

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

Re: Alpine Pipeline Company

Declaratory Ruling Request #415

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

Alpine Pipeline Company (Petitioner) filed a Petition for Declaratory Ruling with the Environmental Board (Board), appealing Jurisdictional Opinion #1-350 (JO). As set forth below, the Board concludes that the installation of a generator does not constitute a material change to the permitted project.

**I. PROCEDURAL SUMMARY**

On May 18, 2000, Petitioner applied for a permit amendment to upgrade a 2.5-mile section of an 11-mile long pipeline facility which provides a sewage disposal connection from the Killington ski area to the Rutland City Municipal Sewage Disposal System. The District 1 Environmental Commission (Commission) issued the permit amendment, #1R0524-6, on June 28, 2000 (Permit).

On July 3, 2002, the Commission's Coordinator (Coordinator) issued the JO, determining that the construction of the roughly 11 foot long by 3 foot wide by 7 foot tall generator (Project or Generator) in Mendon was not sufficiently disclosed in the permit application and is a material change requiring a permit amendment pursuant to 10 V.S.A. §§ 6001-6092 (Act 250).

On July 30 and August 21, 2002, Petitioner filed a request for reconsideration of the JO. On August 30, 2002, the Coordinator issued a reconsidered JO which concluded that a permit amendment is required.

On September 19, 2002, Petitioner filed another request for reconsideration of the JO. On September 23, 2002, the Coordinator issued a further reconsideration of the JO, again concluding that a permit amendment is required.

On September 26, 2002, Petitioner filed a Petition for Declaratory Ruling with the Board, appealing the JO pursuant to 10 V.S.A. § 6007(c) and Environmental Board Rule (EBR) 3.

On November 4, 2002, the Mendon Citizens Group, Mendon Historical Society, Ann Singiser, Steve Singiser, and Brenda Isaacs (collectively referred to as the Mendon group) filed a petition for party status.

On November 4, 2002, a prehearing conference was convened, and on November 7, 2002 a Prehearing Conference Report and Order (PCRO) was issued. Among other things, the PCRO provided an opportunity for reply briefs to the Mendon group's request for party status, and identified preliminary and merits issues.

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On November 18, November 19, and December 3, 2002, the parties filed written memoranda on the petition for party status and the preliminary issue. Petitioner filed its memoranda on the preliminary issue as a motion to dismiss.

On December 18, 2002, the Board heard oral argument on the Petitioner's motion to dismiss. After oral argument, the Board deliberated.

On January 3, 2003, the Board issued a Memorandum of Decision (MOD) denying party status to the Mendon Citizen's Group, Brenda Isaacs, Ann Singiser, and Steve Singiser, granting party status to the Mendon Historical Society pursuant to EBR 14(B)(1) only, and resolving the preliminary issue by ruling that the JO is valid.

Also on January 3, 2003, a Scheduling Order was issued setting this matter for hearing by the Board.

On March 3, 2003, a second prehearing conference was held to discuss the hearing schedule and other issues. The Chair also ruled on the parties' evidentiary objections.

On March 5, 2003, the Board convened public hearing in this matter, Chair Patricia Moulton Powden presiding, and conducted a site visit. The Board commenced deliberations immediately after the hearing. The Board also deliberated on March 19, 2003.

Based upon a thorough review of the record, related argument, and the parties' proposed findings of fact and conclusions of law, the Board declared the record complete and adjourned. The matter is now ready for final decision.

## II. ISSUE

The sole issue on appeal is whether the Project is a material change which would require an amendment to Land Use Permit #1R0524-6.

## III. FINDINGS OF FACT

To the extent that any proposed findings of fact are included herein, they are granted; otherwise, they are denied. See *Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corp.*, 167 Vt. 228, 241-242 (1997); *Petition of Village of Hardwick Nectric Department*, 143 Vt. 437,445 (1983). Topic headings are used for organizational purposes only. Findings of fact listed under one topic may be relevant to more than one topic.

*The Parties and the Pipeline*

1. Petitioner, Alpine Pipeline Company, is a corporation formed to develop and operate the Alpine Pipeline (Pipeline), a user-owned, quasi-municipal facility which provides a sewage disposal connection and conduit to the Rutland City municipal wastewater disposal system from the top of the Sherburne Pass in Killington, for land uses located along the Route 4 corridor in the towns of Killington, Mendon and Rutland.
2. The Mendon Historical Society is a nonprofit organization established in 1999. Its mission is to educate people about the history of the Town of Mendon and to preserve the Town's history for the future.
3. The Pipeline is approximately 11 miles long and serves as the primary mode of sewage disposal for businesses and residences along the Route 4 corridor, including the Killington and Pico ski areas. It presently serves over 10,000 people in the Rutland region.
4. The Pipeline is authorized by Land Use Permit #1 R0524, as amended.

