

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

PETITION TO ABANDON LAND) DISTRICT 4 ENVIRONMENTAL
USE PERMITS #300004-1, #4C0828-2) COMMISSION

REBUTTAL TO PETITIONER’S RESPONSE TO
DISTRICT COMMISSION’S RECESS ORDER

NOW COMES the Town of Shelburne by and through its attorneys at MONAGHAN SAFAR DUCHAM PLLC and submits the following rebuttal to petitioner Northern Vermont Financial Corporation’s (“NVFC”) response to District 4 Environmental Commission’s (“the Commission”) recess order requesting additional information.

I. INTRODUCTION

This case is before the Commission because NVFC has filed a petition to abandon (“the Petition”) two permits affiliated with certain property located in Shelburne, VT (“the Property”). Vermont Railway, Inc. (“Vermont Railway”), which has not appeared in any way in these proceedings, was conveyed the Property after the Petition was filed with the Commission. On February 5, 2016, after two separate days of hearings, the Commission issued a recess order requesting additional information from NVFC. The recess order requested a copy of the warranty deed for the conveyance from NVFC to Vermont Railway—which has been voluntarily provided—and a letter from Vermont Railway “indicating its intent to proceed with the Petition” or a brief from NVFC “indicating why such a letter is not necessary.” Hearing Recess Order, #300004-1, #4C0828-2, Feb. 5, 2016 (“Recess Order”) at 3. Instead of voluntarily providing a letter from Vermont Railway stating its intentions to proceed with the Petition, NVFC went



156 Battery Street
Burlington, VT 05401
T 802 660 4735
F 802 419 3662

92 Fairfield Street
St. Albans, VT 05478
T 802 524 0080
F 802 524 4665

www.msdt.com



through a lengthy restatement asserting it has standing and that one or both permits have already been abandoned. As will be discussed further, the Town agrees that Vermont Railway does not need to submit a letter indicating its intent to proceed. However, the Town strongly disagrees with NVFC's assertion that it continues to have standing, and that one or both of the permits have been abandoned. Accordingly, the Commission should dismiss NVFC as a party to these proceedings and find that the permits have not been abandoned.

II. ARGUMENT

A. Vermont Railway Is Not a Necessary Party

Under the applicable rules, the Commission can proceed with the review of a petition to abandon without Vermont Railway, as the current landowner, expressing its intent to proceed with the Petition. *See* Act 250 Rule 38(D). Specifically, the permittee is only required to be given notice of the proceedings. *See id.* (“The District Commission shall provide at least 20 days’ notice of the proceeding to the permit holder, to all persons who were parties to the permit proceedings, and to the governmental statutory parties listed in Rule 14(A).”).¹

Setting aside NVFC's argument that the permits have already been abandoned—which will be addressed further in this rebuttal—it is indisputable that Vermont Railway is the permit holder for the Property and therefore entitled to notice. Under Act 250 Rules, the two permits in question automatically ran with the Property and are now held by Vermont Railway. *See* Act 250 Rule 33(C)(1), 33(C)(3) (“A purchasing landowner

¹ The Rules also require that notice be given “to all persons who were parties to the permit proceedings . . .” Act 250 Rule 38(D). Just as the notice requirement does not mandate the participation of the permit holder it also does not automatically provide standing to all parties to the permit proceedings. NVFC cannot rely on this language to maintain standing throughout these proceedings.



156 Battery Street
Burlington, VT 05401
T 802 660 4735
F 802 419 3662

92 Fairfield Street
St. Albans, VT 05478
T 802 524 0080
F 802 524 4665

www.msdtv.com

will assume the rights and obligations of a recorded permit without the necessity of an amendment transferring the permit. . . . Notwithstanding the provisions of paragraphs (C)(1) and (2), above, all permits shall run with the land . . .”). While Vermont Railway was not given notice of either the January 11, 2016 hearing or the February 5, 2016 recess order by the Commission, *see* Certificate of Service, Dec. 16, 2015 (Ex. 1); Certificate of Service, Feb. 5, 2016 (Ex. 2), it clearly knows about the proceedings. The president of Vermont Railway, David Wulfson, is the brother of the president of NVFC, Todd Wulfson. Further, the Town has repeatedly referenced the Petition and these proceedings in the federal litigation presently pending between Vermont Railway and the Town. *See* Opposition to Motion for Preliminary Injunction, Vermont Railway, Inc. v. Town of Shelburne, Civil Action No. 2:16-cv-16 at 7 (excerpts attached as Ex. 3) (“Counsel for the Town knows full well that [Vermont Railway] is not a party in that proceeding, entered no appearance, and lodged no objection in that matter.”). The Town would urge the Commission to abide by Act 250 Rule 38(D) and commence providing notice of these proceedings to Vermont Railway.

However, even once Vermont Railway has notice of these proceedings there is no need for it to participate and/or express any kind of intent to proceed with the Petition. *See* Act 250 Rule 38(D) (“If the permittee does not request the right to be heard, the District Commission may declare the permit void without a hearing.”).² The Commission should give Vermont Railway party status based on it being the current landowner/holder of the two permits, *see* 10 V.S.A. § 6085(c)(1)(B), and add Vermont Railway to the certificate of service list going forward. Vermont Railway can then choose whether or not

² There is nothing in Act 250 Rule 38 to imply that the Commission cannot declare permits valid unless there is a hearing. *See* Act 250 Rule 38.



156 Battery Street
Burlington, VT 05401
T 802 660 4735
F 802 419 3662

92 Fairfield Street
St. Albans, VT 05478
T 802 524 0080
F 802 524 4665

www.msdt.com

it wants to participate. It is important to note that declining to participate cannot effect the Commission's final ruling and/or interfere with the Commission's ability to compel testimony from and issue subpoenas to Vermont Railway so that the Commission may make the necessary findings and conclusions required to rule on the Petition. *See* Act 250 Rule 4 (The Commission may "issue subpoenas for the attendance of witnesses or the production of documents on its own motion."); Act 250 Rule 20(B)(2) (The Commission "may make reasonable inquiry as it finds necessary to make findings and conclusions as required . . .").

B. NVFC No Longer Has Standing

The Commission is currently determining party status pursuant to 10 V.S.A. § 6085(c)(1), but acknowledges that the applicable statutes and Act 250 Rules "are not clear as to which persons can offer evidence or cross examine witnesses at a Hearing on Abandonment [and is t]herefore . . . initially using the statute definition for party status." Recess Order at ¶ n.1. Under 10 V.S.A. § 6085(c)(1)(A) "the applicant" has party status. The use of the word "applicant" does not directly align with language in the applicable rules relating to abandonment, which state that an abandonment proceeding is initiated with a "petition" and not an application. *See* Act 250 Rule 38(C). The language in the rule itself even draws a distinction between the "application" to get the permit and the "petition" to abandon the permit. *See id.* ("A petition to declare a permit abandoned may be initiated by the permittee, by any person who was a party to the application proceedings, or by any person entitled to party status under 10 V.S.A. § 6085(c).").

