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 Motion to Alter filed by Vermonters for Clean Environment, Inc.(VCE) in response to a Memorandum of Decision issued by the Water Resources Board (Board) disposing of this appeal on the basis that VCE lacks the requisite standing. As explained in more detail below, the Board denies the Motion to Alter. This matter is dismissed.

I. BACKGROUND

On March 12, 2002, the Board held an evidentiary hearing on the limited question of VCE's standing in this appeal. The Board invited the parties to file closing statements on or before March 15, 2002. In reply, the permittee, OMYA, Inc. (OMYA), filed a Closing Statement and VCE filed Supplemental Findings of Fact and Conclusions of Law and Closing Statement on March 15, 2002.

On April 2, 2002, the Board issued a Memorandum of Decision on the standing question. That decision set forth the entire procedural history leading up to the Board's action disposing of this appeal. Rather than repeat that history here, it is incorporated by reference. See Memorandum of Decision at 1-2 (Apr. 2, 2002).

Following the issuance of the Memorandum of Decision, VCE filed a Motion to Alter on April 16, 2002, pursuant to Board Procedural Rule 34(D). That motion was timely filed.

On April 26, 2002, OMYA filed a legal memorandum in Reply to VCE's Motion to Alter.

On May 14, 2002, the Board deliberated. with respect to the pending filings. This matter is now ready for decision.

II. ISSUES

Whether the Board will grant or deny VCE's Motion to Alter, in whole or in part?

III. DISCUSSION

A. Standard of Review

Board Rule of Procedure 34(D) provides that a party may file a motion to alter within fifteen (15) days of the date of a decision of the Board. That rule further states that "[t]he Board shall not be required to hold a hearing prior to rendering a decision on such a motion."

The scope of a motion to alter is set forth in subpart (1) of Rule 34(D). That subpart of the rule provides:

> 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.

A motion to alter may ask the Board to reconsider arguments previously made. In a motion to alter a decision, the moving party may argue that the Board overlooked or misappre-hended laws or facts previously presented that would probably affect the result or outcome of the proceeding. Re: Hannaford Bros. Co. and Lowes Home Centers, Inc., No. WQ-01-01, Memorandum of Decision at 4 (Aug. 29, 2001).

New *arguments* in a motion to alter may be made with regard to manifest error. The use of the term manifest error in Rule 34(D), like its use in Rule 34(C), refers to "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." Re: Robert A. Gillin, No. MLP-94-01, Memorandum of Decision and Order at 2 (Oct. 4, 1994); see also, Re: Lamoille River Hydro-electric Project, Docket Nos. WQ-94-03 and WQ-94-05 (Cons.), Memorandum of Decision at 2 (Oct. 18, 1995).

New *evidence* may be offered to and admitted by the Board, only if the Board determines that new evidence is necessary to avoid "manifest injustice." "Manifest error" is different from "manifest injustice." Re: Lamoille River Hydroelectric Project at 2. "Manifest injustice" is analogous to what may be called an obvious "miscarriage of justice." See OMYA's Reply to VCE's Motion to Alter at 3, citing State v. Yates, 169 Vt. 20, 28 (1999) (record disclosed no basis for guilty plea). As the Board has stated previously, "manifest injustice" is the "obvious, indisputable and self-evident withholding or denial of justice." Such injustice may be done by

the negligence, mistake or omission of the administrative tribunal itself. Re: Lamoille River Hydroelectric Project, Memorandum of Decision at 3 (May 10, 1996).

In sum, mere disagreement with the Board's procedural and substantive rulings, its findings of facts and conclusions of law, is not a basis for correction, or alteration, of a decision. See Re: Robert A. Gillin at 2. A motion to alter is limited to a reconsideration of the existing record; new argument is available only for certain "manifest errors." New evidence is not permitted, unless it is necessary to avoid "manifest injustice." All such motions are at the discretion of the Board, which may act without holding a hearing. Rule 34(D).

Finally, Rule 34(D)(2) requires that all motions to alter shall number each requested alteration separately. The motion may be accompanied by a supporting memorandum of law which must contain numbered sections corresponding to the motion, but most importantly that memorandum must state why each requested alteration is appropriate "and the location in the existing record of the supporting evidence."

Against this background, the Board now discusses and rules on VCE's requests.

