

**VERMONT ENVIRONMENTAL BOARD**  
**10 V.S.A. Ch. 151**

Re: *Okemo Limited Liability Company, et al.* Land Use Permit #2S0351-24B-EB  
Docket #843

**Memorandum of Decision**

This proceeding involves an appeal from a decision by the District 2 Environmental Commission (Commission) denying party status to Mt. Holly Mountain Watch (MHMW) as to several criteria listed in 10 V.S.A. §6086(a).

**I. History**

On January 8, 2004, the Commission issued Land Use Permit #2S0351-24B (Permit) and accompanying Findings of Fact, Conclusions of Law, and Order (Decision) to Okemo Limited Liability Company (Okemo) and Ludlow Housing Associates and Breed Properties II Limited Partnership. The Permit authorizes the expansion of an existing Okemo snowmaking pond and dam in Ludlow, Vermont (Project).

On January 27, 2004, MHMW filed an appeal with the Environmental Board (Board) from the Permit and Decision, alleging that the Commission erred in denying it party status under Environmental Board Rules (EBR) 14(B)(1) and 14(B)(2) as to several criteria.

On March 12, 2004, Board Chair Patricia Moulton Powden issued a Prehearing Order.

The Board deliberated on this matter on April 21, 2004.

**II. Issue**

Is MHMW entitled to EBR 14 party status under any or all of the following statutory sections: 10 V.S.A. §§6086(a)(1), (1)(A), (1)(D), (1)(E), (2), (3), (7), (9)(A), and (9)(K)?

### **III. Discussion**

#### **A. Filings and the framework of this case**

At the Prehearing Conference, MHMW filed a petition for party status under former EBR 14(B)(1) and (B)(2) and under present EBR 14(A)(6), which was adopted by the Board on January 12, 2004.

Also at the Prehearing Conference, Okemo filed a request that MHMW's party status petition be denied and this appeal be dismissed. Okemo believes that, as this matter is heard *de novo*, the party status rules adopted on January 12, 2004 apply and therefore the Board need only determine whether MHMW has EBR 14(A)(6) party status, which its motion addresses.

Both parties have requested that the Board decide, as a preliminary matter, which party status rules apply to this proceeding, but neither believes that briefing on this issue is necessary. Should the Board decide the former rules apply, however, Okemo requests the opportunity to address MHMW's petition for EBR 14(B)(2) party status before a final determination on that petition is rendered by the Board. See, *Prehearing Order* at 3.

#### **B. The allegations in the MHMW petition**

In party status petition matters, the Board will accept the allegations in a petition as true, unless the person opposing such a petition seeks a hearing to contest their veracity. *Re: Bradford B. Moore*, #5L1423-EB, Memorandum of Decision at 2 (Apr. 27, 2004), citing *McLean Enterprise Corporation*, #2S1147-1-EB, Memorandum of Decision at 6 (Sep 19, 2003). For purposes of this decision, therefore, the Board accepts as true the allegations in MHMW's petition.

MHMW seeks party status under the criteria listed 10 V.S.A. §§6086(a)(1), (1)(A), (1)(D), (1)(E), (2), (3), (7), (9)(A), and (9)(K). In support of its petition, MHMW alleges the following:

- a) MHMW is an organization of approximately thirty Mount Holly Town residents, taxpayers and some of their supporters.
- b) The members of MHMW are interested in environmental issues that may affect their welfare and quality of life in Vermont. The organization is over five years old.
- c) Many of the MHMW members fish and recreate in and on the Black River. They are interested in any degradation of the Black River which is used by them for swimming, fishing and enjoyment of the natural environment.

- d) Mount Holly school children attend the Black River High School in Ludlow and some of those children are from MHMW families. The tax impacts of the Ludlow high school are felt by MHMW families who are paying school taxes for the necessary educational services.
- e) MHMW families and family members shop in, and use services based in the Town of Ludlow. MHMW members drive in Ludlow and are impacted by traffic conditions.
- f) Criterion 1 states that the project in the permit will not result in undue water or air pollution. The expanded pond will increase the risk of a breach or failure, which will contaminate the Black River and its shores with sediment, oils and other matter that would be swept up in the flow of waters. The increased risk is unnecessary as sufficient waters are already available to Okemo.
- g) The increase in waste disposal loads and sewerage with the development made possible by this new storage pond's additional waters has never been subject to review in this permit application.
- h) 1(A) Headwaters The project impacts headwaters of the Black River.
- i) 1(B) Waste disposal The project, if carried out, will greatly increase the capacity of the Ludlow Waste Water Treatment Facility and its impact on the Black River as well as the solid waste generated in Ludlow; also, water diverted to the pond will decrease flows in the River, which will impact on the WWTF's ability to operate efficiently and will impact on the amount of water required for fish habitat.
- j) Criterion 1 (C) Water Conservation The unnecessary taking of water by this project will endanger minimum flows of the Black River as required in Act 250 permits and ANR rules. The increased enforcement of these requirements with proper supervision will be impractical.
- k) Criterion 1(D) Floodways The development within the Floodways fringe may significantly increase the peak discharge if the storage pond is breached or leaks waters to the Black River downstream and endanger the health, safety, or welfare of the public or riparian owners during flooding.
- l) Criterion 1(E) Streams The project will endanger fish habitat in the streams, because of the diversion of water into the pond.
- m) Criterion 1(F) Shorelines The project endangers the shoreline below the proposed storage pond because of possible breach or leakage of the greater amount of water to be held by the expanded pond. The project will eliminate vegetation that will screen the development from the waters.

