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

RE: *Catamount Slate, Inc.* Declaratory Ruling #389
d/b/a Reed Family Slate Products
and Fred and Suellen Reed

Memorandum of Decision

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 December 20, 2001, the Vermont Environmental Board (Board) issued Findings of Fact, Conclusions of Law, and Order (Decision) in this matter.[1] The Decision held that, of the four slate quarry pits at issue, only one - the south pit - qualified for the exemption provided by 10 V.S.A. §6081(j) – (*l*).

On January 18, 2002, Fred and Suellen Reed and Catamount Slate, Inc., (collectively, Catamount Slate) filed a Motion to Alter the Decision.

No responsive papers were filed by any other party.

The Board deliberated on Catamount Slate's motion on February 20, 2002.

II. Discussion

A. Findings of Fact

Catamount Slate requests the Board to amend certain of its Findings of Fact in the Decision.

1. Finding of Fact 2 states, "Catamount Slate presently operates a slate quarry on the Reeds' Fair Haven land." Catamount Slate asks the Board to amend this finding to reflect that Catamount Slate, Inc. operates the quarry. The Board grants this request and will amend Finding 2 accordingly.

2. Finding of Fact 3 states:

> 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

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[1] A complete Procedural History through December 20, 2001 appears in this decision.

> 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.

Catamount Slate asserts that the quarry pits are related to each other because they are all on the same tract of land, they are all on the same slate vein or slate deposit, and there are historical trails linking the pits to each other.

The question is not whether some relationship can be found between the pits; indeed, the pits could all be said to be related to one another because they are all in the Town of Fair Haven or all in the County of Rutland. The question is whether there is any *legally significant* relationship - for purposes of the exemption in §6081 - between the pits.

In its Decision, the Board concluded that, while the southern-most quarry pit at issue in this matter (the south pit) meets the required elements to qualify for the statutory exemption of §6081, the other three historical pits – the northern-most quarry pit at issue in this case (the north pit) and the two pits that have been subsumed by the present quarrying operations - do not. Had it been shown that any of the three other pits were physical extensions or expansions of the south pit, then those pits would be also exempt under prior Board precedent. *See, John Gross Sand and Gravel*, Declaratory Ruling 280 (Supplementary), Findings of Fact, Conclusions of Law, and Order at 6 (July 28, 1994), (because "it is in the nature of all gravel extraction operations to expand into new areas over time as they follow a vein of gravel. … [A] ruling of substantial change cannot be based simply on an expansion of the extraction area because this would mean that all pre-existing gravel pits would lose their exemption by remaining open for business"), *citing Weston Island Ventures,* Declaratory Ruling 169, Findings of Fact, Conclusions of Law, and Order at 6 (June 3, 1985). Here, however, though the four historical quarry pits may enjoy common factors such as a shared slate deposit or vein, "there is simply no evidence that supports a conclusion that they are the same *pit." Thomas Howrigan Gravel Extraction,* Declaratory Ruling 358, Findings of Fact, Conclusions of Law, and Order at 14 (Aug. 30, 1999) (emphasis in original). [2] Thus, because each pit is "separate and distinct," each pit's eligibility for the exemption afforded by §6081 "must be analyzed separately," *id.* at 16.

3. Finding of Fact 5 states that the north pit is located "near the east shore of Inman Pond." Catamount Slate notes that the north pit is actually near the east

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[2] Nor does the Board find that the four pits were, as Catamount Slate asserts, worked in conjunction with one another as one operation prior to 1970.

shore of Marsh Pond. The Board will amend Finding 5 to reflect the pit's correct location.

4. Catamount Slate requests that Findings of Fact 7, 9 and 10 be modified to include the following findings: (a) the area around the north pit shows evidence of having been logged more than 30 years ago, (b) the north pit shows signs of having been blasted, and (c) waste slate around the north pit has man-made, trimmed, straight edges, indicating that it had been worked before being discarded. Evidence to support the first requested modification appears in Exhibit CS9, although it is contradicted by direct observations made by the Board during its site visit.[3] Catamount Slate does not refer the Board to evidence to support the second request.[4] As to the third request, while Exhibit CS1 reports "trimmed, straight edges" on some waste slate, the Board's site visit observations note only that, while some of the waste slate pieces are "large," there is "no uniformity of size and most of the pieces are fairly irregularly shaped."

Even if Findings 7, 9 and 10 were to be amended as requested by Catamount Slate, these amendments would not change the Board's conclusions as to the north pit. This pit was found not to be exempt because there was insufficient evidence to support a finding the slate from this pit had been commercially quarried. Decision at 10. Modifying the Findings as Catamount Slate requests does not change this conclusion, and the Board therefore declines to amend Findings 7, 9 and 10.

