

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

**ORDER AFFIRMING THE CHAIR'S RULINGS ON PARTY STATUS AND
SCOPE OF REVIEW AND ORDER DENYING PUTNEY'S MOTION TO DISMISS**

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"). Prior to convening the prehearing conference, Board Chair William Boyd Davies requested that Appellant "review the Notice of Appeal and frame the issues and concerns stated therein with reference to the Vermont Water Pollution Control Act, the Vermont Water Quality Standards effective April 21, 1997, the federal Clean Water Act and its implementing regulations applicable to the National Pollutant Discharge Elimination System ("NPDES"), any applicable ANR regulations, or other appropriate legal authorities." See Order Requiring Confirmation of Notice and Revised Statement of Issues, Docket No. WQ-98-03, (June 22, 1998). The reason for this request was to sharpen the focus of the appeal to those issues for which there was adequate legal authority and to expedite the identification of issues at the preheating conference. A deadline of July 7, 1998 was established so that other parties would have an opportunity to review and file comments on the revised statement of issues prior to the prehearing conference.

On July 7, 1998, the Appellant sought and was granted an extension to file the revised Notice of Appeal over Putney's objection. A new deadline of July 21, 1998 was established. On July 21, 1998, Appellant again sought an extension for the filing of a revised Notice of Appeal. Both Putney and ANR filed objections to the request and in addition, Putney filed a Motion to Dismiss the appeal. By an Order dated July 28, 1998, Chair Davies denied Appellant's second request to extend the filing deadline and declined to rule on the Motion to Dismiss until the legal issues had been more clearly identified and Appellant's standing, and the extent of his party status, had been more fully evaluated at the prehearing conference.

On July 30, 1998; Appellant filed his "Preliminary Review of Notice of Appeal" in which he failed to more succinctly limit the 87 "comments" raised in the initial Notice of Appeal and continued to provide citations to legal authority only sporadically throughout the Notice of Appeal and, as a result, continued to create confusion as to the Board's legal authority to consider each of the 87 comments in the context of a *de novo* appeal. On August 11, 1998, Putney filed an objection to the Appellant's filing as untimely and sought an opportunity to respond if the Board were to accept the Appellant's filing.

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On August 21, 1998, Chair Davies convened the initial preheating conference relative to this matter. The following persons participated in the August 21, 1998 prehearing conference:

Appellant, *pro se*;
ANR, through Jon Groveman, Esq.; and
Putney Paper, through Peter Van Oot, Esq.

The participants discussed the Appellant's lengthy Notice of Appeal without concluding which of the "comments" constituted discrete legal issues upon which the Board had legal authority to review. The participants also discussed the Appellant's July 30, 1998 "Preliminary Review of Notice of Appeal" and for the most part agreed that it did not provide much guidance beyond what Appellant had filed in the first instance. Accordingly, Chair Davies adjourned the conference and ordered Appellant to file not later than August 28, 1998 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. See Order Requiring Revised Statement of Issues with Citations and Party Standing Request, WQ-98-03, August 24, 1998.

On August 28, 1998, Appellant filed another Motion for Enlargement of Time, and also filed his Request for Party Status and "Preliminary Response to Chair Davies Order of August 24, 1998 Requiring Revised Statement of Issues with Citations." In this filing, Appellant merged the 87 comments filed in the May 19, 1998 Notice of Appeal into 44 issues. Appellant, to a greater extent than his previous filings, provided some citations to legal authority. However, there remains a question as to which of the issues were appropriate for consideration in the context of this appeal. On September 11, 1998, both Putney Paper and ANR filed responses to the Appellant's filing. In addition, Putney Paper renewed its pending Motion to Dismiss and provided supporting documentation which challenged the Appellant's party standing. In order to finally establish the issues in this appeal, Chair Davies established the date of the second preheating conference, November 2, 1998, as the date certain by which the Appellant was required to demonstrate: (1) how each of the Appellant's comments or issues is related to protection of the Appellant's substantial interest in his water supply wells; and (2) the legal rationale, supported by a citation to an *applicable* law or regulation, for including the comment as an issue in this appeal. See Chair's Rulings on Party Standing and Notice of Preheating Conference, dated October 22, 1998.

