

**State of Vermont
WATER RESOURCES BOARD**

**RE: Village of Ludlow (Ludlow Wastewater Treatment Facility)
Docket No. WQ-01-08**

MEMORANDUM OF DECISION

Having found after a limited evidentiary hearing on preliminary issues that the appellant in this case does not have legal standing, the Board dismisses this appeal for lack of jurisdiction.

I. Background

This appeal arises from the issuance of a discharge permit (#3-1208) on September 25, 2001, by the Vermont Agency of Natural Resources (ANR) to the Village of Ludlow. The permit authorizes the discharge of treated municipal wastewater from the Village of Ludlow's Wastewater Treatment Facility (WWTF) to the Black River.¹ On October 10, 2001, Mount Holly Mountain Watch (MHMW), by its spokesperson and vice-chair, Peter H. Berg, appealed the permit to the Water Resources Board (Board) pursuant to 10 V.S.A. § 1269 (1998). The Notice of Appeal alleges that by increasing the ultimate oxygen demand (UOD) of the existing discharge, the discharge authorized by the permit at issue will decrease the dissolved oxygen in the receiving waters and unjustifiably degrade the Black River.

On November 9, 2001 the Board's Chair conducted a prehearing conference in this matter pursuant to Board Rule of Procedure 28 (1999). The Chair issued a Prehearing Conference Report and Order (Prehearing Order) on November 27, 2002. Based on discussions with the parties, the Chair determined at the prehearing conference that the central issue in this appeal is whether the increase in UOD authorized by the permit violates the 2000 Vermont Water Quality Standards, including Vermont's anti-degradation policy, VWQS § 1-03 (2000).

At the prehearing conference, the Chair granted the Village of Ludlow and ANR party status as a matter of right pursuant to Rules of Procedure 25(B)(1) and 25(B)(5), respectively. The Village of Ludlow objected to the standing and party status of MHMW and further objected to the authority of Mr. Berg, who is not an attorney, to represent MHMW in these proceedings pursuant to Rule of Procedure 27(B). At the prehearing conference, Mr. Berg clarified that he is not an individual seeking party status or standing in his own right and that the only appellant in this matter is MHMW. The Village

¹See infra note 13 and accompanying text.

maintained that to satisfy the requirements of Procedural Rule 27(B), Mr. Berg must produce written authorization from MHMW to represent that organization in this appeal.

At the prehearing conference, the Chair decided that the standing and party status of MHMW and the authority of Mr. Berg to represent MHMW need to be established before this appeal can go to a hearing on the merits. The Chair also ruled that, if necessary, a limited evidentiary hearing would be held on these issues. Accordingly, the Prehearing Order established a schedule for Mr. Berg to file evidence of his authority to represent MHMW in this appeal pursuant to Procedural Rule 27(B), for MHMW to file a supplemental petition for party status pursuant to Procedural Rule 25(A), for the Village of Ludlow and ANR to file any objections or motions opposing these filings, and for MHMW to file a response to any motions or objections by the Village of Ludlow or ANR.

Pursuant to the Prehearing Order, MHMW filed a supplemental petition for party status and evidence of Mr. Berg's authority to represent MHMW. The Village of Ludlow filed a motion to dismiss and objections to MHMW's standing and party status and objections to Mr. Berg's representation of MHMW. MHMW then filed a response to the Village of Ludlow's motion and objections. ANR chose not to take any position on these issues.

In its filings and at the prehearing conference, the Village of Ludlow questioned whether MHMW is a bona fide organization. Assuming *arguendo* that it is, the Village also questioned whether any members of MHMW actually use the Black River in the area affected by the discharge. In view of these issues, the Chair issued an Order on January 24, 2002, pursuant to Procedural Rule 23, scheduling oral argument and an evidentiary hearing limited to the following issues: Whether Mr. Berg is authorized to represent MHMW in this appeal pursuant to Procedural Rule 27(B) and whether MHMW has legal standing and party status in this appeal pursuant to Board Rule of Procedure 25(B)(8).

