IN THE SUPREME COURT OF THE STATE OF VERMONT

No. 2014-190

IN RE: NORTHEAST MATERIALS GROUP LLC ACT 250 JO #5-21

On Appeal from a Judgment of the
Vermont Superior Court – Environmental Division
Docket No. 143-10-12 Vtec

BRIEF OF THE APPELLANTS
RUSSELL AUSTIN, PAMELA AUSTIN, JULIE BARRE,
MARC BERNIER, ET AL.
(COLLECTIVELY, NEIGHBORS FOR HEALTHY COMMUNITIES)

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INTRODUCTION

The Superior Court, Environmental Division ("Environmental Court") held that Rock of Ages ("ROA") has a general grandfathering exemption to Act 250 permitting for rock crushing operations that occur anywhere on ROA's 1,100-acre quarry tract. P.C. at 10 (holding that "intermittent crushing operations at various locations within ROA" are part of ROA's pre-existing stone quarry development); *see also id.* at 17 (holding that "intermittent and portable crushing activities" are pre-existing development). The Environmental Court also concluded that the long periods of no rock crushing at distinct sites on this tract did not demonstrate abandonment. *Id.* at 12 (holding that pre-existing development of quarry that included "intermittent rock crushing" occurring "at various locations" had not been abandoned). Last, the Environmental Court concluded that NEMG's rock crushing operations are not a "cognizable change" because the pre-existing granite quarry included "intermittent and portable rock crushing activities." *Id.* at 15.

These holdings, grounded in the premise that "the location of crushing will vary over time," *id.* at 15, reflect two fundamental errors. First, they contradict the text of Act 250, its purposes, and the consistent precedent under the "grandfathering" and "substantial change" provisions of the Act, all of which indicate that the location of the operations matter. The law does not recognize exemptions for operations that might occur anywhere on ROA's 1,100-acre tract, without regard to the specific locations of operations that existed prior to 1970 or what impacts post-1970 operational locations might have on neighboring properties. Second, even if such a blanket exemption could exist under Act 250, the limited evidence presented by the Appellees did not sustain the Appellees' burden of proof for such a broad and unlimited exemption from the Act.

STATEMENT OF THE CASE

On May 3, 2012, Appellants Neighbors for Healthy Communities ("Neighbors") requested a Jurisdictional Opinion ("JO") from the District 5 Environmental Coordinator concerning the application of Act 250 to the rock crushing operations of Appellee Northeast Materials Group, LLC ("NEMG") located on the quarry tract of Appellee ROA. On May 16, 2012, the Coordinator issued JO No. 5-21, stating that an Act 250 permit is not required for these rock crushing operations. On September 28, 2012, the Coordinator issued a response to Neighbors' Motion for Reconsideration, again stating that the rock crushing operations are exempt from Act 250 permitting.

Neighbors appealed the JO to the Environmental Court. *N.E. Materials Grp., LLC Act 250 JO #5-21*, No. 143-10-12 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. Div. Apr. 28, 2014) (Walsh, J.); P.C. at 1. On April 28, 2014, that court held that NEMG's rock crushing operations are a pre-existing development within the meaning of 10 V.S.A. § 6081(b) and Act 250 Rule 2(C)(8), and that these operations are not a substantial change to the pre-existing development within the meaning of 10 V.S.A. § 6081(b) and Act 250 Rule 34(B). P.C. at 9–10, 14–15, 17. Neighbors appeal to this Court.

STATEMENT OF THE FACTS

A. The Parties.

Neighbors are thirteen Vermont citizens living adjacent to the ROA quarry who suffer dust, noise, and traffic impacts from Appellees' rock crushing operations. *Id.* at 1. The nearest residence is only 1,780 feet—one third of a mile—from the rock crushers, and most Neighbors live within half a mile of the crushers. *Id.* at 27. Neighbors had lived adjacent to the ROA quarry for several decades without experiencing the effects of rock crushing operations until NEMG began crushing in 2010. Tr. vol. 2, 5, 14, 33, 49.

Appellee NEMG conducts rock crushing operations on land leased from Appellee ROA. P.C. at 1.

B. The Geography.

The ROA tract is 1,100 acres, including 830 acres in Graniteville. Tr. vol. 1, 35. Pursuant to this litigation, the Appellees identified four sites, numbered 1 through 4, where past rock crushing allegedly has occurred. P.C. at 25. Only sites 2, 3, and 4 are located on the ROA tract. *Id.*; Tr. vol. 1, 88.

Site 1 is located north of Websterville Road. P.C. at 25. Site 1 is not now and never has been owned by ROA. Tr. vol. 1, 88. Instead, it has been owned by various other companies, including Wells-Lamson and Pike. *Id.* Nonetheless, much of the evidence of past rock crushing presented by the Appellees concerned this site and its distinct tract, as did many of the Environmental Court's Findings of Fact. P.C. at 5–6.

Site 2 is located just south of Websterville Road. *Id.* at 25. Site 3 is located roughly in the center of the ROA tract. *Id.* Site 4, NEMG's site, is located south of Graniteville Road. *Id.*

Site 4 is separated from the rest of the ROA tract by a public highway, Graniteville Road. *Id.* Site 4 is approximately 1.6 miles from Site 2 and approximately 0.8 miles from Site 3. *Id.* at 27; Tr. vol. 2, 45. Neighbors live on or in the vicinity of Graniteville Road. P.C. at 26.

C. The Appellees' Pre-1970s Evidence Of Rock Crushing On The ROA Tract.

1. Evidence From 1900–1970.

Reports from the early 1900s suggest that J. M. Boutwell operated a rock crusher at one of his quarries in Barre. *Id.* at 46, 50, 56. These reports do not indicate where the crusher was located or how much rock was crushed. *Id.*

The Appellees also presented a circa 1912 photograph that depicts the Boutwell quarry. *Id.* at 59; Tr. vol. 1, 46–47. Donald Murray, Chief Engineer for ROA, testified that the photograph was taken near the current NEMG crushing site, and that a building in the photograph appeared to be a screening house, which "led [him] to believe there was a crusher" at the site. Tr. vol. 1, 47. The Appellees also presented an undated photograph in a book, which Murray described as depicting a rock crusher on this site. P.C. at 65; *Id.* at 49–50. The Appellees presented no further evidence concerning this alleged crushing operation.

Next, the Appellees presented a site plan from 1926 that illustrates a "crusher siding" at Site 2. P.C. at 61; Tr. vol. 1, 40, 42. Additional site plans from 1946–1948 show a "crusher house" at that same location. P.C. at 62–64; Tr. vol. 1, 41–44. An undated photograph depicts a building that Murray believed was the same crusher house labeled on the 1940s plans. P.C. at 60; Tr. vol. 1, 51. Murray testified that this crusher house no longer exists. Tr. vol. 1, 90, 93. Murray further testified that whatever crushing occurred on Site 2 ended "right in" the period of 1959, and that there was no evidence of any crushing at Site 2 in the last 50 years. *Id.* at 89–90.

Duncan McKay, a former Wells-Lamson employee, testified that a "chicken grit factory" operated at Site 2 when he began working there in 1957. *Id.* at 106–07. When asked if there was a crusher on this site, McKay said "no," and testified that the crusher was located north of Websterville Road, on Site 1. *Id.* at 107, 111. McKay's best recollection was that this "chicken grit" facility at Site 2 operated for two to four years after he began work, consistent with Murray's testimony that it ceased in the 1959 period. *Id.* at 108.

