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

RE:	Okemo Mountain, Inc. n/k/a Okemo Limited Liability Company and Vermont Department of Forests, Parks and Recreation	Land Use Permit Applications #2S0351-23E-EB and #2S0351-25S-EB

MEMORANDUM OF DECISION ON MOTION TO ALTER

This proceeding concerns an appeal of a decision to extend the construction completion deadline on two previously approved permits. Mount Holly Mountain Watch (MHMW) moves to alter the Memorandum of Decision issued on May 23, 2002. As set forth below, the Board denies this motion.

I. PROCEDURAL SUMMARY

On September 12, 2001, Okemo Mountain, Inc. (Okemo) and Vermont Department of Forests, Parks, and Recreation (collectively Permittees) filed Land Use Permit Application #2S0351-23E with the District #2 Environmental Commission (Commission) seeking authorization to extend the construction completion date to October 1, 2004 (23E Project). Prior to the extension request all work authorized in Permit #2S0351-23 had been completed except the placement of snowmaking lines off the Rim and Catnap trails. The 23E Project is on 720 +/- acres located off the Mountain Road in the Towns of Ludlow and Mount Holly, Vermont.

On September 12, 2001, the Permittees also filed Land Use Permit Application #2S0351-25S with the Commission seeking authorization to extend the construction completion date to October 1, 2004 (25S Project). Prior to the extension request all work authorized in Permit #2S0351-25S had been completed except the construction of an upper mountain connector trail 650 feet in length, a 250 foot long surface lift at Solitude Village, and the installation of snowmaking equipment on seven existing ski trails. The 25S Project is located on 1,080 acres off the Mountain Road in the Towns of Ludlow and Mount Holly, Vermont.

On November 6, 2001, the Commission convened a combined hearing on the 23E Project and the 25S Project (collectively Projects). At the outset of the hearing the Commission preliminarily denied party status to MHMW pursuant to Environmental Board Rule (EBR) 14(F).

On January 23, 2002, the Commission issued a Memorandum of Decision (Decision) and Land Use Permits for #2S0351-23E and 2S0351-25S (Dash 23E and 25S Permits). In the Decision, the Commission reaffirmed its prior decision denying party status to MHMW.

On February 12, 2002, MHMW filed a Motion to Alter requesting the Commission reconsider its Decision denying MHMW party status.

On February 22, 2002, the Commission denied MHMW's motion in Memorandum of Decision #2 (Decision #2).

On March 22, 2002, MHMW filed an appeal with the Environmental Board (Board) from the Decision #2 alleging that the Commission erred in its conclusions concerning the party status of MHMW. The appeal was filed pursuant to 10 V.S.A. § 6089(a) and EBR 6 and 40.

On April 4, 2002, Okemo filed a motion to dismiss MHMW's appeal as untimely. In the alternative, Okemo objected to the granting of party status to MHMW.

On April 30, 2002, Board Chair Marcy Harding convened a prehearing conference and issued a Prehearing Conference Report and Order.

On May 3, 2002, MHMW filed a petition for party status and a memorandum in opposition to Okemo's motion to dismiss.

On May 9, 2002, Okemo filed a memorandum in opposition to MHMW's petition for party status.

On May 23, 2002, the Board issued a Memorandum of Decision (MOD) denying Okemo's motion to dismiss and denying MHMW's petition for party status.

On May 31, 2002, MHMW filed a motion to alter the MOD.

On June 10, 2002, Okemo filed a response to MHMW's motion to alter.

On June 19, 2002, the Board deliberated.

II. DISCUSSION

Motions to alter are governed by EBR 31(A), which provides in relevant part:

> (A) Motions to alter decisions. A party may file within 30 days from the date of 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.

Okemo argues that the express language of EBR 31(A) limits the filing of motions to alter to "parties." EBR 2(K) defines party as "any person designated as a party under the Act or Rule 14 of these rules." MHMW was neither designated as a party under the Act nor was it granted party status pursuant to EBR 14.

While on the surface Okemo's argument has some appeal, closer scrutiny and policy considerations dictate that the Board not adopt Okemo's argument. The Board notes that EBR 40(A) has similar language concerning who may file an appeal from a district commission decision:

> Any party aggrieved by an adverse determination by a district commission may appeal to the Board and will be given a de novo hearing on findings, conclusions and permit conditions issued by the district commissions.

