IN THE SUPREME COURT OF THE STATE OF VERMONT

No. 2016-032

IN RE: NORTH EAST MATERIALS GROUP, LLC
ACT 250 JO #5-21

On Appeal from a Judgment of the
Vermont Superior Court – Environmental Division,
On Remand from the Supreme Court of Vermont
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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STATEMENT OF THE CASE

This case involves rock crushing by North East Materials Group, LLC (NEMG). NEMG has been operating a rock crushing operation since 2009 on a site within the Rock of Ages (ROA) tract in Graniteville, Vermont, without an Act 250 permit. On July 17, 2015, this Court issued an Order and Opinion that reversed the trial court's conclusion that this rock crushing was not a cognizable change pursuant to Act 250, as well as its findings concerning preexisting development, and remanded to the trial court for further proceedings. In re N. E. Materials Grp. LLC Act 250 JO #5-21, 2015 VT 79, ¶¶ 31, 35, 36, __Vt.__, 127 A.3d 926, 938, 940 (PC at 67, 69-70).

On December 23, 2015, the trial court issued a Decision and Order that again held that NEMG's rock crushing is not a cognizable change pursuant to Act 250, and is part of a preexisting development. In re N. E. Materials Grp. LLC A250 JO #5-21, No. 143-10-12 Vtec, slip op. at 12, 18 (Vt. Super. Ct. Envtl. Div. Dec. 23, 2015) (Walsh, J.) (Decision on the Merits, hereinafter "Decision") (PC at 12, 18); In re N. E. Materials Grp. LLC A250 JO #5-21, No. 143-10-12 Vtec, slip op. at 1-2 (Vt. Super. Ct. Envtl. Div. Dec. 23, 2015) (Walsh, J.) (Judgment Order) (PC at 22-23). Regretting the necessity of seeking further relief from this Court, Neighbors for Healthy Communities (Neighbors) appeal because the trial court's Decision on remand is contrary to this Court's Order and Opinion. Neighbors ask this Court to hold that NEMG's rock crushing operations require an Act 250 permit because these operations are not part of a preexisting development and, even if they are, the operations are a substantial change from that preexisting development. See 10 V.S.A. § 6081(b).

I. SUMMARY OF FACTS FROM THIS COURT'S OPINION

The Rock of Ages tract consists of approximately 1170 acres (930 acres in Barre and 250 acres in Williamstown). In re N. E. Materials Grp., 2015 VT 79, ¶ 3 (PC at 52). Since 2009, NEMG has operated a series of rock crushers and other equipment at a site on the Rock of Ages tract south of Graniteville Road. Id. ¶¶ 5, 9 (PC at 53, 54-55). NEMG's crushing operations include two jaw crushers, a cone crusher, screens, loaders, and excavators. Id. ¶ 9 (PC at 54-55). This heavy equipment generates crushed rock of various sizes, which is then transported by dump trucks. Id. ¶¶ 4, 9 (PC at 53, 54). NEMG holds an air-pollution-control permit that authorizes it to crush up to 175,000 tons of rock per year. Id. ¶¶ 9, 13 (PC at 54-55, 56). At its current site, NEMG has crushed: 20,285 tons in 2010, 155,577 tons in 2011, 89,667 tons in 2012, and 59,279 tons in 2013. Id. ¶ 9 (PC at 55).

There is photographic evidence of rock crushing activity around 1912 south of Graniteville Road, in proximity to NEMG's current crushing location. Id. ¶ 5 (PC at 53). There were no findings regarding the volume or duration of crushing at this site. Id. Also, there is no evidence of any crushing activity on or near this site after the 1920s. Id. ¶ 5 n.1 (PC at 53). The other evidence of pre-1970 crushing on the ROA tract was crushing of an unspecified amount and frequency by the former Wells-Lamson Quarry Company from approximately 1926 into the 1960s,[1] and possible crushing of approximately 40,000 cubic yards between September 1969 and April 1970 at a site north of Graniteville Road, about .8 miles from the NEMG site. Id. ¶¶ 6, 7, 34 (PC at 53-54, 69).

Neighbors in the area of NEMG's rock crushing site experience noise, rock dust, and truck traffic. Id. ¶ 4 (PC at 53). The Environmental Division acknowledged that NEMG's rock

[1] This site is on the northern border of the Rock of Ages tract, just south of Websterville Road. Decision, PC at 3 (FF 8), 5 (FF 29).

crushing "'creates various impacts, including noise, particulate matter in the form of stone dust, and truck traffic and congestion'" that adversely affect Neighbors. Id. ¶ 14 n.6 (PC at 57) (quoting Environmental Division); see also id. ¶ 26 n.12 (PC at 63) (Environmental Division "specifically found that as a result of the crushing operation, Neighbors experience noise from material being loaded or unloaded; dust on house windows, outside furniture, lawns, and cars; and dump-truck traffic").

II. PROCEDURAL BACKGROUND

District Coordinators of the District 5 Environmental Commission issued a series of Jurisdictional Opinions concluding that these rock crushing operations did not require an Act 250 permit. In re N. E. Materials Grp., 2015 VT 79, ¶ 2 (PC at 52). Neighbors appealed to the Environmental Division, which also concluded that the crushers did not require an Act 250 permit. Id. Neighbors appealed to this Court, which issued an Opinion and Order on July 17, 2015. In re N. E. Materials Grp., 2015 VT 79 (PC at 50-80).

