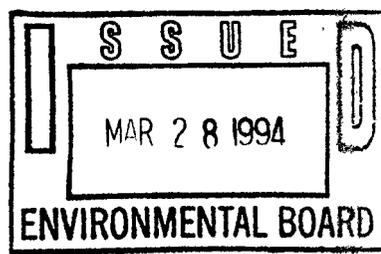


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VERMONT ENVIRONMENTAL BOARD  
10 V.S.A. Chapter 151

Re: Rock of Ages (Bethel White Quarry)  
Declaratory Ruling Request #291

MEMORANDUM OF DECISION AND DISMISSAL ORDER

This decision pertains to preliminary issues raised with respect to a declaratory ruling request concerning a granite quarry located in Bethel and owned and operated by Rock of Ages Corporation (Rock of Ages). As is explained below, the Environmental Board dismisses the declaratory ruling request because it is not a timely appeal of an advisory opinion and because the Board concludes that the law no longer allows parties an independent right to seek a declaratory ruling directly from the Board.

I. BACKGROUND

Rock of Ages operates a granite quarry located off Christian Hill Road in Bethel. Over the years, several advisory opinions have been issued concerning the applicability of 10 V.S.A. Chapter 151 (Act 250) to the quarry, including at least the following:

- a. Advisory Opinion #3-5 dated February 25, 1985, concluding that the operation of a stone crusher by Paul Hummel at the quarry constitutes a substantial change requiring an Act 250 permit.
- b. Advisory Opinion #EO-85-76 dated March 27, 1985, on appeal from Advisory Opinion #3-5, reaching the same conclusion.
- c. Advisory Opinion #3-42 dated April 7, 1989, concluding that substantial changes occurred in the quarry's extraction rate in 1974 and 1978 but that any impacts caused by these increases were temporary and that an Act 250 permit is not required for the quarry.
- d. Advisory Opinion #EO-89-177 dated June 8, 1990, on appeal from Advisory Opinion #3-42, concluding that a substantial change in the extraction rate has not occurred at the quarry and an Act 250 permit is not required.
- e. An unnumbered advisory opinion issued on September 18, 1990 pertaining to the use of a temporary crusher at the quarry and concluding that such use will not require an Act 250 permit.

The advisory opinions listed as items b, d, and e above were not appealed within 30 days.

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On August 6, 1993, the following residents of the Christian Hill area filed a petition for declaratory ruling with the Environmental Board: Richard and Sharon Wagner; Davis L. Dimock; Victoria Weber; D'Ann, Vincent and Celie Fago; Kirk White; Michael Daniel; Margaret Daniel; and Randall and Sarah Koch (collectively, the Petitioners). The petition states that a declaratory ruling is sought with respect to "both the total amount of production and for the addition of a granite crushing operation." The petition also states that "each of these factors equals a substantial change and they should fall under Act 250 jurisdiction."

On November 18, 1993, Environmental Board Chair Elizabeth Courtney convened a prehearing conference in Bethel. During the prehearing conference, the Wagners and Ms. Weber, on behalf of those filing the petition, stated that they were choosing to call themselves the Quarry Neighbors Alliance. In addition, several party status requests were filed. A deadline of December 20, 1993 was set for all people seeking to participate to file party status petitions and to properly serve their petitions on all parties.

On December 2, 1993, the Chair issued a prehearing conference report and order, which is incorporated by reference. That report identifies preliminary issues with respect to party status and the timeliness of the declaratory ruling request. On December 14, the Wagners filed a petition for party status as individuals, stating that the Quarry Neighbors Alliance was no longer an active organization. On December 15, the Fagos filed a petition for party status. On December 16, Ms. Weber and Mr. Dimock filed a petition for party status. On December 16, William and Clara Bunn filed a petition for party status. On December 20, Ric Timmons filed a request for party status and a memorandum on the question of timeliness.'

On January 7, 1994, Rock of Ages filed a memorandum on the issues of party status and timeliness. On January 19, the Bunns filed letters in response. Also on that date, the Wagners filed a response. On January 20, a petition for party status and response concerning the issue of timeliness was filed by Margaret Daniel, Michael Daniel, and Kirk White. Also on that date, Ms. Weber and Mr. Dimock, Mr. Timmons, and the Fagos filed letters with the Board.

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*'The Board notes that many of those seeking party status filed documents at the prehearing conference that were later served on **all parties**. While the Board is not listing all of those documents above, the Board wishes to **assure that** those documents were reviewed.*

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Due to the actions of the Vermont Senate, which on January 19, 1994 voted not to confirm the Governor's re-appointment of the Chair and Board members Ferdinand Bongartz and Terry Ehrich, the Board was forced to postpone an oral argument scheduled for January 26, 1994.

