VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001 et seq.

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

Declaratory Ruling
[redacted]

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 July 21, 2000, District #1 Environmental Commission ("Commission") Coordinator William Burke ("Coordinator") issued Jurisdictional Opinion ("JO") #1-S-50-2 (Second Reconsideration) 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., d/b/a Reed Family Slate Products (collectively, all referred to as "Catamount Slate") filed a Petition for Declaratory Ruling with the Environmental Board ("Board"), appealing JO #1-S-50-2.

Following two Continuance Orders, issued to allow the parties to attempt to settle this matter, Board Chair Marcy Harding held a May 1, 2001 status conference and convened a May 22, 2001 Prehearing Conference. At the Prehearing Conference, the Chair and parties 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(c) and EBR 3(C).

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.

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.

Following briefing by the parties, the Board deliberated on these Preliminary Issues on June 27, 2001. This matter is now ready for decision.

II. Discussion

A history of the proceedings in this matter is helpful to an understanding of the issues presented.

In 1995, in order to provide certain exemptions to the slate quarrying industry, the Vermont legislature amended 10 V.S.A. §6081, to add subsection (l). Subsection (l) reads:

> (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.

Pursuant to the 1995 amendment, on October 15, 1996, Fred and Suellen Reed filed an Application for Slate Quarry Registration with the Commission. The application identified the location of the quarry holes and noted that there were two "existing buildings" at the site, a 24' x 40' building (which was no longer standing), and a 30' x 60' building. Included in the application was a request for a JO under 10 V.S.A. § 6007(c).

Based upon the information provided by the Reeds, on April 9, 1997, the Coordinator issued JO #1-S-50 which held that "the subject quarry holes and existing buildings constitute a preexisting development, are not abandoned, and are not currently subject to a requirement for an Act 250 Land Use Permit." The Certificate of Service which accompanied this Jurisdictional Opinion indicates that it was served on Fred and Suellen Reed, Kathleen Donna and Lorene Sheldon, and others not involved in this Petition.

On August 13, 1999, the Coordinator received an August 9, 1999 letter from seven neighbors and adjoiners to the quarry requesting that he reconsider JO #1-S-50. These neighbors and adjoiners were David and Joann Calvi, Joan Gagnon, Lori Ballard, Kathleen Donna, Lee Sheldon and Lindsey Waterhouse. This request focused solely on the 30' x 60' building, contending that the building had been built as a hunting camp in the 1970s. The request expressed concern about the Coordinator's decision to exempt a planned 40' x 70' structure (to replace the so-called "existing buildings") and asked the Coordinator to "consider whether an exemption for the proposed structure remains appropriate." The August 9, 1999 letter was silent as to the conclusion in JO #1-S-50 as to the exempt status of the quarry holes themselves.

In response to the August 9, 1999 letter from the neighbors and adjoiners, the Coordinator issued JO #1-S-50-1 (Reconsideration). Based on further review of the facts then before him, the Coordinator concluded that he had improvidently grandfathered and exempted the two buildings at the 122 -acre tract where the quarry is located because he had not been aware that the buildings had been used a hunting camps, and not buildings "which are or were used for slate production in the slate industry." Because he concluded that "[h]unting camps do not qualify for registration," the Coordinator modified JO #1-S-50 to "delete reference to exempt buildings on the tract" and to state that "Construction of new buildings on the tract will require [an Act 250] permit...."

JO #1-S-50-1 does not remark upon the propriety or timeliness of the August 9, 1999 request.

The Certificate of Service which accompanied JO #1-S-50-1 indicates that, on September 29, 1999, it was served on Fred and Suellen Reed, David and Joanne Calvi, Joan Gagnon, Lori Ballard, Kathleen Donna, Lee Sheldon, Lorene Sheldon, Richard Sheldon, Lindsey Waterhouse, and attorney Emily Joselson, among others. This Jurisdictional Opinion does not indicate whom Ms. Joselson may have been representing at the time.

No person (including the Reeds) who received JO #1-S-50-1 filed an appeal or request for reconsideration within 30 days of September 29, 1999.

