

VERMONT ENVIRONMENTAL BOARD  
10 V.S.A. §§ 6001-6092

Re: Vermont Agency of Transportation (Rock Ledges)  
Declaratory Ruling #296

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER  
(Third Revision)**

The Agency of Transportation ("AOT") has and/or intends to remove or otherwise alter certain median and side rock ledges along Interstates 89 and 91 ("Interstates"). AOT expects to carry out this work in twelve separate projects (collectively "Ledgework"): one which is already the subject of a valid Act 250 Permit ("Thetford-Fairlee Project"); five which are complete or ongoing ("Complete/Ongoing Projects"); and six which are in the preliminary planning stages or otherwise neither complete nor ongoing ("Preliminarily Planned Projects").

This decision pertains to whether a permit is needed pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250") for the Ledgework in its entirety or for any particular project or combination of projects which is part of the Ledgework. The issue is whether or not the Ledgework may have a significant impact under any one of the Act 250 criteria and thus constitute a substantial change to the Interstates. As is explained below, the Environmental Board concludes that an Act 250 permit is required for the **Thetford-Fairlee** Project but not for the Complete/Ongoing Projects. The Board **finds** that the record does not contain sufficient evidence for it to conclude whether or not the Preliminarily Planned Projects require an Act 250 Permit. As a consequence, the Board will hold its decision regarding them in abeyance until after AOT has submitted additional information to the Board. This information shall result **from** AOT investigations, tests and evaluations. It shall describe in sufficient detail the Preliminarily Planned Projects and any other ledge treatment/work along the Interstates for which AOT has conducted preliminary planning.

**I. SUMMARY OF PROCEEDINGS**

On July 19, 1993, District #5 Coordinator Edward **Stanak** and District #3 Coordinator Robert Sanford jointly opined in Advisory Opinion 5-93-8 that the Ledgework did not need an Act 250 Permit.

On May 31, 1994, Board General Counsel Stephanie J. Kaplan issued Advisory Opinion #EO-93-288 in which she determined that the Ledgework did need an Act 250 permit.

On June 30, 1994, AOT **filed** a Petition for Declaratory Ruling ("Petition").

On August 8, 1994, then Board Chair Arthur Giib convened a **prehearing** conference in Montpelier.

On August 17, 1994, Chair Gibb issued a preheating conference report and order.

Chair Gibb acknowledged that the Planning Commission of the Town of **Fairlee** was a party by right and granted Dean Corren party status pursuant to Environmental Board Rule ("**EBR**") **14 (B)(I)@**). **Additionally**, a hearing on the merits of the Petition was set for December 21, 1994.

During October and November of 1994, the parties filed testimony and lists of witnesses and exhibits.

On October 27, 1994, Representative Correa filed a request for a subpoena to compel the attendance and testimony of Steve Parrea at the hearing. Mr. **Parren** is a **nongame** biologist who is employed by the Agency of Natural Resources ("**ANR**"). He is familiar with the Peregrine Falcon populatioa located near **Fairlee**. On December 2, 1994, Chair Gibb denied the requested subpoena but asked ANR to make Mr. **Parren** available at the hearing.

On December 21, 1994, the Board held a hearing in Montpelier in which the following parties participated: AOT and Representative Correa. Near the end of the hearing, the Board, with the consent of the parties, extended the Sling date for proposed findings of fact and conclusions of law to January 30, 1995. After the hearing, the Board recessed pending review of the record, deliberation and decision.

The **Board** deliberated on December 21, 1994, February 22, 1995 and June 1, 1995. On June 1, 1995, following a review of the evidence and arguments presented in the case, the Board declared the record complete and adjourned the hearing.

On June 15, 1995, the Board issued Findings of Fact, Conclusions of Law and Order ("Decision"). On July 14, 1995, AOT filed a Motion to Alter ("First AOT Motion"). On August 23, 1995, Representative Corren filed objections to the Motion ("Objections"). Neither party requested oral argument.

On September 27, 1995, the Board deliberated on the First AOT Motion and Objections. On November 13, 1995, the Board issued a revised **Findings** of Fact, Conclusions **of Law** and Order ("Revised Decision").

On December 13, 1995, AOT filed a second motion to alter ("Second AOT Motion"). On February 23, 1996, Representative Corren **filed** a response to the Second AOT Motion and a counter motion to alter.

On February 28, 1996, the Board heard oral argument on the Second AOT Motion and the Correa Motion. Immediately thereafter, the Board deliberated. The Board deliberated again on April 10, 1996. On April 12, 1996, the Board issued a second revised Findings of Fact, Conclusions of Law and Order.

