

**VERMONT ENVIRONMENTAL BOARD**  
**10 V.S.A. Ch. 151**

RE: *Catamount Slate, Inc.*  
*d/b/a Reed Family Slate Products*  
*and Fred and Suellen Reed*

Declaratory Ruling #389

**Findings of Fact, Conclusions of Law, and Order**

This proceeding involves a Petition for a Declaratory Ruling (Petition) from a Jurisdictional Opinion concerning a slate quarry operation in Fair Haven, Vermont.

**I. Procedural History**

On July 21, 2000, District #1 Environmental Commission (Commission) Coordinator William Burke (Coordinator) issued Jurisdictional Opinion #1-S-50-2 (Second Reconsideration) (JO) in which he determined that commercial extraction of slate from four slate quarry holes on a ± 122-acre tract located off Inman Pond Road in the Town of Fair Haven (Project) requires a permit pursuant to 10 V.S.A. §§ 6001-6092 (Act 250).

On August 9, 2000, Fred and Suellen Reed and Catamount Slate, Inc., (collectively, Catamount Slate) filed a Petition for Declaratory Ruling with the Environmental Board (Board), appealing the JO.

On August 29, 2000, the General Counsel for the Board issued a Notice of Prehearing Conference and Petition for Declaratory Ruling, informing those individuals who had received notice of the JO that the Petition had been filed and setting a date and time for the Prehearing Conference in this matter for September 14, 2000 at 2:00 p.m.

On September 7, 2000, James Leary, Esq., the attorney for Catamount Slate at that time, informed the Board by letter that Catamount Slate and neighboring landowners, following mediation, “appear to have reached a resolution of the issues” underlying the Petition. Leary’s letter noted that settlement documents were being drafted and stated further that he anticipated “that Catamount Slate will withdraw its appeal after the necessary documents have been executed by the appropriate persons.” Leary therefore requested that the scheduled September 14 Prehearing Conference be continued “pending the withdrawal of the appeal.”

On September 7, 2000, in response to Leary's letter, Board Chair Marcy Harding issued an Order, continuing the Prehearing Conference to October 13, 2000. The Chair's Order required that any further request for a continuance be filed no later than October 5, 2000.

On October 3, 2000, Leary filed a second request for a continuance, noting again that the parties were continuing their attempts at a non-adversarial resolution of this matter. Leary stated that, as a part of the settlement, Catamount Slate would seek an Act 250 permit for the quarry (and associated mill facility), and once a final permit had been obtained that incorporated the relevant terms of the global settlement, Catamount Slate would withdraw the instant appeal. Leary therefore requested that the Prehearing Conference in this matter be continued pending the issuance of a final Act 250 Permit by the Commission.

On October 4, 2000, in response to Leary's request, the Chair issued an Order continuing this proceeding until the Commission issued a decision concerning the Land Use Permit application which Catamount Slate stated it intended to file. The Chair's Order required that on or before January 9, 2001, Catamount Slate file with the Board a status report concerning its application.

In late February 2001, with the filing of a motion to withdraw as counsel filed by Leary, it came to the Board's attention that attempts at an informal resolution of the issues underlying the Petition had been unsuccessful and that this Petition might therefore need to be set for further proceedings.

On May 1, 2001, the Chair held a status conference in this matter and determined that this case should be set for a Prehearing Conference.

On May 22, 2001, the Chair convened a Prehearing Conference.

On June 29, 2001, the Board issued Memoranda of Decision on three Preliminary Issues presented in this matter. Subsequent Memoranda were issued on July 27 and September 20, 2001, following reconsideration motions filed by Catamount Slate.

Hearing was held on October 3, 2001 in Fair Haven, Vermont. Catamount Slate participated through its attorney, Stephanie Lorentz, Esq. Certain neighbors to the Project also participated: Joanne and David Calvi, Lorene Sheldon, Lee Sheldon, Richard Sheldon, Joan Gagnon, Kathleen Donna, Margaret Riter and Lindsey and Priscilla Waterhouse.

On October 17, 2001, Catamount Slate filed two post-hearing motions. The motions ask (a) for the opportunity to provide rebuttal testimony to the testimony provided at the hearing by Coordinator William Burke, and (b) that the testimony of Joseph Badgewick be struck.

The Board deliberated on this matter on October 17, November 14 and December 19, 2001. This matter is now ready for final decision.

## **II. The Issue**

The issue to be decided is "Whether the Project requires an Act 250 Land Use Permit."