In the January 24, 2002, Order, the Chair ruled that the Board's Rules of Procedure effective February 22, 1999, rather than the Rules effective January 1, 2002, shall govern this appeal.² The Chair's Order also established that MHMW would have the

²The 2002 Rules of Procedure, unlike the 1999 Rules of Procedure, provide that a notice of appeal must include a statement of the reasons why the appellant has legal standing to file the appeal. Compare Rule 19(A)(7) (2002) with Rule 19(A) (1999). Consequently, the 2002 Rules, unlike the 1999 Rules, do not require appellants to petition for party status. Compare Rule 25 (2002) with Rule 25 (1999). Because this appeal is governed by the 1999 Rules, this decision treats legal standing as a party-status requirement. However, under both the 1999 and the 2002 Rules, legal standing is a jurisdictional requirement, and

burden of persuasion and the initial burden of production to prove by a preponderance of the evidence that Mr. Berg is authorized to represent MHMW and that MHMW has legal standing and party status. The Chair's Order forewarned the litigants that any documents on which they intended to rely at the limited evidentiary hearing, including documents attached to their filings, would need to be introduced into evidence. The litigants were also cautioned that written or oral out-of-court statements may be inadmissible at the limited evidentiary hearing or carry little weight.³

The limited evidentiary hearing took place at the Board's offices in Montpelier, Vermont on February 26, 2002. MHMW called four witnesses and introduced twenty-five exhibits into evidence. Neither ANR nor the Village of Ludlow offered evidence. The Board deliberated following the hearing on February 26, 2002, and again on March 12 and April 2, 2002. This matter is now ready for decision.

II. Issues

1. Whether Mr. Berg is authorized to represent MHMW in this appeal pursuant to Procedural Rule 27(B).
2. Whether MHMW has legal standing and party status in this appeal pursuant to Board Rule of Procedure 25(B)(8).

III. Findings of Fact

Having considered the evidence admitted at the February 26, 2002, limited evidentiary hearing, the Board makes the following findings of fact:

1. On September 25, 2001, ANR issued discharge permit number 3-1208 to the Village of Ludlow.⁴ The permit authorizes the expansion of the Ludlow WWTF from its previously permitted discharge of 0.70 MGD (million gallons per day) to a discharge of 1.05 MGD, a fifty percent increase. Compared to the previously issued permit, the permit on appeal authorizes no increased discharge of any pollutants, except for UOD. The previously permitted discharge from the Ludlow WWTF contained a UOD limitation of 650 pounds per day for the period of June 1

the outcome of this decision would therefore be the same.

³The Chair's January 24, 2002, Order provided that it would be binding on all parties unless a written objection was filed by January 31, 2002. No objections were filed.

⁴See infra note 13 and accompanying text.

- through September 1. The permit under appeal authorizes a UOD discharge of 860 pounds per day for this period.
2. MHMW appealed the permit to the Water Resources Board on October 10, 2001. The Notice of Appeal alleges, among other things, that by increasing the UOD of the existing discharge, the additional discharge authorized by the permit at issue will decrease the dissolved oxygen in the receiving waters and unjustifiably degrade the Black River in violation of the 2000 Vermont Water Quality Standards, including Vermont's anti-degradation policy.
 3. The Black River, which is a tributary to the Connecticut River, is used for recreation, including fishing, swimming, and wading, both upstream and downstream from the Ludlow WWTF.
 4. The evidence does not indicate which areas of the Black River will be affected by the increased UOD authorized by the permit at issue. Nor does the evidence indicate that the increased UOD in the proposed discharge will have any aesthetic impacts on the Black River.
 5. MHMW is an ad hoc organization of about thirty members.⁵ There are no membership dues, and the members meet sporadically. Last year, in 2001, MHMW met two times. Meetings are organized by telephone. MHMW seeks to look out for the interests of the citizens of Mount Holly. MHMW monitors development in the Mount Holly area, particularly development associated with Okemo Mountain Resort, and takes actions to ensure that growth is sustainable and not harmful to the existing environment. Officers of MHMW tend to act on the basis of the consensus of its members rather than by vote. MHMW has no by-laws.
 6. The chair of MHMW is Jennifer Matthews. On November 23, 2001, Ms. Matthews appointed Mr. Berg to represent MHMW before government boards and commissions and to act as spokesperson. Ms. Matthews appointed Mr. Berg as spokesperson at the direction of MHMW's executive committee, which consists