NVFC also asserts that it only needed to show standing to initiate the Petition, and in doing so relies on a 1997 declaratory ruling of the Vermont Environmental Board: In



156 Battery Street
Burlington, VT 05401
T 802 660 4735
F 802 419 3662

92 Fairfield Street
St. Albans, VT 05478
T 802 524 0080
F 802 524 4665

www.msdt.com

re Putney Paper Co., Inc., DR #335 (Envtl. Bd. May 29, 1997) (Ex. 4). The Environmental Board held that:

A person who wishes to initiate an appeal or declaratory ruling request must demonstrate standing to do so whereas the question of party status arises when a person wishes to be a party to a proceeding initiated by someone else. Once a person has demonstrated standing to file an action, s/he need not make a separate demonstration of party status.

Putney Paper, slip op. at 5–6 (emphasis removed). This language specifically addresses appeals and declaratory rulings, and has nothing to do with petitions for abandonment, or even permit applications. The procedural posture of Putney Paper is crouched in whether an individual had standing to appeal the jurisdictional opinion of a district coordinator. *See id.* at 6. Furthermore, Putney Paper never contemplated a scenario where the very facts that may give rise to the standing to appeal later vanish. That is the case here. The facts that gave NVFC standing to initiate the abandonment petition are now different—its ownership of the land no longer. Therefore, Putney Paper is not instructive to this case.

While both the Town and NVFC are in agreement that NVFC had standing to initiate the Petition pursuant to Rule 38(C) it no longer has party status under any of the prongs under 10 V.S.A. § 6085(c)(1). Each will be discussed in turn.

1. The Applicant

As discussed above, in a petition proceeding there is no applicant. Accordingly, NVFC does not garner party status under 10 V.S.A. § 6085(c)(1)(A).

2. The Landowner

NVFC has conveyed the Property to Vermont Railway and is no longer a landowner entitled to party status. *See* 10 V.S.A. § 6085(c)(1)(B).



156 Battery Street
Burlington, VT 05401
T 802 660 4735
F 802 419 3662

92 Fairfield Street
St. Albans, VT 05478
T 802 524 0080
F 802 524 4665

www.msdt.com

3. *Municipalities and State Agencies*

NVFC is neither a municipality nor a state agency and therefore does not have party status under 10 V.S.A. §§ 6085(c)(1)(C), 6085(c)(1)(D).

4. *Particularized Interest*

To have party status NVFC would need to show that it “has a particularized interest protected by [Chapter 151 of 10 V.S.A.]” 10 V.S.A. § 6085(c)(1)(E). Setting aside the fact that NVFC has not timely petitioned for party status—which is required under 10 V.S.A. §§ 6085(c)(2), 6085(c)(3)—NVFC has not shown how it has a particularized interest.

“Particularized interests” are those “specific land use interests enumerated in the ten criteria and sub-criteria of Act 250.” In re Sports Venue Found., Inc., 168-8-07 Vtec, slip op. at 4, 2007 WL 6970365 (Vt. Env'tl. Ct. Dec. 18, 2007) (Durkin, J.) (referencing the criteria in 10 V.S.A. § 6086). Further, the interest must be specific and particular to the person. See Orlandi Act 250 Kennel Permit, 71-5-14 Vtec, slip op. at 5, 2015 WL 1283023 (Vt. Env'tl. Ct. Feb. 13, 2015) (Durkin, J.). As the Commission is well aware, the ten criteria are laid out at 10 V.S.A. § 6086 and none of these criteria are even remotely related to a landowner’s right to ensure that it can convey good title, which is the only “interest” NVFC has asserted it now has in the Petition proceedings. See Petitioner’s Response to District Commission’s Recess Order at 5 (“Furthermore, when NVFC conveyed its interest in the property by a warranty deed, it warranted therein that the property was free from encumbrances and agreed to warrant and defend against any claim.”).



156 Battery Street
Burlington, VT 05401
T 802 660 4735
F 802 419 3662

92 Fairfield Street
St. Albans, VT 05478
T 802 524 0080
F 802 524 4665

www.msdt.com

NVFC's reliance on the requirement that the initiator of the abandonment petition automatically gains party status is also misplaced. *See* Recess Order at 6; Act 250 Rule 38(F). Party status is a specifically defined term and nowhere in the rules or applicable statutes does that definition include "whomever is responsible for filing." Just because an entity is tasked with the administrative obligation of recording does not mean that the entity has a particularized interest down the line.

For the forgoing reasons, NVFC has not—and cannot—show that it has party status to continue participating in the pending proceedings. By the very nature of the review process before the Commission it is possible that an individual or entity could have party status at one point in the proceedings and then lose party status. *See* Act 250 Rule 14(E)(3); 10 V.S.A. § 6085(c)(6).

C. Neither Permit Has Been Abandoned

Portions of NVFC's response to the Commission's recess order addresses NVFC's assertion that at least one of the permits in question has already been abandoned. Not only is this not relevant to the Commission's requests in the recess order, but the Town argues that it is, in fact, an incorrect application of the law. *See generally* Memorandum of the Town of Shelburne in Opposition to Petition for Abandonment. The Town will not rehash its full argument here, especially since the Commission has already held that abandonment under 10 V.S.A. § 6091(b) is not automatic. Recess Order at 2 (internal quotation marks and citations omitted) (The Natural Resources Board, "through the rulemaking authority vested in it by 10 V.S.A. § 6025, has wisely established procedures whereby district commissions may decide that an Act 250 permit has become abandoned and void. Furthermore the Court has also stated that [s]ince it has not been



156 Battery Street
Burlington, VT 05401
T 802 660 4735
F 802 419 3662

92 Fairfield Street
St. Albans, VT 05478
T 802 524 0080
F 802 524 4665

www.msdt.com



deemed abandoned, the subdivision permit remains in full force and effect, even if the permittee has allowed the construction completion deadlines to expire.”).

D. Vermont Railway’s Intentions Matter

As discussed above, neither of the permits have been abandoned. Once the Commission gathers evidence from Vermont Railway, and the Town urges to Commission to do so, it will see that the development currently being undertaken at the Property is incredibly similar to the development that was planned under the existing permits. Contrary to NVFC’s assertions, this current use is relevant and more evidence should be brought into the record. As was discussed in the Memorandum of the Town of Shelburne in Opposition to Petition for Abandonment, and at the January 11, 2016 hearing, whether the permits have been abandoned turns, in part, on whether there was a change of plans in the usage. Here, there has not been a change in the plans for the Property but, rather, what has changed is the entity owning the Property and commencing plans for, among other things, salt storage, an access road, and railway siding. If Vermont Railway wants the permits abandoned so that it can commence a similar project under the protection of the Interstate Commerce Termination Act then that is material to the petition for abandonment presently before the Commission.

III. CONCLUSION

NVFC and the Town are in agreement that Vermont Railway does not need to express its intent to continue with the Petition. However, the parties are in disagreement over whether NVFC can continue as a party to the proceedings and if one or both of the permits have already been abandoned. For the foregoing reasons, the Town request that Vermont Railway be added to the service list so that it receives proper notice of these



156 Battery Street
Burlington, VT 05401
T 802 660 4735
F 802 419 3662

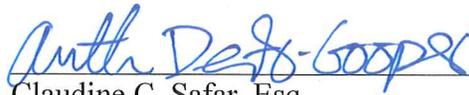
92 Fairfield Street
St. Albans, VT 05478
T 802 524 0080
F 802 524 4665

www.msdt.com

proceedings and further requests that the Commission find that NVFC no longer has party status before proceeding with its review of the Petition. The Town is confident that once more information about Vermont Railway's plans for the Property come into evidence that the Commission will have to find that the permits have not been abandoned and it still retains jurisdiction over this project.

