

State of Vermont,
Water Resources Board

In re: Appeal of Town of Fairlee
Docket No. 92-07

Authority:
10 V.B.A. 61269

PRELIMINARY ORDER
Party Status

BACKGROUND

On June 10, 1992 the Town of Fairlee ("Town") appealed the denial of an aquatic nuisance control permit ("permit") and the granting of a bottom barrier permit by the Department, of Environmental Conservation ("DEC"). The Town originally sought three separate permits under the provisions of 10 V.S.A. §1263a to address a Eurasian milfoil problem in Lake Morey. These permit requests included placement of a bottom barrier, use of the aquatic herbicide Aqua-Kleen, and use of a suction process conducted by scuba divers. The appeal stems from a denial of the Town's request to apply the aquatic herbicide to the lake.

A prehearing conference was held on July 7, 1992. In addition, to the appellant Town and the Agency of Natural Resources ("ANR"), party status was sought by the Lake Morey Protective Association ("LMPA") and by the Vermont Public Interest Research Group ("VPIRG").

In response to the requests for party status, the prospective parties were given a deadline by which to submit detailed requests for party status. VPIRG filed a detailed memorandum prior to the deadline, setting forth a description of the organization, its claimed interests and its arguments for the grant of party status. LMPA filed a letter disputing the party status of VPIRG, but did not file a memorandum supporting its own request for party status. Neither VPIRG nor the LMPA is represented by legal counsel.

The Town objected to party status for both LMPA and VPIRG. The ANR indicated that both VPIRG's and LMPA's participation in the proceedings were warranted and would be helpful to the Board;

DISCUSSION

The Vermont Administrative Procedures Act ("Act") provides all parties in a contested case the opportunity "to respond and present evidence and argument on all issues involved." 3 V.S.A. §809(c). "Party" is defined by the Act to include "each person...properly seeking and entitled as of right to be admitted as a party.." 3 V.S.A. §801(5). The Act

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does **not** define the circumstances that entitle a would-be intervenor to intervention 'as of right'. The water pollution control statute (chapter 47 of Title 10) provides a conditional right to intervene on "persons and parties in interest as determined by board rule." 10 V.S.A. 81269. Hence, intervention is governed by Board Rule of Procedure ("Rule") 22(A) and 22(B)..'

I. V P I R G

Prior to considering ,a Rule 22(A) or 22(B) request for intervention, the Board must look first to the-timeliness of the request.. VPIRG attendedthe prehearing conference and requested party status at that time. The organization was given the opportunity to submit a more detailed request and did so within the time frame set out by the Board. VPIRG's request is, therefore, timely.

Because the Board finds that VPIRG has met the conditions required for permissive intervention in Rule 22(B), it is unnecessary to **address** the more difficult questions posed by a request for intervention as of right under Rule 22(A). VPIRG has met the filing requirements of Rule 22(B)(1) and 22(B)(2). Raving met these requirements, VPIRG must demonstrate a "substantial interest which may be affected by the outcome of the proceeding." Rule 22(B)(3). This standard requires that VPIRG demonstrate some interest more substantial than a general concern for the protection of the public's use and enjoyment of Lake Morey. In re: Appeal of VNRC, Preliminary Order, Docket Nos. 92-02 and 92-05, August 18, 1992.

VPIRG notes in its memorandum that one of its main purposes is the protection of Vermont's natural resources, that it has extensive experience in environmental policy making' in Vermont, that it has a substantial history of working on pesticide use legislation, including testimony before legislative panels, that it represents a significant portion of the population and that it represented the public for several years on the Vermont Pesticide Advisory Council. VPIRG also notes that it specifically submitted testimony during hearings on the law governing the use of aquatic pesticides.

It is clear that VPIRG has invested substantial amounts of time and resources in developing an expertise in the area of pesticide use. It is equally clear that this level of expertise was recognized, when VPIRG was placed. upon the

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Vermont Pesticide Advisory Council.

Although the depth and degree of a would-be **intervenor's** policy interests should not necessarily be the deciding factor in a party **status** request, at some point that **commitment must** be recognized as a considerable or consequential interest of its own. This is the case **with VPIRG.**

In exercising its discretion the Board must consider whether **VPIRG's** interest will be adequately protected **by other** parties, whether alternative means exist by which VPIRG can protect its interest, and whether intervention will unduly delay the proceeding or prejudice the interests of existing parties or the public. Rule 22(B)(3).