On May 13, 1996, AOT filed a third motion to alter ("Third AOT Motion") and Representative Corren filed a motion to alter ("Second Corren Motion").

On May 17, 1996, AOT filed a response to the Second Corren Motion ("AOT Response"). On May 31, 1996, Corren filed a response to the Third AOT Motion and the AOT Response.

On June 5, 1996, Acting Chair Gibb denied that portion of the Third AOT Motion seeking authority to proceed on the Ryegate-St. Johnsbury project. On June 10, 1996, AOT filed a letter advising the Board that it had removed ledge from the Ryegate-St. Johnsbury project ("AOT Letter"). On June 12, 1996, Representative Corren filed a letter in response to the AOT Letter. On June 12, 1996, the Board conducted but did not conclude deliberations.

On September 11, 1996, the Board issued a Memorandum and Order reopening the hearing to obtain further evidence. On October 21, 1996, Representative Corren advised the Board that he did not intend to submit additional evidence, prefiled or otherwise. On October 22, 1996, AOT submitted additional prefiled testimony and exhibits. On January 15, 1997, the Board reconvened the hearing. One of AOT's witnesses, Thomas K. Pierce, could not attend the hearing due to the death of his father. The Board indicated that it would receive Mr. Pierce's **prefiled** testimony into evidence subject to receipt of an **affidavit** from Mr. Pierce stating that his testimony was true and accurate to the best of his information, knowledge and belief. There were no objections to this procedure. On January 23, 1997, AOT submitted Mr. Pierce's affidavit.

Immediately after the hearing the Board deliberated. The Board deliberated again on March 26, 1997. This matter is now ready for decision. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are deemed irrelevant, redundant and/or inaccurate, and denied. See Petition of Hardwick Electric Department, 143 Vt. 437,445 (1983).

## **I I . ISSUES**

1. Whether Interstates 89 and 91 constitute a pre-existing development pursuant to 10 V.S.A. §§ 6081(b) and EBR 2(O).

2. Whether the Ledgework constitutes a substantial change to a pre-existing development pursuant to 10 V.S.A. § 6081(b) and EBR 2(G).

## **I I I . FINDINGS OF FACT**

1. Interstates 89 and 91 ("**Interstates**") were built for state purposes prior to June 1, 1970 and consist of more than ten acres.

2. AOT plans to or already has removed or otherwise altered certain rock ledges along the **Interstates**.
3. The Ledge work consists of twelve projects. Work on five of the Complete/Ongoing Projects was complete or underway as of December 21, 1994:
  - a.) Guilford-Springfield (AOT Project #091-1(18, c/1);
  - b.) **Guilford-Springfield** (AOT Project #091-18, c/2);
  - c.) Springfield-Hartford (AOT Project #091-1(20));
  - d.) Berlin-Williston (AOT Project #089-2(15)); and
  - e.) Royalton-Berlin (AOT Project #089-1(11)).
4. Work on the Thetford-Fairlee Project and the Preliminarily Planned Projects was planned but not underway as of December 21, 1994. The Thetford-Fairlee Project and the Preliminarily Planned Projects are more particularly described as:
  - a.) Thetford-Fairlee (AOT Project #091-2(7));
  - b.) Hartford-Newbury (AOT Project #091-2(6));
  - c.) Hartford-Sharon-Royalton (AOT Project #089-1(8));
  - d.) St. Johnsbury-Lyndon (AOT Project #91-3(5));
  - e.) Lyndon-Derby (AOT Project #091-3(6));
  - f.) Waterford (AOT Project #093-1(8)); and
  - g.) **Ryegate-St. Johnsbury** (AOT Project #91-2(8)).
5. AOT intends to contract with more than one contractor (likely four) to complete the design process on **all** of the **Preliminarily** Planned Projects except the Hartford-Sharon-Royalton project. AOT will complete the design process for Hartford-Sharon-Royalton project "in-house". Due to the small scope of the St. Johnsbury-Lyndon and Waterford projects, these two projects will, in all likelihood, be the subject of one contract with one consultant.
6. The Federal Highway Administration ("**FHWA**") is now reviewing a draft scope of work for the design process contracts. Once FHWA completes its review, AOT personnel will conduct a **final** review. The selection of consultants should be made by mid 1997. The consultants will design the ledge treatment and related work that will comprise each of the **Preliminarily** Planned Projects. Each consultant will, prior to June, 1998 and as part of the design it provides to AOT regarding the Preliminarily Planned Project on which it is working, describe or provide:

- a.) the amount of the suggested ledge treatment and related work involving median ledge **and/or** side ledge removal and/or alteration;
  - b.) an analysis of the potential impacts of the suggested ledge treatment and related work under each and every one of the Act 250 Criteria; and
  - c.) an analysis of the alternatives (guardrails, signs, etc.) to the ledge treatment and related.
- 7. For various reasons, none of the Preliminarily Planned Projects are now ready to go to the design phase.
  - 8. AOT has not yet made any definitive decisions to remove ledge and/or apply alternative treatments as part of any of the Preliminarily Planned Projects. After the design consultants submit their work, AOT will make such decisions in accordance with its April 4, 1995 ledge removal policy.
  - 9. AOT applied for and received an Act 250 permit for the Thetford-Fairlee Project.
  - 10. AOT has not applied for or received an Act 250 permit for any of the Preliminarily **Planned** Projects. Even though the design work for the Preliminarily Planned Projects will be done by more than one consultant, the **Preliminarily** Planned Projects are, collectively, one project. They are viewed as such by AOT. (1/15/97 testimony of Michael **Pologruto**).
  - 11. During the Spring of 1996, AOT, with the approval of then District #3 Coordinator Robert Sanford, removed approximately 1,290 cubic yards of rock **from** the Ryegate-St. **Johnsbury** project. AOT geologist Thomas D. Eliassen determined, in advance of the removal, that the removed rock **was** potentially dangerous. Mr. **Eliassen's** determination was based in large part upon the presence of a 30 foot long and three inch wide tension crack which existed above some unstable rock. **After** reviewing alternatives, Mr. Eliassen recommended that the overhanging and unstable rock be removed. The rock removal was complete in two days. This rock removal was consistent with that which was done as part of the Complete/Ongoing Projects.
  - 12. The Ledge work involves removing and/or scaling back median ledges, widening **rockcuts** by blasting and scaling rock faces situated along the Interstates. **After** blasting or scaling rock, associated vegetation is

removed from the project area.

13. AOT's basic design standard for blasting side rock ledges has been a 4 (vertical) to 1 (horizontal) slope. AOT selected the geometry of the "rock cuts" by considering a number of economic, geological, geometrical and physical factors. AOT uses computer models to design what the ledges should look like. AOT did not consider aesthetics in designing the cuts.
14. Approximately **398,397** cubic yards ("cy") of rock had been blasted, scaled and removed during the Completed/Ongoing Projects as of December 21, 1994. The approximate amount of rock removed **from** each of these projects is:
  - a.) 61,670 cy from Berlin-Williston;
  - b.) **240,311** cy from Guilford-Springfield (both projects);
  - c.) **66,849.4** cy from Springfield-Hartford; and
  - d.) 29,476 cy from Royalton-Berlin.
15. Construction began and ended for each of the Complete/Ongoing Projects as follows:

<u>Project Name</u>	<u>Start Date</u>	<u>End Date</u>
Guil-Spr c/1	10/30/89	1/17/92
Guil-Spr c/2	9/11/92	incomplete
Spr-Hartford	7/6/92	6/23/94
<b>Bel-Will</b>	8/10/92	7/15/94
Royal-Bel	4/15/94	incomplete
Rye-St. J	6/1/96	incomplete

16. As of December 21, 1994 the approximate amount of rock to be removed **from** the Thetford-Fairlee Project and each of the Preliminarily Planned Projects is:
  - a.) 36,900 cy from Thetford-Fairlee;
  - b.) 10,000 cy **from** Hartford-Sharon-Royalton;
  - c.) an undetermined amount **from Lyndon-Derby**; and
  - d.) 10,000 cy from remaining planned projects.

These figures are estimates. They may increase or decrease as the design process continues. AOT has not yet determined which median formations will be removed or otherwise **affected** by the Preliminarily Planned Projects.

