# IN THE SUPREME COURT OF THE STATE OF VERMONT

**No. 2016-170**

## IN RE: NORTH EAST MATERIALS GROUP, LLC AMENDED ACT 250 PERMIT

On Appeal from a Judgment of the
Vermont Superior Court – Environmental Division
Docket No. 35-3-13 Vtec

**REPLY 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 parties agree on two important points: (1) the Environmental Division found that North East Materials Group's (NEMG's) asphalt plant project creates unacceptable impacts under criteria 8 and 5 and therefore found it necessary to impose conditions, NEMG Brief at 5; and (2) the standard of review is whether the Environmental Division's conclusions regarding compliance with the criteria are reasonably supported by the findings, NEMG Brief at 4.

The question remains, then, whether the Environmental Division's conclusion that its conditions on NEMG's project will ensure compliance with Act 250's criteria—as required by the statute—is reasonably supported by the findings—as required by the standard of review. As explained below and in Neighbors' opening brief, the answer is no.

## ARGUMENT

### I. NEMG'S PERMIT DOES NOT ENSURE COMPLIANCE WITH CRITERION 8.

#### A. This Is a Permit Case, Not an Enforcement Case.

The issue in this case is not whether NEMG has violated its permit; the issue is whether the permit will ensure compliance with the criteria. This is the statutory test that must be met before any permit can be issued. See, e.g., 10 V.S.A. § 6086(a) ("Before granting a permit, the District Commission shall find . . . ."); In re Treetop Dev. Co. Act 250 Dev., 2016 VT 20, ¶¶ 11, 12, ___ Vt. ___, ___ A.3d ___ (Act 250 approval "requires . . . affirmative findings under all ten statutory criteria before issuing a permit" and conditions may be imposed "[i]n order to ensure continued compliance with the statutory criteria"); Neighbors Brief at 11-17.

The Environmental Division's findings show that this test has not been met. NEMG's attempt to cast this appeal as an enforcement case in disguise, NEMG Brief at 27-28, is an attempt to divert the Court's attention from the inescapable fact that the Environmental Division

found odors and fumes have left the asphalt plant project over its two years of operation, intruding on Neighbors' lives and causing undue adverse aesthetic impacts. PC 6, 16 n.5, 28-29. These impacts occurred while the odor condition already was in place in both NEMG's Air Pollution Permit and its Act 250 Permit. All of this is highly relevant to the question of whether the Environmental Division reasonably could conclude that re-imposing the exact same condition would ensure compliance with criterion 8, when it had not done so over two years of operation. It is true that the Environmental Division's findings also show that NEMG has violated its Air Pollution and Act 250 Permits, but enforcement of those permits was not before the Environmental Division and is not before this Court now.[1]

Based on its own findings, the Environmental Division could *not* reasonably conclude that imposing the exact same condition would ensure compliance with criterion 8. The fallacious reasoning would be as follows: "To satisfy the statute, this permit needs to ensure criterion 8 will be met. We find that criterion 8 has not been met for the past two years under the existing condition in this permit, therefore we are going to re-impose the exact same condition to ensure that criterion 8 will be met." It would set an untenable precedent under Act 250 if the Environmental Division were allowed to re-impose a condition that has not worked, especially when there are no findings to suggest that, going forward, the permittee will satisfy, or is able to

[1] Neighbors do not contest that the Natural Resources Board, rather than the District Commission, initiates enforcement actions under Act 250. See NEMG Brief at 28 (citing In re Treetop, 2016 VT 20, ¶ 13). Treetop involved an open-ended permit condition that allowed the District Commission to revise the permittee's Act 250 permit as needed based on post-permit stormwater management measures. This creation of "prospective, extra-statutory authority" rendered the condition unenforceable, expanding the Commission's authority and creating "perpetual uncertainty" as to the terms of the permit. Id. ¶ 15. Further, in that case, the permit at issue was unappealed. In contrast, the current case involves an actual permit appeal challenging the sufficiency of a non-open-ended permit condition, which is perfectly allowable. See id. ¶ 16 ("Had the Association appealed the amended permit to the Environmental Division, it would have been entitled to challenge the sufficiency of the amended permit and its conditions, including those regarding the stormwater management system.").

satisfy, that condition. Like the Environmental Division, NEMG did not even attempt to address the fact that the odor condition already was in NEMG's Act 250 Permit.

