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January 6, 2020

Linda Matteson, District Coordinator
District #3 Environmental Commission
100 Mineral Street, Suite 305
Springfield, VT 05156
Linda.matteson@vermont.gov

Re: Ray and Lynda Colton ("Applicants"), Amendment Application #3W0405-6
Motion to Alter Decision

Dear Linda:

Please deem this letter to constitute, pursuant to Act 250 Rule 31(A), the Applicants' Motion to Alter the District #3 Environmental Commission's Findings of Fact, Conclusions of Law, and Order, and Land Use Permit #3W0405-6, dated December 20, 2019. Act 250 Rule 31(A) provides, in relevant part, that "any party, or person denied party status, may file within 15 days from the date of a decision of the District Commission one and only one motion to alter with respect to the decision." Applicant requests that the District Commission reconsider and alter permit conditions 7, and 12 through 19, and to correct misstatements of fact in the Findings of Fact, Conclusions of Law, and Order.

1. Permit Conditions.

Act 250 statute 10 V.S.A. § 6086(c) provides, in relevant part, as follows: "A permit may contain such requirements and conditions as are allowable proper exercise of the police power and which are appropriate within the respect to subdivisions (a)(1) through (10) of this section." The courts have interpreted this provision to require that in order to be enforceable any conditions imposed in an Act 250 permit must be "reasonable", and to be "reasonable" such conditions must be both based on findings of fact and necessary to ameliorate an impact that violates the statutory criteria. *See In re North East Materials Group, LLC*, 2017 VT 43, ¶25 ("Our review is concentrated on whether the conditions imposed are reasonable in light of the Environmental Division's findings and conclusions."); *In re Stokes Communications Corp.*, 164 Vt. 30, 38, 664 A.2d 712, 717 (1995) ("the Board may impose reasonable permit conditions within the limits of its police power to ensure that projects comply with the statutory criteria.").

a. Permit condition 7

Permit condition 7 provides for a deadline of July 1, 2019 for completing work within the State Highway Right of Way. Following the issuance of the Permit, Applicants' attorney received an email from Theresa Gilman, at VTrans with the following note: "Though clearly

they will not be able to meet the required completion date of July 1, 2019, that day has come and gone, but VTrans would look to have this work completed by the end of 2020. . . To allow a reasonable amount of time to complete the work, we would set the permit completion date for December 1, 2020." (See attached email from Theresa Gilman to Nate Stearns, dated December 24, 2019.)

Accordingly, Applicants request that the Commission alter Permit condition 7 to provide for a complete date of December 1, 2020, to read as follows:

> Prior to commencing paving of the driveway apron, the Permittees shall obtain a Title 19 Section 1111 permit from the Vermont Agency of Transportation; the Section 1111 permit shall automatically be incorporated herein. The required work within the State Highway Right of Way shall be completed by December 1. (Exhibit #012)

b. Permit Conditions 12 through 17.

Permit Conditions 12 through 17 all relate to chipping. They provide as follows:

> 12. The Permittees may continue to operate outdoor chipping until March 1, 2020, provided they comply with the 3W0405-5A permit conditions. However, chipping is only allowed in one location, not both inside the insulated chipping building and outdoors. This allows the Permittees the ability to chip material, if needed, between the issuance of this permit and the completion of setting up the chipper into the insulated building.
>
> 13. After March 1, 2020 the Permittees shall not operate any chipper outside of the insulated building. The 24-hours of chipping per year is no longer allowed. Wood chipping shall only be into the insulated building between the hours of 10:00 a.m. and 2:00 p.m., Monday through Saturday, excluding holidays (holidays noted under condition #11).
>
> 14. Before March 1, 2020 the Permittees shall add a ceiling inside the wood chip building or add roof sheathing under the metal roof to increase the noise reduction from 18 dB to 29 dB or greater.
>
> 15. Before March 1, 2020 the Permittees shall add absorptive material such as mineral wool, fiberglass, or other porous materials to the wood chip building to increase the amount of acoustical

> absorption within the wood chip storage building. The material shall have a Noise Reduction Coefficient of 0.8 or greater.
>
> 16. Before March 1, 2020 the Permittees shall install a moveable noise control curtain, as described in Exhibit #006, that can be extended and retracted over the front opening of the wood chipping building.
>
> 17. Before March 1, 2020 the Permittees shall increase the height of the bunker wall described in Exhibit #006 to eleven feet tall.