Respectfully submitted this 7th day of March, 2016.

The Town of Shelburne
By and through its counsel,



Claudine C. Safar, Esq.
Anthea Dexter-Cooper, Esq.
MONAGHAN SAFAR DUCHAM PLLC
156 Battery Street
Burlington, Vermont 05401
(802) 660-4735
csafar@msdvt.com
adextercooper@msdvt.com



156 Battery Street
Burlington, VT 05401
T 802 660 4735
F 802 419 3662

92 Fairfield Street
St. Albans, VT 05478
T 802 524 0080
F 802 524 4665

www.msdvt.com



CERTIFICATE OF SERVICE

I hereby certify on this 16th day of December 2015, a copy of the foregoing ACT 250 DECISION AND ORDER #300004-1 & #4C0828-2 sent by U.S. mail, postage prepaid to the following individuals without email addresses and by email to the individuals with email addresses listed.

Note: any recipient may change its preferred method of receiving notices and other documents by contacting the District Office staff at the mailing address or email below. If you have elected to receive notices and other documents by email, it is your responsibility to notify our office of any email address changes. All email replies should be sent to nrb-act250essex@state.vt.us. Please note you can now fill out and submit the Act 250 survey online at: <http://permits.vermont.gov/act250-survey>.

Northern Vermont Financial Corporation
c/o Carl Lisman, Esq.
Lisman Leckerling, PC
84 Pine Street
Burlington, VT 05402-0728
clisman@lisman.com
jdillon@lisman.com
mnaudlaw@gmail.com

Joe Colangelo, Town Manager
Chair, Selectboard/Chair, Planning Commission
Town of Shelburne
PO Box 88
Shelburne, VT 05482
chaag@shelburnevt.org
jcolangelo@shelburnevt.org

Charlie Baker, Executive Director
Regina Mahony, Senior Planner
Chittenden County Regional Planning Commission
110 West Canal Street, Suite 202
Winooski, VT 05404
cbaker@ccrpcvt.org
rmahony@ccrpcvt.org

Elizabeth Lord, Land Use Attorney/ANR
National Life Drive, Davis 2
Montpelier, VT 05602
anr.act250@vermont.gov

Barry Murphy/Vt. Dept. of Public Service
112 State Street, Drawer 20
Montpelier, VT 05620-2601
barry.murphy@vermont.gov

Craig Keller/John Gruchacz/Jeff Ramsey
VTrans Policy, Planning & Research Bureau
One National Life Drive, Drawer 33
Montpelier, VT 05633
craig.keller@vermont.gov
jeff.ramsey@vermont.gov
john.gruchacz@vermotn.gov

Lauren Masseria, Act 250 Development Coordinator
Vt. Agency of Agriculture, Food & Markets
116 State Street, Drawer 20
Montpelier, VT 05620-2901
AGR.ACT250@vermont.gov

Division for Historic Preservation
National Life Building, Drawer 20
Montpelier, VT 05620
scott.dillon@vermont.gov
james.duggan@vermont.gov
dale.azaria@vermont.gov

FOR YOUR INFORMATION

District #4 Environmental Commission
Marcy Harding, Vice Chair
Parker Riehle/Monique Gilbert
111 West Street
Essex Junction, VT 05452

Dated at Essex Junction, Vermont, this 16th day of December, 2015.

Christine A. Commo

Natural Resources Board Technician
879-5614
christine.commo@state.vt.us

CERTIFICATE OF SERVICE

I hereby certify on this 5th day of February 2016, a copy of the foregoing ACT 250 HEARING RECESS ORDER #300004-1 & #4C0828-2 sent by U.S. mail, postage prepaid to the following individuals without email addresses and by email to the individuals with email addresses listed.

Note: any recipient may change its preferred method of receiving notices and other documents by contacting staff at the mailing address or email below. If you have elected to receive notices and other documents by responsibility to notify our office of any email address changes. All email replies should be sent to nrb-act250es
Please note you can now fill out and submit the Act 250 survey online at: <http://permits.vermont.gov/act250-survey>

EXHIBIT

tabbies

2

Northern Vermont Financial Corporation
c/o Carl Lisman, Esq./Mark Naud, Esq.
Todd Wulfson/Judith Dillon
Lisman Leckerling, PC
84 Pine Street
Burlington, VT 05402-0728
clisman@lisman.com; jdillon@lisman.com
mnaudlaw@gmail.com
todd@rockpointadvisors.com

Joe Colangelo, Town Manager
Dean Pierce, Director of Planning and Zoning
Town of Shelburne
PO Box 88
Shelburne, VT 05482
chaag@shelburnevt.org
jcolangelo@shelburnevt.org
dpierce@shelburnevt.org

Claudine Safar, Esq.
Monaghan Safar Ducham
156 Battery Street
Burlington, VT 05401
csafar@msdvt.com

Catamount/Harbour, LLC
c/o Liam Murphy, Esq./Katelyn Ellermann, Esq.
Murphy Sullivan Kronk
275 College Street, PO Box 4485
Burlington, VT 05406
lmurphy@mskvt.com
kellermann@mskvt.com

David Grayck, Esq.
Law Office of David Grayck, Esq.
57 College Street
Montpelier, VT 05602
dgrayck@gmail.com

Charlie Baker/Regina Mahony
Chittenden County Regional Planning Comm.
110 West Canal Street, Suite 202
Winooski, VT 05404
cbaker@ccrpcvt.org; rmahony@ccrpcvt.org

Elizabeth Lord, Land Use Attorney
Agency of Natural Resources
National Life Drive, Davis 2
Montpelier, VT 05602
anr.act250@vermont.gov

Barry Murphy/Vt. Dept. of Public Service
112 State Street, Drawer 20
Montpelier, VT 05620-2601
barry.murphy@vermont.gov

Craig Keller/John Gruchacz/Jeff Ramsey
VTans Policy, Planning & Research Bureau
One National Life Drive, Drawer 33
Montpelier, VT 05633
craig.keller@vermont.gov
jeff.ramsey@vermont.gov
john.gruchacz@vermont.gov

Lauren Masseria, Act 250 Development Coordinator
Vt. Agency of Agriculture, Food & Markets
116 State Street, Drawer 20
Montpelier, VT 05620-2901
AGR.ACT250@vermont.gov

Division for Historic Preservation
National Life Building, Drawer 20
Montpelier, VT 05620
scott.dillon@vermont.gov
james.duggan@vermont.gov
dale.azaria@vermont.gov

FOR YOUR INFORMATION

District #4 Environmental Commission
Marcy Harding, Vice Chair
Parker Riehle/Monique Gilbert
111 West Street
Essex Junction, VT 05452

Dated at Essex Junction, Vermont, this 5th day of February, 2016.

Christine A. Commo
Natural Resources Board Technician
879-5614
christine.commo@state.vt.us

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

VERMONT RAILWAY, INC.)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 1:16-cv-16
)	
TOWN OF SHELBURNE and JOE)	
COLANGELO in his capacity as Town)	
Manager and Zoning Enforcement)	
Officer,)	
)	
Defendants.)	
TOWN OF SHELBURNE,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 1:16-cv-20
)	
VERMONT RAILWAY, INC.,)	
)	
Defendant.)	

OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Vermont Railway, Inc. (“Vermont Railway” or the “Railroad”) hereby opposes the Town of Shelburne’s (the “Town”) Motion for Preliminary Injunction seeking an order directing Vermont Railway to cease work on its rail facility in Shelburne, Vermont.

This effort by the Town to halt or delay the Railroad’s construction activity highlights the very reason that Congress enacted the ICC Termination Act of 1995 (“ICCTA”) and why Congress *expressly* preempted state and local regulation that conflicts with the ICCTA. In Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638, 640 (2d Cir. 2005), *cert. denied*, 546 U.S. 977 (2005), the Second Circuit Court of Appeals unequivocally held that pre-construction permit

information and answer questions about the project and to discuss possible avenues for accommodating the Town's concerns. Wulfson Aff. ¶16. Moreover, since its initial meeting with the Town in June 2015, the Railroad has extended an open invitation to Town officials to visit the site to learn more about the project. Id. ¶17. The Town's curiously phrased claim on page 4 of its Motion that its request for a site visit in an Act 250 proceeding "have been objected to" is clearly misleading if it is intended to suggest that the Railroad objected to a requested site visit. Counsel for the Town knows full well that the Railroad is not a party in that proceeding, entered no appearance, and lodged no objection in that matter.² See generally Wulfson Aff. ¶18.

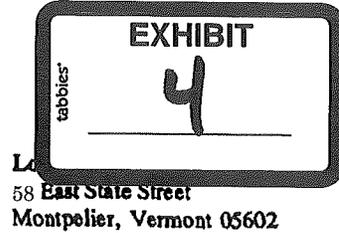
Despite its request that the Court enjoin the project "to give the Town and its residents the opportunity to engage in meaningful review and a dialogue as to the scope and impact of the project," Town Motion at 7, the Town has *not* sought to comment on, or propose steps to address, supposed safety concerns. Instead the Town has sought merely to oppose and delay the project in an effort to drive it from the Town. A Notice of Violation issued by the Town with respect to the Railroad's project, and attached as Exhibit B to the Town's original Complaint, is indicative of the Town's true intent to "prohibit land development (by the Railroad) . . . without first obtaining a zoning permit." No reference to municipal police powers is included in this Notice, and the Town has yet to identify any legitimate concern within the scope of its municipal police powers (i.e. plumbing code, fire suppression systems, electrical code, etc.) with which the Railroad has not or will not comply. In short, it is abundantly clear that the Town's only aim is to prohibit the Railroad from constructing this needed salt facility in Shelburne. The Town's Attorney has made this position explicit in an e-mail to the Railroad's counsel, stating: "If Mr. Wulfson is not interested in discussing an [sic] resolution based on his locating an alternate site,

² Counsel is correct, however, in acknowledging in a subsequent footnote that the referenced Act 250 proceeding is "not pertinent to this litigation." Town Motion at 5, n.2.

Mailing address:
c/o State Office Building PO
Montpelier, Vermont 05602



STATE OF VERMONT
ENVIRONMENTAL BOARD
MONTPELIER, VERMONT 05602
802-828-3309



MEMORANDUM

TO: Service List
FROM: Donna Russo-Savage, Esq., Associate General Counsel
RE: Putney Paper Company, Inc., DR #335
DATE: J u n e 2, 1997

Attached are copies of pages 7 and 10 of the Findings of Fact, Conclusions of Law, and Order issued on May 29, 1997. Please replace those pages of May 29 Order with these corrected pages. These pages are identical to the originals in every way **except** that they correct a citation error -- specifically, pages 7 and 10 of the May 29 Order refer to 10 V.S.A. § 14 rather than to Environmental Board Rule ("EBR") 14.

Please call me if you have any questions in this regard.

FAUSERS\DONNAR\MEMOS\PUTNEY.PRT

DR335

Re: Putney Paper Company, Inc.
Declaratory Ruling #335
Findings of Fact, Conclusions of Law, and Dismissal Order
Page 7

description of the location of his property in relation to the project site, and (iii) a description of the potential effect of the proposed project upon his interests with respect to each of the pertinent Act 250 criterion. EBR 14(B)(3)(a) and EBR 14(B)(4). Such information must be provided to the Board in writing on or before the day of the prehearing conference. EBR 14(B)(3). Whether or not a petitioner has standing is solely within the Board's discretion. 10 V.S.A. § 6007(c). Cf. EBR 14(B)(1); Re: Northern Development Enterprises, #5W0901-R-5-EB, Memorandum of Decision at 7 (Aug. 21, 1995) (decision to grant party status under Rule 14(B)(1) is solely within the Board's discretion).

[3] ~~The~~ Board concludes that Mr. Hendricks has not demonstrated that the use of paper sludge in the vegetative layer may affect his interests under any of the Act 250 criteria and, therefore, he has failed to establish that he has standing to file the Petition.

a. Criterion I(B) (waste disposal / groundwater)

In his Petition, Mr. Hendricks identified himself as an adjoining landowner. He stated that "the use of sludge in the cap and / or vegetative layer will result in more pollution to the groundwater on his adjoining property." Petition at 4. The Petition does not identify the precise criteria at issue. Mr. Hendricks verbally indicated at the prehearing conference that the allegation implicates 10 V.S.A. § 6086(a)(1)(B) ("Criterion 1 (B)") (waste disposal / harmful or toxic substances injected into groundwater or wells). Mr. Hendricks has not indicated whether his well is up- or down-gradient from the landfill, the distance of his property from the landfill, or the direction in which the groundwater flows, nor has he provided any other support for his contention.

The Board concludes that Mr. Hendricks' Petition has failed to demonstrate that the use of paper sludge waste as part of the vegetative layer may affect his interests under Criterion I(B). 10 V.S.A. § 6007(c); EBR 3(C)(3).² Even if the Board were to waive the requirements set forth in EBR 14(B)(3) and consider the representations Mr. Hendricks made at oral argument and in the memoranda he filed in response to the Motion to

² Mr. Hendricks has initiated or participated in several other matters before the Board or its Waste Facility Panel that involve Putney Paper. Written decisions addressing whether Mr. Hendricks has demonstrated party status / standing have issued in more than one case. E.g., Re: Putney Paper Company, Declaratory Ruling #305, Findings of Fact, Conclusions of Law, and Order (Oct. 30, 1995); Re: Putney Paper Company, #2W0436-7-EB, Memorandum of Decision (May 16, 1995). Mr. Hendricks should be well aware of the nature of the demonstration necessary to establish party status / standing.

**Re: Putney Paper Company, Inc.
Declaratory Ruling #335
Findings of Fact, Conclusions of Law, and Dismissal Order
Page 10**

adjoining landowners in In re Conway, 152 Vt. 526 (1989).⁴ In Conway, an assistant district coordinator led Act 250 applicants to believe that it would not matter whether certain landowners were included on the list of adjoiners required by EBR 10(F). Although the Supreme Court observed that adjoining landowners are not entitled to actual notice under § 6084, it held that Rule 10(F) amplifies the statute and requires actual notice unless the district commission reasonably decides otherwise. Id. at 529-30.