*The Amendment Application*

5. On May 18, 2000, Petitioner filed an Land Use Permit Amendment Application #1R0524-6 (Application), to upgrade a 2.5 mile section of the Pipeline by adding a parallel pipe from the so-called Robinwood connection westward along Route 4 and by upgrading two pump stations along its length, being the pump station located at the intersection of Route 4 and Meadowlake Drive and the pump station located on Route 4 directly across from the present Juster Mall/Home Depot Store, and other miscellaneous improvements (Pump Station Project).
6. The Application represented that a Wastewater Disposal/Water Supply Permit would be obtained for the Pump Station Project, and further requested treatment as a Minor Application pursuant to EBR 51.
7. With its Application, Petitioner submitted an engineering plan labeled "Site Plan, prepared by Wright Engineering, Ltd., Wastewater Collection System Improvements for Alpine Pipeline Company, 'Meadowlake Pump Station Site Plan and Elevations,' Sheet A3," which detailed the proposed upgrade at the intersection of Meadowlake Drive and Route 4 in Mendon. This plan was admitted in this proceeding as Exhibit P6.
8. This plan depicted, *inter alia*, a new pump station building at Meadowlake Drive, and a generator pad adjacent to that building. Details of the pump

station building's horizontal and vertical dimensions, and its outer appearance, are depicted on this plan.

9. The generator pad is indicated on the site plan as a shaded rectangle, with the label: "6" THK CONC GENERATOR PAD SEE DET. THIS SHT." This means that the generator pad is six-inch-thick concrete, and that details were to be provided on that site plan. No such details were provided.
10. Horizontal dimensions for the generator pad are not stated on the site plan filed with the Commission, but the site plan is scaled and indicates that the generator pad is approximately four feet by nine feet.
11. The site plan submitted with the Application was a composite of various plans and drawings because the Petitioner put all the Pump Station Project information on one sheet at the Coordinator's request.
12. There was no generator depicted in any of the materials Petitioner submitted to the Commission. The only indication Petitioner gave the Commission about the generator is the depiction of a generator pad on the scaled plan A3.
13. The generator was not depicted on Petitioner's site plans because the plans were put together for permitting purposes, and the generator was purchased rather than built. The specific generator was to be selected by the contractor, and approved by the Pump Station Project electrical engineer, according to the required capacity. This is standard practice. Similarly, the propane tank adjacent to the pump house is a purchased project component not depicted on the site plan.
14. On May 18, 2000, the Coordinator determined the Application to be complete. The Coordinator requested no further information from the Permittee about the Pump Station Project. No party appealed or disputed the completeness determination. The Commission decided to treat the application as a minor application pursuant to EBR 51.
15. At no time did the Coordinator or the Commission request a drawing or elevation of the actual generator to be established at the generator pad depicted on the site plan. Commissions routinely do not require elevations or drawings of every single project component, particularly technical components such as propane tanks, control panels and the like.
16. The Commission subsequently issued a proposed Act 250 Permit for the Pump Station Project and gave notice of same to the Mendon Selectboard, the Mendon Planning Commission, and other statutory parties. The proposed permit specifically indicated that it would incorporate the Water

Supply/Wastewater Disposal Permit to be issued for the Pump Station Project (the WS/WW Permit). The Proposed Permit Notice allowed for filing of a request for a hearing by a date certain. No request for a hearing was received.

*The Wastewater Permit and Rules*

17. The Small Scale Wastewater Treatment Rules effective August 8, 1996, and administered by the Agency of Natural Resources, Department of Environmental Conservation Wastewater Management Division (Rules), which were applicable to the Pump Station Project at the time of the Application, provide that facilities like the Meadowlake Drive pump station must have a backup source of pump power or reserve storage capacity to serve in the event of a power outage. Rules at Appendix 1-A-03M.
18. A reserve storage tank for the Pipeline would have been very large and expensive, so Petitioner elected to install a backup power generator as part of the Meadowlake Drive pump station.
19. Petitioner's engineer prepared and filed the application for the WS/WW Permit, and submitted several plans with that application. The only plan which refers to the generator referenced in the WS/WW Permit and incorporated into the Permit, is Exhibit P20, WS/WW Plan Sheet, C-2 Detail 1, depicting the Generator Pad and labeling it as follows: "6 INCH THK CONC GENERATOR PAD SEE DET, THIS SHT."
20. On June 13, 2000, DEC issued the WS/WW Permit for the Pump Station Project. That permit required that the Pump Station Project be constructed in accordance with the submitted plans and Environmental Protection Rules, Ch. 1, Sec. I-A-03.M. which required construction of a backup generator or reserve storage at the Meadowlake Drive pump station.

