IN THE SUPREME COURT
FOR THE
STATE OF VERMONT
Supreme Court Docket No: 2008-249

In re: Hamm Mine Act 250 Jurisdiction	**]**	**Appealed from Vermont**
(Jurisdictional Opinion #2-241)	**]**	**Environmental Court**
	]	**Docket No. 271-11-06 Vtec**

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Brief of the Appellee
B.W. McCandless Trust

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Statement of the Case

This appeal arises out of the Vermont Environmental Court's holding that a flooded talc mine which continues to cause environmental damage to adjoining properties remains subject to jurisdiction under 10 V.S.A. § 6601 *et seq.*, ("Act 250") after expiration of the mine's Act 250 permit.

Uncontrolled spillage from the mine has clogged culverts along a town highway, created hazardous winter driving conditions and impaired the agricultural use of adjoining fields. The Court found that the mine operator, Luzenac America, Inc. ("Luzenac" or the "Company") failed to complete its mining project in conformance with the terms of its Act 250 permit, and undertook development of the property beyond the scope of what was authorized by the Act 250 permit. Based on factual findings supported by the extensive trial record, the Court held that the mine property remains subject to Act 250 jurisdiction. Luzenac brought this appeal. PC at 3-20.

This case started as a request for a jurisdictional opinion pursuant to Environmental Board Rule 3[1] made by James McCandless, Trustee of the B. W. McCandless Trust (the "Trust"). The Trust is current owner of a residential property that receives the mine spillage (the "McCandless Property"). On October 26, 2006, District Coordinator April Hensel found that the mine property remained subject to Act 250 jurisdiction. PC at 2.

The District Coordinator's determination was appealed pursuant to 10 V.S.A. § 8504 to the Vermont Environmental Court by Luzenac, U.S. Talc Co. (a related entity) and Sean and Elizabeth Reese, the current owners of the mine property. The matter was tried before the Hon.

[1] Environmental Board Rules effective January 12, 2004.
http://www.nrb.state.vt.us/lup/publications/rules/2004rules.pdf

Thomas Durkin over four days.

The trial record shows that on October 22, 1982, District Environmental Commission #2 (the "Commission") issued Land Use Permit #2W0551 (including Findings of Fact and as amended, the "Permit") to Vermont Talc to construct and operate a talc mine in the Town of Windham. The Permit specifically required that the development be completed in accordance with the plans and exhibits stamped "Approved" by the Commission. PC at 310. Luzenac is the successor owner to Vermont Talc.

The construction plans approved by the Permit included a water discharge pipe running from the southeast quadrant of the mine to a sedimentation pond, which in turn contained an outlet pipe that would discharge excess water to the ground on the southeast side of the mine. SPC at 71. [2] The discharge pipes and sedimentation pond depicted in the approved site plan were expressly found by the Commission to be part of the "permanent erosion controls" for the project. PC at 314.

However, Luzenac chose to construct a different set of discharge structures and ponds in a different location, and never applied for an amendment to the Permit for this change. PC at 114-118; 120-121; SPC at 65-66.

During operation of the mine, pumps regularly removed water that was infiltrating the pit and surface run-off into the mine. SPC at 2; 7-12.

In 1995, Luzenac submitted a proposal to amend the Permit to address issues related to "overburden disposal." The application was very clear that the proposed amendment did not constitute the final closure plan for the mine: "[The] overall site reclamation plan is pending

[2] The pipes and pond are depicted in the upper right hand quadrant of the approved site plan, SPC at 71. (The PDF version of this exhibit contained in the digital copy of the Supplemental Printed Case filed with the Court is better suited for viewing details of the plan than the paper copy.)

designation of the mine closure date." SPC at 69. (Mining operations did not cease until 1997.) SPC at 58-59. All pumping of water from the mine stopped when active extraction ceased in 1997. SPC at 59.

There was abundant evidence that Luzenac in 1995 was well aware of the potential for water-management and erosion problems after cessation of mining operations. An internal Company memorandum from 1995 states that the Company assured Byron McCandless, then owner of the McCandless Property, that the Company was prepared "to monitor and pump the sump as required" to prevent discharges on to the McCandless property. The memorandum specifically acknowledges that the McCandless' concerns relate to the "water fill rate for the pit." SPC at 76.

