

**State of Vermont  
WATER RESOURCES BOARD**

**RE: OMYA, Inc.  
Docket No. WQ-01-09 (DEC Permit #3-0395)**

**MEMORANDUM OF DECISION**

This decision pertains to a preliminary issue in the above-captioned appeal: Does Vermonters for Clean Environment, Inc.(VCE) lack standing to appeal DEC Permit #3-0395 (Permit) to the Water Resources Board (Board). As is explained in more detail below, the Board concludes that VCE lacks the requisite standing and, therefore, it dismisses VCE's appeal for lack of jurisdiction.

**I. BACKGROUND**

This matter came to the Board, pursuant to Rule 23 of the Board's Rules of Procedure (eff. Feb. 22, 1999), as a request by VCE for review of a preliminary ruling on the question of VCE's standing.

In summary, VCE appealed the Permit to the Board on October 25, 2001, asserting that the Permit gave the permittee, OMYA, Inc. (OMYA), unfettered discretion to use new or materially different biocides or other process chemicals without first receiving DEC approval under applicable state and federal laws and regulations. On December 11, 2001, OMYA-filed a Motion to Dismiss Appeal for Lack of Standing and a Memorandum of Law in support thereof (together, OMYA's Motion to Dismiss). Following a prehearing conference in this matter, Acting Chair Lawrence H. Bruce, Esq., provided VCE with an opportunity to respond to OMYA's Motion to Dismiss by supplementing its Notice of Appeal and party status petition. Prehearing Conference Report and Order at 8, XI, Item 2 (Dec. 20, 2001).

VCE responded on January 8, 2002, by filing a Memorandum of Law, certain affidavits, and various prefiled exhibits. On January 22, 2002, OMYA filed a Motion in Limine and Motion to Strike as well as a Reply Memorandum (OMYA's Evidentiary Motions). As provided **for** in a Status Conference Report and Order issued by the Acting Chair on January 31, 2002, VCE filed its Responsive Memorandum on February 6, 2002. The Agency of Natural Resources (ANR), the only other party to this proceeding, filed no motions or memoranda with the Board on the standing question.

Relying on the filings of VCE and OMYA, the Acting Chair made certain preliminary evidentiary rulings and, based on their pleadings and VCE's affidavits and admitted exhibits, he ruled that VCE lacked the requisite standing to sustain this appeal. Chair's Preliminary Rulings on

Evidentiary Objections and Preliminary Issues (Feb. 15, 2002) (Preliminary Rulings).

By the terms of the Status Conference Report and Order (Jan. 31, 2002), the parties were provided until February 22, 2002, to raise any objections to the Acting Chair's preliminary rulings and seek Board review. No party objected to the Acting Chair's evidentiary rulings,<sup>1</sup> however, VCE timely requested Board review of the preliminary ruling on standing. On March 7, 2002, OMYA filed a Reply to VCE's Objections. The Board heard oral argument from VCE and OMYA and conducted a limited evidentiary hearing on the standing question on March 12, 2002. Counsel for ANR was present but did not elect to actively participate in this proceeding.

The Board admitted all of VCE's exhibits deemed admissible by the Acting Chair in his preliminary evidentiary rulings. See Preliminary Rulings at 2-13, incorporated herein. The Board also admitted the following exhibits: VCE-W, By-Laws of VCE; VCE-X, VCE's Application for recognition of exemption under Section 501(c)(3) of the Internal Revenue Code (including Articles of Incorporation); OMYA-4, Articles of Amendment for VCE; and OMYA-6, Form 990 filed by VCE for tax year August 25, 1999-July 31, 2000. The Board took sworn testimony from the following persons: VCE witnesses Annette Smith and Linda Poro; and OMYA witnesses Neal Jordan and Ameddia Perry.

The Board recessed the hearing on March 12, 2002, pending receipt of written closing statements and deliberations. Both VCE and OMYA filed written Closing Statements on March 15, 2002. On April 2, 2002, the Board completed deliberations, declared the record complete, and adjourned the hearing.<sup>2</sup> This matter is now ready for decision.

## II. ISSUE

Does VCE lack standing to appeal the Permit to the Board pursuant to 10 V.S.A. § 1269 and Board Rule of Procedure 25?

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<sup>1</sup> In the Chair's Preliminary Rulings at 22-23, Acting Chair Bruce concluded, without explicitly ruling, that the scope of appeal should be confined to the issues identified by VCE in its filing of January 8, 2002, and that the applicable Vermont Water Quality Standards (VWQS) are those regulations which became effective April 1, 2000. The Board agrees with the Acting Chair's conclusions.

<sup>2</sup> Due to the recusal of both Chair David J. Blythe, Esq., and Vice-Chair John D.E. Roberts, member Lawrence H. Bruce, Jr., Esq., was duly appointed Acting Chair of this proceeding by order dated November 28, 2001. In accordance with 10 V.S.A. sec. 905(1)(F), former Board members William Boyd Davies, Esq., and W. Byrd LaPrade were duly appointed to hear and decide this matter on January 9, 2002.