On February 10, 1994, having been re-appointed by the Governor on January 21 along with members Bongartz and Ehrich, Chair Courtney assigned alternate member Robert Opel to act as chair in this matter. The Board convened oral argument on February 11, 1994, with the following persons participating:

Rock of Ages by William W. Schroeder, Esq.  
Victoria Weber and Davis Dimock by Ms. Weber  
Ric Timrnons, pro se  
William and Clara Bunn by Mr. Bunn  
Sharon and Richard Wagner by Mrs. Wagner  
D'Ann, Vincent and Celie Fago by D'Ann Fago

Other people attended the argument but did not offer argument. During the argument, Ms. Weber, the Bunns, and the Wagners submitted written statements. In addition, several of those seeking party status submitted a memorandum concerning how they would allocate issues at an evidentiary hearing. After hearing argument, the Board recessed and conducted a deliberative session.

On February 16, 1994, Rock of Ages filed a letter. On March 2, Mr. Wagner filed a letter. The Board deliberated again on March 23.

## II. DISCUSSION

As stated in the prehearing conference report, there are two preliminary issues in this matter. One is whether the petition for declaratory ruling is timely. The other preliminary issue is whether all persons seeking party status will be granted such status. The Board will first examine timeliness.

Rock of Ages asks the Board to dismiss this declaratory ruling petition as untimely. Rock of Ages argues that the issues raised by the Petitioners have been addressed in prior advisory opinions and that the petition was not filed within 30 days of those opinions. Rock of Ages contends that, under Board Rule 3(C), the petition must have been filed within 30 days of the opinions. Rock of Ages also contends that it has relied on the opinions.

The Petitioners and others seeking party status assert that the petition does not, and does not have to, constitute an appeal of an advisory opinion. They

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contend that Board Rule 3(D) provides an independent right to seek a declaratory ruling from the Board. They also argue that the issues they seek to address are not identical to those addressed in the earlier advisory opinions. They further argue that dismissal would be inefficient because they could simply revive the process by seeking an advisory opinion from the District #3 Coordinator.

The applicable statute regarding timeliness of appeals of advisory opinions is 10 V.S.A. § 6007(c), which provides:

Prior to the partition or division of land, or prior to the commencement of development, any person may submit to the district coordinator an "Act 250 Disclosure Statement" and other information required by the board, and may request an advisory opinion from the district coordinator concerning the applicability of this chapter. An advisory opinion of a district coordinator may be appealed to the executive officer of the board, or directly to the board, in the discretion of the appellant. The executive officer may assign appeals to an assistant executive officer. Appeals from an advisory opinion of a district coordinator or the executive officer or an assistant executive officer must be filed within 30 days of the mailing of the advisory opinion. Appeals to the board are by means of a petition for declaratory ruling and must be accompanied by a \$25.00 filing fee. Such petitions will be considered and disposed of promptly. A petition shall be treated as a contested case. ...

(Emphasis added.) This statute was passed in 1987. At that time, it applied only to advisory opinions and declaratory rulings concerning subdivisions. 1987 Vt. Laws No. 64 § 3. In 1991, the statute was amended to apply to advisory opinions and declaratory rulings concerning both subdivisions and developments. 1991 Vt. Laws No. 111 § 3.

Board Rule 3, which existed prior to the above-referenced statute, provides as follows concerning advisory opinions and declaratory rulings:

(C) Any interested party seeking a ruling as to the applicability of any statutory provision or of any rule or order of the board may request an advisory opinion from a district coordinator, or if appropriate, the executive officer of the board. An advisory opinion of a district coordinator may be appealed to the executive officer of the board. An advisory opinion of the executive officer may be appealed to the environmental board by means of a petition for a declaratory ruling. An appeal from an advisory opinion of a district

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coordinator or the executive officer of the board must be filed within 30 days of mailing of the advisory opinion.

(D) Petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the board shall be filed with the board and shall be accompanied by a \$25.00 filing fee. Such petitions will be considered and disposed of promptly. A petition may be treated as a petition for adoption of rules or as a contested case as may be proper under the circumstances. ...

(Emphasis added.) Rule 3 was authorized by 3 V.S.A. § 808, which requires all agencies to issue procedures for seeking declaratory rulings, and by 10 V.S.A. § 6025(a), which authorizes the rulemaking power of the Board. In addition, the quoted portions of Rule 3 were ratified by the General Assembly in 1985 and therefore have the force and effect of a legislative enactment. 1985 Vt. Laws No. 52 § 5; In re Spencer, 152 Vt. 330, 336 (1989).

Recently, because of the language of 10 V.S.A. § 6007(c), the Board dismissed a declaratory ruling petition because it was not filed within 30 days of the executive officer opinion the petition was seeking to appeal. Re: Earth Construction Co., Declaratory Ruling Request #278, Memorandum of Decision at 3 (March 16, 1993). The basis of this dismissal was that the Board does not have discretion to extend statutory deadlines. Id., citing Allen v. Vermont Emolovment Security Board, 133 Vt. 166 (1975).

In contrast, prior to the passage of the statutory provision, the Board had ruled that use of the advisory opinion procedure set forth in Rule 3(C) is optional and that "any party may proceed directly to the Board with a petition for a Declaratory Ruling" under Rule 3(D). Re: W. Joseph Gannon, Declaratory Ruling Request #173, Memorandum of Decision at 3 (July 3, 1986).

