

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

Re: *Village of Ludlow*

Land Use Permit Amendment  
Application #2S0839-2-EB

**MEMORANDUM OF DECISION**

Mount Holly Mountain Watch (MHMW) appeals from the District 2 Environmental Commission's decision denying MHMW party status on Criteria 1(water pollution) and 1(B)(waste disposal), and from the Permit and Decision (defined below) with respect to Criteria 1(air pollution), 1(B)(waste disposal), 1(E)(streams), 8(A)(necessary wildlife habitat), and 9(A)(impacts of growth). As set forth below, the Board denies MHMW party status on all criteria on appeal except Criterion 1(B), and dismisses the rest of the appeal.

**I. PROCEDURAL SUMMARY**

On October 14, 2002, the Village of Ludlow filed Land Use Permit Amendment Application # 2S0839-2 with the District #2 Environmental Commission (Commission) seeking authorization to construct improvements to the Ludlow Wastewater Treatment Facility, including an increase in capacity from 700,000 gallons per day to 1,050,000 gallons per day with an uncommitted reserve capacity increase from 126,239 gallons per day to 476,239 gallons per day, and construction of a 1.2-mile extension of the Ludlow Wastewater Treatment Facility's Waste Management Zone in the Black River, and the construction of a building addition for storage, on 33.3 acres of involved land in Ludlow, Vermont (Project).

The Commission issued Land Use Permit #2S0839-2 (Permit) and the supporting Findings of Fact, Conclusions of Law, and Order (Decision) on February 7, 2003, and a Memorandum of Decision on Motion to Alter (MOD) on March 13, 2003.

On April 3, 2003, Mount Holly Mountain Watch filed an appeal with the Environmental Board from the Permit, the Decision, and the MOD, alleging that the Commission erred in its conclusions with respect to party status under Environmental Board Rules (EBR) 14(B)(1) and 14(B)(2), and on the merits with respect to Criteria 1(air pollution), 1(B)(waste disposal), 1(E)(streams), 8(A)(necessary wildlife habitat), and 9(A)(impacts of growth). The appeal was filed pursuant to 10 V.S.A. § 6089(a) and EBR 6 and 40.

On April 28, 2003, Board Chair Patricia Moulton Powden convened a Prehearing Conference with the following participants: MHMW, by Peter Berg; and the Village of Ludlow, by J. Christopher Callahan, Esq., with Frank Heald. MHMW filed its petition for party status on the same date.

On April 29, 2003, a Prehearing Conference Report and Order was issued,

setting the matter for hearing and setting preliminary filing deadlines, among other things.

The Board deliberated on May 21, 2003 on preliminary issues and motions.

## II. DISCUSSION

MHMW petitions for party status on several criteria, and the Village of Ludlow moves to dismiss the appeal for lack of standing. MHMW also objects to the participation of Board member Christopher Roy because Mr. Roy's law firm has represented the Black River school district. Because Board member Roy has recused himself from participating on this case, these objections are moot. As set forth below, the Board grants MHMW's petition for party status under EBR 14(B)(1) with respect to Criterion 1(B), and denies the petition in all other respects, and grants the Motion to Dismiss with respect to all but Criterion 1(B).

### A. MHMW's Petition for Party Status

MHMW seeks party status on Criteria 1(air pollution), 1(B)(waste disposal), 1(E)(streams), 8(A)(necessary wildlife habitat), and 9(A)(impacts of growth).

Petitions for party status are heard *de novo*, which means that the Board hears the petition anew, without reference to what happened at the Commission. *Re: Pico Peak Ski Resort, Inc.*, #1R0265-12-EB (March 2, 1995); *Re: St. Albans Group and Wal\*Mart Stores*, #6F0471-EB, Findings of Fact, Conclusions of Law, and Order at 30 (Altered)(June 27, 1995), *aff'd, In re Wal Mart Stores, Inc.*, 702 A.2d 397 (1997); *Re: Gary Savoie d/b/a WLPL and Eleanor Bemis*, #2W0991-EB, Findings of Fact, Conclusions of Law, and Order (Oct. 11, 1995)(citing *Re: Swain Development Corp.*, #3W0445-2-EB, Memorandum of Decision at 4-7 (July 31, 1989)). However, the test the Board applies to determine party status becomes more stringent if the petitioner did not request party status below, as discussed herein.

