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
Petition #389

Memorandum of Decision

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

I. Procedural History

On June 29, 2000, the Environmental Board ("Board") issued a Memorandum of Decision on three Preliminary Issues presented in this matter.

On July 13, 2001, Fred and Suellen Reed and Catamount Slate, Inc., d/b/a Reed Family Slate Products (collectively, “Catamount Slate”) filed a Motion to Reconsider the June 29 Memorandum of Decision, seeking a new decision on one of the Preliminary Issues, to wit, whether the Coordinator for the District 1 Environmental Commission ("Commission") had authority to issue Jurisdictional Opinion 1-S-50-2 (Second Reconsideration), pursuant to 10 V.S.A. §6007(c) and EBR 3(C).

On July 27, 2001, the Board issued a Memorandum of Decision on the Motion to Reconsider. These Memoranda of Decision contain the relevant Procedural History up to July 27.

On August 28, 2001, Joanne Calvi, on behalf of herself and other parties to this appeal (David and Joanne Calvi, Lorene Sheldon, Lee Sheldon, Richard Sheldon, Joan Gagnon, Kathleen Donna, Margaret Riter, and Lindsey and Priscilla Waterhouse (collectively, the "Neighbors")), filed a request to extend the filing date of one of the Neighbors' exhibits, N20, to September 7, 2001.

On August 29, 2001, Catamount Slate filed a further "Motion for Reconsideration on Preliminary Issues And/Or Ruling on New Issues."

On September 12, 2001, within their Supplemental Pre-filed Testimony, the Neighbors requested the Board to issue three subpoenas. *See* Exhibits N31, N33 and N34.

The Board deliberated on all pending motions and requests on September 19, 2001.

II. Discussion

A. Catamount Slate's Motion for Reconsideration

In her May 23, 2001 Prehearing Order Board Chair Marcy Harding identified three Preliminary Issues:

> 1. Whether the Coordinator for the District 1 Environmental Commission had authority to issue Jurisdictional Opinion 1-S-50-2 (Second Reconsideration), pursuant to 10 V.S.A. §6007(a) and EBR 3(C).
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> 2. Whether Joanne and David Calvi, Lorene Sheldon, Lee Sheldon, Richard Sheldon, Joan Gagnon, Kathleen Donna, Margaret Riter, Lindsey Waterhouse and/or Priscilla Waterhouse are entitled to party status in this Declaratory Ruling.
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> 3. Whether the definition of the "Project" in this Declaratory Ruling should include the construction of a commercial slate building on the said ± 122 -acre tract where the quarry is located.

On June 29, 2001, following written argument from the parties, the Board issued a Memorandum of Decision on the Preliminary Issues. On July 13, 2001, Catamount Slate sought reconsideration of the first and second Preliminary Issues. On July 27, 2001, the Board issued a Memorandum of Decision on Catamount Slate's reconsideration request.

Catamount Slate's August 29, 2001 Motion for Reconsideration asks the Board to again address the first Preliminary Issue.

Environmental Board Rule ("EBR") 31(A) states:

> (A) Motions to alter decisions. A party may file within 30 days form the date of the decision of the board or district commission one and only one motion to alter with respect to the decision. However, no party may file a motion to alter a decision concerning or resulting from a motion to alter.

Pursuant to EBR 31(A), Catamount Slate present motion is barred, both because it is untimely, as it was filed beyond the 30-day time limit imposed by the rule, and because it constitutes a second request to reconsider an issue which has been decided. For these reasons, it is denied.

1. Legislative history

Even if Catamount Slate's motion were to be permitted under EBR 31(A), the Board finds it to be without merit.

Catamount Slate makes a number of arguments in support of its belief that the initial Jurisdictional Opinion which addressed its quarry registration, JO #1-S-50, became final as to the world once 30 days had passed from its issuance date.

Catamount Slate argues first that the legislative history of the slate quarry registration provision, 10 V.S.A. §6081(*l*), requires that all Jurisdictional Opinions that address quarry registrations become final as to the world 30 days after they are issued, *whether or not anyone has been notified of their issuance.*

As noted in the Board's earlier Memoranda of Decision, 10 V.S.A. §6081(*l*) states:

> (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.