⁵MHMW is so informally organized that the Board has some questions about whether MHMW has any members at all. Based on the evidence, it is not readily apparent how members of MHMW are distinguished from non-members or how anyone is authorized to make decisions on behalf of the group. However, for purposes of this appeal, the Board will assume that MHMW has bona fide members and that these members authorized this appeal.

of the chair (Ms. Matthews), the vice-chair (Mr. Berg), and the treasurer/secretary (whom Ms. Matthews could not identify at the hearing). The executive committee also made Ms. Matthews chair.

7. One of Mr. Berg's roles is to file and prosecute appeals, which he does on the basis of conversations with others in the group. However, Mr. Berg does not necessarily contact members of MHMW before filing an appeal. Ms. Matthews could not say whether any members other than herself were contacted before Mr. Berg filed the instant appeal on behalf of MHMW.
8. MHMW appealed the permit at issue based on concern about the degradation of the environment and quality of life in the Mount Holly area. MHMW has no other organizational interest in this matter.
9. Peter Smith is a member of MHMW. For twenty years, Mr. Smith was a high-school biology teacher in Springfield, Vermont. He currently teaches at Green Mountain College. Mr. Smith took his high-school classes to study the Black River in areas downstream from the Ludlow WWTF, including Springfield and Cavendish. His classes performed kick sampling of the river in these areas, as well as areas upstream from the WWTF, including Buttermilk Falls. Mr. Smith has fished the Black River in "years gone by." Mr. Smith no longer studies or fishes the Black River. Mr. Smith might "possibly" study the Black River in the future. Mr. Smith could not say how the discharge permit at issue might affect his ability to study the Black River, although he did testify that noticeable degradation may make studies of the river less interesting.
10. Ms. Matthews is a member of MHMW. She uses the Black River for wading and recreation at Buttermilk Falls, which is upstream from the outfall of the Ludlow WWTF. Ms. Matthews is most acquainted with this area of the Black River. Ms. Matthews also appreciates the beauty of the Black River. She drives along the Black River below the outfall at issue, and she has photographed the river. Ms. Matthews has waded in the Black River near the Central Vermont Public Service plant in the area of Cavendish and Proctorville. The CVPS site is located approximately 5.7 miles downstream from the Ludlow WWTF, just above the outfall of the Cavendish WWTF. Ms. Matthews last waded in this area about two years ago. Ms. Matthews is concerned about the water quality of the river, but she could not point to any specific harm that she might experience as a result of the discharge authorized by the permit under appeal. Ms. Matthews testified that she is concerned generally as a citizen of Vermont about the health of the river.

IV. Discussion

A. Authority of Appellant's Representative

The Prehearing Order required Mr. Berg to file evidence of his authority to represent MHMW in this appeal pursuant to Procedural Rule 27(B).⁶ Peter Berg filed a document dated November 23, 2001, purporting to be a memo signed by the chair of MHMW, Ms. Matthews, confirming that MHMW appointed Mr. Berg to represent that organization before government boards and commissions. On its face, this memo satisfies the requirements of Rule 27(B). The Village filed objections to this memo, stating that it is insufficient because it does not specifically permit Mr. Berg to bind MHMW and because the authority of Ms. Matthews to act on behalf of MHMW is unclear. Rule 27(B) does not require such a showing.⁷ See Re: Westall and Gregory, Nos. CUD-99-02 and CUD-99-03, Prehearing Conference Report and Order at 5 (Vt. Water Res. Bd. Aug. 4, 1999) (requiring written authorization of non-attorney representative to “clearly delegate the power to serve” in that capacity).