In this instance, NEMG has not complied with criterion 8 and has not brought forward any evidence suggesting that the asphalt plant can comply with criterion 8 in its current location. See NEMG Brief at 27-28. Either of these scenarios renders the Environmental Division's re-imposition of a failed condition insufficient to ensure compliance with criterion 8. See Neighbors Brief at 15-17.

### B. The Environmental Division's Findings Regarding Undue Adverse Impacts Were Well Supported.

NEMG appears to take issue with the Environmental Division's findings regarding undue adverse impacts under criterion 8, making much of the fact that some of Neighbors' witnesses are hyper-sensitive to smells (which Neighbors do not contest). NEMG Brief at 24-26. However, the Environmental Division made its findings regarding undue adverse impacts based on testimony that it found credible. PC 16 n.5, 28-29 ("Even though we question the credibility of some of the more extreme accounts of asphalt fumes [because some Appellants testified that they are hyper-sensitive to odors and some smelled odors on days the Project was not operating], some of the Appellants who are not hyper-sensitive credibly testified that they experience pungent, eye-watering, and throat-stinging odors from the Project that permeate their properties in the summer time, and cause Appellants to forgo outdoor recreation.").

As illustrated fully in Neighbors' opening brief, these findings regarding odors and undue adverse impacts were well supported by the testimony of multiple Neighbors. Neighbors Brief at 4-7.[2] Additionally, four of the seven Neighbors who testified were not hyper-sensitive to odors

[2] Further, three Neighbors kept event logs showing substantial correlations with NEMG's production logs. PC 56, 63, 74, 117; Neighbors Proposed Findings of Fact & Concl. of Law,

and thus satisfied Quechee's requirement that the impact be shocking or offensive to the "average" person. Re: Quechee Lakes Corp., Nos. 3W0411-EB & 3W0439-EB, Findings of Fact, Concl. of Law, & Order, at 18-20 (Vt. Envtl. Bd. Nov. 4, 1985); Tr. (05-04-2015), at 169 (sensitive); Tr. (05-05-2015), at 81 (sensitive), 132 (sensitive).

In any case, NEMG has not appealed these findings, so there is no point arguing with them now.

Finally, though not central to its argument, NEMG's characterization of the Quechee test is incorrect. The Quechee test is used to determine, first, whether a project is adverse, and then, whether a project is undue. Quechee Lakes, Nos. 3W0411-EB & 3W0439-EB, at 18-20. In turn, the "undue" analysis involves three factors, each of which the Environmental Division addressed (written community standard, offending sensibilities, mitigating steps). PC 28-29. The Quechee analysis ends there. NEMG confuses the "mitigating" factor of the "undue" analysis with the Environmental Division's duty *after* the "undue" prong already has been satisfied. See NEMG Brief at 5 ("once the trial court concluded as it did that there was undue adverse impact as it did, what remained under the Quechee Lakes analysis was to determine if there were conditions that would mitigate the impact"). The distinction matters because, once a project is "undue" for any reason (as here), criterion 8 has not been satisfied and conditions must be imposed or the permit denied. See, e.g., In re McShinsky, 153 Vt. 586, 591-93, 572 A.2d 916, 919-21 (1990) (affirming denial of permit and ruling that "an affirmative answer to any one of the three inquiries means the project would have an undue adverse impact"). In this case, the

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Appendix (June 5, 2015), N. E. Materials Grp., LLC Amended Act 250 Permit, 35-3-13 Vtec (plant produced asphalt on 26 of 30 days that one or more of neighbors recorded asphalt smell). Though smells were recorded on 4 days when the plant was not operating, smells could arise from the storage tank and truck loading. See PC 3 (FF 16); Tr. (05-04-2015), at 226-27; Tr. (05-06-2015), at 97-99.

