State of Vermont
Natural Resources Board
National Life Dewey Building
Montpelier, VT 05620-3201
www.nrb.state.vt.us

Re: Moretown Landfill, Inc.,
Jurisdictional Opinion 5-27

Reconsideration Decision

Moretown Landfill, Inc. (MLI) requests that the Natural Resources Board reconsider Jurisdictional Opinion (JO) 5-27 (Request), which requires an Act 250 permit amendment for MLI's proposed partial closure plan for Cell 3 of the Moretown Landfill (the Project), in accordance with the Superior Court, Environmental Division's Consent Order in *Re: Moretown Landfill Cell 3 Recertification,* No. 37-3-13 Vtec (Consent Order). MLI, represented by Christopher D. Roy, Esq., argues that the Project does not require a permit amendment. Neighbors Lisa Ransom and Scott Baughman (Neighbors), represented by James A. Dumont, Esq., filed a reply opposing MLI's request. No party requested a hearing, in accordance with the Interim Procedure on Jurisdictional Opinions and Reconsideration. For the reasons set forth below, the Board concludes that the Project requires an Act 250 permit amendment.

I. Introduction

Act 250 authorizes district coordinators and assistant district coordinators (collectively, coordinators) to issue jurisdictional opinions on the applicability of Act 250. 10 V.S.A. § 6007. Effective July 1, 2013, a party may seek reconsideration of a jurisdictional opinion by the Board. 10 V.S.A. § 6007(d). To implement this new law, the Board adopted the Interim Procedure on Jurisdictional Opinions and Reconsideration, effective July 9, 2013 (www.nrb.state.vt.us/policies/recon.pdf) (Interim Procedure).

Under the Interim Procedure, the Board reconsiders jurisdictional opinions on the Coordinator's Record, (*see,* Guidance on Compiling the Coordinator's Record for Jurisdictional Opinions, www.nrb.state.vt.us/policies/recordguidance.pdf) (Guidance), as supplemented on reconsideration.

II. Revised Closure Plan

As a preliminary matter, the Board notes that the Revised Closure Plan MLI attached at Tab D of its reconsideration request was not part of the Coordinator's Record. It consists of a detailed written report, with appended site plans. Although there was no formal request made to supplement the record, the first question is whether to supplement the record with the Revised Closure Plan.[1]

[1] MLI also submitted additional information on December 11, 2013 without a request to

MLI filed the Revised Closure Plan with the Agency of Natural Resources (ANR) in accordance with the Consent Order. The Revised Closure Plan explains in greater detail how MLI proposes to cap Cell 3. As such, it is directly relevant to this JO reconsideration. Also, it is understandable why it would not be part of the Coordinator's Record because the JO was issued before the plan was filed with ANR. Although there is no indication on the record that it has been approved by ANR, this revised plan provides more detailed information regarding MLI's plans for closing Cell 3. Also, in their response to MLI's Request, Neighbors did not raise any objection to the Board's consideration of the Revised Closure Plan that was attached to MLI's response. Under these circumstances, it is appropriate to supplement the record with the Revised Closure Plan.

III. Material Change Analysis

The question before the Board is whether the partial capping of Cell 3 requires an Act 250 permit amendment. A permit amendment is required for any material change to a permitted development or subdivision. Act 250 Rule 34(A). A material change is:

> any change to a permitted development or subdivision which has a significant impact on any finding, conclusion, term or condition of the project's permit or which may result in a significant adverse impact with respect to any of the criteria specified in 10 V.S.A. § § 6086(a)(1) through (a)(10).

Act 250 Rule 2(C)(6). The permitted development in this case is the Cell 3 project, as authorized by Act 250 Land Use Permit 5W0164-30 (the Permit).

As stated by the Superior Court, Environmental Division, "not all changes are material, nor do all changes require a permit amendment." *Re: Big Rock Gravel*, No. 116-8-12 Vtec, Entry Order on Cross Motions for Summary Judgment, at 2 (Nov. 28, 2012). To decide whether the work authorized by the Consent Order constitutes a material change, the Board must determine:

(1) whether the Project is a cognizable change to (physical change to, or change in use from) the permitted project, and, if so,

(2) whether the change has a significant impact on any finding, conclusion, term or condition of the Permit, or has the potential for significant adverse impact under any Act 250 criterion.

