

**State of Vermont
WATER RESOURCES BOARD**

**MEMORANDUM OF DECISION ON MOTION TO DISMISS
AND SCHEDULING ORDER**

RE: **Paul Dannenberg**
P.O. Box 187
Huntington, VT 05482

Docket Number:
WQ-99-07
(Appeal of ANR Permit Re:
Application #1999-C01)

Statutory Authority:
10 V.S.A. §1269

I. BACKGROUND

On November 17, 1999, the Water Resources Board ("Board") received an appeal, pertaining to Agency of Natural Resources' ("ANR") issuance of an Aquatic Nuisance Control Permit granting Application No. 1999-C01 ("Permit"). The Permit was issued to James R. Martin of Huntington ("Permittee"). The appeal was filed by Paul Dannenberg ("Mr. Dannenberg") pursuant to 10 V.S.A. §1269. The Permit authorizes Permittee to use Aquashade®, a U.S. EPA-registered aquatic pesticide, to control nuisance aquatic plants and algae in two private ponds located on lands of the Permittee in Huntington. Mr. Dannenberg maintains that he is aggrieved by the issuance of the Permit and in support of that assertion states that, among other things, he owns a shallow spring within 300± feet of the larger of the two ponds which may be affected Permittee's application of Aquashades.

On December 17, 1999, Board Chair, Gerry Gossens, convened the initial prehearing conference in the referenced matter. Participating in the prehearing conference were the Permittee, James Martin, Mr. Dannenberg, and the ANR, by Jon Groveman, Esq. and Ann Bove. No other person either appeared at the conference or filed a written request to participate in this proceeding.

At the prehearing conference, Mr. Dannenberg filed a written request for party status and the participants briefly described the issues in this proceeding. Participants observed that there were several preliminary issues that should be addressed before scheduling a hearing on the merits. The preliminary issues identified by the participants and Board staff included the threshold question of Mr. Dannenberg's party standing, the appropriate scope of the appeal and other issues as required to properly frame the issues. Participants also agreed to pursue an attempt to resolve this matter informally. The prehearing conference was concluded prior to a full discussion of all issues and without establishing a definitive schedule for the prefiling of direct testimony. Rather, Chair Gossens requested that the parties pursue a facilitated or mediated discussion during the early part of January in an attempt to resolve all or some of the disputes giving rise to the appeal. Chair Gossens set forth a deadline for a status report on any progress toward settlement, which report was due on January 20, 2000.

As of January 20, 2000, no status report was filed. However, on February 3, 2000, Mr. Dannenberg filed a "Status Report" in which he stated that "Two parties in this matter agree to a request for a thirty (30) day extension to attempt to mediate this matter." The reasons provided for the extension request were the illness of Mr. Dannenberg and the unavailability of the mediator. The Permittee was not contacted regarding the request, and accordingly, did not participate in making the request. In contrast, on February 4, 2000, Permittee filed an Opposition to Appellants Request of an Extension ("Opposition Letter"). In the Opposition Letter, Permittee contends that the appeal is without merit for various reasons, some of which are germane to the Board's jurisdiction, and some of which appear to stem from matters unrelated to the Aquatic Nuisance Control Permit in question. In any event, Permittee sought no relief from the Chair other than to deny the pending request for continuance of thirty days. Permittee confirmed that as of February 3, 2000, no mediation had occurred.

On February 14, 2000, Mr. Dannenberg filed a "Reply to Permittee's Opposition for Appellants Request for an Extension," seeking to allow the deadline for an attempt to mediate this matter to extend to February 21, 2000, again citing illness and scheduling issues as the reasons for the delay. Based on representations made in Mr. Dannenberg's letter, the mediation discussed at the initial prehearing conference on December 17, 1999 was scheduled to be held on February 10, 2000.

On February 14, 2000, shortly after what the Board's staff understands to have been an unsuccessful attempt at mediation, the Permittee repeated concerns with the merit of Mr. Dannenberg's appeal, this time in a "Motion to Dismiss the Dannenberg Appeal for Lack of Standing." The Motion to Dismiss concerns only the issue of whether Mr. Dannenberg is a person aggrieved pursuant to 10 V.S.A. §1269.

By an Order dated February 24, 2000, Chair Gossens granted the requests for additional time but required parties to brief their positions relative to the Motion to Dismiss prior to taking up the issue at oral argument. Prior to hearing oral argument on the Motion to Dismiss, Mr. Dannenberg and the ANR were provided an opportunity to file written responses to the Permittee's Motion to Dismiss, not later than 4:30 p.m. on Wednesday, March 8, 2000.

