

**State of Vermont
WATER RESOURCES BOARD**

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

MEMORANDUM OF DECISION

The appellant's Motion to Alter a Memorandum of Decision dismissing this appeal for lack of jurisdiction is denied.

I. Background

On September 25, 2001, the Vermont Agency of Natural Resources (ANR) issued a permit (#3-1208) authorizing the discharge of treated municipal wastewater from the Village of Ludlow's Wastewater Treatment Facility (WWTF) to the Black River. On October 10, 2001, pursuant to 10 V.S.A. § 1269 (1998), Mount Holly Mountain Watch (MHMW), by its spokesperson and vice-chair, Peter Berg, appealed the permit to the Water Resources Board (Board). The Board's Chair conducted a prehearing conference in this matter on November 9, 2001, and on November 27, 2001, issued a Prehearing Conference Report and Order (Prehearing Order). Among other things, the Prehearing Order established a schedule for Mr. Berg to file evidence of his authority to represent MHMW in this appeal pursuant to Board Rule of Procedure 27(B) (1999) and for MHMW to file a supplemental petition for party status pursuant to Rule 25(A). The Prehearing Order also set deadlines for the Village of Ludlow and ANR to file objections or motions opposing these filings and for MHMW to file a response.

On February 26, 2002, after reviewing the materials filed by the parties pursuant to the Prehearing Order, the Board convened a limited evidentiary hearing on the authority of Mr. Berg to represent MHMW in this appeal and also on MHMW's standing and party status. In a Memorandum of Decision issued April 5, 2002, the Board decided that Mr. Berg is authorized to represent MHMW in this matter. However, the Board dismissed this appeal for lack of jurisdiction because it found that MHMW failed to prove that it has legal standing and party status. See In re: Village of Ludlow, No. WQ-01-08, Memorandum of Decision (Vt. Water Res. Bd. Apr. 5, 2002).

On April 18, 2002, MHMW, pursuant to Board Rule of Procedure 34(D) (1999), timely filed a Motion to Alter the Board's April 5, 2002, Memorandum of Decision. The Board's Chair issued an Order on April 19, 2002, setting April 29, 2002, as the deadline for filing responses or objections to MHMW's Motion to Alter. The Village of Ludlow filed an Opposition to the Motion to Alter on April 29, 2002. No other responses to the Motion to Alter were received.

The Board deliberated on MHMW's Motion to Alter at its regular meeting on May 14, 2002. The Board denied the Motion to Alter for the reasons set forth herein.

II. Standard of Review

MHMW's Motion to Alter is governed by Board Rule of Procedure 34(D) (1999), which provides as follows:

(D) Motions to Alter Decisions

A party may file within 15 days from the date of a decision of the Board a motion to alter the decision, no party, however, may file a motion to alter a decision concerning or resulting from a motion to alter. The Board shall not be required to hold a hearing prior to rendering a decision on such a motion.

(1) All motions to alter shall be premised upon a proposed reconsideration of the existing record. New arguments are not allowed, with the exception of arguments in response to permit conditions or typographical, technical, and other manifest errors, provided that the party seeking the alteration reasonably could not have known of the conditions or errors prior to decision. New evidence shall not be submitted unless the Board acting on a motion to alter, determines that it will accept new evidence in order to avoid manifest injustice.

(2) All motions to alter shall number each requested alteration separately. The motion may be accompanied by a supporting memorandum of law which shall contain numbered sections corresponding to the motion. The supporting memorandum shall state why each requested alteration is appropriate and the location in the existing record of the supporting evidence. Any reply memorandum of law shall also contain numbered sections corresponding to the motion.

As Rule 34(D)(1) makes clear, new arguments in a motion to alter are permitted only with respect to permit conditions or manifest error. Manifest error in Rule 34(D)(1) means "obvious, patent errors in a decision, such as the misidentification of a party, the wrong citation to a case, or other defect that may readily be determined to be in error." In re: Gillin (Encroachment Permit), No. MLP-94-01, Memorandum of Decision and Order

at 2 (Vt. Water Res. Bd. Oct. 4, 1994), quoted in In re: Hannaford Bros. Co., No. WQ-01-01, Memorandum of Decision (Vt. Water Res. Bd. Aug. 29, 2001).