Because VPIRG has interests that may differ from **ANR's**, the Board has determined that **VPIRG's** interests may not be adequately protected by **ANR.** The degree of inadequacy required is "**minimal.**" In re Vermont Public Power Supply Authority, 140 Vt. 424, at 433 (1981) (citing Trbovich v. United Mine Workers of America, 404 U.S. 528, 538, n.10 (1972)). Although sharing a common goal creates a presumption of adequacy, the Board believes that VPIRG has made a showing adequate enough to overcome that presumption. In re Vermont Public Power Supply Authority, supra, at 433. VPIRG was active in developing and influencing legislation on pesticide use. The Agency has management responsibilities under this legislation. It is unlikely that VPIRG and **ANR's** views are identical. In fact, VPIRG has claimed in its filings that it, does **not entirely** agree with the basis for the **ANR's** decision and raised one issue at the prehearing conference that was not raised by counsel for the **ANR.** The Board also believes that it would be inappropriate to assume that a permitting agency that is a **statutory** party **can adequately** represent the interests of a proposed intervenor. Where **the** interests of the parties **may diverge** and there is no **substantial** shared identity of purpose, the Board **will permit** intervention in its **discretion.**

The Board also finds that there is no alternative means by which VPIRG can protect its interest. This is the sole forum through which this particular permit can be contested. A public informational hearing where there is no opportunity for the introduction of cross examination does not provide an alternative means of protection, as the Town has suggested. There is no statutory requirement that a proposed **intervenor** opt between the **public** informational hearing at the ANR level and an appellate proceeding at the Board and the Board finds

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no reason to draw such a distinction in applying its Rules.

Finally, although the Board acknowledges that the addition of another party inevitably involves the expansion of issues and additional time, the Board does not believe that such expansion necessarily prejudices the interests of the existing parties. If prejudice were automatic, intervention would be prohibited in all circumstances. Where, as here, that expansion will enable the Board to more fully address a complex legal and technical case, the Board has discretion to allow the intervention of an applicant. VPIRG is granted party status pursuant to Rule 22(B).

II. Lake Norey Protective Association

The LMPA did not specify under which subsection of Board Rule 22 it was seeking party status. Because the standards for intervention pursuant to Rule 22(A) are more stringent, the Board has opted to consider the LMPA request in relation to Rule 22(B).

According to its entry of appearance, the LMPA is a representative organization whose membership consists of land and property owners on or in the vicinity of Lake Morey. The proclaimed purpose of the organization is the protection and enhancement of Lake Morey and its surrounding environment. The LMPA stated in its entry of appearance that it supported the position of the Town. It did not provide any additional information regarding its structure, the make-up of its membership or the authority that was provided for the party status request.

LMPA has timely filed its request for party status pursuant to Rule 22(B)(2). The issue is one of whether LMPA has a substantial interest that may be affected by the outcome of the proceeding.

The Board does not doubt that if the LMPA's membership and purpose are substantially in line with the claims made in its July 6 letter, it has a substantial interest that may be affected by the outcome of the proceeding. Because the LMPA chose to rely on the one page letter and failed to file any additional information when requested by the Board, the Board is unable to adequately assess the validity of the claims made by LMPA. This does not necessarily end the discussion, however.

In making a discretionary determination under Rule

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22(B) (3), the Board must consider at least three factors. Because the Town has objected to the request of the LMPA, the Board believes that whatever interests the LMPA may have may not adequately be protected by the Town's participation in this proceeding. Second, as noted in the discussion above, this is the sole means by which this permit can be addressed. Finally, although the LMPA's intervention may create some delay, potential prejudice to the LWPA by denying it intervention may outweigh the small amount of prejudice that might accrue to the other parties by permitting LMPA's intervention.

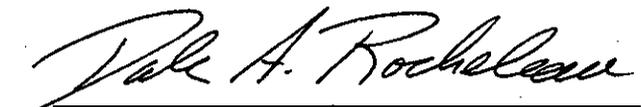
For these reasons, the LMPA request for intervention will be allowed on the condition that it provide the Board within 10 working days of the date of this order the following information: (1) a complete description of its membership and the organization (number of members, age of the organization, organizational structure, etc.); (2) a copy of any minutes or other writing indicating the intervention authorization; (3) a satisfactory explanation of the manner in which the decision authorizing intervention was accomplished; and (4) written statements from at least two members indicating membership and the member's specific relationship to Lake Morey. Should the LMPA fail to provide this information within the allotted time, its request for party status will be denied.

ORDER

The Board now holds that VPIRG is granted party status as an intervenor pursuant to Rule 22(B). LMPA is granted party status provided that it meets the conditions spelled out above.

Vermont Water Resources Board
by its Chair

8/28/92
Date


Dale A. Rocheleau, Chair

Concurring: Elaine Little
Stephen Reynes
Mark DesMeules

Not participating: Jonathan Lash