The Appellees also presented two historical publications stating that, in 1957, Wells-Lamson constructed a "mammoth" rock crusher that had a capacity to produce 1,000 tons of crushed rock per day. P.C. at 74, 75. These publications do not state where the crusher was

located or provide any rates of actual crushing. However, consistent with McKay's testimony, Murray testified that this Wells-Lamson crusher was located on Site 1. Tr. vol. 1, 84.

The Appellees also presented a third historical text, stating that, in 1959, a rock crusher was used to provide sub-base material for Interstate 89, and that "[u]ntold hundreds of carloads of crushed granite were brought down from the Quarry District." P.C. at 71. This text does not state where this crusher was located. Murray testified that the photograph accompanying this text was from Site 2; McKay testified that only a "chicken grit" facility was operating on Site 2 at that time, and that the rock crusher was on Site 1. Tr. vol. 1, 107, 111. Consistent with McKay's testimony, the Wells-Lamson crusher depicted in Exhibits O and P was located on Site 1, *id.* at 84, and these Exhibits describe this large crusher as "in a position to supply the needs of Vermont's vast new road building program." P.C. at 75.

The Appellees' final evidence concerning alleged pre-1970 rock crushing activity was a contract dated August 25, 1969, between Kelley Construction and ROA, and an invoice dated September 29, 1969, from Kelley Construction to ROA. *Id.* at 81–83; Tr. vol. 1, 63–65. The contract states that Kelley would remove waste material from ROA at Site 3 at a charge of $2.15 per cubic yard removed, and that if any rock were crushed, Kelley would credit back to ROA 33 cents per cubic yard of crushed rock. P.C. at 81; Tr. vol. 1, 91. The invoice submitted pursuant to this contract reflects multiple charges for material removed, but no credit for rock that was crushed. P.C. at 83. Murray testified that the invoice contained no evidence that any crushing actually occurred. Tr. vol. 1 at 91–92.

2. Summary Of The Appellees' Evidence.

a. Site 2.

The Appellees presented a map showing a "crusher siding" at Site 2 in 1926, and maps and a photograph of a "crusher house" in the 1940s and 1950s. P.C. at 60–64. The Appellees presented evidence that a "chicken grit" facility was operating on Site 2 in 1957, but that this facility ceased operations around 1960. Tr. vol. 1, 89–90, 108. The crusher house no longer exists, and there is no evidence that any rock crushing has occurred on Site 2 in the last 50 years. *Id.* at 40–41, 89–90, 106–08.

b. Site 3.

The only evidence the Appellees presented concerning alleged pre-1970 rock crushing on Site 3 consisted of Exhibits R and S, the Kelley Construction contract and invoice from 1969. P.C. at 81–83; *Id.* at 63–65. These documents contain no evidence that any rock crushing actually occurred. Tr. vol. 1, 91–92.

c. Site 4.

The Appellees presented texts describing rock crushing on the Boutwell quarry in the early 1900s. P.C. at 46, 50, 56. They also presented two photographs, including one from the early 1900s, that suggest a crusher may have been present at the Boutwell quarry, which Murray identified as near Site 4. *Id.* at 59, 67; Tr. vol. 1, 47–50. There was no evidence of any rock crushing occurring at Site 4 since the 1920s.

d. Crushing Scope, Or Rates.

The Appellees presented no evidence of actual crushing rates or volumes from any alleged crushing operations prior to 1970 on the ROA tract. P.C. at 4–5. None of the evidence

Appellees presented from the 1900s through the 1950s contained any actual crushing rates. *Id.* at 46–64.

The only evidence that could link to pre-1970 crushing rates or volumes was (1) a reference to a crusher providing base material for Interstate 89, *id.* at 68; (2) a reference to hundreds of carloads of crushed granite coming from the "Quarry District" for use in Interstate 89, *id.* at 71; and (3) two articles describing the opening of the Wells-Lamson crusher on Site 1, which had a capacity of 1,000 tons per day. *Id.* at 74, 75; Tr. vol. 1, 84.

3. The Appellees' Post-1970s Evidence Of Rock Crushing.

The Appellee's next evidence of rock crushing occurred at Site 1 in 1988, nearly two decades after the passage of Act 250. P.C. at 5–7. The Appellees presented numerous exhibits related to rock crushing at various sites post-1970. *Id.* at 84–87, 91–93, 99, 101–02.

D. <u>The Appellees' Evidence Of Rock Crushing On Site 1.</u>

Much of the Appellees' evidence was related to rock crushing that occurred on Site 1, which ROA does not own, and never has owned. *Id.* at 74–75, 84–87, 92–93, 99; Tr. vol. 1, 84–86, 88. The "mammoth" rock crusher constructed in 1957 by Wells-Lamson operated on Site 1. P.C. at 74–75; Tr. vol. 1, 84, 107, 111. The Appellees also presented evidence of rock crushing operations at Site 1 from the 1970s through the early 2000s, which accounts for a majority of the post-1970 crushing. P.C. at 84–87, 92–93, 99.

E. <u>The Evidence That Rock Crushing Is Not Integral To ROA's Quarrying.</u>

The ROA quarry produces dimension stone, which is sold in large blocks or manufactured into memorial or architectural stone. Tr. vol. 1, 55. A dimension stone quarry is distinguishable from "an aggregate quarry which is just producing basically shard rock and

crushed stone." *Id.* Piles of waste rock, called grout, fill the ROA site, and some grout piles have existed for decades. *Id.* at 75.

Murray testified that ROA receives 100% of its revenue from dimension stone. *Id.* at 102. Thus, ROA derives only a "very small fraction of a percent" of its revenue from rock crushing. *Id.* When pressed, Murray testified that rock crushing was neither integral nor necessary to ROA, but merely was "desirable." *Id.* at 103. Harry Hart, an owner of NEMG, testified that rock crushing does not occur at every dimension stone quarry. *Id.* at 139.

ROA never has operated any of its own rock crushers. *Id.* at 97–98. Sporadic crushing has occurred only when ROA could find a willing subcontractor to run the crushing operations. *Id.* at 98, 101. The current subcontractor, NEMG, crushes rock based on its own business and financial needs, rather than the needs of ROA. *Id.* at 134.

F. NEMG's Rock Crushing Operations.

Since NEMG began crushing at Site 4 in 2010, it has crushed 324,808[1] tons of rock: 20,285 tons in 2010; 155,577 tons in 2011; 89,667 tons in 2012; and 59,279 tons in 2013. P.C. at 103. NEMG claimed that the spike in crushing in 2011 was due to road repair from Tropical Storm Irene, but only about 50,000 tons of the 155,577 crushed in 2011 is accountable to Irene repair. *Id.* NEMG crushed almost 90,000 tons in 2011 before Irene ever occurred—a large spike from the 20,000 tons crushed in 2010. *Id.*

NEMG's operations consist of a primary jaw crusher, secondary jaw crusher, and tertiary cone crusher. Tr. vol. 1, 115–17. The primary jaw crusher traps the boulder between several rotating steel mandibles, which crack the boulder into smaller pieces with each consecutive

[1] Although Exhibit CC states a total of 231,964 for all years, the actual total reached when adding all the columns is 324,808 tons. The Appellees stated that the numbers were recently modified. Tr. vol. 1, 123.

rotation. *Id.* This crusher can reduce five-foot boulders into pieces less than 15 inches in diameter. *Id.* at 115. For boulders wider than five feet, NEMG uses a large rock breaker to hammer chunks from the sides of the boulder so it can fit into the crusher. *Id.* at 115, 142. This rock breaker is a six-foot long spike with a four-inch diameter tip, which is driven by pneumatic force into the boulder "like a jack hammer." *Id.* at 143.