### III. FINDINGS OF FACT

To the extent that any party's proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied. See Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corporation, 167 Vt. 228, 242-243 (1997); Petition of Village of Hardwick Electric Department, 143 Vt. 437, 445 (1983).

1. OMYA filed applications for renewal of two discharge permits, #3-0395 and #3-1124 on December 31, 1999, and June 30, 2000. In the process of reviewing these applications, ANR decided to "eliminate" permit #3-1123 and authorize the discharge of wastewater from OMYA's two facilities -- OMYA East and OMYA West -- under the terms of one renewal permit, #3-0395 (Permit), issued on October 25, 2001. The Permit authorizes the discharge of wastewater from OMYA's two facilities into Otter Creek and an unnamed tributary of Smith Pond in Florence, Vermont.
2. VCE is a Vermont nonprofit, public benefit, corporation headquartered in Danby, Vermont. VCE received its certificate of incorporation from the Vermont Secretary of State in August 1999, prior to the date that OMYA filed with ANR the applications for the Permit now under appeal.
3. According to VCE's Articles of Association, filed with the Secretary of State on August 25, 1999, VCE listed three directors and no members. Annette Smith was listed as Registered Agent, Director, and Incorporator for the corporation. The purposes of the corporation, as stated in the Articles of Incorporation, were: "Anything legal in the State of Vermont."
4. VCE adopted By-Laws on June 30, 2000. The By-Laws do not state the purpose of the corporation. Article III, addressing membership of the corporation, contains two provisions:

Section 1. The members of the Corporation shall be limited to the members of the general public.

Section 2. There shall be no membership dues for participation.

The By-Laws do not provide for member voting rights, designate membership classes, or otherwise state the rights and privileges of the membership. The By-Laws do not provide for an annual meeting of the membership.

5. Article IV, Section 1, of the By-Laws provide that there shall be a Board of Directors consisting of not less than three nor more than eleven members. The By-Laws do not

state how and by whom the Directors are elected to their three year terms, however, Article IV, Section 2 provides that any vacancies on the Board shall be “filled by a majority vote of the remaining Directors.”

6. Annette Smith is VCE’s President, Vice-President, Treasurer, Executive Director, and one of three members of the Board of Directors. The only other officer of the corporation is Nancy Boardman, VCE’s corporate secretary, who has served in that position since June 2000.
7. According to Ms. Smith, the Board of Directors appoints or elects its the Directors of VCE. VCE “members” have no right to vote for the corporation’s Directors.
8. VCE has amended its Articles of Association only once. On March 8, 2001, Annette Smith, as President of the corporation, filed with the Vermont Secretary of State Articles of Amendment to amend the operating year of the corporation from a calendar year to a fiscal year running August 1 to July 31. In the section of the Articles of Amendment form where the filing officer is directed to indicate whether the amendment required approval of members, Ms. Smith responded that approval was not required.
9. In November 2000, VCE applied for tax exempt status under Internal Revenue Code Section 501(c)(3). In July 2001, VCE was recognized as a tax exempt charitable organization by the Internal Revenue Service.
10. In response to Part II, Question 1, of the Section 501(c)(3) application form, VCE was asked to provide “a detailed narrative description of all the activities of the organization -- past, present, and planned.” VCE responded to Part II with the following statement concerning its activities:

Vermonters for a Clean Environment (VCE) is a Vermont non-profit corporation working to preserve the rural, small-town character of Vermont and prevent the industrialization of Vermont that would result from the construction of power plants and pipelines in southwestern Vermont. VCE was incorporated August 25, 1999.

The corporation has raised funds from individuals who are concerned about the impact on Vermont from this massive energy project. Contributions have been made by affected property owners along the proposed pipeline route, by people who have received VCE’s mailing, and by concerned citizens who have read about our efforts in newspaper articles or seen television coverage.

VCE has a headquarter in East Arlington, Vermont, which is open to the public to gain information about the details of the project. VCE has retained attorneys and

experts to represent our interests in the litigation known as Act 248 that will occur in front of Vermont's Public Service Board as the project advances. VCE sends out informational mailings and will be holding an informational public forum including project promoters and opponents. The public forum will be promoted through advertising.

The Board's role is to provide oversight, wisdom, and guidance to assure VCE's purpose as a source of information for the people of Vermont and to encourage public participation and involvement.

