

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

Re: Alpine Pipeline Company

Declaratory Ruling  
Request #415

**MEMORANDUM OF DECISION**

Alpine Pipeline Company (Petitioner) filed a Petition for Declaratory Ruling with the Environmental Board (Board), appealing Jurisdictional Opinion #1-350 (JO). This Memorandum of Decision concerns the requests for party status and the preliminary issue.

**I. PROCEDURAL SUMMARY**

On July 3, 2002, the District #1 Environmental Commission 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) in Mendon was not sufficiently disclosed and is a material change requiring a permit amendment application 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 Reconsideration of the JO which concluded that a permit amendment was 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 and again the Coordinator concluded that a permit amendment was required.

On September 26, 2002, Petitioner filed a Petition for Declaratory Ruling with the Board, appealing the JO. The petition for declaratory ruling is filed pursuant to 10 V.S.A. § 6007(c) and Environmental Board Rule (EBR) 3. The Petitioner contends that the Project does not require an Act 250 permit and that the JO is void because the requesters of the JO did not have standing.

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, Board Chair Marcy Harding convened a prehearing conference and on November 7, 2002 the Chair issued a Prehearing Conference Report and Order (PCRO).

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.

## **II. Discussion**

### **A. Party Status**

Brenda Isaacs and Ann and Steve Singiser filed a petition for party status on behalf of themselves individually, the Mendon Citizens Group, and the Mendon Historical Society requesting party status pursuant to EBR 14 (B)(1) and (2). The Petitioner objected to the Mendon group's request for party status. The Board makes its determinations on party status petitions in declaratory rulings based on whether the petitioning party has made the requisite showing of interest under EBR 14. *Developer's Diversified Realty Corporation*, Declaratory Ruling #364, #317, and #375 (consolidated), Memorandum of Decision at 5-6 (Sep. 10, 1998).

#### **i. EBR 14(B)(1) Party Status**

The Board considers three elements when determining party status pursuant to EBR 14(B)(1). The petitioner has the burden of establishing a connection between the Project and a specified interest. Second, the petitioner must show that, due to the demonstrated connection, its specified interests may be affected. *Re: Maple Tree Place Associates, #4C0775-EB*, Memorandum of Decision and Order at 6 (Oct. 11, 1996). Third, the petitioner must articulate how its interests are different from those of the general public. *Re: Springfield Hospital, #2S0776-2-EB*, Memorandum of Decision at 5-6 (Aug. 14, 1997), appeal dismissed, *Re: Springfield Hospital, No. 97-369* (Oct. 30, 1997); see also, *Re: Josiah E. Lupton, Quiet River Campground, #3W0819 (Revised)-EB*, Chair's Preliminary Ruling at 4 (Oct. 3, 2000).

##### **a. Mendon Citizens Group**

The Mendon Citizens Group is a grassroots organization which believes the generator has an undue adverse affect on the scenic and natural beauty of the grassy area in the center on Mendon. Its interest is to preserve the aesthetics of the area.

The Petitioner argues that the Mendon Citizens Group's interest is not different from the general public's interest. The Petitioner adds that there is no indication that the group has held meetings, raised funds, circulated newsletters or taken any action that would entitle it to be recognized as a functioning entity.

Pursuant to EBR 14(B)(3)(b) an organization seeking party status must describe the organization, its membership, and its purposes. However, an organization does not need to provide the names and addresses of its members. *Re: The Van Sicklen Limited Partnership, #4C1013R-EB*, Memorandum of Decision at 5 (Jun. 8, 2001). If a petition for party status does not provide sufficient information on the nature of the organization and its members, the petition will be denied. *Re: Home Depot USA, Inc., Ann Juster, Homer and Ruth Sweet, #1R0048-12-EB*, Memorandum of Decision at 9 (Nov. 30, 2000). Like the organization denied party status in *Home Depot*, the Mendon Citizens Group only generally described its interests and did not provide sufficient information on its members. Therefore, the Board denies the Mendon Citizens Group EBR 14(B)(1) party status.

b. Mendon Historical Society

The Mendon Historical Society was incorporated as a Vermont domestic non-profit corporation in 1999 “to preserve, protect, restore, and display records and artifacts relating to the history of Mendon with the intent to educate and preserve Mendon’s history for the future.” It has approximately 60 members. The generator is adjacent to the Mendon Honor Roll, a large wooden tablet listing the names of Mendon residents who served during World War II.

The Petitioner argues against granting the Mendon Historical Society party status by questioning whether the board of directors of the Mendon Historical Society authorized its participation in this matter. The Petitioner also questions the Mendon Historical Society’s interest in the matter since according to the Petitioner, the Honor Roll still functions, is visible, and is not disturbed by the Project.

The Board has never required an organization to produce written authorization from its board of directors. Nevertheless, the Mendon Historical Society sent a letter authorizing members Ann and Steve Singiser and Brenda Isaacs to represent it in this proceeding. The Board also notes that Ann Singiser is the current president of the Mendon Historical Society. Petitioner has not produced any evidence to substantiate its claim that Brenda Isaacs and Steve and Ann Singiser are not authorized to represent the Mendon Historical Society.

