

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

RE: Barre Granite Quarries, LLC
William and Margaret Dyott
Land Use Permit Application #7C1079-EB (Revised)
Docket #739

CHAIR'S RULING ON PRELIMINARY STAY
and CHAIR'S PRELIMINARY RULING

This proceeding concerns Land Use Permit #7C1079 (Revised) ("Revised Permit") pertaining to Barre Granite Quarries, LLC and William and Margaret Dyott ("Permittees") authorizing the Permittees to reactivate and expand abandoned granite quarries located on the Dyott, Padula and LeCours properties in the Town of Sheffield, Vermont ("Project"). The Revised Permit has a maximum granite extraction rate of 400,000 cubic feet per year for sale to market. Additionally, the Revised Permit allows for the annual extraction of 400,000 to 800,000 cubic feet of waste granite with on-site storage in grout piles.

This Chair's Ruling addresses Residents for Northeast Kingdom Preservation, Ltd. ("RNKP's") Motion for a Preliminary Stay. For the reasons stated below, RNKP's Motion for a Preliminary Stay is granted in part and denied in part. RNKP has also filed a Motion for Long-Term Stay. The Board will deliberate on the Motion for Long-Term Stay on May 10, 2000 and issue a decision thereafter.

This Chair's Preliminary Ruling also addresses Permittees' request for additional time to respond to RNKP's motion for stays.

I. PROCEDURAL SUMMARY

On June 23, 1999, the District #7 Environmental Commission ("Commission") issued Land Use Permit #7C1079 ("Permit") and Findings of Fact and Conclusions of Law and Order ("Decision") to Permittees authorizing the Project.

On July 23, 1999, RNKP filed a Motion to Alter the Permit with the Commission.

On July 28, 1999, RNKP filed a Motion for Preliminary Stay with Chair Harding and a Motion for Long-Term Stay with the Board.

On August 4, 1999, the Permittees filed their Response to RNKP's Motions for Preliminary and Long-Term Stay.

[DOCKET #739 CPR 2]

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In an August 5, 1999 Memorandum of Decision, the Board Chair denied RNKP's Motion for a Preliminary Stay because no appeal had been filed from the Commission's Decision and Permit to the Board (thereby transferring jurisdiction to the Board), RNKP was not an "aggrieved party," and there had been no "final order" issued by the Commission from which relief could be sought by means of a stay.

On August 9, 1999, in reaction to RNKP's Motion to Alter the Permit, the Commission issued the Revised Permit, Revised Findings of Fact and Conclusions of Law and Order ("Revised Decision") and a Memorandum of Decision on RNKP's Motion to Alter.

On August 12, 1999, RNKP filed a Notice of Appeal with the Board from the Commission's Revised Decision contending that the Commission erred by finding that the Project fails to comply with 10 V.S.A. § 6086(a)(1), (1)(A), (1)(B), (1)(E), (2), (3), (4), (5), (7), (8), (8)(A)(i)-(iii), (9)(E), (9)(K), (10) ("Criteria 1, 1(A), 1(B), 1(E), 2, 3, 4, 5, 7, 8, 8(A)(i)-(iii), 9(E), 9(K), and 10"). RNKP also appealed the Commission's denial of RNKP's party status under Environmental Board Rule ("EBR") 14(B)(1). The Notice of Appeal was filed on behalf of RNKP by Stephanie J. Kaplan, Esq.

On August 18, 1999, Permittees filed a reply in opposition to RNKP's Motion for Long-Term Stay.

On August 18 and September 8, 1999, the Board deliberated on RNKP's Motion for Long-Term Stay.

In a September 8, 1999 Memorandum of Decision, the Board denied RNKP's Motion for a Long-Term Stay.

On October 8, 1999, RNKP filed a Motion to Alter the Board's Denial of its Request for Stay of Permit ("Motion to Alter").

On November 1, 1999, Permittees filed its Response to RNKP's Motion to Alter.

On November 3, 1999, the Board deliberated on the Motion to Alter.

In a November 8, 1999 Memorandum of Decision, the Board denied RNKP's Motion to Alter.

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On April 3, 2000, RNKP filed another Motion for Preliminary and Long-Term Stay.

On April 11, 2000, Permittees' counsel filed a letter explaining that counsel did not receive RNKP's Motion for Preliminary and Long-Term Stay. Permittees' counsel also explains that he will be out of the State on a personal family matter from April 17 to 24 and requests an extension to file in response to RNKP's motion until May 9, 2000.

On April 12, 2000, RNKP filed a letter objecting to Permittees' extension request.

II. PRELIMINARY RULING

Pursuant to Environmental Board Rule ("EBR") 42, the Chair may issue a preliminary stay which shall be effective for a period not to exceed 30 days. Any preliminary stay shall be reviewed by the board within that 30 day period. A party may file a motion to dissolve a preliminary stay within 10 days of issuance.