The crushed rock leaves the primary crusher via a conveyor belt, and a bucket-loader shovels the rock into the secondary jaw crusher. P.C. at 31, 32; Tr. vol. 2, 52–53. The secondary jaw crusher breaks the rock into smaller pieces in the same manner as the primary crusher. Tr. vol. 1, 115. Some of the rock enters the tertiary cone crusher, which pulverizes the rock into gravel and sand. *Id.* at 117. Large trucks haul the grout boulders to the rock crushers, and similar trucks haul the crushed rock to NEMG's customers. *Id.* at 132. All trucks hauling crushed rock use Graniteville Road. *Id.*

G. The Impacts Of NEMG's Rock Crushing Operations On Neighbors.

1. Dust.

Each stage of the rock crushing operations emits rock dust that drifts from the crushing site to adjacent properties within approximately a half-mile radius. P.C. at 31–38, 40–45; Tr. vol. 2, 109–10. The trucks and front-loaders also suspend rock dust that drifts to neighboring properties. P.C. at 28; Tr. vol. 2, 109–10. This dust accumulates on windows, screens, outdoor furniture, lawns, and cars. P.C. at 29; Tr. vol. 2, 8.

Pamela Austin, who has lived on Graniteville Road since 1969, testified, "I can see it all over everywhere. If I wipe a chair down in the morning, I have to rewipe that chair down at night before I can sit in it or I'm going to be covered in dust. I can see it on the leaves out in back of my house. The dust is just everywhere." Tr. vol. 2, 16–17. Exhibit 9 is a photograph of

Russell Austin standing next to their porch after tapping their screen; the photograph demonstrates the cloud of dust that had accumulated on the screen, which had been installed only a week prior. P.C. at 29; *Id.* at 17–18.

Marc Bernier, who lives approximately half a mile from the NEMG site, testified, "[T]here's a lot of dust in the area that wasn't there before this operation moved in." Tr. vol. 2, 65. Suzanne Bennett, who has lived adjacent to the Berniers' property since 1961, testified, "The dust is very, very disturbing to me. I have it in -- on my windowsill, my porch, my stair, my car, my lawn, furniture, tables outside. You have to wash everything before you get to use it." *Id.* at 8.

Photographs taken from Graniteville Road illustrate the plumes of dust traveling from the rock crushing operations and kicked up by the trucks. P.C. 28–45. Bernier also testified that "[the dust] starts at the crusher . . . [and] it just . . . broadens into the air and flows . . . into the distance. It doesn't just drop on the ground. It just keeps -- keeps going." Tr. vol. 2, 54.

2. Noise.

NEMG's rock crushing operations subject the neighboring residents to loud, disturbing noises. *Id.* at 7–8. Each crusher creates constant loud noise as it breaks, crushes, and pulverizes the rock. *Id.* at 66. Pamela Austin testified that the noise sounds like a "laundry mat full of uneven -- unleveled washing machines." *Id.* at 23. Bernier testified that the crushing sounds like a "bunch of bricks" thrown into a running dryer. *Id.* at 66. "[Y]ou hear that crunch, crunch, crunch, crunch, you know, that crushing, crushing, crushing," he added. *Id.* Bennett testified that the noise was so "[v]ery loud that it woke [them] up early in the morning. And sometimes until 8 o'clock . . . at night it would be there." *Id.* at 7.

3. Traffic.

The aggregate from NEMG's rock crushers is loaded onto trucks that enter the NEMG site via Graniteville Road. Tr. vol. 1, 132; Tr. vol. 2, 15. The trucks leave the site via Graniteville Road. Tr. vol. 1, 132; Tr. vol. 2, 15. Neighbors regularly encounter trucks traveling to and from the crushing site on Graniteville Road. P.C. at 28; Tr. vol. 2, 8, 16, 34, 47.

Graniteville Road is the primary public highway in Graniteville and is used by pedestrians going to and from the only local store in lower Graniteville. Tr. vol. 2, 47. Because the road has narrow shoulders, the trucks must cross the median to avoid pedestrians, and cars must swerve to avoid colliding with the trucks. *Id.* Bernier testified, "I've had to actually go onto the shoulder of the road to avoid being hit by these trucks." *Id.* Austin also testified to the many times she has had to call the police because the trucks do not stop at the school bus stop, which endangers the children. *Id.* at 34. She stated, "I have kids getting on at the bus stop, and [the trucks] go out around them." *Id.* Bennett stated that when she meets the trucks on Graniteville Road, "I'm scared . . . some of [the trucks are] way off on the other line." *Id.* at 8.

Regarding changes since NEMG began rock crushing operations, Austin testified, "There's a lot more trucks. Fast trucks. Some days, there's a hundred. Some days, it's less, but since they've started, there's been a lot of trucks going back and forth, back and forth." *Id.* at 16. Bernier added, "[M]ost every day when I come to and from work or from downtown during the day, I encounter [the aggregate] trucks. It could be two, three, four at a time . . . [s]ome days six in that -- that one timeframe in the time that it takes me to drive through there." *Id.* at 48.

STANDARDS OF REVIEW

This Court reviews questions of law in Act 250 appeals *de novo*. *In re Village Assocs. Act 250 Land Use Permit*, 2010 VT 42A, ¶ 7, 188 Vt. 113, 998 A.2d 712. This Court will overturn the Environmental Court's legal conclusions if the findings do not "reasonably support

those conclusions." *In re Chaves Act 250 Permit Reconsider*, 2014 VT 5, ¶ 22, 93 A.3d 69 (citing *In re Rinkers, Inc.*, 2011 VT 78, ¶ 8, 190 Vt. 567, 27 A.3d 334). Factual findings are reversed if, "taking them in the light most favorable to the prevailing party, they are clearly erroneous." *In re Rinkers, Inc.*, 2011 VT 78, ¶ 8 (quoting *In re Eastview at Middlebury, Inc.*, 2009 VT 98, ¶ 10, 187 Vt. 208, 992 A.2d 1014).

ARGUMENT

I. THE ENVIRONMENTAL COURT ERRED IN GRANDFATHERING ROCK CRUSHING OPERATIONS ANYWHERE ON THE ROA TRACT BECAUSE SUCH A BROAD EXEMPTION CONTRADICTS THE TEXT OF ACT 250, ITS PURPOSES, AND CONSISTENT PRECEDENT UNDER THE ACT.

Act 250 prohibits development without a permit. Vt. Stat. Ann. tit. 10, § 6081(a) (2013). Development is "[t]he construction of improvements on a tract or tracts of land," *id.* § 6001(3)(A)(i), which broadly encompasses "any physical change to a project site." 16-5 Vt. Code R. § 200:2(C)(3) (2013). Act 250 exempts developments that existed before June 1, 1970, as long as the operation has not been abandoned or undergone a substantial change. Vt. Stat. Ann. tit. 10, § 6081(b); 16-5 Vt. Code R. § 200:2(C)(8).