On February 25, 2000, the Coordinator received a request from Lori Ballard, David and Joanne Calvi, Kathleen Donna, Joan Gagnon, Margaret Riter, Richard and Christine Sheldon, Joan Sheldon, Lee Sheldon, Lorene Sheldon, and Lindsey and Priscilla Waterhouse to reconsider JO #1-S-50-1, based upon an assertion that the Catamount Slate quarry was not in operation prior to June 1, 1970 and therefore was not entitled to grandfathered status.

On July 21, 2001, the Coordinator issued JO #1-S-50-2 (Second Reconsideration). As an initial matter, the Coordinator noted that Lori Ballard, David and Joanne Calvi, Kathleen Donna, Joan Gagnon, Richard Sheldon, Joan Sheldon, Lorene Sheldon, and Lindsey Waterhouse had received actual notice of JO #1-S-50-1, and, therefore, their request for reconsideration, filed more than thirty days after the issuance of that Jurisdictional Opinion, was untimely. The Coordinator noted, however, that Margaret Riter, Christine Sheldon, Lee Sheldon, and Priscilla Waterhouse had not received actual notice of JO #1-S-50-1 and were therefore not time-barred. The Coordinator also noted that there is no time bar to an allegation of fraud.

It is the issuance of JO #1-S-50-2, in which the Coordinator found that the Catamount Slate quarry was not entitled to grandfathered status and that JO #1-S-50 was therefore void, which provides the basis for the instant Declaratory Ruling Petition.

Because each of the Jurisdictional Opinions issued by the Coordinator in this case and their Certificates of Service are essential to the Board's decision on Preliminary Issues 1 and 3, the Board takes official notice of JO #1-S-50, JO #1-S-50-1 and JO #1-S-50-2 and their accompanying Certificates of Service. The Board does *not*, however, take official notice of any other documents which are cited in the Jurisdictional Opinions or which may be in the Coordinator's file in this case, including any of the evidence which he may have relied upon in making his decisions.

A. 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(c) and EBR 3(C).

Catamount Slate presents a series of reasons to support its contention that the Coordinator was without authority to issue Jurisdictional Opinion 1-S-50-2.

1. that the Coordinator failed to identify and serve interested persons with JO #1-S-50

First, Catamount Slate notes that the application form for quarry registration only requires the applicant to distribute the application to limited parties, which Catamount Slate asserts occurred. Catamount Slate then contends, "The obligation to determine interested parties and to serve them rested with the district coordinator, not the applicant, pursuant to 10 V.S.A. §6007(c). ... The applicant had no duty to determine who should be noticed...." Catamount Slate concludes that the Coordinator's failure to serve interested parties with JO #1-S-50, therefore, cannot work to its prejudice.

This argument is contrary to the language of the statute and the Board Rules. Section 6007(c) of title 10 V.S.A. reads, "If the requestor wishes a final determination to be rendered on the question [of jurisdiction], the district coordinator, at the expense of the requestor and in accordance with the rules of the board, shall serve the opinion [on interested parties]...." The language of EBR 3(C)(1) is similar, with a clarification:

> If the person who requested the opinion *wants it to be a final determination*, the district coordinator, *at the expense of the requestor*, shall serve the opinion on all persons *identified in writing by the requestor*, or known to the coordinator, as either qualifying as parties under Rule 14(A), or who may be affected by the outcome of the opinion.

(Emphasis added).

There is no indication that Catamount Slate ever informed the Coordinator that it wished JO #1-S-50 to be served on particular persons. Nor is there any indication that Catamount Slate identified in writing any persons to be served by the Coordinator who were not served. Nor is there any indication that the Coordinator knew of any other interested persons other than those noted on the Certificate of Service which accompanied JO #1-S-50. Catamount Slate's argument, therefore, that the Coordinator should somehow have divined Catamount Slate's desire that JO #1-S-50 be universally served is without merit. If Catamount Slate had wanted JO #1-S-50 to be final and

binding on other persons it had an obligation to identify those persons and pay the expenses of service. It did neither.