Additionally, pursuant to EBR 16(B), the Chair may make preliminary rulings as to party status and other procedural matters as are necessary to expedite and facilitate the hearing process. Any such ruling may be objected to by any interested party and the matter then resolved by the Board.

III. DISCUSSION

A. RNKP's Request for Preliminary Stay

On April 2, 2000, RNKP filed a 14 page Motion for Preliminary and Long-Term Stay with a 9 page Appendix and 24 pages of exhibits.¹ This is the third time RNKP has requested that the Board issue a stay of Permittees' Revised Permit. On the two prior occasions, the Board denied the stay requests concluding that RNKP failed to meet its

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EBR 12 (D) establishes a maximum page limit of 5 pages for motions, excluding supporting memoranda. RNKP did not seek relief from this limitation prior to filing its motion. Permittees were warned earlier in this proceeding that exceeding page limitations would not be allowed in the future. All parties are heretofore warned that the Board will not accept filings exceeding the page limits set forth in EBR 12 without a prior request for relief from the rules.

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burden of showing that a stay was necessary. As of the issuance of this ruling, Permittees have not yet filed in response to RNKP's motion.

RNKP filed this new motion for stay pursuant to EBR 42 requesting that the Board grant both preliminary and long-term stays of "any activity associated with the quarry on the quarry site or involving any of the roads that lead to the quarry site." RNKP states that a stay is now warranted based upon the new evidentiary record on which the Board can base its decision, including prefiled testimony, three days of public hearings and two site visits.

EBR 42 states the circumstances under which a stay of a commission decision may be requested:

No decision of the board or district commission is automatically stayed by the filing of an appeal. Any party aggrieved by a final order of the board or a district commission may request a stay by written motion filed with the board identifying the order or portion thereof for which a stay is sought and stating in detail the grounds for the request.

EBR 42 then states the factors which the Chair must weigh when determining whether to grant a stay. First, the Chair must consider the hardship to the parties. Second, the impact, if any, on the values sought to be protected by Act 250 must be evaluated. Third, the effect on the public health, safety or general welfare is considered.

RNKP has the burden in this case to prove that a stay is necessary, *Re: Stokes Communication Corp.*, 3R0703-EB, Supplemental Memorandum of Decision at 1 (Feb. 26, 1993)[EB# 562M2]. Consequently, RNKP must prove that the above three factors weigh in favor of granting a stay.

In its motion, RNKP alleges hardship to its members including traffic nuisances, unsafe traffic conditions and noise. A noise demonstration is scheduled for May 24, 2000 for the Board to observe noise from the Project. Furthermore, the Revised Permit and Revised Decision set maximum noise levels at which the Project can currently operate. *See Revised Permit # 7C1079, condition #49.* Accordingly, this ruling does not further address noise issues. RNKP has alleged traffic nuisances and unsafe truck traffic conditions due to the fact that road improvements required by the Revised Permit and Revised Decision have not been completed. RNKP alleges that while some improvements were begun last fall, substantial work remains to be done. RNKP alleges that the roads in their current state are unsafe for the quarry truck traffic. For instance,

RNKP alleges that the roads are not wide enough and the shoulders are too soft for a vehicle to pass an oncoming granite truck.

Based on these allegations, the Chair concludes that balancing the hardships relating to traffic issues tips in favor of granting a preliminary stay of trucking activities until all road improvements required by the Revised Permit or Revised Decision are completed.

RNKP alleges impacts on the values sought to be protected by Act 250 including traffic and noise impacts. These appear to be the same concerns that RNKP raises in its balancing of the hardships argument. Accordingly, this ruling does not further address these issues.

With respect to public health, safety and general welfare, RNKP alleges that the public good would suffer if a stay is not granted because under the terms of the Revised Permit, the Permittees could cut trees at the Project that have not been cleared to date and could strip more land to prepare it for mining. RNKP argues that these activities would result in irreparable harm. RNKP also alleges that there is insufficient money in the escrow account to cover the costs of restoring the site and that the escrow account is not under the sole control of the Commission as required in Revised Permit condition number 68. RNKP argues that both of these issues will make it more difficult for the Commission to successfully complete restoration should there be a need.

Based upon these allegations, the Chair concludes that it is in the best interest of public health, safety and general welfare that no tree cutting, timber harvesting or land be cleared for 30 days from the date of this ruling. The Chair also concludes that it is in the best interest of public health, safety and general welfare that the funds in the restoration escrow account be increased to \$45,000. This includes the \$15,000 initial deposit, \$15,000 deposited for operating year 1999 and an advance deposit of \$15,000 for operating year 2000.² Lastly, the Chair concludes that it is in the best interest of public health, safety and general welfare the escrow agreement be revised giving the Commission sole control of disbursement of the funds within the account.