As noted above, in order to be enforceable, conditions must be imposed to ensure compliance with the statutory criteria. *See In re North East Materials Group, LLC*, 2017 VT 43, ¶25. In this case, the District Commission made findings that the conditions related to the chipping were necessary to ensure compliance with Criterion 8, aesthetics—specifically noise impacts. More specifically the Commission found, under the *Quechee* test, that the noise impacts from the proposed project amendment did not violate a clear, written community standard and were not offensive or shocking, but that the authority to impose conditions was tied to the requirement to employ generally available mitigating steps. *Findings of Fact, Conclusions of Law and Order #3W0405-6*, at 15-18. As the Commission noted in its Findings, "A generally available mitigating step 'is one that is reasonably feasible and does not frustrate [either] the project's purpose of Act 250's goals.'" *Id.* at 17.

Eliminating the ability to chip outdoors for up to 24 hours per year is not a generally available mitigating step, because losing that capability would frustrate the purpose of the project amendment. Even with the added ability to chip into the retrofitted wood shed, Applicants will not be able to chip into the wood shed when it is in use to store processed firewood. Based on historic usage, this would leave Applicants with no ability to chip for the six to seven months of the year that includes the period during Emerald Ash Borer flight season. Losing this capability would defeat the purpose of the project amendment, as (a) chipping is one of the recommended treatment methods of the State's EAB Slow the Spread Guidelines, and (b) it is not feasible for Applicants to retrofit the wood shed but only be able to chip for half the year or less. Applicants request that the Commission alter these conditions so that the previously permitted outdoor chipping can continue.

In addition, to the extent the project proceeds, Permit Condition 13 limits the hours of chipping into the insulated wood shed to between 10 a.m. and 2 p.m. Monday through Saturday. This results in more days of chipping, but results in inefficiencies due to the time necessary to set up the chipper for each day of chipping. Applicants request that the Commission alter this condition to allow chipping between the hours of 8 a.m. and 4 p.m., but limit the days of the week to Tuesday through Thursday—this is the same number of total hours per week, but is more reasonably feasible for Applicants.

Finally, the Permit provides a deadline of March 1, 2020 (less than 60 days away) for completing the retrofit of the wood shed. This short time frame is not realistically feasible. The components for retrofitting the shed, including the insulation panels and the curtain for the opening, need to be custom-ordered and there simply is not enough time for the components to be manufactured, delivered and installed prior to March 1, 2020. Applicants request that this deadline be extended to September 1, 2020.

Accordingly, Applicants request that the Commission alter Conditions 12 through 17 to read as follows:

> 12. The Permittees may continue to operate outdoor chipping, provided they comply with the 3W0405-5A permit conditions.
>
> 13. After September 1, 2020, wood chipping shall only be allowed between the hours of 8:00 a.m. and 4:00 p.m., Tuesdays through Thursdays, excluding holidays (holidays noted under condition #11).
>
> 14. Before September 1, 2020 the Permittees shall add a ceiling inside the wood chip building or add roof sheathing under the metal roof to increase the noise reduction from 18 dB to 29 dB or greater.
>
> 15. Before September 1, 2020 the Permittees shall add absorptive material such as mineral wool, fiberglass, or other porous materials to the wood chip building to increase the amount of acoustical absorption within the wood chip storage building. The material shall have a Noise Reduction Coefficient of 0.8 or greater.
>
> 16. Before September 1, 2020 the Permittees shall install a moveable noise control curtain, as described in Exhibit #006, that can be extended and retracted over the front opening of the wood chipping building.
>
> 17. Before September 1, 2020 the Permittees shall increase the height of the bunker wall described in Exhibit #006 to eleven feet tall.

c. Permit Condition18.

Permit Condition 18 provides as follows:

> Starting with the first Sunday in August, the Permittees shall shut the facility down for the first full two weeks in August. All equipment and activities that generate noise, including firewood processing and splitting, operating the kilns, chipper, and mulch grinder shall not be in use during those two weeks of mill shut-down. Permittees may continue to accept logs.