B. VCE's Requests for Alterations

1. Request for Alteration of the Board's Findings of Fact

VCE first asks the Board to alter Section III. of its Memorandum of Decision by "finding the facts proposed in VCE's Supplemental Findings." VCE's Motion to Alter at 2. Those Supplemental Findings were filed by VCE on March 15, 2002, following the Board's evidentiary hearing on the limited question of standing. VCE argues that the record evidence supports its assertion that it has the requisite organizational and representational standing as a membership organization. VCE's Motion to Alter at 2.

VCE has not directed the Board to the location in the record of any specific evidence which either supports the findings it would like the Board to adopt or refutes the findings made by the Board. Indeed, VCE has not alleged that the Board failed in its duty to make specific findings of fact based on the record evidence or that it abused its discretion in not adopting VCE's proposed findings of fact. Rather, VCE appears to disagree with the Board's choice of findings of fact.

The Board, in weighing the entirety of the record evidence, adopted some of VCE's proposed findings of fact – albeit, not verbatim – and rejected other proposed findings of fact. See Memorandum of Decision, Section III., first paragraph at 3. Disagreement with the Board's choice of findings of fact, alone, is not a basis for alteration of the Board's decision.

Accordingly, the Board **denies** VCE's general request to alter Section III. of the Board's decision.

2. Request for Alteration of the Board's Conclusions of Law re: Organizational Standing

VCE asks the Board to alter Section IV. of its Memorandum of Decision with respect to its conclusions of law on the question of VCE's organizational standing. VCE argues that the Board's conclusions are erroneous as a matter of law and are not supported by the evidence.

At the outset, the Board notes that VCE did not allege nor demonstrate 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 discharge permit issued by the Secretary of the Agency of Natural Resources (ANR). Rather, the sole basis for VCE's alleged claim of organizational standing was an alleged injury to its corporate purposes. Memorandum of Decision at 12. With this claim in mind, the Board now addresses VCE's arguments.

a. Board's conclusions of law are not erroneous as a matter of law

VCE first asserts that by requiring it to describe with particularity its organizational purposes, the Board is imposing a *new* requirement for organizational standing, neither provided for by statute nor Board rule. VCE therefore argues that it would be inequitable for the Board to impose such a new requirement in this appeal since VCE "relied on the Board's past precedent in formulating its corporate purposes, filing this appeal, and requesting standing." VCE requests permission to file new evidence in support of its claim that the "retroactive application of this new standard will cause injustice and hardship to VCE based on its reliance on prior Board precedent." VCE appears to offer new argument based on a claim of manifest error and its request to file new evidence on a claim of manifest injustice, although VCE does not expressly address these standards in its briefing.

The Board finds no merit in VCE's arguments. Contrary to VCE's assertion, the Board has not imposed a *new* requirement for organizational standing. 10 V.S.A. § 1269 plainly states that only "a person or party in interest" who is "aggrieved" by an act or decision of the Secretary of ANR is entitled to appeal that act or decision to the Board. In other words, not just any person or organization has the requisite standing to appeal an act or decision of the Secretary. In order to evaluate the interest at stake and the actual or threatened injury, the Board has for nearly nineteen years required by rule that organizations appealing to the Board file a petition including, among other things, "a detailed statement of the petitioner's interest in the proceedings;" "a description of the organization, its membership and its purposes;" and "a statement of the reasons the petitioner believes the Board should allow it party status in the proceeding."

Board Rule of Procedure 25(A) (eff. Feb. 22, 1999); Board Rule of Procedure 22(B) (eff. June 10, 1983).

Moreover, contrary to VCE's contention, there is prior Board precedent that articulates the requirement of "particularized identification" of an interest. For example, the Board in a wetland reclassification proceeding directed the petitioner to provide a copy of its Articles of Association in order to enable the Board to confirm that it had satisfied the test of an organization "in interest." Based on its review of that document, the Board determined that the purpose of the organization was the "Preservation of the Northeast Kingdom." The organization provided the Board with no other explanation of its purpose. The Board therefore dismissed the petition, in part because it could not determine that the organization was "dedicated to the protection of water quality or wildlife habitat or any other environmental value germane to wetlands protec-tion," the subject matter of the petition. Re: Residents of Northeast Kingdom Preservation, Ltd., Docket No. WET-98-03, Dismissal Order at 4 (May 13, 1999). While this decision interpreted the "in interest" standard under Section 7.1 of the Vermont Wetland Rules, rather than the "in interest" standard of 10 V.S.A. § 1269, it nonetheless is instructive concerning the depth of inquiry that the Board was prepared to make in response to a standing challenge. Indeed, because of its relevance to this case, the Acting Chair brought this decision to the attention of VCE in the Chair's Preliminary Rulings on Evidentiary Objections and Preliminary Issues at 20 (Feb. 15, 2002). Thus, it cannot be said that the Board has imposed a *new* requirement or that VCE did not have an opportunity to apprize itself of precedent on point.[1]

