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

Re: Pico Peak Ski Resort, Inc.
#1R0265-12-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER:
PRELIMINARY ISSUES

I. INTRODUCTION

This decision pertains to preliminary issues raised with respect to a proposal to create and/or widen ski trails and expand snowmaking coverage. As explained below, the Environmental Board concludes:

(1) the Motion to Dismiss filed by Pico Peak Ski Resort, Inc. is denied;

(2) the Conservation Law Foundation, the Otter Ski Patrol and the Vermont Ski Areas Association are granted party status under Criteria l(E) and 8(A) and denied party status under all other criteria;

(3) the Vermont Environmental Council is denied party status under all criteria;

(4) the request for stay made by the Conservation Law Foundation is denied; and

(5) the Environmental Board will hold a de novo hearing on compliance of the Application with Criteria l(E) and 8(A).

II. PROCEDURAL BACKGROUND

On September 21, 1994, the District Environmental Commission #1 ("District Commission") issued Land Use Permit Amendment #1R0265-12 and related Findings of Fact, Conclusions of Law, and Order ("Permit Amendment") to Pico Peak Ski Resort, Inc. ("Pico"). The Permit Amendment authorizes Pico to:

(1) construct an approximately 1,400 foot extension of the base of Glade Chair from elevation 2,650 feet down to 2,400 feet;

(2) construct a new ski trail on Outpost between Wrangler and Pipeline, approximately 1,200 feet long by 150 feet wide, with snowmaking/fire protection;

(3) widen Pipeline ski trail 25 feet to 40 feet from elevation 2,350 feet to 2,800 feet, with snowmaking/fire protection; and

3/6/95

(4) widen east side of Lower Pike by 25 feet to 40 feet from elevation 2,000 feet to 2,125 feet.

On October 14, 1994, the Conservation Law Foundation ("CLF") filed an an appeal from the Permit Amendment with the Environmental Board ("Appeal"). The Appeal included a request for party status, a request for stay of the Permit Amendment and a request that the matter be remanded to the District Commission for a new hearing. On October 24, 1994, Environmental Board Chair Arthur Gibb denied CLF's request for stay. Chair Gibb indicated that the Environmental Board ("Board") would review the denial in conjunction with its review of CLF's request for party status. Chair Gibb confirmed the denial in an October 31, 1994 letter to CLF.

On November 7, 1994, Chair Gibb convened a preheating conference in Montpelier, Vermont. At the conference, Pico filed a Motion to Dismiss and the Otter Ski Patrol ("OSP"), the Vermont Ski Areas Association ("VSAA") and the Vermont Environmental Council ("VEC") each filed a request for party status or a similar submittal which the Board treated as such a request. Chair Gibb scheduled oral argument before the Board on preliminary issues for November 30, 1994. Additionally, a deadline for any further written submissions concerning the preliminary issues was set for November 21, 1994. On November 18, 1994, CLF filed a Reply to Pending Motions.

On November 21, 1994, Chair Gibb issued a Prehearing Conference Report and Order in which he outlined the preliminary issues, schedules relating to oral argument and a filing schedule relative to a potential hearing on the merits. Preliminary issues were argued before the Board on November 30, 1994 by Pico, the City of Rutland, the Sherbume Planning Commission and CLF.

On February 6, 1995, Acting Chair Gibb continued generally the filing dates set forth in the Board's Preheating Conference Report and Order.[1] On February 7, 1995, Acting Chair Gibb issued a summary of decision concerning the preliminary issues.[2] The summary included a revised filing schedule applicable to a hearing on the merits of CLF's appeal.

[1] *Effective February 1, 1995, John Ewing is Chair of the Board, and Arthur Gibb's title in this matter is Acting Chair.*

[2] *The summary indicates that the Board granted CLF, OSP and VSAA party status under criteria 1 (E) and 8(F). This is a typographical error. In fact, the Board granted these groups party status under Criteria 1 (E) and 8(A).*

III. FINDINGS OF FACT

At the November 30, 1994 oral argument, the Board, by consent of the participants, accepted into evidence in the Appeal the District Commission's file pertaining to the Permit Amendment as the file existed at the Board. The Board finds as fact:

1. On March 4, 1994, the Agency of Natural Resources ("ANR") instituted a procedure for determining conservation flows for ski area snowmaking projects ("Agency Flow Procedure").

