

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

*Re: Village of Ludlow*

Land Use Permit Amendment #2S0839-2-EB

**MEMORANDUM OF DECISION ON MOTION TO ALTER**

Mount Holly Mountain Watch (MHMW) moves to alter the Board's decision and related permit issued on September 18, 2003. As set forth below, the Board denies the Motion to Alter and makes a clarifying amendment to the decision and permit.

**I. Procedural History**

On October 14, 2002, the Village of Ludlow filed Land Use Permit Amendment Application # 2S0839-2 with the Commission seeking authorization for the Project. The Commission issued Land Use Permit #2S0839-2 (Commission Permit) and supporting Findings of Fact, Conclusions of Law, and Order (Commission Decision) on February 7, 2003, and a Memorandum of Decision on Motion to Alter (Commission MOD) on March 13, 2003.

On April 3, 2003, MHMW filed an appeal with the Environmental Board (Board) from the Commission Permit, the Commission Decision, and the Commission MOD, alleging that the Commission erred in its conclusions with respect to party status under Environmental Board Rules (EBR) 14(B)(1) and 14(B)(2), and on the merits with respect to Criteria 1 (air pollution), 1(B) (waste disposal), 1(E) (streams), 8(A) (necessary wildlife habitat), and 9(A) (impacts of growth). The appeal was filed pursuant to 10 V.S.A. § 6089(a) and EBR 6 and 40.

On April 28, 2003, Board Chair Patricia Moulton Powden convened a Prehearing Conference with the following participants: MHMW, by Peter Berg; and the Village of Ludlow, by J. Christopher Callahan, Esq., with Frank Heald. MHMW filed its petition for party status on the same date.

On April 29, 2003, a Prehearing Conference Report and Order was issued, setting the matter for hearing and setting preliminary filing deadlines, among other things.

The Board deliberated on May 21, 2003 on preliminary issues and motions. On May 28, 2003, the Board issued a Memorandum of Decision which, among other things, granted MHMW party status on Criterion 1(B) and dismissed the rest of the appeal.

On June 2, 2003, MHMW filed a Motion to Continue the June 4, 2003 deadline for pre-filing direct evidence to June 24, 2003. On June 3, 2003, the Chair issued a Continuance Order, continuing the June 4, 2003 deadline to June 20, 2003, and adjusting other prehearing deadlines, but keeping the July 23, 2003 hearing as originally scheduled.

On June 9, 2003, MHMW objected to the Continuance Order, again asking that the deadline for prefilng direct evidence be continued to June 24, 2003. The Village of Ludlow opposed MHMW's objection. The Board deliberated on June 18, 2003, and denied MHMW's objection by Memorandum of Decision issued the same date.

On June 26, 2003, MHMW filed a Motion to Continue the deadline for prefilng rebuttal evidence. The Village of Ludlow's opposition was filed the same day. The Chair issued an Order denying the motion on the same day.

On July 9, 2003, MHMW filed a Motion to Continue the deadline for prefilng proposed findings and conclusions. The Chair issued an Order extending the deadline from July 11, 2003 to July 17, 2003.

The Chair convened a second prehearing conference on July 21, 2003, to go over the hearing schedule and site visit itinerary, among other things.

On July 23, 2003, the Board convened a public hearing, Chair Moulton Powden presiding. The Board conducted a site visit, admitted exhibits, and heard testimony from the parties. Immediately after the hearing, the Board commenced deliberations.

On August 5, 2003, MHMW filed Supplemental Proposed Findings and Conclusions. On August 18, 2003, the Village of Ludlow filed a Partial Objection to Appellant's Supplemental Proposed Findings and Conclusions. Also on August 18, 2003, MHMW filed a Motion to Dismiss the Village of Ludlow's Objection.

The Board deliberated on September 17, 2003. Based on a thorough review of the record, related argument, and the parties' proposed findings of fact and conclusions of law, the Board declared the record complete and adjourned. On September 18, 2003, the Board issued Findings of Fact, Conclusions of Law, and Order (Decision), in which it concluded that the Project complies with criterion 1(B), the only criterion on appeal, and issued Land Use Permit #2S0839-2-EB (Permit).

On October 14, 2003, MHMW filed a Motion to Alter. On October 28, 2003, the Village of Ludlow filed an Objection to MHMW's Motion to Alter. Also on October 28, 2003, ANR filed a Response to MHMW's Motion to Alter. The Board deliberated on November 12, 2003.

## II. Discussion

MHMW moves to alter the Decision and Permit, arguing that the CVPS swimming hole is within the Waste Management Zone (WMZ), and asking that the Board alter its findings and conclusions concerning the WMZ and the distance from the Ludlow wastewater treatment facility (WWTF) to the CVPS swimming hole. As set forth below, the Board denies this motion but makes a clarifying alteration to one finding.

### A. Length of the WMZ

MHMW argues that the expanded WMZ for the Ludlow WWTF should be 5.39 miles, rather than 5.6 miles. To support this argument, MHMW states that "ANR recalculated the WMZ and reached the correct WMZ of 5.39 miles." (Motion to Alter, at 9). Specifically, MHMW asks the Board to alter the Permit and the Finding 2, arguing that the extension of the WMZ should be .99 miles, not 1.2 miles. (Motion to Alter, at 7.) MHMW argues that the currently permitted WMZ extension of 1.2 miles improperly includes the CVPS swimming hole.

ANR responds that MHMW's motion should be denied, stating that any "discrepancies between the Act 250 permit and the discharge permit regarding the WMZ length are resolved by the fact that the Permittee is absolutely required to meet the E.coli limit of 65/100 ml, regardless of the length of the waste management zone." (ANR's Response to Motion to Alter at 2-3).