2. *that certain parties had actual notice of JO #1-S-50*

It is clear that a person who is served with a Jurisdictional Opinion has only a limited time period in which to either seek reconsideration of that Opinion. EBR 3(C)(2) states, in pertinent part:

> Persons who qualify as parties under Rule 14(A) or who may be affected by the outcome of the opinion may request reconsideration from the district coordinator within 30 days of the mailing of the opinion. [1]

Catamount Slate argues that that, under 10 V.S.A. §6007(c), the Coordinator had an obligation to comply with 10 V.S.A. §6084 and to publish notice of his decision in the newspapers. Had he done so, Catamount Slate claims, all persons would have had constructive notice of JO #1-S-50.

There are two problems with this argument. First, nothing in 10 V.S.A. §6007(c) requires a Coordinator to publish a Jurisdictional Opinion or even to publish a notice that a Jurisdictional Opinion has been issued. The reference to §6084 in §6007(c) is there to describe the category of persons on whom service ought to be made - - "parties who would be entitled to notice under section 6084 of this title, if jurisdiction were determined to exist." Merely listing those on whom service should be made – if requested by the person seeking the Jurisdictional Opinion – places no affirmative legal duty on a Coordinator to publish notice that he or she has issued a Jurisdictional Opinion.

Second, Catamount Slate cites the Vermont Supreme Court's decision in *In re Great Waters of America*, 140 Vt. 105, 109 (1981), for the proposition that had notice of the Jurisdictional Opinion been published, this constructive notice would have been sufficient to bind certain persons to the finality of JO #1-S-50. The problem with this argument is inherent in the language of the statute: "If the requestor wishes a final determination to be rendered on the question [of jurisdiction], the district coordinator ... shall *serve* the opinion [on interested parties]...." (Emphasis added). Service is effectuated, under Board policy, by the mailing of a Jurisdictional Opinion to a person. *And see* 10 V.S.A. §6007(c) (appeal to the Board from a Jurisdictional Opinion must be

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[1] Similarly an appeal of a Jurisdictional Opinion, by means of a Petition for Declaratory Ruling, must be filed within "30 days of the mailing of the opinion to the person appealing." 10 V.S.A. §6007(c); EBR 3(C)(3).

taken within 30 days of "the mailing of the opinion"); EBR 3(C)(3) and 12(J). That a person may have had actual notice or might otherwise have become aware of a Jurisdictional Opinion is immaterial; for a Jurisdictional Opinion to be binding on a person, the law requires that it be *served* on him.

Nor does the Board find the *Great Waters* case to be apposite here. That case addressed only the question of whether the constitution required actual notice that an application had been submitted to a District Commission be given to an adjoining landowner; the Court held that, as an adjoiner has no constitutionally protected liberty or property rights to notice or to participate in Act 250 cases, but has only those rights that the legislature has granted to him, actual notice of an application is not constitutionally required. Notice, however, is different from service, and, in §6007(c) the legislature has specifically stated that only those persons who are served with a Jurisdictional Opinion will be bound by it.

Catamount Slate argues further that certain persons had actual notice of JO #1-S-50, and should therefore be barred by *Great Waters* from seeking reconsideration, even if they were not served with the Jurisdictional Opinion. In support of this argument, Catamount Slate notes that in a March 17, 1999 letter to the Fair Haven Zoning Board, Lorene Sheldon, Lee Sheldon, Sarah Sheldon, Joan Gagnon, Lindsey and Priscilla Waterhouse, and Richard Sheldon, wrote:

> The attached list of signatories takes exception with the proposed expansion of the operation as it is proposed. However, this letter is not intended to prevent or impair in any way the current scope of operations being conducted by Catamount Slate to extract or mine the slate deposits currently available on the Corporation's lands located on the North end of the Sheldon Marsh, and those operations and facilities currently approved under the existing Act 250 registration....