Another internal Company memorandum in July 1995 related to Hamm Mine closure stated that "*major concerns* are surface and mine water flow related to adjacent property" (emphasis supplied.) This memorandum specified that the water level would be allowed to rise to a level 20 feet below the mine entrance level, and then be pumped as necessary *to maintain it at that level* (emphasis supplied). The memo also proposed budgeting for the expenses involved in post-operations water management, including "erosion control." SPC at 75.

Yet there was no evidence in the record that Luzenac ever submitted the "overall site reclamation plan" which the Company, in 1995, told the Commission would be submitted at the time the mine closed.

In December 1997, an internal Luzenac memorandum reported on a public meeting in Windham at which concerns were expressed to a Company representative by the Select Board that "a neighbor's property would likely be flooded if the pit was allowed to overflow." The Luzenac employee who attended the meeting, Howard Clay, wrote: "I assured the Board [of

Selectmen] that we were monitoring the pit water level routinely and would pump it down before it overflowed on to someone's property." SPC at 77-81.

The concerns of the Windham Selectman and of the late Byron W. McCandless proved to be well founded. After operations ceased, water started to rise in the pit at a rate of ten to twenty feet each year. Despite Luzenac's repeated assurances that it would address the potential risks associated with rising water in the mine, there was no evidence that Luzenac took *any* steps to manage the water level in the pit after operations ceased. Luzenac simply stopped pumping. By October 2002, the water level had risen to the very top of the mine, and was still rising. SPC at 59-60.

Condition #8 of the Permit provided that "[t]his permit shall expire on October 15, 2002, unless extended by the District Commission." SPC at 68.

In early October 2002, Linda Matteson, the assistant coordinator of the Commission, contacted Luzenac to determine whether the mine was in compliance with the Permit conditions and reclamation plan. SPC at 54-56.

She spoke to Howard Clay, the environmental and community affairs manager for Luzenac operations in Vermont – the same individual who previously assured the Windham Select Board that the Company would never allow discharges of water on to a neighbor's property. Mr. Clay followed up the conversation with a letter to Ms. Matteson dated October 2, 2002 in which he assured her that the Company "to our knowledge" had complied with all conditions of the original permit. SPC at 72-73.

Mr. Clay did *not* disclose to Ms. Matteson that:

- The Company had failed to construct and maintain the water discharge structures and pond specified in plans approved by the Permit.

- The overall site management plan, which the Company had promised in 1995 to submit at the time of closure, had never been presented to the Commission.
- The Company had stopped all of the pumping necessary to control water levels.
- Water had been rising in the pit at the rate of ten to twenty feet per year since operations stopped.
- The Company had expressly promised both the Select Board of the Town of Windham and the McCandless family that Luzenac would continue pumping to prevent the very type of spillage that was about to occur.
- The pond in the mine was at that very moment lapping at the lip of the mine rim and poised to start discharging on to the McCandless Property. SPC at 54-57; 72-73.

Ms. Matteson testified that if such disclosures had been made, staff would have investigated further to see whether the Commission should extend the term of the permit. In the absence of accurate knowledge about site conditions, the Commission allowed the Permit to expire in October 2002. SPC at 56.

In early 2003, the mine pond started to spill over its northeasterly edge across land of the Reeses on to the McCandless Property. SPC at 61. This discharge had never been proposed by Luzenac nor approved in the Permit. PC at 102-103; SPC at 45.

The McCandless Property has been in the McCandless family for seventy years. It consists of approximately 201 acres of land at 1483 White Road, adjoining the site of the Hamm Mine. The property includes a farmhouse and a large post-and-beam barn. SPC at 58.

The spillage that started in winter of 2003 has continued almost without interruption since then. This nearly continuous spilling of water visibly eroded the McCandless Property on

both sides of White Road. Water flows both under the surface of the ground and above it. In a swath several hundred feet wide, between the mine and White Road, the property is now constantly saturated with water. Cattails are growing in profusion where James McCandless regularly mowed dry fields for more than two decades. These fields were consistently dry until 2003. Now, if Mr. McCandless tries to walk in the spillage area, he sinks down in muck and into open cavities below the surface where native soil has eroded. Many trees have died from the constant flooding, and Mr. McCandless finds fish swimming in fields he formerly mowed. SPC at 59-60; 60-63; 3-5; 6.