At the limited evidentiary hearing, MHMW, through Mr. Berg, moved the November 23, 2001, memo by Ms. Matthews into evidence, without objection from the Village of Ludlow or ANR. In addition, MHMW called Ms. Matthews as a witness. Ms. Matthews confirmed that she signed the November 23, 2001, memo authorizing Mr. Berg to represent MHMW before government boards and commissions. The direct and cross examination of Ms. Matthews, and the other evidence in this case, makes clear that

⁶Board Rule of Procedure 27(B) provides in pertinent part as follows:

A party to a matter before the Board may appear for itself, or may be represented by an attorney or other representative of the party's choice. The Board shall require any representative of a party to file with the Board a statement signed by the party authorizing such representation, unless the representative is an attorney licensed by the Vermont Supreme Court.

⁷The requisite organizational formalities for an organization to demonstrate representational legal standing and party status before the Board under Rule 25(B)(8) may well be more stringent than those needed to show that a non-attorney is authorized to speak on behalf of an organization before the Board under Rule 27(B). However, the Board does not address in its analysis of the standing issue whether MHMW has bona fide members or whether these members, if any, have duly authorized this appeal on their behalf. See supra note 5 and infra notes 9 and 10 and accompanying text.

MHMW is very informally organized. Nevertheless, the Board is satisfied that an appropriate officer of MHMW has filed a signed statement authorizing Mr. Berg to act as its representative in this appeal. The Board concludes that Mr. Berg is authorized to represent MHMW in this appeal pursuant to Procedural Rule 27(B).

B. Appellant's Standing and Party Status

1. Legal Requirements for Standing and Party Status

Having decided that Mr. Berg is authorized to represent MHMW in this appeal, the Board must now determine whether MHMW has legal standing and party status. MHMW cited both Rule 25(B) and Rule 25(C) in support of its petition for party status. Because MHMW is the appellant, it cannot be a permissive intervenor under Rule 25(C). Consequently, MHMW must qualify as an intervenor as of right under Rule 25(B) to be granted standing and party status in this matter.⁸

The only part of Rule 25(B) that could apply to MHMW is paragraph (8), which provides that the following shall become parties: “any 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 that interest and where the interest may not be adequately represented by existing parties.” (Emphasis added.) Whether MHMW meets the substantial-interest test of Rule 25(B)(8) is governed by the applicable statutes and case law on legal standing, including the statutory basis for the appeal.⁹

The doctrine of standing is derived from the case-or-controversy requirement of Article III of the United States Constitution. Hinesburg Sand & Gravel v. State, 166 Vt. 337, 340 (1997). The Vermont Supreme Court has stated that “[t]he standing and case or

⁸In an appeal involving Okemo Mountain Resort that MHMW filed with the Environmental Board, MHMW was granted party status as a party by permission rather than by right. See Re: Okemo Mountain, Nos. 2S0351-30-EB (2nd Revision), 2S0351-31-EB, and 2S0351-25R-EB, Memorandum of Decision (Vt. Env'tl. Bd. May 22, 2001). The Environmental Board Rules materially differ from the Rules of the Water Resources Board with regard to party status. Compare Environmental Board Rule 14 (2001) with Water Resources Board Rule 25 (1999).

⁹Because the Board decides this appeal on other grounds, the Board does not address whether MHMW constitutes a “person” within the meaning of Rule 25(B)(8). See infra note 10 and accompanying text.

controversy requirements . . . enforce the separation of powers between the three different branches of government by confining the judiciary to the adjudication of actual disputes and preventing the judiciary from presiding over broad-based policy questions that are properly resolved in the legislative arena.” Parker v. Town of Milton, 169 Vt. 74, 77 (1998). The standing doctrine helps to ensure that judicial decisions are factually based, which assists with the writing of well-grounded decisions and the development of reliable precedent. See id. at 79.

Although the Vermont Water Resources Board is not an Article III court, the Board is nevertheless limited in its quasi-judicial powers to determining actual controversies that arise between identified parties and that come to the Board for review under express statutory authority. See 10 V.S.A. § 905 (1998). The Board does not have jurisdiction to hear an appeal if the appellant does not have legal standing. E.g., Re: Appeal of Wallace-Senft, Nos. WQ-99-04 and CUD-99-05, Dismissal Order (Vt. Water Res. Bd. Sept. 8, 1999).