Environmental Division found that NEMG had used generally available mitigating steps, PC 28, but the project was still undue—even stronger support for Neighbors' position that the asphalt plant simply cannot satisfy criterion 8 in its current location. See In re: Rivers Dev. Act 250 Appeal, No. 68-3-07 Vtec, slip op. at 57, 71 (Vt. Super. Ct. Envtl. Div. Mar. 25, 2010) (denying permit and holding that quarry and rock crushing project failed criterion 8 despite use of mitigating efforts).

**C. Neighbors Have Not Waived Their Arguments.**

NEMG's waiver arguments lack seriousness, for multiple reasons.

First, Neighbors' aesthetics arguments clearly fall within the Statement of Questions filed in the Environmental Division, which raised compliance with criterion 8 as an issue. SPC 58-60. Among other things, the Questions include whether the Environmental Division could make an affirmative finding that the asphalt plant project will satisfy criterion 8. SPC 58. This is precisely the question at issue in the current appeal before this Court, and Neighbors' arguments speak to that question.

Second, there is no requirement, and NEMG has not cited any authority to support the notion, that Neighbors must include the relief sought, the evidence to be presented, and the arguments to be made in the Statement of Questions. See NEMG Brief at 23. To the contrary, the Statement of Questions requires simply "a statement of the questions that the appellant desires to have determined." V.R.E.C.P. 5(f).

Third, it is no surprise to NEMG that Neighbors seek denial of the permit (or, in the alternative, adequate permit conditions, if any are possible), since that is the obvious result of a failure to make affirmative findings under criterion 8. 10 V.S.A. §§ 6086(a), 6087; e.g., In re Brattleboro Chalet Motor Lodge, Inc., No. 4C0581-EB, Findings of Fact, Concl. of Law, &

Order, at 11-12 (Vt. Envtl. Bd. Oct. 17, 1984) (denying permit under criterion 8). This is especially true given Neighbors' proposed conclusions of law below, which specifically called for denial of the permit. Neighbors Proposed Findings of Fact & Concl. of Law, at 41 (June 5, 2015), N. E. Materials Grp. Amended Act 250 Permit, No. 35-3-13 Vtec (Vt. Super. Ct. Envtl. Div.).

NEMG's real complaint here seems to be with the Environmental Division for admitting and relying on evidence of impacts during the plant's two years of operation under its permit, rather than conducting the trial in a fictional, pre-operation reality. However, NEMG did not object to the admission of such evidence and did not file an appeal on that basis, so it is too late for NEMG to object now. See, e.g., In re Estate of Peters, 171 Vt. 381, 390, 765 A.2d 468, 475 (2000) (must make timely objection to preserve claim of error in introduction of evidence); Vt. R. Evid. 103(a)(1) (same).

Relatedly, NEMG's claim that Neighbors have waived any argument about odors from the "smokestack," and that the Environmental Division found the "smokestack" did not emit unduly adverse odors, is incomprehensible and meritless. See NEMG Brief at 3.[3] The smokestack is an essential component of the asphalt plant project on the NEMG site, and therefore plainly covered by both Neighbors' Statement of Questions and the Environmental Division's decision, a decision that found odors from the project create undue adverse aesthetic effects. See SPC 58 (Statement of Questions referring to aesthetic effects from project); PC 2, 3 (decision referring to "hot-mix asphalt plant and related fixtures and equipment" as "Project" and identifying "smokestack" as one of several points of air emissions from "Project"); PC 6, 16 n.5,

[3] NEMG perhaps confused the Environmental Division's discussion of the smokestack's *visual* aesthetics (PC 21-22) with the Environmental Division's discussion of *odors* from the asphalt plant (PC 28-29)—two separate analyses.

28-29 (decision referring to odors and fumes from "Project" and "asphalt plant itself" as adverse and undue).