Because, Catamount Slate contends, this letter indicates that, as early as March 1999, Lorene Sheldon, Lee Sheldon, Richard Sheldon, Sarah Sheldon, Joan Gagnon, and Lindsey and Priscilla Waterhouse were aware of JO #1-S-50, they had notice of JO #1-S-50 and therefore should be barred from filing a reconsideration request of JO #1-S-50 in August 1999.

Again, the problem with this argument is rooted in the language of §6007(c), which requires more than just constructive or actual notice; the statute requires service, so that it is clear that a person has, in his hands, a copy of the Jurisdictional Opinion at issue. *Compare* 10 V.S.A. §6089(a)(4) and EBR 40(A); *Central Vermont Public Service Corp. et al.*, #2W1074-EB, Memorandum of Decision at 6 – 7 (June 29, 2000) (neither

service nor notice of a Commission's permit decision is required to start the 30-day time period for filing an appeal to the Board). One cannot tell, from reading the March 1999 letter to the Zoning Board, what precise knowledge the Sheldons, Waterhouses and Ms. Gagnon had of JO #1-S-50. They knew that there were "operations and facilities currently approved under the existing Act 250 registration," but did they know that those "operations and facilities" had been exempted from Act 250 under the slate quarry exemption of 10 V.S.A. §6081(l)? Had they been served with JO #1-S-50, the answer to this question would have been known; without such service the Board can only speculate as to the extent of their knowledge, and the Board declines to speculate in a such a way as to preclude the reconsideration request filed in August 1999. [2]

3. *that certain persons are barred from seeking untimely reconsideration of JO #1-S-50 and/or JO #1-S-50-1 because they or their attorney were served with that Jurisdictional Opinion*

There is no question that Kathleen Donna and Lorene Sheldon were served with JO #1-S-50 on April 9, 1997. Had they been the ones who requested reconsideration of JO #1-S-50 in August 1999, their request would have been time-barred. But they were not the ones who filed the reconsideration request; that was filed by other neighbors and adjoiners, namely David and Joann Calvi, Joan Gagnon, Lori Ballard, Kathleen Donna, Lee Sheldon and Lindsey Waterhouse.

Similarly, as the Coordinator stated, the February 25, 2000 request that he reconsider JO #1-S-50-1, was untimely as to Lori Ballard, David and Joanne Calvi, Kathleen Donna, Joan Gagnon, Richard Sheldon, Joan Sheldon, Lorene Sheldon, and Lindsey Waterhouse, as they had received actual notice of JO #1-S-50-1, and their request was filed more than thirty days after the issuance of that Jurisdictional Opinion.

Because Margaret Riter, Christine Sheldon, Lee Sheldon, [3] and Priscilla Waterhouse, were not personally served with JO #1-S-50-1, the Coordinator therefore

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[2] Even assuming that Lorene Sheldon, Lee Sheldon, Richard Sheldon, Sarah Sheldon, Joan Gagnon, and Lindsey and Priscilla Waterhouse did have actual notice of JO #1-S-50, this may be a moot point, as Catamount Slate does not claim that Margaret Riter and Christine Sheldon also had such notice. Since the request for reconsideration of JO #1-S-50-1 was filed by Margaret Riter and Christine Sheldon, it was, absent some reason as to why Riter and Sheldon were barred from filing it, sufficient to allow the Coordinator to reconsider JO #1-S-50-1 and issue JO #1-S-50-2.

[3] Catamount Slate correctly notes that Lee Sheldon should have been served with JO #1-S-50-1, as he had been one of the people who had requested the

concluded that their reconsideration request was not untimely and they were therefore not time-barred.

Catamount Slate notes that JO #1-S-50-1 was served on attorney Emily Joselson, who is a member of the firm of Langrock, Sperry and Wool. Ms. Joselson's colleague at that firm, Rendol Barlow, filed a September 28, 1999 Notice of Appeal on behalf of Lori Ballard, David and Joanne Calvi, Kathleen Donna, Joan Gagnon, Margaret Riter, Richard and Christine Sheldon, Joan Sheldon, Lee Sheldon, Lorene Sheldon, and Lindsey and Priscilla Waterhouse, in connection with the appeal of the zoning permit issued to Catamount Slate by the Town of Fair Haven. By implication, therefore, Catamount Slate contends that, through their attorneys, these persons were served with JO #1-S-50-1. If this were to be the case, their February 2000 request for reconsideration of that Jurisdictional Opinion would be time-barred.