[4] Conway cannot be read to extend § 6007(c) standing to adjoining landowners. First, § 6007(c) specifically confers standing solely to persons entitled to notice under § 6084. Nothing in § 6084 entitles an adjoining landowner to personal notice. Conway, 152 Vt. at 529. It is significant that § 6007(c) does not confer standing to persons “entitled to notice under the statute and rules” or to persons “entitled to notice.” Second, as a practical matter, at the time when a person attempts to appeal a jurisdictional opinion under § 6007(c) the district commission has not yet been called upon to exercise its discretion regarding whether to send actual notice of an application filing to adjoiners under EBR 10(F). Therefore, Conway cannot be relied upon as support for the argument that adjoiners are among those granted standing under the “entitled to notice under section 6084” language of § 6007(c).

The Board concludes that, for purposes of § 6007(c) standing, an adjoining landowner is not among the “parties that would be entitled to notice under section 6084.”

3. Qualifies as Rule 14(A) Party -- Direct Effect

EBR 3(C)(3) provides that “any person who qualifies as a party under Rule 14(A)” may appeal a jurisdictional opinion. Under EBR 14(A)(5), an adjoining landowner may qualify for party status to the extent that the landowner “demonstrates that the proposed development ... may have a direct effect on the adjoiner’s property under any of the 10 [Act 250] criteria.” Such information must be provided to the Board in writing on or before the day of the preheating conference and must state the details of the landowner’s interest in the proceeding. EBR 14(B)(3). The burden of proof is on the landowner. EBR 14(A)(5). Whether or not an adjoining landowner has standing is solely within the Board’s discretion. 10 V.S.A. § 6007(c); EBR 3(C)(3). Cf. EBR 14(A)(5).

⁴ In all ways pertinent to this discussion, the version of § 6084 construed in Conway is identical to the current version.

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

RE: Putney Paper Company, Inc. Declaratory Ruling Request #335

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision **pertains** to the Motion to Dismiss and Objection to Prehearing Order filed by Putney Paper Company Inc. ("Putney **Paper**"). It also concerns Nathaniel Hendricks' oral request for a ruling as to whether this matter is properly before the Environmental Board ("Board"). As explained more fully below, the Board dismisses the proceeding with prejudice because Mr. Hendricks has failed to establish that he has standing under 10 V.S.A. § 6007(c) to file this request for declaratory ruling.

I. BACKGROUND

On October 31, 1996, District #2 Environmental Commission Coordinator April Hensel issued Jurisdictional Opinion #2- 102 ("Opinion") which opined that Pumey Paper's use of paper sludge waste as part of the vegetative layer over a sludge landfill clay cap in the Town of Putney is not a material or **substantial** change **requiring** an amendment to Land Use Permit #2W0436-5 ("Dash 5 Permit") pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250").

On December 2, 1996, Mr. Hendricks filed a petition for a declaratory ruling ("Petition") with the Board concerning the Opinion and **referencing** the Dash 5 Permit, Land Use Permit #2W0436-6 ("Dash 6 Permit"), and Land Use Permit #2W0436-7 ("Dash 7 Permit"). Mr. Hendricks contends that the use of **paper** sludge is a material change requiring an Act 250 permit pursuant to Environmental Board Rule ("EBR") 34.

On January 6, 1997, Board Chair John T. Ewing convened a prehearing conference at which the following individuals and entities **participated** (collectively the "Participants"): Pumey Paper by Peter Van Oot, Esq. and Turk Ellis; Nathaniel Hendricks, **pro se**; The Agency of Natural Resources ("ANR") by Mark Ollmann, Esq. and Andrew Raubvogel, Esq.

The following were among the issues raised and discussed at the preheating conference:

- (i) Pumey Paper orally moved to dismiss the Petition based on Mr. Hendricks' a) failure to prove party status and b) failure to state a claim ("Motion to Dismiss").
- (ii) Mr. Hendricks orally requested a written ruling **from** the Board as to whether the Environmental Board or the Waste Facility Panel of the Environmental Board was the proper forum in which to address the issues

**Re: Putney Paper Company, Inc.
Declaratory Ruling #335
Findings of Fact, Conclusions of Law, and Dismissal Order
Page 2**

in this matter ("Request Regarding Forum").

(iii) Chair Ewing indicated that, pursuant to 10 V.S.A. § 6027(g) and EBR 4 1, **the** matter would be heard by himself as a hearing officer of the **Environmental** Board.

(iv) Mr. Hendricks requested that "all **pertinent** ANR documents" be **subpoenaed** for consideration in this matter.

Pumey Paper and Mr. Hendricks orally addressed the merits of the Motion to Dismiss at the preheating conference. Mr. Hendricks was advised **that, pursuant** to EBR 4, his request for subpoenas must be made in writing.

On January 10, 1997, the Chair issued a Preheating Conference Report and Order ("Order"), which is incorporated herein by reference. Among other things, the Order set forth a procedural schedule for this matter. In particular, the Participants were permitted to submit legal memoranda addressing the Motion to Dismiss, the Request Regarding Forum, and the decision to proceed by hearing officer, as well as to **file** objections to the Order, in whole or in **part**, on or before Tuesday, January **28, 1997**. In addition, the Order indicated the **Chair's** finding **that**, although unclear from the pleadings, the Petition was based upon the Dash 5 Permit. The Order reiterated that Mr. Hendricks should review EBR 4 regarding requests for the issuance of subpoenas.

On January 28, 1997, Pumey Paper filed its Motion to Dismiss and Objection to Preheating Conference Order in which it (i) objected to the Chair's determination that the Petition is based on the Dash 5 Permit and provided support for its contention that the Petition is based on the Dash 6 Permit; (ii) set forth its arguments in support of the Motion to Dismiss; and (iii) addressed the issues raised by the Request Regarding Forum.

Also on January **28, 1997**, Mr. Hendricks filed his Response to Pumey Paper's Motion to Dismiss in which he (i) set forth his argument **in** opposition to the Motion to Dismiss; (ii) objected to the determination that this matter proceed by hearing officer; and (iii) requested the issuance of subpoenas.

On February 6, 1997, Chair Ewing issued a Chair's **Preliminary** Ruling, which is **ncorporated** herein by reference, in which he (i) **suspended all** deadlines set forth in the **Order**; (ii) permitted Mr. Hendricks and the ANR to file **responsive** memoranda to Pumey **Paper's** January 28, 1997 filing; (iii) scheduled a **full Board** deliberation **concerning the Motion** to Dismiss and Request Regarding Forum; and (iv) permitted the Participants to **request oral argument prior** to the Board deliberation.

Re: **Putney Paper Company, Inc.**
Declaratory Ruling #335
Findings of Fact, Conclusions of Law, and Dismissal Order
Page 3

On March 10, 1997, Mr. Hendricks filed his response to Putney Paper's Motion to Dismiss and Objections to **Prehearing** Order.

On April 23, 1997, the Board heard oral argument relative to the Motion to Dismiss and the **Request Regarding** Forum at which the following individuals and entities participated: Putney Paper by Peter Van **Oot**, Esq. and Turk **Ellis; Nathaniel** Hendricks, **pro se**.

On April 23, 1997 and on May 28, 1997, **the** Board deliberated. Based upon a thorough review of the record, the oral arguments of Putney Paper and **Mr** Hendricks, and relevant statutes, rules, and legal precedent, the Board adjourned. This matter is now ready for final decision.

II. ISSUES

The issues are as follows:

1. Whether the appeal from the Opinion is properly before **the** Board or should be brought before the Waste Facility Panel.
2. **Whether** Mr. Hendricks has standing to bring the Petition regarding the **Opinion**.
3. **whether the** Petition must **be dismissed** because Putney Paper alleges that it is baseless.