In closing, because the Environmental Division's conclusion that NEMG's permit will ensure compliance with criterion 8 is not reasonably supported by the findings, this Court should reverse that conclusion and deny the permit based on the trial court's findings, or remand for consideration of whether additional conditions, if any, can ensure compliance.

## II. NEMG'S PERMIT DOES NOT ENSURE COMPLIANCE WITH CRITERION 5.

NEMG's brief never addressed the central issue posed by this appeal—whether the conditions imposed by the Environmental Division will ensure compliance with all Act 250 criteria. See 10 V.S.A. § 6086(a), (c); In re Treetop, 2016 VT 20, ¶ 12. Concerning criterion 5, the conditions imposed by the Environmental Division do not ensure that NEMG's asphalt plant will not cause "unsafe conditions with respect to the use of the highways." 10 V.S.A. § 6086(a)(5).

### A. Adding Traffic to the Existing Safety Concern in Graniteville Road Fails Criterion 5.

As set forth in Neighbors' opening brief, and consistent with In re Pilgrim Partnership, adding traffic to an existing hazardous condition fails criterion 5. Neighbors Brief at 22-23. In hanging its hat on the size of the trucks, NEMG misses this point and also does not defend the Environmental Division's misuse of Pilgrim, which concerns increased traffic and is not limited to the size of the vehicle. See In re Pilgrim P'ship, 153 Vt. 594, 596-97, 572 A.2d 909, 910-11 (1990). While the Environmental Division found that tractor-trailer sized trucks (vs. dump trucks) have crossed the centerline, it also misunderstood Pilgrim as applying only where the underlying problem is traffic congestion (not safety). PC 18. In fact, Pilgrim was specifically

concerned with adding more traffic to an existing unsafe condition, and held that the proposed project failed criterion 5 on that basis. 153 Vt. at 596-97, 572 A.2d at 910-11.

Here, though the Environmental Division reasoned that a high crash location (HCL) is not "per se unreasonably dangerous," it referred to the sharp curve area in Lower Graniteville as an "existing safety concern." PC 18. This makes sense because, in addition to the HCL, this stretch of road has a sharp, 90-degree turn; narrow shoulders; no sidewalks; a telephone pole limiting vehicle use of the shoulder; and it goes through the hub of commercial and community activity in the village, including a general store, senior apartments, post office, playground, and school bus stop. Neighbors Brief at 8-9. Further, the Environmental Division's condition applies to all "trucks associated with the Project," not just tractor-trailer-sized trucks. PC 31.

Thus, the Environmental Division appears to have recognized that the sharp curve area is an existing safety concern, but failed to recognize that adding traffic to this area fails criterion 5 under Pilgrim.[4] Only the condition proposed by Neighbors—for all trucks to avoid the sharp curve area altogether by using internal Rock of Ages (ROA) roads—would alleviate this problem. See Neighbors Brief at 10-11, 26.

### B. It Was Not Reasonable for the Environmental Division to Conclude That Re-imposing a State Law Requirement Would Ensure Compliance with Criterion 5.

The Environmental Division found that large, tractor-trailer sized trucks cross over the centerline when negotiating the sharp curve in the high crash location in the center of Lower Graniteville. PC 8, 18. The Environmental Division appropriately concluded that this crossing over the centerline may pose a danger to other motorists, bicyclists, and pedestrians. Id. at 18-19. Rather than address this danger in a meaningful or effective manner, the Environmental

[4] In this case, the traffic increase is actually higher than in Pilgrim—5-11% vs. 5%. Pilgrim, 153 Vt. at 596, 572 A.2d at 910; PC 10.

Division merely added a condition that requires these trucks to stay in their lane of travel. Id. at 19. This condition mimicked a requirement that already existed under state law, and that had been violated multiple times according to the evidence and the court's own findings. Neighbors Brief at 9-10. Curiously, the Environmental Division recognized that these trucks already were violating state traffic law, but offered no explanation for its apparent belief that adding the possibility of violations of the Act 250 permit somehow would result in these trucks staying within their lane of travel. PC 19.

