NATURAL RESOURCES BOARD
District 5 Environmental Commission
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RE: Jurisdictional Opinion 5-38
Northeast Materials Group and Rock of Ages Corporation
Rock Crushing Operation/Smith Quarry/Graniteville

Dear Attorney Tisher:

This letter constitutes a jurisdictional opinion, pursuant to Act 250 Rule 3 in response to your August 30, 2017 letter on behalf of Requestors Louise and Ronald Gagne, Brandy Ofciarcik-Perez, Suzanne and Padraic Smith, and Nancy and Scott Wagner, as to whether Northeast Materials Group's (NEMG) rock crushing operation near the Smith Quarry on the Rock of Ages (ROA) tract in Graniteville constitutes a substantial change to a preexisting development pursuant to Act 250 Rule 2(C)(7), and thus requires an Act 250 permit. This opinion is based on facts contained in two Vermont Supreme Court (Court) decisions: In re Northeast Materials Group, LLC, 2015 VT 79, 127 A.3d 926 (NEMG I); In re North East Materials Group, LLC, 2016 VT 87, 141 A.3d 766 (NEMG II); your August 30, 2017 letter; and an April 10, 2017 letter from Neighbors for Healthy Communities (Neighbors).

FACTS

1. NEMG operates a rock quarry on the ROA tract, which is comprised of approximately 1170 acres located in the towns of Barre and Williamstown.

2. NEMG commenced a rock crushing operation at Adam Quarry in 2012. Neighbors filed a request for a Jurisdictional Opinion as to whether the rock crushing operation required an Act 250 permit. The jurisdictional opinion was appealed to the Environmental Division and then to the Vermont Supreme Court.

3. The Court issued an opinion on July 17, 2015 (NEMG I) in which the Court remanded the case to the Environmental Division for further findings. Neighbors appealed the Environmental Division's decision on remand.

4. The Court issued a second opinion on August 12, 2016 (NEMG II) reversing the decision of the Environmental Division and holding that the crushing operation at Adam quarry is a substantial change to the preexisting ROA quarry and directed NEMG to submit an Act 250 application and obtain an Act 250 permit to continue its rock crushing activities.

5. NEMG filed Land Use Permit Application 5W0966-7 on September 30, 2016. The District Commission denied the application on June 14, 2017 under Criterion 1 (Air Pollution) and Criterion 8 (Noise).

6. On April 10, 2017, Neighbors filed a letter with the district coordinator advising that NEMG had commenced a rock crushing operation near the Smith Quarry in Graniteville. Smith quarry is located north of Graniteville Road, approximately 0.8 miles from Adam quarry. The closest residence is located 2200 feet from the Smith Quarry crushing operation.

ISSUE

1. Whether a rock crushing operation near Smith Quarry constitutes a substantial change, pursuant to Act 250 Rule 2(C)(7) and thus requires an Act 250 permit, consistent with Act 250 Rule 34(B).

Substantial Change

Act 250 Rule 2(C)(7) defines substantial change as:

> Any cognizable change to a pre-existing development or subdivision which may result in significant adverse impact with respect to any of the criteria specified in 10 V.S.A Section 6086(a)(1) through (a)(10).

10 V.S.A. § 6081(b) and Act 250 Rule 2(C) (8) define “preexisting development” as

> any development in existence on June 1, 1970.

Act 250 Rule 34(B) sates:

> A substantial change to a pre-existing development shall be subject to a new application process including the notice and hearing provisions of 10 V.S.A. §§ 6083, 6083(a), 6084 and 6085 and the related provisions of these rules.

The Rock of Ages quarry has been in existence since the 19th century; therefore, the quarry meets the statutory definition of a pre-existing development and is exempt from Act 250 jurisdiction-unless

there is a substantial change to the quarry operation. To determine whether a substantial change has occurred, the Court applied the former Environmental Board's (Board) two-pronged substantial change test, wherein it must first be determined whether a cognizable change would result. If so, it must then be determined whether the change has the potential for significant adverse impacts under any of the Act 250 criteria. (NEMG II @4)

In applying the first prong of the analysis, the Court rejected the Environmental Division's view that the entire ROA tract was an "undifferentiated whole" for purposes of determining whether there has been a substantial change, holding that "Our conclusion is that some level of granularity (rather than a uniform 'tract-wide' approach) is required in assessing substantial change in connection with quarrying operations….[such that] pre-1970 crushing operations on one or more parts of a large tract cannot simply be imputed to all parts of that tract for purposes of substantial change analysis without regard to relative impacts of the pre-and post- 1970 operations in the vicinity of the proposed change." (NEMG II) @8.

The Court also rejected the Environmental Division's rationale that evidence of previous crushing operations on the ROA tract is sufficient to demonstrate that rock crushing is a preexisting, thus exempt, activity. The Court explained that the grandfathered exemption is to be read narrowly, and "is limited when the proposed development potentially impacts the statutory criteria." (NEMG I @18). The Court held: "If the operations entail a physical change accompanied by a significant potential impact, they are unlikely to be properly considered to be within the scope of the preexisting development." (NEMG I @19).

The Court further explained: "We cannot agree that instances of crushing operations decades ago and miles away from the site of NEMG's present operations can be viewed as establishing some sort of baseline defeating any claim that NEMG's present operations constitute a cognizable change. The Environmental Division's rationale would take us back to the view that the location of development on the ROA tract is generally irrelevant, a view we explicitly rejected." (NEMG II at 17).