III. FINDINGS OF FACT

1. On December 2, 1983, the District **Commission** issued the Dash 5 Permit authorizing Putney Paper to operate a paper sludge landfill located on River Road, in Putney, **Vermont** ("Landfill"). By its terms, the Dash 5 Permit expired November 1, 1988.

2. On October 1, 1991, the **District** Commission issued the Dash 6 Permit authorizing Putney Paper to operate the La&ill.

3. Mr. Hendricks owns real property adjoining the Landfill tract.

4. On October 31, 1996, District Commission Coordinator April Hensel issued the Opinion finding that Putney Paper's use of paper sludge waste as part of the

Re: **Putney Paper Company, Inc.**
Declaratory Ruling #335
Findings of Fact, Conclusions of Law, and Dismissal Order
Page 4

vegetative layer over the Landfill clay cap is not a material or substantial change requiring an amendment to the Dash 5 Permit.

5. On December 2, 1996, Mr. Hendricks **filed** the Petition with the Board **appealing the Opinion** and contending that the use of paper sludge is a material change requiring an Act **250 permit** under EBR 34. The Petition **references** the Dash 5 Permit, the **Dash 6** Permit, and the Dash 7 Permit.

6. The Petition states that Mr. Hendricks has **standing** to bring the Petition under 10 V.S.A. § 6007(c) because "as an adjoining property owner to the **Putney Paper** landfill site, he would be entitled to notice under **10 V.S.A.** section 6084 if an Act 250 permit **were** required."

7. The Petition states that Mr. Hendricks also has standing because he "would be **affected** by the changes to the design of the landfill **because** the use of sludge in the cap and / or vegetative layer will result in more pollution to the groundwater on his adjoining property."

8. The Petition states that the use of sludge "also **affect[s]** the values sought to be protected by the Act, since the Prohibition of farm equipment use by the Agency of Natural Resources **decreases** prime agricultural soils."

9. At the **prehearing** conference held January 6, 1997, Mr. Hendricks orally alleged that he **also** had standing because the following Act 250 criteria may be **affected** by the use of sludge in the vegetative layer: Criteria 1(**air** pollution -- because sludge /toxins on surface may dry out and blow onto his Property), 1(**E**) (streams), 4 (reduction in capacity of land to hold water), 8 (necessary wildlife and endangered species), and 9(**B**) (prime agricultural soils). During the conference, Mr. Hendricks provided no additional support for any of his **allegations of standing**.

10. **In** his responsive memoranda filed January 28 and March 10, 1997, Mr. Hendricks alleged that the use of sludge may **affect** Criteria 1(**water** and air), 1(**B**) (waste disposal), and 9(**B**) (prime agricultural soil). The memoranda provide no additional support for his allegations of standing.

11. Mr. Hendricks filed no **other** documents with the Board to establish standing to bring the Petition.

Re: **Putney Paper Company, Inc.**
Declaratory Ruling #335
Findings of Fact, Conclusions of Law, and Dismissal Order
Page 5

IV. REQUEST REGARDING FORUM

At the January 6, 1997 prehearing conference, Mr. Hendricks orally requested the Board determine whether his Petition is properly before the Board or whether it should be decided by the Waste Facility Panel ("WFP"). At oral argument, Mr. Hendricks **conceded that the** Board is the proper forum in which to bring the Petition. Because Mr. Hendricks did not formally withdraw his request to the Board regarding this issue, the Board will address the Request Regarding Forum briefly.

[1] Any person "may request a jurisdictional opinion from the district coordinator concerning the applicability of" Act 250. 10 V.S.A. §6007(c). Within 30 days after the jurisdictional opinion is mailed, it may be appealed to the Board by petition for declaratory ruling. *Id.* The WFP has jurisdiction over decisions of the "*district environmental commission [made]* in respect to a waste management facility." *Id.* § 6 10.5 (emphasis supplied). A jurisdictional opinion regarding a waste management facility, like all jurisdictional opinions, is rendered only by a district **coordinator**, never by the district environmental commission. Therefore, a jurisdictional opinion regarding a waste management facility, like all jurisdictional opinions, is appealable only to the Board. *Id.* § 6007; **Re: Putney Paper Company, Inc.**, Declaratory Ruling #305, Findings of Fact, Conclusions of Law, and Order at 5 (Oct. 30, 1995) ("Waste Facility Panel has no authority to adjudicate a petition for a declaratory ruling relative to Act 250 jurisdiction").

Based on the Act 250 statute and Board precedent, the Board concludes that it is the appropriate forum in which to address the Petition.

v. MOTION TO DISMISS

The Board may dismiss any matter **before** it, in whole or in part, at **the** request of any party or on its own motion for reasons provided by the Board Rules, by statute, or by law. EBR 18(D). A decision to dismiss must be supported by Findings of fact and conclusions of law. *Id.*

A. Standing

[2] In its motion to dismiss, Putney Paper alleges that Mr. Hendricks is not entitled to party status in this matter. The real question, however, is whether Mr. Hendricks has standing to appeal the jurisdictional opinion by **filing** a petition for **declaratory** ruling. The distinction between standing and party status is slight: A person who wishes to **initiate** an appeal or declaratory **ruling** request must demonstrate **standing** to do so whereas the question of *party status arises when* a person wishes to be a party to a

Re: Putney Paper Compady, Inc.
Declaratory Ruling #335
Findings of Fact, Conclusions of Law, and Dismissal Order
Page 6

proceeding initiated by someone else. Once a person has demonstrated standing to file an action, **s/he** need not make a separate demonstration of party status. Although the **analysis** of standing and party status issues is at times very much the same, it is not identical. In addition, failure to treat standing and party status as distinct issues can lead to incongruous results.⁷

A district coordinator's jurisdictional opinion may be appealed to the Board by "the applicant, by individuals or entities who may be **affected** by the outcome of the opinion, or by parties entitled to notice under [10 V.S.A. §] 6084, if jurisdiction were determined to exist." 10 V.S.A. § 6007(c). EBR Z(C)(3) states that a jurisdictional opinion may be appealed to the Board "by any person who qualifies **as** a party under Rule 14(A) or who may be **affected** by the outcome of the opinion.* Thus, as Mr. Hendricks is not the applicant, there are three ways in which he may have standing to file this Petition: Mr. Hendricks must demonstrate that (i) he may be affected by the outcome of the opinion, (ii) he is a party entitled to notice under 10 V.S.A. § 6084, or (iii) he qualifies as a party under EBR 14(A).

1. Affected by the Outcome

A district coordinator's jurisdictional opinion may be appealed to the Board by any individual "who may be **affected** by the outcome of the opinion." 10 V.S.A. § 6007(c); EBR 3(C)(3). The standard by which the Board determines whether a person is "**affected** by the outcome" pursuant to § 6007(c) is identical to the standard by which it determines whether to grant party status to a person under EBR 14(B)(1). Re: Wesco, Inc. and Jacob & Harmke Verburg, Declaratory Ruling #304, Memorandum of Decision at 4-5 (June 30, 1995); Re: Hiddenwood Subdivision, Declaratory Ruling #324, Memorandum of Decision and Dismissal Order at 4 (Aug. 29, 1996).