A development has been abandoned if the operation ceased prior to 1970. *Re: U.S. Quarried Slate Prods., Inc.*, Declaratory Ruling Nos. 279 & 283, Findings of Fact, Conclusions of Law, and Order (Reconsidered), at 23 (Vt. Envtl. Bd. Oct. 1, 1993). If the operation has ceased for so long that the community has an expectation that the operation has been abandoned, generally two generations, it no longer is exempt. *Id.*

A substantial change is "any change in a pre-existing development or subdivision which may result in significant adverse impact with respect to any of the [Act 250] criteria." 16-5 Vt. Code R. § 200:2(C)(7). A substantial change occurs when (1) "there has been a cognizable physical change to the pre-existing development" and (2) "the change has the potential for

significant impact under one or more of the ten Act 250 criteria." *In re Hale Mountain Fish & Game Club, Inc.*, 2007 VT 102, ¶ 4, 182 Vt. 606, 939 A.2d 498 (citing *Sec'y, Vt. Agency of Natural Res. v. Earth Constr., Inc.*, 165 Vt. 160, 164 (1996); *In re H.A. Manosh Corp.*, 147 Vt. 367, 369–70 (1976)).

Act 250 exemptions are construed narrowly and applied only "when the facts clearly support the exemption's application." *In re Ochs*, 2006 VT 122, ¶ 12, 181 Vt. 541, 915 A.2d 780. When applying the grandfathering exemption, courts balance the expectations of the surrounding community against the expectations of the development owners. *In re Big Rock Gravel, LLC*, No. 174-8-08 Vtec, slip op. at 8 (Vt. Super. Ct. Envtl. Div. Oct. 19, 2010) (Wright, J.). Grandfathering is applicable only "so long as the impacts of the operation upon the environment or upon the community are no greater after June 1, 1970, than before that date." *Id.* (quoting *Re: Orzel*, Declaratory Ruling No. 174, Findings of Fact, Conclusions of Law, and Order, at 6 (Vt. Envtl. Bd. Oct. 2, 1986)). Because Act 250 has been in effect for more than 40 years, the import of the grandfathering exemption has diminished and applicants no longer can claim "unfair surprise." *Re: Vt. Verde Antique Int'l, Inc.*, Declaratory Ruling Request No. 387, Dismissal Order, at 5 (Vt. Envtl. Bd. Feb. 2, 2001) (citing *Re: John Gross Sand & Gravel*, Declaratory Ruling No. 280, Memorandum of Decision, at 4 (Vt. Envtl. Bd. Dec. 2, 1993)).

The courts' narrow construction of the grandfathering exemption is rooted in the underlying purposes of Act 250: "to protect and conserve the lands and environment of the state from the impacts of unplanned and uncontrolled changes in land use and to insure that these lands are devoted to uses which are not detrimental to the public welfare and interests." *In re S-S Corp./Rooney Hous. Devs.*, 2006 VT 8, ¶ 12, 179 Vt. 302, 896 A.2d 67 (citing Findings and Declaration of Intent, 1969, No. 250 (Adj. Sess.), § 1, eff. Apr. 4, 1970). As such, Act 250

regulates the "*impacts* of development." *In re Vt. RSA Ltd. P'ship*, 2007 VT 23, ¶ 9, 181 Vt. 589, 925 A.2d 1006.

Act 250 case law consistently demonstrates the courts' narrow application of the grandfathering exemption to specific operations and operational sites that existed on June 1, 1970. The Environmental Board established this site-specific analysis of grandfathering exemptions in *Re: Clifford's Loam and Gravel, Inc.*, where it articulated several factors that may trigger Act 250 jurisdiction over pre-existing extraction operations. Declaratory Ruling No. 90, Findings of Fact, Conclusions of Law, and Order, at 3 (Vt. Envtl. Bd. Nov. 6, 1978); *see Re: Weston Island Ventures*, Declaratory Ruling No. 169, Findings of Fact, Conclusions of Law, and Order, at 6 (Vt. Envtl. Bd. June 3, 1985) (stating that *Clifford's Loam* factors apply to quarry operations, as well as gravel pits). The Board found that a substantial change may occur when "a new [extraction] area [is opened] a substantial distance from the pre-existing area" or "gravel [is removed] in or across a stream or body of public waterway, or across a public highway." *Re: Clifford's Loam & Gravel, Inc.*, Declaratory Ruling No. 90, at 2–3; *see also Re: Champlain Marble Corp. (Fisk Quarry)*, Declaratory Ruling No. 319, Findings of Fact, Conclusions of Law, and Order, at III.2 (Vt. Envtl. Bd. Oct. 2, 1996) (grandfathering only "removal of loose stone," but not other extraction operations, on tract that existed before June 1, 1970).

The Board has applied the *Clifford's Loam* factors to extraction operations and established the precedent that non-contiguous operational sites must be analyzed independently. *See Re: Raleigh B. Palmer, Isle La Motte Gravel Pit*, Declaratory Ruling No. 424, Findings of Fact, Conclusions of Law, and Order, at 8–11 (Vt. Envtl. Bd. Nov. 4, 2004) (analyzing three pits separately to determine if they are grandfathered); *Re: U.S. Quarried Slate Prods., Inc.*, Declaratory Ruling Nos. 279 & 283, at 22 (same).

For example, in *Re: Weston Island Ventures*, the Board considered a 150-acre tract containing gravel pit operations that was bisected by Route 100. Declaratory Ruling No. 169, at 2. Prior to 1970, extraction was limited to one side of Route 100, but after 1970, new extraction areas were opened on the other side of the highway. *Id.* The Board concluded that the new extraction areas were not part of the original operation because the intervening public highway disrupted the natural expansion of the pit. *Id.* at 5. Similarly, in *Re: Thomas Howrigan Gravel Extraction*, the Board found that two gravel pits separated by a road and a 400-foot meadow were not contiguous, despite their being part of the same gravel deposit. Declaratory Ruling No. 358, Findings of Fact, Conclusions of Law, and Order, at 14–15 (Vt. Envtl. Bd. Aug. 30, 1999). The Board reasoned that the sites were distinct because "[t]hey are separated from the other pits . . . by a substantial distance and by intervening publicly owned roadways." *Id.* at15.

The location of an operation is central to determining whether a substantial change has occurred because regulating location protects the legitimate expectations of the community and ensures that no new adverse impacts under Act 250's criteria will result. *See In re R.E. Tucker, Inc.*, 149 Vt. 551, 557–58 (1988) (affirming Board's decision to prohibit rock crushers at pre-existing gravel pit from operating in close proximity to neighboring residences), *aff'g*, *Re: R.E. Tucker, Inc.*, Land Use Permit No. 5W0829-EB, Findings of Fact, Conclusions of Law, and Order (Vt. Envtl. Bd. June 2, 1986); *see also Re: Weston Island Ventures*, Declaratory Ruling No. 169, at 3, 5 (finding cognizable change in addition of crusher at one pit even though crushers were used at two other pits on tract prior to 1970); *Sec'y, Vt. Agency of Natural Res. v. Earth Constr., Inc.*, No. E92-031 Vtec, slip op. at 9 (Vt. Envtl. Ct. July 6, 1993) (Wright, J.) (finding cognizable change in dumping of waste soil in new location); *Re: Lake Champagne Campground*, Declaratory Ruling No. 377, Findings of Fact, Conclusions of Law, and Order, at

16 (Vt. Envtl. Bd. Mar. 22, 2001) (finding cognizable change in storage of campers in new location); *Re: Agency of Admin.*, Declaratory Ruling No. 151, Findings of Fact, Conclusions of Law, and Order, at 5 (Vt. Envtl. Bd. May 9, 1984) (finding cognizable change in replacement of leach fields with new disposal system in new location).