Putney Paper and ANR participated in the second prehearing conference. The Appellant did not attend the conference, nor did he inform the Board or its staff that he would

not attend.'

By an Order dated November 13, 1998, Chair Davies provided a background of the Appellant's previous attempts to clearly state the grounds for his appeal. The November 13, 1998 Order stated specifically that: "if the Appellant is unsuccessful in clearly linking the comments he has raised to applicable legal authority by providing specific citations, or if, with respect to those issues for which a citation or legal nexus is provided, he fails to demonstrate how they relate to the substantial interest he seeks to protect in this proceeding, such comments will be dismissed from consideration in this appeal." Also in the November 13, 1998 Order, Chair Davies scheduled the third prehearing conference in this matter for December 7, 1998. Shortly thereafter, Appellant filed objections to both the Chair's Ruling on Party Status, and the November 13, 1998 Order requiring the written summary of issues. Because the Chair's previous orders were subject to review and potential changes, the December 7, 1998 prehearing was cancelled, and oral argument was scheduled before the full Board on January 5, 1999.

On January 5, 1999, the Board convened oral argument relative to the Appellant's objections to Chair Davies' Rulings on Party Status, and the November 13, 1998 Order Requiring a Revised Statement of Issues, as well as Putney's Motion to Dismiss. The following persons participated in the oral argument:

Putney Paper, by Peter Van Oot, Esq; and
Nathaniel Hendricks, pro se

The Board deliberated thereafter.

II. ORDER

A. Party Standing

The Board affirms the Chair's October 22, 1998 Rulings on Party Status. Appellant's participation shall be limited to issues for which the Appellant has not only provided adequate citations to legal authority, but also has sufficiently explained (at the third prehearing conference) how such issue is necessary for inclusion in this de novo appeal to protect Appellant's water supply wells from the potential impacts of Putney's activities.

B. Revised Statement of Issues

¹ Mr. Hendricks claims to have received no notice of the prehearing conference.

The Board affirms the Chair's November 13, 1998 Order requiring a revised statement of issues. However, because such Order required the submittal of a revised written summary of issues not later than November 23, 1998 and Appellant opted to disregard that order and instead appeal to the Board, we note that the deadline established thereby was and is binding and any filing made by the Appellant after November 23, 1998 is out of time and will, therefore, not be considered. It appears that despite nearly 10 months of effort, the issues in this case have not been adequately identified and the Board is convinced that further opportunities provided to Appellant to distill the myriad comments and issues that have been raised to those properly before the Board in this appeal will only result in additional delay, not additional clarity. Accordingly, the Chair will identify the issues in the Prehearing Conference Report and Order, with or without the benefit of Appellant's further clarification of those issues, and will in establishing the issues take into consideration the limited extent of the Appellant's party status.

C. Putney's Motion to Dismiss

The Board declines to grant Putney's Motion to Dismiss for the same reasons provided by the Chair in his July 28, 1998 Ruling. The Board acknowledges that the extent of any actual impacts from Putney's operation upon Appellant's water supply wells is a question of fact that may be pursued in the context of this proceeding. However, the Board is not prepared to dismiss the case entirely without first hearing evidence relative to Appellant's substantial interests that he seeks to protect in this proceeding.

D. ⁷Third Prehearing Conference

The third prehearing conference is rescheduled for **Tuesday, March 23, 1999 at 3:00 p.m.** in the Board's Montpelier Office Any party wishing to participate by telephone shall contact Karen Dupont at (802) 828-2870 or kdupont@envboard.state.vt.us, not later than Thursday, March 18, 1999 to so indicate.

The third prehearing conference will resolve the outstanding question concerning the scope of legal issues on appeal. After conclusion of the third prehearing conference, a final statement of issues will be distributed to parties in the form of a Prehearing Conference Report and Order. In addition to determining the issues on appeal, Chair Davies will establish the schedule for prefiling and the merits hearing and identify any other preliminary issues.

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It is so ordered.

Dated at Montpelier, Vermont on this 18th day of February, 1999.

WATER RESOURCES BOARD



William Boyd Davies
Chair

Concurring:

Gail Osherenko

Ruth Einstein

Jane Potvin

Gerry Gossens