The Village of Ludlow argues that the 5.6-mile WMZ as permitted by ANR and now by the Board, is proper and should not be disturbed because MHMW has not rebutted the presumption that no undue water pollution will result from the Project. (Village of Ludlow's Objection to MHMW's Motion to Alter, at 1-2).

ANR's discharge permit was based in part on a technical determination that the WMZ would be 5.6 miles in length. This technical determination is entitled to substantial deference. See 10 V.S.A. § 6086(d); EBR 19(F)(1). Moreover, the WMZ originally sought by the Village of Ludlow was 5.6 miles. While this appeal was pending before the Board ANR modified its model by assuming a partial disinfection failure, and calculated a shorter WMZ of 5.39 miles. This evidence, submitted on rebuttal, was not accompanied by an amended discharge permit.

The Vermont Water Quality Standards (Vermont Water Quality Standards) define a WMZ, in relevant part, as "a specific reach of Class B waters designated by a permit to accept the discharge of properly treated wastes that prior to treatment contained organisms pathogenic to human beings." The ANR discharge permit in question designates a 5.6-mile WMZ, a 1.2-mile extension of the preexisting WMZ. Although ANR testified on rebuttal that the WMZ could be shortened to 5.39 miles

and still comply with the VWQS, this is not the WMZ designated by the permit. Until and unless the discharge permit is amended to incorporate this 5.39-mile number, the WMZ is 5.6 miles in length.

## **B. Distance to CVPS Swimming Hole**

MHMW argues, apparently based on new evidence, that the distance from the Ludlow WWTF to the CVPS swimming hole should be changed to 5.48 miles. For instance, MHMW argues that Finding 40, which states that a WMZ of 5.6 miles would end upstream of the CVPS swimming hole, is “untrue and must be corrected.” (Motion to Alter, at 8.) However, the Board remains persuaded that the 5.6-mile WMZ does, in fact, end upstream of the CVPS swimming hole.

There was no credible evidence admitted at the hearing that supports MHMW's contention that the distance to the swimming hole should be 5.48 miles. In other words, this argument is based on new evidence. In general, motions to alter must be based on the existing evidentiary record. *Re: Charles and Barbara Bickford, #5W1186-EB*, Memorandum of Decision at 3 (Sept. 12, 1995). No new hearings are held and no new evidence is taken. *Id.* This prevents parties from using motions to alter to turn Board decisions into “proposed” decisions. *Id.* EBR 31(A), which governs Motions to Alter, provides in relevant part that: “New evidence may not be submitted unless the board or district commission, acting on a motion to alter, determines that it will accept new evidence. MHMW has not presented the Board with good cause to reopen the record in this matter and the Board declines to do so.

MHMW argues that the Board erred in Finding 34 regarding the distance from the Ludlow WWTF to the CVPS swimming hole, and that “[t]here is no evidence of any testimony that the actual distance is at least 5.59 miles.” (Motion to Alter, at 8.) At the hearing, MHMW presented an orthophoto with a line showing the distance as 5.36 miles. However, Ludlow's expert Karl E. Tanner rebutted this evidence with testimony that this method of measurement is inaccurate, and that the measurement contained at least three errors that, if corrected, would make the proper measurement between 5.56 and 5.59 miles, at a minimum. Neither Ludlow's expert nor MHMW measured the distance in the field or provided other reliable evidence of the actual distance. The Board found Mr. Tanner's rebuttal testimony persuasive, and found that the distance to the swimming hole was in excess of 5.59 miles.

This finding omits the correct distance to the swimming hole, as determined by ANR in the discharge permit. Although not raised in MHMW's motion, the Board will take this opportunity to alter Finding 34 to clarify this point. ANR's discharge permit is based in part on a technical determination that the distance from the

Ludlow WWTF to the CVPS swimming hole is approximately 5.7 miles. As a technical determination, this measurement is entitled to substantial deference from the Board. See 10 V.S.A. § 6086(d); EBR 19(F)(1). This does not conflict with the testimony of Mr. Tanner, which simply rebutted the evidence submitted by MHMW. No party has provided clear and convincing evidence that the distance is anything other than 5.7 miles and ANR's technical determination must stand. The Board, on its own motion, or *sua sponte*) alters Finding 34 to add the sentence in italics below:

34. At the hearing, MHMW submitted an ortho photograph into evidence with the distance from the Ludlow effluent outfall to the CVPS swimming hole marked as 5.36 miles. However, this measurement is inaccurate in several respects and the actual distance is at least 5.59 miles. *ANR made a technical determination in issuing the discharge permit, and the Board now finds, that the distance from the Ludlow WWTF outfall to the CVPS swimming hole is approximately 5.7 miles.*

The Permit, which refers to the Board's Findings, Conclusions and Order, will also be altered to incorporate the altered decision.

The conclusion that the extended WMZ ends just upstream of the CVPS swimming hole remains undisturbed.

### III. ORDER

1. MHMW's Motion to Alter is DENIED.
2. The Board alters its decision and permit *sua sponte*. Altered Findings of Fact, Conclusions of Law, and Order, and an Altered Permit are issued herewith.
3. Jurisdiction is returned to the District 2 Environmental Commission.

DATED at Montpelier, Vermont this 26th day of November, 2003.

ENVIRONMENTAL BOARD

/s/ Patricia Moulton Powden  
Patricia Moulton Powden, Chair  
George Holland  
Samuel Lloyd  
William Martinez  
Patricia Nowak\*  
Alice Olenick  
A. Gregory Rainville  
Jean Richardson

\* Board member Patricia Nowak was unable to attend the Board's November 12, 2003 deliberations, but joins in the Board's decision.