In August 2003, White Road suffered serious washouts fed by "extreme" discharges from the Hamm mine pond. SPC at 70; 64-65.

The spillage has created dangerous conditions on White Road during winter. Commencing in 2003, ice has accumulated through the winter months in the ditch on the south side of White Road, and in some winters sheeted over the roadway. Unless the town road crews constantly place sand on the area, the roadway by the McCandless house becomes extremely slippery. The ice also has crossed the road and builds up around the foundation of the barn. SPC at 63-64; 13-14.

Robert Stevens, a Vermont engineer, testified that the nearly continuous, unregulated spillage creates safety risks to the integrity of the mine pond itself. If a portion of the un-armored earth along the spillage area were to give way in a storm, a flood of several feet of water would sweep down across White Road. This would pose a safety risk to any humans in the vicinity at the time, substantially impair the public's investment in the road, and make the road impassable for an extended period. SPC at 13-14; 19.

Mr. Stevens also testified that the area where the water spills from the mine pond now

functions as a spillway on an earthen dam. If viewed in a section diagram, the rim of the mine pond would appear the same as any earthen dam – except that it lacks a properly designed and constructed outlet structure. Soil borings and other site analysis would be necessary to assess whether the transformation of the un-fortified earthen bank at the top of the mine into an ad hoc spillway is reasonably safe -- or whether this de facto spillway poses a substantial or even imminent risk to public safety. SPC at 14. Luzenac and its predecessors never performed any engineering assessment of the area that was functioning as a spillway. PC at 119; SPC at 19.

No finding by the Commission or Permit condition authorized the mine to fill with water and overflow onto adjoining properties. No finding by the Commission or Permit condition ever designated a spillage point in the pond except for the non-existent discharge system specified in the original approved plans. *See* Permit, PC at 310-358; SPC at 67-68; 71.

If the discharge structure and pond system approved by the Permit had been constructed and remained in place, this system could have been used (or readily adapted) by the Permittee to manage water levels in the pond as the waters rose. SPC at 33-34.

Based on this evidence, the McCandless Trust argued that there is Act 250 jurisdiction over the development because (a) the project was not completed in accord with the terms of the Permit, (b) there had been material changes under at least three criteria of Act 250, and (c) and the permittees should be estopped from contesting jurisdiction because Luzenac concealed material facts. SPC at 1-2.

Luzenac, relying on *In re Huntley*, 2004 VT 115, 177 Vt. 596, 865 A.2d 1123, argued that there was no Act 250 jurisdiction as a matter of law because the Permit had expired on its own terms. Luzenac also claimed that because it had filed "as-built" drawings and because District Commission staff apparently visited the site in 1995, the Commission should be

estopped from "assert[ing] a variance in the as-built dimensions and excavations from permits previously issued as a ground for extending jurisdiction beyond the expiration date of the permits." Luzenac's Proposed Findings of Fact, dated December 17, 2007, at 14.

The Environmental Court issued its decision on May 15, 2008. The Court found that the Permit required that the project be constructed in accordance with the plans and exhibits stamped "Approved." Yet Luzenac had failed to construct the approved project. Specifically, the Court found components of the "permanent erosion controls" were omitted. PC at 5-6.

The Court further found that the omitted erosion-control structures had been essential to the District Commission's finding, in originally approving the Permit, that the project would not cause unreasonable soil erosion. PC at 7. The Court also found that no amendment to the Permit had been sought to change the approved erosion control structures, and that the applicant had never brought the omission to the attention of the Commission. *Id.*

The Court then made extensive findings about the actual knowledge of Luzenac's representatives over an extended period of time regarding the potential for water problems to occur at the mine once pumping stopped. PC at 7-8.

The Permit provided that it would "expire on October 15, 2002, unless extended by the District Commission." The Court found that on October 2, 2002, Luzenac wrote to the Assistant Coordinator, representing that the property was in full compliance with the Permit conditions. PC at 8.