While, ordinarily, service on an attorney is equivalent to service on that attorney's clients, *see* V.R.C.P. 5(b), it is not clear from the documents presented to the Board whom Ms. Joselson represented (or whether she represented anyone in connection with the Jurisdictional Opinion) when she received service of JO #1-S-50-1 in September 1999. Nor is it a given that Mr. Barlow's representation of the neighbors and adjoiners in the zoning matter meant that he or his firm was representing or had represented them in the proceedings before the Coordinator in the fall of 1999. The mere fact that an attorney represents a person on one matter does not mean that he, or his partners, represents that person on all other matters. *See Agency of Natural Resources v. Towns*, 168 Vt. 449, 453 - 54 (1998) (while the Attorney General usually represents ANR, whether the Attorney General was ANR's representative in a particular matter – such that notice to the Attorney General constitutes notice to ANR – is a question of fact to be determined on a case-by-case basis). Further, the fact that Ms. Joselson and Mr. Barlow may be colleagues is not enough to impute Ms. Joselson's knowledge of the issuance of JO #1-S-50-1 to Mr. Barlow, and, by further imputation, to Mr. Barlow's clients in the zoning matter.

Catamount Slate has provided insufficient evidence for the Board to conclude that service of JO #1-S-50-1 on Ms. Joselson was service on certain of the neighbors because Ms. Joselson represented those neighbors, or that, because Ms. Joselson is a

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reconsideration of JO #1-S-50. While this may be true, and while he should have also perhaps have been barred from seeking reconsideration in February 2000, this point is somewhat academic, as others who filed the request which eventually led to JO #1-S-50-2, namely, Margaret Riter, Christine Sheldon and Priscilla Waterhouse, were not served with that Jurisdictional Opinion. Whether service on them can be imputed through service on an attorney, however, is another question.

member of Mr. Barlow's firm, service on her constitutes service on Mr. Barlow, and, by agency, service on those neighbors.

4. *that the Coordinator did not make findings that would have allowed him to reconsider JO #1-S-50-1, sua sponte, at any time*

Pursuant to EBR 3(C)(3), a Coordinator may reconsider, on his own motion and at any time, a Jurisdictional Opinion which he has issued, if there is "an adequate showing of a failure to disclose material facts or fraud."

Catamount Slate asserts that the Coordinator did not, and could not, make such findings in this matter and that, merely because the Coordinator may have changed his earlier opinion, this does not meet the "failure to disclose" or "fraud" standards set out in EBR 3(C)(3).

Because the Board has found that, by virtue of Margaret Riter's and Christine Sheldon's reconsideration request, the reconsideration of JO #1-S-50-1 was properly before the Coordinator, it need not reach the question as to whether the Coordinator could have reconsidered JO #1-S-50-1, *sua sponte.*

5. *Summary of conclusions as to Preliminary Issue 1*

The difficulty that Catamount Slate faces with respect to its various claims under Preliminary Issue 1 derives from the plain language of 10 V.S.A. §6007(c).

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.

Second, to be bound by a Jurisdictional Opinion, a person must be *served* with it.

Lastly, even if service is made upon many people, the finality of a Jurisdictional Opinion cannot be guaranteed. Section 6007(c) reads, "With respect to the partition or division of land, or with respect to an activity which might or might not constitute development, *any person* ... may request a jurisdictional opinion from the district coordinator concerning the applicability of this chapter." (Emphasis added) Thus, in some respects, under the statute, no Jurisdictional Opinion issued by a Coordinator can

ever be considered to be absolutely final as regards the world. Even if a Jurisdictional Opinion is served on those who would be most interested in its outcome, *any person* can come in at any time and request a Jurisdictional Opinion on the same matter. Granted, the opinion may not change, but if a person comes to the Coordinator with new information, a new Jurisdictional Opinion with a different conclusion could be issued, as happened here. Like a Declaratory Ruling, a Jurisdictional Opinion is only as good as the facts upon which it is based.

