

**State of Vermont  
WATER RESOURCES BOARD**

**In re: Dean Leary (Appeal of DEC Permit No. 93-29  
Point Bay Marina, Charlotte, Vermont)  
Docket No. MLP-94-08**

**PRELIMINARY ORDER  
Standing and Party Status Issues**

This order pertains to two preliminary issues: a Motion to Dismiss filed by Point Bay Marina, Inc., (the permittee), challenging the standing of Dean W. Leary (the appellant); and a Motion to Intervene filed by the Conservation Law Foundation (CLF). As explained below, the Board denies the permittee's Motion to Dismiss and grants CLF's request for party status pursuant to Rule 22(A)(7).

**I. BACKGROUND**

On June 9, 1994, the Water Resources Board (Board) received a notice of appeal filed by Dean W. Leary of Charlotte, Vermont, seeking review of the June 3, 1994, decision of the Department of Environmental Conservation (DEC), Agency of Natural Resources (ANR), granting Management of Lakes and Ponds (MLP) Permit No. 93-29. Permit No. 93-29 authorizes Point Bay Marina, Inc., to add seven finger docks and relocate two finger docks at its facility on Lake Champlain in Charlotte, Vermont, and authorizes the previous relocation of a service dock and swim docks at that facility. Mr. Leary filed his appeal pursuant to 29 V.S.A. § 406(a).

On July 1, 1994, this appeal was deemed complete and docketed, and on July 6, 1994, it was noticed in the Burlington Free Press pursuant to Rules 18(C) and 20 of the Board's Rules of Procedure. A prehearing conference was held on July 20, 1994, and a Prehearing Conference Report and Order was issued September 30, 1994, setting forth deadlines for petitions for intervention and requests for rulings on preliminary matters.

On October 7, 1994, the permittee filed a timely Motion to Dismiss, challenging the appellant's standing. The appellant filed a written response on November 3, 1994.

On October 21, 1994, CLF filed a Motion to Intervene as a full party and, in the alternative, requested amicus curiae status. On November 3, 1994, the appellant filed a written response supporting CLF's motion. On November 4, 1994, the permittee filed a written objection to CLF's intervention request.

Oral argument and deliberations on the permittee's Motion to Dismiss and CLF's Motion to Intervene were held on December 7, 1994.

## II. DISCUSSION

### A. Standing

The DEC may approve or deny a request for an encroachment permit pursuant to 29 V.S.A. § 405(c). 29 V.S.A. § 406(a) provides that "[a]ny person aggrieved by the decision of the department [] may appeal to the board within 10 days from the date of notice of action."

The permittee argues that this matter should be dismissed because Mr. Leary, the sole appellant in this proceeding, is not a "person aggrieved" within the meaning of 29 V.S.A. § 406(a). It notes that the DEC is required by statute to provide written notice of the application and its decision to abutting property owners, the selectmen of the municipality in which the proposed encroachment is located, and such "other persons as it considers appropriate." 29 V.S.A. § 405(a) and (c). The permittee argues that the appellant is not an "appropriate" person in that he allegedly lacks a substantial interest, such as an affected property interest, and that the appellant has no interest distinguishable from the general interest of the public in the protection of state waters.

The Board rejects the permittee's narrow reading of 29 V.S.A. § 406(a). The permittee seeks approval for encroachments in public waters off Thompsons Point at Town Farm Bay, Lake Champlain. The appellant is a resident of Vermont and uses the Bay for boating, swimming, fishing, fowling and other recreational uses. The appellant was on the DEC's distribution list for the permit proceeding which authorized MLP Permit No. 93-29, and he was a signatory to a previous agreement between the DEC and the permittee concerning expansion of encroachments at Point Bay Marina. Although the appellant does not own shoreland property within the vicinity of Point Bay Marina, the Board observes that property ownership is not the sole test for determining whether a person meets the standing requirement of 29 V.S.A. § 406. Appellant's present and historical use of Town Farm Bay, and his participation in previous permitting decisions concerning the expansion of Point Bay Marina, coupled with the allegation that his use and enjoyment of the public waters off Thompsons Point may be adversely affected if Permit MLP No. 93-29 is allowed to stand, give appellant an interest sufficient to support this appeal.

Therefore, the Board denies the permittee's Motion to Dismiss.

**B. Party Status of CLF**

CLF requests party status pursuant to Rule 22(A)(7) or Rule 22(B), and, in the alternative, permission to participate as Amicus Curiae. CLF seeks to participate in this appeal so that it may address the question whether the Board must consider the public trust doctrine in ruling on an application for an encroachment permit.

29 V.S.A. § 406(c) states that the parties to an appeal filed pursuant to § 406(a) are "the applicant, the municipality in which the project is located, the department and other persons whom the board allows by rule." Rule 22 of the Board's Rules of Procedure governs the petition and grant of party status as of right or by permission. Any person shall become a party who enters a timely appearance and, pursuant to Rule 22(A)(7), can demonstrate "a substantial interest which may be adversely affected by the outcome of the proceeding where the proceeding affords the exclusive means by which that person can protect that interest and where the interest is not adequately represented by existing parties."

In its Motion to Intervene, counsel for CLF has stated that members of the organization use and enjoy the public waters of Lake Champlain for fishing, boating, and other activities, and that members residing in the area of Point Bay Marina have a particular and substantial interest in the continued use and enjoyment of those waters which may be adversely affected by the expansion of the permittee's operations under MLP Permit No. 93-29. Counsel for CLF persuasively argues that participation as a party in this proceeding affords the exclusive means by which it can protect its members' interests, given that the Board has primary jurisdiction to adjudicate encroachment permit appeals and no other party to this proceeding, including the pro se appellant, has the expertise in the public trust doctrine that CLF has gained through years of litigation in Vermont and other New England states.

Therefore, the Board determines that CLF is a party of right pursuant to Rule 22(A)(7) of the Board's Rules of Procedure. Although CLF, in its Motion to Intervene, expressed an intention to limit its participation to the filing of briefs and argument with respect to the public trust issue, as a party of right it is free to present evidence and cross-examine the witnesses of other parties. Nevertheless, the Board expects that CLF will coordinate its case with that of the appellant, when possible and where appropriate, in order to avoid any unnecessary duplication of filings and testimony.

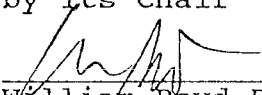
III. ORDER

For the forgoing reasons, it is hereby ordered that:

- (1) the permittee's Motion to Dismiss challenging the appellant's standing is denied; and
- (2) the Conservation Law Foundation's request for intervention as a Rule 22(A)(7) party is granted.

Dated at Montpelier, Vermont, this 28<sup>th</sup> day of December, 1994.

Vermont Water Resources Board  
by its Chair

  
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William Boyd Davies

Concurring:

William Boyd Davies  
Stephen Dycus  
Ruth Einstein  
Gail Osherenko  
Jane Potvin