EBR 14(B)(1) authorizes the Board to grant party status to a person petitioning for such status where the petitioner has adequately **demonstrated that** "a proposed development or subdivision may **affect** the petitioner's interest under any of the Act 250 criteria. Therefore, applying Rule 14(B)(1) standards to § 6007(c), Mr. Hendricks must demonstrate that his interests may be affected, and thus that he has standing to appeal a jurisdictional opinion, by providing (i) details of his interest in the proceeding, (ii) a

⁷ For example, Putney Paper's apparent misunderstanding of the distinctions led it to argue that **just** because a person has standing to file a petition for a **declaratory ruling**, that same person does not necessarily have party status to participate in the proceedings. Motion to Dismiss at 14-15.

Re: Putney Paper Company, Inc.
Declaratory Ruling #335
Findings of Fact, Conclusions of Law, and Dismissal Order
Page 7

description of the location of his property in relation to the project site, and (iii) a description of the potential effect of the proposed project upon his interests with respect to each of the pertinent Act 250 criterion. EBR 14(B)(3)(a) and EBR 14(B)(4). Such information must be provided to the Board in writing on or before the day of the prehearing conference. EBR 14(B)(3). Whether or not a petitioner has standing is solely within the Board's discretion. 10 V.S.A. § 6007(c). Cf. 10 V.S.A. § 14(B)(1); Re: Northern Development Enterprises, #5W0901-R-5-EB, Memorandum of Decision at 7 (Aug. 21, 1995) (decision to grant party status under Rule 14(B)(1) is solely within the Board's discretion).

[3] The Board concludes that Mr. Hendricks has not demonstrated that the use of paper sludge in the vegetative layer may affect his interests under any of the Act 250 criteria and, therefore, he has failed to establish that he has standing to file the Petition.

a. Criterion 1(B) (waste disposal / groundwater)

In his Petition, Mr. Hendricks identified himself as an adjoining landowner. He stated that "the use of sludge in the cap and / or vegetative layer will result in more pollution to the groundwater on his adjoining property." Petition at 4. The Petition does not identify the precise criteria at issue. Mr. Hendricks verbally indicated at the prehearing conference that the allegation implicates 10 V.S.A. § 6086(a)(1)(B) ("Criterion 1(B)" (waste disposal / harmful or toxic substances injected into groundwater or wells). Mr. Hendricks has not indicated whether his well is up- or down-gradient from the landfill, the distance of his property from the landfill, or the direction in which the groundwater flows, nor has he provided any other support for his contention.

The Board concludes that Mr. Hendricks' Petition has failed to demonstrate that the use of paper sludge waste as part of the vegetative layer may affect his interests under Criterion 1(B). 10 V.S.A. § 6007(c); EBR 3(C)(3).² Even if the Board were to waive the requirements set forth in EBR 14(B)(3) and consider the representations Mr. Hendricks made at oral argument and in the memoranda he filed in response to the Motion to

² Mr. Hendricks has initiated or participated in several other matters before the Board or its Waste Facility Panel that involve Putney Paper. Written decisions addressing whether Mr. Hendricks has demonstrated party status / standing have issued in more than one case. E.g., Re: Putney Paper Company, Declaratory Ruling #305, Findings of Fact, Conclusions of Law, and Order (Oct. 30, 1995); Re: Putney Paper Company, #2W0436-7-EB, Memorandum of Decision (May 16, 1995). Mr. Hendricks should be well aware of the nature of the demonstration necessary to establish party status / standing.

**Re: Putney Paper Company, Inc.
Declaratory Ruling #335
Findings of Fact, Conclusions of Law, and Dismissal Order
Page 8**

Dismiss, it must conclude that Mr. Hendricks has **failed** to demonstrate that the outcome of the Petition may **affect** his interest under Criterion 1(B).³

b. **Criterion 9(B) (prime agricultural soils)**

In his Petition, Mr. Hendricks also alleged that the ANR's prohibition of the use of farm equipment on the capped **landfill** (allegedly due to the sludge in the vegetative layer) indicates a decrease in prime **agricultural** soils (Criterion 9(B)). The "affected by" analysis of § 6007(c) and EBR 3(C)(3) concerns whether Mr. Hendricks **has** standing to bring this appeal. Mr. Hendricks must demonstrate how the outcome may **affect** his **interests under** the Act 250 **criteria**, not what **effect** the outcome may have *in general*. Therefore, the Board concludes that Mr. Hendricks has failed to demonstrate that the

³ Although neither party addressed this issue, the **Board** notes that the Petition could also be dismissed pursuant to the doctrine of collateral estoppel. See In re Stowe Club Highlands, No. 95-341, slip op. at 4 (Vt. Nov. 8, 1996) ("the principles of collateral estoppel generally apply in administrative proceedings, although not as an 'inflexible rule of law.'). Mr. Hendricks has initiated and participated in several matters before the **Board** and its **Waste Facility Panel** concerning the Landfill. During extensive hearings, he has presented expert witness testimony and documentary evidence and has **cross-examined** Putney Paper's witnesses on *the very facts now needed to support a demonstration of his standing to file the Petition*. The Board and its Waste Facility Panel have issued written orders concluding, among other things, that the **groundwater** beneath the **Landfill** does not flow in the direction of Mr. Hendricks' property, that Mr. Hendricks' drinking wells lie **up-gradient** approximately 3/4 of a mile **from** the **Landfill**, and that surface water on the Landfill is diverted into a drainage ditch that does not drain onto or otherwise **affect** Mr. Hendricks property. In addition, the Orders have found that tests of Mr. Hendricks' wells have consistently revealed the presence of arsenic, iron, and manganese since before the issuance of the Dash 5 Permit. They have also concluded that the paper sludge waste generated by Putney Paper is not a "hazardous or toxic waste." E.g., Re: Putney Paper Company, #WH-600-WFP and #ID-9-0257-WFP, Findings of Fact, Conclusions of Law, and Order (Nov. 8, 1996); Re: Putney Paper Company, #2W0436-EB (Revocation), Findings of Fact, Conclusions of Law, and Dismissal Order (Altered) (June 30, 1995). Mr. Hendricks has had a full and fair opportunity in more than one proceeding to litigate the very issues that would be necessary to show that the **Landfill** may **affect** his property. It would be an abuse of the Act 250 process and patently **unfair** to Putney Paper to **permit** Mr. Hendricks yet another **opportunity** to demonstrate that the Landfill may affect his property when, in more than one proceeding, the Board and its Waste Facility Panel have concluded that it does not.

Re: **Putney Paper Company, Inc.**
Declaratory Ruling #335
Findings of Fact, Conclusions of Law, and Dismissal Order
Page 9

outcome of the Petition may **affect** his interests under Criterion 9(B).

c. **other Criteria**

Although EBR 14(B)(3) requires that the **petitioner's** demonstration be made in writing **on** or before the preheating conference, Mr. Hendricks made the following additional allegations. At the prehearing conference he orally alleged that the use of sludge in the vegetative layer may implicate Criteria 1 (air **pollution** -- because sludge /toxins on **surface** may dry out and blow onto his property), **1(E)** (streams), 4 (reduction in **capacity** of land to hold water), and 8 (necessary **wildlife** and endangered species). *In his* responsive memoranda filed January 28 and **March** IO, 1997, Mr. Hendricks alleged that the outcome may affect **Criterion** 1 (water and air), in addition to 1(B) and 9(B) discussed separately above. He has failed to provide any support for these allegations. **Therefore**, even if Mr. Hendricks had made these allegations in writing and within the time period imposed by EBR 14(B)(3), the Board concludes that Mr. Hendricks has failed to demonstrate that his interests may be **affected** under **Criteria** 1, **1(E)**, 4, and 8.