Rather than appealing an advisory opinion, the Petitioners are seeking independently to bring a declaratory ruling under Rule 3(D). The question thus becomes whether such a right continues to exist following the passage of the 1991 amendment to 10 V.S.A. § 6007(c). This is a close question concerning which strong arguments can be adduced on both sides.

Upon examination, the Board concludes that, in amending 10 V.S.A. § 6007(c) in 1991, the General Assembly intended to promulgate a specific statutory provision concerning the process for seeking advisory opinions and declaratory rulings regarding the applicability of Act 250. The provision is the most recent legislative statement on the subject. See Lomborg v. Crowley, 138 Vt. 420, 423 (1980) (specific statutory provisions take precedence over general, and

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later-enacted provisions take precedence over earlier). This provision does not provide for seeking declaratory rulings from the Board except within 30 days of the issuance of an advisory opinion. Accordingly, the Board concludes that it no longer has independent jurisdiction to hear a declaratory ruling request that is not filed within 30 days of the issuance of an advisory opinion.

In addition to believing this conclusion to be legally correct, the Board believes that it is good policy because it allows for fact-gathering and review of jurisdiction initially at the district level, and for the potential resolution of jurisdictional disputes through an informal proceeding rather than forcing parties to go through a contested case before the Board.

In view of the Board's conclusion that it cannot hear a petition for declaratory ruling that is not filed within 30 days of the issuance of an advisory opinion, this petition must be dismissed.

Having concluded that the petition should be dismissed, the Board declines to decide the party status disputes that have arisen. However, the Board will address additional matters in the interests of what it will call "administrative" economy, meaning by that phrase the administrative, quasi-judicial equivalent of the phrase "judicial economy."

Specifically, based on the statements of some of the Petitioners and others seeking party status, the Board anticipates that the District #3 Coordinator will be asked to render an advisory opinion on the issues concerning which the Petitioners seek a declaratory ruling. Such a request may be permissible, for three separate and independent reasons. First, the Board has previously ruled that advisory opinions, as a matter of law, are not binding, final judgments. Re: H.A. Manosh Corp., Declaratory Ruling Request #247, Memorandum of Decision at 2 (July 2, 1991); Re: Esprit. Inc., Declaratory Ruling #181 at 3 (June 3, 1987); and Saggon ~~supra~~ <sup>at 2</sup> appears that some of the parties may not have had notice of the earlier advisory opinions issued concerning Rock of Ages. See Re: Triple M Marketnlace. Declaratory Ruling Request #274, Memorandum of Decision at 3 (January 15, 1993). Third, the issues that the Petitioners seek to address appear to encompass matters that were not specifically discussed in the prior advisory opinions. For example, the Petitioners claim that a road being used today to haul granite from the Quarry is different from a road that allegedly was used in 1969 to haul granite to Interstate 89 for use in the construction of the Interstate.

While it may be permissible to ask the District Coordinator for an advisory opinion, this does not mean that the prior advisory opinions should simply be disregarded. Rock of Ages claims reliance on those opinions, and may in fact be

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able to prove that the State of Vermont is barred from asserting Act 250 jurisdiction under the doctrine of "estoppel." See In re McDonald's Corp., 146 Vt. 380, 383-85 (1985); Re: Jericho Corners Elementary School, Declaratory Ruling Request #285, Memorandum of Decision at 4 (June 22, 1993); Triple M Marketplace at 3.

But even if Rock of Ages cannot prove that the State is "estopped" from asserting Act 250 jurisdiction, the Board believes that fairness dictates that the prior advisory opinions be given presumptive weight. Specifically, to the extent that an issue has been addressed in a prior advisory opinion that was not appealed, the opinion should be presumed correct on that issue, unless: (a) it is shown that circumstances have changed materially since the opinion was issued, or (b) it is demonstrated by clear and convincing evidence or argument that the opinion was incorrect or that the information relied upon was materially incorrect.

Finally, the Board notes that two of the advisory opinions issued at the district level concerning the Bethel White Quarry were appealed to the executive officer. Thus, to the extent there is a conflict between the district opinion that was appealed and the executive officer opinion resulting from that appeal, the executive officer opinion would supersede the district opinion, and would be the one to which presumptive weight should be given.

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III. ORDER

The declaratory ruling request filed by the Petitioners on August 6, 1993 is dismissed.

Dated at Montpelier, Vermont this 28th day of March, 1994.

ENVIRONMENTAL BOARD

A handwritten signature in black ink that reads "Robert Opel (by AWA)". The signature is written in a cursive style and is positioned above the printed name of the signatory.

Robert Opel, Acting Chair

Rebecca Day

Lixi Fortna

Arthur Gibb

Samuel Lloyd

William Martinez

Steve E. Wright

Ferdinand Bongartz participated in the oral argument and deliberation on February 11, 1994. He has not subsequently participated because, on February 22, 1994, the Vermont Senate voted not to confirm his re-appointment by the Governor on January 21, 1994.

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