Clearly the Court held that there is no pre-existing, or exempt, rock crushing operation on the ROA tract. Therefore, any crushing operation on the ROA tract, such as near Smith Quarry, is subject to a substantial change analysis. As evidenced by the Court's findings of fact, crushing operations at Smith Quarry occurred in 2005, and from 2010-2012. The record demonstrates that crushing has been intermittent, with lapses of up to five years between activity to over two decades. Therefore, it is concluded that the commencement of a crushing operation near Smith Quarry in 2017, five years after the most recent activity, constitutes a cognizable change and satisfies the first prong of the substantial change analysis.

The Court also took issue with fact that the Environmental Division ignored the second prong of the substantial change analysis**.** The Court held that to "cut off the substantial change analysis at the

cognizable change step, which would in turn disregard the actual change in the impact of proposed development at a site just because similar development had already taken place within the tract, is inconsistent with Act 250's focus on discerning the impact of proposed development." (NEMG II @17)

The Court noted that "for Act 250 purposes the location of a particular activity or operation within a tract is often inextricably connected to its impact. For this reason, when reviewing Act 250 permit applications, the district environmental commissions routinely engage in impact analysis that is location specific and evaluates the impacts on particular neighbors or households." (NEMG I @ 27**)**

The Court found it "almost inconceivable that dimension stone quarry with neighbors nearby could obtain an open-ended permit to install a crusher at any location on its property that it choses, with no requirement to mitigate its impact on neighboring landowners. Given that, a legal framework that treats crushing operations is one location as establishing a grandfathered right to crushing operations in any location on the tract is incongruous." (NEMG I @ 28).

The Court's holding is consistent with the precedent established by the Board, which found that changes in crushing operations have the potential for significant impacts on air, aesthetics, traffic, and other Act 250 criteria. (*Re: John Gross Sand and Gravel, Declaratory Ruling* #280, Findings of Fact, Conclusions of Law, and Order (7/28/93)). In such cases, the Board considered whether the activity at a particular site had intensified or if there had been any qualitive changes in the activity at the site, as compared to historical activity. (*Re: Robert and Roberta Barlow*, Declaratory Ruling #234, Findings of Fact, Conclusions of Law, and Order (9/20/91); aff'd, *In re Barlow*, 160 Vt. 513 (1993)

The Court explained that "We are looking here for only potential significant impacts under the relevant criteria. We conclude that the likely effect of noise and clouds of rock dust on the sensibilities of the average person is significant enough to reach the potential impact as a matter of law and that the second prong of the substantial change test has been met." (NEMG II @ 20)

Thus, the Court concluded that the rock crushing operation in Adam Quarry constituted a substantial change and required an Act 250 permit.

The introduction in 2017 of a crushing operation near Smith Quarry is a cognizable change that has the potential to result in neighboring landowners experiencing significant adverse noise, dust, and traffic impacts, similar to the impacts found by the Court as likely to result from the crushing activity at the nearby Adam Quarry. The location of a crushing operation is often inextricably linked to its impact. The crushing operation near Smith Quarry is located within 2200 feet of the closest residence. Consistent with the Court's holding, as it is determined that it is inconceivable to site a crusher at any location on a tract with no requirement to mitigate its impacts on adjacent landowners,

it is concluded that the crushing operation near Smith Quarry has the potential for significant adverse impacts, and the second prong of the substantial change analysis is met.

Based on the foregoing, it is concluded that the rock crushing operation near Smith Quarry constitutes a substantial change, pursuant to Act 250 Rule 2(C)(7), and an Act 250 permit was and is required, consistent with Act 250 Rule 34(B).

Sincerely.

Susan Baird

Susan Baird, District Coordinator

cc: Certificate of Service

This is a jurisdictional opinion issued pursuant to 10 V.S.A. § 6007(c) and Act 250 Rule 3(B). Reconsideration requests are governed by Act 250 Rule 3(B) and should be directed to the district coordinator at the above address. As of May 31, 2016, with the passage of Senate Bill 123 (Act number pending), Act 250 Rule 3(C) (Reconsideration by the Board) is no longer in effect. Instead, any appeal of this decision must be filed with the Superior Court, Environmental Division (32 Cherry Street, 2nd Floor, Ste. 303, Burlington, VT 05401) 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 (VRECP). The appellant must file with the Notice of Appeal the entry fee required by 32 V.S.A. § 1431 and the 5% surcharge required by 32 V.S.A. § 1434a(a), which is $262.50. The appellant also must serve a copy of the Notice of Appeal on the Natural Resources Board, National Life Records Center Building, Montpelier, VT 05620-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings.

CERTIFICATE OF SERVICE

I hereby certify that I sent a copy of the foregoing **JURISDICTIONAL OPINION 5-38 (ENVIRONMENTAL & NATURAL RESOURCES LAW CLINIC)** by U.S. Mail, postage prepaid, on this 1st day of December, 2017, to the individuals without email addresses and by electronic mail, to the following with email addresses:
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 email below. If you have elected to receive notices and other documents by email, it is your responsibility to notify our office of any email address changes.

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BY */s/ Lori Grenier*
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