11. In response to Part II, Question 11, of the Section 501(c)(3) application form, VCE was asked to provide information concerning its membership status. VCE affirmatively indicated that it is a membership organization. It further indicated, in response to the directive to describe the organization's membership requirements and attach a schedule of membership fees and dues, that "[t]here are no requirements or dues to become a member." In response to the question concerning "what benefits do (or will) the members receive in exchange for their payment of dues," VCE responded that "no dues are paid" and "they do not receive any benefit."
12. In response to Part II, Question 11, of the Section 501(c)(3) application form, VCE was asked to describe the organization's present and proposed efforts to attract members and attach a copy of any descriptive literature or promotional material used for this purpose. VCE responded by indicating that its "[e]fforts to attract supporters has been through literature." VCE attached a sample eight-page publication providing information about the proposed pipeline and power plant project, at the end of which was a form to be returned to VCE's office. This form included check boxes: one box was for a respondent to indicate whether he or she wished to "join VCE to help fight this harmful project;" another two boxes where the respondent could indicate whether he or she wished to make a contribution now or in the coming months; and one box to indicate whether the respondent was "interested in actively participating in the effort" and wished to be contacted by the organization.
13. Since making its filing in November 2000, VCE has not amended the information contained in its Section 501(c)(3) application form with respect to either its description of corporate activities or membership status.
14. As a member of the Board of the Directors and as a corporate officer, Annette Smith participates in the overall management and operation of VCE as provided for in VCE's By-Laws. As Executive Director, she performs duties related to VCE's corporate purposes.

15. Ms. Smith alone maintains VCE's membership list; she alone makes the determination whether a person is a "member" of VCE, based on that person's "participation." According to Ms. Smith, it is not VCE's practice to require express written consent for a person to join VCE as a "member." Ms. Smith adds people to VCE's "membership" list based on whether that person has communicated with the organization, made a financial contribution, volunteered services, or otherwise demonstrated interest in VCE. Ms. Smith also determines on her own whether someone should be dropped from VCE's "membership" list, based on that person's request, orally or in writing, to "resign" from membership or that person's lack of participation in VCE activities.
16. "Members" do not receive membership cards or other tangible indicia of membership from VCE. VCE members receive no specific benefits. They do, however, receive regular informational communications from VCE in print form, by email, or by telephone.
17. VCE purports to have over 200 "members." VCE uses the terms "member" and "supporter," synonymously and interchangeably.
18. Since its incorporation and filing for tax exempt status under Section 501(c)(3), VCE has expanded the list of projects that it opposes to include OMYA's open-pit mine in Danby, the present Permit renewal applications for discharge of wastewater into an unnamed tributary of Smith Pond and Otter Creek, and the build-out of the cellular network in Vermont. VCE's current aim is to "encourage economic development with minimal environmental impacts and preserve Vermont's natural beauty." VCE espouses the belief that "Vermont's future lies in conserving its clean, rural, small-town environment," and it does so by "providing information, technical support and community outreach so that people can make informed decisions."
19. VCE, as a corporation, owns no real property or possesses no other tangible interest that may be adversely affected by the Permit under appeal. VCE asserts, however, that Smith Pond and Otter Creek are important public waters, that VCE relies upon these bodies of water "to fulfill its corporate purpose," and that its corporate purpose will be "injured" if these receiving waters continue to decline in water quality as a result of OMYA's operation under the Permit. Specifically, VCE asserts that its corporate purpose will be injured should the conditions contained in the Permit – specifically, Part I, Condition A.3.d. -- be allowed to stand as issued by the Secretary of ANR.
20. Among other things, the Permit authorizes OMYA to use certain biocides and other chemicals listed in Attachment A of the Permit in connection with processing and preparation for shipping of its calcium carbonate product. Under Part I, Condition A.3.d., such authorization requires OMYA "[p]rior to using new or materially different biocides or other process chemicals on a regular basis," to "submit, at a minimum, the material

Safety Data Sheet (MSDS) and an estimate of the volume of the chemical to be used on an annual basis to the Wastewater Management Division.”

21. Annette Smith does not have a personal interest arising from the use and enjoyment of Smith Pond and Otter Creek nor some other legally cognizable interest that may be adversely affected by the Permit under appeal.
22. Linda Poro, a resident of Florence, Vermont, is a supporter of VCE. Ms. Poro “joined” VCE in March 2001 as a direct response to operations at the OMYA West facility. Through VCE, Ms. Poro became aware of unauthorized spills from OMYA’s facilities. She has had monthly contact with VCE since becoming a “member” of the organization through participation in VCE activities, but not as a financial contributor. Ms. Poro was a supporter of VCE when VCE filed its appeal of the Permit.
23. Linda Poro uses water from Florence’s municipal water supply. However, she no longer uses tap water for drinking water due to her fear that that water could be unsafe and that OMYA is authorized by the Permit under appeal to use new biocides without receiving prior approval from ANR.
24. VCE has other supporters in Florence, Vermont. Two of these, William A. Church and Andy Snyder, each rely on VCE “for information regarding development projects that may have an adverse effect on the environment and economy of Vermont.” They both rely on VCE “to protect [them] from development projects that may have an adverse effect on the environment and economy of Vermont.”
25. William A. Church lives near Smith Pond and can see that pond from his house. For the past twelve years he has enjoyed viewing wildlife and fish at Smith Pond, but during that same period he has seen a decline in their populations which he believes is attributable to OMYA’s unauthorized discharges. Mr. Church believes that he continues to be deprived of the benefit of enjoyment of wildlife at Smith Pond because under the Permit now on appeal, OMYA is not required to obtain prior approval from ANR for the use of new biocides.
26. Andy Snyder is an avid and long-time fisherman. He has often fished for trout in the small tributaries leading to Smith Pond and Otter Creek, as well as in these two water bodies. He has witnessed a deterioration in these waters and no longer fishes in Smith Pond due to what he believes is a decline in water quality due to OMYA’s operations. Mr. Snyder believes that he has been and will continue to be deprived the benefit of the use of these waters for fishing as a result of OMYA’s past unauthorized discharges and the discharges of new biocides allowed by the Permit under appeal.