Under Rule 34(D)(1), the Board may accept new evidence when acting on a motion to alter only to avoid manifest injustice. The term manifest injustice has been used to describe a result that is “wholly without legal support.” Ulm v. Ford Motor Co., 170 Vt. 281, 285 (2000). See also In re: White, Nos. 1R0391-EB, 103091-3-EB, 1R03091-4-EB, 1R03091-5-EB, 1R03091-5A-EB, 1R03091-6-EB (Rev), Memorandum of Decision at 8 (Vt. Env'tl. Bd. July 24, 1998) (finding no legal basis for convening new hearing and describing “manifest injustice” as act or omission of decision maker that is “apparent error”), aff'd, ___ Vt. ___, 779 A.2d 1264 (2001).

The requirements of manifest injustice and of manifest error in rule 34(D) preclude a party from using a motion to alter as a means of re-litigating a case or expanding the scope of previous proceedings. See Gillin at 2. The proper focus of a motion to alter is on errors that may have been committed by the Board in the prior proceeding, not on strategies or techniques that proved unsuccessful for the moving party. See, e.g., Rubin v. Sterling Enterprises, 164 Vt. 582, 588-589 (1996). See also, e.g., Okemo Mountain v. Okemo Trailside Condominiums, 139 Vt. 433, 436 (1981) (denying relief from judgment based on tactical decisions that in retrospect may have seemed ill-advised). A motion to alter is not an opportunity for a party to treat the prior proceeding as a first run, to evaluate what may have gone wrong, and to then revise its arguments. As the Environmental Board has explained,

The purpose of the standards concerning motions to alter is to preserve the integrity of the appeal process by ensuring that arguments and evidence are introduced prior to a final decision and to prevent the use of motions to alter to convert Board decisions into "proposed" decisions to which parties can later respond, thereby elongating the process.

White at 9.

“A motion to alter may ask the Board to reconsider arguments previously made.” Hannaford at 4. Thus, “the moving party may argue that the Board overlooked or misapprehended laws or facts previously presented that would probably affect the result.” Id. With these standards in view, the Board now addresses MHMW’s requested alterations.

III. Requested Alterations

1. MHMW requests that a written statement of Mr. Berg (Exhibit MHMW-2) be admitted into evidence and considered by the Board in making its decision.

Exhibit MHMW-2 is a statement signed by Mr. Berg that reads as follows: "I, Peter H. Berg, fish, wade and recreate in the Black River." This exhibit was attached to MHMW's supplemental petition for party status, which MHMW filed pursuant to the Prehearing Order on December 10, 2001. In its April 5, 2002, MOD, the Board noted that Exhibit MHMW-2 was not introduced into evidence and that it would therefore not be considered by the Board. MOD at 10 n.11.

MHMW's request to introduce this new evidence at this stage is not supported by manifest injustice. See Rule 34(D)(1). The Board did not exclude Exhibit MHMW-2 from evidence. MHMW did not introduce it. For the Board to consider new evidence at this stage, without a demonstration of manifest injustice, would be unfair to the other parties to this appeal and contrary to principles of finality and judicial economy. The request is therefore denied.

It may be noted that Exhibit MHMW-2 would not affect the Board's April 5, 2002, MOD even if the exhibit were now considered. The exhibit does not state where Mr. Berg has used the Black River in relation to the discharge at issue or when. The exhibit would therefore not change MHMW's failure to prove its legal standing and party status.

2. MHMW requests that the Board now consider written statements of Barbara Berg (Exhibits MHMW-5 and 13) and of Annette Lynch (Exhibit MHMW-4) as evidence in this matter, and MHMW again asks the Board to consider Mr. Berg's written statement (Exhibit MHMW-2).

Exhibit MHMW-4 is a written statement signed by Annette Lynch that reads as follows: "I, Annette Lynch, fish, wade and recreate in the Black River." Exhibit MHMW-5, signed by Barbara L. Berg, reads, "I, Barbara L. Berg, fish, wade and recreate in the Black River." In Exhibit MHMW-13, Barbara Berg states as follows: "Both with Mount Holly Concerned Citizens on Public Issues (MHCCPI) and Mount Holly Mountain Watch (MHMW) I have witnessed my husband Peter H. Berg, verbally harassed and I have also seen and read letters that he received harassing him and the organization."