A. This Court's Opinion Concerning Preexisting Development and Cognizable Change under Act 250.

1. *Legal Framework Regarding Preexisting Development.*

In discussing preexisting development, this Court first confirmed that the burden of proving that a project falls within the exemption for preexisting development is on the person seeking the exemption. In re N. E. Materials Grp., 2015 VT 79, ¶¶ 20, 22 (PC at 59, 60-61) ("NEMG bears the burden of persuasion as to the general existence of the preexisting development"). In this case, NEMG could meet its burden by showing "that dimension-stone quarrying was conducted throughout the ROA tract for many decades, and that crushing operations were part of those operations at various sites within the tract at various times through that period." Id. ¶ 24 (PC at 62). The Court held that, while the question of whether a proposed

project falls within a preexisting development is a more general one, the Environmental Division's findings regarding crushing on the Rock of Ages tract were not sufficient to establish crushing as part of ROA's preexisting development. Id. ¶¶ 22, 32-35 (PC at 60-61, 68-69); see infra at 5-6.

2. *Legal Framework Regarding Cognizable Change.*

This Court began its cognizable change analysis by affirming the longstanding two-part test for "substantial change" under Act 250: (1) whether a project has resulted or may result in a cognizable physical change to the preexisting development, and (2) whether that change has the potential for significant impact under one or more of the Act's ten criteria. Id. ¶ 16 (PC at 58). The Court noted that NEMG has the burden to produce information concerning the scope of the pre-1970 and post-1970 operations, while Neighbors have the burden of persuasion with respect to substantial change. Id. ¶¶ 21, 22 (PC at 60-61).

Though the Court accepted a broad, tract-wide approach to defining the preexisting development, it explicitly rejected this approach in determining cognizable change:

> But 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.

Id. ¶ 24 (PC at 62). The Court reached this conclusion in part because "the focus of Act 250 is regulating the impacts of development" and "the location of a particular activity or operation within a tract is often inextricably connected to its impact." Id. ¶¶ 26, 27 (PC at 62-63) (emphasis in original). Thus, "a legal framework that treats crushing operations in one location as establishing a grandfathered right to crushing operations in any location on the tract is incongruous." Id. ¶ 28 (PC at 64). The Court further reasoned that whether crushing is "integral" to quarrying is beside the point for purposes of the cognizable change test; rather, the

test turns on "the actual existence, relative location, and relative amount of pre-1970 crushing, and the consequent impact of the new crushing on the Act 250 criteria." Id. ¶ 31 n.17 (PC at 67).

This Court also concluded that the Environmental Division's "broad, tract-wide approach to assessing cognizable change" was incompatible with Environmental Board gravel pit decisions concluding that operations at different sites within a tract, or increased operations, are cognizable changes. Id. ¶¶ 29, 30 (PC at 64-66). The Court expressly analogized this case to the gravel pit cases that found a cognizable change:

> The circumstance here—the introduction of significant crushing operations on a site not known to have had similar operations for over fifty years—is more closely analogous to the introduction of new operations on a different site within a gravel extraction tract than to the gradual expansion of existing operations.

Id. ¶ 30 n.14 (PC at 66). Last, the Court stated that the Environmental Division's analysis was "inconsistent with a string of cases" that had treated "relatively modest changes" as cognizable under Act 250. Id. ¶ 31 (PC at 66-67).

Based on this analysis, this Court's holding concerning cognizable change was as follows:

> The deployment of heavy industrial equipment that qualifies as development in a vicinity where it has not previously been deployed is a cognizable change. We accordingly reverse the Environmental Division's conclusion that the challenged rock-crushing activity is not a cognizable change.

Id. (PC at 67) (emphasis added). The Court continued: "Whether the development gives rise to potential significant impact with respect to one or more of the Act 250 criteria remains to be seen." Id.

3. *Legal Adequacy of the Environmental Division's Factual Findings.*

This Court concluded its opinion by addressing the Environmental Division's factual findings. The Court noted that the Environmental Division had "rested heavily on its finding that

dimension-stone-quarrying operations on the ROA tract have included intermittent crushing operations at various locations within ROA from 1904 through to present times" in assessing the preexisting development and cognizable change issues. Id. ¶ 32 (PC at 68). The Court concluded that the Environmental Division had erred in relying on substantial rock crushing for I-89 that occurred outside the ROA tract.[2] Id. ¶¶ 32-34 (PC at 68-69).

Without that crushing, the only remaining findings regarding pre-1970 crushing were:

1) Crushing in an "unspecified amount" near the current NEMG site around 1912;

2) Crushing in an "unspecified amount" and at an "unspecified frequency" by Wells-Lamson from 1926 to 1960; and

3) A contract between ROA and a contractor to crush approximately 30,000-40,000 cubic yards of material for eight months in 1969 and 1970.

Id. ¶¶ 7, 34 (PC at 54, 69). This Court held that the "sparseness" of these findings, especially when disregarding the off-tract crushing, did not "match the breadth of the Environmental Division's conclusion that intermittent crushing, presumably in an amount commensurate with the crushing at issue in this case, characterized ROA's operations for over a century." Id. ¶ 34 (PC at 69). Therefore, the Court reversed the Environmental Division's findings regarding "the scope of rock-crushing activities in the preexisting development." Id. ¶ 35 (PC at 69). On remand, the Environmental Division was to revisit its findings concerning preexisting development and substantial change, "analyzed consistent with the guidance set forth above." Id. ¶ 36 (PC at 69).

[2] This crushing occurred outside the northern border of the ROA tract, north of Websterville Road. Decision, PC at 3 (FF 8), 5 (FF 29).

B. Proceedings on Remand.

On remand, the parties declined the opportunity to present additional evidence. Decision, PC at 1. Therefore, the Environmental Division decided this case on remand based on the same evidence that was before it and this Court in the prior appeal.

C. The Environmental Division's Decision on Remand.

1. *Findings of Fact Concerning Pre-1970 Rock Crushing on the Rock of Ages Tract*.