#### IV. CONCLUSIONS OF LAW

##### A. PAST BOARD DECISIONAL LAW ON STANDING

The Board's jurisdiction to decide the merits of an appeal is contingent upon a finding that an appellant has the requisite "standing" – a legally cognizable "interest" and an "injury" arguably attributable to the Secretary's act or decision under appeal, which is within the Board's jurisdiction to redress. Re: Home Depot, U.S.A., Inc., et al., Docket No. WQ-00-06 and Docket Nos. CUD-00-07 and CUD-00-08 (Cons.), Memorandum of Decision on Preliminary Issues and Order at 3 (Sept. 8, 2000) (hereinafter, Home Depot MOD). This is analogous to the standing requirement in the courts, whereby, "on the face of the complaint," a plaintiff must at a minimum allege sufficient facts to show a protected interest, actual injury or the threat of injury to that interest traceable to the defendant's conduct, and redressability. Parker v. Town of Milton, 169 Vt. 74, 76-78 (1998); Hinesburg Sand & Gravel Co. v. State, 166 Vt. 37, 341 (1997); Town of Cavendish v. Vermont Pub. Power Supply Auth., 141 Vt. 144, 147-48 (1982).

The focus of the standing inquiry is "on the *party* seeking to get his complaint" before the decision maker and only secondarily "on the *issues* he wishes to have adjudicated." Tribe, American Constitutional Law (2<sup>nd</sup> ed.) at 107 (1988). This is an important distinction.

Title 10 V.S.A. § 1269 provides in relevant part that "[a]ny person or party in interest aggrieved by an act or decision of the [S]ecretary" of ANR pursuant to the Water Pollution Control Act, [ch. 47] subchapter 1., may appeal to the Board within thirty days of that act or decision. Discharge permits issued by the Secretary of ANR pursuant to 10 V.S.A. § 1263 may be appealed to the Board pursuant to 10 V.S.A. § 1269. The word "person" is defined at 10 V.S.A. § 1251(8) to include corporations, however, the terms "in interest" and "aggrieved" are not defined in 10 V.S.A. ch. 47. Thus, as the Board has stated more than once, the determination of what it means to be a person in interest "aggrieved" has been decided by the Board on a case-by-case basis. Home Depot MOD at 3-4; Re: Appeals of Nathan Wallace-Senft and Anita Bellin, Docket Nos. WQ-99-04 and CUD-99-05, Dismissal Order (Aug. 19, 1999) (hereinafter, Wallace-Senft Dismissal); Re: Aquatic Nuisance Control Permit #C93-01-Morey, Docket No. WQ-93-04, Memorandum of Decision on Party Status at 4 (Aug. 25, 1993). Determining "aggrievement" involves a mixed question of fact, law, and public policy. Re: Husky Injection Molding Systems, Inc., Docket No. MLP-98-06, Memorandum of Decision at 5 (Feb. 22, 1999) (hereinafter, Husky MOD.)

The Board has construed the person "aggrieved" standard liberally to allow a person; demonstrating some interest affected by the act or decision of the Secretary or his representative within DEC, an opportunity to appeal that act or decision. See Re: Husky Injection Molding Systems, Inc., Docket No. MLP-98-06, Chair's Preliminary Ruling at 4 (Jan 13, 1999) (hereinafter, Husky Chair's Ruling). A would-be appellant's interest may or may not be a riparian pro-



perty interest or a pecuniary interest. Wallace-Senft Dismissal at 4. The Board has previously determined that use and enjoyment of the water resource at issue may constitute the necessary “interest” to support standing, as demonstrated by the appellant’s present and historical use of that resource for boating, swimming, fishing, and other water-based recreational uses. Re: Dean Leary, Docket No. MLP-94-08, Preliminary Order at 2 (Dec. 28, 1994).

Mere speculation about the impact of some generalized grievance is not a sufficient basis to find standing. Town of Cavendish at 147. The “injury” to the appellant’s interest must be concrete and particularized, not an injury affecting the common rights of all persons. Parker v. Town of Milton at 78. This is why the Board has previously found that the alleged “injury” to the appellant’s interest *must* be something more than a generalized complaint about the Secretary’s favored approach to approving an activity; and also why individuals who have alleged to be acting on behalf of the public, or who have sought to prevent unnecessary environmental degradation generally, have been found to lack standing. Wallace-Senft Dismissal at 4-5.

