



Date July 30, 2012

Michael Bernhardt  
PO Box 2003  
So. Londonderry, VT 05155

**Subject: Jurisdictional Opinion #2 -279, (Big Rock quarry; LUP #2W1283, Londonderry)**

Dear Mike:

**I. Summary of Opinion**

You have asked whether the Permittee is required to obtain a permit amendment for crushing beyond ten calendar days for the year as happened recently. As I have previously stated, I determined that "ten working days" could fairly mean 80-90 hours total since each working day is limited to nine hours. The one event per year concluded on July 16 mid-morning after operating 77-80 hours. I conclude there has been no material change to the permit's terms, therefore no amendment is necessary.

**II. Facts and Documents**

On January 9, 2012, the DEC #8 issued LUP #2W1283 to Big Rock to operate a rock quarry in Londonderry. Condition #16 states: Blasting is limited to one event per calendar year; while concurrent crushing and hammering is limited to two weeks or 10 working days per year.

On March 29th, you appealed the Permit to Environmental Court contesting criteria 1 and 8 relative to noise impacts.

On May 30th, Judge Walsh denied your motion to stay the permit. Subsequently the Court has scheduled the de novo hearing on the merits for August 7th.

On Friday June 22nd, the Permittee's contractor began operation of the crusher, operating 5 hours that day. He continued to operate weekdays, except July 4th, until 10:30 am on July 16th. Hours each day varied due to equipment failures: a broken hydraulic line on June 29th resulted in only two hours of operation, while a broken conveyor belt at 2pm on July 6th resulted in shutdown until July 12th.

In total, the crusher operated 77 hours.

On or about the day of the first breakdown, the Permittee called me to inquire if he could carry over unused hours due to the breakdown. I told him then that I thought a fair interpretation of "ten working days" was 80 hours of operation.

On July 16th you emailed a request that the project cease operation of the crusher. I responded to you then and subsequently. On July 20th you requested a formal JO.

### **III. Analysis**

Act 250 Rule 34(A) states: *Material change to a permitted development or subdivision.* An amendment shall be required for any material change to a permitted development or subdivision, or any administrative change in the terms and conditions of a land use permit... Upon request, the district coordinator will expeditiously review a proposed change and determine whether it would constitute a material change to the project, or whether it involves administrative changes that may be subject to simplified review procedures pursuant to 10 V.S.A. Section 6025(b)(1).

Rule 2(C)(6) defines "material change" as: any change to a permitted development or subdivision which has a significant impact on any finding, conclusion, term or condition of the project's permit or which may result in a significant adverse impact with respect to any of the criteria specified in 10 V.S.A. Section 6086(a)(1) through (a)(10).

You seek a ruling from me as to whether the "ten working days" really means ten calendar days, perhaps even ten consecutive days, regardless of how many hours were operational during those days. Reasonable minds may differ, but looking at the big picture here, I must keep in mind that the whole permitted project relies on the crushing of rock as it is a rock quarry. The permit already limits the project to "ten working days" of crushing for the whole year. It would be an absurd result if the crusher machine broke a hydraulic line each day after only one hour of operation for five consecutive days, thereby resulting in loss of half of its year's allocation. Substantial costs are incurred by the Permittee to his contractor to set-up and dismantle the large, cumbersome crusher. It is only fair that any ambiguity in the language of the permit be weighed in favor of a reasonable outcome. That was my reasoning when I told the permittee that lost hours could be carried over for a total of 80 hours.

The findings are silent on "ten working days." Nor is there an exhibit which would clarify the matter. I do not find the hours or days of crusher operation to have been a significant impact on any finding, conclusion, term or condition of the project's permit.

Since the crusher operated only 77 hours, I do not find this to be a "significant adverse impact" with respect to any of the ten criteria.

### **IV. Conclusion**

No permit amendment is necessary. The pending appeal places the issue of noise impacts on the Court's docket where you and the permittee can argue the merits of crafting more specific permit language. As the permit currently authorizes only one event per year, the issue should not arise again in 2012.

### **V. Reconsideration or Appeal**

This is a jurisdictional opinion issued pursuant to 10 V.S.A. § 6007(c) and Act 250 Rule 3(A).

**Reconsideration requests** are governed by Act 250 Rule 3(B) and should be directed to the district coordinator at the above address within 30 days of the date of this opinion.

Any **appeal** of this decision must be filed with the Superior Court, Environmental Division within 30 days of the date the decision was issued, pursuant to 10 V.S.A. Chapter 220. The Notice of Appeal must comply with the Vermont Rules for Environmental Court Proceedings (VRECP). The appellant must file with the Notice of Appeal the entry fee required by 32 V.S.A. § 1431 and the 5% surcharge required by 32 V.S.A. § 1434a(a), which is \$262.50 as of January 2011.

The appellant must also serve a copy of the Notice of Appeal on the Natural Resources Board, National Life Records Center Building, Montpelier, VT 05620-3201, and on other parties in accordance with VRECP 5(b)(4)(B).

For additional information on filing appeals, see the Court's website at: <http://www.vermontjudiciary.org/GTC/environmental/default.aspx> or call (802) 828-1660. The Court's mailing address is: Superior Court, Environmental Division, 2418 Airport Road, Suite 1, Barre, VT 05641-8701.

Sincerely,



Warren Foster  
District Coordinator<sup>1</sup>

c: Certificate of Service

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<sup>1</sup> This Opinion is written by the Acting coordinator who staffed the permit proceeding for case # 2W1283.