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[3] At the site visit to the north pit, the Chair placed the following observation from Board Member Richardson on the record:

> From an ecological point of view, the area that we're in is all a very recently cut-over property. On the way up we observed large tree stumps from some period ago, at least 40 to 50 years ago. The area immediately around the hole in the ground is certainly – the vegetation here is certainly less than 30 years - to grow here. Some of these trees that we see around us are only about 15 to 20 years old in a mixed deciduous forest with white pine, cherry, oak; (inaudible)… main species that are immediately around us here. So a very, very recent clearcut area.

[4] The Board declines to search the record itself for such evidence. *See In re Wildlife Wonderland*, 133 Vt. 507, 517 (1975).

5. Finding of Fact 15 states, "There is no evidence of any relationship (physical or otherwise) between the south pit and the two subsumed pits." Catamount Slate contends that this Finding is inaccurate. [5]

Catamount Slate refers to testimony which states that both the south pit and the two subsumed pits have been recently mined. Catamount Slate also argues that evidence indicates that the present quarry roads are not in the same locations as they were in the 1950s and that material from the south pit was used for the roads. Catamount Slate does not explain, and the Board fails to see, how this evidence indicates a legally significant relationship between the three pits. The fact that Catamount Slate may have taken slate from both the south pit and from the area of the two subsumed pits within the past few years does not indicate that the three pits are the same pit.

Catamount Slate also alleges that "The 'South Pit' or the 'Black hole' was the quarry hole that Fred Reed first discovered and began working before expanding and moving in a Northeasterly direction toward the other quarry holes. (see pre-filed testimony CS3 and rebuttal CS22)." While CS3 discusses Reed's discovery of the pits in the 1970s, nothing in the referenced exhibits support a finding that Reed expanded the south pit or "moved in a Northeasterly direction" from that pit. There is even less in the record to support the implication that Catamount Slate would have the Board make -- that the two subsumed pits (and therefore the present quarrying operation) are physically part of the exempt south pit.

Lastly, Catamount Slate contends that "Evidence of the expansion from the 'South Pit'' was observable at the site visit by a trench connecting the larger pit area," and that a portion of the trench is observable in Exhibit CS1(1)-iii, photograph 8.

The Board has reviewed Photograph 8 and fails to see the trench. Even if a trench were visible, this trench may have been dug at a time after Catamount Slate began to remove slate from the area of the two subsumed pits (the area of the present quarrying operation) and therefore after Act 250 jurisdiction was triggered over that operation. There is no evidence in the record that a trench was dug from the south pit to the area of the subsumed pits *before* modern quarrying operations commenced in that area, such that the trench could be deemed to be an expansion of the south pit into that area.

Further, the fact that something might have been observable at the site visit conducted by the Board does not make it a part of the record. There is no mention in

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[5] As Catamount Slate advances the same reasons it asserted relative to Finding of Fact 3, above, the Board's discussion as to Finding 3 likewise applies to Finding 15.

the record of the observations from the site visit of any trench leading from the south pit to the area of the modern quarrying operations.

Indeed, the only mention of *any* trench in the record is a statement by Stephanie Lorentz, Catamount Slate's attorney, prior to the site visit. Ms. Lorentz stated that, "since Mr. Burke's last visit" (in April 2000), a Catamount Slate witness had dug a trench to look for evidence that "the pit had been used for something else" and that the Board would see evidence of that digging.[6] This statement by Ms. Lorentz, however, is not evidence. Further, it was offered by Catamount Slate to ensure the Board that Catamount Slate had not done anything underhanded to alter the site from what Mr. Burke had observed in 2000. Thus, if anything, Ms. Lorentz's statement indicates that the trench was dug to search for evidence, not to expand the south pit, and that the trench is of very recent origin -- after the time that the modern quarrying activities commenced in the area of the subsumed pits.

6. Catamount Slate contends that Finding of Fact 23 is inaccurate. Finding 23 states "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."

Catamount Slate argues first that its present operations do include the south pit. It refers to Fred Reed's pre-filed testimony (Exhibits CS3 and CS22) and "testimony at the hearing." The Board does not find reference in Reed's pre-filed testimony to present operations at the south pit; it also declines to hunt through the record for such references in Reed's live testimony. *Wildlife Wonderland.* Further, as before, the fact that the south pit may be part of Catamount Slate's present operation does not mean that it and that operation are one and the same.

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[6] Ms. Lorentz's entire comment is as follows:

> I just wanted to let the Board know, I visited the quarry site yesterday that we're going to be visiting today. And I hadn't been there in some time, and I observed that in the – because we had specifically talked about whether or not it had changed since Mr. Burke's last visit -- wanted to bring, I just wanted to let the Board know and the neighbors know that there has been one small change in that a trench was dug by our witness to look for any other evidence of – that this pit had been used for something else, and you will see evidence of that digging there. And that's all that has taken place, nothing else has changed, nothing has been removed from the site. There is evidence that that digging has taken place.

