

*Alston*

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

RE: Okemo Mountain, Inc.  
Application #2S0351-12A-EB

MEMORANDUM OF DECISION

This memorandum, dated July 23, 1992, pertains to the Applicant's Motion to Alter dated April 23, 1992. In that motion the Applicant seeks to delete what it contends is an unnecessary permit condition and to have the Board modify several of its Findings of Fact and Conclusions of Law. The Conservation Law Foundation and the Connecticut River Watershed Council have filed responses to the Applicant's motion. The Board has considered the parties' submissions and, as is explained in detail below, grants in part and denies in part the Applicant's motion. A revised permit and Findings of Fact, Conclusions of Law, and Order accompany this memorandum.

I. ISSUES

1. The Applicant contends the evidence shows that the February median flow of the Black River is 0.78 csm, not 8.0 csm, and that Condition #1 and all references to the February median flow should be changed accordingly. The Board agrees and the requested changes have been made.
2. The Applicant requests that the Board delete, in its entirety, Condition #2, which provides that the Applicant must formulate a habitat enhancement program. The Applicant contends that its willingness to implement a habitat enhancement program was predicated on the Board's acceptance of the Step-Down Proposal, which did not occur. Additionally, the Applicant contends that such a program is unnecessary in light of the Board's adoption of the February median flow rate as the minimum flow rate.

The Board declines to delete Condition #2. The evidence shows that even with a minimum flow rate of 0.78 csm there will be a **considerable loss of** spawning, incubation and juvenile habitat. Thus, the Board feels that it is appropriate to require the Applicant to formulate a habitat enhancement program,

3. The Board substantially adopts the Applicant's Proposed Finding of Fact #37.
4. Finding of Fact #38 has been revised to state that the 8.1 percent and 6.1 **percent losses for a spawning and** incubation habitat and juvenile habitat are, respectively, maximum losses and to reflect that those

7/23/92  
471 M-4.

losses decrease as one moves downstream from the withdrawal point. Insofar as losses for spawning and incubation habitat will exceed 5 percent at two other flow rates, the balance of the Applicant's proposed finding is not accepted.

5. Finding of Fact #41 is revised to delete the characterization of the February median flow as a "low" flow rate.
6. Finding of Fact #42 is revised as requested. The Board does not, however, consider this revision to significantly affect the basis for its decision.
7. Finding of Fact #48 is revised to reference the fact that the Applicant proposed the habitat enhancement program in connection with its Step-Down Proposal. However, as explained in Issue #2, above, the Board declines to delete Condition #2, and thus the Board declines to adopt the balance of the Applicant's proposed Finding of Fact #48 and its proposed Finding of Fact #49.
8. The Board declines to adopt the Applicant's proposed Finding of Fact #51. All of the facts contained therein are contained in the Board's decision and do not warrant repetition.
9. The Board has revised all of the references in its Conclusions of Law to the 6.1 and 8.1 habitat loss percentages as being maximum losses. The Board still believes, however, that even though these percentages are maximum losses that in this case use of the February median flow standard is justified.
10. The Board has revised its Conclusions of Law concerning Criterion 8(A) to discuss the issue of burden of proof. As stated in the revised Conclusions of Law, the Board holds that the project's opponents met their burden of proof on Criterion 8(A).
11. The Board has also revised its Conclusions of Law concerning the subcriteria to Criterion 8(A) to address the issue of burden of proof with respect to those subcriteria.

The Board disagrees with the Applicant's contention that the opponents did not meet their burden of proof on subcriteria (i) and (ii) of Criterion 8(A). In reaching

this conclusion the Board does believe that the Applicant's extensive snowmaking system and successful operation in recent years is of importance. The Board understands why the Applicant feels that the Board's partial reliance on these facts amount to penalization of the Applicant for its successful management. That, however, is not the Board's intent.

Rather, the Board believes that in this case the issue of additional snowmaking capacity is, in terms of the balancing test required under subcriterion (i), a matter of diminishing returns. At one extreme the initial creation of snowmaking capacity is probably of **significant** public benefit, and may well outweigh the negative impact it creates, because without any snowmaking it is unlikely that a ski area can be successful. As a general proposition, it is to the public's benefit for ski areas to be successful.

On the other extreme, the ability of a ski area that already has considerable snowmaking capacity to make snow on all of its trails on a 24-hour basis for every day of the ski season may produce little extra benefit to the **public and** may entail considerable adverse impact to the public values protected by subcriterion (i).

The Board cautions that by necessity the application of the balancing test called for in subcriterion (i) to cases involving snowmaking proposals must turn on the specific facts of each case. Moreover, in no way is the Board suggesting that the Applicant's Step-Down Proposal represents the extreme situation of little extra public benefit outweighed by large adverse impacts.

It is understood that despite having snowmaking pipes along 90 percent of its trails, the Applicant is not necessarily able to provide, simultaneous coverage on 90 percent of its **skiable** terrain. --It is also understood that under its Step-Down Proposal, the Applicant would gain flexibility in its snowmaking operations, particularly in being able to recover from thaws in a more rapid and comprehensive fashion than it currently is able to do. The fact remains, however, that the Applicant does have a relatively large snowmaking capacity and that for a variety of reasons, including its snowmaking capacity, it has been successful in its operations in recent years. Thus, even with the current requirement of maintaining a minimum flow of **1.0** csm, the

Applicant has been able to generate the benefits to the public that arise from the successful operation of a ski area, and there was **little** evidence of what further benefit there would be to the public of having the additional snowmaking capacity represented in the **Step-Down Proposal**. When those facts are balanced against the Step-Down Proposal's demonstrated impact on the Black River, with the attendant negative impact on the public values protected by subcriterion (i), the Board concludes that the opponents have met their burden of proof and that a negative conclusion under subcriterion (i) is warranted.

In light of this, the Board reaffirms its conclusion under subcriterion (ii) that imposing a minimum flow rate of 0.78 csm, which will allow the Applicant to withdraw additional water, is a reasonable means of lessening the habitat loss.

The Board rejects the Applicant's assertions concerning the Board's Conclusions of Law under subcriterion (iii). As was stated by the Vermont Supreme Court in In re Denio, \_\_\_ Vt. \_\_\_, 3 Vt. Law Week 85 (1992), in **determining whether** a party has met his burden of proof in an Act 250 proceeding the Board may consider all of the evidence, regardless of which party introduced it. Id. at 86-87. In this case, the Board is persuaded that there may be reasonably acceptable alternative **water** storage sites owned or controlled by the Applicant.<sup>1</sup>

12. The Board declines to modify its Conclusions of Law under Criterion 9(K). The Board believes that there was sufficient evidence in the record to support the proposition that a decrease in spawning, incubation and juvenile habitat for brown trout will lead to a decrease in the population of **brown trout** in the Black River.

---

<sup>1</sup>Board member Gibb dissents with respect to this conclusion.

Okemo Mountain, Inc.  
Application #2S0351-12A-EB  
Memorandum of Decision  
Page 5

II. ORDER

For the foregoing reasons, the Board grants in part and denies in part the **Applicant's** Motion to Alter.

Dated at Montpelier, Vermont this 23rd day of July, 1992.

ENVIRONMENTAL BOARD

Charles F. Storrow  
Charles F. Storrow. Chair  
Lixi Fortna  
Arthur Gibb  
Samuel Lloyd  
Anthony Thompson  
Lawrence Bruce  
Robert Opel

C:\pah\ebtext\mdokemo.12