The standing requirement applies to organizations as well as individuals. An organization may have standing in its own right by demonstrating that the activity authorized by the permit at issue will injure or threatens to injure its own corporate interests, such as the use and enjoyment of its own riparian property, its financial investment in the protection of water-dependent species, to name a few possible examples. However, more often than not, organizations allege standing in their so-called “representational” capacity. *An organization has standing to bring suit on behalf of its members when (1) its members have standing individually; (2) the interests it asserts are germane to the organization’s purpose; and (3) the claim and relief requested do not require the participation of individual members in the action.* Parker v. Town of Milton at 78.

The Board has recognized that a corporation, including a not-for-profit corporation, may be a “person” aggrieved. Re: Appeal of Vermont Natural Resources Council (Sugarbush), DAM-92-02, Prehearing Conference Report and Order at 2 (April 10, 1992) (Appellant, an incorporated environmental organization, was granted “party status” pursuant to 10 V.S.A. § 1099(a) as a “person in interest”). Indeed, 10 V.S.A. § 1251, which sets forth the statutory definitions applicable to 10 V.S.A. ch. 47, subch. 1., states in relevant part:

(8) “Person” means 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;

If a corporation seeks standing in its representational capacity, it must demonstrate that its members make use and enjoyment of the water resource in question and that that use and enjoyment is germane to its corporate purposes. Husky Chair’s Ruling at 6. Thus, the Board has recognized that a local non-profit, public benefit corporation organized “for the purpose of supporting growth that is sustainable and which does not threaten Vermont’s environment” was a

person in interest aggrieved because its members had specific and substantial interests in the protection of the water resources downstream of the Project discharge authorized by the permit under appeal which were different from those of the general public and those interests *might* not be adequately protected by the decision of the Secretary. Home Depot MOD at 5-8.<sup>3</sup> Whether an organization has standing in its representational capacity, however, depends in part on the *relief* sought and whether this relief adequately protects the interests of the individual members. If the legal interests of the individual members are distinct and cannot be adequately protected by the relief sought by the organizational appellant, the question arises whether those individuals should have appealed the permit to secure relief appropriate to their alleged injuries. Cf. Husky MOD (Where trade union and individual members from Milton simultaneously appealed permit, the Board determined that named individual appellants had the requisite standing in their individual capacities, but the trade union which purported to represent their interests was found to lack standing and also was denied party status.).

The Board has routinely considered an appellant's alleged interest(s) in the outcome of a proceeding in relation to the purpose of the statutory program under which the appealed permit or decision was issued. When additional guidance has been needed, the Board historically has looked to its own rule on party status, Procedural Rule 25, to determine party "standing." Home Depot MOD at 5. To avoid confusion concerning Board practice, the Board amended its Procedural Rules (eff. Feb. 22, 1999) by adding to Rule 25(A) the requirement that persons seeking to participate in contested cases before the Board, "including appellants," had to petition the Board for party status. Thus, VCE, in its Notice of Appeal, included a petition for party status pursuant to Procedural Rule 25(A) which not only addressed the statutory standard of 10 V.S.A. § 1269, but requested party status pursuant to Rule 25(B)(7) and (8).

Rule 25(A) requires that all petitions for party status must include:

- (1) A detailed statement of the petitioner's interest in the proceedings, including (if known) whether the petitioner's position is in support of or in opposition to the relief sought by the appellant; and
- (2) In the case of an organization, a description of the organization, its membership and its purposes; and

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<sup>3</sup> In Home Depot, the permit applicants challenged the standing of the appellant, Friends of Vermont's Way of Life, Inc. The Board's analysis, consistent with the briefing of the parties, focused not on the question whether the non-profit corporation had bonafide members but whether its members had the requisite interest and injury to support standing. See Home Depot at 7-8 (Addressing Applicants' challenge that members' real property was too far from point of discharge to support claim of legally cognizable interest and injury.).

- (3) A statement of the reasons the petitioner believes the Board should allow the petitioner party status in the pending proceeding either as an intervenor as of right or by permissive intervention.

Rule 25(B) states, in relevant part, that among the petitioners entitled to party status as of right, are:

- (7) any person upon whom the applicable statute confers an unconditional right to intervene or a conditional right to intervene and the conditions are satisfied.
- (8) 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.

## **B. APPLYING STANDING ANALYSIS TO THE FACTS AS FOUND**

The Board has generally looked to an appellant's notice of appeal, as supplemented, to find facts demonstrating a nexus between the appellant's alleged interest, the injury asserted, and the act or decision of the Secretary or his representative in DEC. The Board also has assumed that the signer of a pleading incorporating a petition or memorandum in support of standing or party status, has read the document and that to the best of the signer's knowledge, information and belief, formed after reasonable inquiry, the document is well grounded in fact. Based upon this assumption, the Board has presumed the veracity of the factual allegations contained in such filings. Home Depot MOD at 5. However, even affording this presumption, the appellant is still required to make a prima facie showing that it meets the requisite elements of standing. This is true, whether or not a party opponent files affidavits or other documents in support of its motion to dismiss for lack of standing.