Catamount Slate again asserts the existence of a trench linking the present quarrying operation to the south pit. Catamount Slate refers the Board to Exhibit CS10 and an aerial photograph from the original Reed registration file, 1-S-50, filed in October 1996. But there is no testimonial evidence in the record of such trench, the Board was not requested to observe such a trench or the present quarrying operation on its site visit, and the Board is unable to find that the photograph, taken from a great height, shows any such trench. Catamount Slate's claims that the present operation is merely an offshoot and expansion of the exempt south pit are simply not supported by the evidence.

7. Finding of Fact 25 states, "There is no evidence of the commercial sale of slate from the north pit or the subsumed pits prior to 1970." Catamount Slate asks this Finding be modified to reflect extraction for commercial purposes a series of reasons.

a. that waste slate from the north pit had "trimmed, straight edges," and it would not have been so worked had it not been extracted for commercial purposes

The Board has declined to find that the north pit waste slate was so worked. Further, even if trimmed slate exists, this does not lead inexorably to the conclusion that Catamount Slate seeks.

b. that slate is so difficult to extract by hand that it is not done unless it is for commercial purposes

There is insufficient evidence to indicate that the slate from the north and subsumed pits was extracted by hand.

c. that no one in the slate industry would have quarried slate for his own use because slate quarries allow their employees to take slate for their personal use

There is no evidence to indicate who quarried the slate from the north pit and the subsumed pits or whether they were employees of other slate quarries.

d. that the initial act of commercial slate production would be to dig a quarry pit to determine the color and quality of the slate in the area

This appears to be new evidence which is not accepted unless allowed by the Board. Environmental Board Rule 31(A)(1). Further, even if the Board were to find

this fact, is it not also true that the initial act of mining slate for personal use would be to dig a quarry pit to determine the color and quality of the slate?

The key evidence that distinguishes the south pit from the other three historical pits is Andrew Brown's testimony that he worked the south pit in the 1950s and that Henry Reed paid him for his work. This direct testimony provides the Board with sufficient evidence to find that the south pit had been commercially mined prior to 1970. It is lacking, however, as to the other pits.

8. Catamount Slate contends that the Board's Findings of Fact are incomplete and asks the Board to include a series of additional facts. The Board declines to do so, as the requested findings would not alter the Board's conclusions as to the eligibility of the north and subsumed pits for the exemption provided by §6081.

B. Conclusions of Law

1. Northeast Developers, Inc.

a. citation to page 5 of the Northeast Developers *opinion*

Catamount Slate first contends that the Board's citation to the case of *Northeast Developers, Inc.*, Declaratory Ruling #342, Findings of Fact, Conclusions of Law, and Order at 5 (Oct. 28, 1997), for the proposition that "the Board must look at each individual hole to determine whether or not it meets the requirements of the law" is incorrect. The Board disagrees.

First, it is quite clear that the quoted sentence from the Board's Decision depends on the language of the definition of "slate quarry" in the statute, 10 V.S.A. § 6001(25). The full quotation from the Decision reads, "*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." (Emphasis added). The reference to *Northeast Developers* is not essential to the Board's conclusion; indeed, it is only a "*see*" citation, not a direct citation.

Second, the Decision refers to page 5 of the *Northeast Developers* opinion. On that page, the Board wrote: "Northeast identified *each* of the five Quarry Holes on a survey of the Project Tract and *each* was demonstrated to be in existence prior to June 1, 1970." (Emphasis added) Clearly, *Northeast Developers* does stand for the proposition cited by the Board – that it must look to *each individual hole* on a site to determine its eligibility for the exemption under the statute.

b. the failure in the Northeast Developers *opinion to require the "commercial production" element as part of the statutory definition of "slate quarry"*

Catamount Slate makes a better argument when it notes that the *Northeast Developers* opinion, which concluded that the five Quarry Holes were exempt under §6081, failed to require a showing that slate from those holes had been extracted for commercial purposes. It is apparent, however, that the commercial aspects of the Quarry Holes were not the issue before the Board in that case: "The only issues before the Board in this matter are whether the existing surveys and maps of the Project Tract accurately depict the locations of the five Quarry Holes." *Northeast Developers* at 3.