For example, in *In re R.E. Tucker*, the applicant ran a rock crushing operation at a pre-existing gravel pit. 149 Vt. at 552–53. Based on differential noise impacts to neighboring residences, the Board conditioned the applicant's permit to limit the crushing operations only to certain locations within the pit, *id.* at 557–58, and this Court affirmed the Board's condition. *Id.* at 559. The Board expressed similar concerns about the location of rock crushing in *Re: Weston Island Ventures*. Declaratory Ruling No. 169, at 3, 5. Although rock crushing had occurred at two pits on the 150-acre tract prior to 1970, the Board found the addition of a crusher at a third pit on the same tract would be a cognizable change, and that this new crusher would be "accompanied by potential impacts." *Id.* at 5. Plainly, the impacts of rock crushers on air quality, noise, and traffic can vary substantially depending on the crushers' location and proximity to neighboring properties, especially in the context of a 1,100-acre tract.

This long line of authority demonstrates that the cognizable change test is liberally construed in favor of requiring a permit, finding that any physical change is cognizable if it is anything more than "in-kind replacements necessitated by normal wear and tear, and repairs and routine maintenance." *Re: Hale Mountain Fish & Game Club*, Declaratory Ruling No. 435, Findings of Fact, Conclusions of Law, and Order, at 18 (Vt. Envtl. Bd. Aug. 4, 2005), *rev'd on other grounds, In re Hale Mountain Fish & Game Club*, 2007 VT 102; *see In re L.W. Haynes, Inc.*, 150 Vt. 572, 573–74 (1988) (affirming Board's decision to require an Act 250 permit for permanent rock crusher where only portable crusher previously had been used); *Re: Vt. Agency*

of Transp. (Rock Ledges), Declaratory Ruling No. 296, Findings of Fact, Conclusions of Law, and Order, at 6 (Vt. Envtl. Bd. June 15, 1995) (finding cognizable change in upgrades to rock ledges along interstate); *Re: Vt. Agency of Transp. (Rt. 73)*, Declaratory Ruling No. 298, Findings of Fact, Conclusions of Law, and Order, at 2–3 (Vt. Envtl. Bd. May 9, 1995) (finding cognizable change in replacement of guardrail with new material); *Re: Village of Ludlow*, Declaratory Ruling No. 212, Findings of Fact, Conclusions of Law, and Order, at 9 (Vt. Envtl. Bd. Dec. 29, 1989) (finding cognizable change in replacement of old parts with new parts at sewage treatment plant because new parts were physically different); *Re*: *Rick Harootunian*, Declaratory Ruling No. 198, Findings of Fact, Conclusions of Law, and Order, at 2, 4–5 (Vt. Envtl. Bd. Mar. 2, 1988) (finding cognizable change in replacement of limestone crusher with gravel crusher).

Here, the Environmental Court's broad exemption for rock crushing operations anywhere on ROA's 1,100-acre tract contradicts the text of Act 250, its purposes, and consistent precedent. Such a broad exemption for an entire category of operations regardless of the location, merely because the operations occurred *somewhere* on the pre-existing tract before 1970, likely will result in new and further impacts to the surrounding community under Act 250.

The Environmental Court particularly erred in its failure to consider the site of NEMG's rock crushing operations as distinct from the other alleged pre-1970 crushing sites, despite the fact that it is a substantial distance from the other sites and is separated by an intervening public highway. P.C. at 11. The many cases cited above require that non-contiguous operational sites be analyzed independently for the purposes of grandfathering. Specifically, the court's distinguishing of cases relying on *Clifford's Loam* factors was error because, in *Re: Weston Island Ventures*, the Board explicitly broadened the application of *Clifford's Loam* factors to

quarry operations, and applied these factors to the location of a rock crushing operation. Declaratory Ruling No. 169, at 3, 5. Therefore, the court should have considered the specific locations of the rock crushing operations when applying the test for grandfathering.

The Environmental Court's conclusion that NEMG's rock crushing operations are "not a separate stand-alone development," P.C. at 10, also was legal error because it misapplied the basic definitions in the Act 250 statute and its Rules. The statute defines development as "[t]he construction of improvements," which the Rules further define as "any physical change to a project site." Vt. Stat. Ann. tit. 10, § 6081(a); 16-5 Vt. Code R. § 200:2(C)(3). The construction of a rock crushing operation at a quarry site clearly is a physical change to that site. Neither the statute nor the Rules provide any language to support the court's conclusion that an operation must be a "separate stand-alone development" for the purposes of grandfathering.

The Environmental Court also erred in concluding that NEMG's rock crushing operations are so integral to ROA's dimension stone quarrying operations that they cannot be a cognizable change to the pre-existing development. P.C. at 15. The "cognizable change" test is a low threshold, and the Board has found a cognizable change in any physical change beyond mere repair and maintenance or in-kind replacement. *Re: Hale Mountain Fish & Game Club*, Declaratory Ruling No. 435, at 18. This is true even when the activity that is a cognizable change is "integral" to the overall development—e.g., a guardrail replacement is a cognizable change even though guardrails are integral to highways. *Re: Vt. Agency of Transp. (Rt. 73)*, Declaratory Ruling No. 298, at 2–3.

The Environmental Court's broad exemption for rock crushing operations occurring anywhere on the ROA tract violated the statute, rules, and consistent precedent under Act 250.

II. THE LIMITED EVIDENCE PRESENTED BY THE APPELLEES DID NOT MEET THEIR BURDEN OF PROVING SUCH A BROAD, ROVING EXEMPTION TO ACT 250.

The grandfathering exemption and the substantial change doctrine are complementary lenses through which Act 250 is applied to regulate the impacts of development, and to require permits for operations that have the potential for distinct impacts compared to operations that pre-existed June 1970. *See Re: Hale Mountain Fish & Game Club, Inc.*, Declaratory Ruling No. 435, at 16–17 (stating that legislative intent of grandfathering exemption is to allow pre-existing uses to continue "only to the extent that there is no significant increase in environmental impacts"). Viewed through either lens, the limited evidence presented by the Appellees did not meet their burden of proof to sustain the broad, roving exemption granted by the Environmental Court, allowing rock crushing activities anywhere on ROA's 1,100-acre tract without an Act 250 permit.

A. <u>The Appellees' Evidence Was Insufficient To Prove Grandfathering, But Did Prove Abandonment.</u>

1. The Appellees Provided No Evidence Of The Scope, Rates, Or Volumes Of Pre-1970 Rock Crushing On The ROA Tract.

The Appellees' burden includes proof of the scope of the alleged pre-1970 rock crushing operations on the ROA tract, including extraction or production rates. *See Re: John Gross Sand & Gravel*, Declaratory Ruling No. 280, Findings of Fact, Conclusions of Law, and Order, at 8 (Vt. Envtl. Bd. July 28, 1993) (stating that burden of proof for pre-existing development not met where gravel pit extraction rates not produced). The Appellees failed to meet this burden because they submitted no evidence of the scope or rates of the alleged pre-1970 rock crushing on the ROA tract.

The Appellees presented no witnesses who testified concerning the scope, rates, or volumes of any alleged rock crushing that occurred on the ROA tract prior to 1970. Murray did

not begin working at ROA until the late 1970s, and accordingly did not testify concerning pre-1970 scope, rates, or volumes. McKay began working at Wells-Lamson in 1957, and saw the "chicken grit" facility at Site 2, but did not testify concerning this facility's scope, rates, or volumes.