The language of §6081(*l)*(3) is neither confusing nor ambiguous. If a party wants a final determination as to whether a slate quarry exemption applies, he is to follow the process established by 10 V.S.A. §6007(c). Because this language is clear and straightforward, resort to legislative history is neither necessary nor appropriate. "When the meaning of a statute is plain on its face, we have no need for construction, but rather must enforce it according to its terms." *Russell v. Armitage*, 166 Vt. 392, 403 (1997); *In re Margaret Susan P.*, 169 Vt. 252, 263 (1999) (only where statutory language is "unclear and ambiguous" may legislative history be used to determine legislative intent); *Hitchcock Clinic, Inc. v. Mackie*, 160 Vt. 610, 611 (1993): "This Court will not look beyond the statute itself in an effort to determine whether any contrary legislative intent exists when the statutory language itself is clear and unambiguous." *Citing Cavanaugh v. Abbott Laboratories*, 145 Vt. 516, 529 (1985) ("If confusion or ambiguity does not appear, then the statute is not construed, but rather is enforced in accordance with its express terms. *Heisse v. State,* 143 Vt. 87, 89 (1983)"). *And see In*

re Burlington Housing Authority, 143 Vt. 80, 83 (1983) ("This Court has consistently held that when the meaning of a statute is plain and unambiguous on its face, it must be enforced according to its express terms without resort to construction.")

Catamount Slate makes no argument in its motion that §6081(*l)*(3) is unclear and ambiguous. [1] Rather, its Memorandum discusses a portion of the legislative history of the provision, the implication being that this is always an appropriate means by which to understand a statute's express language.

While an examination of legislative history, when appropriate, can lead to clarification of ambiguous and unclear terms in a statute, legislative history in Vermont is sparse. Unlike the United States Congress, the Vermont legislature does not publish written analyses or explanations of its legislation from the House and Senate Committees which hold hearings on proposed legislation or from conference committees which could be of use in understanding its intent. At most, transcripts from committee hearings can be examined, but the Board finds that such an examination can be a somewhat dubious exercise; there is sometimes a question in the transcript as to who is speaking, transcripts do not always reflect what draft version of a bill is being considered by a particular committee on a particular day, and discrete passages, if taken out of context or edited, can be misleading. The Board must therefore carefully approach any attempt to discern the meaning of a particular law through a reading of isolated transcripts or testimony.

Even if the Board does consider the legislative testimony cited by Catamount Slate, despite EBR 31(A)(1)'s prohibition on new evidence and arguments,[2] it affords no support for Catamount Slate's positions.

a. Legislative history cited by Catamount Slate

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[1] "A mere assertion that certain language could have a different meaning does not compel the Board to conclude that the statute is not clear." *Nextel Communications of the Mid-Atlantic d/b/a/ Nextel Communications*, Declaratory Ruling #362, Findings of Fact, Conclusions of Law, and Order at 17 (Nov. 18, 1998). Catamount Slate does not even make this assertion.

[2] Motions to reconsider or alter decisions of the Board cannot be used to present new evidence, *Van Sicklen Limited Partnership,* 4C1013R-EB, Memorandum of Decision at 3 (July 26, 2001); *North Country Animal League*, #5L0487-4-EB, Memorandum of Decision (Apr. 20, 2000), or new argument. *Upper Valley Regional Landfill*, #3R0609-EB, Findings of Fact, Conclusions of Law, and Order at 7 (Nov. 12, 1991).

In furtherance of its arguments, Catamount Slate has provided transcripts of testimony before the Vermont House Natural Resources and Energy Committee from March 23 and 27, 1995 on H. 331, the bill that was the precursor to Act 30 (1995), which established the slate quarry exemption sought here by Catamount Slate. [3]

Catamount Slate presents the following certain, discrete (and edited) language in the testimony before the Committee to support a contention that Jurisdictional Opinions for slate quarries were intended to be treated differently from all other Jurisdictional Opinions:

> REP. BEYER: Findings of Fact contained in certified registration shall not be subject to later challenge, if not appealed within 30 days of issuance, and we provided last year a thought (sic) with an advisory opinions and also a mechanism to make those final…. If nobody challenges it, then there's a mechanism where after 30 days its going to be final and done and case closed.

House Natural Resources and Energy Committee March 27, 1995 (Transcript at 28).