- n) Criterion 1(G) Wetlands The project will endanger the wetlands surrounding the Black River in violation of the Water Resources Board Rules.
- o) Criteria (2) and (3) Water Supply The project will cause an unreasonable burden on the flows of the Black River.
- p) Criterion (4) Reduction of land capability to hold water The project reduces this capacity in the event of breach.
- q) Criterion (5) Traffic The further development that will result from this project will cause increased unreasonable congestion on the highways and other transportation modes in the area.
- r) Criterion (7) Burden on local municipal government The increased development caused by the addition of condominium units that will use the stored waters for drinking and bathing as well as the added snowmaking; lowering the flows to the Black River will affect the costs of operating the WWTF.
- s) Criterion (8) Aesthetics The project replaces a natural area with an unobstructed view of the proposed new pond.
- t) Criterion 8(A) Wildlife Habitat The decreased flows into the Black River that will result from this project will imperil fish habitat and other invertebrate species.
- u) Criterion 9(A) Growth The growth in population that would be possible and the rate of growth that would result if the development was approved would significantly affect existing or potential financial capacity of the town to accommodate such growth.
- v) Criterion 9(H) Scattered development The project will allow development which is not physically contiguous to an existing settlement that existed when the initial phases of the development started.
- w) Criterion 9(K) Development affecting public investments The project will allow development adjacent to public parks, hiking trails, forest and game lands that will materially interfere with the public's use or enjoyment of or, access to the lands.

*MHMW petitions, January 26, 2004 and March 9, 2004.*

C. *Which party status rules apply?*

The Commission's decision, issued on January 8, 2004, was based on the Commission's evaluation of MHMW's party status request under former EBR 14(B)(1) and (B)(2).

On January 12, 2004, the Board adopted new rules, which repeal former EBR 14(B)(1) and (B)(2) and replace those rules with a new 14(A)(6) category and with a category of Non-Party Participant (EBR 14(E)).<sup>1</sup>

A preliminary issue in this case is whether the old rules or the new rules should apply to MHMW's party status petition pending before the Board. Okemo contends that the new rules apply; MHMW argues that the rules in place at the time of Okemo's application should govern.

General case law is that "the law which is in effect on the date a proceeding before the Board is commenced is the law of the case for purposes of Act 250 proceedings." *Re: Swedish Ski Club of Vermont Land Trust*, Declaratory Ruling #411, Findings of Fact, Conclusions of Law, and Order at 7 (Jan. 16, 2003) (citations omitted). This is consistent with 1 V.S.A. §213, which states, "Acts of the general assembly, except acts relating to ... amendments of process or pleadings, shall not affect a suit begun or pending at the time of their passage." If we apply this language to the Environmental Board and the EBRs, then it can be argued that the change in the party status rules that occurred on January 12 should have no effect on MHMW's rights to have its party status application judged on the rules that were in effect at the time it initially sought party status, in this case, former EBRs 14(B)(1) and (B)(2).

The Board has applied an exception to 1 V.S.A. §213; the Board has in the past applied changes in the law which occur during pendency of a case where the change benefits the applicant or has the effect of making the application of Act 250 to a particular applicant or project less onerous or restrictive. Thus, in *Re: Swedish Ski Club*, the Board let the landowner take advantage of a change in the Board rules which allowed the landowner to "undo" jurisdiction over a subdivision. Likewise, the Board has consistently held that, at an applicant's request, Town Plan amendments which occur after the application date and which favor an applicant may govern the application. *Re: Fred and Laura Viens*, #5W1410-EB, Memorandum of Decision at 4 - 5 (Sept. 3, 2003); *Juster Development Corp.*, #1R0048-8-EB, Findings of Fact, Conclusions of Law, and Order at 33 (Dec. 19, 1988).

The Board notes, however, that the exception applied to 1 V.S.A. §213 has been narrowly drawn: only when there is a change to an existing standard that the landowner would otherwise have to satisfy (such as an old Town Plan) can the landowner ask that a new standard be applied. Here, there is a change in law which

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<sup>1</sup> MHMW is not seeking EBR 14(E) status.

may benefit Okemo (the landowner), but, at the same time, it harms the person, MHMW, who is seeking party status.