17. There were more than 50 median ledge formations along the Interstates. A relatively small number of them have been removed by the Complete/Ongoing Projects.
18. AOT may have conducted preliminary planning for and may expect to commence construction on certain ledge treatment/work along the Interstates which is similar in nature to but not included among the twelve projects comprising the Ledge work.
19. After the public expressed its concerns about the Complete/Ongoing Projects, AOT altered the criteria by which it determined which ledges along the Interstates required treatment/work. The initial ledge removal policy changed from one with an emphasis on creating clear zones to one of eliminating identifiable accident and high maintenance locations. As a result of this change, the amount of ledge that will be removed and/or altered by AOT as part of the Complete/Ongoing Projects was reduced.
20. Several Burlington residents including Representative Corren formed the Save the Rocks Coalition. This coalition held a number of planning sessions and public meetings. AOT officials, including Secretary **Garahan**, attended these gatherings and shared information. After the public expressed its continued concern regarding the Complete/Ongoing Projects, AOT reevaluated the criteria it used to determine which section of ledge would be subject to treatment work. As a result, in part, of additional public input, AOT issued its "Policy on the Ledge Removal on Interstate Safety Projects" on April 8, 1994. This policy describes certain steps that AOT will take to address ledge areas during the design of Interstate Safety Projects. The likely result of this policy is that the Preliminarily Planned Projects will involve less ledge removal.
21. The Ledge work involves the use of heavy machinery to "scale" ledges or in the case of removing more substantial quantities of rock, blasting. Trucks haul resultant waste rock material to other areas for storage and disposal. The waste rock is also used to flatten slopes along the Interstates, add to some permanent Jersey barriers, help meet drainage needs and improve certain median sections where AOT believes long-term erosion has occurred. Vegetation and large quantities of soils along the Interstates have been and may need to be removed. Very little soil has been/will be disturbed by the Complete/Ongoing Projects.
22. Activities associated with the Ledge work include: installation or replacement of right-of-way fences, guardrails and Jersey barriers; digging of old ditches and/or the creation of new drainage ditches and culverts to

- accommodate storm water runoff, channel water parallel to the roads and foster erosion control; excavation and regrading with new topsoil and oat seed to stabilize erodible soils; road resurfacing; and dust control.
23. Most of the rock excavated from the Complete/Ongoing Projects was used within the Interstates' right of way. However, some was stockpiled at AOT yards or hauled to private property.
  24. **Traffic** has been and may be temporarily affected during the Complete/Ongoing Projects. AOT has employed **traffic** control, traffic signs, temporary traffic barriers and "related items" to reduce traffic impacts.
  25. Traffic detours divert traffic from the **Interstates** onto smaller Vermont state highways. These detours inconvenience motorists. Most motorists are accustomed to road work caused delays.
  26. At the Thetford-Fairlee Project, AOT plans to combine ledge blasting and removal with the placement of wire mesh netting over the Palisades rock formation. The bottom of the netting system will be close to the foot of the Palisades rock formation. A specially graded catchment area will be established within the project area. This project is directly adjacent to a Peregrine Falcon nest area. The birds feed and raise their young in the vicinity of this project, Peregrine Falcons **are** protected under the Federal Endangered Species Act.
  27. During the Thetford-Fairlee Project, three detours will be used. They will not be in place at the same time.
  28. A Class 3 wetland exists within the Thetford-Fairlee Project. The wetland is on the northwest side of the southbound lane of Interstate 9 1. None of the Complete/Ongoing Projects have had or will have a significant impact upon wetlands. None of the Preliminarily Planned Projects have reached the point where potential wetland impacts have been **identified**.
  29. AOT acquired approximately 1.95 acres of right-of-way within the Thetford-Fairlee Project. In addition, AOT acquired a permanent right to use approximately one mile of woods road in an existing Central Vermont Public Service Corporation easement. AOT will improve this road with a surface of crushed rock and will **install** several culverts.
  30. The Thetford-Fairlee Project has the potential for significant impact under Criteria 8 (aesthetics) due to the wire mesh system and 8(A) (wildlife) due



to the project's proximity to the Peregrine Falcon population.

31. A small number of median ledges have been removed during the Complete/Ongoing Projects. These removal areas have been filled, seeded and mulched. Their appearance matches that of the adjacent median. Outside ledges are not removed. They are scaled back. After the work is complete, the newly blasted areas appear different than ledge areas left in place. The rock drilling which precedes blasting leaves vertical lines on the cliff face **from** which the rock is removed. After blasting, these areas quickly weather. The overall appearance of the Interstates after outside ledge is treated is largely the same as it was before treatment. It is difficult for the typical motorist to tell where ledge work has been completed.
32. Geologists study the rock ledges to learn about the geologic history of the Green Mountains.
33. The Ledge work will not increase the vehicular capacity of the Interstates.
34. The Interstates have scenic value. The rock ledges contribute to this value. This scenic value is offset somewhat by directional signs, automobiles, trucks, jersey barriers, etc.
35. The Complete/Ongoing Projects have not and will not significantly impact: water availability **from** nearby water supplies; the ability of government to provide governmental or educational services, or to accommodate growth; public investment; agricultural soils, earth resources; energy use; utility services; rural growth areas; aesthetics; the local or regional plan or any other factor/value which the Act 250 Criteria are designed to protect.

