10 V.S.A. § 6093(a)(2)".

*(c) The **Northwest** proposed 4.3 acres is fragmented by a Class II mapped wetland, that divides the proposed mitigation soils into three smaller areas. While the proposed 4.3 acre area is fragmented by the Class II wetland, the proposed mitigation soils themselves exclude the Class II wetland as mapped. The proposed mitigation soils do, however, themselves contain Class II wetland buffers (see list of constraints on page 2 of the Applicant's revised "Criterion 9(B) Soils Matrix", revision date 01/06/2021). This revised soils matrix provides helpful context regarding square footage of constraints, but does not state the total acreage of proposed mitigation soils free of Class II wetlands/buffers, or provide clear information on any associated fragmentation. The Agency's desktop review of these figures, subject to confirmation, indicates that 65,525 square feet (+/- 1.5 acres) of the proposed Northwesterly mitigation soils may include wetland buffer overlap in some form. The presence of the Class II wetland fragmenting the proposed mitigation soils into three smaller areas is also a complicating factor.*

*(d) Analogous facts exist for the proposed 2.0-acre mitigation area in the **Southeast** field – while the design excludes Class II wetland itself from these proposed mitigation soils, Class II wetland buffers are included in these proposed 2.0 southeasterly acres; and the issue is further complicated by the fact that these proposed 2.0 acres are bisected by a Class II wetland shown on the plans, that divides the proposed soils into two smaller areas. These proposed southeasterly mitigation soils lack the minimum of 2.0-acre contiguity for on-site mitigation, due to the presence of the Class II wetland that divides these soils. The Agency's desktop review of these figures, subject to confirmation, indicates 48,575 square feet (+/- 1.1 acres) of the proposed Southeasterly mitigation soils may include wetland buffer overlap in some form.*

Having at least two acres of contiguous soils is necessary to ensure that land used for on-site mitigation will be "capable of supporting or contributing to an economic or commercial agricultural operation" consistent with Section 6093(a)(2). Fragmented soils are far less economical and viable for commercial farming. ¹

Furthermore, Class I/II wetlands and their buffers are not sufficient on-site mitigation – even if in agricultural use, mapped wetland areas can revert to wetland if farming is discontinued, and these soils do not meet the higher standard under Vermont law for soils that not only meet the PAS definition [10 V.S.A. §6001(15)] but are suitable for on-site mitigation pursuant to 10 V.S.A. § 6093(a)(2).

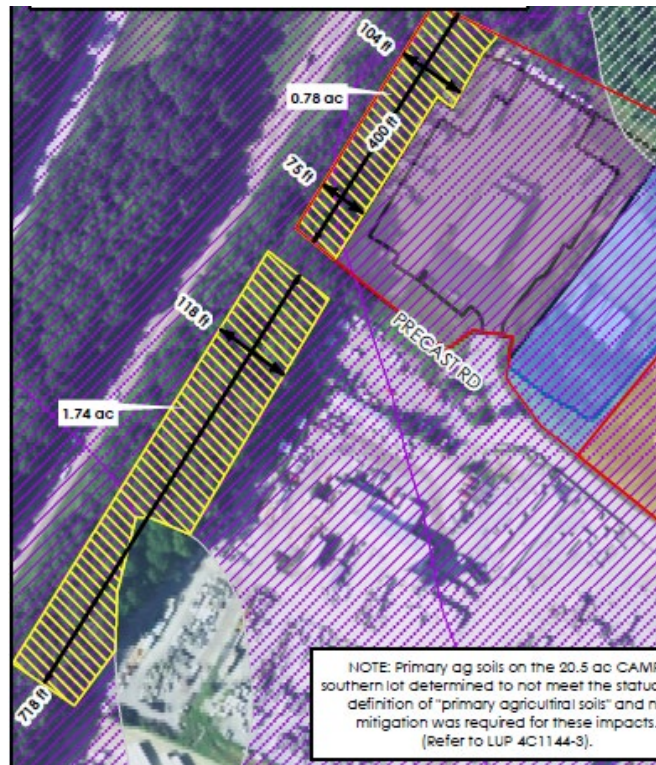
8. AAFM references a District 4 (D4) Commission (4C1144-5) as precedent, and in a footnote, in support of its recommended 2 acre minimum, and this Commission has provided it as Exhibit 039, and a related site plan as Exhibit 040. In this other D4 case, narrow 1.74 acre and 0.78 acre strips of land were proposed for on-site mitigation, and were rejected by AAFM and by the D4 Commission. Following are excerpts from the D4 decision referenced by AAFM:

"Both of these two smaller blocks fall short of the AAFM practice of a two-acre minimum contiguous area for on-site mitigation. These smaller blocks of proposed on-site mitigation are 1.74 acres and 0.78 acres, respectively, and they are not contiguous. Both smaller slices are bounded on the west by proximity to Interstate-89, and would be fragmented on the east and southeast by existing development associated with Camp Precast".