Though NEMG relies on the Environmental Division's decision on the post-trial Motion to Alter for explanation, this decision mainly shows that the Environmental Division recognized NEMG would need to require large trucks to avoid the HCL in order to meet the condition, and highlights that the court could have imposed conditions requiring the large trucks to avoid the HCL. NEMG Brief at 10-11; SPC 3. However, the Environmental Division did not impose such a condition, or require NEMG to adopt any actual measures to ensure that trucks do not cross the centerline in the HCL. Instead, the Environmental Division justified its decision as giving NEMG "flexibility," SPC 3, but this amount of flexibility does not ensure that criterion 5 will be met.

For instance, the Environmental Division did not make any findings that large trucks could comply with this condition when going through the HCL, and NEMG highlighted testimony from its own expert that supports the opposite. NEMG Brief at 13-14. The critical question and answer are:

Q: In this traffic -- in this truck, it's a stretch -- but he couldn't, right?

A: Correct.

Id. at 14; Tr. (05-04-2015), at 132. In the context of the preceding questions, the answer of "correct" conceded that the truck could not make the curve without going into the other lane or,

at the very least, that the driver did not believe it could (either of which results in the truck crossing the centerline). NEMG ignored this answer, an answer that makes it even more clear these large trucks cannot safely travel through the sharp curve and must avoid it altogether in order to satisfy criterion 5.

NEMG's brief continues to miss the point in arguing the appropriateness of a condition that mimics state law. NEMG Brief at 15-16. The issue is not whether a condition that mimics state law is *per se* inappropriate, as NEMG asserted. Id. at 15. The issue is whether, when the Environmental Division found that tractor-trailer sized trucks have violated that state law by crossing the centerline, merely re-imposing the state law requirement as an Act 250 condition ensures that those trucks no longer will cross the centerline. The Environmental Division's conclusion it would ensure compliance by transposing state law into an Act 250 condition, rather than directly remedying the safety issue that the court had identified, was not reasonably supported by its findings.

### C. To the Extent the Traffic Condition Is Not Identical to State Law, Any Differences Support the Point That the Sharp Curve Area Is a Safety Concern and Trucks Should Not Pass Through It.

Last, NEMG's parsing of the state vehicular statutes further reinforces Neighbors' position in this appeal. According to NEMG, state law does not already prohibit trucks from crossing the centerline. NEMG Brief at 17-18. Trucks can cross the centerline when the road is not "of sufficient width," or when an obstruction exists, or when it is not practicable to stay within a single lane. Id. Whatever the merits of NEMG's reading of the statutes, if any of these conditions apply in the sharp curve on Graniteville Road, then the asphalt plant trucks cannot travel through this sharp curve safely by staying in their lane, and these trucks should not be

permitted to endanger the public, especially when readily available alternative routes exist, such as internal haul roads on the ROA tract. See Neighbors Brief at 10-11, 26.

The Environmental Division's primary defense for its condition—providing flexibility to the applicant—does not justify its misapplication of Pilgrim Partnership and cannot outweigh Act 250's command that conditions must ensure compliance with criterion 5. This Court should remand for the Environmental Division to impose meaningful conditions under criterion 5 that will ensure compliance with Act 250.

## CONCLUSION

Neighbors respectfully request the Court to reverse the Environmental Division's conclusions that NEMG's permit will ensure compliance with criteria 8 and 5. The permit should be denied for failure to comply with criterion 8 or, in the alternative, new and further conditions should be imposed to ensure compliance with these criteria and Act 250.

Respectfully submitted this 13th day of September, 2016.

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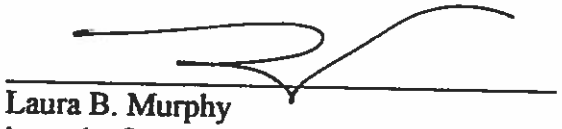
## VERMONT RULE OF APPELLATE PROCEDURE 32(a) CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply 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 Reply and according to the software word count tool it contains 3448 words, excluding the Table of Contents, Table of Authorities, signature blocks, and this Certificate of Compliance.

Dated September 13, 2016.

BY: 

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