In his preliminary determination that VCE lacked the requisite standing, the Acting Chair accepted as true the facts alleged in VCE's notice of appeal, as supplemented with affidavits and the exhibits deemed admissible. See Preliminary Rulings at 16. The Board, in conducting its review of VCE's general objection to the preliminary ruling on standing, has relied on the exhibits admitted by the Acting Chair and conducted its own limited evidentiary hearing to decide the standing question de novo. Accordingly, it has admitted and taken into consideration certain corporate documents offered by VCE and OMYA, as well as live testimony from witnesses for both parties. Based on its own evaluation of the evidence, the Board has found certain facts not contained in the Acting Chair's preliminary ruling but it nonetheless reaches the same conclusion: That VCE, both as a corporate entity and in its representational capacity, lacks the requisite standing to bring and sustain this appeal.

1. Organizational Standing

VCE is a “person” within the meaning of 10 V.S.A. § 1251(8) and, as a non-profit corporation, it is an organization within the meaning of Procedural Rule 25(A). In order to demonstrate that it has standing to appeal, VCE was required by Procedural Rule 25(A)(2) to provide a description of “the organization, its membership and its purposes.”

VCE has now provided the required information. Therefore, the question is whether this information supports VCE’s claim of standing in its own right. As indicated above, a corporation may have the requisite standing if it can demonstrate that it is entitled to party status in its own right. VCE has asserted that it is entitled to party status pursuant to Procedural Rule 25(B)(7) and (8).

The Board has previously concluded that Procedural Rule 25(B)(7) is not an appropriate basis for an appellant, who is not the permit applicant, to seek standing under 10 V.S.A. § 1269. Motion to Dismiss at 3-4; Re: Paul Dannenberg, Docket No. WQ-99-07, Memorandum of Decision on Motion to Dismiss and Scheduling Order at 4 (Apr. 20, 2000). Rather, the appropriate analytical framework for determining the question is Procedural Rule 25(B)(8). As stated above, that provision requires the petitioner to demonstrate “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.”

Based on VCE’s filings, the Acting Chair was unable to find such an interest or an injury, and the Board is unable to do the same, taking into consideration the testimony of VCE’s witnesses and additional exhibits admitted at the hearing on March 12, 2002.

First, VCE has not alleged nor demonstrated that it owns real property or has other tangible interests that will be or might be allegedly harmed by OMYA under the terms of the Permit. Rather, VCE asks the Board to consider the alleged injury that may or will occur to its corporate purposes.

In testimony and in its promotional flyers and other communications, VCE has represented that its corporate purpose is to encourage “economic development with minimal environmental impacts” and to preserve “Vermont’s natural beauty.” VCE espouses the belief that “Vermont’s future lies in conserving its clean, rural, small-town environment.” These goals are laudable and, as VCE has pointed out, akin to those articulated in various publications produced by the State of Vermont. With respect to the present appeal, VCE asserts that Smith Pond and Otter Creek are important public waters, that VCE relies upon these bodies of water “to fulfill its corporate purpose,” and that its corporate purpose will be “injured” if these receiving waters continue to decline in water quality as a result of OMYA’s operation under the Permit.

A review of VCE's corporate documents, however, reveals that the organization's purposes are actually broader or narrower than alleged. Its Articles of Association reveal that VCE is a public benefit corporation that may do "[a]nything legal in the State of Vermont." On the other hand, VCE's Section 501(c)(3) application describes in detail its efforts to "prevent the industrialization of Vermont that would result from the construction of power plants and pipelines in southwestern Vermont." Nowhere, for example, has VCE asserted in its corporate documents that its purposes include protection of water quality, water-dependent wildlife species, or other resource values related to water resources management in Vermont, let alone protection of those values in southwest Vermont.

VCE is no doubt effective in providing information, technical support, and other assistance to educate the public and to enable citizens in southwest Vermont to take political and legal action to protect their respective interests in clean water, clean air, and a clean environment. However, the Board is unable to conclude that VCE has articulated a legally cognizable interest in the protection of its corporate purposes or an injury to that interest that is any different than that suffered by the general public even if, as VCE has asserted, the waters of Smith Pond and Otter Creek will be degraded under the Permit issued by ANR.

## 2. Representational Standing

Having failed to demonstrate that it has the requisite standing based on a showing that, as a corporation, it has a cognizable legal interest that may somehow be injured if the Permit is allowed to stand, the next question is whether VCE has made the requisite showing that it has standing in its *representational* capacity.

If a corporation seeks standing in its representational capacity, it must demonstrate that its *members* make use and enjoyment of the water resource in question and that that use and enjoyment is germane to its corporate purposes. Husky Chair's Ruling at 6. What constitutes "membership" may vary, depending on the formality of the organization involved. When, however, an organization has sought the benefits of non-profit incorporation, it may, by operation of state law, have corporate members or no members at all. Because the Board is not regularly asked to examine whether a given organization has the requisite *membership* to support standing, it has not developed a body of decisions interpreting and applying corporate statutes and judicial precedent on the subject. Rather, as noted previously at page 9, supra, most standing challenges have come down to the question of whether the appellant has shown that its members have demonstrated the requisite injury to a legally cognizable interest. See Home Depot MOD at 5-8.

