

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

Re: Peter and Carla Ochs
George and Carole Trickett

Declaratory Ruling #437

MEMORANDUM OF DECISION

Peter and Carla Ochs (Petitioners) petition for declaratory ruling to determine whether their apple packing and distribution facility and apple orchard on over 300 acres of land in Orwell, Vermont, at the intersection of Sanford Road, Mutton Square Road and Conkey Hill, (Project) requires a land use permit pursuant to 10 V.S.A. Ch. 151 (Act 250). This decision concerns two petitions for party status and non-party participation.

I. PROCEDURAL HISTORY

On July 7, 2004, the District 9 Environmental Commission Coordinator (Coordinator) issued Jurisdictional Opinion #9-04-01(JO) in which he determined that the Project requires an Act 250 permit.

On September 14, 2004, the Coordinator issued a Reconsidered JO, again concluding that the Project requires an Act 250 permit.

On September 21, 2004, Petitioners filed a Petition for Declaratory Ruling with the Environmental Board (Board) appealing the JO and the Reconsidered JO pursuant to 10 V.S.A. § 6007(c). The Petitioners contend that the Project does not require an Act 250 permit.

On October 15, 2004, Board Chair Patricia Moulton Powden convened a Prehearing Conference with the following participants:

Petitioners, by Frank Langrock, Esq., with Carla Ochs
The Tricketts, by Paul Gillies, Esq. and Janet Currie
The Vermont Farm Bureau, by Clark W. Hinsdale, III

The Town of Orwell filed a letter with the Board stating that they may be interested in participating in this proceeding, but were unable to attend the prehearing conference. The Tricketts filed a petition for party status and the Vermont Farm Bureau also filed a petition the date of the prehearing conference.

The Chair issued a Prehearing Conference Report and Order on October 18, 2004 (PCRO). Among other things, the PCRO set the schedule in the case, identified issues, and allowed the parties an opportunity to reply to the party status petitions.

On October 20, 2004, the Addison County Regional Planning Commission entered an appearance, but did not file any reply to the party status petitions.

The Board deliberated on preliminary issues on November 17, 2004.

II. ISSUES

The preliminary issues, as defined in the PCRO, are:

1. Whether the Tricketts should be granted party status pursuant to EBR 14(A)(5) or EBR 14(A)(6), or both.
2. Whether the Vermont Farm Bureau should be granted party status pursuant to EBR 14(A)(6), or non-party participant status pursuant to EBR 14(E), or both.

III. DISCUSSION

A. George and Carole Trickett

George and Carole Trickett petition for party status as adjoining property owners pursuant to EBR 14(A)(5). They did not request party status as interested parties pursuant to EBR 14(A)(6), a possibility that was anticipated at the prehearing conference and in the PCRO.

Board rules provide that an adjoining property owner is entitled to party status if he or she “demonstrates a property interest under any of the criteria . . . which may be directly affected by the outcome of the proceeding.” EBR 14(A)(5). It is undisputed that the Tricketts’ property adjoins the Project tract. The question is whether the Tricketts have an interest that may be directly affected by the Project.

The Board has read the party status rules in declaratory ruling proceedings to turn on whether the project could impact an Act 250 interest of the adjoining landowner, not whether the outcome of the jurisdictional issue could impact that person’s interest. See, *Re: Dennis Demers and NE Central R.R.*, Declaratory Ruling #429, Memorandum of Decision on Party Status at 3-4 (Apr. 26, 2004)(interpreting similar language in EBR 14(A)(6) and citing *Re: Catamount Slate, Inc., d/b/a Reed Family Slate Products, and Fred and Suellen Reed*, Declaratory Ruling #389, Memorandum of Decision at 11-12 (Jun. 29, 2001)(Board looks to whether party may be affected under Act 250 criteria, rather than under jurisdictional determination, to decide party status in declaratory ruling proceeding); *Re: GHL Construction, Inc. and PAK Construction, Inc.*, #2S1124-EB, Declaratory Ruling #396, Memorandum of Decision at 3 (Jul. 5, 2001)(holding that the plain language of EBR 14(A)(5) requires that the Board look for possible impacts under one or more Act 250 criteria in determining party status, even where the sole merits issue is jurisdictional and the Board will not be reviewing a

proposed development for compliance with Act 250 criteria)). “Although declaratory rulings involve procedural and jurisdictional matters, it is appropriate to grant interested party status to those persons who may be directly affected by the project under an Act 250 criterion.” *Demers*, Memorandum of Decision at 4.

In their petition the Tricketts allege that truck fumes from the Project affect their interests under Criterion 1(air); that pesticides from the Project pollute the groundwater and a stream that runs to the Tricketts’ from the Project site, under Criteria 1(water) and 1(E); that trucks from the Project cause congestion and occasional closure of Sanford Road under Criterion 5; and that noise from the Project affects their interests under Criterion 8(aesthetics). This is sufficient to warrant party status under EBR 14(A)(5).

The Tricketts’ petition for EBR 14(A)(5) party status is granted.

B. Vermont Farm Bureau

The Vermont Farm Bureau’s petition does not cite any Board rule, but it clearly offers material assistance to the Board and does not allege an affected interest the organization or its members might have under any Act 250 criterion. Accordingly, the Board is considering the petition as a request for non-party participation under EBR 14(E).

Board rules authorize the Board to grant non-party participant status to any person who “will materially assist in the review of the . . . appeal.” EBR 14(E). In its petition, the Farm Bureau states that it can offer expert testimony on legislative and rulemaking history concerning Act 250’s farming exemption. The merits issue in this case is likely to raise the question of whether agricultural products produced on land that is leased rather than owned by the farmer, constitute products produced on the farm under 10 V.S.A. § 6001(22). This is an issue of first impression.

The non-party participation offered by the Farm Bureau may be particularly helpful in this case because it raises a novel issue and the Farm Bureau may have unique access to relevant evidence and information. See, *Re: Spring Brook Farm Foundation, Inc.*, #2S0985-EB, Memorandum of Decision at 3 (Oct. 3, 1995), *aff’d on other grounds, In re Spring Brook Farm*, 164 Vt. 282 (1995)(decided under former “materially assisting party” rules and holding that the more novel or complex an issue, the greater the Board’s need for material assistance); see also *Re: Springfield Hospital*, #2S0776-2-EB, Memorandum of Decision at 7 (Aug. 14, 1997)). The Board grants the Vermont Farm Bureau’s petition for non-party participation under EBR 14(E).

IV. ORDER

1. The Tricketts' petition for party status pursuant to EBR 14(A) is GRANTED.
2. The Vermont Farm Bureau's petition for non-party participant status pursuant to EBR 14(E) is GRANTED.
3. The remaining preliminary issues are DISMISSED as moot.

DATED at Montpelier, Vermont this 22nd day of November, 2004.

ENVIRONMENTAL BOARD

/s/ Patricia Moulton Powden
Patricia Moulton Powden, Chair
George Holland
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