The only evidence that could be construed as relating to pre-1970 scope, rates, or volumes is from the historical texts in Exhibits N, O, and P. Exhibit N references "hundreds of carloads" of crushed granite, but only refers to these as coming from the "Quarry District." P.C. at 71. Therefore, Exhibit N provides no evidence of rock crushing scope, rates, or volumes on the ROA tract.

Exhibits O and P describe the "mammoth" Wells-Lamson crusher that was constructed in 1957 to "supply the needs of Vermont's vast new road building program," with an expected capacity of 1,000 tons per day. *Id.* at 74, 75. The critical facts about these Exhibits are that Murray and McKay testified that this crusher was located on Site 1, Tr. vol. 1, 84, 106, 111, and Murray testified that Site 1 is not part of the ROA tract because ROA does not own the site, and never has owned it. *Id.* at 88. Because a tract must be "owned or controlled by the same person," 16-5 Vt. Code R. § 200:2(C)(12), this evidence concerning Site 1 was irrelevant to the scope or production rates of alleged pre-1970 rock crushing on the ROA tract.

The Environmental Court misinterpreted Exhibits N, O, and P, and erroneously attributed this evidence to the ROA tract in Finding of Fact No. 23:

> 23. Wells-Lamson rock crushing operations provided granite sub-base material for Interstate 89 in 1958 and 1959. This crushing operation ceased shortly after this time. This crushing operation had a capacity of 1,000 tons per day. Railcars were used to transport the crushed material. A railcar has a load capacity of approximately 100 tons of crushed rock. Hundreds of railcars of crushed rock were transported off-site for Interstate 89 development.

P.C. at 5. Similarly, the court referenced 1950s crushing operations that supplied crushed granite to build Interstate 89, *id.* at 14, and stated that "[t]hrough the 1940s, 1950s, and 1960s, the crushing capacity was 1,000 tons of material crushed per day with railcar load capacities of approximately 100 tons per car." *Id.* at 15.

Plainly, in this finding and in these statements, the Environmental Court confused the "chicken grit" crusher at Site 2, which ceased operating about 1960, Tr. vol. 1, 89–90, 108, with the crusher that Wells-Lamson built in 1957 on Site 1, which had a capacity of 1,000 tons per day. P.C. at 75; *Id.* at 84. Furthermore, this rock crusher on Site 1 was not operating in the 1940s or in the 1950s, prior to 1957, P.C. at 74, and there was no evidence as to when this rock crusher ceased operation.

Finding of Fact No. 23 and the other statements attributing the Wells-Lamson crusher on Site 1 to the ROA tract are clearly erroneous because there was no evidence to support those findings. To the contrary, the evidence affirmatively proved that the Wells-Lamson rock crusher on Site 1 was not part of the ROA tract. Tr. vol. 1, 84, 88.

Absent this clearly erroneous misunderstanding of Exhibits N, O, and P, the Appellees presented no evidence of the scope, rates, or volumes of rock crushing that occurred on the ROA tract prior to 1970, and thus failed to meet their burden of proving a grandfathering exemption for this alleged rock crushing.

2. On The ROA Tract, The Appellees' Evidence Proved That Any Rock Crushing Was Abandoned At Site 4 And Site 2, And Failed To Prove That Any Rock Crushing Actually Occurred At Site 3.

To qualify for the exemption for pre-existing development, the Appellees' "must establish that *the particular land use* has not been abandoned." *Re: U.S. Quarried Slate Prods., Inc.*, Declaratory Ruling Nos. 279 & 283, at 22 (emphasis added). Uses are abandoned where

there has been "a substantial period of nonuse." *Re: Raleigh B. Palmer, Isle La Motte Gravel Pit*, Declaratory Ruling No. 424, at 9. In this case, not only did the Appellees not meet their burden, their evidence affirmatively proved that ROA abandoned any alleged rock crushing operations at Sites 2 and 4.

Beginning with Site 4, the site of the current NEMG rock crushing operations, the Appellees presented historical texts and photographs related to rock crushing during the 1904–1920 period. P.C. at 48, 52, 57–58, 59, 71. The Appellees presented no evidence of any rock crushing operations on Site 4 from the 1920s to the beginning of NEMG's current operations in 2010—a period of approximately 90 years of nonuse of this site for rock crushing operations.

Concerning the alleged rock crushing operations at Site 2, the Appellees presented maps and photographs that indicate a "crusher siding" in 1926, and a "crusher house" in the 1940s and 1950s. *Id.* at 60–64. McKay also testified that a "chicken grit" facility was operating on Site 2 in 1957. Tr. vol. 1, 106–07. However, both McKay and Murray testified that crushing operations ceased at Site 2 around 1960, and Murray testified that neither the crusher nor the crusher house still exist. *Id.* at 89–90, 93, 108. The Appellees presented no evidence of any rock crushing operations on Site 2 since 1960—a period of 50 years of nonuse.

Concerning the alleged rock crushing on Site 3, the Appellees proved no actual rock crushing on this site prior to 1970. The Appellees' only evidence regarding Site 3 was Exhibits R and S, the contract and invoice, but, as Murray conceded, these Exhibits provide no evidence that any rock crushing actually occurred. *Id.* at 91–92.[2]

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[2] As with the previous argument, the Appellees presented evidence that the pre-1970 rock crushing operations on Site 1 were not abandoned, but this evidence was irrelevant because Site 1 is not part of the Rock of Ages tract.

Applying *Re: U.S. Quarried Slate Products, Inc*. to these undisputed facts leads inevitably to the conclusion that any rock crushing operations that may have existed prior to 1970 on the ROA tract were abandoned long before NEMG began its rock crushing operations in 2010. A period of 50–90 years clearly qualifies as a "substantial period of nonuse."

At a minimum, any rock crushing on Site 4, adjacent to neighboring property owners and separated from the rest of the ROA tract by Graniteville Road, was abandoned because there was no evidence of any rock crushing occurring at this Site in the past 90 years. *See Re: Weston Island Ventures*, Declaratory Ruling No. 169, at 2, 5 (finding that pre-existence of pits on one side of Route 100 "does not extend north of Route 100"); *see also Re: Thomas Howrigan Gravel Extraction*, Declaratory Ruling No. 358, at 15 (finding that parcels of land divided by public highways and by distance must be analyzed as "separate and distinct" for Act 250 purposes, including grandfathering).

The Environmental Court's holding to the contrary, P.C. at 12, was legally and factually erroneous. This holding was legally erroneous because it contradicted the principle that "[a]n important factor in the abandonment analysis is the reasonable expectations of neighboring property owners." *Re: Raleigh B. Palmer, Isle La Motte Gravel Pit*, Declaratory Ruling No.424, at 9–10. The Environmental Court's decision did not "do justice to the legitimate expectations of the property owners who reside nearby," *Re: U.S. Quarried Slate Prods., Inc*., Declaratory Ruling Nos. 279 & 283, at 23, who have resided many decades without a rock crushing operation next door. Further, industry custom cannot justify five to nine decades of nonuse. *Id.*

This holding also was factually erroneous because it was premised on what is "customary" in the industry, P.C. at 12, but the Appellees presented no evidence that supported this premise. Because neither Murray nor any other witness testified concerning what was

customary in the industry, there was no evidence to support the Environmental Court's Findings of Fact 16 and 17 (intermittent rock crushing at various locations is customary), or the court's later statements to the same effect. *Id.* The trial transcript does not contain the word "customary." Tr. vol. 1, index., and, in fact, Murray testified that grout was brought to the crusher, rather than the crusher going to the grout. *Id.* at 72. These factual findings and statements are clearly erroneous.