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supplement the record. The Board declines to add this late filling to the record on reconsideration.

Act 250 Rule 2(C)(6); *see also, In re Carson,* No. 13-1-08 Vtec, Decision at 5-6 (applying prior Act 250 rule which required both a potential for significant Act 250 impact and an impact on permit finding, conclusion, term or condition, and holding that construction of shed did not constitute material change to permitted residential subdivision); *Re: McDonald's Corp.,* #1R0477-5-EB, Memorandum of Decision at 9 – 10 (Vt. Envtl. Bd. May 3, 2000)(applying two-step test under former Environmental Board Rules)(citing *Re: Developer's Diversified Realty Corp.*, Declaratory Rulings 364, 371 and 375, Findings of Fact, Conclusions of Law, and Order at 15-16 (Vt. Envtl. Bd. Mar. 25, 1999)*; Re: Vermont Institute of Natural Science,* Declaratory Ruling 352, Findings of Fact, Conclusions of Law, and Order at 29 (Vt. Envtl. Bd. Feb. 11, 1999); *Re: Sugarbush Resort Holdings,* Declaratory Ruling 328, Findings of Fact, Conclusions of Law, and Order (Vt. Envtl. Bd. Feb. 27, 1997); *Re: David Enman*, Declaratory Ruling 326, Findings of Fact, Conclusions of Law, and Order (Vt. Envtl. Bd. Dec. 23, 1996)*; Re: Mount Mansfield Co., Inc.,* Declaratory Ruling #296, Findings of Fact, Conclusions of Law, and Order (Vt. Envtl. Bd. Jul. 22, 1992)).

The first consideration in the material change determination is "the scope of the project as originally permitted by the District Commission." *Big Rock, supra,* at 2. Put another way, the permitted project serves as the baseline for the material change test.

A. Permitted Project

The District Commission issued the Permit in 2005, authorizing the construction and operation of a 13.9-acre lined landfill cell (Cell 3) at the Moretown Landfill. As noted on page 1 of the JO, the Commission approved the closure plan for Cell 3 as "detailed in section 6.3 of Exhibit 6," with drawings and specifications for final landfill slopes and cap design" as set out in Exhibit 2 to the Permit. Exhibit 2 consists of 40 pages of site plans. Sheet 34 of Exhibit 2, entitled, "Final Closure Plan," depicts a permanent cover over all of Cell 3. The Permit also incorporates the ANR Solid Waste Facility Certification, which provides for post-closure monitoring and a performance bond, $2,622,997 of which is for Cell 3 closure. *See,* Permit Condition 5; Findings 34 – 37. Under the Permit, Cell 3 will be completely and finally capped after closure, and [a]t closure, grass will be established as part of the cover system." Finding 62.

As noted in the JO, the narrative for final closure in Section 6.3 of Exhibit 6 "includes no language proposing a temporary cover/cap on any portion of Cell 3." JO 5-27, at 1. The same is true of the Findings issued with the Permit, and the ANR Solid Waste Facility Certification incorporated into the Permit. In sum, the Permit does not provide for a partial temporary cap.

B. Cognizable Change

The first step of the material change test is whether the Project authorized by the Consent Order involves a cognizable change to the permitted project. A cognizable change is a physical change or a change in use. *See, e.g., In re Gallagher*, 150 Vt. 50,

51 (1988)(holding that a physical change or change in use may constitute a material change); *see also, Re: George E. Benson,* Declaratory Ruling 432, Memorandum of Decision at 4-5 (Vt. Envtl. Bd. Aug. 6, 2004)(citing *In re H.A. Manosh Corp.,* 147 Vt. 367, 369-70 (1986); *Re: Hiddenwood Subdivision*, Findings of Fact, Conclusions of Law, and Order at 9 (Vt. Envtl. Bd. Jan. 12, 2000)). The Consent Order calls for "a phased closure" of Cell 3 (Consent Order, at 3, ¶ 14), and notes that MLI contemplates seeking approval for a new cell, Cell 4, that would partially overlap Cell 3 (*id.* at 2, ¶ 6). As correctly described in the JO, the proposed project involves a phased-in closure rather than the complete closure originally contemplated by the Permit.