*The Permit*

21. On June 28, 2000, the Commission processed the Application as a minor application and issued the Permit without holding a hearing.
22. Condition 1 of the Permit required that the Pump Station Project be "completed, operated, and maintained in accordance with the plans and exhibits on file," including site plan A3.
23. Condition 6 of the Permit incorporates the WS/WW Permit by reference.

*The Generator and its Surroundings*

24. The Pump Station Project was constructed in the late summer and fall of 2000. In August 2000, Petitioner installed an industrial generator at the intersection of Meadowlake Drive and Route 4, on the generator pad depicted on the site plan (the Generator). The Generator is a Generac model, 10'9" long, 3'3" wide, and 6'9" high, including a beige-colored metal generator with a black metal diesel fuel tank beneath.
25. The Generator is of the capacity required by the Rules and the WW/WS Permit.
26. Directly adjacent to the Generator to the northeast and east is approximately 30' of open grassy area that gently slopes away from the generator, into a wooded area and a steep embankment leading down to the Mendon Brook.
27. Approximately 50-60 feet to the east of the Generator is a World War II Honor Roll sign, located immediately adjacent to the traveled portion of Route 4. The Honor Roll was constructed in 1943, and lists the residents of Mendon who served in the U.S. military during World War II. Some of these residents were killed in combat and others still live in Mendon.
28. The Generator is partially screened by shrubs to the east, and by the pump house to the south. There is some evergreen shrubbery and three immature white pine trees between the Generator and the Honor Roll. White pines are fast-growing trees. There are minimal plantings on the side of the generator facing Meadowlake Drive, or on the side facing the pump house.
29. The Generator does not block access to or visibility of the Honor Roll from Route 4, but it is currently visible from the Honor Roll.
30. There are approximately thirteen utility poles in the area of the Generator, including a utility pole with a streetlight on it at the corner of Meadowlake Drive and Route 4. There are also several signs in the vicinity, including a large green sign at the intersection near the pump house giving directions and mileage to nearby towns.
31. The area to the north and northeast of the Project is a natural ravine area and is not commercially developed. The area to the west of the Project contains substantial commercial and residential development.
32. Just across Meadowlake Drive to the west of the Project is a commercial restaurant, called Sugar and Spice, which is built with unpainted wood to look like a sugar house. It has been there for approximately 20 years.

33. Across Route 4 to the south of the Project are three buildings with white clapboard siding, listed on the Vermont Register of Historic Places and identified by the Division of Historic Preservation as the Phelps House, the Mendon Church, and the Wiggin House.
34. Across the intersection diagonally from the Project is a house which is painted mostly a blue-gray color.
35. The pump house has white clapboard siding.
36. The area near the Generator is characterized primarily by Route 4, which is a heavily traveled state highway.
37. The Generator is visible to cars and trucks traveling east on Route 4, and is visible briefly to vehicles traveling west on Route 4.
38. The Generator is more prominently visible to vehicles headed south on Meadowlake Drive because Meadowlake Drive rises as it approaches Route 4 and because the shrubs planted to screen the Generator are still much lower than the Generator.
39. The Generator is not located on a scenic ridge or other aesthetically sensitive area.

#### IV. CONCLUSIONS OF LAW

Petitioner installed a generator on a permitted project on Route 4 in Mendon. The question is whether this generator is a material change that requires a permit amendment. As set forth below, the Board concludes that it is not a material change and that no permit amendment is needed.

##### A. De Novo Review

A petition for declaratory ruling is heard *de novo* to determine the applicability of any statutory provision or of any rule or order of the Board. 10 V.S.A. § 6007(c); EBR 3(D); *Re: Vermont Institute of Natural Science*, Declaratory Ruling #352, Findings of Fact, Conclusions of Law, and Order at 20 (Feb. 11, 1999). Therefore, the Board must reach its own conclusions as though no action had been taken by the Commission or Coordinator below. *In re Killington, Ltd.*, 159 Vt. 206, 214 (1992)(citing *In re Green Peak Estates*, 154 Vt. 363, 372 (1990), and cited in *Re: Champlain College, Inc.*, #4C0515-6-EB, Memorandum of Decision at 3 (Jun. 28, 2002)); see also, *Re: Unifirst Corporation*, Declaratory Ruling # 348, Findings of Fact, Conclusions of Law, and Order at 8 (Jan. 30, 1998).