2. **Entitled to Notice Under 10 V.S.A. § 6084**

A district coordinator's jurisdictional opinion may also be appealed to the Board by "parties that would be entitled to notice **under [10 V.S.A. §] 6084.**" 10 V.S.A. § 6007(c). Section 6084(a) requires the applicant to send notice to

the owner of the land if the applicant is not the **owner**; the municipality in which the land is **located**; the **municipal** and regional **planning** commissions for the municipality in which the land is **located**; [and] any adjacent Vermont municipality and municipal and regional planning commission if the land is located on a boundary.

Section 6084(b) **requires** that notice be forwarded to "any state **agency** directly affected, the solid waste management district . . . , and **any other** municipality, state agency, or *person the district commission or [B]oard deems appropriate.*" Notice must also be published in a **local newspaper**. *Id.* §6084(b). Accordingly, **§ 6084** does not expressly require that **all adjoining** automatically receive notice. EBR **10(F)** requires the applicant to file a list of adjoining landowners with its application. "Provision of personal notice to adjoining property owners . . . shall be solely within the discretion and responsibility of the chair of the district commission." EBR **10(F)**.

The Vermont Supreme Court addressed Act 250 notice provisions as they **relate** to

Re: **Putney Paper Company, Inc.**
Declaratory Ruling #335
Findings of Fact, Conclusions of Law, and Dismissal Order
Page 10

adjoining landowners in In re Conway, 152 Vt. 526 (1989).⁴ In Conway, an assistant district coordinator led Act 250 applicants to believe that it would not matter whether certain landowners were **included** on the list of adjoiners required by **EBR 10(F)**. Although the Supreme Court observed that adjoining landowners are not entitled to actual notice under § 6084, it held that Rule **10(F)** **amplifies** the statute and requires **actual** notice unless the district commission reasonably decides otherwise. Id. at 529-30.

[4] Conway cannot be read to extend § 6007(c) standing to adjoining landowners. First, § 6007(c) **specifically** confers standing solely to persons entitled to notice under § 6084. Nothing in § 6084 entitles an adjoining landowner to personal notice. Conway, 152 Vt. at 529. It is significant that § 6007(c) **&es** not confer standing to persons “entitled to notice under the statute and **rules**” or to persons “entitled to notice.” Second, as a practical matter, at the time when a person attempts to appeal a jurisdictional opinion under § 6007(c) the district commission has not yet been called upon to exercise its discretion regarding whether to send actual notice of an application **filing** to adjoiners under EBR 10(F). Therefore, Conway cannot be relied upon as support for the argument that adjoiners are among those **granted** standing under the “entitled to notice under section 6084” language of § 6007(c).

The Board concludes that, for purposes of § 6007(c) standing, an adjoining landowner is not among the “parties that would be entitled to notice under section 6084.”

3. Qualifies as **Rule 14(A) Party -- Direct Effect**

EBR 3(C)(3) provides that “any person who qualifies as a party under Rule **14(A)**” may **appeal** a jurisdictional opinion. Under EBR 14(A)(5), an adjoining landowner may qualify for party status to the extent that the landowner “demonstrates that the proposed development . . . may have a direct effect on the adjoiner’s property under any of the **10 [Act 250]** criteria” Such information must be provided to the Board in writing on or before the day of the **prehearing** conference and must state the details of the landowner’s interest in the proceeding. EBR 14(B)(3). The burden of proof is on the landowner. EBR 14(A)(5). Whether or not an adjoining landowner has standing is solely within the Board’s discretion. 10 V.S.A. § 6007(c); EBR 3(C)(3). Cf. 10 V.S.A. § 14(A)(5).

⁴ In **all** ways pertinent to this discussion, the version of § 6084 construed in Conway is identical to the current version.

Re: **Putney Paper Company, Inc.**
Declaratory Ruling #335
Findings of Fact, Conclusions of Law, and Dismissal Order
Page 11

[5] The Petition alleges that “the use of sludge in the cap and / or vegetative layer will result in more pollution to the **groundwater** on his **adjoining** property.” Petition at 4. The Petition also alleges that the use of sludge will **decrease** prime agricultural soils in the landfill property. Mere allegations, unsupported by **sufficient detail**, cannot sustain the burden of proof to demonstrate that development may have a direct effect on an adjoiner’s property. **Cf. Re: Spring Brook Farm Foundation, Inc.**, Declaratory Ruling Request #290, Preheating Conference Report and Order and Memorandum of Decision at 4 (Jan. 6, 1994) (“The mere assertion that one may be entitled to party status in a district commission proceeding does not demonstrate that a project may have a direct effect on one’s property.”). **See also, cf. Spring Brook Farm Foundation, Inc., #2S0985-EB**, Memorandum of Decision at 5-1 1 (July 18, 1995) (**finding** that an **adjoiner** failed to adequately support request for party **status** under Criteria 5,8,9(K), and 10). As discussed in V.A. 1. above, the Board **concludes** that Mr. Hendricks has not met a minimum threshold demonstration that his allegations have merit. Mr. Hendricks has failed to demonstrate that the use of paper sludge in the vegetative layer may have a direct effect on his property under any of the **Act 250 criteria**.⁵

B. Baselessness of Allegations

Putney Paper argues that the petition should be dismissed because Mr. Hendricks’ allegations are **baseless**.

[6] The Board may dismiss any **matter** before it, in whole or in part, for reasons provided by the Board Rules, by statute, or by law. EBR 18(D). Except to the extent that a person must **make** a demonstration to establish **party** status or standing, Act 250 and the Board Rules do not **require a threshold** level of specificity for filing an appeal or a request for declaratory **ruling**. **Once** the Board **finds** that a matter is properly before it, it is the parties’ responsibility to present relevant evidence on which the Board is able to determine whether the allegations have merit. If the Board determines that a person has **standing** to file a petition for declaratory ruling, it would be premature for it to rule on the merits of the petition until **after** it convenes a hearing and accepts relevant evidence from all parties.

⁵ See footnote #3 **infra**.

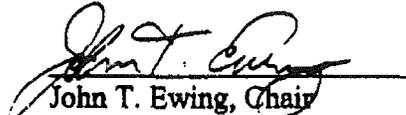
Re: Putney Paper Company, Inc.
Declaratory Ruling #335
Findings of Fact, Conclusions of Law, and Dismissal Order
Page 12

VI. ORDER

1. The Environmental Board, and not the Waste Facility Panel, is the appropriate forum in which to file a petition for declaratory ruling regarding Jurisdictional Opinion #2-102.
2. Nathaniel Hendricks has no standing to file Declaratory Ruling Request #335.
3. Declaratory Ruling Request #335 is hereby dismissed with prejudice.

Dated at Montpelier, Vermont this 29th day of May, 1997.

ENVIRONMENTAL, BOARD



John T. Ewing, Chair

Arthur Gibb

Marcy Harding

Rebecca M. Nawrath

Robert H. Opel

Robert G. Page, M.D.

Steve E. Wright

* Board Members Samuel Lloyd and William Martinez did not participate in the deliberations concerning this matter.