## **III. Findings of Fact**

To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied. See, *Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corporation*, 167 Vt. 228, 241-42 (1997); *Petition of Village of Hardwick Electric Department*, 143 Vt. 437, 445 (1983).<sup>1</sup>

### **A. The quarry tract**

1. Frederick Reed and Suellen Reed own a +/-122 acre parcel of land located on the northeasterly side of "Old Marsh Pond" in Fair Haven, Vermont.

2. Catamount Slate presently operates a slate quarry on the Reeds' Fair Haven land.

3. At one time, there were at least four small slate quarry pits on the Reed land; each of these four quarry pits was a separate and distinct pit, some distance from and unrelated to the others. There is present evidence of two of these quarry pits on the Reed land; the current quarrying operation has destroyed and subsumed the other two quarry pits.

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<sup>1</sup> The Board makes its Findings of Fact based solely on evidence provided by Catamount Slate and observed at the site visit. Because the Board has not relied upon the testimony of William Burke or Joseph Badgewick, Catamount Slate's post-hearing motions are moot.

4. Other pits, their ages unknown, exist on the Reed land; they do not appear to be natural holes. Waste slate or shale appears in or near some of these pits.

**B. The four quarry pits**

**1. *the north pit***

5. The northern-most quarry pit at issue in this case (the north pit) is located on the Reed land, several hundred yards to the northwest of the present quarry operation, near the east shore of Inman Pond.

6. The north pit is approximately 25 feet long, three to six feet wide, and four to six feet deep; slate pieces lie in the bottom of the pit.

7. Some of the walls of the north pit are flat; there are drill holes on the walls.

8. Brush grows on the sides of the north pit; no trees are growing in the pit, but there is a rotted out stump on the edge of the pit.

9. The area immediately around the north pit is a mixed deciduous forest which has been logged within the last 30 years.

10. Waste slate mounds appear around the north pit; some slate pieces are large; there is no uniformity of size and the pieces are odd shapes. One waste slate mound to the west of the north pit, an oval shape about 20 feet long, eight feet wide and three feet high, appears to have existed for some time.

**2. *the south pit***

11. The southern-most quarry pit at issue in this matter (the south pit) is located to the east of the marsh and to the southwest of the present quarry operation; it is the southern-most of the three historical pits in its immediate area.

12. The south pit is larger than the north pit; it is shaped like a "Y" and is about 35 – 40 feet long and 5 - 15 feet wide; there is water in this pit, so its exact depth is unknown, but the walls above the water surface are at most five to six feet high. There is waste slate to the south side of this pit. Three blue/white wires extend into this hole.

**3.     *the other two quarry pits***

13.     Two other quarry pits once existed on the Reed land; they were located northeast of and in the immediate area of the south pit.

14.     These two other quarry pits (the subsumed pits) are no longer evident, having been destroyed and subsumed by the present quarrying operation.

15.     There is no evidence of any relationship (physical or otherwise) between the south pit and the two subsumed pits.

**C.     **Extraction of slate at the four quarry pits****

**1.     *the south pit***

16.     Andrew Brown worked for Henry Reed, Fred Reed's father, in the summer of 1954.

17.     Henry Reed paid Brown an hourly wage for this work.

18.     Brown quarried slate from the south pit, the pit closest to the marsh (Inman Pond). At the time he worked the south pit, it appeared to have been worked at some prior time by others.

19.     The work performed by Andy Brown was performed utilizing crowbars, shovels, horses and a pulley system. Brown and Henry Reed also blasted the south pit with black powder.

20.     The commercial slate extracted from the south pit in which Brown and Henry Reed worked was dimensional stone known as flagging.

21.     About five or six, one-quarter wagon loads of slate were removed from the site by Brown and Henry Reed utilizing a wagon pulled by a horse over the dike across Inman Pond.

22.     At least some of the slate Brown and Henry Reed quarried from the south pit was marketed commercially.

23.     Catamount Slate's present quarrying operations do not include the south pit and are not connected to, related to, or an offshoot of, the south pit.

## **2. *the north pit and the subsumed pits***

24. In 1954, Brown saw the subsumed pits; he is also aware of the north pit but has never seen it. He did not work these other three pits, however, and he is only aware of work prior to 1970 at the south pit where he worked.

25. There is no evidence of the commercial sale of slate from the north pit or the subsumed pits prior to 1970.

## **IV. Conclusions of Law**

### **A. The slate quarry exemption law**

In 1995, in order to provide certain exemptions to the slate quarrying industry, the Vermont legislature amended 10 V.S.A. §§6001 and 6081.

