

24. Criterion 9(D) (Earth resources)

I. Requirements for Issuance of a Permit

Where land has a high potential for extraction of mineral or earth resources, before the Commission may issue a permit, it must find that the proposed use will not prevent or significantly interfere with the possibility of future extraction of mineral or earth resources.

The statute provides:

Earth resources. A permit will be granted whenever it is demonstrated by the applicant, in addition to all other applicable criteria, that the development or subdivision of lands with high potential for extraction of mineral or earth resources, will not prevent or significantly interfere with the subsequent extraction or processing of the mineral or earth resources.

10 V.S.A. Section 6086 (a)(9)(D)

II. Burden of Proof

The applicant has the burden to demonstrate that the project will not prevent or significantly interfere. 10 V.S.A. Section 6086 (a)(9)(D).

On the matter of deciding whether the land has a “high potential for extraction,” there is no guidance on the burden of proof. Presumably, the applicant does not have the burden to prove this “high potential” because the applicant would have no incentive to prove a matter that would subject their project to further scrutiny. However, as explained below, there is difficulty in getting party status under this criterion. Thus, it may also not be reasonable to leave the burden to a party opposing the application when there is a high likelihood that there will be no parties with standing to make a showing of “high potential” under 9(D).

III. Analysis

Applicability

Where the project itself involves extraction of minerals and earth resources, this criterion does not apply. *Re: Forestdale Heights, Inc., #4C0329-16-EB, Findings of Fact, Conclusions of Law, and Order at 6 (Jan. 8, 1993).*

Definition of “minerals and earth resources”

The term “minerals and earth resources” includes sand, gravel granite marble and other similar items.

Definition of “high potential for extraction”

The term “high potential for extraction” is a technical term and can be determined based on an expert (e.g. geologist’s) testimony on the quality of the resource, the quantity of the resource, and its accessibility.

Considerations

1. Currently, there are very few decisions dealing with 9(D); therefore, the analysis is not well defined.

2. Drafting of permit conditions

For all applications other than those dealing with extraction, permit conditions can be drawn to prevent or minimize any interference with subsequent resource extraction. If the application involves extraction, the only interest an opposing party may have, concerns the possibility that the project’s extraction of earth resources would interfere with the subsequent extraction of additional earth resources in the future.

3. Party Status

It is difficult to obtain party status under this criterion because it deals with future use of the project site and not the project’s impacts on surrounding land. The only interest an opposing party may have concerns the possibility that the project would interfere with the subsequent extraction of additional earth resources on that site in the future. *Re: McLean Enterprises Corporation, #2S1147-1-EB, Memorandum of Decision at 14 (Sep. 19, 2003).*

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