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April 9, 2004

Mr. Collis Adams
Administrator, Wetlands Bureau
New Hampshire Department of Environmental Services
6 Hazen Drive
Concord, New Hampshire

**Re: Legal Standing to Submit Dredge and Fill Permit Application
Application No. 2004-00377**

Dear Mr. Adams:

I write on behalf of members of a citizens' group called Focus:Tamworth regarding the Standard Dredge and Fill Permit Application (file No. 2004-00377) filed on March 5, 2004 by Motorsports Holding, LLC ("MSH"), to explore whether MSH satisfies the definition of "applicant" under the Department's rules. Based on the application MSH has filed, it appears that it does not.

Under the Department's rules, an "applicant" is defined as "any person with a property interest in the land on which the project is to be located sufficient for the applicant to legally proceed with the project...." See New Hampshire Wetland Rules Wt. 101.04. While permits issued by the Department generally contain a condition that they are not effective until other legal requirements for the project are met, the rules as written do require that an applicant obtain a property interest in the land *before* submitting an application¹. This requirement makes a great deal of sense because if an applicant who has no legal right to construct the project on the property obtains a permit and is subsequently unable to acquire the property rights, the project would have to be reconfigured, relocated, or possibly abandoned. In the case of substantial reconfiguration or relocation, the applicant would likely need to begin the permit process again or, at the least, apply for a permit amendment. The result would be a great deal of wasted time and expense for the Department, the applicant, and all parties involved.

¹ A 1987 Opinion of the Office of NH Attorney General also indicates that the definition of "applicant" should be followed. In Opinion #87-86, the AGO stated "Granite State Minerals, Inc. [the applicant] cannot satisfy a threshold requirement for consideration of a permit application by the Board – that a permit applicant possess a recognizable property interest in the project site." Id. at p.2. At that time, the rule defined an applicant as a "...person owning land on which the project is to occur, or, if not the owner,...[a] person having financial interest who assumes responsibility for such activity." Wt 101.10 (1987). While the rule as currently written is slightly different, it still requires the equivalent of "a recognizable property interest in the project site" and thus this opinion is instructive.

MSH has stated in its application that it does not have a property interest in all of the land on which the project is to be constructed. In Section 2.1 of the application, "Overview of the Site," MSH states that:

The Site is located on the south side of Route 25 in Tamworth, New Hampshire and covers an area of approximately 251 acres. ...It should be noted that out of the 251-acre Site, the Applicant owns approximately 242 acres... As part of the purchase agreement for Parcel 28 (the Davis property), an approximately 16-acre area of land immediately adjacent to Route 25 was subdivided and retained by Mr. Davis, as there is an existing business (lakes Region Fire Apparatus) on this parcel. *Out of those 16 acres, the Applicant is finalizing a lease agreement to utilize approximately 9 acres for the Project and the remaining 7 acres remain under the complete control of Mr. Davis. In conclusion, the 242 acres owned by Motorsports and the additional 9 acres to be leased from Mr. Davis comprises the Site (251 acres) as presented in this Joint Application. (emphasis added).*

As the Project is configured in the application, it cannot be constructed without the additional 9 acres of land. MSH has no property right to these 9 acres. The *intent* to lease this property is not sufficient legal authority to proceed, even if that legal intent were evidenced by some legally binding document between MSH and Mr. Davis (which does not appear to be the case).

Furthermore, Mr. Davis cannot legally lease the property to MSH until he obtains subdivision approval from the Tamworth Planning Board. Under Tamworth Subdivision Regulations, a "subdivision" includes the division of a lot for the purpose of a lease. Subdivision Regulations of Tamworth, NH, Section III(V)². Therefore, until Mr. Davis and MSH complete the entire subdivision process, including an application to the Planning Board, a public hearing, and any appeals, MSH can have no legal right to proceed with respect to those 9 acres. It is my understanding that no subdivision application has been filed.

Accordingly, since MSH does not have a property right sufficient to legally proceed with the project for which it has applied, it cannot be a proper "applicant" for a Dredge and Fill Permit under the Department's rules. If subdivision approval is not granted for any reason, the project would require substantial revisions, if it could be constructed at all, resulting in significant modification to the wetlands application. It is therefore inappropriate for the Department, the Army Corps of Engineers, and the Town of Tamworth to spend considerable time, effort and money to evaluate the wetlands application based on a project that may never materialize if MSH cannot obtain the necessary right to use all of the necessary land. Only after MSH has obtained subdivision approval of, and executed a long-term lease for, the 9 acres owned by Mr. Davis, will MSH qualify as an "applicant" under the Department's rules.

² It is worth noting here that the Tamworth definition of "subdivision" is identical to that in NH RSA 672:14, and is intended to prevent the avoidance of the application of subdivision regulations by leasing, rather than selling, the divided lot.

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I look forward to your response regarding this matter.

Very truly yours,

Sherilyn Burnett Young

cc: Attorney Mark Harbaugh, NHDES
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