

10/30/95

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

Re: Putney Paper Company, Inc.
Declaratory Ruling #305

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to (i) a request for party status by Nathaniel Hendricks, and (ii) whether slope and elevation changes to Putney Paper Company, Inc.'s paper sludge landfill off Blood Road in Putney, Vermont, constitute a material change pursuant to 10 V.S.A. Chapter 151 ("Act 250"). As is explained below, the Environmental Board denies Mr. Hendricks party status, and concludes that the slope and elevation changes do **not** require an Act 250 permit.

I. BACKGROUND AND SUMMARY OF PROCEEDINGS

On May 26 and June 14, 1995, Putney Paper Company, Inc. ("Putney Paper") filed, respectively, a petition for a declaratory ruling and a supplement to the petition (collectively the "**Petition**"). The Petition appeals Jurisdictional Opinion #2-95 (the "**Opinion**") issued on April 28, 1995 by the Assistant District #2 Coordinator.

On July 18, 1995, Nathaniel Hendricks filed a petition for party status.

On July 18, 1995, Board Chair John T. Ewing convened a prehearing conference in Montpelier, Vermont with the following parties **participating**:¹

- Putney Paper Company, Inc. by Peter Van Oot, Esq.
and Turk Ellis
- Agency of Natural Resources by Jim Caffry, Esq.
and Bryan Harrington
- Nathaniel Hendricks, **pro se**

At the prehearing conference, Chair Ewing appointed himself as administrative hearing officer pursuant to 10 V.S.A. § 6027(g) and Environmental Board Rule ("**EBR**") 41.

¹At the prehearing conference, Associate General Counsel Grayck disclosed to the parties that he was a former employee of Downs Rachlin & Martin, and that Peter Van Oot had been his supervisor for a portion of his employment. Attorney Van Oot stated that Putney Paper was not a client of Downs Rachlin & Martin during Mr. Grayck's period of employment. No party objected to Mr. Grayck serving as counsel to the Board.

Putney Paper Company, Inc.
Declaratory Ruling #305
Findings of Fact, Conclusions of Law, and Order
Pase 2

On July 28, 1995, Putney Paper filed a Memorandum in Response to Mr. Hendricks' party status petition.

On September 8, 1995, Chair Ewing issued a proposed decision to the parties. The parties were provided an opportunity to file written objections, and to present oral argument before the full Board.

On September 25, 1995, Putney Paper filed a response to the proposed decision, and also an affidavit by Mr. Turk Ellis (the "**Affidavit**") with an accompanying three-sheet site plan prepared by DSM Environmental Services, Inc., June, 1991, entitled "**Putney Paper Company Papermill Sludge Landfill Site Plan**" (the "**Site Plan**").

On September 25, 1995, Mr. Hendricks filed a response to the proposed decision and requested oral argument before the Board.

On October 3, 1995, Mr. Hendricks filed a supplementary response to the proposed decision, Affidavit, and Site Plan.

On October 11, 1995, Putney Paper filed an objection to Mr. Hendricks' October 3, 1995 supplementary response.

On October 18, 1995, the Board convened oral argument with Putney Paper and Mr. Hendricks participating. After oral argument, the Board deliberated, and, following a review of the proposed decision and the evidence and arguments presented in the Petition, declared the record complete. This matter is now ready for decision. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied. See Petition of Villase of Hardwick Electric Department, 143 Vt. 437, 445 (1983).

II. ISSUES

1. Whether the Board has jurisdiction to adjudicate **the Petition**.

2. Whether to grant Mr. ~~Hendricks~~ party status **pursuant** to EBR 14(A)(3) or **14(B)(1)(b)**.

3. Whether, pursuant to EBR 2(A)(5), 2(P) and 34(A), slope and elevation changes to Putney Paper's sludge land-fill off Blood Road in Putney, Vermont constitute a material change such that Putney Paper must obtain an amendment to Land Use Permit **#2W0436-6**.

Putney Paper Company, Inc.
Declaratory Ruling #305
Findings of Fact, Conclusions of Law, and Order
Page 3

III. EVIDENCE BEFORE THE BOARD

A. Official Notice

Under § 810(4) of Vermont's Administrative Procedure Act, codified at 3 V.S.A. Chapter 25 (the "APA"), notice may be taken of judicially cognizable facts in contested cases. Under § 810(1) of the APA, "[t]he rules of evidence as applied in civil cases ... shall be followed" in contested cases. Under the Vermont Rules of Evidence, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is .. (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." V.R.E. 201(b); See In re Handy, 144 Vt. 610, 613 (1984). Official notice of a judicially cognizable fact may be taken whether requested or not, and may be done at any stage of the proceeding. 3 V.S.A. § 810(4); V.R.E. 201(c) and (f). A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking official notice and the tenor of the matter noticed. See V.R.E. 201(e). Under § 809(g) of the APA, findings of fact may be based on matters officially noticed.