MHMW filed its notice of appeal pursuant to 10 V.S.A. § 1269. Section 1269 provides in pertinent part that a “person or party in interest aggrieved by an act or decision” of ANR may appeal to the Board.¹⁰ The Board has held that an appellant does not need to own property along a water resource to be sufficiently “aggrieved” to have legal standing and party status. Re: Dean Leary, No. MLP-94-08, Preliminary Order at 2 (Vt. Water Res. Bd. Dec. 28, 1994). Nor must an appellant demonstrate a pecuniary interest in a controversy to have standing before the Board. Wallace-Senft at 4. An appellant’s present and historical use of the water resource at issue for recreational purposes, coupled with an allegation that the appellant’s use and enjoyment of the waters will be adversely affected if the permit under appeal is allowed to stand, has been sufficient to demonstrate legal standing before the Board. See Dean Leary at 2. Appellants may be required to prove the allegations supporting their standing and party status at a hearing if those allegations are controverted. See Re: Dannenberg, No. WQ-99-07, Findings of Fact, Conclusions of Law, and Order (Vt. Water Res. Bd. Dec. 29, 2000.)

Standing inquiries focus on the party appearing before the Board rather than on the

¹⁰The term “person” in section 1269 is defined as “an individual, partnership, public or private corporation, municipality, institution or agency of the state or federal government and includes any officer or governing or managing body of a partnership, association, firm or corporation.” 10 V.S.A. § 1251 (1998). The term “party in interest” in section 1269 is not defined. The Board does not decide whether MHMW is a “person” or “party in interest” as those terms are used in section 1269 because the Board concludes that MHMW is not “aggrieved.” See supra notes 5, 7 and 9 and accompanying text.

merits of the appeal. Re: OMYA, No. WQ-01-09, Chair's Preliminary Rulings at 13 (Vt. Water Res. Bd. Feb. 15, 2002). Consequently, limited information indicating that the appellant's substantial interest in a water resource may be affected by the action appealed from may be sufficient to establish standing and party status. However, evidence supporting a conclusion that the action appealed from cannot possibly affect the appellant's interest in the water resource may be grounds for dismissing the appeal for lack of standing. Re: Dannenberg, No. WQ-99-07, Memorandum of Decision on Motion to Dismiss at 4-5 (Apr. 20, 2000).

Persons advancing generalized complaints about ANR's actions, or appellants seeking to prevent environmental degradation generally, without more, do not have standing to appeal. The alleged injury to the appellant's interests must be concrete, actual, and particularized. Litigants without a personal stake in the proceedings beyond those affecting the common rights of all persons do not have standing to act on behalf of the public interest. Abstract concern or mere speculation about the effects of a generalized grievance cannot substitute for the threat of actual injury. Parker at 76-79.

Organizations may have standing either in their own right or in their representational capacity. Re: Home Depot, U.S.A., Nos. WQ-00-06, CUD-00-07, and CUD-00-08 (Cons.), Memorandum of Decision on Preliminary Issues and Order (Sept. 8, 2000). To bring suit in its own right, an organization must demonstrate that the matter on appeal may injure or threaten to injure the organization's interests. An organization whose interest in the protection of the resource at issue is no different from that of the general public does not have legal standing. An organization may not lift itself by its bootstraps into a position of legal standing merely by defining its organizational purpose as the protection of natural resources. Like an individual, an organization's interest in the outcome of a proceeding must be direct and immediate in order for the organization's appeal to be legally cognizable and justiciable by the Board.

Even if an organization does not have standing to bring suit in its own right, it may have standing to sue on behalf of its members. Id. In order to obtain such representational standing, the organization must show that at least some of its members have standing individually, that the interests it asserts on appeal are germane to the organization's purposes, and that the relief requested does not require the organization's members to participate in the action individually. Parker at 78.