The Environmental Division's single new finding of fact concerning the existence of pre-1970 rock crushing on the Rock of Ages tract was that the rock crushing for the sub-base of I-89 occurred on property that never was part of the Rock of Ages tract. Decision, PC at 5 (FF 29). The Environmental Division made no findings regarding the frequency or amount of crushing at any of the three sites it had previously identified as pre-1970 crushing locations.

The Environmental Division made two findings on remand regarding rock crushing generally: 1) that rock crushing is not necessary for quarrying, but that it helps the bottom line, and 2) that, because a 1988 crushing contract between ROA and Cooley Asphalt Paving Corporation referenced crushing that had already occurred, there is an inference that "it was common practice in the quarrying industry to conduct crushing without formal contracts." Id., PC at 4 (FF 20), 5 (FF 31).

2. *New Findings of Fact Concerning the Impacts of NEMG's Rock Crushing on Neighbors*.

The Environmental Division made twelve new findings of fact concerning the impacts of NEMG's rock crushing on Neighbors. Decision, PC at 7-8 (FF 54-65). Three witnesses testified for Neighbors—Suzanne Bennett, Pamela Austin, and Marc Bernier—each living at a different residence near the NEMG rock crushers. The Environmental Division found that each witness

has experienced loud noises from the NEMG rock crushers, rock dust from the crushers, and increased truck traffic due to the NEMG rock crushers. Id.

For example, the Environmental Division found that Suzanne Bennett experiences noises "like stone on metal" that are loud enough to wake her up and continue until 8:00 or 8:30 at night, and further experiences a coating of gritty dust on her house, lawn, outdoor furniture, and car, as well as increased truck traffic from the NEMG crushers. Id., PC at 7 (FF 55-57). The Environmental Division also found that Pamela Austin experiences "loud noises from the crusher" that are distinct from noises from a nearby ROA compressor, "a coating of dust on her property," and increased truck traffic due to trucks hauling aggregate from the crushers. Id., PC at 7-8 (FF 59-61). Last, the Environmental Division found that Marc Bernier experiences "very loud noise from the crusher," dust, and increased truck traffic from dump trucks hauling aggregate from the crushers. Id., PC at 8 (FF 63-65).

3. *The Environmental Division's Analysis of Preexisting Development.*

On remand, the Environmental Division again held that rock crushing activities were part of the preexisting development of the Rock of Ages Quarry. Decision, PC at 12. In reaching this conclusion, the Environmental Division cited its three findings of pre-1970 crushing that were previously before this Court: 1912/1920s crushing near the current NEMG site, 1926-1960 crushing just south of Websterville Road by Wells-Lamson, and 1969-1970 crushing at the Smith quarry. Id., PC at 10-11; In re N. E. Materials Grp., 2015 VT 79, ¶¶ 5, 6, 7, 34 (PC at 53-54, 69).

The Environmental Division went on to explain that "crushing is a naturally mobile and intermittent activity." Decision, PC at 11. Further, "rock crushing is closely economically related to quarrying." Id. Thus, though "crushing is not strictly necessary for quarrying," the

Environmental Division made the "reasonable inference that crushing was happening even when there [we]re no concrete written records of it" because crushing "'helps your bottom line.'" Id. The Environmental Division explained that, before 1970, landowners "often kept no records" because they "had no notice that they might have to prove the existence of uses that had been occurring on their land for decades." Id., PC at 11-12.

Therefore, the Environmental Division reasoned that it could not "reasonably demand" too much evidence from NEMG and stated that NEMG had "uncovered impressive evidence of historical rock crushing." Id., PC at 12. This evidence, coupled with the Environmental Division's finding regarding "the economic relationship between quarrying and crushing" and the inference that it was common practice to "crush rock without formal, written contracts," led the Environmental Division to conclude that "crushing was occurring continuously (though intermittently) on the ROA tract since the early 20th century." Id., PC at 4 (FF 20), 5 (FF 31), 11-12. Thus, the Environmental Division held that crushing activities on the ROA tract were a preexisting development. Id., PC at 12.

4. *The Environmental Division's Analysis of Cognizable Change.*

The Environmental Division began its analysis of substantial change by citing the dissenting opinion from this Court. Decision, PC at 12. Concerning cognizable change, the Environmental Division asserted that this Court left "little guidance" on the issue and posited various potential interpretations of this Court's Opinion. Id., PC at 13, 14-15.

The Environmental Division stated that this Court's reasoning "is not fully compatible with traditional preexisting-development/substantial-change analysis." Id., PC at 13. The Environmental Division re-analyzed the cases analyzed by this Court, and characterized this Court's decision as a "departure" from these cases. Id., PC at 14. Next, the Environmental

Division re-analyzed and re-interpreted the series of cases involving gravel pits that had been addressed in this Court's Opinion. Id., PC at 15-16. The Environmental Division did not cite footnote 14 of this Court's Opinion (analogizing NEMG's crushing to gravel pit cases that found a cognizable change), but drew the opposite analogy from these gravel pit cases by stating that "[j]ust as gravel pits naturally and inherently expand, rock crushing operations are naturally and inherently mobile." Id., PC at 16.

Based on its analysis of the gravel pit cases, the Environmental Division interpreted this Court's decision as requiring it to determine whether "the relocation of rock crushing operations from one area of a well-developed, preexisting quarry to another is consistent with the rock crushing operation's historic pattern of relocation." Id. (emphasis in original). Given this test, the Environmental Division re-concluded that NEMG's rock crushers are not a cognizable change. Id. The Environmental Division reasoned that the relocation of crushing to the NEMG site was consistent with the "intrinsically portable" nature of crushing. Id., PC at 16-18.