At the Commission, MHMW requested and was denied party status on Criterion 1(B)(waste disposal), but did not request party status on Criteria 1(air pollution), 1(E)(streams), 8(A)(necessary wildlife habitat), and 9(A)(impacts of growth).<sup>1</sup> The fact that party status was not requested before the Commission on

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MHMW also sought party status on Criterion 1(water pollution) before the Commission, but does not raise that criterion on appeal. The Commission denied MHMW's requests for party status on both Criterion 1(water pollution) and 1(B)(waste

these criteria does not preclude MHMW from requesting party status before the Board, but it raises the bar for MHMW to obtain party status. "It is possible for a petitioner to overcome this impediment if he can persuade the Board that party status on the criterion should be granted and that a substantial injustice or inequity will occur if the appeal on the criterion is disallowed." *Re: Okemo Mountain, Inc.*, #2S0351-30-EB (2<sup>nd</sup> Revision), #2S0351-31-EB, and #2S0351-25R-EB, Memorandum of Decision at 10 (May 22, 2001)(citing *Re: Old Vermonter Wood Products and Richard Atwood*, #5W1305-EB, Memorandum of Decision at 2 (Feb. 3, 1999); *Re: Okemo Mountain, Inc.*, #2S0351-10B-EB, Memorandum of Decision at 3 (Jan. 15, 1993); *Savoie*, Findings, Conclusions and Order at 6-7 (Oct. 11, 1995)). Therefore, the threshold question in these cases is whether substantial injustice or inequity will occur if the appeal is dismissed on these criteria.

MHMW has not demonstrated that substantial injustice or inequity will occur with dismissal of these parts of this appeal. This is not a case in which extenuating circumstances prevented a party from seeking party status before the district commission on the criteria on appeal, and MHMW does not claim any such injustice or inequity. While MHMW does allege that the Commission's denial of party status was unfair, any such injustice would be remedied by MHMW's ability to appeal the Commission's determination *de novo*. The petition and Notice of Appeal are silent on why MHMW failed to request party status on Criteria 1 (air pollution), 1(E), 8(A), and 9(A). This is not sufficient to establish substantial injustice. MHMW's petition for party status on these criteria must fail.

MHMW also appeals the Commission's denial of party status on Criterion 1(B)(waste disposal). Criterion 1(B) requires that the Project "meet any applicable health and environmental conservation department regulations regarding the disposal of wastes, and will not involve the injection of waste materials or any harmful or toxic substances into ground water or wells." 10 V.S.A. § 6086(a)(1)(B).

**1. *EBR 14(B)(1)***

The Board may grant party status under EBR 14(B)(1) to any person who shows that the proposed project may affect that person's interest under any of the Act 250 criteria. EBR 14(B)(1). To make this showing, the petitioner must adequately demonstrate: that the petitioner has a specified interest that may be affected by the proposed project, *Re: Maple Tree Place Associates*, #4C0775-EB (Interlocutory Appeal), Memorandum of Decision and Order at 6 (Oct. 11, 1996), and that the specified interest is different from interests of the general public, *Re: Springfield Hospital*, #2S0776-2-EB, Memorandum of Decision at 5-6 (Aug. 14,

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disposal).

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).

Any entity which seeks party status by permission must adequately demonstrate that its interest may be affected by a development. Thus, such an entity bears a certain burden to convince the Board or district commission that its interest may be affected by a development. This burden is not satisfied by unsupported assertions that vaguely defined interests may be affected. Instead, an entity seeking party status by permission must first establish a connection between the development and certain specified interests. Then, such an entity must show that, due to the demonstrated connection, the specified interests may be affected.

*Maple Tree Place Associates*, Memorandum of Decision and Order at 6.

In its Notice of Appeal, MHMW states that many of its "members fish and recreate in and on the Black River downstream from the Ludlow wastewater treatment facility. They are therefore interested in the degradation of the river and the extension of the Waste Management Zone." (Notice of Appeal, at 3.) MHMW also makes several claims that the Project will degrade water quality in this stretch of the Black River, including the following:

The new UOD [Ultimate Oxygen Demand] and increased capacity extends the waste management zone for the discharge from 4.4 miles to 5.6 miles downstream. This increase is a degradation of the river from its previous condition. Our expert will comment on how the increased UOD may effect the removal and restriction of phosphorous discharge.

(Notice of Appeal at 3.) This is sufficient to establish a link between the Project and specified interests of MHMW's members who fish and recreate in and on the Black River in the affected area. Furthermore, because these MHMW members fish and recreate in and on the affected areas of the Black River, their interests differ from those of the general public. See, e.g., *Re: Okemo Mountain, Inc.*, #2S0351-30-EB (2 Revision), #2S0351-31-EB, and #2S0351-25R-EB, Memorandum of Decision (May 22, 2001)(claim that an organization's members use the affected waters for recreational purposes is sufficient to demonstrate party status under EBR 14(B)(1) under Criterion 1(B)). MHMW's petition shows more than a generalized concern about the Black River, it shows that the group's members' interests in fishing in and recreating on that river stand to be affected by

the Project. *Compare, Re: Mount Anthony Union High School District #14, #8B0552-EB*(Interlocutory), Memorandum of Decision at 5 (Jan. 31, 2002)(group's interests in protecting environment and preventing sprawl not sufficiently different from those of the general public). The Board grants MHMW's petition for EBR 14(B)(1) party status on Criterion 1(B).