On March 14, 2000 at 12:00 p.m. at the Board's regularly scheduled Board meeting, the Board heard oral argument on the limited question of Mr. Dannenberg's standing to file the appeal. Each participant was allowed not more than 10 minutes to argue before the Board. Immediately after hearing the parties arguments, the Board deliberated. This matter is now ready for a decision.

II. DISCUSSION

The test for party status when it is the Appellant who is seeking to commence an appeal consists of two related questions, First, the Board looks to the statute under which the putative appellant seeks to participate, then, if necessary, the Board looks to its own Rules of Procedure governing party status and rules for intervention.

The statutory requirements to take an appeal to the Board are known as the test of "standing." In the instant case, the statutory provision granting to the putative appellant the right to appeal states that "any person aggrieved by the decision of the Secretary" may file an appeal from the decision of the Secretary. In this instance, Mr. Dannenberg claims to be aggrieved because, he argues, the permitted use of Aquashade® may adversely affect his private water supply which is drawn from a shallow well located on Mr. Dannenberg's property less than 500 feet from the nearest point of the larger of Permittee's ponds.

Despite being widely used in the Vermont and federal statutes as a test for standing, a concise interpretation of what it means to be "aggrieved" has not been forthcoming from the courts. See for example, Trombley v. Bellows Falls Union High School District, 160 Vt. 101, 106 (1993) (Court stated that "we need not define 'aggrieved' in order to hold that plaintiffs must make some showing of injury to obtain relief."). As the Board held in Re: Killington Ltd., Docket No. WCC-97-10, Memorandum of Decision (May 20, 1998), the hesitancy of courts to define what it means to be aggrieved is, in part, because such a determination is the product of a case-by-case inquiry. See, In re: Aquatic Nuisance Control Permit #C93-01-Morey, Docket No. WC-93-04, Memorandum of Decision on Party Status (August 25 1993) at page 4 (Board reads person aggrieved standard broadly, obtaining guidance in making its standing determinations through an examination of the legislation enabling the secretary's decision, the Board's own implementing rules (where applicable), and the Board's procedural rules). As noted above, Mr. Dannenberg has made a credible claim to being aggrieved merely based on the proximity of his well to the pond which will receive the permitted application of aquatic herbicide. Although Mr. Dannenberg has not "made some showing of injury," he has provided a context in which he perceives some harm to be likely or possible that is sufficient as a threshold showing on the preliminary matter of whether or not he has standing to bring the appeal.'

In order to examine more fully whether Mr. Dannenberg has standing to pursue the appeal, the Board looks to its own Rules of Procedure. Therein, at

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The Board reserves the right to dismiss should it determine based on evidence adduced at a site visit or in written pre-filed testimony that there is no hydrological nexus between Mr. Martin's pond that will receive treatment and Mr. Dannenberg's spring.

WBR 25(A), the Rules require that "All persons seeking to participate in a contested case . before the Board, including appellants and petitioners, must petition the Board for party status." On December 17, 1999, Mr. Dannenberg filed a timely petition for party status pursuant to WBR 25.

ANR, at oral argument, pointed out that Mr. Dannenberg's petition is filed pursuant to WBR 25(B)(7). ANR argues that Mr. Dannenberg's reliance on WBR is misplaced, and that the appropriate test for his party status is WBR 25(B)(8). ANR contends further, that because Appellants request is filed pursuant to WBR 25(B)(7), if he qualifies for party status only under WBR 25(B)(8) that he should not be granted party status. The Board does not find that in the context of this appeal that a party status petition apparently limited to WBR 25(B)(7) precludes a determination as to whether a putative appellant may be granted party status requirements of WBR 25(B)(8). It could be argued that Mr. Dannenberg is both a "person upon whom the applicable statute confers a conditional right to intervene and the conditions are satisfied" (i.e. he is a person who is aggrieved) and a "person demonstrating a substantial interest which may be affected by the outcome of the proceeding where the proceeding affords the exclusive means by which that person can protect the interest and where the interest may not be adequately represented by existing parties." In any event, the Board finds these to be distinctions without a difference and finds ANR's technical argument that because Mr. Dannenberg sought party status under 25(B)(7) and not 25(B)(8) unavailing.