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(c) and EBR 3(C).

B. 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.

Whether a person can seek a Declaratory Ruling or whether a person validly can request reconsideration of an earlier Jurisdictional Opinion are different inquiries than the question of whether a person can seek party status in a Declaratory Ruling Petition which has been filed by another person. The only issue considered by the Board in determining a person's party status in a Declaratory Ruling Petition is whether he has made the requisite showing of interest under Board Rule 14. *See Developer's Diversified Realty Corporation*, Declaratory Rulings #364, #317 and #375 (consolidated), Memorandum of Decision at 5-6 (Sept. 10, 1998).

Some general observations are applicable to the arguments that Catamount Slate makes as to one or more of the persons who seek party status in this matter:

1. Catamount Slate appears to believe that whether to grant party status to a person in a Declaratory Ruling Petition is dependent upon the information that such person can give relative to the *jurisdictional question* presented to the Board by the Petition. This is not the case. What is important for a consideration of a party status petition is whether the petitioner can show that he is one who is either entitled to notice under 10 V.S.A. §6084, or is a person who "may be affected by the outcome of the decision" on the Declaratory Ruling Petition. See 10 V.S.A. § 6007(c). As the Board wrote in *Developer's Diversified*:

> The standard by which the Board determines whether an entity is "affected by the outcome" pursuant to §6007(c) is identical to the standard by which it determines whether to grant party status to an entity under EBR 14(B)(1): the entity must demonstrate that

> the proposed development may affect its interest under any of the Act 250 criteria.

Memorandum of Decision at 6 (citations omitted)

2. That a neighbor may not have moved to the area of the Catamount Slate quarry until after 1970 does not mean that he does not have an interest that can provide the basis for Rule 14 party status. This person may not be able to present first-hand, direct evidence of what existed at the Catamount Slate site before 1970, but he may be able to provide witnesses who can.

3. Catamount Slate claims that a number of the persons who seek party status have failed to show direct effects of the quarry on their property. The requirement that the quarry have a direct impact on a putative party's land arises when a person seeks EBR 14(A)(5) (adjoining property owner) party status; it is not a requirement for a claim of EBR 14(B)(1) party status.

4. Again, as to a number of the persons who seek party status, Catamount Slate raises claims concerning the timeliness of their reconsideration request. While this argument may be relevant to the first Preliminary Issue (whether a particular person is barred from seeking reconsideration of JO #1-S-50 and/or JO #1-S-50-1), it is not relevant to the question of whether that person may obtain party status to this Petition.

5. As to some of the party status petitioners, Catamount Slate argues that physical deterioration of the Town's roads (as a result of the quarry trucks) is the Town's concern, not the opponents'. (Most of the party status petitioners who have raised this concern do so under Criterion 5, but this would appear to be more of an argument based upon Criterion 9(K).) Catamount Slate does not cite the Board to any case which restricts Criterion 9(K) arguments to Towns or state agencies whose public investments are threatened by a proposed development or subdivision. Indeed, non-municipal and non-state parties have routinely been allowed to raise Criterion 9(K) claims. *See, Old Vermonter Wood Products and Richard Atwood,* #5W1305-EB, Findings of Fact, Conclusions of Law, and Order at 2 and 24 (Aug. 19, 1999) (neighbor to proposed project granted Criterion 9(K) party status and appealed District Commission grant of permit on grounds that it did not comply with Criterion 9(K)); *Wake Robin Associates, et al.,* #4C0814-EB, Findings of Fact, Conclusions of Law, and Order at 1 and 20 (Aug 14, 1991) (same).

To the extent that the above observations are relevant to the various party status petitions and Catamount Slate's objections to such petitions, they are incorporated herein and not repeated in the individual discussions of party status below.