Unfortunately, Catamount Slate's citation does not include everything that Rep. Beyer said. The full quotation (highlighting those part omitted by Catamount Slate in its Memorandum) is:

> REP. BEYER: *In my mind, this really is like an advisory opinion and the language that is suggested by the Board treats like (sic) an advisory opinion and does, say, though, it's not final. It provides 30 days*. Findings of Fact contained in certified registration shall not be subject to later challenge, if not appealed within 30 days of issuance, and we provided last year a thought (sic) with an advisory opinions and also a mechanism to make those final. *So there is a way to get to know, to get to the answer, and I think this language does do that, and I think there should be a process where someone can say, that hole wasn't there, but they've got to prove that it wasn't there. You can't just rely on the applicant submitting registration information*. If nobody challenges

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[3] In addition to the difficulties that arise when transcripts form the sole basis for legislative history, the history provided by Catamount Slate is incomplete. Catamount Slate has not informed the Board as to subsequent developments of H. 331, which can further provide an understanding as to the bill that the House and the Senate ultimately passed.

> it, then there's a mechanism where after 30 days its going to be final and done and case closed.

Reading the full quotation makes it clear that Rep. Beyer was referring to the fact that the legislature had, "last year," (i.e. in 1994) revised 10 V.S.A. §6007(c) to establish a process to ensure the finality of Jurisdictional Opinions. *See* Act 232, §25 (1993 Adj. Sess.) Clearly, this is the "mechanism to make those [Jurisdictional Opinions] final" to which Rep Beyer refers. It is also apparent that Rep. Beyer also was concerned that parties other than the slate quarry registrant be permitted to participate in the process of determining whether an exemption from Act 250 is warranted: " You can't just rely on the applicant submitting registration information."

Notably, there is nothing in Rep. Beyer's comments to suggest, as Catamount Slate argues, that slate quarry registrations were to be handled in a manner different than the ordinary §6007 process.

Catamount Slate also presents the following exchange between an unknown Committee member and John Ewing, then Chair of the Environmental Board:

> -----: I register and 30 days later nobody comes forward, it's just, nobody can come forward. Am I correct, John?
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> MR. EWING: That's correct

House Natural Resources and Energy Committee March 27, 1995 (Transcript at 30).

Catamount Slate asks the Board to find that Ewing intended that a registration, with no notice to anyone, can become final as to the world with the simple passage of 30 days. Ewing's comments however, must be understood within the context of Rep. Beyer's statement that had occurred only minutes before. Further, it is clear from a reading of the entire Transcript that Ewing had been a consistent advocate for the application of the normal §6007 process to slate quarry registrations.

b. Other transcript passages and legislative history, not presented by Catamount Slate

That the House Committee intended the standard §6007 Jurisdictional Opinion process to apply to slate quarry registrations is apparent from the vote that the Committee took soon after Rep. Beyer's comments:

REP. McCORMACK: Okay, so we are ready to vote on the registration process?

-----: Can we hear the motion again?

-----: You moved that we use the standard Act 250 district commission process for registration.

-----: Point of inquiry, is that essentially the language, your language proposed has that effect, correct?

-----: Our proposed language does. ……

REP. McCORMACK: Anymore discussion? All those in favor please raise your hands. It's unanimous.

House Natural Resources and Energy Committee March 27, 1995 (Transcript at 35).

The Board further notes that the bill that the House Committee presented to the entire House contained the following proposed language to be added as 10 V.S.A. §6081(*l)*(3):

> (3) 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. The board may order amendments to a quarry registration document , to the extent necessary to ensure its accuracy. *Information contained in a quarry registration document shall not be subject to later challenge, after a final determination is reached under subsection 6007(c) of this title.*

House Journal, March 29, 1995 at 16 (emphasis added).

The following day, Representative Corren moved to strike "all after the first sentence" in the proposed §6081(*l*)(3), which was agreed to. House Journal, March 30, 1995 at 2. Thus, what legislative history that there is indicates that the House did not intend that slate quarry registrations achieve the finality status urged by Catamount Slate. If anything, the contrary is apparent from the votes on the House floor.

When the Senate addressed the bill, the language from the Corren amendment was not changed. Thus, ultimately, a simple, direct reference to the §6007(c) process, and nothing more, appears in the slate registration statute. The "inconclusive

legislative history" relied on by the Catamount Slate is thus "insufficient to overcome the plain meaning" of the statutes at issue. State v. Madison, 163 Vt. 360, 373-74 (1995).

c. Act 250's obligation to publish notice of the slate quarry registration

Catamount Slate next argues that "if the Act 250 process was utilized instead of registration through a town clerk notice would be provided to all through publication as the following process would be followed…." Catamount Slate then cites to testimony by John Ewing, earlier in the March 27 Committee hearing, which implies that, at one point, the process for slate quarry registrations might have followed a different path from that which ultimately appears in the statute:

> MR. EWING: They file a notice of registration, okay, and then we go through a normal process of publication and simplified procedure, and then we would certify that registration and then file that with the town clerk, and the way it's written, it would be filed in the town record. So that at that point, it would become more of a public record so that people would know and can hear that it's happened, plus there would be notice to everybody.