2. Application of Standing and Party-Status Requirements to Appellant

With the foregoing standards in view, the Board now addresses the question of whether MHMW has demonstrated standing to sue, either in its own right or on behalf of

its members. In addressing these questions, the Board considers the evidence presented at the February 26, 2002, limited evidentiary hearing and the legal arguments that the litigants advanced at the hearing and in writing during the course of this appeal. Factual allegations or documents that were not admitted into evidence at the hearing will not be taken into account. See 3 V.S.A. § 810 (1995 & Supp. 2001) (providing that rules of evidence apply in contested cases).¹¹

a. Organizational Standing

The purpose of MHMW is to monitor development in the Mount Holly area, particularly development associated with Okemo Mountain Resort, and to take actions to ensure that growth is sustainable and not harmful to the existing environment. One of the members of MHMW, Mr. Smith, testified that the function of MHMW is “to testify at hearings like this.” MHMW’s spokesperson is Mr. Berg. Mr. Berg files appeals on behalf of MHMW after discussions with its members, but the general membership may not always be aware of particular legal actions instituted by Mr. Berg.

Although as an organization MHMW may be dedicated to environmental protection and sustainable growth in the Mount Holly area, MHMW has not demonstrated that its interests in the permit at issue are any different from those of the public generally. MHMW has not demonstrated a “concrete injury,” Parker at 78, other than an injury affecting “the common rights of all persons.” Hazen v. Perkins, 92 Vt. 414, 421 (1918) quoted in Parker at 78. Because MHMW has not demonstrated “a substantial interest which may be affected by the outcome of the proceeding,” see Rule 25(B)(8), MHMW lacks standing in its organizational capacity.

b. Representational Standing

¹¹At the February 26, 2002, limited evidentiary hearing, MHMW did not follow ordinary procedures for the introduction of documentary evidence, leading to some disorganization of the exhibits that MHMW offered. Following the hearing, counsel for the Board organized all of the exhibits and generated a new exhibit list to accurately reflect the exhibits that were offered and admitted. This exhibit list was mailed to the parties on February 27, 2002, with instructions to file any objections by March 6, 2002. On March 4, 2002, MHMW filed a letter with the Board asking that a “short statement by Peter H. Berg” that was attached to MHMW’s pleadings as MHMW-2 be included on the exhibit list. Because this exhibit was not introduced into evidence, it will not be considered by the Board. No other objections to the modified exhibit list were filed.

The remaining question is whether MHMW has legal standing in its representational capacity. As set forth in part IV.B.1, supra, an organization seeking representational standing must establish, among other things, that at least some of its members have standing individually.¹² See Parker at 78. MHMW has not met this requirement.

MHMW called David Deen to testify on its behalf. Mr. Deen is the river steward for the Connecticut River Watershed Council. In that capacity, Mr. Deen's job is to watch, care for, and otherwise help the Connecticut River and all of its tributaries. In addition, Mr. Deen is a professional fly fishing guide. Mr. Deen testified that he has fished and guided in the Black River both upstream and downstream from the Village of Ludlow's WWTF. However, Mr. Deen also testified that he has never been a member of MHMW.

Mr. Smith, a teacher at Green Mountain College and a former high school biology teacher, testified that he is a member of MHMW. Mr. Smith used to take his high-school students to the Black River, where they analyzed the waters, fish, aquatic biota, and shoreline vegetation. Mr. Smith testified that these activities occurred downstream from the Village of Ludlow's outfall. However, Mr. Smith's testimony with regard to his high school classes was confined to projects in the past rather than current or on-going activities. Similarly, Mr. Smith testified that outside of class, he has fished in the Black River, but not in recent years. On cross examination, Mr. Smith testified that he might study the River in the future, but he did not have definite plans.

The chair of MHMW, Ms. Matthews, testified that she uses the Black River for wading and recreation at Buttermilk Falls and that she enjoys the beauty of the river, both upstream and downstream from the Ludlow WWTF. On cross examination, Ms. Matthews acknowledged that the Village of Ludlow's WWTF is downstream from Buttermilk Falls. However, Ms. Matthews added that she wades in the receiving waters in the area of Cavendish and Proctorville, down river from the Ludlow WWTF. The last time Ms. Matthews waded in these areas was around two years ago. Ms. Matthews enjoys the aesthetic beauty of the river from her car, and she has photographed the river as well.

