

State of Vermont
WATER RESOURCES BOARD

RE: Putney Paper Company
Docket No. WQ-98-03
(Appeal of Discharge Permit #3-1 128)

Statutory Authority:
10 V.S.A. §1269

**CHAIR'S RULINGS ON PARTY STANDING
NOTICE OF SECOND PREHEARING CONFERENCE**

I. BACKGROUND

On May 19, 1998, Nathaniel Hendricks ("Appellant") filed an appeal of the Agency of Natural Resources' ("ANR") issuance of Discharge Permit #3-1 128 ("Permit") to the Putney Paper Company ("Putney Paper") with the Vermont Water Resources Board ("Board"). On August 21, 1998, I convened a prehearing conference relative to this matter. Appellant, ANR, through Jon Groveman, Esq., and Putney Paper, through Peter Van Oot, Esq., participated in the conference.

At the prehearing conference, Appellant was directed to file both: (1) a written request for party status stating why he has standing to bring the appeal; and (2) a list of citations corresponding to each of the "comments" raised in Appellant's Notice of Appeal that was filed on May 19, 1998. The order to file a list of citations provided Appellant with his third opportunity to clarify the legal issues presented in his Notice of Appeal. ANR and Putney Paper were provided an opportunity to respond to both the request for party status and the revised statement of the issues.

On August 28, 1998, Appellant filed a written request for party status, a request for enlargement of time, and a list of citations which, Appellant argues, relate to the issues raised in its Notice of Appeal filed on May 19, 1998. On September 11, 1998, Putney Paper filed an objection to Appellant's party status and a request that the appeal be dismissed. Putney Paper also submitted materials in support of its objection to party status. Also on September 11, 1998, ANR filed a response to the Appellant's filing.

II. DISCUSSION

A. Appellant's Request for an Enlargement of Time

As noted at the prehearing conference, the time frame established for filing of additional citations and clarification of issues was not subject to additional continuances. The extensions allowed thus far have been made to facilitate understanding of the issues Appellant seeks to raise. Any further extension would unduly delay this matter. Accordingly, Appellant's request is denied.

B. Party Standing

Appellant is granted standing to appeal the issuance of Discharge Permit #3-1128. This grant of party standing is based on the determination that Mr. Hendricks has met the statutory test for standing which is set forth in 10 V.S.A. § 1269 in the following manner: "Any person or party in interest aggrieved by an act or decision of the secretary pursuant to this subchapter may appeal to the board within 30 days." Appellant's aggrievement is suffered only with respect to his water supply wells. Thus, the final statement of issues in this matter will not include any of Appellant's comments or issues that are founded upon generalized interest, for example, in protecting the water quality in downstream reaches of the Connecticut River, or with regard to Appellant's study of endangered species in the Putney/Dummerston area, or concerning the safety of drinking water in other regions as described by the Appellant on page 3 of the request for party status.'

In this case, Appellant claims to be aggrieved and claims to be entitled to party status as a Water Resources Board Rule of Procedure ("WBR") 22(A)(7)* party, one who participates in the appeal because his legally protected (i.e. his substantial) interests are not adequately represented by any other party to the proceeding. Appellant has a legally protected interest to the extent that Putney Paper's activity may affect Appellant's water supply wells. Upon review of Putney Paper's Motion to Dismiss and the supporting documentation, notably that provided by Theodore S. Reeves, P.E., I recognize that the presence of a hydrological nexus between Mr. Hendricks' wells and the discharge for which Putney seeks authorization is a question of fact that may be pursued by Putney Paper in the appeal. Based upon the documentation provided, however, I can not definitively conclude that Mr. Hendricks' water supply will not be affected. In the context of a petition for party status, the Board refrains from foreclosing an Appellant's opportunity to seek review merely because a definitive connection between the activity under review and the Appellant's substantial interests has not previously been established, provided that there has been some showing of potential effects.

I recognize that Mr. Hendricks has participated in many cases in which Putney

With respect to those references to unsubstantiated potential adverse effects upon Appellant's study of endangered species or his ability to consume drinking water in other towns along the Connecticut River, those are not substantial interests for which this proceeding affords Appellant the exclusive means to protect such interest.

2

I have concluded that Mr. Hendricks' reference to WBR 22(7) in his supplemental filing dated August 28, 1998, at page 2, should be to WBR 22(A)(7).