House Natural Resources and Energy Committee March 27, 1995 (Transcript at 26).

Catamount Slate uses the above testimony by Mr. Ewing to make the claim that "Because of the failure of this District Coordinator to publish notice as required under 10 V.S.A. §6084 the Coordinator is Estopped from denying finality of JO #1-S-50."

This argument has no merit. The fact that alternative registration processes may have been discussed as the slate quarry bill made its way through the legislature is irrelevant. The bill that ultimately passed and became law is what governs. As noted, that law states that the standard §6007(c) Jurisdictional Opinion process is to be used. There is nothing in §6007(c) that imposes on a Coordinator any obligation under §6084 to publish notice of the issuance of a Jurisdictional Opinion.

References to 10 V.S.A. §6084 appear twice in §6007(c). [4] If the person who has requested the Jurisdictional Opinion *"wishes a final determination to be rendered*, the district coordinator, at the expense of the requestor and in accordance with the rules

[4] The second reference to §6084, not relevant to the present discussion, appears in §6007(c) within the list of those persons who are permitted to appeal a Jurisdictional Opinion to the Board.

of the board shall serve the opinion" on a certain group of individuals, some of whom are described by reference to §6084. 10 V.S.A. §6007(c) (emphasis added).

However, as the Board has noted *twice* before in its Memoranda of Decision issued on this particular issue:

> First, if the person who requests a Jurisdictional Opinion wants others to be bound by it, it is incumbent upon that person to make this desire known to the Coordinator, to provide the Coordinator with the names of those persons to be served with the Jurisdictional Opinion, and to pay for such service. The Coordinator has no independent obligation to provide notice to others who have not appeared or participated in the Jurisdictional Opinion process, either by service or publication, of the Opinion.
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> Second, to be bound by a Jurisdictional Opinion, a person must be *served* with it.

July 27, 2001 Memorandum of Decision at 8 - 9, quoting the Board's June 29, 2001 Memorandum of Decision at 10 - 11.

Catamount Slate has presented no evidence or argument that it ever requested that JO #1-S-50 be served on anyone. [5] Thus, any obligations that may have been placed on the Coordinator's shoulders (and such obligations do not include the obligation "to publish notice as required under 10 V.S.A. §6084") have never been triggered.

B. Catamount Slate's Request for Ruling on New Issues

Catamount Slate has also asked that the Board rule on a series of issues that it believes are raised as a result of its conclusion in its earlier Memoranda of Decision that because under §6007(c), "*any person* … may request a jurisdictional opinion from the

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[5] Catamount Slate implies (Memorandum at 5) that its simple submission of its registration documents pursuant to 10 V.S.A. §6081(*l*)(3), by itself, imposed an obligation on the Coordinator to serve JO #1-S-50 on all parties and affected persons. But that section's direct reference to 10 V.S.A. §6007(c) informs the registrant that, if he wishes finality for any Jurisdictional Opinion that may be issued, there is a specific procedure that he must follow: he must inform the Coordinator of his wish for finality, he must provide the Coordinator with the names of those he wishes to be notified, and he must pay for service on those whom he wishes to be bound by the opinion. Catamount Slate took none of these actions.

district coordinator concerning the applicability of this chapter," "[i]n some respects, under the statute, no Jurisdictional Opinion issued by a Coordinator can ever be considered to be absolutely final as regards the world." July 27, 2001 Memorandum of Decision at 9, quoting the Board's June 29, 2001 Memorandum of Decision at 10 - 11.