Although the Honor Roll may still function and be visible, there is no doubt that the Project can still have a significant impact on the Honor Roll and the interests of the Mendon Historical Society. The Board concludes that the Mendon Historical Society has specified interests that may be affected and that its interests are different from those of the general public. Therefore, the Board grants the Mendon Historical Society EBR 14(B)(1) party status.

c. Brenda Isaacs and Ann and Steve Singiser

Brenda Isaacs and Ann and Steve Singiser argue that they qualify for party status individually based on their part ownership of an option to buy a c.1850 house that is directly across Route 4 from the generator. They argue that the option demonstrates their keen interest in preserving the village center's architectural and historical integrity. They also claim to be leaders of the Mendon Citizens Group and active members of the Mendon Historical Society. Ann and Steve Singiser also own property in fee simple which is adjacent to the original Permit #1R0524 on Route 4 along the wastewater pipeline.

However, Brenda Isaacs and Ann and Steve Singiser's names do not appear on the option to purchase contract and the contract is not signed by the seller. In addition, Ann and Steve Singiser's property in fee simple is located about 1 mile away from the Project.

The Board notes that while Brenda Isaacs and Ann and Steve Singiser have a keen interest in the Project as evidenced by their participation in this matter to date, they do not have a specified interest that is different from the general public.<sup>1</sup> Although they live near the Project, they can not see it from their homes and only observe it like everyone else when they pass by. Therefore, the Board denies Brenda Isaacs and Ann and Steve Singiser's petition for party status pursuant to EBR 14(B)(1).

## ii. **EBR 14(B)(2) Party Status**

The Board considers the following elements in determining whether a person qualifies for EBR 14 (B)(2) party status. First, whether they possess particular expertise with respect to the Project; second, whether the Project is complex and whether the issues presented by the Project are novel and unfamiliar. *Maple Tree Place Associates, supra* at 7; see also, *Re: Josiah E. Lupton*. Third, the Board also considers whether another party will provide the assistance which a person who seeks EBR 14(B)(2) status may give. *Stonybrook Condominium Owners Association, Declaratory Ruling #385, Memorandum of Decision* at 3 (May 3, 2000).

Although for EBR 14(B)(1) party status the interest of each entity of the Mendon group was considered separately, for EBR 14(B)(2) party status they can be considered together since there was one argument presented for the entire group. The Mendon group merely listed proposed witnesses and exhibits without demonstrating any particular expertise. A determination that a EBR 14(B)(2) party can

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The interests of the Mendon Citizens Group and the Mendon Historical Society was considered in their respective requests for party status. The fact that individuals are a part of a group does not create a separate specified interest for the individuals.

materially assist the Board requires more than an assertion that the party can cross-examine witnesses and present experts. "Mere assertions of an interest do 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 the District Commission or Board in addressing particularly complex, novel, or unfamiliar project." *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), *quoting Re: Spring Brook Farm Foundation, Inc.*, #2S0985-EB, Memorandum of Decision at 3 (Oct. 3, 1995) (internal quotation marks omitted).

In addition, the issues presented by this case are not particularly complex, novel, or unfamiliar. The Board regularly addresses such issues in its decisions. In light of the above, the Board denies each entity of the Mendon group EBR 14(B)(2) party status.

**B.** In light of the Supreme Court's decision *In re: Vermont Verde Antique International, Inc.*, No. 2001-116 (Sept. 6, 2002), should the JO be voided because the Coordinator did not have authority to issue it.

On July 3, 2002, the Coordinator issued JO 1-350 based on a request for a jurisdictional opinion from Brenda Isaacs and Ann and Steve Singiser. The Petitioner argues that under the Supreme Court's recent decision in *Re: Vermont Verde Antique International, Inc.*, No. 2001-116 (Sep. 6, 2002), the JO is invalid since the request for a JO did not come from the "landowner or an interested third party."

Pursuant to EBR 3(C) and 10 V.S.A. §6007(c) "any person" may request a jurisdictional opinion from a district coordinator. Prior to the Supreme Court's decision in *Vermont Verde*, the Board interpreted "any person" broadly and literally to include any person, even the district coordinator. *Re: CVPS*, Declaratory Ruling 401, Findings of Fact, Conclusions of Law, and Order fn 7 (Apr. 2, 2002).

In *Vermont Verde*, the Vermont Supreme Court concluded "that Environmental Board Rule 3(C), to the extent that it authorizes the issuance of a jurisdictional opinion at the request of a district coordinator, exceeds the scope of § 6007(c) and is invalid." *Vermont Verde* at 6. This case presents the Board with its first opportunity to review a challenge to a request for a jurisdictional opinion under the teachings of *Vermont Verde*.