## **B. Material Change**

A material change is "any 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." EBR 2(P).

A determination of whether an activity is a "material change" involves a two-step analysis: First, the Board must determine whether a physical change or a change in use has occurred or will occur. Second, if there is a change, the Board must determine whether the alteration has a significant impact on any finding, conclusion, term, or condition of the permit and whether the alteration affects one or more of the values protected by Act 250. *Re: Hiddenwood Subdivision*, Declaratory Ruling #378, Findings of Fact, Conclusions of Law, and Order at 7 (Jan.12, 2000)(citing *Re: Vermont Institute of Natural Science*, Declaratory Ruling #352, Findings of Fact, Conclusions of Law, and Order at 26 (Feb. 11, 1999); *Re: Sugarbush Resort Ho/dings, Inc.*, Declaratory Ruling #328, Findings of Fact, Conclusions of Law, and Order (Feb. 27, 1997); *Re: David Enman*, Declaratory Ruling #326, Findings of Fact, Conclusions of Law, and Order (Dec. 23, 1996); *Re: Mount Mansfield Co., Inc.*, Declaratory Ruling #296, Findings of Fact, Conclusions of Law, and Order (July 22, 1992); *In re Greg Gallagher*, 150 Vt. 50, 51 (1998)).

### ***Physical Change***

The first question is whether the installation of this generator is a change from what the Commission approved on June 28, 2000 when it issued the Permit. If there is no change, there is no material change and an amendment is not required. *Re: Hiddenwood Subdivision*, Declaratory Ruling #378, Findings of Fact, Conclusions of Law, and Order at 7 (Jan.12, 2000).

Changes that are not depicted or authorized by the prior permit are physical changes under EBR 34(A). *Re: Developer's Diversified Realty Corporation*, Declaratory Rulings #364, #371, and #375 (Consolidated), Findings of Fact, Conclusions of Law, and Order at 12-13 (March 25, 1999)(new double doors, ramps, bollards, concrete pad and trash compactor, jib hoist, satellite dish, and HVAC units constitute cognizable physical changes)(citations omitted); see also, *Re: Montpelier Broadcasting, Inc.*, #5W0396-2-EB (Revocation), Findings of Fact, Conclusions of Law, and Order at 13 (1994)("aspects of the project that were different from the representations made to the District Commission--the cooling and dehumidifying equipment and generators in the building, and the scope and extent of the road construction--constitute material and substantial changes").

In order to determine whether an alteration has taken place, it is necessary to determine the scope of the Project initially reviewed and approved by the Commission. The question that the Board must



address is whether the activities that now exist were contemplated as part of the approved project in the first instance by the Commission.

*Re: Vermont Institute of Natural Science*, Declaratory Ruling #352, Findings of Fact, Conclusions of Law, and Order at 21 (Feb. 11, 1999)(citations omitted).

In a case like this, involving a permit issued using the minor application procedure, the Board looks to the “permit application and material representations relied on during the review and issuance of [the Permit]” to determine whether the Generator was contemplated as part of the Pump Station Project approved by the Commission. EBR 51 (G).

The site plan submitted with the Application shows a “6” THK CONC GENERATOR PAD.” The horizontal dimensions of the generator pad, 4 feet by 9 feet, can also be determined from the scaled site plan. It is obvious from the presence of a generator pad on the site plan that a generator would also be installed, and that it would not be much wider or longer than the pad. The Generator Petitioner installed is located atop the generator pad shown on the site plan, and it has similar horizontal dimensions. Its size not unreasonable given the size of the generator pad.

There is no question that it would have been better for all concerned if Petitioner had submitted complete information on the Generator, particularly given the context of this Pump Station Project, which is relatively small and located at a busy intersection. Providing such information would have avoided any dispute over whether the Generator is a material change. The Board notes that it is clear that Petitioner did not intend to mislead the Commission by omitting the Generator information. The Board also notes that no additional information was requested of Petitioner by the Coordinator in determining the application complete, or by the Commission in determining that the application could be handled as a minor under EBR 51.

Although the Generator was not depicted on the plans submitted with the Application, it was reasonably foreseeable in terms of its size, appearance, and Act 250 impacts. Therefore, given the facts and circumstances of this case, the Generator is not a physical change.’

