

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)


MEMORANDUM OF DECISION

This proceeding concerns Land Use Permit #7C 1079 (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 authorizes a granite extraction rate of 400,000 cubic feet per year for sale to market. Additionally, the Revised Permit allows for 400,000 to 800,000 additional cubic feet of waste granite storage in on-site grout piles.

This matter comes before the Vermont Environmental Board (the "Board") on RNKP's Motion to Alter the Board's Denial of Request for Stay of Permit. For the reasons stated below, RNKP's motion is denied. The Board also hereby reschedules the date for the second prehearing conference and orders a second site visit to the Project on one of the hearing days.

I. PROCEDURAL SUMMARY

On June 23, 1999, the District #7 Environmental Commission ("Commission") issued Land Use Permit #7C 1079 ("Permit") and Findings of Fact and Conclusions of Law and Order ("Decision") to Permittees authorizing the Project.

On July 23, 1999, Residents of Northeast Kingdom Preservation, Ltd. ("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.

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.

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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)(F), (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 October 20, 1999, the Board deliberated on the issue of a second site visit.

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

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

II. DISCUSSION

A. Permittee's Response to RNKP's Motion to Alter

The Board declines to accept Permittee's Response to RNKP's Motion to Alter as it was filed with the Board beyond the deadline for reply. RNKP's Motion to Alter was filed on October 8, 1999. EBR 12(F) states in pertinent part: "... all memoranda in reply

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to a motion shall be filed within fifteen days of service of the motion...“.” Counsel for RNKP certified that it mailed a copy of its Motion to Alter to Counsel for Permittees on October 8, 1999. Accordingly, Permittees had until October 23, 1999 to file a reply to RNKP’s Motion to Alter. Furthermore, this filing deadline was expressly addressed in Board Chair Harding’s October 18, 1999 Chair’s Preliminary Ruling. Permittees filed their reply on November 1, 1999 without any rationale for why the filing was out of time. The Board therefore declines to accept Permittee’s reply.

B. RNKP’s Motion to Alter

On October 8, 1999, pursuant to EBR 3 1 (A), RNKP filed the Motion to Alter the Board’s September 8, 1999 Memorandum of Decision which denied RNKP’s motion to stay the Revised Permit. 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]. EBR 42 states the factors which the Board must weigh when determining whether to grant a stay. First, the Board 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. Consequently, RNKP must prove that the above three factors weigh in favor of granting a stay.

The Board denies RNKP’s Motion to Alter for the following reasons. EBR 3 1(A) states in relevant part:

- (1) All requested alterations must be based on a proposed reconsideration of the existing record. New arguments are not allowed, with the exception of arguments in response to permit conditions or allegedly improper use of procedures, provided that the party seeking the alteration reasonably could not have known of the conditions or procedures prior to decision. New evidence may not be submitted unless the board or district commission, acting on a motion to alter, determines that it will accept new evidence.

Attached to RNKP’s Motion to Alter are a letter from a party to this proceeding to the Commission Coordinator, two aerial photographs and an affidavit concerning the photographs. These materials are “new evidence” which is not admissible under EBR 3 1 (A) unless the board determines to accept the evidence. The Board does not accept

¹ Pursuant to V.R.C.P. Rule 5(b), service by mail is complete upon mailing.

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these materials.

RNKP's arguments in its Motion to Alter are either "new arguments" which are prohibited under Rule 3 1 (A) or arguments which have been previously addressed and rejected by the Board in its September 8, 1999 Memorandum of Decision. For example, RNKP argues that a stay is necessary to protect 15 acres of deer wintering area. The Board has previously reviewed and rejected this argument in its September 8, 1999 Memorandum of Decision. RNKP's also makes a new argument that the Revised Permit requires Permittee to mitigate the loss of the 15 acre deer yard by preserving 45 acres of alternate deer yard. RNKP states that if the permit is denied on appeal, the 15 acre deer yard will have been destroyed and the mitigated acres will not be preserved. This new argument is not allowed under EBR 3 1(A), but even if the Board accepted this argument, it is wrong. If the 15 acre deer yard is cleared and if the permit is denied, the Board has enforcement powers to require Permittee to continue to mitigate the deer yard loss.