The Commission also imposed Condition 18 under the rubric of a generally available mitigating step necessary to mitigate noise impacts. Unfortunately, this condition, as written, is not reasonably feasible for Applicants. Shutting down for a full two weeks in August with no ability to continue deliveries would mean that Applicants will no longer be able to fulfill contracts that require deliveries within 7 days. The timing of this shutdown during prime camping and landscaping season in Vermont would be particularly impactful and a significant loss to Applicants. Also, this condition is not supported by the Commissions findings. There is no evidence in the findings that deliveries produce any substantively different impacts that accepting logs—both involve the use of trucks, loading equipment, and the movement of wood. Yet the loss of the ability to make deliveries creates a substantially greater detriment to Applicants than retaining the ability to accept logs due to the likely loss of contracts. Allowing deliveries during the shut down, and moving the shut down one week earlier or splitting the shut down into two, noncontiguous weeks would make this condition feasible. Also, it is important to clarify that the Applicants can have personnel on-site during this shut down to conduct the deliveries and perform maintenance on the equipment. As an alternative to Condition 18 as written, Applicants request that the Commission alter this condition to provide one of the two following alternatives:

Either A:

> Starting with the last Sunday in July, the Permittees shall shut the facility down for two full weeks. All equipment and activities that generate noise, including firewood processing and splitting, operating the kilns, chipper, and mulch grinder shall not be in use during those two weeks of mill shut-down. Permittees may have personnel on site during the shut down to perform maintenance on the equipment and may make up to ten (10) deliveries to customers per day.

Or B:

> During each of the 4th of July week and the last week of July, the Permittees shall shut the facility down. All equipment and activities that generate noise, including firewood processing and splitting, operating the kilns, chipper, and mulch grinder shall not be in use during those two weeks of mill shut-down. Permittees may have personnel on site during the shut down to perform

> maintenance on the equipment and may make up to ten (10) deliveries to customers per day.

d. Permit Condition19.

Permit Condition 19 provides as follows:

> Daytime noise levels shall not exceed 55 dBA Lmax and nighttime noise levels shall not exceed 45 dBA Lmax at areas of frequent human use, including the residence north of the property (now owned by Sarah and Gordon Gray).

Applicants request that the Commission eliminate this provision. As noted by the Commission, the existing project has been in operation since 1983. *Findings* at 17. When the project was initially permitted there were no noise standards or limits applied. In fact, it was not until the *Barre Granite* case in the year 2000 that the former Environmental Board established the 55 dBA Lmax standard for determining when a noise impact is adverse. In re Barre Granite Quarries, LLC, No. 7C1079 (Revised)-EB, slip op. at 80 (Vt. Envtl. Bd. Dec. 8, 2000). Even after that "standard" was established, however, the court recognized that it is not a rigid standard that should be applied indiscriminately. In the case of *In re Application of Lathrop Limited Partnership I*, the Vermont Supreme Court stated as follows:

> Although the environmental court recognized this standard, it emphasized that the standard should not be applied rigidly. The court cited *McLean Enterprises*, No. 2S1147-1-EB, in which the Environmental Board acknowledged that the context and setting of a project should aid in dictating the appropriate noise levels. [199 Vt. 56] Id. at 64. As the Board stated, " a 50 dBA Lmax standard may not make sense in noisy areas ... . It may be of questionable logic and practically impossible to enforce a 50 dBA Lmax when trucks passing by ... already register 78 dBA at an adjacent residence." Id.
>
> [¶82] We endorsed this flexibility in *Chaves*, 195 Vt. 467, 2014 VT 5, 93 A.3d 69 . . ..

In this case, the noise from Route 100 is dominant in the area surrounding the project. The noise report submitted with Applicants' amendment application demonstrated that the average hourly noise at surrounding residences due to traffic on Route 100 is as high as 64 dBA,

with maximum sound levels of 76 dBA for cars and 83 dBA for trucks.[1] Exhibit 6 to Application, pp. 3-4. The average background sound level on the project site was monitored at 62 dBA with maximum sound levels due to vehicle passbys at 72 dBA. *Id.* In addition, due the volume of traffic on Route 100 in this location the maximum sound levels are not occasional noise events; they occur hundreds to thousands of times throughout the day.[2] The noise from Route 100 was significant enough that District Commission included a finding that "during the site visit, noise from traffic on Route 100 was more objectionable than the kiln noise." *Findings* at 11 (finding 39).