2. On July 1, 1994, the District Commission received from Pico a complete application pertaining to the following proposal:

> (1) construct an approximately 1,400 foot extension of the base of Glade Chair from elevation 2,650 feet down to 2,400 feet;
>
> (2) construct a new ski trail on Outpost between Wrangler and Pipeline, approximately 1,200 feet long by 150 feet wide, with snowmaking/fire protection;
>
> (3) widen Pipeline ski trail 25 feet to 40 feet from elevation 2,350 feet to 2,800 feet, with snowmaking/ fire protection; and
>
> (4) widen east side of Lower Pike by 25 feet to 40 feet from elevation 2,000 feet to 2,125 feet ("Project").

3. On July 14, 1994, the District Commission determined that Pico's Land Use Permit application #1R0265-12 was complete ("Application").

4. In a July 19, 1994 letter, the District Commission asked the Rutland Herald to publish an Act 250 notice ("Notice") relative to the Application. The Notice provided in part:

> The District Environmental Commission is treating this as a minor application pursuant to Environmental Board Rule 5 1 , with the knowledge that the Agency of Natural Resources will hold an informal conference to determine their position on the increased snowmaking proposed, pursuant to the Agency Flow Procedure dated March 4, 1994. The Agency has scheduled their conference for July 28, 1994.

* * *

> A proposed Land Use Permit has been prepared by the Commission and is attached for review. No public hearing will be held and Findings of Fact and Conclusions of Law will not be issued unless a public hearing is requested.
>
> To request a public hearing, a party must notify the Commission in writing at the address given below on or before August 8, 1994. Any request for a hearing shall state why a hearing is requested and what evidence will be presented. Any written request to the Commission must be copied to the applicant and other parties listed on the attached, certificate of service. In any event, the Commission reserves the right to request a hearing on or before August 9, 1994.

5. On July 19, 1994, ANR advised "statutory parties (to the Application) and interested persons (in the Application)" that ANR would convene a conference on July 28, 1994 at 9:00 a.m., at which the stream flow issues raised by the Application would be discussed.

6. On July 28, 1994, the District Commission received a July 22, 1994 letter from CLF which states in part:

> CLF requests party status in this matter on the limited matter of compliance with Agency policy and Board precedents on snowmaking. This statement may suffice if Pico agrees to comply with the policy. If Pico resists application of the policy, CLF would ask that the Commission hold a hearing on the question of the applicability of the policy and Board precedent to the project. Findings of fact and conclusions of law also will be required.

7. On August 8, 1994, the District Commission received prehearing comments from ANR in which it asked the District Commission to include two conditions in any land use permit which is issued relative to the Application:

> The first requested condition will require the Permittee to keep specified records that will allow the District Commission and the Agency to determine the extent to which Pico Peak is withdrawing the available water. The second requested condition will require that the Permittee not withdraw more snowmaking water from Mendon Brook than it has historically.

> According to the records provided to the Agency by Pico Peak, the largest volume of water withdrawn from Mendon Brook for snowmaking in any single ski season was 97,336,640 gallons.
>
> * * *
>
> The Agency of Natural Resources hopes that the applicant and the Commission will agree to the proposed conditions listed above. If the applicant or the Commission should oppose the incorporation into the permit of any of the Agency's recommended conditions, then the Agency would request to be heard on these issues.

8. In an August 10, 1994 letter to the District Commission, CLF reiterated the hearing request contained in its July 22, 1994 letter to the District Commission. The August 10, 1994 letter provides in relevant part:

> CLF believes that the Commission must hold a hearing on this issue. In our view, Pico's expansions plans and ANR's recommendations do not comply with the new state policy OF with Environmental Board precedents on snowmaking expansion. We believe a full public hearing is necessary so that Pico's new representations, ANR's recommendations, and other matters relating to the application can be reviewed and tested by all parties.