While it is disconcerting to the Board that in *Northeast Developers* it overlooked the "commercial production" element of the definition of "slate quarry" in 10 V.S.A. §6001(25), the fact that the Board may have erred in the past does not mean that it should intentionally repeat that error here. As Chief Justice Amestoy recently wrote in *State v. Fitzpatrick,* ___ Vt. ___, 772 A.2d 1093, 1100 (2001), "Thus, while I respect the doctrine of *stare decisis*, as Justice Jackson once observed, "I see no reason why [the Court] should be consciously wrong today because [it] was unconsciously wrong yesterday." *Massachusetts v. United States,* 333 U.S. 611, 639-40 (1948) (Jackson, J., dissenting)." (Amestoy, C.J., dissenting).

c. activities on registered parcels

Lastly, Catamount Slate reads *Northeast Developers* for the proposition that the Board will exempt entire parcels of land from Act 250 jurisdiction if an exempt quarry exists on such parcel. However, while it is in the nature of a quarry to expand as it follows its resource vein and the Board has held that such excavations do not, alone, constitute "substantial changes" which trigger jurisdiction, this does not mean that all activities on the parcel on which such quarry sits are also exempt.

The statutory exemption language speaks both in terms of the registration of "slate quarries," 10 V.S.A. §6081(l)(2), and "parcels." §6081(l)(5). But it is important to note the significance of such registrations.

When a slate quarry is registered and deemed exempt, then those "ancillary activities" which are related to that quarry which occur on a registered parcel, are also exempt. The term "ancillary activities" is specifically defined in the statute, §6081(k)(1);[7]

[7] With respect to a registered parcel, the statute specifically states that such activities do *not* include "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(l)(5).

if an activity is not among those listed as "ancillary," then it is not exempt from Act 250 jurisdiction, even if it occurs on a registered parcel. Thus, the mere fact that there is an exempt slate quarry on a registered parcel does not mean that everything that occurs on that parcel is exempt as well.

The effect of Catamount Slate's position is that, if there were to be one exempt slate quarry on a parcel of land, then *every other slate quarry on that parcel* – regardless of its size, location or age - would also be exempt, whether or not it met the elements of the exemption. But the statute is not so broadly encompassing.

2. Commercial production

Catamount Slate next argues that "In order to be exempt under the statute, it is not necessary to provide evidence that the extraction of slate from the subsumed pits or the north pit was for 'commercial purposes.' The failure to show specific sales from a particular pit does not indicate that the pit was not held in reserve for future commercial slate production." Citing 10 V.S.A. §6081(j), Catamount Slate notes that the statute "recognizes that a pit or hole may have existed to be held in reserve."

> (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.

Catamount Slate's argument runs afoul of the language of the statute. The simple fact that a slate pit existed before 1970 does not mean, as Catamount Slate would contend, that it is deemed to be held in reserve and not abandoned. Subsection (j) does not afford the preferred reservation and non-abandonment status to all pits from which slate has been excavated; rather, only a pit that is a "slate quarry" can be held in reserve. As the Board noted in its Decision, the statutory definition of "slate quarry" requires that the "slate has been extracted or removed for the purpose of commercial production of building material, roofing, tile or other dimensional stone products." Decision at 6. Catamount Slate's argument cannot succeed.

Lastly, Catamount Slate advances an argument which, for all intents and purposes, contends that the extraction of slate from any pit is *always* for a commercial purpose. Catamount Slate states first that, "The initial act of any slate quarry operation for 'commercial purposes' must be to dig a pit. … [S]ometimes marketable stone is not removed from the pit due to its quality or the pit is dug for exploration, but the pits were

still quarried for 'commercial production.' " Certainly, the Board cannot argue with these truisms. But it is important to recognize that Catamount Slate's contention assumes the proposition that a pit is being dug for a commercial purpose. And if one begins with that assumption, it is not difficult to end up at that point as well.

Catamount Slate's final argument repeats its earlier position that "the work of quarrying is too difficult not to have been performed for 'commercial production.' " But if Catamount Slate's proposition is accepted, then *every slate pit* is a commercial pit, and there is therefore no need for the "commercial produciton" element in the statutory definition of "slate quarry." 10 V.S.A. §6001(25). The Board cannot read its statute in a manner that results in the inclusion of useless surplusage. *See State v. Stevens*, 137 Vt. 473, 481 (1979) (in construing statute, every part must be considered, and every word, clause, and sentence given effect if possible); *State v. Racine*, 133 Vt. 111, 114 (1974) (presumption that all language is inserted in a statute advisedly).

III. Order

1. Catamount Slate's Motion to Alter is granted in part and denied in part, as explained above.

2. Revised pages 3 and 4 to the December 20, 2001 Findings of Fact, Conclusions of Law, and Order are issued.

Dated at Montpelier, Vermont this 25th day of February 2002.

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 Members Nawrath and Olenick were not present for the February 20, 2002 deliberations in this matter, but they have reviewed and concur with this decision.

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).[1]

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, Inc. 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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[1] 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 Marsh 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.

keep with mod of Feb. 25, 2002