#### IV CONCLUSIONS OF LAW

##### 1. DEVELOPMENT

10 V.S.A. § 608 1 (a) requires that a permit be obtained prior to commencement of construction on a development or prior to commencement of development. Development includes state projects involving more than ten acres of land. 10 V. S.A. § 600 1(3). The Interstates constitute development.

##### 2. PREEXISTING DEVELOPMENT

Pre-existing developments are exempt **from** the Act 250 permit requirement unless there has been or is planned a substantial change to them. 10 V.S.A. § 608 1(b)

and EBR 2(A)(5). The Interstates are a pre-existing development. Therefore, an Act 250 permit is not required unless a substantial change occurs or is proposed.

### 3. SUBSTANTIAL CHANGE

[1] EBR 2(G) defines substantial change as "any change in a development or subdivision which may result in significant impact with respect to any of the criteria specified in 10 V.S.A. § 6086(a)(1) through (a)(10)." The validity of EBR 2(G) has been upheld by the Vermont Supreme Court. In re Barlow, 160 Vt. 513, 521-22 (1993); In re Orzel, 145 Vt. 355, 360-361 (1985).

The Board has articulated a two-prong test which must be satisfied when applying EBR 2(G). First, there must be a cognizable change to the pre-existing development. Second, if a cognizable change is found, an Act 250 permit is required if the change has caused or may cause a **significant** impact under one or more of the ten criteria. Re: Sugarbush Resort Holdings, Inc., Declaratory Ruling # 328 at 22 and 23 (February 27, 1997); Re: David Enman (St. George Property), Declaratory Ruling #326 (December 23, 1996); Re: L.W. Haynes, Declaratory Ruling #192 at 7 (Sep. 5, 1987). The Board need only find that a change may result in significant impact, not that a change has resulted or will result in significant impact. However, the impact that may result must be significant. In re Barlow, *supra*, at 521-22.

#### A . . . Cognizable Change

[2] Repair or routine maintenance is not cognizable change under EBR 2(G). Re: Agency of Transportation (Leicester Route 7), Declaratory Ruling #153 at 4 (June 28, 1984) and Re: Windsor Correctional Facility, Declaratory Ruling #151 at 6 (May 9, 1984). Such activity does not alter the existing development. Rather, it prevents or eradicates alteration to an existing development which has occurred or would otherwise occur over time through normal wear and tear.

The real question at this juncture is whether the Ledge work is repair or routine maintenance to the Interstates. **If it is**, an Act 250 permit is not required. **If it is not**, the Board continues with its substantial change analysis. To answer the question, it is helpful to consider relevant Board precedent. The following activities are not repair or routine maintenance: new pavement, guardrail replacement and elimination or decrease in pull-offs (Re: Agency of Transportation, Declaratory Ruling #298 (May 9, 1995)); an upgrade to an historic condition (Re: Town of Wilmington, Declaratory Ruling #258 at 12 (June 30, 1992)); the replacement of leach fields with a different sewage disposal system for a correctional facility (Re: Windsor Correctional Facility, *supra*); and the widening of U. S. Route 7 to create a 30 foot wide clear zone (Re: Agency of Transportation (Leicester Route 7), Declaratory Ruling #153 (June 28, 1984)). By contrast, the restoration of a washed out road to its original condition is repair or routine maintenance. Re:

Productions, Ltd., Declaratory Ruling #168 (April 10, 1985).

The nature of the Ledge work is analogous to that of the leach field at issue in Re: Windsor Correctional Facility, supra. AOT agrees. See AOT's Proposed Conclusions of Law, at 6 and 7, #9. Additionally, it is very similar to that of the road work at issue in Re: Agency of Transportation, Declaratory Ruling #298 supra.

The Board concludes that the Ledge work is not merely repair or routine maintenance. Rather, the Board finds that the Ledge work is an upgrade to the Interstates. It is not simply an effort to correct the effects of normal wear and tear. Nor is it an effort to protect the Interstates from such effects. Rather, it is designed to change the Interstates to improve driver safety and reduce **future** maintenance. The Ledge work is not focused on the original condition, character or make-up of the Interstates. It is intended to and will result in a cognizable change to the Interstates.