1. Rule 14(A)(5) petitioners

Lorene Sheldon

Lorene Sheldon seeks EBR 14(A)(5) and 14(B)(1) and (2) party status as an adjoining landowner and an interested person. She claims to own land adjoining the Catamount Slate quarry and to own the access road used by the quarry. She asserts that the quarry has impacts on her land under 10 V.S.A. §6086(a)(1) (water and air pollution) ("Criterion 1"), (a)(5) (traffic) ("Criterion 5"), and (a)(8) (aesthetics) ("Criterion 8").

Having considered the arguments for and against party status, the Board grants Lorene Sheldon party status to this Declaratory Ruling. EBR 14(A)(5) and 14(B)(1).

Lee Sheldon

Lee Sheldon's petition is virtually identical to Lorene Sheldon's petition. He seeks the same party status on the same Criteria.

The Board grants Lee Sheldon party status. EBR 14(A)(5) and 14(B)(1).

Kathleen Donna

Kathleen Donna petitions for party status pursuant to EBR 14(A)(5) party status as an adjoining landowner. She claims to own land adjoining the Catamount Slate quarry. She asserts that the quarry has impacts on her land under Criterion 8.

The Board grants Kathleen Donna party status. EBR 14(A)(5).

2. Rule 14(B) petitions

Richard Sheldon

Richard Sheldon seeks EBR 14(B)(1) party status. He lives and farms near the quarry. He asserts an interest under Criterion 5 (although his claim of road deterioration may be closer to a claim under Criterion 9(K)). He also asserts a Criterion 8 interest based upon harm to a fragile environment and impacts on scenic beauty.

The Board grants Richard Sheldon party status. EBR 14(B)(1).

Joanne and David Calvi

The Calvis, who live near the quarry, seek EBR 14(B)(1) and (2) party status under Criteria 1, 5, and 8 and 10 V.S.A. §6086(a)(1)(F) and 1(G) ("Criteria 1(F) and 1(G)").

The Board grants Joanne and David Calvi party status. EBR 14(B)(1).

Lindsey and Priscilla Waterhouse

The Waterhouses live about two miles from the quarry, on the road which must be used to access the quarry. They seek EBR 14(B)(1) and (2) party status under Criteria 1 (air pollution), 1(F), 1(G), 5, 8, and 10 V.S.A. §6086(a)(1)(A) and 9(E) ("Criteria 1(A) and 9(E)").

Catamount Slate claims that the Waterhouses do not live on Inman Road, but rather live 1.4 miles by road from the Project Site. A person may have a cognizable interest in a potential project even his land does not adjoin the Project Site.

The Board grants Lindsey and Priscilla Waterhouse party status. EBR 14(B)(1).

Margaret Riter

Margaret Riter lives in the neighborhood of the quarry. She seeks EBR 14(B)(1) and (2) party status under Criteria 1 (air and water pollution), 5, and 8.

The Board grants Margaret Riter party status. EBR 14(B)(1).

Joan Gagnon

Joan Gagnon lives in the neighborhood of the quarry. She seeks EBR 14(B)(1) and (2) party status under Criteria 5 and 8.

Catamount Slate also attacks the weight of Gagnon's possible testimony, as it is apparently based on her childhood memories; but this objection must wait until the testimony is offered; it is not relevant to the question of party status.

Catamount Slate claims that Gagnon has failed to include a description of the evidence that she will present as required by EBR 14(B)(5). But Gagnon does contain a summary of her observations, and this is enough for purposes of the Rule.

The Board grants Joan Gagnon party status. EBR 14(B)(1).

C. 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 September 29, 1999, in response to an August 9, 1999 letter from seven neighbors and adjoiners, the Coordinator issued JO #1-S-50-1, in which he reconsidered that aspect of JO #1-S-50 in which he had found that the two existing buildings on the site were exempt as pre-existing buildings. Because he had found the two buildings to be exempt, he had further concluded that a planned 40' x 70' structure would also be exempt, as it was to replace the two "existing buildings." In JO #1-S-50-1, as noted, the Coordinator concluded that he had improvidently grandfathered and exempted the two buildings because they had been built and used as hunting camps, and not as slate production buildings. Thus, he determined that the construction of new buildings (including, it appears, the planned 40' x 70' building) would require an Act 250 permit.