A new definition of "slate quarry" was added as §6001(25):

(25) "Slate quarry" means a quarry pit or hole from which slate has been extracted or removed for the purpose of commercial production of building material, roofing, tile or other dimensional stone products. "Dimensional stone" refers to slate that is processed into regularly shaped blocks, according to specifications. The words "slate quarry" shall not include pits or holes from which slate is extracted primarily for purposes of crushed stone products, unless, as of June 1, 1970, slate had been extracted from those pits or holes primarily for those purposes.

New language concerning Act 250 jurisdiction over slate quarries was also added as 10 V.S.A. §6081( j), (k) and (l):

(j) With respect to the extraction of slate from a slate quarry that is included in final slate quarry registration documents, if it were removed from a site prior to June 1, 1970, the site from which slate was actually removed, if lying unused at any time after those operations commenced, shall be deemed to be held in reserve, and shall not be deemed to be abandoned.

(k) (1) With respect to the commercial extraction of slate from a slate quarry, activities that are not ancillary to slate mining operations may constitute substantial changes, and be subject to permitting requirements under this chapter. "Ancillary activities" include the following activities that pertain to slate and that take place within a registered parcel that contains a slate quarry: drilling, crushing, grinding, sizing, washing, drying, sawing and cutting stone, blasting, trimming, punching, splitting and gauging, and use of buildings and use and construction of equipment exclusively to carry out the above activities. Buildings that existed on April 1, 1995, or any replacements to those buildings, shall be considered ancillary.

(2) Activities that are ancillary activities that involve crushing, may constitute substantial changes if they may result in significant impact with respect to any of the criteria specified in subdivisions 6086(a)(1) through (10) of this title.

(l) (1) By no later than January 1, 1997, any owner of land or mineral rights or any owner of slate quarry leasehold rights on a parcel of land on which a slate quarry was located as of June 1, 1970, may register the existence of the slate quarry with the district commission and with the clerk of the municipality in which the slate quarry is located, while also providing each with a map which indicates the boundaries of the parcel which contains the slate quarry.

(2) Slate quarry registration shall state the name and address of the owner of the land, mineral rights or leasehold rights; whether that person holds mineral rights, or leasehold rights or is the owner in fee simple; the physical location of the same; the physical location and size of ancillary buildings; and the book and page of the recorded deed or other instrument by which the owner holds title to the land or rights.

(3) Slate quarry registration documents shall be submitted to the district commission together with a request, under the provisions of subsection 6007(c) of this title, for a final determination regarding the applicability of this chapter.

(4) The final determination regarding a slate quarry registration under subsection 6007(c) of this title shall be recorded in the municipal land records at the expense of the registrant along with an accurate site plan of the parcel depicting the site specific information contained in the registration documents.

(5) With respect to a slate quarry located on a particular registered parcel of land, ancillary activities on the parcel related to the extraction and processing of slate into products that are primarily other than crushed stone products shall not be deemed to be substantial changes, as long as the activities do not involve the creation of one or more new slate quarry holes that are not related to an existing slate quarry hole.

10 V.S.A. §6081( j), (k) and (l).

Distilled to its basics for purposes of this matter, this legislation means that:

1. Any registered slate quarry that was in existence before July 1, 1970 will never be deemed to have been abandoned.
2. Any registered slate quarry in existence before July 1, 1970 is exempt from Act 250 jurisdiction. *See Northeast Developers, Inc., Declaratory Ruling #342, Findings of Fact, Conclusions of Law, and Order (Oct. 28, 1997).*
3. Even a substantial change to any registered slate quarry in existence before July 1, 1970 will not require an Act 250 permit.<sup>2</sup>

Other language which addresses "ancillary activities" to slate extraction and processing is not pertinent to the issue before the Board in this case.

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<sup>2</sup> While the statute actually states that activities that are *not* "ancillary" to slate mining operations may be "substantial changes," the inference is that activities that *are* ancillary to such operations – including the mining itself – are *not* "substantial changes" and therefore do not trigger jurisdiction.



## B. Burden of proof

As the party seeking the benefit of the slate quarry exemption, Catamount Slate bears both the burdens of production and persuasion that it applies to its circumstances. *United States v. First City National Bank of Houston*, 386 U.S. 361, 366 (1967); *Vermont Verde Antique International, Inc.*, Declaratory Ruling Request #387, Dismissal Order at 4 (Feb. 2, 2001). The burden of production is the burden of going forward with evidence. See, *Director, Office of Workers' Compensation Programs, Department of Labor v. Greenwich Collieries*, 512 U.S. 267, 272-274 (1994) (discussing burden of production and burden of persuasion); *Re: Thomas Howrigan Gravel Extraction*, Declaratory Ruling #358, Findings, Conclusions and Order at 9 (Aug. 30, 1999), *citing Champlain Construction Co.*, Declaratory Ruling #214, Memorandum of Decision at 2-4 (Oct. 2, 1990)).