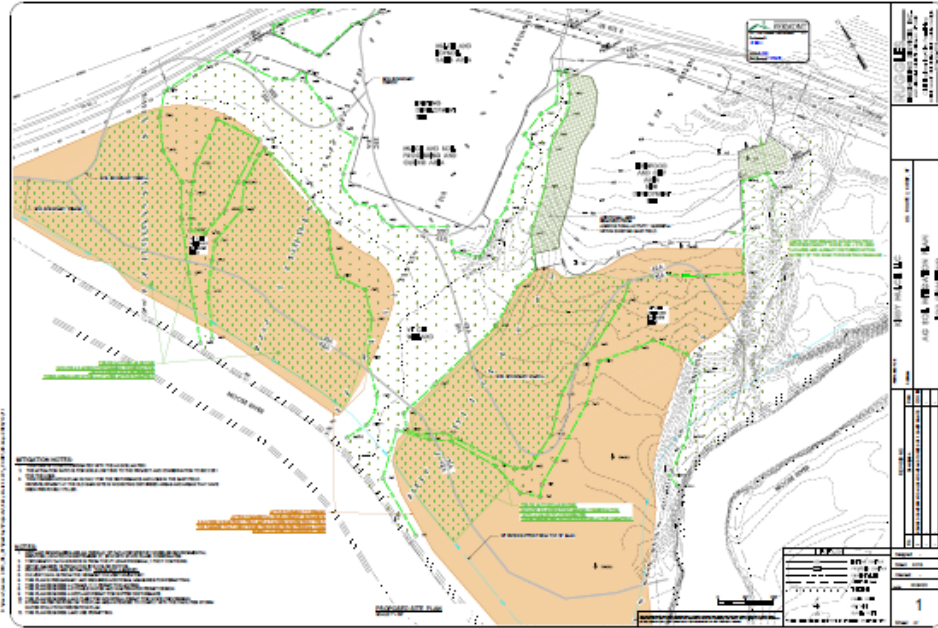
Concerning the other on-site mitigation issues, the Commission concludes that mitigation soils carry a higher standard of quality that is not being met by the two narrow on-site parcels. These are 1.74 acres and 0.78-acre strips along the interstate right of way and adjacent to the pre-cast and existing maintenance building. These strips are only 118 feet and 104 feet wide respectively. We agree with the AAFM position that at least 2 contiguous acres are needed for suitable on-site mitigation. This is consistent with the on-site mitigation statute which provides, for projects such as this located outside of certain designated areas:

Mitigation shall be provided on site in order to preserve primary agricultural soils for present and future agricultural use, with special emphasis on preserving prime agricultural soils. Preservation of primary agricultural soils shall be accomplished through innovative land use design resulting in compact development patterns which will maintain a sufficient acreage of primary agricultural soils on the project tract capable of supporting or contributing to an economic or commercial agricultural operation and shall be enforceable by permit conditions issued by the District Commission. 10 V.S.A. §6093 (a)(2).

9. The following site plan excerpt (portion of Exhibit 040) pertains to the D4 (4C1144-5) project referenced above, and depicts the narrow 1.74 acre and 0.78 acre strips of land that were proposed for on-site mitigation in support of this other D4 project (and rejected by the D4 Commission), located in a long linear area between Interstate 89 and existing industrial development (Camp Precast):



10. Below is a copy of the site plan (Exhibit 032) depicting the shape and extent of the areas that the subject 7C1391-1 Applicants have designated for continued farming, which include the proposed on-site mitigation areas, and some Class II wetlands and wetland buffers, generally located between U.S Route 2 and the subject 7C1391-1 proposed development, and the Moose River:



11. The on-site mitigation proposed in the case of the D4 (4C1144-5) project is distinguishable from the subject 7C1391-1 project proposed on-site mitigation, with respect to the width and the available area to turn a tractor around; the long linear D4 project areas (that were rejected by D4) feature widths of only 118 feet and 104 feet, whereas the subject 7C1391-1 mitigation and adjacent farming area is not long and linear in shape and features good access and considerable room for equipment to maneuver, as illustrated above. In addition, the rejected D4 (4C1144-5) proposed on-site mitigation areas were located between an interstate highway (I-89) and a developed industrial site (Camp Precast), whereas the subject proposal has better access, and is not surrounded by highly developed areas.
12. Although each of the 5 individual mitigation areas proposed by the Applicants would not, by itself, provide adequate on-site mitigation, lacking sufficient acreage capable of supporting or contributing to an economic or commercial agricultural operation, the proposed on-site mitigation areas (i.e. the 5 individual areas comprising the 4.3 acres and the 2.0 acres) are separated only by narrow wetlands which the Applicants have also designated for continued farming, whereby the actual area to remain available for farming exceeds the AAFM recommended minimum size of 2.0 acres, when considered together, as depicted on Exhibit 032.

Conclusion of Law

Under Criterion 9(B), a subdivision or development may not result in any reduction in the agricultural potential of the primary agricultural soils or must meet sub-criteria i–iv. Act 250 defines primary agricultural soil as either (1) important farmland soil map units identified by the NRCS as prime, statewide, or local importance, unless the District Commission determines that the identified soils have lost their agricultural potential, or (2) “soils on the Project Tract that the District Commission finds to be of agricultural importance, due to their present or recent use for agricultural activities...” 10 V.S.A. § 6001(15). To determine whether identified soils have lost their agricultural potential, the District Commission considers each of the factors listed in 10 V.S.A. § 6001(15) as follows:

- i. Impacts to the soils relevant to the agricultural potential of the soil from previously constructed improvements;

The District Commission concludes that previously constructed improvements negatively impact the agricultural potential of the soils, in some areas, totaling 3.5 acres.

- ii. The presence on the soils of a Class I or Class II wetland under 10 V.S.A. Ch. 37.

Class II wetlands are present on the tract and in a portion of the mapped soils areas. The property has continued to be farmed despite these wetlands, and applicants plan to continue farming a significant portion of the tract (11.5 acres). The District Commission concludes that although presence of wetlands may at times make farming more difficult it does not render all of the soils unsuitable for potential continued agricultural use. This is particularly true in that the site has continued to be farmed, including recent seed investment.

- iii. The existence of topographic or physical barriers that reduce the accessibility of the rated soils so as to cause their isolation and that cannot reasonably be overcome.

There are no substantive topographic or physical barriers that reduce accessibility of the soils. The District Commission concludes that the soils remain readily accessible from U.S. Route 2 and are not isolated.

The District Commission concludes that site-specific considerations reduce the agricultural potential of the soils. However, in consideration of the overall soils and site conditions, the history of farming, the investment in re-seeding, and the designation of 11.5 acres for farming (Exhibit 032), the District Commission concludes that the mapped primary agricultural soils on the site have not lost their agricultural potential. The District Commission concludes that the Project contains primary agricultural soils as defined by Act 250 (10 V.S.A. § 6001(15)).

13. The Project is not located in a designated growth area referenced in 10 V.S.A. § 6093(a).

14. The Project will result in a reduction in the agricultural potential of the primary agricultural soils.
15. The Project will not interfere with agriculture or forestry uses on adjoining lands.
16. The Applicants do not own or control any lands other than primary agricultural soils which are reasonably suited to the purpose of the Project.
17. The Project has been planned such that the development area is situated on the portion of the site nearest to U.S. Route 2, leaving the rear portion of the site, along the river, available and designated for continued farming. This minimizes the reduction of agricultural potential of the primary agricultural soils through innovative land use design resulting in compact development patterns so that the remaining primary agricultural soils on the Project Tract are capable of supporting or contributing to an economic or commercial agricultural operation.
18. The project will impact 2.3 acres of primary agricultural soils as defined by 10 V.S.A. §6001(15). The soil unit type impacted by the project is "Rumney fine sandy loam".
19. The Secretary of AAFM has determined that the appropriate mitigation ratio for the primary agricultural soils affected by the Project is 2.25:1 for the 2.3 acres of soils impacted. As identified in the Findings above, the Applicants, in their "Ag Soil Mitigation Plan" revised December 11, 2020 (Exhibit 032) propose a total of 6.30 acres of mitigation on-site.