5. *The Environmental Division's Analysis of the Potential for Significant Impact.*

As before, the Environmental Division did not reach the issue of the potential for significant impacts. Decision, PC at 18 ("Because we conclude there is no cognizable physical change to the ROA development, we do not reach the 'impacts' prong of the substantial change analysis."). However, the Environmental Division noted that its "review of the facts shows that neighbors near the NEMG crusher experience noise, dust, and traffic impacts, all of which are relevant under Act 250." Id., PC at 20. It then concluded, without citation to authority:

> But the evidence in this matter does not show that the relocation causes new impacts. The relocation simply impacts new neighbors. Thus, even if we were to conclude that there is a cognizable physical change, we would conclude that Appellants have failed to persuade us that the impacts of noise, dust and traffic

> are any different than the impacts experienced by neighbors of crushing operations in other locations at the ROA tract.

Id.

STANDARD OF REVIEW

This appeal presents issues of law or statutory interpretation that are reviewed de novo. In re N. E. Materials Grp., 2015 VT 79, ¶ 18 (PC at 58). As to the trial court's use of inferences, any inference must be "reasonably drawn," Poronto v. Sinnott, 89 Vt. 479, 95 A. 647, 648 (1915), and "a trier of fact may not legitimately find a fact by inferring its existence from another fact which has itself been found as a result of an inference," Huestis v. Lapham's Estate, 113 Vt. 191, 198, 32 A.2d 115, 119 (1943).

ARGUMENT

I. NEMG'S ROCK CRUSHERS ARE A COGNIZABLE CHANGE, AND THE DECISION OF THE ENVIRONMENTAL DIVISION TO THE CONTRARY IS INCONSISTENT WITH THIS COURT'S DECISION AND OPINION.

A. This Court Decided that NEMG's Rock Crushers Are a Cognizable Change.

Neighbors respectfully outline four consistent and reinforcing elements of this Court's Opinion demonstrating that the Court held NEMG's rock crushers are a cognizable change.

First, in the concluding paragraph on cognizable change, this Court stated:

> The deployment of heavy industrial equipment that qualifies as development in a vicinity where it has not previously been deployed is a cognizable change.

In re N. E. Materials Grp., 2015 VT 79, ¶ 31 (PC at 67) (emphasis added). This sentence left no room for the Environmental Division to conclude on remand that NEMG's deployment of heavy industrial rock crushing equipment "is not" a cognizable change.

Second, that critical sentence is followed by:

> We accordingly reverse the Environmental Division's conclusion that the challenged rock-crushing activity is not a cognizable change. Whether the

> development gives rise to potential significant impact with respect to one or more of the Act 250 criteria remains to be seen.

Id. These sentences reinforce the holding that NEMG's rock crushing "is" a cognizable change by reversing the Environmental Division's prior conclusion that it "is not," and by noting that the second part of the substantial change test—potential for significant impact—remains to be seen. Thus, of the two-part test for substantial change, cognizable change has been decided, and only the potential for significant impact remained for decision on remand.

Third, as part of its extensive discussion of gravel pit cases, this Court stated:

> The circumstance here—the introduction of significant crushing operations on a site not known to have had similar operations for over fifty years—is more closely analogous to the introduction of new operations on a different site within a gravel extraction tract than to the gradual expansion of existing operations.

Id. ¶ 30 n.14 (PC at 66). By explicitly analogizing NEMG's rock crushing to the introduction of new operations on a different site within a gravel extraction tract, this Court reinforced that NEMG's rock crushing is a cognizable change, just as the introduction of new operations on a different site was a cognizable change in the gravel pit context.

Fourth, the dissenting opinion's characterization of the majority's holding, and its arguments that NEMG's rock crushers are not a cognizable change, further reinforce that the majority held that these rock crushers are a cognizable change. Id. ¶¶ 45, 54 (PC at 74-75, 80).

Strikingly, the Environmental Division did not cite or refer to Paragraph 31of this Court's Opinion (concluding that the deployment of heavy industrial equipment in a vicinity where it has not previously been deployed is a cognizable change). Nor did the Environmental Division cite or refer to footnote 14 of this Court's Opinion (analogizing NEMG's crushing to gravel pit cases that found a cognizable change). The Environmental Division thus ignored the fundamental holding of this Court.

B. At a Minimum, the Environmental Division's Decision Is Inconsistent with this Court's Ruling on Cognizable Change.

Even if this Court had not decided that NEMG's rock crushers are a cognizable change, the Environmental Division's renewed conclusion that these rock crushers are not a cognizable change cannot stand because that conclusion is deeply inconsistent with this Court's Opinion. This Court held that whether NEMG's rock crushing constitutes a cognizable change could not be decided based on past rock crushing at other sites on the ROA tract:

> To the extent that the evidence shows that dimension-stone quarrying was conducted throughout the ROA tract for many decades, and that crushing operations were part of those operations at various sites within the tract at various times through that period, the Environmental Division could conclude that the disputed crushing operations are grandfathered unless Neighbors can show that they constitute a substantial change. But 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.

Id. ¶ 24 (PC at 62) (emphasis added). The Court took issue with the Environmental Division's analysis as resting on "its view of the parcel as an undifferentiated whole" for purposes of the substantial change analysis, so that "any pre-1970 crushing activity anywhere on the entire 1170 acres owned by ROA" would establish "a baseline of rock crushing such that new rock-crushing facilities or operations anywhere on the tract would not constitute a substantial change." Id. ¶ 23 (PC at 61); see also id. ¶ 28 (PC at 64) ("[A] legal framework that treats crushing operations in one location as establishing a grandfathered right to crushing operations in any location on the tract is incongruous. This is true even in the face of a pre-1970 history of intermittent crushing at two or three different locations on an 1170-acre tract.").