## C. Elements to the exemption

To obtain the statutory exemption for a pit, Catamount Slate must prove:

1. that a slate quarry (or quarries) exists on its land. The elements of the definition of a slate quarry, as set out in 10 V.S.A. §6001(25), are:
  - a. that it is a *quarry pit or hole*
  - b. from which *slate has been extracted or removed*
  - c. for the purpose of *commercial production of*
    - i. *building material, roofing, tile or other dimensional stone products* (slate that is processed into regularly shaped blocks, according to specifications); or
    - ii. crushed stone products, if, as of June 1, 1970, slate had been extracted from those pits or holes primarily for those purposes. (This part does not apply to the present case, as Catamount Slate has never argued that its pits produced crushed product.)
2. that the slate quarry existed *as of June 1, 1970*; 10 V.S.A. §6081(l)(1); and,

3. that the owner of the slate quarry *registered* such quarry with the district commission no later than January 1, 1997. 10 V.S.A. §6081(l)(1).

Since the definition of slate quarry is tied to the particular quarry pit or hole, the Board must look at each individual hole to determine whether or not it meets the requirements of the law. *See, Northeast Developers, supra*, at 5. It may well be that one or more of the four holes on the 122-acre tract owned by Catamount Slate qualifies for the exemption. But the Board's consideration cannot be of the entire tract; a finding that there is an exempt pit on the tract does not mean that the entire tract is therefore exempt. Rather, the exemption that the statute affords can be granted only to the particular pit that meets all of the elements of the law.

#### **D. Discussion**

Catamount Slate has proved that, prior to 1970, slate was extracted from four separate pits on the Reed land. Catamount Slate has also proved that the extraction of the slate from one of these pits – the south pit worked by Andrew Brown in 1954, was for the purpose of the commercial production of dimensional stone products.

As to the three other pits at issue in this matter, although Brown observed the subsumed pits in 1954, and other evidence indicates that the north existed prior to 1970, Catamount Slate has not provided any evidence that the extraction of slate from the subsumed pits or the north pit was for commercial purposes. Slate extracted from those pits could have been used for private, non-commercial purposes, especially given the small size of those pits.

Further, Brown's testimony and other evidence offered by Catamount Slate and admitted into the record indicate that the north pit and the two subsumed pits are and were separate and distinct from the south pit. They are located some distance away from the south pit; the north pit is several hundred yards distant, and there is no evidence of any relationship between the south pit and these other pits.

The Board is constrained by the language of the statute to treat each pit individually; "slate quarry" is defined in 10 V.S.A. §6001(25) as "a quarry pit or hole," not the area or general location where a quarry pits or hole exists. Thus, the Board cannot find that, because of their proximity to the south pit, the subsumed pits (and therefore the present Catamount Slate quarrying operation) should be afforded the same exemption as the south pit enjoys. That the north pit and the subsumed pits may have been in the same general area as the exempt south pit is not relevant; that the north pit and the subsumed pits were at all times pits that were separate and distinct from the south pit is.

The Board therefore concludes that the south pit qualifies for the slate quarry exemption provided by 10 V.S.A. §6081(j), (k) and (l). All of the remaining pits at issue in this Declaratory Ruling – the north pit and the subsumed pits - do not qualify for the said exemption.

## **V. Order**

1. The south pit (the southernmost of the four pre-1970 quarry pits on the Reed land and the one worked by Andrew Brown and Henry Reed in 1954) qualifies for the slate quarry exemption provided by 10 V.S.A. §6081(j), (k) and (l).

2. All of the remaining pits at issue in this Declaratory Ruling – the north pit and the subsumed pits - do not qualify for the exemption provided by 10 V.S.A. §6081(j), (k) and (l).

3. Because the present slate quarrying operation being conducted by Catamount Slate on the Reed land is occurring in the vicinity of the location of the two non-exempt subsumed pits, an Act 250 Land Use Permit was and is required for the said present quarrying operation.

4. Catamount Slate's post-hearing motions are moot.

Dated at Montpelier, Vermont this 20th day of December 2001.

ENVIRONMENTAL BOARD

*/s/Marcy Harding* \_\_\_\_\_  
Marcy Harding, Chair  
John Drake  
George Holland  
Samuel Lloyd  
Rebecca M. Nawrath \*  
Alice Olenick  
Greg Rainville  
Jean Richardson  
Don Sargent

\* Board Member Nawrath was not present at the December 19, 2001 deliberations in this matter, but she has reviewed and concurs with the decision.