In *Vermont Verde*, the Supreme Court stated that:

the statute provides that "any person" may request a jurisdictional opinion "from the district coordinator." 10 V.S.A. § 6007(c) (emphasis added). Read in

context, this suggests that "any person" refers broadly to third parties exclusive of the coordinator, who is authorized to rule on such requests, but not to make them.

*Vermont Verde* at 5.

The Supreme Court's rationale was based on the need to separate the Board's prosecutorial and adjudicatory functions. The Court was concerned that allowing a district coordinator to issue a jurisdictional opinion *sua sponte* would blur the distinction between the two functions.

The Legislature has taken care to separate the prosecutorial and adjudicatory functions of the Board, which serves in turn to maintain its integrity when functioning as an adjudicatory forum for resolving jurisdictional questions. Viewed in this context, nothing in the language of § 6007(c) indicates a legislative intent to transform the request for a jurisdictional opinion into the equivalent of an enforcement action.

*Id.* At 5.

Although the Court's opinion seems clear, the Petitioner seizes on one instance immediately following the above quoted language where the Court substituted the term "interested third party" for "third party".<sup>2</sup>

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The Board notes that although the Supreme Court used the term "interested third party" once, in the paragraphs quoted below the Court once again left out the word "interested" and referred to a request for a jurisdictional opinion from the "landowner or a third party."

Jurisdictional opinions, by way of contrast, cast the Board in the role of adjudicator, determining the applicability of Act 250 to the project or development in question. The statutory scheme thus indicates that the Legislature contemplated separate roles for the Board as a party in an enforcement action, and as an adjudicatory body in jurisdictional determinations made at the request of the *landowner or a third party*....

*Vermont Verde* at 5 (emphasis added).

An alternative ruling would result in a peculiar scenario. Not only would the Court be granting the Board the right to exceed its legislative mandate, but it would be allowing the district coordinators to issue jurisdictional orders in the absence of a *landowner or third party request*.

Although the statute provides that "any person" may request a jurisdictional opinion, the statutory context and structure demonstrates a legislative understanding that the request will originate from the landowner or an interested third party, not from an official of the Board itself.

*Vermont Verde* at 5-6.

The Petitioner argues that only a "landowner or an *interested* third party" who have a stake in the matter may request a jurisdictional opinion (emphasis added). The Petitioner relies on *Constantino Antique Business*, Declaratory Ruling #262, Findings of Fact, Conclusions of Law, and Order at 6 (Jul. 30, 1993) to define "interested third parties" as those persons who qualify for party status. However, *Constantino* interpreted EBR 3(C) in effect at the time which on its face limited the ability to request advisory opinions to an "interested party." EBR 3(C) has subsequently been amended and as discussed above allows any person to request a jurisdictional opinion.

Moreover, the Petitioner's argument is contrary to 10 V.S.A. §6007(c) which allows "any person" to request a jurisdictional opinion, not any "interested person" or any person with party status. This non-interest based standard is contrasted with other provisions of 10 V.S.A. §6007(c) which only allow appeals of jurisdictional opinions to the Board by "the applicant, by individuals or entities who may be affected by the outcome of the opinion, or by parties that would be entitled to notice under section 6084, if jurisdiction were determined to exist." The legislature clearly created a different threshold for requesting a jurisdictional opinion ("any person") and appealing a jurisdictional opinion (only certain interested parties). The Petitioner's argument ignores that difference. Thus, Petitioner's argument is based on an ambiguous phrase in *Vermont Verde*, outdated rules, and is contrary to the express language of the statute and the rule.

The Board concludes that the Court in using the phrase "interested third party" was distinguishing the "third party" from "an official of the Board itself." Given the context of the opinion, the Supreme Court's concern was district coordinators' issuance of *sua sponte* jurisdictional opinions which the Court believed was contrary to the adjudicatory role of a jurisdictional opinion. There is no compromise of the adjudicatory process if the request for a jurisdictional opinion comes from anyone other than the district coordinator. Thus, under *Vermont Verde* while a district coordinator cannot request a jurisdictional opinion from him or herself, any other person can. To the extent the Supreme Court one time referred to "interested third party" as compared to "third party," that reference can be interpreted to mean a person

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*Vermont Verde* at 6 (emphasis added).

who is interested enough to request a jurisdictional opinion. In light of the above, the Petitioner's motion to dismiss is denied.

**III. ORDER**

1. The Mendon Citizen's Group is denied EBR 14(B)(1) and (2) party status.
2. The Mendon Historical Society is granted EBR 14(B)(1) party status and denied EBR 14(B)(2) party status.
3. Brenda Isaacs and Ann and Steve Singiser are denied EBR 14(B)(1) and (2) party status.
4. The JO is valid since it was issued based on a request from a third party. The Petitioner's motion to dismiss is denied.

Dated at Montpelier, Vermont this 3rd day of January 2003.

ENVIRONMENTAL BOARD

/s/ Marcy Harding  
Marcy Harding, Chair  
John Drake  
Bernie Henault  
George Holland  
Samuel Lloyd  
William Martinez  
Alice Olenick  
Jean Richardson  
Donald Sargent