The Court further found that:

> 24. Upon cessation of mining activities, the open pit mine filled with water to become a nine acre pond. In 2003, the mine pond began overflowing at its northeastern corner near White Road and onto the McCandless property. The water collecting in the former mine has flowed on a generally continuous basis, with varying degrees of intensity, since at least 2003. The northeast portion of the mine pit edge became an

unanticipated release point for water, which flowed into the ditches along White Road and onto the McCandless property.

25. This overflow caused erosion of the McCandless' property, as well as sedimentation buildup in ditches along and in culverts underneath White Road. An August 2003 rainstorm increased the overflow so that it washed out a portion of White Road onto the McCandless fields…

26. The continuous mine overflow has contributed to a portion of the McCandless' fields becoming saturated and muddy, such that machinery can no longer safely travel over this portion of the McCandless fields.

> (fn. 5) We are not concluding here that the water flowing from the former mine was the sole cause of erosion. Luzenac presented convincing evidence that the most serious erosion damage coincided with a significant rainstorm in August, 2003. But we remain convinced, based upon the evidence presented at trial that the mine water, flowing over an un-planned, not-engineered and non-permitted natural earthen dam contributed to the ongoing water and erosion damage.

27. Wetlands have been established on the McCandless property, due to the increased saturation... Wetland vegetation, such as cattails, have become established that did ·not exist prior to the Hamm Mine filling and overflowing with water. The credible evidence at trial revealed that (a) the fields on the McCandless property were not so saturated prior to the mine overflow; (b) the wetlands appeared after the mine overflow; and (c) the overflow of water from the former mine and over the McCandless fields contributed to the establishment of the wetlands, thereby eliminating the productive use of a portion of the McCandless fields.

28. The Hamm Mine pond's spillage point functions as an unplanned spillway over a natural earthen dam. The capacity of the mine to retain water, and in cases of overflow, to act as a spillway, has not been tested nor certified by any engineer or regulating authority. PC at 9-10.

The Court held that the Hamm Mine property remains subject to Act 250. The Court distinguished *In re Huntley, supra* on the grounds that in this case, unlike *Huntley*, the permittees had conducted development activity on the property that was not authorized by the Permit. PC at 11. Specifically, the Court found that un-permitted sedimentation pond and discharge structures "were above the mine and higher in elevation [than the permitted structures], thereby making them useless in handling the flow of water subsequent to active mining operations." The Court continued:

> The jurisdictional triggers here include both the substitution of the sedimentation ponds and the removal of the discharge structures, thereby leaving the water accumulating in the mine pit without a planned discharge structure. Neither of these development activities obtained permit approval. Thus, Act 250 jurisdiction did not expire with this permit and the mine site's reclamation; it continues to this day and until the important issues of water flow and erosion control are addressed. PC at 12.

The Court declined to hold that constructive knowledge by the District Commission or by its staff estopped the State from asserting jurisdiction. The Court considered the applicability of *In re Appeal of Tekram Partners,* 2005 VT 92, 178 Vt. 628, 883 A.2d 1160. In that case, a town was estopped from asserting that a project was non-compliant after issuance of a certificate of occupancy by the municipal zoning administrator. The Court found that the zoning procedure in *Tekram Partners* was a required certification based on a required inspection, and that the alleged zoning violations were of "the most minor and technical nature." PC at 13, citing *Tekram Partners* at ¶9. In the Hamm Mine case, however, there was no requirement of an inspection. The Court found that "deviations from the approved plans [in the Hamm mine] were more substantial in nature and have contributed to significant water and erosion damage." PC at 14.

Finally, the Court wrote that if estoppel should be applied in this case, it would be against Luzenac based on its failure to take the corrective measures that it repeatedly had promised would be taken. PC 14.

Luzenac filed its appeal on May 13, 2008.

STATEMENT OF THE ISSUE

Did the Environmental Court err when it found that the Hamm mine property remains subject to Act 250 jurisdiction?

STATEMENT OF THE STANDARD OF REVIEW

The trial court's findings will be sustained on appeal unless, viewing the evidence in the light most favorable to the prevailing party, there is no credible evidence to support the findings. *First Congregational Church of Enosburg v. Manley*, 2008 VT 9, ¶7, ___ Vt. ___, 946 A.2d 830.

The conclusion of the trial court must stand if the findings of fact reasonably support it. *In re Cove Irrevocable Trust*, 2006 VT 3, ¶2, 179 Vt. 587, 893 A.2d 344.