The Project does not contemplate any change from the permitted project insofar as the north slope of Cell 3 is concerned. However, rather than the permitted final closure of both the north and south slopes of Cell 3 as permitted by the Commission, the Project contemplates a temporary capping and partial closure of the south slope. It is this temporary capping which forms the basis for the JO and for this reconsideration.

The Consent Order provides for installation of "a temporary cover of the south slope of Cell 3 as "generally depicted" in the map attached to the Consent Order as Exhibit B. Consent Order, at 4, ¶ 16(a). This temporary cover would use "a Dura Skrim (or equivalent) temporary cap." *Id.*

The Consent Order and Revised Closure Plan provide several options for the south slope, part of which overlies the Cell 4 area. The south slope plan depends on how Cell 4 is handled:

If MLI fails to file a complete application with ANR for Cell 4 by December 31, 2013, MLI would put the final cap on the south slope by August 1, 2014. Revised Closure Plan, Section 2.4.1.

If MLI does file a complete application with ANR by December 31, 2013, the south slope would be capped temporarily with existing subgrade material regraded and overlain by a 40 mil textured geomembrane, anchored into the subgrade every 60 feet. Revised Closure Plan, Section 2.4.2. This plan would also involve drainage swales to collect stormwater runoff, and landfill gas collection pipes to connect to the active gas collection system.

If that application is denied, then MLI would construct a final cover on the south slope, as set forth in Section 2.2 for the north slope. This would require replacement of any temporary cover with final cover. Installation of the final cover would have to be completed within 90 days after the denial. Subject to weather, MLI would establish grass or ground cover within four months of complete installation of final cover. Revised Closure Plan, Section 2.4.3.

If ANR issues a certification of Cell 4, the temporary cover in the Cell 4 overlay area of the south slope of Cell 3 will be replaced with the Cell 4 liner. This would happen as

Cell 4 construction occurs. Other areas of the south slope would be permanently capped.

The JO under reconsideration concluded:

> As Cell 3 is closed, but is not proposed to be permanently capped in its entirety, the project has been altered from the original proposal reviewed and approved by the District Commission.

JO 5-27, at 2.

Although all versions of the Proposed Project call for the eventual permanent capping of all of Cell 3, the timing and sequence of this capping vary, depending on the existence and status of an application to ANR for certification of Cell 4. This differs physically and temporally from the closure plans outlined in the Permit.

Moreover, if MLI does file a complete application for Cell 4 by December 31, 2013, the temporary cap is not the only change to the permitted project. The Revised Closure Plan calls for installation of a drainage swale to collect stormwater runoff, and a series of shallow, horizontal, landfill gas (LFG) pipelines to collect gas and direct it to the active gas collection system.

There is no question that the current proposed Project is a cognizable change to the permitted project. The question is whether the change is material.

C. Potential for Significant Impact

A change to a permitted project requires a permit amendment if that change has the potential for significant impact under any Act 250 criterion. Act 250 Rule 2(C)(6)(defining material change). By requiring permit amendments for material changes, Act 250 ensures continued protection as a project evolves. If a permittee modifies a permitted project in a way that could cause a significant impact under one or more Act 250 criteria, Rule 34(A) requires further Commission review. “It is through achieving compliance with those criteria that the public and the environment are protected.” *Re: Developer’s Diversified, supra*, at 20 (citing *Re: Mount Mansfield Co., Inc.*, *supra,* at 15)(cited in *Moretown Landfill, Inc.,* JO 5-26, at 5 (Mar. 7, 2013)(concluding that the installation of a series of active, horizontal, landfill gas (LFG) pipes, a condensate forcemain pipe system, condensate traps, and a 5.9-acre, temporary geomembrane cap on Cell 3 for the LFG collection system, constitute a material change to the Permitted Project)). In short, amendment jurisdiction is critical to the integrity of Act 250.

The JO concludes that the closure of Cell 3 without permanent capping of the entire area has the potential for significant impacts under several criteria:

> This change has the potential for significant impacts under criterion 1(Air Pollution) as there are still odor management issues at the facility; under criterion 1(B)(Waste Disposal) due to the presence of contaminants of concern in the groundwater at the facility; and under criterion 8 (Aesthetics) as there is no visual mitigation proposed in conjunction with the installation of a temporary cap on the south slope.

JO 5-27, at 2.

The record supports a conclusion that significant odor could result from the trenching and excavation necessary to install LFG pipes, *see also, Moretown Landfill, Inc.,* JO 5-26, *supra*, and from the construction of the drainage swale.