Conclusions of Law

Presence of Primary Agricultural Soils

Under criterion 9(B), a subdivision or development may not result in any reduction in the agricultural potential of the primary agricultural soils or significantly interfere with or jeopardize the continuation of agriculture or forestry on adjoining lands or reduce their agricultural or forestry potential. Act 250 defines primary agricultural soils as either (1) an important farmland soils map unit identified by the Natural Resources Conservation Service of the United States Department of Agriculture (NRCS) as prime, statewide, or local importance, or (2) "soils on the Project Tract that the District Commission finds to be of agricultural importance, due to their present or recent use for agricultural activities..." 10 V.S.A. § 6001(15).

The Commission finds that 25.3 acres of primary agricultural soils on the site have been identified by the NRCS as prime, statewide, or local importance. As discussed in the Findings above, the District Commission concludes that 3.5 acres of mapped primary agricultural soils have lost their agricultural potential due to existing impacts. It is also noted that 6.1 acres of these mapped soils are Class II wetlands. Omitting the impacted and Class II wetland areas, the

Commission concludes that ± 15.7 acres of soils on the Project Tract currently meet the Act 250 definition of primary agricultural soils at 10 V.S.A § 6001(15).

Reduction in Agricultural Potential of Soils

The Commission finds that the Project will result in a reduction in the potential of 2.31 acres of primary agricultural soils through direct impacts to the soils. Because there will be a reduction in the agricultural potential of 2.31 acres of primary agricultural soils, the District Commission must conduct a review under the sub-criteria of Criterion 9(B).

Sub-criterion (i)

Sub-criterion (i) is met through a representation that the proposed Project will not significantly interfere with or jeopardize the continuation of agriculture or forestry on adjoining lands or reduce their agricultural or forestry potential. The Project will not significantly interfere with or jeopardize the continuation of agriculture or forestry on adjoining lands or reduce their agricultural or forestry potential. Therefore, the Commission concludes that the applicants have met sub-criterion (i).

Sub-criterion (ii)

Sub-criterion (ii) is met if the Applicants do not own or control any non-agricultural soils which are reasonably suited for this Project. The applicants do not own or control lands other than primary agricultural soils which are reasonably suited to the purpose of the development or subdivision. Therefore, the Commission concludes that the applicants have satisfied sub-criterion (ii).

Sub-criterion (iii)

For projects located outside designated growth centers, applicants, in most instances, are required to provide “on-site” mitigation through the use of “innovative land use design resulting in compact development patterns which will preserve primary agricultural soils on the Project Tract for present and future agricultural use.” The remaining soils must be capable of supporting or contributing to an economic or commercial agricultural operation.

The Project is located outside of a designated growth center. The Project will result in the reduction of the agricultural potential of 2.31 acres of soils while 6.3 acres of primary agricultural soils will be permanently preserved onsite through permit condition in a configuration that will enable their continued use for agriculture. The acreage provided exceeds the calculated on-site mitigation acreage required (2.31 acres x 2.25 = 5.2 acres) and is located within other larger areas designated for continued farming, as depicted on Exhibit 032 (total 11.5 acres in two areas). This preservation complies with and exceeds the applicable ratios enumerated in 10 V.S.A § 6093 as determined by the Secretary of Agriculture, Food, and Markets. Thus, the Commission finds that the Project has been planned to minimize the reduction of agricultural potential of the primary agricultural soils through innovative land use design resulting in compact development patterns, so that the remaining primary agricultural soils on the Project Tract are capable of supporting or contributing to an economic or

commercial agricultural operation. Therefore, the Commission concludes that the applicants have satisfied sub-criterion (ii).

Sub-criterion (iv)

The Project is located outside of a designated area and suitable mitigation will be provided for any reduction in the agricultural potential of the primary agricultural soils caused by the development or subdivision, in accordance with 10 V.S.A § 6093. The findings under sub-criterion 9(B)(iii) above are hereby incorporated by reference.

Summary

The District Commission concludes that the Project will result in a reduction in the agricultural potential of primary agricultural soils on the Project site, however the applicants have satisfied the applicable provisions of sub-criteria (i) – (iv).

Therefore, the Project complies with Criterion 9(B).

VII. 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 7C1391-1, will comply with the Act 250 criteria. 10 V.S.A § 6086(a).

VIII. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, Land Use Permit 7C1391-1 is hereby issued.

DATED this 8th day of April, 2021.

By /s/ Eugene Reid
Eugen Reid, Chair
District 7 Environmental Commission

Commissioners participating in this decision: Nicole Davignon, Keith Johnson

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.

Street, 2nd Floor, Suite 303, Burlington, VT 05401.