This Court also reasoned that:

> The broad, tract-wide approach to assessing cognizable change that the Environmental Division followed is . . . at odds with this Court's, and the

> Environmental Board's, historical treatment of gravel pits in cases that present analogous issues. . . . Pre-1970 crushing operations on one or more parts of a large tract cannot simply be imputed to all parts of that tract for the purposes of a substantial-change analysis, without regard to the relative impacts of the pre- and post-1970 operations in the vicinity of the proposed change.

Id. ¶¶ 29-30 (PC at 64-65) (emphasis added). Thus, rather than a broad, tract-wide approach for determining cognizable change, this Court held that what matters is "the actual existence, relative location, and relative amount of pre-1970 crushing." Id. ¶ 31 n.17 (PC at 67).

In the face of these holdings and rationale, and despite this Court's direction to issue a decision "analyzed consistent with the guidance" in this Court's Opinion, id. ¶ 36 (PC at 69-70), the Environmental Division made no new findings concerning the actual existence, relative location, or relative amount of pre-1970 crushing in the vicinity of the NEMG rock crushers. All evidence concerning pre-1970 rock crushing already had been introduced in the prior trial.

Instead, on remand the Environmental Division re-adopted the same broad, tract-wide approach to assessing cognizable change that it previously used, and that this Court had rejected, by "interpreting" this Court's Opinion as requiring it to determine whether "the relocation of rock crushing operations from one area of a well-developed, preexisting quarry to another is consistent with the rock crushing operation's historic pattern of relocation." Decision, PC at 16; compare with In re N. E. Materials Grp. LLC A250 JO #5-21, No. 143-10-12 Vtec, slip op. at 15 (Vt. Super. Ct. Envtl. Div. Apr. 28, 2014) (Walsh, J.) (Decision on the Merits) (PC at 46) ("Because the location of crushing operations has moved around ROA's 1,100-acre site since the early 1900s, we conclude that it is reasonable to expect that the location of crushing will vary over time."). This interpretation led the Environmental Division to conclude, again, that NEMG's crushing is not a cognizable change because "mobile and intermittent" crushing is characteristic of the ROA tract. Decision, PC at 17. Therefore, contrary to this Court's mandate,

and relying upon the same findings previously before this Court, the Environmental Division's decision on remand once again allowed instances of intermittent crushing at different locations on an 1170-acre tract to defeat Neighbors' claim of cognizable change, with no new findings regarding the actual existence, relative amount, or relative location of crushing at the NEMG site.

In addition to repeating its prior analysis, the Environmental Division's analysis and conclusion essentially followed the dissenting opinion from this Court's decision, rather than the majority. Compare Decision, PC at 18 (citation omitted):

> We conclude that the present relocation of ROA's crushing to NEMG's site is consistent with the intrinsically portable nature of rock crushing and with ROA's historic pattern of mobile crushing operations. We therefore conclude that the ROA tract is being "operated in essentially the same manner as it was before June 1, 1970," and that no cognizable physical change has occurred.

with Dissent ¶ 54 (PC at 80):

> The ROA industrial complex is contiguous, and the rock-crushing operations there have historically moved from one area of the complex to another depending on the source of the stone to be crushed. Because crushing has always been part and parcel to the contiguous stone- quarrying operations in the complex, there is no cognizable change to the preexisting development.

This was inappropriate; the Environmental Division was bound to follow the Opinion of this Court, rather than its own view of the law or the dissent.

Neighbors respectfully request this Court to hold (again) that NEMG's rock crushers are a cognizable change. This Court held that the particular location, level, and duration of an operation are key to determining cognizable change. Here, NEMG's crushers have been operating at significant levels since 2010 on a site that has not seen crushing activity in the vicinity, if any, since the early 1900s, and then of undetermined volume and duration.

II. THE ENVIRONMENTAL DIVISION'S ADDITIONAL FINDINGS OF FACT CONCERNING THE IMPACTS OF NEMG'S ROCK CRUSHERS ON NEIGHBORS ESTABLISH POTENTIAL SIGNIFICANT IMPACTS THAT MEET THE SECOND PRONG OF SUBSTANTIAL CHANGE.

In its prior Opinion, this Court noted the Environmental Division's acknowledgement that NEMG's rock crushing "'creates various impacts, including noise, particulate matter in the form of stone dust, and truck traffic and congestion'" that adversely affect Neighbors. In re N. E. Materials Grp., 2015 VT 79, ¶ 14 n.6 (PC at 57); see also id. ¶ 26 n.12 (PC at 63) (Environmental Division "specifically found that as a result of the crushing operation, Neighbors experience noise from material being loaded or unloaded; dust on house windows, outside furniture, lawns, and cars; and dump-truck traffic"). However, the Court did not consider the proper application of the second prong of the substantial change analysis—the potential for significant impact—because the Environmental Division had not made findings as to whether this prong had been met. Id. ¶ 17 n.9 (PC at 58).

On remand, the Environmental Division made twelve new findings concerning the impacts of the NEMG rock crushers on Neighbors. Decision, PC at 7-8 (FF 54-65). There is no question that these impacts are caused by the crushers. See id.; see also id., PC at 20 (referring to "the impacts experienced by neighbors of crushing operations" and stating that "[o]ur review of the facts shows that neighbors near the NEMG crusher experience noise, dust, and traffic impacts, all of which are relevant under Act 250"). These findings demonstrate that the rock crushers cause not just potential significant impacts, but actual significant impacts to the neighbors who live in proximity to these operations.

First, the Environmental Division found that each of the three witnesses who testified for Neighbors experiences loud noise from NEMG's rock crushers. For Suzanne Bennett, these noises are "like stone on metal," are loud enough to awaken her in the morning, and can last into

the night. Id., PC at 7 (FF 55). Similarly, Pamela Austin "experiences loud noises from the crusher" distinct from other noises on the ROA tract near her property, and Marc Bernier "experiences very loud noise from the crusher." Id., PC at 7 (FF 59), 8 (FF 63).