The Commission's Findings state that "[e]ven though the nature of the project's surroundings in an existing, permitted firewood processing facility, an increase in the use or duration of the equipment that makes noise, including the kiln and chippers is adverse." This is an incomplete analysis. The nature of the project's surrounding is an existing, permitted firewood processing facility on a busy section of Route 100. Even if an increase in the use or duration of equipment makes additional noise, that additional noise is not automatically adverse. Under the Vermont Supreme Court's holding in *Lathrop*, whether the noise from the project is adverse needs to be considered in light of the existing noise from Route 100, which is the dominant noise source in the area and creates background noise levels significantly louder than 55 dBA. Applicants have agreed to take measures to limit the noise from the proposal to increase the amount of chipping at the project and has offered a noise study that demonstrates that the proposed change will comply with the 55 dBA Lmax standard. In light of the evidence that demonstrates that the background noise in the area is greater than 55 dBA, however, there is no reasonable basis for imposing a 55 dBA Lmax limit to the entire, existing project.

Accordingly, Applicants request that the Commission remove condition 19.

2. Corrections to the Findings.

The Findings contain several misstatements of fact that should be corrected.

a. "new" chipper

The Findings continually refer to the "new" chipper. To be clear, while chipping into the insulated wood shed is a new proposed activity, there will only be one chipper in use at the project.

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[1] The background noise from Route 100 was highest at 1662 VT Rte 100 (which is the residence due south of the property that is currently owned by Gordon Gray).

[2] According to the VTrans 2018 (Route Log) AADTs State Highways (May 2019) https://vtrans.vermont.gov/sites/aot/files/planning/documents/trafficresearch/Final%20Web.pdf, the average annual daily traffic in this section of Route 100 (Killington Town Line to Upper Michigan Road) was 3,800 vehicles in 2018. That averages to more than 2.6 cars per minute.

b. Notifications

The second sentence of the last paragraph on Page 4 of the Findings states, in part, that "the Coltons have been deviating from the notifications to the neighbors related to the chipping." Applicants do not believe that any evidence presented at the hearing supports this conclusion, and request that the Commission identify the information that they relied on to make this determination. Applicants recall that Gordon Gray presented to the Commission a box full of notifications that he had received, and Applicants have been providing chipping notices pursuant to the existing permit requirements.

c. Interested Parties

Paragraph B.i.2. states that Don Gray lives across Route 100 from the Coltons' mill. Applicants note that Don Gray lives in Maine—although he does own property across Route 100 from the Coltons' mill. Applicants understand that Don Gray lives at the address he provided for notices as set forth on the E-Notification Certificate of Service: 17 Perry Street, Rockland, ME 04841.

d. Condition 10 of the dash 5A permit

Finding 19 omits that the dash 5A permit currently allows three "sessions" of 96 hours even if Ms. Gray is home between May 1 and August 14.

Thank you for your consideration. Please let me know if you require additional information. Thank you.

Yours truly,

/s/ Nathan H. Stearns

Nathan H. Stearns

cc: Ray and Lynda Colton
Christi Bollman
Attached Service List

Nate Stearns

From: Gilman, Theresa <Theresa.Gilman@vermont.gov>
Sent: Tuesday, December 24, 2019 9:47 AM
To: Nate Stearns
Subject: RE: LUP #32w0405-6 (Ray G. and Lynda J. Colton) - Pittsfield, VT
Attachments: Permit and COS.pdf

Hi Nate,

I see that Colton Enterprises has received its Land Use Permit and included is a condition requiring a VTrans permit and completion of the work in the right-of-way (Item 7). Though clearly they will not be able to meet the required completion date of July 1, 2019, that day has come and gone, but VTrans would look to have this work completed by the end of 2020.

We have not received the permit application for this work, so I would like to ask if over the next couple of months you would coordinate with your client to have this submitted. To allow a reasonable amount of time to complete the work, we would set the permit completion date for December 1, 2020.

A link to the S.1111 application form can be found at **VTrans Permit Application and Fee Schedule**

Thank you for your assistance.
Theresa

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