9. In an August 24, 1994 letter to the District Commission, CLF states:

> As we discussed this morning, it appears that the Commission intends to issue a permit in this matter without any public hearing, as required under Environmental Board Rule 5 1 (B)(5). Conservation Law Foundation (CLF) requested a hearing on this matter, which the Commission designated a "minor" permit application, by letters dated July 22, 1994 and August 10, 1994 (enclosed).

10. On August 29, 1994, the District Commission issued a Notice of Hearing which provided:

> On July 19, 1994, the District Environmental Commission #1 noticed the application in accordance with Environmental Board Rule 51 (minor process) giving parties and interested persons or groups until August 8 to request a hearing. The notice also referenced a public hearing set for July 28, 1994, which was

held by the Agency of Natural Resources (ANR) in Sherbume, Vermont for the purpose of discussing conservation stream flows for Pico's snowmaking water withdrawal. As a result of that July 28 public hearing and subsequent written documentation to ANR by Pico, the Agency of Natural Resources submitted an Entry of Appearance on August 8 which included two proposed conditions, one specifying record keeping for water withdrawals, the other setting a cap on water withdrawal. The ANR requested a hearing only if Pico chose not to agree to the conditions.

* * *

On July 28, 1994, CLF submitted a request (dated July 22, 1994) for hearing subject to the outcome of the ANR's public hearing concerning the ANR's March 4, 1994, "Procedure for Determining Conservation Flows" (Policy).

11. On August 26, 1994, the District Commission deliberated on CLF's request for hearing which the District Commission received on July 28, 1994 and concluded:

> The District Environmental Commission #1 deliberated on the request for hearing on August 26, 1994 in Rutland. The Commission has concluded that a public hearing is warranted in order to discuss the snowmaking aspects of the project, and the implications of Environmental Board precedent and the March 4, 1994, ANR policy on water withdrawals.

12. The Notice of Hearing scheduled a hearing on the snowmaking aspects of the Application for 9:30 a.m. on September 13, 1994.

13. In a letter dated September 7, 1994, CLF requested:

> With regard to the upcoming hearing on September 13, 1994, Conservation Law Foundation (CLF) requests that the following persons be made available as witnesses at the proceeding: Mr. Heald and Mr. Nelson from Pico Resort; and Mr. Sease and Mr. Cueto from Agency of Natural Resources (ANR).
>
> The presence of these individuals is essential for us to explore all outstanding issues, including the applicability of Act 250 and ANR snowmaking principles.

14. On September 13, 1994, the District Commission held a hearing on the Application.

15. CLF filed a Petition for Party Status dated September 9, 1994 with the District Commission at the September 13, 1994 hearing.

16. The District Commission did not hold a prehearing conference.

17. On September 21, 1994, the District Commission issued a Findings of Fact, Conclusions of Law, and Order and the Permit Amendment and denied party status to CLF.

IV. CONCLUSIONS OF LAW

A. PICO'S MOTION TO DISMISS

The Motion to Dismiss is based upon two distinct arguments. First, Pico asserts that because CLF did not file a lawfully sufficient request for party status with the District Commission until the day of the District Commission's hearing on the Application, September 13, 1994, CLF could not have been a party when it requested a hearing on the Application on July 28, 1994. Therefore, CLF's request for hearing is void ab initio, and thus, pursuant to 10 V.S.A. $6086(a), no appeal from the Permit Amendment may be taken. Second, Pico asserts, in the alternative, that even if CLF may request a hearing under Environmental Board Rule ("EBR") EBR 51 without possessing party status, CLF did not make a timely or legally sufficient hearing request. Therefore, CLF's request for hearing is void ab initio, and thus, pursuant to 10 V.S.A. $6086(a), no appeal from the Permit Amendment may be taken. The Board does not agree with either of Pico's contentions, and the Motion to Dismiss is denied.

1. Timeliness of CLF's Petition for Party Status

EBR 51 does not specifically address party status. The applicable Rule is EBR 14. Petitions for party status must be made "on or before the first hearing day if a prehearing conference is not held ...." EBR 14(B)(2)(c). CLF made its request for party status on September 13, 1994, the first day of the District Commission's hearing. The District Commission did not hold a Prehearing conference.