ARGUMENT

The Environmental Court did not err when it found that the Hamm mine property remains subject to Act 250 jurisdiction.

C. The Environmental Court did not err when it found that Luzenac (i) failed to construct and operate the Hamm mine in accord with the terms of its Permit, and (ii) undertook unpermitted "development" of its property.

The Environmental Court found that Luzenac failed to construct the approved sedimentation pond and erosion control system specified in the Permit as originally issued, and that no Permit amendment was obtained to authorize these variances. PC at 5-7.

As set forth in detail in the Statement of the Case, the Court's findings incontestably rest on evidence in the record. Indeed, Luzenac does not appear to contest this. Rather the Company argues that its failure to construct the project in accordance with the Permit is unrelated to the ongoing environmental damage caused by pond formed in the mine. Therefore, Luzenac claims these variances are not material and do not support a finding of Act 250 jurisdiction after the Permit expired. *See* Appellants' Brief, at 11-15.

These factual claims by Luzenac are contrary both to the record and to the Court's findings. The Court specifically held that the substitute sedimentation pond and discharge system that Luzenac constructed were at a higher elevation than the authorized system, "thereby making them useless in handling the flow of water subsequent to active mining operations." PC at 11. The Court also found that Luzenac's removal of the authorized discharge structures resulted in "water accumulating in the mine without a planned discharge structure." PC at 12.

These findings are based squarely on testimony by Robert Stevens, a Vermont-licensed engineer. He testified that if the project had been constructed as specified in the Permit, the sedimentation and erosions structures would have been useful for containing the rising water in

the mine after operations ceased. SPC at 33-34.

Accordingly, the Court's findings and the record both support the conclusion that (i) the project had not been completed according to the terms of the Permit, and (ii) this failure to abide by the terms of the Permit was directly related to the on-going environmental damage caused by the spillage.

In related findings, the Court determined that development had occurred on the mine property that was not authorized by the Permit. PC at 12. Specifically, the Court found that the "dangerous" rise in water levels caused by the cessation of pumping and the failure to construct the required sedimentation and erosion control structures were changes to the project that required amendments to the Permit. "Thus, Luzenac… remain[s] obligated by continuing Act 250 jurisdiction that arose as a consequence of the prior non-compliance with the original permit condition." PC at 12.

This holding rests squarely on the terms of the Permit, which required that "the permittees, its assigns and successors in interest are obligated… to complete and maintain the Project only as approved by the District Commission." PC at 12 & 310.

This holding is also based on Act 250 Rule 34[3] (reproduced in Appendix). PC at 12. Rule 34 requires an amendment to an existing Act 250 permit for any "material change" in "development." A "material change" is defined by Act 250 Rule 2(C)(6)(reproduced in Appendix) as "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 and which may result

[3] State of Vermont Natural Resources Board Land Use Panel Act 250 Rules, adopted October 3, 2007. The version of Act 250 Rule 34 in effect in October 2002 does not materially differ with respect to jurisdiction over a "material change" to development permitted under Act 250. *See* Environmental Board Rules 2(P) and 34 effective January 18, 2001. http://www.nrb.state.vt.us/lup/publications/rules/2001rules.pdf

in an impact with respect to any of the criteria specified in 10 V.S.A. Section 6086(a)(1) through (a)(10)."

The Court found that the permitted open-pit mine had been transformed into a nine-acre pond. PC at 9. The pond was spilling on to adjacent property and a town highway, where the surface discharges were causing erosion and damage to culverts and highway ditches. These discharges were also rendering agricultural fields unusable because machinery could no longer operate in them. PC at 9-10. The Permit did not authorize creation of a pond spilling on to adjoining properties and eroding them away. The Court's findings support the conclusion that this unpermitted change in the use of the Property created significant impacts under the Act 250 criteria related to erosion and public investment in highway facilities. 10 V.S.A. § 6086(a)(4)&9(K).

The Court also found that the discharge point from the mine pond was functioning as "an unplanned spillway over a natural earthen dam that had not been tested or certified by any regulatory authority." PC at 10.