These findings of fact conclusively establish the potential for significant impact under Criteria 1 and 8 of Act 250 because "noise can create undue pollution when it intrudes on people, regardless of the decibel level." Re: Sherman Hollow, Inc., No. 4C0422-5-EB (Revised), Findings of Fact, Conclusions of Law, and Order, at 30 (Vt. Envtl. Bd. Feb. 17, 1989); see also Re: Pike Industries, Inc., No. 5R1415-EB, Findings of Fact, Conclusions of Law, and Order, at 32 n.5 (Vt. Envtl. Bd. June 7, 2005) (welfare impacts of noise considered under Criterion 8). Moreover loud noises such as those found by the Environmental Division, have led to conditions on the location of rock crushers within a quarry, exactly the type of conditions that should be considered for NEMG's rock crushers. See In re R.E. Tucker, Inc., 149 Vt. 551, 557–58, 547 A.2d 1314, 1318-19 (1988).

Second, all three witnesses experience significant rock dust from the NEMG rock crushers. Suzanne Bennett experiences a "coating of gritty dust" on her house, lawn, outdoor furniture, and car. Decision, PC at 7 (FF 56). Pamela Austin also experiences a coating of dust on her property, and Marc Bernier experiences dust in the area. Id., PC at 8 (FF 60, 64). Like the noise from the crushers, the rock dust the crushers impose on Neighbors is a potential significant impact under Criterion 1, and should lead to conditions on the proximity of these crushers to the neighboring residences. See Re: Pike Industries, Inc., at 31-32 (Vt. Envtl. Bd. June 7, 2005) (citing cases) (rock dust is air pollution under Criterion 1).

Third, the NEMG rock crushers result in increased truck traffic and congestion that impact all three witnesses. Decision, PC at 7 (FF 57), 8 (FF 61, 65). Increased truck traffic and

congestion are potential significant impacts under Criterion 5 that require Act 250 review in order to protect the public's interest in safe travel on public roadways. See, e.g., In re Pilgrim P'ship, 153 Vt. 594, 596-97, 572 A.2d 909, 910-11 (1990).

Any one of these categories of impacts (noise, dust, truck traffic), and certainly the combination of impacts, is enough to establish that the "potential for significant impact" prong of the substantial change test has been met. See In re Hale Mountain Fish & Game Club, Inc., 2007 VT 102, ¶ 4, 182 Vt. 606, 607, 939 A.2d 498, 500-01 (prong met if there is potential for significant impact "under one or more of the ten Act 250 criteria"); Secretary, Vt. Agency of Natural Resources v. Earth Constr., Inc., 165 Vt. 160, 164, 676 A.2d 769, 772 (1996) (findings concerning air and noise pollution from truck traffic, soil erosion, aesthetics, and potential reduced highway safety demonstrated potential for significant impacts under multiple criteria). Rather than reach this inevitable conclusion, however, the Environmental Division reasoned that significant impacts were unlikely based on the novel legal theory that these impacts were not new, but merely impacted new neighbors. Decision, PC at 18-20.

The Environmental Division cited no precedent or authority for this remarkable interpretation of Act 250. Nor could it, because this assertion contradicts decades of Act 250 law, including this Court's Opinion in this case. In discussing the potential impacts prong of substantial change, this Court highlighted that this prong turns on "the relative impact on Neighbors of NEMG's operations as compared to the pre-1970 impacts." In re N. E. Materials Grp., 2015 VT 79, ¶ 26 n.12 (PC at 63) (emphasis added). This Court added:

> 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 and the Environmental Division routinely engage in impact analysis that is location-specific and evaluates the impacts on particular neighbors or households.

Id., 2015 VT 79, ¶ 27 (PC at 63) (emphasis added); see also In re Application of Lathrop Ltd. P'ship, 2015 VT 49, ¶ 109, __ Vt. __, 121 A.3d 630, 666 (holding that Act 250 application should be remanded to District Commission based on "project revisions that may implicate new criteria not before the Environmental Court or affect new parties not participating in the proceedings") (emphasis added); In re R.E. Tucker, 149 Vt. at 557-58, 547 A.2d at 1318-19 (approving condition in land-use permit placing limitations on where gravel crusher could be located within tract because severity of noise pollution depended on placement). The Environmental Division ignored this Court's Opinion and precedent and instead invented a contradictory rule.

In this case, the Environmental Division's findings establish significant impacts on Neighbors, and there was no evidence of pre-1970 impacts from rock crushing on Neighbors. Therefore, Neighbors respectfully ask this Court to apply its prior Opinion—and decades of Act 250 law—to the Environmental Division's findings on remand by holding that NEMG's rock crushers have the potential for significant impact under one or more Act 250 criteria.

III. THE ENVIRONMENTAL DIVISION'S DECISION ON PREEXISTING DEVELOPMENT IS INCONSISTENT WITH THIS COURT'S DECISION AND OPINION, AND THE DIVISION'S FINDINGS DO NOT ESTABLISH THAT NEMG'S CRUSHERS ARE GRANDFATHERED AS A PREEXISTING DEVELOPMENT.

The Environmental Division's decision does not establish that NEMG's rock crushers are part of a preexisting development because it relies upon inferences that, even if supported by the record, would not meet the test for preexisting development articulated by this Court. Further, the inferences that the Environmental Division relied upon are not supported by the record and therefore cannot be relied upon to meet the preexisting development exemption.