Accordingly, the Board has previously assumed, based on the pleadings of organizational appellants, that they have sought standing in their representational capacity for their bonafide members. Where, as in this case, the question of an organization's representational standing has been placed squarely in issue, the Board is required to inquire more deeply concerning the

organization's membership, and then only after determining that such membership exists will it examine the members' interests and alleged injuries.

In addressing the filing requirements of Procedural Rule 25(A), VCE provided the Board with a description of the organization and its purposes, and also indicated that it has "supporters" in Florence, Vermont. Notice of Appeal at 3. It did not, however, provide a description of "its membership."

In its Motion to Dismiss, OMYA specifically objected to the fact that VCE had not identified any "members" of its organization. Motion to Dismiss at 6-7. When provided with an opportunity to respond to OMYA's Motion to Dismiss by supplementing its petition in support of standing, VCE filed various affidavits and exhibits, a number of which the Acting Chair ruled were admitted. However, none of the affidavits and exhibits filed by VCE, including those excluded, addressed the question of VCE's membership. Indeed, VCE Exhibits I, J, K, and L, which all come from VCE's web site and which describe VCE, its purposes, and activities, provided no information supporting the assertion made in VCE's January 8, 2002, Memorandum of Law that VCE has "members."

After reviewing the evidence, the Acting Chair surmised that it was possible that VCE is not a membership organization at all. He noted that Title 11B V.S.A. § 6.03 provides that a Vermont non-profit corporation is not *required* to have members. However, with respect to those non-profit corporations that elect to be membership corporations, he observed that Vermont's Act governing non-profit corporations sets forth specific requirements that must be followed in accordance with statute or as otherwise provided in the articles or bylaws of that corporation. See, for examples, 11B V.S.A. § 6.20 et seq. Preliminary Rulings at 20.

The Acting Chair went further to suggest that if VCE *is* a membership corporation, Board precedent was available to guide how this fact might be demonstrated. For example, he noted that an organization might file copies of corporate documents, such as articles of association or bylaws, or submit affidavits from persons indicating membership as of the date of the filing of the appeal. See In re: Residents for Northeast Kingdom Preservation, LTD, Docket No. WET-98-03, Dismissal Order (May 13, 1999). Since no such exhibits were offered by VCE for the Acting Chair's consideration, the Acting Chair concluded that VCE was *not* a membership corporation and therefore it failed to meet the test for *representational* standing. Preliminary Rulings at 20-21.

On appeal to the Board, VCE offered and the Board admitted at the limited evidentiary hearing two corporate documents: VCE's By-Laws and VCE's application for tax exempt status under Section 501(c)(3), which included a copy of VCE's Articles of Incorporation. OMYA offered and the Board admitted two other corporate documents.

After scrutinizing these carefully, the Board once again concludes that VCE has failed to

demonstrate that it is a membership corporation within the meaning of Vermont corporate law. Title 11B V.S.A. § 1.40(21) and several sections of ch. 6 expressly address what is required for a non-profit corporation to be a membership corporation. Title 11B V.S.A. § 1.40(21) defines the term “member” as follows:

“Member” means (*without regard to what a person is called in the articles or bylaws*) any person or persons who on more than one occasion, pursuant to a provision of a corporation's articles or bylaws, have the right to vote for the election of a director or directors. A person is *not* a member by virtue of any of the following:

- (A) any rights such person has as a delegate;
- (B) any rights such person has to designate a director or directors;
- (C) any rights such person has as a director; or
- (D) any rights of association, *not including the right to vote for the election of a director or directors*, created in the corporation's articles of incorporation or bylaws for persons who participate in the activities of the corporation.

(Emphasis added in italic.)

It is evident from the corporate documents admitted in this proceeding that VCE's “members” do not have the right to vote for directors or, for that matter, for anything else. VCE acknowledges this fact. See VCE Closing Statement, Finding 9, at 2 (Mar. 15, 2002). Therefore, regardless of what VCE calls its supporters, contributors, volunteers, or other participants, they are not legally *members* of the corporation. Even though VCE may describe these individuals as “members” in its By-Laws, this is immaterial under 11B V.S.A. § 1.40(21) since these persons do not have the requisite voting rights. If these persons fit into any category, it is as participants in the activities of the corporation under 11B V.S.A. § 1.40(21)(D). This, however, does not confer on them the legal status of “participatory members,” as VCE has asserted. See VCE Closing Statement at 8-11.