Odor is generally an aesthetic issue under Criterion 8, *see, e.g., Re: John A. Russell Corp.,* 1R0489-6-EB, Findings of Fact, Conclusions of Law, and Order at 52 (Vt. Envtl. Bd. Jul. 10, 2001); *Re: Larry and Diane Brown*, 5W1175-1-EB, Findings of Fact, Conclusions of Law, and Order at 17 (Vt. Envtl. Bd. Jun. 19, 1995). It would not be a Criterion 1(air) issue unless it rises to the level of a health risk. *See, In re Barre Granite Quarries, LLC*, #7C1079 (Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 70-71 (Vt. Envtl. Bd. Dec. 8, 2000)(stating that noise from a project violates Criterion 1 only where the noise may cause adverse health effects)(citations omitted)(cited in *Re: Burlington Broadcasters, Inc.,* #4C1004R-EB, Memorandum of Decision on Motion to Alter, at 1 – 2 (Vt. Envtl. Bd. Sept. 26, 2003)(holding that radiofrequency radiation constitutes air pollution under Criterion 1 only to the extent that it poses an undue adverse health effect)); *see also, Re: Bull's Eye Sporting Center*, #5W0743-2-EB, Findings of Fact, Conclusions of Law, and Order at 14 (Feb. 27, 1997); *Talon Hill Gun Club and John Swinington*, #9A0192-2-EB, Findings of Fact, Conclusions of Law, and Order at 8 (June 7, 1995); *Black River Valley Rod & Gun Club, Inc.*, #2S1019-EB(Altered), Findings of Fact, Conclusions of Law, and Order at 18 (Jun. 12, 1997); *Re: James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership*, #8B0444-6-EB (Revised), Findings of Fact, Conclusions of Law, and Order at 22 (Aug. 19, 1996)); *see also*, *In re R.E. Tucker, Inc.*, 149 Vt. 551, 556-557 (1988).

Thus, it is reasonable to conclude that the Project could cause a significant adverse impact under Criterion 8 (aesthetics) due to odors.

Another Criterion 8 issue is visual aesthetics. There is no question that Cell 3 is visible to some degree from I-89 and U.S. Route 2. Findings, at 10, Finding 59. Although the visibility of Cell 3 may be somewhat limited, Cell 3 is visible to the public. Under the Revised Closure Plan, if MLI applies for a Solid Waste Facility certification from ANR, the partial temporary cap on the south slope could remain visible, uncovered by soil and vegetation, during the pendency of any appeal or appeals. Instead of a naturally vegetated area, Cell 3 would appear to be covered in plastic, possibly for another year or longer. This could cause a significant adverse visual aesthetic impact.

In addition, if MLI does file a complete application for Cell 4 by December 31, 2013, the Project could create stormwater runoff and resulting impacts under Criterion 1(B) (waste disposal). The Revised Closure Plan calls for installation of a drainage swale to collect stormwater runoff in the area of the partial, temporary cap. It is logical to conclude that the partial, temporary cap could cause significant stormwater runoff, and that it has the potential to create significant, adverse impacts under Criterion 1(B).

IV. Conclusion

As set forth above, the Coordinator's Record, as supplemented on reconsideration, supports the conclusion that the Project has the potential for significant adverse impact under at least one Act 250 criterion. Accordingly, the Project constitutes a material change and requires a permit amendment.

DATED in Montpelier, Vermont, this 20th day of December, 2013.

NATURAL RESOURCES BOARD

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Ronald A. Shems, Chair
William B. Davies
Martha Illick
Donald Sargent
Patricia Moulton Powden

Any appeal of this decision must be filed within 30 days of the date the decision was issued, pursuant to 10 V.S.A. Chapter 220, with the Superior Court, Environmental Division, 2418 Airport Road, Barre, VT, 05641.

The Notice of Appeal must comply with the Vermont Rules for Environmental Court Proceedings (V.R.E.C.P.). The $262.50 entry fee and surcharge must be filed with the Notice of Appeal. A copy of the Notice of Appeal must be sent to the Natural Resources Board, National Life Dewey Building, Montpelier, VT, 05620-3201, and to all other parties in accordance with V.R.E.C.P. 5(b)(4)(B).