Like Exhibit MHMW-2, Exhibits MHMW-4, 5, and 13 were attached to MHMW's supplemental petition for party status. None of these exhibits were introduced into evidence at the hearing on the merits. MHMW has not demonstrated that manifest injustice would result if the Board does not consider this new evidence. See Rule 34(D)(1).

MHMW suggests that the remedy for the disorganization and confusion surrounding its presentation of evidence is to convene another hearing and offer the Village of Ludlow the opportunity to question MHMW on its new evidence. In its Opposition to MHMW's Motion to Alter, the Village of Ludlow opposes this suggestion. A litigant's desire for a second opportunity to present its case does not support the granting of a motion to alter, much less a new hearing.

The Board notes that if Exhibits MHMW-4, 5, and 13 were now admitted, even along with Exhibit MHMW-2, they would offer MHMW no succor. Like Exhibit MHMW-2, Exhibits MHMW 4 and 5 do not state where or when Annette Lynch or Barbara Berg have used the Black River. Moreover, neither of these statements indicate that their signatories are members of MHMW. Exhibit MHMW-13 is a bald allegation, and in any event, any alleged harassment of MHMW or its members by persons who are not parties to this proceeding, or acting on behalf of parties, is not relevant. MHMW's second request is denied.

3. MHMW again requests the Board to hold another hearing in which the Board should consider Mr. Berg's written statement (Exhibit MHMW-2).

For the reasons set forth with respect to MHMW's first two requests, its third request is denied.

4. Here again, MHMW requests the Board to hold another hearing in which the Board should consider Mr. Berg's written statement (Exhibit MHMW-2).

MHMW argues that the Board should now take official notice of Mr. Berg's written statement and consider this new evidence because MHMW was not represented by counsel at the hearing and also because MHMW is inexperienced in litigation before the Board. Parties who appear before the Board without counsel are held to the same rules as those who do. Mr. Berg's written statement was not offered into evidence. In addition, MHMW did not ask the Board at the hearing to take official notice of his written statement. Moreover, Mr. Berg's written statement is not an appropriate matter for official notice. See 3 V.S.A. § 810(4). See also Vt. R. Evid. 201 (relating to judicial notice of adjudicative facts).

MHMW's Motion to Alter alleges that the permit at issue will degrade the Black River and interfere with its recreational uses. Assuming *arguendo* that these allegations are true, MHMW has nevertheless failed to prove that it has legal standing to bring this appeal. MHMW cannot use a motion to alter as a means of obtaining a second opportunity to prove legal standing. Because MHMW has not shown that the Board

“overlooked or misapprehended laws or facts previously presented,” Hannaford at 4, or supported its request that the Board consider new evidence with a showing of manifest injustice, Rule 34(D)(1), MHMW’s fourth request is denied.

5. MHMW requests the Board to strike finding of fact number 4 in the April 5, 2002, MOD and to find that “the evidence submitted indicates the areas of the Black River, downstream from the discharge point of the Ludlow Village WWTF into the Black River are affected by the increased UOD as noted in the issued permit.”

Finding of fact number 4 of the April 5, 2002, MOD states as follows: “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 impact on the Black River.” MOD at 4. As the Board found in its April 5, 2002, MOD, the evidence at the hearing showed that only two members of MHMW used the Black River, and neither of those members alleged a specific or particularized injury relating to the discharge permit at issue. MOD at 13.

At the hearing in this matter and in its arguments based on the evidence, MHMW needed to show a connection between the impacts of the permit on the Black River and either its organizational interests or the interests of its members. However, MHMW failed to show that its organizational and membership interests in the river are any different from those of the general public. MHMW did not demonstrate a nexus between the permitted discharge on the one hand and either its legal interests or those of its members on the other. Mere disagreement with the Board’s findings is not grounds for a motion to alter. See Gillin at 2. Accordingly, MHMW’s fifth request is denied.

6. MHMW requests the Board to alter its decision by deleting the words that “the Board has some questions about whether MHMW has any members at all.”

While the Board questioned in its April 5, 2002, MOD, whether MHMW actually has any members, the Board also assumed for purposes of its decision that MHMW has bona fide members and that they authorized the appeal. MOD at 4 n.5. MHMW’s sixth request does not relate to a finding of the Board and, if granted, would not affect the outcome of the Board’s decision. Accordingly, MHMW’s sixth request is denied.