The Board concludes that CLF's request for party status was timely filed with the District Commission.

2. Timeliness Of CLF's Hearing Request

The District Commission has discretion to treat any development or

subdivision subject to 10 V.S.A. §6081 and the Board's rules as a "Minor Application" if the District Commission "finds that the project appears to present no significant adverse impact under any of the 10 criteria of 10 V.S.A. §6086(a)." EBR 5 l(A). In making this determination, the District Commission may consider the extent to which "potential narties and the district commission have identified issues cognizable under the 10 Criteria. " Id. (emphasis added). The District Commission elected to review the Application as a "Minor Application".

Pursuant to EBR 51(B)(l), the District Commission prepared a proposed permit. It then moved to comply with EBR 51(B)(2) which states in relevant part: "the notice shall state the district commissions intent to issue a permit without convening a public hearing unless a reuuest for hearing is received by a date specified . . . ." Id. (emphasis added). EBR 51(B)(2) is intended to facilitate input at the initial stages of "Minor Application" review so that a district commission can best get a sense of public concern. This provision does not preclude non-parties from requesting a hearing or district commissions from considering non-party hearing requests. Such a preclusion would be inconsistent with the provision's purpose.

The District Commission's early treatment of the Application is consistent with this construction. The Notice of Hearing states: "On July 19, 1994, the District Environmental Commission #1 noticed the application in accordance with Environmental Board Rule 51 (minor process) giving narties and interested persons or groups until August 8 to request a hearing. " (Emphasis added).

The Board concludes that, whether a party or not, CLF was entitled to request a hearing on the Application on or before August 8, 1994. CLF first requested a hearing on the Application in a July 22, 1994 letter to the District Commission, which the District Commission received on July 28, 1994 ("CLF Hearing Request").

The Board concludes that the CLF Hearing Request was timely filed.

3. Specificity Of CLF's Hearing Request

EBR 51(B)(5) provides, in pertinent part, "any hearing request shall state with specificity why a hearing is required and what additional evidence will be presented . . . ." Id. The purpose of this provision is clear. It is intended to encourage those who request a hearing to supply a district commission with enough information to enable it to determine whether substantive issues requiring a hearing have been raised. The CLF Hearing Request achieved this purpose. In it, CLF raises concerns about which ANR snowmaking policy will be applied to the Application and whether or not Pico will be required to adhere to a schedule of compliance that will increase existing flows and ensure evaluation of alternatives. It is not a model of comprehensiveness under EBR 51(B)(5). However, it suffices. Further, as amended by CLF in letters

dated August 10 and August 24, 1994, it is more than adequate.[3]

The District Commission's early response to the CLF Hearing Request demonstrates that the request met EBR 51(B)(5). The District Commission conducted deliberations in response to the CLF Hearing Request and concluded that the issues raised in it required a hearing on all snowmaking aspects of the Application. The Board concludes that the CLF Hearing Request was sufficiently specific.

B. CLF'S PARTY STATUS BEFORE THE BOARD

1. Standard Of Review

CLF requested party status before the District Commission on Criteria l(A), l(C), l(E), l(F), 8(A) and 9(K). The District Commission denied CLF's request. CLF appealed the District Commission's denial under only Criteria l(C), l(E), l(F), 8(A) and 9(K) (Contested Criteria).[4] The Board considers CLF's appeal of the District Commission's denial of party status de novo. The Board is compelled to do so. 10 V.S.A. §6089. See Re: St. Albans Group and Wal★Mart Stores Inc., #6F0471-EB, Memorandum of Decision, at 4 (April 15, 1994) and Re: Swain Development Corp., #3W0445-2-EB, Memorandum of Decision, at 7 (July 31, 1989).

2. Board Discretion

Under EBR 14(B), the Board may grant party status to those whose interests are affected under one or more of the Act 250 criteria or who can materially assist the Board. Re: St. Albans Group and Wal★Mart Stores. Inc., supra, at 4. The decision whether or not to grant party status is solely within the discretion of the Board. Re: Sherman Hollow, #4C0422-5-EB, Memorandum of Decision, at 5 (February 3, 1988).

