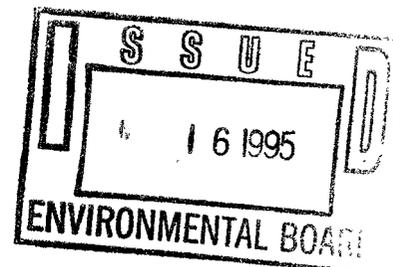


VERMONT ENVIRONMENTAL BOARD  
10 V.S.A. Chapter 151

Re: Putney Paper Company, Inc.  
Land Use Permit #2W0436-7-EB



MEMORANDUM OF DECISION

This ~~decision~~ **pertains** to an appeal of a land use permit which authorizes Putney Paper Company, Inc. to extract earth to be used for certain uses.

On April 26, 1995, the Environmental Board deliberated on all **pending motions** and Environmental Board Rule 16 objections. **The Board's** conclusions are set out below.

I. PROCEDURAL BACKGROUND

On May 19, 1994, Putney Paper Company, Inc. ("**Putney**") filed an **application** for a permit to "**utilize** soil material as daily cover, for an adjacent landfill" ("**Application**"). On September 7, 1994, the District #2 Environmental Commission ("**Commission**") issued a permit authorizing Putney to "extract earth to be used for closure of the adjacent paper sludge landfill" ("**Permit**"). Some confusion resulted from the different terminology employed in the Application and Permit. Julia **Schmitz**, Assistant District #2 Coordinator, in a March 28, 1995 letter to Putney employee Turk Ellis, states:

The District 2 Environmental Commission understood throughout the permit procedure the earth extraction was for closure and daily cover of the adjacent paper sludge landfill. Not including the words "**daily cover**" was an oversight.

The Municipality of Putney, the Putney Planning Commission, the **Windham** Regional Planning Commission and the Agency of Natural Resources were parties by right to the proceedings before the Commission. Environmental Board Rule ("**EBR**") 14(A). Nathaniel Hendricks ("**Hendricks**") had sought party status before the Commission on more than fifteen Criteria but **was** awarded it under Criterion 1(B) only pursuant to **EBR** 14(A)(3).

On October 6, 1995, Hendricks appealed the Permit ("**Appeal**").

On December 12, 1995, Board Chair Arthur **Gibb's** delegate, Board General Counsel George E. H. Gay convened a prehearing conference. At the Conference, Hendricks filed a document in which he alleged, among other things, that the Commission erroneously denied him party status under **Criteria** 1 (Air Pollution), **1A** (Headwaters), **1C** (Water Conservation), **1D** (Floodways), **1E** (Streams), **1F** (Shorelines), **1(G)** (Wetlands), 2 (Water Supply), 4 (Erosion), 5 (Traffic), 7 (Municipal Services), 8

(Aesthetics), 8A (Wildlife Habitat), **9A** (Impact on Growth), **9B** (Primary Agricultural Soils), **9D** and E (Earth Resources and Extractions), **9K** (Public or Quasi-Public Investments) and 10 (Local and Regional Plan) ("Contested Criteria"). This document also included a request for subpoena covering 26 identified witnesses, 14 unidentified witnesses and 25 documents or categories of documents.

On December 29, 1995, Chair Gibb denied the subpoena request and directed the parties to brief Hendricks' party status and the scope of the Appeal. On January 9, 1995, Hendricks filed a memorandum setting forth the reasons he qualifies for party status under Criteria 1, 1(A), (B) and (D)-(F), 3, 4, 8, 8(A), 9(B), (E), (**K**) and 10 and contending that **Putney's** entire sludge dump operation should be at issue in the Appeal. In this memorandum, Hendricks does not provide any support or argument for why the Board should grant him party status under Criteria 1(C) and (G), 2, 5 and 7.

On January 20, 1995, Hendricks filed a Request for Reconsideration of, or Objection to, Prehearing Ruling challenging Chair **Gibb's** subpoena ruling.

On January 30, 1995, Putney filed a response to Hendricks' January 9, 1995 memorandum.

On February 24, 1995, Chair Ewing denied Hendricks' request for reconsideration, and the Board sustained Hendricks' objection concerning the subpoenas directed to **Messers. Ellis, Ledgard, Murray and Dorhman ("Subpoenas")**.  
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On February 27, 1995, Hendricks filed a Motion for Extension of Time.

On February 28, 1995, the Subpoenas were sent to Hendricks for process, and Chair Ewing advised Hendricks: "**Of course, it is your responsibility, not the Board's, to effect legally sufficient service of these documents.**"

On March 1, 1995, Chair Ewing:

1.) granted Hendricks party status under Criterion **1B** (Waste Disposal) and denied him such status under all other

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<sup>1</sup> On February 1, 1995, John T. Ewing became Board Chair and, thereafter, Chair in this Appeal.