7. MHMW requests the Board to find that the organizational interest of MHMW is to prevent further degradation of the Black River downstream from the Ludlow WWTF and to find that the permitted discharge will prevent members of MHMW from using the Black River for recreational purposes.

MHMW would like to present expert testimony on the affects of the proposed discharge on the Black River. MHMW already had an opportunity to do so and cannot use a motion to alter as a chance to reformulate its hearing strategies. Based on an Existing Use Determination of the Black River that was admitted into evidence, MHMW argues that people have been deterred from swimming in the Black River because of low water, slow flow, odor, turbidity, and the perception of pollution. None of this evidence, however, indicates how the permitted discharge will affect the river, or where, or that the effects of the permitted discharge will injure any specific or particularized interests of MHMW or its members. See MOD at 9.

MHMW again argues that the Board erred by finding that Mr. Berg's written statement (Exhibit MHMW-2) was not admitted into evidence. MHMW asks to be excused for its lack of organization because of the inexperience of its representative. Here again, MHMW expresses its willingness to appear at "an additional evidentiary hearing" and to be "cross-examined and questioned" on this exhibit. Because MHMW has not supported its request to introduce new evidence with a showing of manifest injustice, its seventh request is denied. See Rule 34(D)(1).

8. MHMW again requests "another evidentiary hearing so that [Mr. Berg's written statement (Exhibit MHMW-2)] may be subject to examination, cross-examination and questions from the [Board]."

In support of its eighth request MHMW argues that it would like another opportunity to introduce evidence relating to its membership. On the other hand, MHMW argues that it should not have to produce more information about its membership because its members have allegedly been subject to harassment. In its April 5, 2002, MOD, the Board found that MHMW's allegations of harassment do not excuse MHMW from proving legal standing. MOD at 13. MHMW claims that one of its members was unable to appear because of a medical emergency. However, MHMW did not request a continuance for that reason or any other. MHMW again seeks to present expert testimony on the effects of the permitted discharge on the Black River. The requirement of manifest injustice in Rule 34(D)(1) precludes the Board from granting a new evidentiary hearing to enable a party to make up for the deficiencies in its case at the first one. MHMW's eighth request is denied.

9. MHMW requests the Board to find that it has legal standing in both its organizational and representational capacities.

Because the evidence submitted fails to demonstrate that MHMW has legal standing in either its organizational or its representational capacity, MHMW's ninth request is denied.

10. MHMW again requests the Board to find that it has legal standing in its representational capacity.

MHMW again asks that Mr. Berg's written statement (Exhibit MHMW-2) be admitted into evidence and considered by the Board, and MHMW again requests the Board to schedule another hearing so that the Village and the Board may question MHMW on this exhibit. Again, MHMW speculates about the effects of the permitted discharge on the Black River, and again MHMW argues that it was excused from having to provide more information about its membership at the hearing because its members are subject to harassment. For the reasons set forth with respect to MHMW's previous requests, above, MHMW's tenth request is denied.

IV. Conclusion

The requirements for showing legal standing before the Board are not onerous. See, e.g., In re: Leary, No. MLP-94-08, Preliminary Order (Vt. Water Res. Bd. Dec. 28, 1994). MHMW had the opportunity to show party status and legal standing in its notice of appeal, in its supplemental petition for party status, and at the evidentiary hearing on this subject. MHMW failed in all three cases. As set forth above, because MHMW has not shown that manifest error or manifest injustice would result from the denial of its Motion to Alter, or that the Board's decision overlooked or misapprehended laws or facts previously presented that would probably affect the result, MHMW's Motion to Alter is hereby denied.

V. Order

It is hereby Ordered:

1. The Motion to Alter filed by MHMW is denied in its entirety.
2. The Board's April 5, 2002, Memorandum of Decision is final.
3. In accordance with that Memorandum of Decision, this appeal is dismissed for lack of jurisdiction, and DEC Permit #3-1208 remains in full force and effect.

Dated at Montpelier, Vermont, this 15th day of May, 2002.

WATER RESOURCES BOARD

/s/ David J. Blythe
David J. Blythe, Chair

Concurring:

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