3. Materially Assist

CLF claims, pursuant to EBR 14(B)(l)(b), that it is entitled to party status under the Contested Criteria because its participation under them will materially assist the Board. CLF's October 14, 1994 Notice of Appeal and the District Commission file are particularly relevant to this claim.

---

[3] These *amendments were appropriate under the circumstances of this particular matter. c.f. Re: Berlin Associates, #5W0584-9-EB, Memorandum of Decision, at* 3 *(April* 26, 1989).

[4] *CLF does not seek party status under Criteria 1 (A) before the Board.*

If granted party status, CLF expects to cross-examine witnesses and present legal argument. However, CLF believes that the Appeal may not require additional factual investigation. As a consequence, it suggests that, even if it is granted party status, it may not present any direct evidence.

In support of its request for party status under EBR 14(B)(l)@), CLF relies heavily upon the Board's proceedings in Re: Okemo Mountain, Supra. The Board recognizes that CLF possesses certain expertise in the area of stream flows. This expertise enabled CLF to assist the Board in Okemo. However, the Appeal is not Okemo. The Project is not as complex as the one at issue in Okemo. The Application does not include a request to decrease minimum stream flow. The public's awareness of stream flow issues is greater now than it was prior to Okemo. ANR's Agency Flow Procedure was adopted after Okemo. CLF has not yet determined whether or not it will present direct testimony in the Appeal. Finally, the Board has more experience with snowmaking and stream flow issues now than it did prior to Okemo.

The Board, concludes, as did the District Commission, that the Application and Okemo are not substantially similar in scope and substance. Actual and legal issues in this matter were identical to those in Okemo, the Board is not compelled to grant CLF party status, pursuant to EBR 14(B)(1)(b), under the Contested Criteria. Nevertheless, the Board believes that CLF has adequately demonstrated that its participation under Criteria l(E) and 8(A) will materially assist the Board in the Appeal.

The Board will accept CLF's assistance only under Criteria l(E) and 8(A). With respect to these Criteria, CLF's petition for party status pursuant to EBR 14 (B)(l)(b) is granted.

CLF's request for party status under Criteria l(C), l(F) and 9(K) pursuant to EBR 14(B)(l)(b) is denied.

4. Interests Affected

CLF claims that, pursuant to EBR 14(B)(l)(a), it is entitled to party status under the Contested Criteria because the Project may affect its interests under each of them. The Board principally focused on CLF's October 14, 1994 Notice of Appeal and the District Commission's file to review this claim.

The Board concludes that CLF has not adequately demonstrated that the Project may affect its interests under any of the Contested Criteria. Therefore, CLF's request for party status under each of them pursuant to EBR 14(B)(l)(a) is denied.

C. OSP AND VSAA - PARTY STATUS BEFORE THE BOARD

Neither of these groups participated before the District Commission. However, the Board has construed EBR 14 to allow it to admit new parties on appeal even though they did not participate before the district commission in instances when another party has perfected a valid appeal to the Board. Re: Derby Plaza Associates Limited Partnershin, #7R0886-EB, Memorandum of Decision, p.5, f.n. 1 (February 24, 1994). CLF does not oppose the participation of these groups.

The Board is not convinced that the Project, in and of itself, may affect any interests these groups may have under any criteria. Consequently, their petitions for party status pursuant to EBR 14(B)(l)(a) are denied.

The Board is convinced that these groups have demonstrated a certain degree of knowledge or experience regarding Criteria l(E) and 8(A), and as a result, their participation under these Criteria will materially assist the Board. Therefore OSP and VSAA are granted party status under Criteria l(E) and 8(A), and they are denied party status under all other criteria.

The Board notes the potential for redundancy caused by party status of both OSP and VSAA. Therefore, these parties must present a joint case through one representative. c.f. St. Albans Group and Wal★Mart Stores. Inc., supra, at 10.