B. Potential for Significant Impact

[3] The Board has not specifically defined the term "significant". In re Barlow, 160 Vt. at 522. The determination as to whether there is a potential significant impact is "inextricably fact bound and not susceptible to the application of preset definitional rules." Id.

i. The Thetford/Fairlee Project

The Thetford-Fairlee Project may have **significant** impacts under Criterion 8(A) (wildlife habitat and endangered species) due to the associated Peregrine Falcon nesting site. The Board believes that the activities involved in or associated with this project may have an impact upon the nesting, feeding or rearing habits of the birds.

The proposed netting system will be the only one of its kind along the Interstates. Consequently, it will be very noticeable to passing motorists. It will not weather as will AOT's other ledge treatments which comprise the Ledge work. It will not "blend" with or begin to resemble any previously completed ledge treatment/work. Eventually, the system **will** weather and become relatively less intrusive. However, the project may also have a significant impact under Criterion 8 (aesthetics, scenic or natural beauty). <sup>1</sup>

Finally, this project may also **significantly** impact wetlands and associated streams and thus have a significant impact under Criteria 1 (E) (streams) and 1 (G) (wetlands).

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<sup>1</sup> Although AOT has obtained an Act 250 permit for this Project, the Board may opine on it. In re Barlow 160 Vt. at 518-520.

ii. The Complete/Ongoing Projects

Water and air quality issues are raised by the blasting, culvert and ditch work, water withdrawal and dust control activities associated with these projects. Additionally, disposal of waste rock and vegetative materials and erosion runoff must be considered. The Board concludes that any impacts **from** these projects under each and every one of the Criteria are not sufficiently significant to constitute substantial change to the Interstates.

Relatively little soil has been/will be removed or impacted by these projects. AOT has implemented erosion control measures for them. Due in part to these protections, the Board believes that, with respect to these projects, there is no chance for significant soil erosion impacts.

The Board finds that the Complete/Ongoing Projects have and/or will cause temporary traffic delays, stoppages and detours. Travelers along the Interstates are accustomed to minor inconveniences caused by road work. These impacts have been or will be short-lived and insignificant.

The Board notes that these projects will not significantly impact the view enjoyed by travelers **along** the Interstates. Motorists traveling along the Interstates will see a particular side ledge for a second or two as they pass by. In a relatively short period of time, the side ledges treated during the Complete/Ongoing Projects will look like the side ledges created during the initial construction of the Interstates.

iii. The Preliminarily Planned Projects

AOT views the Preliminarily Planned Projects as one project. The Board believes that such a view is correct. Consequently, the Board will consider the Preliminarily Planned **Projects** collectively.

The Board is concerned about the impacts that the Preliminarily Planned Projects will have upon streams, wetlands, soil erosion and, most particularly, the scenic beauty of the Interstates. AOT acknowledges that these projects are still in the preliminary planning stages. AOT has not considered aesthetics in planning the Ledge work. AOT candidly states that the Board “cannot at this time reach a decision for the **[Preliminarily Planned Projects]**“. **AOT's** Proposed Conclusions of Law, at 11, #17. The Board agrees.

**[4]** The Board cannot, based upon the current state of the record, conclude whether or not the Preliminarily Planned Projects may have a significant impact under any of the Criteria. The Board simply cannot conduct a detailed review of the potential impacts of these projects until AOT has fully completed its planning function and supplied all relevant and necessary information to the Board for public review and the Board's

consideration.

The Board will hold its decision on the Preliminarily Planned Projects in abeyance. It will not issue a decision on these projects until AOT has submitted additional information to the Board. This information shall describe in sufficient detail the Preliminarily Planned Projects and any other ledge treatment/work along the Interstates for which AOT has conducted preliminary planning.

4. THE MOTIONS TO ALTER

A. The First AOT Motion and Objections

In the First AOT Motion, AOT asks the Board to:

- (1) delete a requirement that AOT submit a Ledge-work Masterplan; and
- (2) state that the Board can neither make a declaratory ruling on, nor retain jurisdiction over the Preliminarily Planned Projects and/or other ledge treatment/work along the Interstates but that the parties may seek advisory opinions at appropriate times.

In the Petition, AOT states that it “will be glad to provide any documentation requested by the Board if its file materials are not adequate.” In accordance with this offer, 10 V.S.A. §6024 and EBR 20, the Board directs AOT to submit certain additional information which the Board defines as a Ledge-work Master-plan. AOT takes issue with certain aspects of this requirement. While the Board believes that most of the information is necessary, it will delete the “Ledge-work Master Plan” terminology and a requirement for an analysis of aesthetics. The latter is unnecessary in light of the other ordered information submittal.