Because the Generator does not constitute a physical change, it is not a material change to the permitted project. No permit amendment is necessary.

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Conversely, a project component omitted from an application would constitute a physical change if its size, appearance, and other Act 250 impacts were not reasonably foreseeable given the information submitted with the application.

**V. ORDER**

The Project is not a material change which would require an amendment to Land Use Permit #1R0524-6.

DATED at Montpelier, Vermont this 31<sup>st</sup> day of March, 2003.

ENVIRONMENTAL BOARD



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

\* DISSENT by Board Member Donald Marsh:

I respectfully dissent. The generator was not shown on any of the plans Petitioner submitted to the Commission, so it was never reviewed. The depiction of a generator pad does not indicate that the Commission contemplated this large, unsightly generator and accompanying diesel fuel tank. There was credible testimony to support the contrary conclusion -- that this is not the sort of generator a lay commission member might anticipate given the application materials. Also, the fact that the application was handled as a minor is a clear indication that the Commission never contemplated how large or unsightly this generator would be. See, EBR 51 (A)(minor application procedure applies only where Commission determines that there is "a demonstrable likelihood that the project will not present significant adverse impacts"). I would conclude that the generator is a physical change to the permitted pipeline upgrade project.

Because this alteration has significant impact on Condition 1 of the Permit, which requires construction in accordance with approved plans, and it affects aesthetic values protected by Criterion 8 of Act 250, I also would hold that the installation of the generator is a material change and that Petitioner should apply for a permit amendment.

In a case like this, where a project component forms such a visible and significant portion of the project, the burden should be on the applicant to provide complete information on that component with the application. This is particularly crucial when an application is being processed as a minor under EBR 51. The Board's decision shifts this burden to the Coordinator, in determining whether the application is complete, and to the lay Commission, in reviewing the application to determine whether it can be handled as a minor. Petitioner (the applicant) was the only party in a position to know what the generator would look like at the time of the application, and was the party who decided not to provide a full landscape screen for the generator, so Petitioner should have taken the steps necessary to ensure that the generator was reviewed by the Commission. Perhaps more important, shifting this burden may reduce the ability of Commissions to expedite review and treat applications as minors.

The practical effect of Petitioner's omission in this case, inadvertent though it may have been, was to deprive potential parties of the ability to request a hearing on this very large and visible generator. The Commission should have the opportunity to review the generator and parties should have an opportunity to be heard.

**\*\* DISSENT by Board Member Jean Richardson**

I dissent because the Generator is a material change. The Petitioner has the burden of providing sufficient details in the application and accompanying materials so that the Coordinator, Commission members and interested parties can make a meaningful determination of the full impact of the proposed development. This is especially important in applications which would most probably be treated as "minor" applications and thus not result in a public hearing where neighbors and others in the community could have had the opportunity to ask questions and assess the proposal. Petitioner should have known that a generator of this scale, while minimal in an urban setting, would have far greater visual impact in a rural setting, even at a busy rural crossroads, when set against a forested backdrop, and that such a generator might be considered offensive by residents of the community. This impact was not reasonably foreseeable from the Application and accompanying materials.

By not finding a physical change, the majority of the Board leaves the door open for applicants to omit potentially controversial project components, and effectively precludes Commission review of such components. I agree with Board Member Donald Marsh that this inappropriately shifts the burden to the local Commission members and staff to foresee the Act 250 impacts of any omission from an application. The Generator was a physical change from what the Commission

approved and violates Condition 1 of the Permit because it was neither depicted on the site plan nor was its visual impact otherwise described in the Application.

Further, by failing to provide the necessary information with the Application, Petitioner deprived interested persons of notice and the opportunity to be heard on the project. Had there been an early opportunity for local citizens to have reviewed the project, this matter may have been resolved to the satisfaction of all parties many months ago. As the Board stated in the VINS case, the emphasis in the material change analysis "is not whether the physical change ... conforms with the ten criteria of Act 250, but rather whether a permit amendment should be required so as to provide the Commission with an opportunity to review ... alterations that it could not reasonably have contemplated." *Re: Vermont Institute of Natural Science, Declaratory Ruling #352, Findings of Fact, Conclusions of Law, and Order at 24 (Feb. 11, 1999).* The right of interested parties to participate in the process is a core value protected by Act 250. Petitioner's omission of information on the Generator had a significant impact on this core value, as well as on aesthetic values protected by Criterion 8.

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