This Court held that, in order for NEMG to show that its rock crushing operations are

part of a preexisting development, NEMG would need to show "that dimension-stone quarrying was conducted throughout the ROA tract for many decades, and that crushing operations were part of those operations at various sites within the tract at various times throughout that period." In re N. E. Materials Grp., 2015 VT 79, ¶ 24 (PC at 62). This Court further held that the existing findings regarding crushing on the ROA tract were insufficient to establish that "intermittent crushing, presumably in an amount commensurate with the crushing at issue in this case, characterized ROA's operations for over a century." Id. ¶ 34 (PC at 69). Therefore, the Court reversed the Environmental Division's conclusions concerning "the scope of rock-crushing activities in the preexisting development." Id. ¶ 35 (PC at 69).

On remand, the Environmental Division cited the same three findings of pre-1970 crushing that were insufficient to establish crushing as part of a preexisting development before this Court: crushing near the current NEMG site, crushing on the southern portion of the Wells-Lamson site, and crushing at the Smith quarry. Decision, PC at 10-11; In re N. E. Materials Grp., 2015 VT 79, ¶¶ 5, 6, 7, 34 (PC at 53-54, 69). The Environmental Division cited no additional evidence of actual crushing on the ROA tract, but instead relied upon two inferences to conclude that crushing had occurred continuously on the ROA tract. Decision, PC at 11-12. Those inferences were: 1) because crushing "'help[s] your bottom line,'" crushing "was happening even when there [we]re no concrete written records of it," and 2) because a 1988 crushing contract referred to crushing that had already occurred, "it was common practice in the quarrying industry to conduct crushing without formal contracts," and thus crushing was occurring even when there were no records of it. Id., PC at 4 (FF 20), 5 (FF 31), 11, 12.[3]

[3] The Environmental Division also used the "bottom line" quote to support the idea that there is an economic relationship between quarrying and crushing. But, as explained above, this

These inferences are not sufficient to support a finding of preexisting development. First, even if the inferences were supported by the record, the inferences speak to a relationship between quarrying and crushing, not to actual instances of crushing at specific levels, sites, and times on the ROA tract. It is the latter that this Court required to prove preexisting development, not the existence of a general relationship between quarrying and crushing, or the belief that crushing occurs without written records. See In re N. E. Materials Grp., 2015 VT 79, ¶¶ 24, 34 (PC at 62, 69) (must show crushing at "various sites within the tract" at "various times" in "amount commensurate" with current amount). Further, this Court already was aware of a relationship between quarrying and crushing when it held that the Environmental Division's findings were insufficient to establish preexisting development. Id. ¶ 4 (PC at 53) ("Crushing . . . is a common industry practice, allowing quarrying operations to make use of otherwise useless waste material."), ¶ 10 ("Environmental Division explained that [off-site] rock crushing . . . support[s] the finding of a relationship between quarrying and rock-crushing"), ¶ 34 (PC at 69) ("the findings made by the Environmental Division do not establish the amount and frequency of the pre-1970 crushing sufficient to support the Environmental Division's broader conclusion") (emphasis added).

Second, these inferences do not satisfy the burden of proof for establishing preexisting development. It is well settled that a project proponent bears the burden of persuasion in proving a preexisting development sufficient to invoke the grandfathering exemption to Act 250. Id. ¶¶ 20, 22 (PC at 59, 60-61) (citing cases); see also Re: John Gross Sand & Gravel, Declaratory Ruling No. 280, Findings of Fact, Conclusions of Law, and Order, at 9-10 (Vt. Envtl. Bd. July 28, 1993) (holding that sand and gravel extraction operation did not qualify as preexisting

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would speak to a general relationship between quarrying and crushing, if anything, and not to the proof required to meet the preexisting test.

development because operation failed to produce sufficient evidence to establish pre-1970 extraction rate). And, as this Court explained, exemptions to Act 250 jurisdiction are to be read "'narrowly,'" and only applied "'when the facts clearly support the exemption's application.'" In re N. E. Materials Grp., 2015 VT 79, ¶ 18 (PC at 59) (citation omitted).

Rather than require NEMG to meet its burden by providing evidence demonstrating crushing at various sites and times and at commensurate levels as directed by this Court, the Environmental Division decided, without citation to any evidence or authority, that landowners "often kept no records" because, before 1970, they "had no notice that they might have to prove" prior uses. Decision, PC at 11-12. Therefore, the Environmental Division could not "reasonably demand" too much evidence from NEMG and ROA. Id., PC at 12; contrast with John Gross Sand, at 9 (Vt. Envtl. Bd. July 28, 1993) (rejecting claim that, since project proponent "cannot or will not produce the information, it should not be required to produce it"). Using this approach, and despite its conclusory statement to the contrary, the Environmental Division effectively relieved NEMG of its burden of proof. See Decision, PC at 12.

Third, the Environmental Division's inferences are not supported by the record and therefore cannot be used to meet the test for preexisting development. Any inferences made by a trial court must be reasonably drawn from the facts. Poronto v. Sinnott, 89 Vt. 479, 95 A. 647, 648 (1915) ("Taken altogether, we do not think the record warrants us in saying that the required inference could reasonably be drawn."); see also Wellman v. Wales, 97 Vt. 245, 122 A. 659, 663 (1923) (must be evidence "from which . . . inference may fairly be drawn"). In addition, inferences based upon inferences are explicitly disallowed: "The only inferences of fact which the law recognizes are immediate inferences from the facts proved." Vermont Shade Roller Co. v. Burlington Traction Co., 102 Vt. 489, 150 A. 138, 142 (1930); see also Merrihew v.

Goodspeed, 102 Vt. 206, 147 A. 346, 350 (1929) (citing cases) ("to base an inference upon a fact the existence of which itself rests upon a prior inference . . . . would violate a well established rule").