VCE has argued that a recently issued Vermont Supreme Court opinion supports its contention that Vermont law provides for “voting members” and “participatory members.” The Board has read Ferrill v. North American Hunting Retriever Association, Inc., Vt. No. 2001-047 (Feb. 25, 2002) and concludes that this opinion does not support VCE's view of the law. In Ferrill a non-profit Vermont corporation, NAHRA, appealed a summary judgment ruling granting the plaintiff, who asserted that he was a “member” of the corporation, access to certain corporate documents. The corporation argued that it had never conferred corporate membership rights as provided under Vermont law and therefore the trial court erred in granting summary judgment to the plaintiff. The corporation's articles of association did not establish different membership classes and it had never adopted bylaws. The Supreme Court concluded that the trial court had used the wrong legal standard in determining that the plaintiff had voting rights, and it reversed and remanded the case for further proceedings consistent with its views. The operative language

upon which VCE relies in asserting that the Supreme Court endorsed the concept of “participatory members” was the following:

. . . Effective January 1, 1997, the Vermont Nonprofit Corporation Act modified the statutory scheme that was in effect when NAHRA incorporated in 1984. The changes include a new definition of “member,” which limits “members” to those persons “who on more than one occasion, pursuant to a provision of a corporation’s articles or bylaw, have the right to vote for the election of director or directors.” 11B V.S.A. §§ 1.40(21) [emphasis in original]. In contrast to the old statute, the law now mandates that nonprofit corporations state in their articles of incorporation whether or not they will have members. *Id.* §§ 2.02(a)(5). Thus, while the 1984 statutes arguably created default corporate membership if the corporation’s articles or bylaws did not explicitly state that the nonprofit would not have members, *the new scheme restricts members to those persons to whom the corporation’s articles or bylaws have expressly granted voting rights.* [Emphasis added in italic.] If the corporation chooses to have members, all members have the same rights and obligations with respect to voting unless the articles or bylaws “establish classes of membership with different rights and obligations.” *Id.* §§ 6.20. *The new Act also recognizes that a nonprofit may have “members” who participate in the corporation’s activities, but who do not have the right to vote. Id.* §§ 1.40(21)(D). *Such “membership” alone does not confer corporate membership with all its attendant rights, however, under the Act. Id.* [emphasis added in italic.] Because the statute defines a corporate member by reference to the nonprofit corporation’s articles of incorporation or bylaws, a court faced with a request like Ferrill’s [the plaintiff’s] must first construe the articles of incorporation or bylaws.

Ferrill at 2-3.

Since VCE was incorporated in 1999, it was required to comply with the “new” law. Thus, when it framed its Articles of Association, if it elected to be a membership corporation, it needed to declare that its members had voting rights. However, the evidence demonstrates that no members were listed on the Articles of Association form filed with the Secretary of State. While the Inurement of Income clause provided that “[n]o part of the net earnings of the corporation shall inure to the benefit of, or be distributable to, its *members*, trustees, officers or other private persons . . .,” this provision did not in and of itself transform VCE into a membership corporation. Rather, the Articles of Association would have had to expressly state that its members have voting rights in order for them to be corporate members. Without such a provision, VCE’s “members” are what the Supreme Court has said they are: They are at best participants in the corporations activities pursuant to 11B V.S.A. § 1.40(21)(D), regardless what they are called in VCE’s Articles of Association or By-Laws.

Moreover, the Board notes that 11B V.S.A. § 6.01(b), which addresses admission of



members to a non-profit corporation, states: “No person shall be admitted as a member without his or her consent.” It is apparent from a review of VCE’s By-Laws that there are no provisions for how one gives his or her consent to become a member. Ms. Smith has indicated that VCE does not require express written consent. Indeed, the By-Laws merely state that “[t]he members of the Corporation shall be limited to the members of the general public” and that there are “no membership dues for participation.” Thus, any member of the public can become a “member” by merely expressing an interest in the corporation. Moreover, once the Executive Director adds a person’s name to the “membership” list, that person receives no benefits or specific rights: VCE issues no membership card and it is not required to notice and hold an annual membership meeting.

In short, VCE’s “members” have no rights or obligations; they may merely participate through their contributions of money, volunteer time, and interest. Furthermore, contrary to VCE’s assertions, the law does not create a class of “participatory members.” Classes of *corporate* members may be provided for in a corporation’s articles of association or bylaws. See 11B V.S.A. § 6.20. However, “participatory members” are not corporate members.

The significance of the determination that VCE lacks corporate members is that it cannot meet even the first prerequisite of *representational* standing under the Parker standing test, since it has no members on whose behalf it can bring suit. Thus, the Board does not need to reach the question whether individuals, such as Ms. Poro, Mr. Church, and Mr. Snyder would have the requisite standing individually to support VCE’s standing. Since VCE is not a membership corporation, it cannot bring suit on their behalf, even if their individual claims of alleged injury are meritorious and would have supported their personal standing had they timely appealed the Permit.

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**V. ORDER**

It is hereby ordered:

1. VCE lacks sufficient standing in its corporate and representational capacities to confer jurisdiction on the Board;
2. This appeal is dismissed for lack of jurisdiction; and
3. DEC Permit #3-0395 remains in full force and effect.

Dated at Montpelier, Vermont, this 2nd day of April, 2002.

WATER RESOURCES BOARD  
By its Acting Chair,

/s/ Lawrence Bruce

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Lawrence H. Bruce, Jr., Esq.

Concurring:

William Boyd Davies \*

W. Byrd LaPrade \*

Mardee Sánchez

Not Participating Due to Absence: Jane Potvin

\* Specially appointed Board members pursuant to 10 V.S.A. § 905(1)(F)