3. The Environmental Court Also Erred In Basing Its Holdings On A "Relationship" Between The ROA Quarry Business And Rock Crushing Operations.

Last, the Environmental Court erred in basing its holdings on a "relationship" between ROA quarry operations and rock crushing operations. P.C. at 10. Act 250 and its Rules say nothing about grandfathering based on a "relationship" between different types of operations. Instead of following the statute, the Environmental Court created a new test for grandfathering, and did so absent any citation to precedent.

Moreover, the evidence demonstrated that any "relationship" between the ROA quarry and rock crushing operations was ancillary and minor. Murray testified that ROA receives 100% of its revenue from dimension stone, and derives only a "very small fraction of a percent" of its revenue from rock crushing. Tr. vol. 1, 102. Murray conceded that rock crushing was neither integral nor necessary to ROA, but merely was "desirable." *Id.* at 103. Sporadic crushing has occurred only when ROA could find a willing subcontractor to run the crushing operations. *Id.* at 98, 101. The present subcontractor, NEMG, crushes rock based on its own business and financial needs, rather than the needs of ROA. *Id.* at 134.

B. NEMG'S Rock Crushing Operations Are A Substantial Change From1970 That May Result In Significant Impacts.

A substantial change occurs when (1) "there has been a cognizable physical change to the preexisting development" and (2) "the change has the potential for significant impact under one or more of the ten Act 250 criteria." *In re Hale Mountain Fish & Game Club, Inc.*, 2007 VT 102, ¶ 4.

1. The Environmental Court Erred In Concluding That NEMG's Rock Crushing Operations Are Not A Cognizable Change.

A "cognizable change" is any physical change to the permitted project that does more than repair and maintain existing facilities. *Re: Stonybrook Condo. Owners Ass'n*, Declaratory Ruling No. 385, Finding of Fact, Conclusions of Law, and Order, at 8 (Vt. Envtl. Bd. May 18, 2001). This definition sets a low threshold, encompassing such minor alterations as the addition of antennas inside a church steeple and a change in the location of stored camper units. *In re Vt. RSA Ltd. P'ship*, 2007 VT 23, ¶ 11; *Re: Lake Champagne Campground*, Declaratory Ruling No. 377, at16. Lowering the bar even further, the Board has found that the mere replacement of a wooden guardrail with a steel guardrail was a cognizable change. *Re: Vermont Agency of Transp. (Route 73)*, Declaratory Ruling No. 298, at 2–3.

Multiple cases have applied this low threshold to quarry and gravel pit operations as well. *Re: Clifford's Loam and Gravel, Inc.*, Declaratory Ruling No. 90, at 3, set forth four factors that tend to show a substantial change:

1. Acquisition of and removal of gravel on additional land;
2. Opening a new area a substantial distance from the pre-existing area;
3. Changing the nature of the operation as might occur by the addition of a stone crusher; or,
4. Removal of gravel across a public highway, where the intervening ownership defined the limits of the pre-existing operation.

This Court has relied on the *Clifford's Loam* factors in finding that the introduction of mechanized equipment and the addition of a portable stone crusher constituted a cognizable change, *In re H.A. Manosh Corp.*, 147 Vt. at 369–70, *In re Barlow*, 160 Vt. 513, 517 (1993), and the Board specifically has applied these factors to quarries. *Re: Weston Island Ventures*, Declaratory Ruling No. 169, at 6.

At the outset, the Appellees admit that no rock crushing was occurring at Site 4 as of June 1970. Tr. vol.1, 93. This fact alone demonstrates that the NEMG crushing operations constitute a cognizable change from whatever rock crushing activities may have pre-existed Act 250. Moreover, Site 4 is separated from the other alleged sites of past crushing by Graniteville Road, satisfying another of the *Clifford's Loam* factors.

As argued above, the specific location of the pre-existing operations is critical to determining whether a cognizable change has occurred. The Environmental Board found that a change in the dumping site for waste soil in a rock quarry operation was a cognizable change compared to the site where waste soil had been dumped prior to June 1, 1970. *Sec'y, Vt. Agency of Natural Res.*, No. E92-031 Vtec, slip op. at 9. Likewise, the Environmental Board found the movement of the storage location for camping units constituted a cognizable change. *Re: Lake Champagne Campground*, Declaratory Ruling No. 377, at 16.

The Environmental Court's conclusion that the Appellees' location of rock crushing operations, where none has existed for the past 90 years, was not a cognizable change contradicts this unbroken line of cases and undermines Act 250's goal of respecting the reasonable expectations of neighboring property owners. Consistent with these precedents, this Court should reverse the decision of the Environmental Court.

2. NEMG's Rock Crushing Operations Have Potentially Significant Impacts To Air, Noise, And Traffic.

The second prong of the substantial change analysis is whether the change "*may* result in significant adverse impact with respect to any of the criteria specified in 10 V.S.A. § 6086(a)(1) through (a)(10)." 16-5 Vt. Code R. § 200:2(C)(7) (emphasis added). Neighbors' evidence was more than sufficient to demonstrate that NEMG's rock crushing operations have the potential for significant impacts.

All of Neighbors' witnesses testified that NEMG's crushing operations produce significant rock dust, which they are exposed to as it drifts onto their properties. Pamela Austin, a Graniteville resident since 1969, testified that "[t]he dust is just everywhere." Tr. vol. 2, 17. She no longer is able to enjoy her front porch because the "grill is just covered with dust." *Id.* Exhibit 9 is a photograph illustrating the significant dust that had accumulated on her porch screen in the week since it had been installed. P.C. at 29; *Id.* at 17–18. Similarly, Suzanne Bennett testified that the dust pollution is "very, very disturbing" because she finds it on her windowsill, porch, car, and lawn. Tr. vol. 2, 8. This dust pollution began only when NEMG began its crushing operations; Marc Bernier testified that this excessive dust was not present "before this operation moved in two to three years ago." *Id.* at 65.

NEMG's rock crushing operations also generate significant noise. The Board has acknowledged that "noise can create undue pollution when it intrudes on people, regardless of the decibel level." *Re: Sherman Hollow, Inc. et al.*, Application No. 4C0422-5-EB (Revised), Findings of Fact, Conclusions of Law, and Order, at 30 (Vt. Envtl. Bd. Feb. 17 1989). Neighbors testified that NEMG's rock crushing operations produce loud noise that sounds like "a laundry mat of uneven -- unleveled washing machines," Tr. vol. 2, 23, and a "bunch of bricks"

thrown into a running dryer. *Id.* at 66. Bernier testified "you hear that crunch, crunch, crunch . . . that crushing, crushing, crushing." *Id.*

Finally, NEMG's rock crushing operations carry potentially significant impacts to traffic, primarily from the many large trucks that carry rock aggregate from the crushers. Pamela Austin testified that "[s]ome days there's a hundred" of these trucks along Graniteville Road, the primary road through the village. *Id.* at 16. Bernier testified, "I've had to actually go onto the shoulder of the road to avoid being hit by these trucks." *Id.* Bennett testified that, when she encounters the trucks on Graniteville Road, "I'm scared . . . some of [the trucks are] way off on the other line." *Id.* at 8. Accordingly, these adverse traffic impacts require review under Act 250 to protect the public's interest in safe travel on public roadways. *In re Pilgrim P'ship*, 153 Vt. 594, 596 (1990).