D. VEC'S PARTY STATUS BEFORE THE BOARD

On November 7, 1994, VEC submitted to the Board a written statement concerning party status. It is the only written document VEC has filed with the Board in the Appeal. CLF treats this submittal as a request for party status in its November 18, 1994 Reply to Pending Motions. To clarify the record on this point, the Board will consider VEC's submittal as a request for party status under all Criteria.

VEC's lone submittal consists of a series of responses to CLF's request for party status. It does not satisfy the requirements of 14(B)(2). Therefore, VEC's request for party status is denied under all Criteria.

E. CLF'S REQUEST FOR STAY

CLF now has party status under Criteria l(E) and 8(A). Consequently, the Board will consider its request for stay. CLF argues that the Board should grant a stay because "the project clearly violates Act 250, and Board rule and precedent."

As provided by EBR 42:

> In deciding whether to grant or deny a stay, the board may consider the hardship to parties, the impact, if any, on the values sought to be protected by Act 250, and any effect upon public health, safety or general welfare. The board may issue a stay containing such terms and conditions, including the filing of a bond or other security, as it deems just.

Id. The Board has broad discretion whether or not to grant a stay. The Board is not convinced that if the Project is not stayed that:

(1) CLF will suffer hardship;

(2) the values sought to be protected by Act 250 will suffer injury; or

(3) that the public health, safety or general welfare will suffer negative effect.

As noted earlier, the Application does not request additional water withdrawal. Thus, the Board cannot conclude without further evidence that the Project, in and of itself, will have any effect on the natural resources associated with Mendon Brook or the water supply of the City of Rutland. Further, the Board believes that if the snowmaking activity included within the Project occurs throughout the 1994-1995 ski season and the Permit Amendment is subsequently reversed, the values sought to be protected by Act 250 will not suffer any permanent harm. Finally, the Board is not willing to conclude without further evidence that the Project, in and of itself, will result in any negative effects to the public health, safety and welfare. Therefore, CLF's request for stay is denied.

F. CLF'S REQUEST FOR REMAND

The Board has broad discretion whether or not to remand a matter to a district commission upon a reversal of a district commission's denial of party status. The Board has stated:

> The Board further interprets Rule 40 to allow the Board, if it finds that a person denied party status by a district commission on a particular criterion should in fact be granted such status, to consider directly the person's testimony and evidence regarding the criterion at issue, without remanding the matter to the district commission.

Re: Maple Tree Place Associates, #4C0775-EB at 13, Memorandum of Decision, (December 22, 1988) (emphasis added).

In the interests of administrative economy and expediting the processing of the Application, CLF's request for remand is denied.

V. ORDER

The Board hereby orders:

(1) Pico's Motion to Dismiss is denied;

(2) CLF is granted party status under Criteria l(E) and 8(A) and denied party status under Criteria l(C), l(F) and 9(K);

(3) OSP and VSAA are granted party status under Criteria l(E) and 8(A) and denied party status under all other criteria;

(4) VEC is denied party status under all criteria;

(5) CLF's request for stay is denied;

(6) The Board will hold a de Novo hearing on compliance of the Application with Criteria l(E) and 8(A); and

(7) Paragraph 4, Section IV of Chair Gibb's November 7, 1994 Prehearing Conference Report and Order, as amended by Acting Chair Gibb's February 7, 1995 summary, is amended to provide:

> 4. The Board will hold a second prehearing conference in this matter on Tuesday, **April 25, 1995 at 9:30 a.m. at the Environmental Board Conference Room, (Fourth Floor), Montpelier, Vermont.**

Dated at Montpelier! Vermont this 2nd day of March, 1995.

ENVIRONMENTAL BOARD

Arthur Gibb, Acting Chair
Rebecca Day
John T. Ewing
Samuel Lloyd
Robert Page
Steve E. Wright

Dissenting: William Martinez*

* Board member Martinez dissents, in part, from the majority opinion. Contrary to the majority's conclusion in the Material Interest portion of this decision, Mr. Martinez believes that CLF has not adequately demonstrated that it can materially assist the Board under Criteria l(E) and 8(A). Therefore, he would deny CLF party status under all Criteria and as a result, dismiss the Appeal.

GEHG:vl

a:picomod(G4)