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EBR 42 allows for the issuance of a stay containing terms and conditions, including the filing of a bond or other security.

B. Permittees' Request for Additional Time

On April 11, 2000, Permittees' counsel filed a letter with the Board explaining that Permittees' counsel was not originally served with RNKP's Motion for Preliminary and Long-Term Stay. Permittees' counsel also explained that he would be out of the State on a personal family matter from April 17 to 24 and requested an extension to file in response to RNKP's motion until May 9.

On April 12, 2000, RNKP filed a letter objecting to Permittees' extension request. RNKP objects to the extension because Mark Austin of Barre Granite Quarries, LLC was originally served and because of concerns of irreparable harm that could occur prior to the Chair's and Board's rulings on RNKP's requests for stay. The specific irreparable harm concern stated by RNKP is timber harvesting on the Pedula property.

Permittees' request for additional time is granted in part. Permittees are given until 12:00 noon, Friday, April 28, 2000 to file in reply to RNKP's motion. This extension meets the concerns of all parties in that this ruling issued today stays the cutting of trees and also provides Permittees sufficient time to respond to RNKP's Motion for Long-Term stay.

IV. ORDER

1. RNKP's Motion for Preliminary Stay is **DENIED** to the extent that Permittees can operate the Sheffield quarry, with exception of the limitations set out at number 2 below, only in full compliance with the Revised Permit and Revised Decision. **All conditions set forth in the Revised Permit and Revised Decision must be met prior to resuming quarry operations.**

2. RNKP's Motion for Preliminary Stay is **GRANTED** to the extent that the following activities are preliminarily stayed:

A. No trees may be cut, timber harvested, or land stripped for quarrying on the Project for 30 days.

B. Granite quarrying activities at the Project are preliminarily stayed for 30 days or until the Barre Granite Quarries, LLC Quarry Reclamation Escrow Agreement, admitted as Exhibit P-30, is revised to give the Commission sole control over

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disbursement of funds.³ As presently drafted a counter signature of Barre Granite Quarries, LLC is required. The revised agreement must be filed with the Commission and served on all parties. The revised agreement must also be filed with the Board and be approved by the Board Chair.

C. Granite quarrying activities at the Project are preliminarily stayed for 30 days or until the total balance of funds within the Barre Granite Quarries, LLC Quarry Reclamation Escrow account is \$45,000.⁴ Evidence of the balance within the account must be filed with the Commission and Board and served on all parties.

D. All hauling of granite from the Sheffield quarry, and related trucking activities, is preliminarily stayed for 30 days or until all road improvements have been made and a qualified inspector's report is filed with the Commission verifying that all required improvements have been satisfactorily made as required by Revised Permit condition number 59.⁵ This inspectors' report must be filed with the Commission and served on all parties. This inspectors' report must also be filed with the Board and be approved by the Board Chair.

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If the Barre Granite Quarries, LLC Quarry Reclamation Escrow Agreement is revised and approved by the Board Chair sooner than 30 days following the issuance of this Ruling, then granite quarrying operations may be undertaken with compliance with all other conditions.

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If the balance within the Barre Granite Quarries, LLC Quarry Reclamation Escrow account reaches \$45,0000 sooner than 30 days following the issuance of this Ruling, then granite quarrying operations may be undertaken with compliance with all other conditions.

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These improvements include the posting of speed limits. RNKP has raised the issue that state law prohibits the posting of speed limits below 25 miles per hour. 23 V.S.A. § 1007, as revised, allows for posting of speed limits of less than 25 miles per hour under certain circumstances. The Permittees must evaluate and resolve this issue. If all road improvements are completed sooner than 30 days following the issuance of this Ruling, then granite hauling and related trucking activities may be undertaken with compliance with all other conditions.

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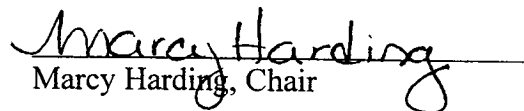
3. On or before, **Monday, April 24, 2000, at 4:30 P.M.**, pursuant to EBR 42, any party may file a motion to dissolve this Chair's Ruling on Preliminary Stay.

4. On or before **Friday, April 28, 2000, at 12:00 noon**, Permittees may file in reply to RNKP's Motion for Long-Term Stay.

5. With respect to Permittees' request for additional time to reply to RNKP's motion, this Chair's Preliminary Ruling is issued pursuant to EBR 16(B) and is binding on all parties unless a written objection to it, in whole or in part, is filed on or before **Monday, April 24, 1999, at 4:30 P.M.**

Dated at Montpelier, Vermont this 13th day of April, 2000.

ENVIRONMENTAL BOARD


Marcy Harding, Chair