This finding is directly rooted in the testimony of Mr. Stevens, the engineering expert for the McCandless Trust. Mr. Stevens described the risks associated with transforming a hillside bank into a dam that holds back nine acres of water upstream from a municipal highway and a residence. If the bank subsides, the downstream properties would be subject to flash flooding and erosion, and pose a risk to public safety. SPC at 14-17; 20. Again, the Court's findings support the conclusion that this unpermitted change in the project would create significant impacts under the Act 250 criteria related to erosion and public investment in highway facilities. 10 V.S.A. § 6086(a)(4)&9(K).

Luzenac nonetheless argues that the mine property is no longer subject to Act 250

jurisdiction because spillage did not first occur until after the Permit expired, and because Luzenac fully complied with the terms of its reclamation plan. Therefore, Luzenac concludes that property falls within the scope of this Court's decision in *In re Huntley, supra.* Appellants' Brief, at 17-19.

This argument is not supported by the Court's findings or by the record, and is inconsistent with the Court's ruling in *In re Huntley.*

First, the Court found that before the Permit expired the rising waters had reached a "dangerous height;" and that Luzenac was well aware of that fact, failed to take necessary corrective measures, and failed to disclose those facts to the District Environmental Coordinator when expressly questioned about conditions at the mine property. PC at 12. That is, the conditions creating the risk of the damage existed on the property before the Permit expired, even if the damage to adjoining properties did not actually occur until shortly after expiration.

Second, the Company's argument rests on the claim that the final reclamation plan for the mine was approved in Permit amendment 2W0551-2. Appellants' Brief at 17, *citing to* PC at 356-357. That Permit Amendment specifically addressed disposal of mining overburden, not water management or any other site reclamation issues. Appendix to PC, Exhibit Z. At the time Luzenac filed the application for this Permit amendment, it expressly represented to the Commission that an overall reclamation plan would later be filed when the mine ceased operations. SPC at 69; 47-48. There is no record that any such overall site reclamation plan was ever filed. So Luzenac's factual assertion that it fully complied with a final reclamation plan directly contradicts by its own representations to the Commission. Certainly, the Environmental Court did not find that the Company either proposed or complied with a final reclamation plan.

Third, the Company's argument ignores the Court's findings that the mine property had

been developed in a materially different manner than authorized by the Permit.

In *In Re Huntley*, *supra* at ¶1, this Court held that when an Act 250 permit expires for a mineral extraction project, "the land is no longer subject to Act 250 jurisdiction *absent some activity to trigger the statute's application*" (emphasis supplied).[4]

10 V.S.A. § 6081 specifies that "no person shall commence development without a permit." Luzenac commenced development on the Hamm mine property beyond the authorized scope of its Permit. The Company constructed a sedimentation pond and discharge structures in locations that made them useless for managing water levels after active pumping ceased. The Company created of a nine-acre pond that discharged surface water on to adjoining properties over a risky de facto spillway that was never subjected to engineering analysis. Those uncontrolled discharges created risks to public safety, damaged a public road, and eroded agricultural fields. These are among the activities found by the Court to have triggered Act 250 jurisdiction over the Hamm mine property.

D. The Environmental Court did not err when it rejected Luzenac's claim that material changes in its development should be deemed approved.

Luzenac acknowledges that the sedimentation pond and discharge structures specified by the Permit were altered without express review and approval by the District Commission. Luzenac argues that these changes should be deemed approved because (i) Luzenac filed "as-built" plans which showed the changes; and (ii) District Commission staff visiting the Hamm mine property might have observed the changes. Appellants' Brief at 21-25.

Luzenac relies on *In re Tekram Partners*, 2005 VT 92, 178 Vt. 628, 883 A.2d 1160, in

[4] Mineral extraction permits, unlike most Act 250 permits, are granted for a specified period pursuant 10 V.S.A. § 6090(b)(1).

arguing that "Act 250 is now barred and precluded from looking back and saying that these actions constitute ongoing development activities." Appellants' Brief at 24.

In *Tekram,* this Court applied the statutory "exclusivity of remedy" provision applicable to zoning proceedings, 24 V.S.A. § 4472(a). This Court held that the zoning statute barred a municipality from belatedly contesting express determinations made by its zoning administrator in issuing a certificate of occupancy. The Hamm mine dispute does not arise under municipal zoning, so that the statute is not applicable. Beyond that, it would be inequitable on this record to apply any species of judicially fashioned estoppel that might have the effect of approving "development" never applied for nor reviewed under Act 250.