On the other hand, while the Commission decided the question under the old rules, an appeal has now been taken, and Board precedent states that the Board considers appeals from the denial of party status *de novo*. *Re: Mount Anthony Union High School District #14*, #8B0552-EB(Interlocutory), Memorandum of Decision at 5 (Jan. 31, 2002); *Re: Springfield Hospital*, #2S0776-2-EB (Aug. 14, 1997), *sup. ct. appeal dismissed*, *In re Springfield Hospital*, No. 97-369 (Vt. S. Ct. Oct. 30, 1997); *Re: Gary Savoie d/b/a WLPL and Eleanor Bemis*, #2W0991-EB (Oct. 11, 1995).

In a *de novo* hearing, the Board hears the matter *as if no prior proceedings had taken place*. *In re Woodford Packers, Inc.*, 2003 VT 60 ¶6 (Jun. 26, 2003); *In re Killington, Ltd.* 159 Vt. 206, 214 (1992); *In re Green Peak Estates*, 154 Vt. 363, 372 (1990); *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 518 (1975); *In re Preseault*, 130 Vt. 343, 348 (1972) (a *de novo* proceeding is one in which all the evidence is heard anew, and the probative effect thereof determined). Thus, since the Board is hearing the case anew, and the Board must operate under the legal fiction that no Commission proceedings have ever occurred, the party status rules in effect at the time that the appeal is taken – in this case, new EBR 14(A)(6) – must govern.

*D. EBR 14(A)(6) party status provisions*

EBR 14(A)(6), as adopted on January 12, 2004, states:

Party status. In proceedings before the board and district commissions, the following persons shall be entitled to party status:

- (6) Any person who demonstrates an interest under any of the criteria listed at 10 V.S.A. Section 6086(a) which may be directly affected by the outcome of the proceeding.

EBR 14(A)(6) has been in existence for only four months; it is therefore not surprising that there have been no Board decision interpreting the new rule.

*E. The merits of MHMW's party status petition*

This is an application to expand an existing snowmaking and fire pond and dam. The existing pond is eight acres, a maximum of 50 feet deep and has the capacity to hold 73 million gallons of water. The proposed pond would be 14.5 acres, with a maximum depth of 64 feet deep, and a 154.5 million gallon capacity. Commission Finding of Fact 10 states that Okemo is “not seeking to alter permit conditions regarding pumping rates, minimum flow and reporting requirements” in its existing Act 250 permits.

The petition filed by MHMW notes its membership and states that “The members of MHMW are interested in environmental issues that may affect their welfare and quality of life in Vermont.” Specifically, the petition contends that because MHMW members fish and recreate in and on the Black River, they are “interested in any degradation of the Black River which is used by them for swimming, fishing and enjoyment of the natural environment.” The petition also notes that children of MHMW families attend the Black River High School in Ludlow and that MHMW families and family members shop in, and use services based in the Town of Ludlow. Lastly, the petition notes a series of Act 250 criteria which MHMW believes will be impacted by the Project.

MHMW’s petition does not establish that its interests are, in any respect, different from those which any member of the general public might assert, a requirement for party status under former EBR 14(B)(1), see, *Re: Village of Ludlow*, #2S0839-2-EB, Memorandum of Decision at 3 (May 28, 2003); *Re: Alpine Pipeline Company*, Declaratory Ruling #415, Memorandum of Decision at 4 (Jan. 3, 2003); *Re: Mount Anthony Union High School District #14*, #8B0552-EB(Interlocutory), Memorandum of Decision at 7 (Jan. 31, 2002), that is equally applicable under EBR 14(A)(6).

Nor does the petition indicate how MHMW’s interests will be *directly* affected by the proposed expansion of the pond at issue here, as EBR 14(A)(6) requires. For example, MHMW contends that the expansion of the pond will negatively affect Criteria 1(A), (B), (C), (E), 2, 3, 7, and 8(A), even though the Project, as proposed, will not increase the amount of water drawn from the Black River, either in terms of pumping rates or minimum flow requirements. Thus, many of MHMW’s claimed interests bear no relationship or connection to the Project, a basic requirement for any claim of party status. *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, Memorandum of Decision at 3, (Oct. 8, 2003); *Re: Village of Ludlow*, *supra*, at 3; *Re: Alpine Pipeline Company*, *supra*, at 4; *Re: Mount Anthony Union High School District*, *supra*, at 7.