AOT suggests that the Preliminarily Planned Projects should be addressed at the district coordinator level in separate and distinct jurisdictional opinions. The Board disagrees. Such a piecemeal approach is contrary to the Petition, the procedural history of this declaratory ruling, program efficiency and appropriate planning principles.

[5] AOT argues that the Board’s actions in this matter are not inconsistent with the Vermont Supreme Court’s holdings In re Agency of Administration, 141 Vt. 68 (1982) and In re Vermont Gas Systems, Inc., 150 Vt. 34 (1988). The Board disagrees. The Board has not concluded that the Preliminarily Planned Projects require an Act 250 permit. Rather, the Board is simply asking for more information ~~from~~ AOT In order to resolve the question. It is possible that once AOT submits and the Board reviews the additional information, the Board will conclude that the Preliminarily Planned Projects do not require an Act 250 permit.

In the Objections, Representative Corren, In part, asks the Board to:

- (1) explicitly state that Act 250 applies to past and proposed ledge treatments;  
and
- (2) explicitly state that AOT should have applied for an Act 250 permit before undertaking work on any of the Complete/Ongoing Projects.

To the extent the Objections seek alteration of the Decision, they are denied. They are not timely filed pursuant to EBR 3 1.

B. **Second AOT Motion and Corren Motion**

In the Second AOT Motion, AOT asks the Board to:

- (1) delete existing finding of fact #12 relating to ledge treatment/work along the Interstates which is similar In nature to but not included among the Preliminarily Planned Projects;
- (2) limit the scope of the additional information which AOT must submit to the Board regarding the Preliminarily Planned Projects;
- (3) allow AOT to commence construction at its own risk on any one of the Preliminarily Planned Projects or any other ledge treatment/work along the **Interstates** for which AOT has conducted preliminary planning;
- (4) delete the requirement that AOT include certain evaluations In the additional information it submits to the Board; and
- (5) correct a typographical error.

The Board will **clarify** finding of fact #12. This modified finding supports the Board's interest in additional information pertaining to any ledge treatment/work along the Interstates for which AOT has conducted **preliminary planning**. The Board **will** review this necessary information in order to more fully and accurately evaluate the impacts of the Preliminarily Planned Projects under any one of the Act 250 criteria. The Board will not use this information in this declaratory ruling **proceeding** to determine whether or not any other ledge **treatment/work** along the Interstates for which AOT has conducted preliminary planning requires an Act 250 permit.

As to item (3) of **AOT's** Second Motion, the Board has noted that it will no longer preclude AOT from commencing construction on any of the Preliminarily Planned Projects or ledge treatment/work along the Interstates for which it has conducted

preliminary planning before the Board has determined whether or not an Act 250 permit is required for each and every one of the **Preliminarily** Planned Projects. However, should AOT commence such construction without an Act 250 permit, it does so, as it acknowledges in the Second Motion, at its own risk. The Board believes that item (3) of AOT's Second Motion is based on AOT's need to address situations in which certain ledge treatment/work on the Preliminarily Planned Projects is necessitated by unforeseen emergency circumstances that threaten the public health, safety and welfare. Therefore, in such situations, the Board will require AOT to promptly provide the Board with a letter from a registered professional geologist confirming that the ledge treatment/work performed was the minimum amount necessary to protect the public health, safety and welfare.

The Board will ~~not~~ delete the requirement that AOT ~~include certain~~ evaluations in the additional information it submits to the Board: This requirement is consistent with EBR 20 and 10 V.S.A. §6024.

The Board will correct the typographical error identified by AOT.

Representative Corren's counter motion to alter ("Corren Motion"), asks the Board to alter the Revised Decision to reflect that the Complete/Ongoing Projects originally required Act 250 permits but, because these projects are now complete, no such permits are required at this time. The Corren Motion is not timely filed pursuant to EBR 31. The Board will not grant the relief requested therein.

C . **Third AOT Motion and the Second Corren Motion**

In the Third AOT Motion, AOT seeks:

(1) an extension of time by which it must provide supplementary information to the Board regarding the **Preliminarily** Planned Projects to June 12, 1998; and

(2) authority to promptly complete the Ryegate-St. **Johnsbury** project pursuant to the Act 250 permit issued for the **Thetford-Fairlee** project while, at the same time, seeking an amendment to such permit.