Criteria under which he was seeking it; <sup>2</sup>

2.) limited the scope of the appeal to potential impacts of **Putney's** application for an Act 250 permit authorizing the utilization of soil material as daily cover for an adjacent landfill it owns and operates;

3.) determined that the parties could only rely upon evidence which directly relates to the excavation of soil for use as daily cover; and

4.) extended the prefile deadlines but otherwise denied Hendricks' Motion for an Extension of Time.

On March 2, 1995, Hendricks filed a Motion for **Continuance** which Chair Ewing denied on March 6, 1995.

On March 16, 1995, Hendricks filed objections to Chair Ewing's March 1, 1995 and March 6, 1995 rulings.

On March 21, 1995, Putney filed a Motion to Alter Memorandum of Decision dated February 24, 1995 and Withdraw Subpoenas; To Quash Service of Subpoenas and for a Protective Order ("Motion to **Alter**"). On March 29, 1995, Hendricks filed a memorandum in response thereto.

On April 12, 1995, Chair Ewing advised the parties that his March 1, 1995 ruling contained typographical errors and that he had not granted Hendricks party status under Criterion **9(K)**. On April 19, 1995, Hendricks filed an objection to this ruling.

On April 19, 1995, Putney filed a Motion to Strike Evidence and Witnesses submitted by Hendricks ("Motion to Strike").

On April 20, 1995, Hendricks filed a Motion for **Continuance**.

Thus, when the Board deliberated on April 26, 1995, the following motions and/or EBR 16 objections were pending:

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<sup>2</sup> Chair Ewing's ruling notes that Hendricks seeks party **status** under 9(K). However, through a typographical error it does not specifically grant or deny under this Criterion. Rather, it denies Hendricks party status under a series of Criteria which mistakenly excludes 9(K) and, although **Hendricks** never raised it, includes 9(L). The Board does **not** understand how Hendricks can interpret this course of events as a grant to him of party status under 9(K).

1.) objection to Chair Ewing's March 1, 1995 ruling regarding party status, scope of appeal and extension of prefiled **testimony deadlines** (Hendricks);

2.) objection to Chair Ewing's March 6, 1995 ruling regarding continuance of hearing (Hendricks);

3.) motion to alter the Board's February 24, 1995 decision regarding subpoenas (Putney);

4.) objection to Chair Ewing's March 1, 1995 ruling, confirmed in his April 12, 1995 memorandum to parties, regarding Hendricks' party status under Criterion 9(K) (Hendricks);

5.) motion to strike Hendricks' prefiled evidence and witnesses regarding Criterion 9(K) (Putney); and

6.) motion for continuance **of the May 3, 1995** hearing (Hendricks).

## II. CONCLUSIONS

The Board reaches the following conclusions regarding the pending motions and EBR 16 objections.

### A. The Permit

As indicated by Ms. Schmitz, the Permit authorizes Putney to extract earth and utilize it for daily cover and closure of the paper sludge landfill adjacent to the extraction site ("**Project**"). It does not authorize or address daily cover techniques, closure methodologies, capping practices, grading, slope procedures etc. This conclusion is consistent with Ms. **Schmitz'** April 28, 1995 jurisdictional opinion: #2-95.

### B. Party Status

Hendricks argues that he should be granted party **status under each and every one of the Contested Criteria pursuant to EBR 14(A) and/or EBR 14(B)(1)(a).**<sup>3</sup> Putney contends that his party status should be limited to Criterion 1B. The Board agrees with Putney.

**Under EBR 14(A)(3) Hendricks must demonstrate how the Project may have a direct effect upon his property. Under**

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<sup>3</sup> *To the extent Hendricks requests party status under EBR 14(B)(1)(b), his request is denied.*

EBR 14(B)(1)(a), he must demonstrate how the Project may affect his interests. He has met these standards under Criterion 1B. **However**, he has not met either of them under any other Criterion.

Hendricks identifies several potential impacts that Putney's overall operation may have upon his property and/or interests. However, the Board concludes that these impacts cannot possibly result solely from the Project. The Board believes that there is no likelihood that the Project will have any effect upon Hendricks' property or affect any of his other interests under any Criterion except 1B.

C. The Scope of Appeal

The scope of the Appeal is defined by Criterion 1B and the Project. The Board will consider only whether Putney's excavation of earth for daily cover and closure:

- 1.) meets any applicable health and environmental department regulations regarding disposal of wastes; and
- 2.) will not involve the injection of waste materials or any harmful or toxic substances into ground water or wells.