Ms. Matthews could not point to any specific harm that she would suffer as a result of the permit at issue. Rather Ms. Matthews testified that she is concerned generally

¹²Because the Board concludes that MHMW has failed to show that at least some of its members have standing individually, the Board does not address the other elements of representational standing set forth in Parker at 78.

about the health of the river as a concerned citizen of Vermont. When asked on cross examination why MHMW was appealing the permit at issue, Ms. Matthews testified that MHMW is concerned about degradation of the environment and quality of life.

Finally, Mr. Berg took the stand on behalf of MHMW. Mr. Berg stated that the Black River is a public resource owned by the citizens of Vermont and used by them.

MHMW moved numerous documents into evidence, but none of them are probative of the issue of MHMW's legal standing in its representational capacity.¹³ They do not indicate that members of MHMW use and enjoy the Black River or that MHMW's members have any substantial interest in the river beyond that of generally concerned citizens. For example, some nine exhibits relate to an Existing Use Determination of the Black River, which merely shows that the Black River is used for recreation, a matter that is not at issue. The Existing Use Determination was prepared by the Southern Windsor County Regional Planning Commission on behalf of the Town of Ludlow to assist with the Village of Ludlow's application for the permit under appeal. While the Existing Use Determination confirms that the Black River is used for fishing and contact recreation downstream from the outfall for the Village of Ludlow's WWTF, this study does not indicate that members of MHMW use the river in areas that may be affected by the permit or how MHMW members would otherwise be aggrieved by ANR's decision to issue this permit. Indeed, counsel for the Village of Ludlow stipulated at the hearing that the Black River is used for fishing.

MHMW introduced into evidence four definitions of "ad hoc," apparently to prove that it is loosely organized. Four definitions of "bind" were introduced, evidently to demonstrate that MHMW would be bound by the representations of Mr. Berg. Other documents relate to the alleged harassment of MHMW for undertaking activities to protect the environment. Although this evidence was apparently introduced to indicate

¹³Although the merits of the permit that generated this appeal are not at issue, the Board notes that MHMW did not move the permit into evidence. It would be difficult for MHMW to prove that it has legally cognizable injury as a result of an action by a state agency without the state's action being a part of the record. The Board, however, pursuant to 3 V.S.A. § 810(4) (1995), takes official notice of discharge permit no. 3-1208, issued September 25, 2001, along with the accompanying fact sheet and response summary. On March 20, 2002, counsel for the Board sent a memo to the parties in this matter informing them that, pursuant to 3 V.S.A. § 810(4), the Board intended to officially notice the discharge permit at issue, along with the fact sheet and response summary accompanying the permit. The parties were instructed to file any objections with the Board no later than March 27, 2002. No objections were filed.

why MHMW's members may not identify themselves, none of these documents indicate that MHMW's members would have standing in their own right to appeal the permit at issue or excuse MHMW from demonstrating that it has legal standing to represent its members in this appeal.

Based on the evidence presented and the arguments of the parties, the Board concludes that MHMW has failed to prove by a preponderance of the evidence that it has legal standing in its representational capacity. See Parker at 78. The evidence indicates that only two members of MHMW have used the Black River at all. Neither of these members, Mr. Smith and Ms. Matthews, have alleged a concrete injury relating to the permit at issue. To the contrary, the evidence shows that MHMW and its members are acting as concerned citizens with a general concern about the environment rather than to redress a direct and immediate, legally cognizable injury. Because MHMW has failed to show that it is acting on behalf of members with "a substantial interest which may be affected by the outcome of the proceeding," see Rule 25(B)(8), MHMW lacks standing in its representational capacity.

V. Order

It is hereby Ordered:

1. MHMW lacks sufficient standing to confer jurisdiction on the Board;
2. This appeal is dismissed for lack of jurisdiction; and
3. DEC Permit #3-1208 remains in full force and effect.

Dated at Montpelier, Vermont, this 5th day of April, 2002.

WATER RESOURCES BOARD

/s/ David J. Blythe
David J. Blythe

Concurring:

Lawrence H. Bruce, Jr., Member
John D.E. Roberts, Vice-Chair
Mardee Sánchez, Member