The Board will extend the time by which it must provide supplementary information to the Board regarding the **Preliminarily** Planned Projects to June 10, 1998.

The Board recognizes that prior to the Board's review of AOT's June 10, 1998 submittal, AOT may be compelled, due to unforeseen emergency **circumstances** which threaten the public health, safety and welfare, to perform ledge treatment/work on one or more of the Preliminarily Planned Projects. In such an instance, AOT shall promptly provide the Board with a letter from a registered professional geologist confirming that

the ledge treatment/work performed was the minimum amount necessary to protect the public health, safety and welfare.

As previously noted, Acting Chair Gibb denied **AOT's** request for authority to complete the Ryegate-St. Johnsbury project while, at the same time, seeking an amendment to the Thetford **Fairlee** permit to allow such action.

In the Second Corren Motion, Representative Corren seeks to have the Board:

- (1) use the requested additional information to determine whether or not AOT projects other than those comprising the Ledge work are subject to Act 250 jurisdiction;
- (2) expand the scope of the requested additional information; and
- (3) determine that the Complete/Ongoing Projects originally required Act 250 permits but, because these projects are now complete, no such permits are required at this time.

**[6]** The Board is willing to seek information pertaining to projects other than those comprising the Ledge work for the sole purpose of determining whether or not the Preliminarily Planned Projects are subject to Act 250 jurisdiction. AOT has petitioned for a jurisdictional determination regarding the Preliminarily Planned Projects. It has not filed for such a determination regarding other projects. Further, as noted previously, if AOT conducts **ledge work/treatment** without a necessary Act 250 permit, it does so at its own risk.

The Board believes that the scope of the additional information is sufficient to enable the Board to determine whether or not the Preliminarily Planned Projects are subject to Act 250 jurisdiction.

The Board will not reach the third issue raised by the Second Corren Motion. The particular issue was noted in both the Objections and the Corren Motion. It should have been noted in a timely motion to alter **filed** in response to the Decision. **See Re: Finard-Zamias Associates, #1R0661-EB**, Memorandum of Decision (Jan. 16, 1991).

## **V. ORDER**

1. An Act 250 permit is required for the **Fairlee/Thetford** Project.
2. An Act 250 permit is not required for the Complete/Ongoing Projects, either individually or In any combination.
3. On or before **Wednesday, June 10, 1998**, AOT shall submit the following



information:

a.) a specific description of each and every one of the Preliminarily Planned Projects and any other ledge treatment/work along the Interstates for which AOT has conducted preliminary planning including, but not limited to, a statement of whether and in what amount each and every one of the Preliminarily Planned Projects and any other ledge treatment/work along the Interstates for which AOT has conducted preliminary planning involves median ledge and/or side ledge removal and/or alteration;

b.) an analysis of the potential impacts of each and every one of the Preliminarily Planned Projects and any other ledge treatment/work along the Interstates for which AOT has conducted preliminary planning under each and every one of the Act 250 Criteria; and

c.) an analysis of the alternatives (guardrails, signs, etc.) to each and every one of the Preliminarily Planned Projects and any other ledge treatment/work along the Interstates for which AOT has conducted preliminary planning.

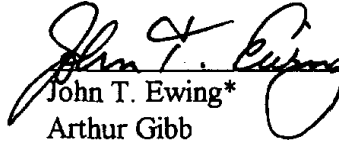
4. The Board, upon review of the AOT submittal described above, and any evidence and argument relating thereto, shall promptly determine whether or not an Act 250 Permit is required for the Preliminarily Planned Projects.

5. If, prior to the Board's review of the AOT submittal and decision as described above, AOT is compelled to perform ledge treatment/work on any of the Preliminarily Planned Projects due to unforeseen emergency circumstances which threaten the public health, safety and welfare, AOT shall promptly provide the Board with a letter **from** a registered professional geologist confirming that the ledge treatment/work performed was the minimum amount necessary to protect the public health, *safety* and welfare.

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Dated at Montpelier, Vermont this 28th day of March, 1997.

ENVIRONMENTAL BOARD

  
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John T. Ewing\*

Arthur Gibb

Marcy Harding

Samuel Lloyd

Robert G. Page, M.D.

Steve E. Wright

\* On February 1, 1995, John Ewing became Chair of the Board. At Mr. Ewing's request, Arthur Gibb continued as Acting Chair on this case until September 1, 1997.

**J:\DATA\DECISION\EB\APPEALS\AOT3RD.D2**