The inferences made by the Environmental Division do not satisfy these standards. Donald Murray's statement that crushing "'help[s] your bottom line'" does not reasonably lead to the Environmental Division's inference that crushing occurred when there were no written records of it, and certainly not to a level that would support the conclusion that "crushing was occurring continuously (though intermittently) on the ROA tract since the early 20th century." Decision, PC at 11-12. This conclusion is especially weak in light of the Environmental Division's findings that crushing "is not absolutely necessary for quarrying" and that "[m]uch of the material in ROA's grout piles is too large for crushing." See id., PC at 3 (FF 18), 4 (FF 20).

The Environmental Division's second inference is also problematic. The Environmental Division relied on evidence that one corporation referenced prior crushing at an undefined location during an undefined "'period of time'" in one crushing contract written eighteen years after the enactment of Act 250 to infer that "it was common practice in the quarrying industry to conduct crushing without formal contracts." Id., PC at 5 (FF 31). Then, the Environmental Division relied on this "common practice" inference to conclude that "crushing was occurring continuously (though intermittently) on the ROA tract since the early 20th century." Id., PC at 12. The inference that it was common practice to conduct crushing without contracts is not reasonably drawn from the evidence consisting of one contract, and certainly not to the level that

would establish that "crushing was occurring continuously (though intermittently) on the ROA tract since the early 20th century." Id.[4]

Further, the Environmental Division's ultimate conclusion—that crushing has occurred continuously and intermittently on the ROA tract for a century—is based upon an inference that is based upon another inference. From the "no written records" inference, the Environmental Division would have had to make another inference: that because crushing occurred without written records in quarries, crushing frequently occurred across the ROA tract without written records for the past century. Only then could the Environmental Division begin to conclude that crushing occurred "continuously (though intermittently) on the ROA tract since the early 20th century." Therefore, the Environmental Division's conclusion is invalid because it violates the "well-established rule" that an inference may not be based upon an inference. Merrihew, 102 Vt. 206, 147 A. at 350.

In sum, even if the Environmental Division's inferences were permissibly drawn from the record, they would provide no information about the various sites, times, and levels of crushing on the Rock of Ages tract, as required by this Court. Without that evidence and information, NEMG failed to meet its burden of proof. Neighbors respectfully request this Court to hold that NEMG's rock crushing is not part of any preexisting development.

IV. THE DECISION OF THE ENVIRONMENTAL DIVISION ON REMAND VIOLATED THE LAW OF THE CASE AND ITS DUTIES AS A TRIAL COURT ON REMAND.

On remand from this Court, the duty of the Environmental Division was to apply the law and follow the directions from this Court's Opinion. This Court's Opinion is the law of the case "'on the points presented throughout all the subsequent proceedings therein.'" Coty v. Ramsey

[4] It would have made more sense for the Environmental Division to infer that, sometimes, crushing was not memorialized in a contract until after the crushing had occurred, rather than the inference that crushing commonly occurred with no contracts, ever.

Assocs., Inc., 154 Vt. 168, 171, 573 A.2d 694, 696 (1990) (citation omitted). Because the lower court was acting pursuant to this Court's mandate, "[i]t is axiomatic that on remand the trial court is constrained to follow '[this Court's] specific directions as interpreted in light of the opinion.'" State v. Higgins, 156 Vt. 192, 193, 588 A.2d 1062, 1062 (1991) (citation omitted) (finding that "remand was not followed" and reversing trial court for second time); see also Coty, 154 Vt. at 172, 573 A.2d at 697 (reversing trial court on remand because "the [trial] court directly contradicted our decision that the earlier award was not excessive and changed the theory of punitive damages to one of compensation").

In this case, the trial court's decision on remand directly contradicted and failed to follow this Court's prior decision. As explained above, the Environmental Division again found no cognizable change, when this Court had held that NEMG's rock crushers are a cognizable change. Even if this Court had not held that NEMG's rock crushers are a cognizable change, the Environmental Division's decision would still violate the law of the case because it opposes and is inconsistent with this Court's analysis of cognizable change in multiple respects. Similarly, the Environmental Division essentially repeated its analysis on preexisting development and ignored the requirements set forward by this Court. In this case, as in Higgins and Coty, this Court should reverse the trial court for its failure to follow the law of the case.

CONCLUSION

Under this Court's prior Opinion and the further law cited above, NEMG's rock crushers require an Act 250 permit because they are not part of a preexisting development. Even if these rock crushers were part of a preexisting development, they would require an Act 250 permit because they meet both the cognizable change and potential for significant impact prongs of the substantial change test.

Neighbors respectfully request this Court to enter Judgment that the rock crushers are subject to Act 250 and must obtain an Act 250 permit. See Coty, 154 Vt. at 170, 172, 573 A.2d at 696-97 (entering judgment after trial court failed to follow Vermont Supreme Court on remand); Smith v. Hill, 45 Vt. 90, 92 (1872) (referring to "common practice of this court . . . in cases tried by the court when the facts are found by the county court, if the judgment of the county court is reversed, to proceed and render final judgment, such as the facts warrant)." In the alternative, Neighbors request that this Court remand to the Environmental Division with instructions for the Environmental Division to enter Judgment that the rock crushers are subject to Act 250 and must obtain an Act 250 permit. See In re Lathrop Ltd. P'ship, 2015 VT 49, ¶ 110, __ Vt. __, 121 A.3d at 666 (remanding with specific instructions that Environmental Division "shall" follow).

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VERMONT RULE OF APPELLATE PROCEDURE 32(a)
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). The Microsoft Office Word 2010 word processing system was used to create this Brief and according to the software word count tool it contains 8,218 words, excluding the Statement of Issues, Table of Contents, Table of Authorities, signature blocks, and this Certificate of Compliance.

Dated February 19, 2016.

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