RNKP argues that there will be an effect on health, safety and general welfare by not granting the stay. RNKP cites to the *Re: H.A. Manosh, Inc.* decision and argues that the public good will be better served by issuing a stay. *Re: H.A. Manosh, Inc.*, Land Use Permit #5L1290 (Revocation Petition) at 10 (Aug. 27, 1998). In *Manosh*, the Board denied a request for stay of a permit because it was not clear that the public interest would be served by the grant of a stay. *Id.*

The party moving for the stay has the burden of demonstrating that it is in the best interest of the public health, safety, or general welfare to stay the permit. *Id.* In this matter, RNKP carries this burden and has failed to meet it. RNKP argues that the public good would be better served by issuing a stay to prevent the loss of a pristine environment and irreparable damage to land.

RNKP made this same irreparable harm to the environment argument in its original request for a stay. The Board did not find this argument persuasive at that time and continues to find this argument unpersuasive for the Motion to Alter. First, the Board's enforcement powers will provide a remedy for damage to the environment from Permittee's activities if the Revised Permit is ultimately overturned. Second, there is public good in Permittee's activities. Permittee's employees as well as the State's granite industry will benefit from Permittee's operations.

RNKP also argues that allowing the Permittee to operate during the pending appeal will make it harder to ultimately overturn the permit and will result in irreparable damage. Again, this new argument is not allowed under EBR 3 1 (A), but even if the

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Board accepted this argument, it is wrong. The Board has expressly warned Permittee that it is operating at its own risk. Consequently, should the Board find grounds for overturning the Revised Permit, it will be justified to do so regardless of the investment which Permittee has made. As for resulting damage in the event the Revised Permit is overturned, the Board will not be reluctant to take appropriate enforcement measures.

Based on the record at the time of the Board's decision denying the request for long term stay, the Board finds that RNKP has not met its burden of demonstrating that a stay is warranted. The Board therefore denies RNKP's Motion to Alter.

C. Rescheduling of the Second Prehearing Conference

The October 8, 1999 Memorandum of Decision schedules the second prehearing conference in this matter for Monday, January 17, 2000. The Board now realizes that January 17, 2000 is Martin Luther King day, a Vermont State "Floating" Holiday. In recognition of this holiday, the Board reschedules the second prehearing conference for Friday, January 14, 1999 at 10:00 a.m.

D. Second Site Visit

On October 13, 1999, Board members Harding, Drake, Holland, and Nawrath performed a site visit to the Barre Granite Quarries' site in Sheffield, Vermont. In a September 23, 1999 Memorandum of Decision, the Board reserved the right to conduct a second site visit at the time of the hearing on this matter. The Board will conduct a second site visit on one of the hearing dates presently scheduled for January 19 and **26, 2000**.

III. ORDER

1. The Board declines to accept Permittee's reply to RNKP's Motion to Alter.
2. RNKP's Motion to Alter is **DENIED**.
3. Section III Order of the October 8, 1999 Memorandum of Decision is amended by rescheduling the second prehearing conference from Monday, January 17, 2000 to **Friday, January 14, 2000 at 10:00 a.m.**
4. The Board will conduct a second site visit on one of the hearing dates in

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this matter scheduled for January 19 and 26, 2000.

Dated at Montpelier, Vermont this 3 day of November, 1999.

ENVIRONMENTAL BOARD*

Marcy Harding

Marcy Harding, Chair
John Drake
Samuel Lloyd
George Holland
W. William Martinez
Rebecca M. Nawrath
Alice Olenick

* Board member Robert H. Opel was not present for and did not participate in the November 3, 1999 deliberations.

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