JO #1-S-50-1 was served on Fred and Suellen Reed, and others, on September 29, 1999. No appeal or request for reconsideration was filed within 30 days of September 29, 1999.

Catamount Slate argues that JO #1-S-50-2 addresses the two buildings which had been ruled exempt in JO #1-S-50 and then ruled not to be exempt in JO #1-S-50-1. Thus, by appealing JO #1-S-50-2, Catamount Slate contends that the exempt status of those buildings is open for consideration by the Board in this Petition.

There is no question that *Conclusion* to JO #1-S-50-2 mentions the quarry holes as well as the buildings. However, as is apparent from the opening paragraph of JO #1-S-50-2, the request for reconsideration of JO #1-S-50-1 focuses solely on the quarry holes. Further, the analysis in JO #1-S-50-2 addresses only the quarry holes, not the buildings.

Catamount Slate notes that JO #1-S-50-2 refers to a May 15, 2000 letter from Catamount Slate's attorney which apparently raised arguments concerning the exempt status of the two buildings. While Catamount Slate's instant arguments do not appear to rely specifically on the May 15 letter, Catamount Slate argues that , "Because of the confusing nature of the circumstances and facts and notices, etc. surrounding this (sic) issuance of 1-S-50 it is apparent that the District Coordinator under took (sic) to consider all matters involved in 1-S-50, including the buildings and therefore, this appeal involves all matters considered and ruled upon in 1-S-5-2."

Catamount Slate's presumptions are misplaced. In JO #1-S-50-2, the Coordinator states explicitly that the May 15 letter "has to do with the propriety of the unappealed JO #1-S-50-1, which I find to be legally final as you were the subject of the opinion and you did not appeal it." Thus, to the extent that the May 15 letter was even referenced in JO #1-S-50-1, it is evident that the Coordinator did not consider the question of the exemption for the two buildings to be before him and, in fact, dismissed as untimely Catamount Slate's attempts to revive the issue.

The Board therefore finds no merit to Catamount Slate's arguments. While the buildings were mentioned in passing in JO #1-S-50-2, they were not the subject of that Jurisdictional Opinion; indeed, the Board concurs with Coordinator's finding in JO #1-S-50-2 that JO #1-S-50-1 was final and binding on Catamount Slate as of 30 days of its issuance on September 29, 1999.

The Board will therefore not reexamine the question of whether the buildings at the Catamount Slate site are exempt.

III. Order

1. The Board takes official notice of JO #1-S-50, JO #1-S-50-1 and JO #1-S-50-2 and their accompanying Certificates of Service. The Board does *not,* however, take official notice of any other documents which are cited in the Jurisdictional Opinions or which may be in the Coordinator's file in this case, including any of the evidence which he may have relied upon in making his decisions.

2. The Coordinator had authority to issue Jurisdictional Opinion 1-S-50-2 (Second Reconsideration), pursuant to 10 V.S.A. §6007(c) and EBR 3(C).

3. The Board grants EBR 14(A)(5) party status to Lorene Sheldon, Lee Sheldon, and Kathleen Donna. The Board grants EBR 14(B)(1) party status to Lorene Sheldon, Lee Sheldon, Richard Sheldon, David and Joanne Calvi, Lindsey and Priscilla Waterhouse, Margaret Riter and Joan Gagnon.

4. The definition of the "Project" in this Declaratory Ruling does not include the construction of a commercial slate building on the said ± 122 -acre tract where the quarry is located.

5. The Board will issue a Scheduling Order setting forth the dates for filing of testimony and exhibits and a date for the merits hearing on Declaratory Ruling Petition.

Dated at Montpelier, Vermont this 29th day of June 2001.

ENVIRONMENTAL BOARD

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