The scope of the evidence in the Appeal was correctly set forth by Chair Ewing on March 1, 1995. The parties may only introduce into evidence in the Appeal testimony and documentation which falls directly within the scope of the Appeal.<sup>4</sup>

D. Subpoenas

The Board considered Putney's Motion to Alter in light of the foregoing conclusions. The Board agrees with Putney that the subpoenas must be evaluated in light of the scope of the Appeal and the evidence which may be presented during the appeal.

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<sup>4</sup> We note that this determination appears to broaden the scope of evidence established by Chair Ewing on March 1, 1995 because our ruling includes extraction of earth for closure, and Chair Ewing's did not. However, the key aspect of each determination is that the evidence must relate directly to **Putney's** extraction of earth. Thus, for all practical and material purposes, the two decisions are the same. The scope of the evidence effectively remains that which it was as of March 1, 1995.

The Board has previously ruled that: "[n]o subpoena should issue to secure testimony that is not material. .." Interstate Uniform Services Corp., Declaratory Ruling 147, Memorandum of Decision at 2 (Mar. 5, 1984). This determination extends to the production of documents pursuant to subpoena. It is consistent with Rule 45(c) of the Vermont Rules of Civil Procedure ("V.R.C.P.") (rev. 3/1/95) which indicates that a subpoena is inappropriate if it subjects a person to undue burden.

The Board concludes that it will only issue a subpoena to compel testimony upon a demonstration that the sought after testimony is reasonably likely to be material. Further, the Board concludes that it will only issue a subpoena to compel the production of documents upon a demonstration that the sought after documents are themselves reasonably likely to be material or that there is a significant likelihood that they will lead to the discovery of material evidence. The Board believes that it would be an undue burden to ask a person to respond to a subpoena which does not meet either of these broad tests. This approach to subpoena issuance is consistent with V.R.C.P. 45, EBR 4 and Board precedent.

The documents sought by Hendricks are not, in and of themselves, material to the Appeal. They do not address the earth excavation authorized by the Permit. Furthermore, **there** is no indication that they will lead to the discovery of material evidence.

E. Other Matters

Those pending motions and EBR 16 objections which are not addressed in paragraphs A-D of Section III are summarily disposed of below.

IV. ORDER

1.) Hendricks' March 16, 1995 objections to Chair Ewing's March 1, 1995 rulings are **OVERRULED**.

a.) Hendricks shall have party status under **Criterion 1B** only.

b.) The scope of the Appeal shall be whether the **Project:**

i.) meets any applicable health and environmental department regulations regarding disposal of **wastes**; and

ii.) will not involve the injection of waste materials or any harmful or toxic substances into ground water or wells.

c.) The parties may only introduce into evidence testimony and documentation which falls directly within the scope of the Appeal.

d.) The filing deadlines for prefiled testimony as set forth in Chair Ewing's March 1, 1995 ruling are binding.

2.) Hendricks' March 16, 1995 objection to Chair Ewing's March 6, 1995 denial of his Motion for Continuance is OVERRULED.

3.) Putney's March 21, 1995 Motion to Alter is GRANTED.

a.) Hendricks' January 20, 1995 objection to Chair Gibb's December 29, 1994 Prehearing Ruling is DENIED.

b.) The Subpoenas are withdrawn and of no further force and effect.

c.) As a result of the Board's conclusions in paragraph 3, subparagraph (a) and (b) above, Putney's request that the subpoenas be quashed is moot and not addressed herein.

d.) As a result of the Board's conclusions in paragraph 3, subparagraphs (a)-(c) above, Putney's request for a protective order is moot and not addressed herein.

4.) Hendricks' objection to Chair Ewing's May 1, 1995 ruling regarding Hendricks' party status under Criterion 9(K), as confirmed in Chair Ewing's April 12, 1995 memorandum to parties, is OVERRULED.

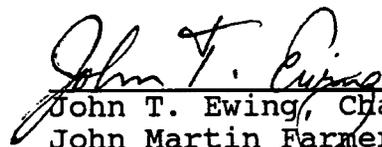
5.) Putney's April 19, 1995 Motion to Strike is GRANTED.

6.) Hendricks' April 21, 1995 Motion for Continuance is GRANTED. A hearing on the merits of the Appeal and a prehearing conference in relation thereto shall be scheduled by Chair Ewing for the earliest possible date in consultation with the parties.

7.) Pursuant to 10 V.S.A. § 6027, the Appeal shall be heard by a three person sub-committee of the Board.

8.) Pending evidentiary objections shall be resolved at a later date ~~prior~~ to a hearing on the merits of the appeal.

ENVIRONMENTAL BOARD

  
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John T. Ewing, Chair  
John Martin Farmer  
Arthur Gibb  
Samuel Lloyd  
William Martinez  
Robert Page

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