Pursuant to Board Rule 25(B)(7), pertaining to Intervention as of Right, "any person upon whom the applicable statute confers an unconditional right to intervene or a conditional right to intervene and the conditions are satisfied;" shall become a party to a Board proceeding. The Board agrees with ANR that this provision of Rule 25 is inapplicable to this proceeding. There is no specified "conditional right to intervene" other than that which is attendant to most appeals to the Board, to wit: a person who is aggrieved. Rather, it is WBR 25(B)(8) that provides the more appropriate analytical framework to determine party status in this instance. WBR 25(B)(8) states that "any person demonstrating a substantial interest which may be affected by the outcome of a proceeding where the proceeding affords the exclusive means by which that person can protect that interest and where the interest may not be adequately represented by existing parties."

In Mr. Dannenberg's party status petition he explains several reasons for his involvement in this proceeding, most of which derive from his interest in his

private drinking water supply'. The protection of Mr. Dannenberg's drinking water supply is clearly a substantial interest. The Board emphasizes that based on the limited information available to it, Mr. Dannenberg's substantial interest may be affected. That is all Mr. Dannenberg needs to show to establish party status. However, the Board notes that should any party provide sufficient evidence to support a conclusion that Mr. Martin's application of Aquashade® could not affect Mr. Dannenberg's water supply, this matter may be dismissed prior to a full hearing on the merits.

Because Mr. Dannenberg has made a showing sufficient to meet the relatively modest threshold for standing, the Motion to Dismiss is denied and the matter shall proceed to hearing.

III. SCHEDULING

Chair Gossens has convened several prehearing conferences relative to this matter to address preliminary issues and encourage, to the extent appropriate, a mutually acceptable settlement between Mr. Dannenberg and the Permittee.³ Despite having several prehearing conferences, specific issues under appeal, the appropriate scope of the appeal, lists of potential witnesses, and lists of potential exhibits from the respective parties, all of which are commonly discussed in a prehearing conference, have not, as yet, been identified with certainty. Moreover, no schedule for the filing of prefilled testimony and legal memoranda has been established and no description of the hearing process and its technical requirements (number of copies, how to prepare prefilled evidence, etc.) has been discussed. Accordingly, and under the authority of the Chair, Associate General Counsel Joe Minadeo ("Board Counsel"), will meet with the parties in this matter in a prehearing conference on Thursday, May 18, 2000 at the Board's office in Montpelier to set up a filing schedule, identify the time, date, and location of a merits hearing, discuss the particulars of a site visit, and answer questions relative to the parties' obligations in this proceeding. Prior to meeting on **May 18, 2000**, parties are directed to file the following memoranda with the Board. On or before Tuesday, **May 2, 2000**, Appellant shall identify **with specificity those issues (not to exceed those enumerated in the Notice of Appeal) that remain issues in this proceeding. Not later than Thursday, May 11, 2000, Permittee and the ANR shall file responses.** Parties will discuss with Board Counsel on Thursday, May 18, 2000 the issues in this proceeding with the

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An exception is Mr. Dannenberg's attempt to include within the context of this appeal concerns about noise emanating from a compressor pump on Mr. Martin's land. Mr. Dannenberg has withdrawn this issue from the notice of appeal.

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While settlement discussions to date have not been successful , the Board continues to encourage informal resolution of this matter.

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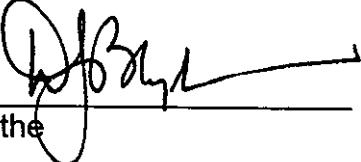
goal of creating a statement of issues to be summarized in a prehearing conference report and order. It is upon these issues that the parties will submit testimony and establish a proposed site visit. The Board's factual findings and legal conclusions will also be oriented around the statement of issues, and a decision will issue based upon how the Board disposes of each.

IV. ORDER

- A. Permittee James Martin's Motion to Dismiss is hereby denied.
- B. Paul Dannenberg is hereby granted party status pursuant to WBR 25 subject to any party making a subsequent showing that the Permittee's application of Aquashade® could have no effect upon his water supply.
- C. Mr. Dannenberg shall file, not later than 4:30 p.m. on Tuesday, May 2, 2000, a revised, detailed statement of legal issues in this proceeding.
- D. ANR and the Permittee may file, not later than 4:30 p.m. on Thursday, May 11, 2000 a response to the statement of issues filed by Mr. Dannenberg.
- E. A subsequent prehearing conference with Board Counsel is scheduled for Thursday, May 18, 2000 at the Board's Montpelier Office Conference Room.

Dated at Montpelier, Vermont, this 20th day of April, 2000.

VERMONT WATER RESOURCES BOARD
by its Vice-Chair



David J. Blythe

Concurring in Decision on Motion to Dismiss

Gerry Gossens

Jane Potvin

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