## 2. **EBR 14(B)(2)**

A determination that a EBR 14(B)(2) party can materially assist the Board requires more than an assertion that the party can cross-examine witnesses and present experts. The Board considers the following elements. First, that they possess particular expertise with respect to the project; second, that the project is complex and that the issues presented by the project are novel and unfamiliar. *Maple Tree Place Associates*, Memorandum of Decision and Order at 7; *see also, Re: Josiah E. Lupton, Quiet River Campground, #3W0819 (Revised)-EB*, Chair's Preliminary Ruling at 4 (Oct. 3, 2000) and *Re: Northeast Cooperatives and L&S Associates, #2W0434-11-EB*, Memorandum of Decision at 3 (Jan. 29, 1999). Third, the Board also considers whether another party will provide the assistance which a person who seeks EBR 14(B)(2) status may give. *Re: Stonybrook Condominium Owners Association*, Declaratory Ruling #385, Memorandum of Decision at 3 (May 3, 2000) (citing to *Re: Circumferential Highway, State of Vermont, Agency of Transportation and Circumferential Highway District, #4C0718-EB*, Memorandum of Decision and Dismissal Order at 2 (Sept. 25, 1989)).

MHMW claims it will present evidence from a hydrology expert, Lori Barg, from a fishing guide, David Deen, and from MHMW users of the Black River. (Notice of Appeal at 3.) With respect to the expert testimony, MHMW claims it could show that the Project would increase the Ultimate Oxygen Demand from 650 pounds per day to 860 pounds per day for the period from June 1 through September 1, and that this will "unjustifiably degrade the Black River in violation of the 2000 Vermont Water Quality Standards, including Vermont's antidegradation policy." (Notice of Appeal at 2.) MHMW also asserts that the proposed extension of the waste management zone from 4.4 miles to 5.6 miles downstream will degrade the river from its previous condition, and that their expert will testify on how an increase in UOD can impact phosphorous levels in the water, (Notice of Appeal at 3), and on relationships between phosphorous and E-coli and Biochemical Oxygen Demand, Total Suspended Solids, chlorine and settlement solids being discharged into the Black River (Notice of Appeal at 4). These are the sorts of issues the Board has dealt with in the past under Criterion 1(B).

"[P]arty status under EBR 14(B)(2) is sparingly granted, usually to a person with specific expertise who can assist the District Commission or Board in addressing 'a particularly complex, novel, or unfamiliar project.'" *Re: Stonybrook Condominium Owners Ass'n*, Declaratory Ruling 385, Memorandum of Decision at 4 (May 19, 2000)(citing *Re: Springfield Hospital*, # 2S0776-2-EB, Memorandum of Decision at 7, (Aug. 14, 1997), quoting *Re: Spring Brook Farm Foundation, Inc.*, # 2S0985-EB, Memorandum of Decision at 3 (Oct. 3, 1995). MHMW has failed to demonstrate that the project in question is particularly complex, novel or unfamiliar such that the assistance of its experts would be needed to assist the Board. Therefore, the petition for 14(B)(2) party status is denied.

### **B. Motion to Dismiss for Lack of Standing**

The Village of Ludlow moves to dismiss this appeal for lack of standing, asserting that MHMW has failed to demonstrate party status under EBR 14(B)(1) or EBR 14(B)(2). Alternatively, the Village of Ludlow requests that the appeal be dismissed on Criteria 1(B), 8(A) and 9(A).

If the Board denies an appellant party status on a criterion, the appeal is dismissed with respect to that criterion. *Savoie*, Findings, Conclusions and Order at 7. Conversely, if the Board grants party status, it "will proceed with substantive review on any criteria concerning which it determines that the appellant qualifies for party status." *Id.*

For the reasons discussed above, the Board grants the Motion to Dismiss with respect to Criteria 1(air pollution), 1(E), 8(A) and 9(A), and denies it with respect to Criterion 1(B).

### **III. ORDER**

1. MHMW's Petition for Party Status is GRANTED with respect to EBR 14(B)(1) on Criterion 1(B), and is DENIED in all other respects.
2. MHMW's Motion to Disqualify is moot.
3. The Village of Ludlow's Motion to Dismiss is GRANTED with respect to Criteria 1(air pollution), 1(E)(streams), 8(A)(necessary wildlife habitat), and 9(A)(impacts of growth), and DENIED with respect to Criterion 1(B).

DATED at Montpelier, Vermont this 28<sup>th</sup> day of May, 2003.

ENVIRONMENTAL BOARD

/s/Patricia Moulton Powden  
Patricia Moulton Powden, Chair

George Holland  
Samuel Lloyd  
Donald Marsh\*  
Patricia Nowak\*\*  
Alice Olenick  
Richard C. Pembroke, Sr.  
Jean Richardson

\* DISSENT of Board Member Donald Marsh:

I would deny MHMW party status under EBR 14(B)(1).

\*\* DISSENT of Board Member Patricia Nowak:

I would deny party status to MHMW on Criterion 1(B). MHMW's interests are not sufficiently different from those of the general public because any member of the general public can fish in or recreate on the Black River.