Luzenac's claims involve the rights of third parties – the McCandless Trust and the Town of Windham. There is nothing in the record to suggest that representatives of these entities should be constructively charged with the knowledge of individual Commission staff members, or with receiving as-built drawings. Yet the McCandless Trust's property and the Town's road are being damaged and put at risk by the unpermitted development on the Hamm mine property. The McCandless Trust and the Town of Windham had no notice or opportunity to be heard with respect to the offending changes in development on the Hamm mine property.

Statutory requirements and administrative rules specify the procedures for amending Act 250 permits. 10 V.S.A. § 6083 (requirements for applications); 10 V.S.A. § 6084 (notice requirements for applications); 10 V.S.A. § 6085 (hearings and rights of parties); Act 250 Rules 10 & 12 (procedures for applications and service requirements). These carefully prescribe express notice requirements and assure an opportunity for parties to be heard.

Luzenac argues, in effect, that these statutory and administrative requirements should be deemed optional in cases when a District Commission staff member might have personal

knowledge of changes in a development, or when such changes might be discovered by someone who travels to the district office and searches the files. There is no accepted principle of public policy or equitable estoppel that would support scrapping statutory and regulatory requirements on such vague grounds, and Luzenac cites none.

Rather the Environmental Court found that principles of equitable estoppel incorporated in *Greenmoss Builders, Inc. v. King*, 155 Vt. 1, 580 A.2d 971 (1990) and in *Gravel and Shea v. White Current Corp.*, 170 Vt. 628, 752 A.2d 19 (2000) "suggest[] the opposite result" from Luzenac's claim:

> [I]t was Luzenac that made assurances to Mr. McCandless, the Windham Selectboard and the District Coordinator that they would monitor the water level at the mine and would disclose and take corrective measures if the water level became a concern… And yet, when Luzenac sold the property to the Reeses, Luzenac had taken no corrective measures or even made disclosure… PC at 12.

Finally, Luzenac requests that the Court strike certain findings made by the Environmental Court because "of their propensity to cause legal mischief." Appellants' Brief at 25. Luzenac does not argue that these offending findings are unsupported by the record. Rather Luzenac expresses concern that certain findings might "have a legal impact elsewhere if allowed to stand." Appellants' Brief at 26.

No case is cited for the remarkable proposition that this Court should scissor out trial court findings supported by the record because they are inconvenient. Luzenac might well be embarrassed by the record of broken promises, misrepresentations and knowing silences documented by the Environmental Court. But Luzenac argued below and argues here that principles of estoppel preclude the assertion of Act 250 jurisdiction. The Environmental Court quite properly examined Luzenac's own conduct in considering this claim. There is no basis for trimming out findings that support its decision respecting Luzenac's estoppel claim.

Conclusion

The decision of the Vermont Environmental Court should be affirmed.

Dated: November 19, 2008

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Appendix

STATE OF VERMONT
NATURAL RESOURCES BOARD
Land Use Panel
ACT 250 RULES

Rule 2(C) Definitions.

(6) *"Material change"* means 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 and which may result in an impact with respect to any of the criteria specified in 10 V.S.A. Section 6086(a)(1) through (a)(10).

Rule 34(A)

Material change to a permitted development or subdivision. An amendment shall be required for any material change to a permitted development or subdivision, or any administrative change in the terms and conditions of a land use permit. Applications for amendments shall be on forms provided by the land use panel of the board, and shall be filed with the district commission having jurisdiction over the project. Upon request, the district coordinator will expeditiously review a proposed change and determine whether it would constitute a material change to the project, or whether it involves administrative changes that may be subject to simplified review procedures pursuant to 10 V.S.A. Section 6025(b)(1). Continuing jurisdiction over all development and subdivision permits is vested in the district commissions.

Certificate of Compliance

Pursuant to V.R.A.P. 32(a)(7)(C), I hereby certify that the foregoing brief contains _____ words, excluding statement of issues, table of contents, table of authorities, signature blocks, certificate of compliance and appendix, as counted by Microsoft Word 2007.

Dated: November 19, 2008

_____
Robert E. Woolmington, Esq.