

## **19. Criterion 8 (Rare and irreplaceable natural areas)**

### **I. Requirements for Issuance of Permit**

Under Criterion 8, before issuing a permit, the Commission must find the proposed project will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare or irreplaceable natural areas. 10 V.S.A. §6086(a)(8).

### **II. Burden of Proof**

While the burden of proof under Criterion 8 is on those who oppose the project, 10 V.S.A. §6088(b), an applicant for a permit must provide sufficient information for the Commission to make affirmative findings. *Re: Susan Dollenmaier and Martha Dollenmaier Spoor, #3W0125-5-EB*, Findings of Fact, Conclusions of Law, and Order at 9 (Feb. 7, 2005); *Re: Hannaford Brothers Co. and Southland Enterprises, Inc., #4C0238-5-EB*, Findings of Fact, Conclusions of Law, and Order at 13 (Apr. 9, 2002); and *see, Re: Southwestern Vermont Health Care Corp., #8B0537-EB*, Findings of Fact, Conclusions of Law, and Order at 28 (Feb. 22, 2001); *Re: Black River Valley Rod & Gun Club, Inc., #2S1019-EB*, Findings of Fact, Conclusions of Law, and Order at 19 (June 12, 1997) and cases cited therein.

### **III. Analysis - Rare and Irreplaceable Natural Areas**

The Commission uses a four-part test to determine whether a Project satisfies Criterion 8 (rare and irreplaceable natural areas). First, it must determine whether the Project is located in a natural area. Second, it determines whether the natural area is rare and irreplaceable. Third, it determines whether the Project will have an adverse effect on the rare and irreplaceable natural area. Fourth, it determines whether the adverse effect, if any, is undue. *Re: Barre Granite Quarries, LLC and William and Margaret Dyott, #7C1079 (Revised)-EB*, Findings of Fact, Conclusions of Law, and Order at 83 (Dec. 8, 2000), citing *Re: Leo and Theresa Gauthier, #4C0842-EB*, Findings of Fact, Conclusions of Law, and Order at 11-13 (Jun. 26, 1991).

#### **Natural Area**

There are two guidelines for identifying natural areas:

- a. an area which contains an identifiable type of ecological community;
- and
- b. an area in which natural conditions predominate over human influences.

*Re: Barre Granite Quarries, LLC and William and Margaret Dyott, #7C1079 (Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 83 (Dec. 8, 2000), citing Re: Leo and Theresa Gauthier, #4C0842-EB, Findings of Fact, Conclusions of Law, and Order at 11 (Jun. 26, 1991).*

There are officially designated "natural areas" in Vermont, but the Board has specifically ruled that a site does not have to be officially listed to be considered a natural area. *Re: Barre Granite Quarries, LLC and William and Margaret Dyott, #7C1079 (Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 83 (Dec. 8, 2000), citing Re: Leo and Theresa Gauthier, #4C0842-EB, Findings of Fact, Conclusions of Law, and Order at 9 (Jun. 26, 1991).*

### **Rare and Irreplaceable**

There are several examples of rare areas:

- a. community type which occurs infrequently in Vermont and usually occurs further south;
- b. hosts rare plants;
- c. is a valuable educational and scientific resource.

*Re: Barre Granite Quarries, LLC and William and Margaret Dyott, #7C1079 (Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 83 - 84 (Dec. 8, 2000), citing Re: Leo and Theresa Gauthier, #4C0842-EB, Findings of Fact, Conclusions of Law, and Order at 12 (Jun. 26, 1991).*

An example of an irreplaceable area is a, "pine-oak sandplain community . . . because the conditions that caused it are unlikely to re-occur within the foreseeable future. Specifically, the creation of the community is closely related to particular effects of melting glaciers, including the deposit of sediment and the formation of large river deltas." *Id.*

### **Adverse Effect**

The Board did not set forth specific guidelines for determining adverse effects on rare and irreplaceable natural areas. Factors and guidelines from the aesthetics and historic sites analyses (adverse effect) may be applicable. *Re: Barre Granite Quarries, LLC and William and Margaret Dyott, #7C1079 (Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 84 (Dec. 8, 2000).*

### **Undue Adverse Effect**

The Board has considered one factor in determining whether an adverse effect was undue in *Gauthier*: the failure of the applicant to take reasonably available steps to mitigate the adverse effect. *Re: Barre Granite Quarries, LLC and William and Margaret Dyott, #7C1079 (Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 85 (Dec. 8, 2000)*, citing *Re: Leo and Theresa Gauthier, #4C0842-EB, Findings of Fact, Conclusions of Law, and Order at 13 (Jun. 26, 1991)*. This is one of the factors used in determining whether an adverse effect is "undue" in the aesthetics and historic sites analyses. The other two factors used in analyzing "undue adverse effects" on aesthetics and historic sites are applicable to rare and irreplaceable natural areas as well. *Re: Barre Granite Quarries, LLC and William and Margaret Dyott, #7C1079 (Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 85 (Dec. 8, 2000)*. An affirmative conclusion on any one of these factors may be sufficient to support a conclusion that an adverse effect on a rare and irreplaceable natural area is undue. *Re: Barre Granite Quarries, LLC and William and Margaret Dyott, #7C1079 (Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 85 (Dec. 8, 2000)*, See, e.g., *Black River, supra*, at 19-20; *Hand, supra*, at 25-29; *Quechee Lakes, supra*, at 19-20; *Manchester Commons, supra* at 22; *Middlebury College, supra* at 10.

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