As to MHMW’s claimed interests under Criteria 1, 1(F) and (4), the potential of a breach of the dam is only speculative. See, *Re: Chittenden Solid Waste District*, #EJ99-0197-WFP, Memorandum of Decision at 7 (Apr. 29, 2003) (mere speculation about the impact of some generalized grievance is not a sufficient basis to find standing), citing *Re: CCCH Stormwater Discharge Permits*, WQ-02-11, Memorandum of Decision (Vt. WRB, Mar. 21, 2003), and *Re: Town of Cavendish v. Vermont Pub. Power Supply Auth.*, 141 Vt. 144, 147 (1982). There is nothing that convinces the Board that the expansion of the snowmaking pond will have impacts on those criteria, nor, again, is it apparent that MHMW’s interests noted under the particular criteria are distinguishable from the interests that the general public may have.

In short, the allegations presented by MHMW’s party status petition, even if accepted on their face, fall short of meeting the requirements for party status under EBR 14(A)(6). The Board denies MHMW’s petition.

*F. Evaluating MHMW's party status petition under the former EBRs*

Former EBR 14(B)(1) stated:

Parties by permission. The board or a district commission may allow as parties to a proceeding individuals or groups, including adjoining property owners, not otherwise accorded party status by statute upon petition if it finds that the petitioner has adequately demonstrated:

- (1) That a proposed development or subdivision may affect the petitioner's interest under any of the provisions of § 6086(a)...

To obtain party status as a 14(B)(1) party, the petitioner was required to demonstrate a connection between project and petitioner's specified interest and that the project might affect such interest; the petition was also required to articulate how the petitioner's interest differed from that of the general public. *Re: John J. Flynn Estate and Keystone Development Corp.*, *supra*; *Re: Village of Ludlow*, *supra*; *Re: Alpine Pipeline Company*, *supra*; *Mount Anthony Union High School District*, *supra*.

Former EBR 14(B)(2) stated:

Parties by permission. The board or a district commission may allow as parties to a proceeding individuals or groups, including adjoining property owners, not otherwise accorded party status by statute upon petition if it finds that the petitioner has adequately demonstrated: ...

- (2) That the petitioner's participation will materially assist the board or commission by providing testimony, cross-examining witnesses, or offering argument or other evidence relevant to the provisions of § 6086(a).

To obtain party status as a 14(B)(2) party, the petitioner was required to demonstrate that it could materially assist the Commission or the Board in its understanding of the case before it. Mere assertions of an interest did not satisfy Rule 14(B)(2); rather, "party status under EBR 14(B)(2) is sparingly granted, usually to a person with specific expertise who can assist Commission or Board in addressing 'a particularly complex, novel, or unfamiliar project.'" *The Van Sicklen Limited Partnership*, #4C1013R-EB, Memorandum of Decision at 9 (Jun. 8, 2001); *Stonybrook Condominium Owners Association*, Declaratory Ruling 385, Memorandum of Decision at 3 (May 19, 2000), quoting *Springfield Hospital*,

#2S0776-2-EB, Memorandum of Decision at 7, (Aug. 14, 1997), *appeal dismissed, In re Springfield Hospital*, No. 97-369 (Vt. S. Ct. Oct. 30, 1997), quoting *Re: Spring Brook Farm Foundation, Inc.*, #2S0985-EB, Memorandum of Decision at 3 (Oct. 3, 1995); and see, *Maple Tree Place Associates*, #4C0775-EB (Interlocutory Appeal) (Oct. 11, 1996), aff'd, *In re Maple Tree Place Associates*, No. 96-559 (Vt. S. Ct. Oct. 10, 1997) (Entry Order).

Thus, the Board has granted materially assisting party status when issues were complex or novel, and when the petitioner demonstrated expertise to assist Board in understanding issues. *Mt. Mansfield Company, Inc. d/b/a Stowe Mountain Resort*, #5L1125-10B-EB and #5L1125-10A(Revised)-EB, Memorandum of Decision at 2 (Nov. 15, 2001); *The Van Sicklen Limited Partnership*, *supra*, at 9.

Even if the Board were to decide that the pre-January 12, 2004 party status rules applied to this case, the Board would conclude that MHMW's petition does not provide a basis for a grant of party status under any of the criteria at issue in this appeal. No interest is asserted by MHMW that, in this instance, is different from an interest that would be asserted by a member of the general public. Former EBR 14(B)(1). Nor does MHMW present sufficient evidence to establish that the issues in this application are complex or novel, or that it demonstrate expertise to materially assist the Commission in understanding those issues. Former EBR 14(B)(2). Were the present petition to be evaluated under the former party status rules, therefore, the Board would deny it.

#### **IV. Order**

1. MHMW's petition, seeking party status under 10 V.S.A. §§6086(a)(1), (1)(A), (1)(D), (1)(E), (2), (3), (7), (9)(A), and (9)(K), is denied.
2. Jurisdiction is returned to the District 2 Environmental Commission.

Dated at Montpelier, Vermont this 10<sup>th</sup> day of May 2004.

ENVIRONMENTAL BOARD

/s/Pat Moulton Powden \_\_\_\_\_  
Patricia Moulton Powden, Chair  
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