Pursuant to 3 V.S.A. § 810(4) of the APA, the Board takes official notice of the following:

1. the Opinion;
2. Land Use Permit #2W0436-6;
3. Re: Putney Paper Company, Inc., #2W0436-6,
Findings of Fact and Conclusions of Law (Oct. 1, 1991) (the "Dash 6 District Decision");
4. Secretary, Vermont Agency of Natural Resources v. Putney Paper Company, Inc., #E94-32, Assurance of Discontinuance (September 14, 1994) (the "AOD");
5. Secretary, Vermont Agency of Natural Resources v. Putney Paper Company, Inc., #E94-32, Amendment to Assurance of Discontinuance (November 1, 1994) (the "First AOD Amendment");
6. Secretary, Vermont Agency of Natural Resources v. Putney Paper Company, Inc., #E94-32, Stipulation to Vacate Second Amendment to Assurance of Discontinuance and Enter into Revised Second Amendment to Assurance of Discontinuance (June 21, 1995) (the "Second AOD Amendment (Revised)");

7. April 13, 1995, letter from Bryan Harrington, Technical Assistance Section, ANR, to Turk Ellis, Putney Paper, including DSM Environmental Services closure plan dated December 1, 1993 (the "**Closure Approval Letter**"); and
 - a. May 8, 1995, letter from Bryan Harrington, Technical Assistance Section, ANR, to Turk Ellis, Putney Paper (the "**Clarification Closure Approval Letter**").

B. The Affidavit and Site Plan

The Board grants Putney Paper's request made at oral argument that the Affidavit and Site Plan be accepted as evidence in the Petition.

IV. FINDINGS OF FACT

1. Putney Paper received Land Use Permit #2W0436-6 on October 1, 1991. The permit authorizes the operation and use of a paper sludge landfill off Blood Road in Putney, Vermont (the "**Landfill**"). The Landfill is located on a 14 acre tract of land (the "**Property**").
2. Land Use Permit #2W0436-6 includes a closure plan for the Landfill (the "**Dash 6 Closure Plan**"). The Dash 6 Closure Plan depicts a "**dome-like**" cap on the Landfill with the ridge of the cap running along an approximate north-south axis. The elevation of the peak of the cap shown on the Dash 6 Closure Plan is 298'. The slope of the cap shown on the Dash 6 Closure Plan is 5%.
3. The AOD, First AOD Amendment, Second AOD Amendment (Revised), Closure Approval Letter, and Clarification Closure Approval Letter authorize a closure plan (the "**AOD Closure Plan**") that is different from that authorized in Land Use Permit #20436-6.
4. Under the AOD Closure Plan, the Landfill's cap will (i) have a ridge running along an approximate east-west axis which will slope towards both the Connecticut River and the railroad tracks in the northern part of the Property, and (ii) have a final elevation of 296', which is two feet less than that approved in the Dash 6 Closure Plan. The slope of the cap shown on the AOD Closure Plan is 5%.
5. The re-orientation of the ridge axis and elevation

changes (the "**Project**") are the only physical differences between the Dash 6 Closure Plan and the AOD Closure Plan relative to the Landfill.

6. The changes approved in the AOD Closure Plan will reduce potential stormwater impacts to the Connecticut River.
7. The Dash 6 District Decision only contains written findings relative to Criteria 1(B) and 9(E). The Dash 6 District Decision made affirmative findings for all other criteria based upon the documentation submitted by Putney Paper as part of its permit application.
8. The Dash 6 District **Decision. Criterion** 1(B) findings do not address the elevation or slope of the Landfill's cap.
9. Under Criterion 9(E), the Dash 6 District Decision provides, in part, that "[t]he area presently in use will be covered with a 5% dome to shed water. After two to four years, the second cell will be used. When the second cell is complete it will also receive a **dome.**"
10. Nathaniel Hendricks is an adjoining land owner to the Property.

V. CONCLUSIONS OF LAW

A. Board's Jurisdiction

Pursuant to 10 V.S.A. §6007(c), jurisdictional opinions are appealed to the Board by means of a petition for declaratory ruling. While the Waste Facility Panel of the Vermont Environmental Board has jurisdiction over appeals from district commission decisions that are in respect of a solid or hazardous waste management facility, the Waste Facility Panel has no authority to adjudicate a petition for a declaratory ruling relative to Act 250 jurisdiction. Therefore, the Petition is properly before the Board.