Paper has requested permits, permit renewals, or other legal authorizations. See Exhibit C of Putney's Motion to Dismiss and Response to revised Statement of Issues filed on September 11, 1998. In most, if not all, of the Putney Paper proceedings in which Mr. Hendricks has sought to participate, party status has been granted to Mr. Hendricks on the basis of a potential connection between his water supply and pollutants which have their origin in Putney Paper's activities. I also recognize that in each of these cases, the factual question of a hydrological nexus via groundwater has been at issue. Putney has not provided any citation to a case in which such a relationship was adjudicated not to exist and accordingly, there is no legal basis for precluding the grant of party status under the doctrine of *res judicata*. The Board also notes that the Supreme Court, in a recent entry order, decided that the Waste Facility Panel's decision to grant party status to Appellant on the basis of the proximity of his drinking wells to Putney's unlined landfill Project was supported by the evidence where the Panel concluded that Putney's project would potentially have some effect on Appellant's property. See Re: Putnev Pauer Comuanv. Inc., #WH-600-WFP, Memorandum of Decision (January 10, 1996) and Re: Putnev Paper Comuanv. Inc., #WH-600-WFP and #ID-9-0257-WFP, Memorandum of Decision (May 16, 1996) at P.4). The Panel's grant of party status was supportable even after the Panel subsequently determined that there would be no effects on Hendricks' property. In re Putnev Pauer Comuanv. Inc., Supreme Court Docket No. 97-081, Entry Order (June 23, 1998). In part, the Panel granted party status on the theory that there was still uncertainty as to whether any future impacts would result. Such uncertainty is confirmed by the imposition of conditions to "install observation wells to determine the extent of the westerly flow component to further protect the public's health." See Re: Putnev Paper Comnanv. Inc., #WH-600-WFP and #ID-9-0257-WFP, Findings of Fact, Conclusions of Law and Order (November 8, 1996) at P.44.

Notwithstanding the grant of party standing in this case, I recognize that Putney Paper disputes the existence of a causal relationship between pollutants originating from Putney Paper's operations and Mr. Hendricks' water supply. As noted above, a relationship between Putney Paper's legally authorized past discharges and Mr. Hendricks water supply has never been legally adjudicated to exist. Putney Paper may pursue the issue in this appeal if it so desires.

C. Scope of the Appeal

The grant of party standing does not legitimize each and every issue raised in the Appellant's Notice of Appeal tiled on May 19, 1998. As described herein, the scope of the appeal is a separate issue from the question of statutory standing. Following completion of the second prehearing conference, I will issue an Order that describes the issues which have been properly appealed and for which Appellant has provided adequate

legal authority. Stated another way, the fact that Mr. Hendricks is aggrieved by the secretary's issuance of Discharge Permit #3-1 128 does not entitle Mr. Hendricks to have the Board conduct a hearing that would necessarily review all 87 "comments" raised in his May 19, 1998 Notice of Appeal. Rather, for each comment raised, the Appellant must achieve two additional requirements in addition to meeting the general test of aggrievement before the Board can proceed with drafting the issues properly within the scope of the appeal: (1) the Appellant must identify the substantial interest which may be adversely affected by the outcome of this proceeding and this proceeding must be shown to be the exclusive means by which Appellant can protect that interest as required by WBR 22(A)(7) pursuant to which he has claimed entitlement for party status; and (2) the Appellant must provide specific legal support for *each* of his claims of error, which Appellant has loosely characterized as comments.' Stating that the agency's decision was incomplete, unfair, or otherwise inappropriate, is not enough. The alleged error must be linked to an applicable state or federal statutory or regulatory requirement that was improperly applied in this matter. The statute or regulation must be specifically identified, it must be shown to be applicable to this permit; and if Appellant has reason to believe that it was not properly followed, the Appellant must explain how, with respect to the applicable law or regulation, ANR erred in implementing it in its issuance of the Permit. **Given the number of attempts to date, notice is hereby given that failure to strictly comply with the above requirement in a timely manner will result in dismissal of the "comment" from consideration in this appeal.**

D. Notice of Second Prehearing Conference

As noted above, I will conduct a second prehearing conference to resolve the question as to the issues on appeal. Such statement of issues will then be issued in the form of a Preheating Conference Report and Order.

The second prehearing conference will be held in the Board's Montpelier Office on **Monday, November 2, 1998 at 2:00 p.m.** Any party wishing to participate by telephone shall contact Karen Dupont at (802) 828-2870 not later than October 29, 1998. In addition to determining the issues on appeal, we will discuss the schedule for pretiling and the merits hearing and identify any other preliminary issues.

3

A prehearing conference report and order including a statement of those issues that are properly within the scope of review will be issued after the second prehearing conference. Putney Paper's Motion to Dismiss, to the extent that it seeks to limit the number of issues properly before the Board, will be specifically ruled upon in that order.

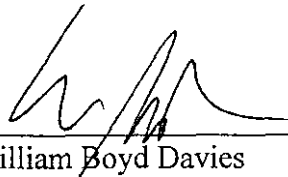
III. ORDER

- (1) Appellant is granted party status pursuant to WBR 22(A)(7).
- (2) Appellant's Request for Enlargement of Time is denied.
- (3 A second prehearing conference will be held in the Board's Montpelier Office, National Life Records Center Building, on **Monday, November 2, 1998 at 2:00 p.m.**

It is so ordered.

Dated at Montpelier, Vermont on this 22nd day of October, 1998

WATER RESOURCES BOARD
by its Chair



William Boyd Davies
Chair