Catamount Slate asks the Board to rule on:

a. Whether the Environmental Board through its rule making authority had a duty to implement the intent of the legislature and provide a workable finality procedure for Jurisdictional Opinions relative to Slate Quarry registrations.

b. Whether the Environmental Board breached its duty through its rule making authority to provide a workable finality procedure for jurisdictional opinions.

c. Whether the Environmental Board Rules preclude rather than provide finality, thus compromising the substantive requirements of 10 V.S.A. §6007(c) as incorporated by 10 V.S.A. §6081(*l*)(3) concerning the finality of jurisdictional opinions of registered quarries.

d. Does the failure of the Board's regulatory scheme to enable the identification of affected persons with promptness and specificity require that service upon and appeal by "persons/entities affected by the outcome" be disregarded as an impediment to finality determinations which the Legislature contemplated for Slate quarry Jurisdictional Opinion (sic) under 10 V.S.A. §6007(c).

Catamount Slate Request at 3 - 4.

Whether the Board has the duties alleged by Catamount Slate, whether the Board breached those duties, whether the Board's rules are contrary to the intent of the legislature, whether the Board's rules or "regulatory scheme" are flawed or fraught with failure, and what should be the remedy for such flaws and failures, is not for the Board to decide. While the Board has certain powers to determine "the applicability of any statutory provision or of any rule or order of the [Board]," 3 V.S.A. §808, the validity of a rule may only be determined "in an action for a declaratory judgment in the Washington superior court…." 3 V.S.A. §807.

In its own defense, the Board will note, however, that, as it pointed out in its July 27, 2001 Memorandum of Decision at 9, the finality problem suffered by Catamount

Slate "is not an impediment to Catamount Slate's position that the Board has artificially erected; Catamount Slate's difficulties in this regard arise out of the language of §6007(c)." It is the *statute* that allows "any person" (who is not otherwise barred by the statute's finality provisions) to seek a Jurisdictional Opinion, presumably at any time; [6] Environmental Board Rule 3(C)(1) merely parrots the statutory language. Indeed, were the Board to promulgate rules which abrogated these statutory rights, to the benefit of the slate quarry industry or anyone else, the Board's rules would be subject to attack as contrary to the plain language of the section.

C. The Neighbors' request for an extension of time in which to file Exhibit N20.

The Neighbors have submitted some aerial photographs, but had trouble securing one photograph (Exhibit N20) and therefore missed the August 29, 2001 filing date. In their August 28, 2001 filing, they explain the reason for the difficulty in obtaining the photograph and ask that they be allowed until September 7, 2001 to file Exhibit N20. Catamount Slate has not opposed this request.

The Board grants the Neighbors' request and allows the late filing of Exhibit N20.

D. The Neighbors' subpoena requests

The Neighbors ask the Board to subpoena three witnesses: William Burke, the Commission Coordinator; Larry Becker, State Geologist; and Caryl Philip Adams, the Fair Haven Zoning Administrator (see Exhibits N31, N33 and N34). The Board has reviewed the parties' pre-hearing filings and finds, at present, that only Burke's presence at the hearing may provide evidence which will assist the Board in its determination of the merits of this case. In particular, since Burke took a site visit to the Catamount Slate land in April 2000, his observations as to what he saw at that time and what he may see during the Board's scheduled site visit on October 3, 2001 may assist the Board in this matter. The Board therefore grants the Neighbors' request as to Burke and denies the Neighbors' request as to Becker and Adams.

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[6] The Board further questions Catamount Slate's claim that "[T]he language of the statute does not contemplate that service upon some, but not all parties or affected persons, renders finality only upon those served." *Memorandum* at 6. Service under §6007(c) is clearly intended to put a person on notice that, if he disagrees with the Jurisdictional Opinion, he had better seek reconsideration of or appeal that opinion or forever be bound by it. Certainly, the statute cannot be read to mean that those who are *not* served – those who have no idea that a Jurisdictional Opinion exists that finds a slate quarry to be exempt from Act 250 – are also so bound. Due process concepts of notice and the opportunity to be heard must dictate otherwise.

III. Order

1. Catamount Slate's Motion for Reconsideration on Preliminary Issues is denied.

2. The Board is without authority to rule on Catamount Slate's Motion for a Ruling on New Issues.

3. The Neighbors may file Exhibit N20 by September 7, 2001.

4. The Board grants the Neighbors' request to subpoena William Burke and denies the Neighbors' request to subpoena Larry Becker and Carl Philip Adams.

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

ENVIRONMENTAL BOARD

/s/Marcy Harding____
Marcy Harding, Chair
John Drake
*George Holland
Samuel Lloyd
Alice Olenick
Greg Rainville
Jean Richardson
Don Sargent

* Board Member Holland finds Catamount Slate's Motion for Reconsideration to be barred as untimely and abstains as to the remainder of Section II(A), above.