B. Party Status

Mr. Hendricks seeks party status pursuant to EBR 14(A)(3) and 14(B)(1)(b). The Board considers Mr. Hendricks' party status petition relative to the Project, and not the Landfill's overall operation.

i. EBR 14(A) (3)

Pursuant to EBR 14(A)(3), an adjoining property owner is entitled to party status to the extent that the adjoining property owner demonstrates that the proposed development may have a direct effect on his property under any of the 10 Act criteria.

Mr. Hendricks' contends that the Project may have a direct effect on his property relative to Criteria 1 (water and air pollution), 1(A) (Headwaters), 1(B) (Waste disposal), 1(C) (Water conservation), 1(D) (Floodways), 1(E) (Streams), **1(F) (Shorelines)**, 1(G) (Wetlands), 3 (Water supply), 8 (Aesthetics), 8(A) (Wildlife), 9(A) (Impact on growth),, 9(B) (Primary agricultural soils), and 9(K) (Public investment).

Mr. Hendricks' party status petition identifies several potential impacts from the Landfill's operation, but fails to address specifically how the Project may have a direct effect on his property. Given the limited nature of the Project, the Board concludes that Mr. Hendricks has not demonstrated that the Project may have a direct effect on his property and, therefore, Mr. Hendricks is denied party status under EBR 14(A)(3).

ii. EBR 14(B) (1) (b)

Mr. Hendricks also seeks party status pursuant to EBR 14(B) (1) (b). Under EBR 14(B)(1)(b), a person may be entitled to party status by permission if that person's participation will materially assist the board or commission by providing testimony, cross-examining witnesses, or offering argument or other evidence relevant to the ten criteria of 10 V.S.A. § 6086(a). Party status under Rule 14(B) is discretionary. See Re: Okemo Mountain, Inc., #2S0351-10B-EB, Memorandum of Decision at 4 (Jan. 15, 1993).

In determining whether a person can materially assist the Board, pertinent issues include whether that person possesses particular expertise with respect to a proposed project, the complexity of the proposed project, whether the issues involved are novel and unfamiliar or the subject of sufficient public awareness, and whether the Board has experience with the issues involved with the proposed project. Re: Pico Peak Ski Resort, Inc., #1R0265-12-EB, Findings of Fact, Conclusions of Law, and Order: Preliminary Issues at 10 (March 2, 1995).

The Project is extremely limited in nature. The Project is not a complex, novel, or unfamiliar project which requires the Board to seek the assistance of persons with particular expertise. The Board is not persuaded that Mr. Hendricks can materially assist the Board in ruling on the Petition and, therefore, his request for party status under EBR 14(B)(1)(b) is denied.

C. Material Change

EBR 2(P) defines material change as an "alteration to a project which has a significant impact on any finding, conclusion, term or condition of the project's permit and which affects one or more values sought to be protected by the Act." The Board uses a two-step process to determine whether there is a material change to a previously permitted project.

First, the Board must find that an alteration has taken place or will take place. This alteration may be either a physical change or a change in use. Re: Mount Mansfield Co., Inc., Declaratory Ruling #269 (July 22, 1992); Re: Town of Sunderland, Declaratory Ruling #200 at 10 (June 24, 1988). Second, the Board must find that the alteration has a significant impact on any finding, conclusion, term or condition of the project's permit and that the alteration affects one or more of the values Act 250 protects. Re: City of Barre Sludge Management Program, Declaratory Ruling #284 at 14 (Oct. 11, 1994).

The Project will result in physical changes to the Landfill. However, the Project will not have any significant impact on any finding, conclusion, term or condition of Land Use Permit #2W0436-6. Rather, the Project will reduce potential stormwater impacts to the Connecticut River. Accordingly, the Project is not a material change and no Act 250 permit is required prior to its construction by Putney Paper.

VII. ORDER

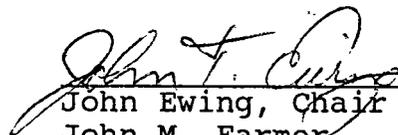
1. The Board has jurisdiction to adjudicate the Petition.

2. Mr. Hendricks is denied party status.

3. The Project does not require an Act 250 permit.

Dated at Montpelier, Vermont this 30th day of October, 1995.

ENVIRONMENTAL BOARD



John Ewing, Chair
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