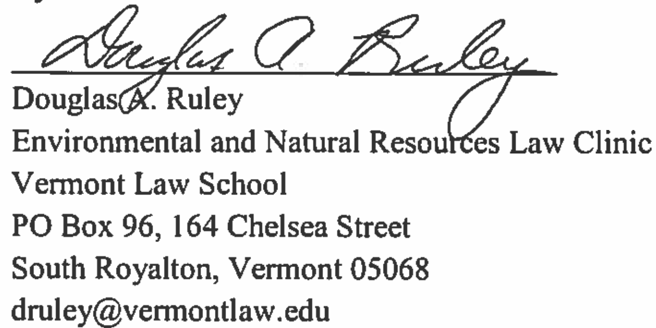
CONCLUSION

For the reasons stated, this Court should reverse the Environmental Court and hold that Appellees' rock crushing operations at Site 4 require an Act 250 permit.

Respectfully submitted this 13th day of August, 2014.

Neighbors for Healthy Communities

By:



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VERMONT RULE OF APPELLATE PROCEDURE V.R.A.P. 32(a)(7)(A)(i)
CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the word count limitation set forth in V.R.A.P. 32(a)(7)(A)(i). The Microsoft Office Word 2010 word processing system was used to create this Brief and according to the software word count tool it contains 8,932 words.

Dated August 13, 2014.

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ADDENDUM

Sections of relevant statutes and rules

10 V.S.A. § 6001(3)(A)

"Development" means each of the following:

(i) The construction of improvements on a tract or tracts of land, owned or controlled by a person, involving more than 10 acres of land within a radius of five miles of any point on any involved land, for commercial or industrial purposes in a municipality that has adopted permanent zoning and subdivision bylaws.

(ii) The construction of improvements for commercial or industrial purposes on more than one acre of land within a municipality that has not adopted permanent zoning and subdivision bylaws.

(iii) The construction of improvements for commercial or industrial purposes on a tract or tracts of land, owned or controlled by a person, involving more than one acre of land within a municipality that has adopted permanent zoning and subdivision bylaws, if the municipality in which the proposed project is located has elected by ordinance, adopted under 24 V.S.A. chapter 59, to have this jurisdiction apply.

(iv) The construction of housing projects such as cooperatives, condominiums, or dwellings, or construction or maintenance of mobile homes or trailer parks, with 10 or more units, constructed or maintained on a tract or tracts of land, owned or controlled by a person, within a radius of five miles of any point on any involved land, and within any continuous period of five years.

(v) The construction of improvements on a tract of land involving more than 10 acres that is to be used for municipal, county, or state purposes. In computing the amount of land involved, land shall be included that is incident to the use such as lawns, parking areas, roadways, leaching fields and accessory buildings.

(vi) The construction of improvements for commercial, industrial or residential use above the elevation of 2,500 feet.

(vii) Exploration for fissionable source materials beyond the reconnaissance phase or the extraction or processing of fissionable source material.

(viii) The drilling of an oil and gas well.

(ix) any support structure proposed for construction, which is primarily for communication or broadcast purposes and which will extend vertically 20 feet or more above the highest point of an attached existing structure or 50 feet or more above ground level in the case of a proposed new support structure, in order to transmit or receive communication signals for commercial, industrial, municipal, county, or state purposes, independently of the acreage involved.

(I) Under this subdivision (ix):

(aa) the word “development” shall also include the construction of improvements ancillary to the support structure, including buildings, broadcast or communication equipment, foundation pads, cables, wires, antennas or hardware, and all means of ingress and egress to the support structure; and

(bb) the word “development” shall not include future improvements that are not ancillary to the support structure and do not involve an additional support structure, unless they would otherwise be considered a development under this subdivision (3).

(II) The criteria and procedures for obtaining a permit for a development under this subdivision (ix) shall be the same as for any other development;

(x) any withdrawal of more than 340,000 gallons of groundwater per day from any well or spring on a single tract of land or at a place of business, independently of the acreage of the tract of land or place of business, if the withdrawal requires a permit under section 1418 of this title or is by a bottled water facility regulated under chapter 56 of this title.

10 V.S.A. § 6081(a)

(a) No person shall sell or offer for sale any interest in any subdivision located in this State, or commence construction on a subdivision or development, or commence development without a permit. This section shall not prohibit the sale, mortgage, or transfer of all, or an undivided interest in all, of a subdivision unless the sale, mortgage, or transfer is accomplished to circumvent the purposes of this chapter.

10 V.S.A. § 6081(b)

(b) Subsection (a) of this section shall not apply to a subdivision exempt under the regulations of the Department of Health in effect on January 21, 1970 or any subdivision which has a permit issued prior to June 1, 1970 under the Board of Health regulations, or has pending a bona fide application for a permit under the regulations of the Board of Health on June 1, 1970, with respect to plats on file as of June 1, 1970 provided such permit is granted prior to August 1, 1970. Subsection (a) of this section shall not apply to development which is not also a subdivision, which has been commenced prior to June 1, 1970, if the construction will be completed by March 1, 1971. Subsection (a) of this section shall not apply to a State highway on which a hearing pursuant to 19 V.S.A. § 222 has been held prior to June 1, 1970. Subsection (a) of this section shall not apply to any telecommunications facility in existence prior to July 1, 1997, unless that facility is a “development” as defined in subdivision 6001(3) of this title. Subsection (a) of this section shall apply to any substantial change in such excepted subdivision or development.

16-5 Vt. Code R. § 200:2(C)(3)

"*Construction of improvements*" means any physical change to a project site except for:

(a) any activity which is principally for preparation of plans and specifications that may be required and necessary for making application for a permit, such as test wells and pits (not including exploratory oil and gas wells), percolation tests, and line-of-sight clearing for the placement of survey markers, provided that no permanent improvements to the land will be constructed and no significant impact under any of the criteria of 10 V.S.A. § 6086(a)(1) through (10) will result; a district commission may approve more extensive exploratory work prior to issuance of a permit after complying with the notice and hearing requirements of Rule 51 of these Rules for minor applications

(b) construction for a home occupation as defined in these Rules; or

(c) construction which the person seeking the exemption demonstrates (i) is de minimis and (ii) will have no potential for significant adverse impact under any of the criteria of 10 V.S.A. § 6086(a)(1) through (10) directly attributable to such construction or to any activity associated with such construction.

16-5 Vt. Code R. § 200:2(C)(7)

"*Substantial change*" means any change in 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. §§ 6086(a)(1) through (a)(10).

16-5 Vt. Code R. § 200:2(C)(8)

"*Pre-existing development*" mean any development in existence on June 1, 1970 and any development which was commenced before June 1, 1970 and completed by March 1, 1971. "Pre-existing development" also means any telecommunications facility in existence on July 1, 1997, unless that facility is already subject to jurisdiction pursuant to 10 V.S.A. § 6001(3)(A).

16-5 Vt. Code R. § 200:34

"*Substantial change to a pre-existing development or subdivision.*" If a change to a pre-existing development or subdivision involves a substantial change thus implicating Act 250 jurisdiction, it shall be subject to a new application process including the notice and hearing provisions of 10 V.S.A. §§ 6083, 6083a, 6084 and 6085 and the related provisions of these rules.