Following Okemo's strict interpretation of the word "party" in EBR 40(A) would limit the filing of appeals to only those who meet the definition of party in EBR 2(K). Such an interpretation would preclude persons denied party status before the district commission from appealing that denial to the Board and is contrary to the Vermont Administrative Procedure Act, 3 V.S.A. 801, *et. seq*. and decades of Act 250 precedent. *In re Preseault*, 130 Vt. 343 (1972). The Board has previously recognized that while the EBRs are more than guidelines, the Board will not strictly interpret them if doing so results in an absurd or unfair outcome.

> The Board's rules are more than mere guidelines. They are precise rubrics which must be followed. The Board has made clear time and time again that it will strictly enforce them. However, the Board does not apply its rules unjustly, unfairly or in a manner which promotes form over substance. To do so would have a chilling effect upon citizen participation. The Act 250 process must be understandable, reasonable, efficient and balanced.

Re: Cersosimo Lumber Company, Inc., #2W0957-EB Memorandum of Decision at 2 (May 23, 1995).

Policy considerations also argue in favor of a sensible interpretation of the word "party" in EBR 31. Were the Board to deny reconsideration to a person

seeking party status, the only avenue of review would be an appeal to the Supreme Court. This would preclude the Board from correcting its own mistakes and would lead to judicial inefficiency. Ironically, it could also result in delay to a project, as Supreme Court
appeals generally take much longer than Board reconsiderations.

Therefore, the Board will interpret the provisions of EBR 31(A) to be consistent with its interpretation of EBR 40(A). However, the Board's reading of "party" in EBR 31(A) is limited to allowing persons denied party status the option to request reconsideration on the decision on their party status. This decision does not allow a motion to alter by persons without party status on the merits of a decision.

The Board will now proceed to the merits of MHMW's motion to reconsider. There are three elements to consider when determining party status pursuant to EBR 14(B)(1). First, the petitioner has the burden of establishing a connection between the project and a specified interest. Second, the petitioner must show that, due to the demonstrated connection, its specified interests may be affected. *Maple Tree Place Associates,* #4C0775-EB, Memorandum of Decision and Order at 6 (Oct. 11, 1996). Third, the petitioner must articulate how its interests are different from those of the general public. *Springfield Hospital, #2S0776-2-EB*, Memorandum of Decision at 5-6 (Aug. 14, 1997), appeal dismissed, *In re Springfield Hospital*, No. 97-369 (October 30, 1997); *see also*, *Josiah E. Lupton, Quiet River Campground*, #3W0819 (Revised)-EB, Chair's Preliminary Ruling at 4 (Oct. 3, 2000). MHMW has failed to meet these requirements.

MHMW argues that it has a specified interest in the Projects since its members fish, wade, and recreate in the Black River and therefore, any impacts to the river will affect those activities. However, the Dash 23E and 25S Permits do not govern the withdrawal of water from the Black River for snowmaking purposes. MHMW states that when it petitioned for party status, it was not aware that Land Use Permits #2S0351-12-EB Black River Snowmaking, #2S0351-24, Okemo Snowmaking Pond, and #2S0351-31-EB Jackson Gore Phase I govern snowmaking and set conditions on river minimum flow, snowmaking water withdrawal rate and ramping, and total seasonal water volume rates. MHMW essentially admits that they do not have an interest in the matter when they state that "MHMW believed at the time that a relationship existed between the linear feet of snowmaking pipe to be built and the amount of water removed from the Black River, the more linear feet, the more water." MHMW may have believed at one time that it had an interest but now recognizes that the interests they claim have no

bearing on the Projects.

The fact that MHMW misunderstood the Projects at the outset of the hearings before the Commission is not justification for granting preliminary party status. A petitioner's mistaken belief about the nature of a project is not relevant for preliminary party status determinations. The dispositive issues are the project's impacts and the nature of the petitioner's interests.

The instant case is an application to extend a construction completion deadline. The Projects were described in the amendment application and the underlying permits. A cursory review of those permits by MHMW should have indicated that the interests that MHMW articulated will not be impacted.

III. ORDER

1. MHMW's motion to alter is denied.

2. Jurisdiction is returned to the District #2 Environmental Commission.

Dated at Montpelier, Vermont this 3rd day of July, 2002.

ENVIRONMENTAL BOARD

/s/ Marcy Harding
Marcy Harding, Chair
John Drake
Alice Olenick
Jean Richardson
Donald Sargent