Even if the requirement for a statement of particularized interest were indeed a *new* requirement, which it is not, it is difficult for the Board members to believe that VCE *relied* to its detriment on old Board cases "in formulating its corporate purposes." See VCE's Motion to Alter at 3. This is because VCE's corporate purposes, as articulated in its corporate documents, are not germane to the protection of water resources protection, even though VCE has recently expanded its list of projects to include opposition to the discharge permit under appeal. Memorandum of Decision at 13; see also, 3-6, Findings 3, 4, 10, and 18 (Apr. 2, 2002).

Finally, the Board finds no merit in VCE's argument that it has a legally cognizable interest arising from its reliance on the State water quality policy. VCE argues that it has a *unique* interest because it allegedly "relied upon the policy statements in 10 V.S.A. § 1250 in shaping its operations" and those interests are "not shared by all members of the general public."

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[1] Having determined that the requirement of a statement of particularized interest is not a new requirement, the Board does not directly rule on VCE's argument that the "retroactive" application of that requirement causes injustice or hardship to VCE. The Board observes, however, that Solomon v. Atlantis Development, Inc., 145 Vt. 70, 74 (1984), as OMYA has suggested, does not support VCE's contention and is distinguishable. See Reply to VCE's Motion to Alter at 7-8.

VCE criticizes the Board for its omission of any discussion of this argument in its conclusions of law on the standing question. VCE's Motion to Alter 3-4.

It is true that the Board did not address this argument in its Memorandum of Decision. This is because the Board found other, more compelling, grounds on which to base its determination that VCE lacks the requisite organizational standing. In any event, the Board holds here that a corporation which has not demonstrated that it has the requisite injury to its own interests sufficient to support organizational standing cannot make up for that deficiency by invoking statutory policy statements articulating the public interest. While VCE may endorse the State's water quality policy in 10 V.S.A. § 1250 and it may have legitimate concerns about whether that policy is being properly implemented through ANR's issuance of discharge permits, its recourse is with the Vermont General Assembly, not by appeal to the Board.[2] Compare Parker at 78-9 (Appellants without a personal stake in the proceeding could not rely on harm to some generalized interest, such as the public trust doctrine, to invoke the Court's jurisdiction; rather, appellants' concerns regarding the economic and employment impacts of the project at issue were properly addressed to the Legislature.)

In summary, the Board's requirement of "particularized identification" of an organizational interest is not a new requirement nor a requirement that VCE could not have known of prior to the issuance of the Board's Memorandum of Decision. Therefore, the Board **denies** VCE's request to alter its conclusions of law with regard to organizational standing based on new arguments. Furthermore, the Board **denies** VCE's request to file new evidence. VCE has failed to demonstrate that such evidence is necessary to avoid manifest injustice. Since the Board has rejected VCE's argument that VCE is being required to comply with a new requirement for organizational standing, evidence offered by VCE to show how it will suffer from "injustice and hardship" by the "retroactive application" of that standard is irrelevant.

b. Board's conclusions of law are not unsupported by the evidence and facts

VCE asserts that the Board's legal conclusions with regard to organizational standing are not supported by the evidence. VCE argues that it provided substantial evidence demonstrating that it has the requisite corporate interest. In support of its contention, VCE generally directs the Board to the testimony of its witnesses and to a few of its exhibits admitted by the Board. VCE's Motion to Alter at 4-7.

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[2] The Board has required appellants to show that their alleged interests are germane to the subject matter of the regulatory programs under which their appeals have been taken. See, e.g., In re: Home Depot, USA, 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 10 (Sept. 8, 2000). However, in this instance, VCE appears to imply that its organizational interest *is* synonymous with and in furtherance of the public policy articulated in 10 V.S.A. § 1250, even though VCE's corporate documents make no reference to water resources protection.

The Board concludes that VCE has failed to demonstrate that alteration of the Board's decision is required. The Board's duty is to sift through and weigh *all* of the evidence in the record, not just the exhibits and testimony offered by VCE. VCE may disagree with the weight that the Board may have accorded certain evidence or the findings and conclusions that it drew from the record. This, however, is not a basis for obtaining an alteration of a decision. See supra at 3.

Moreover, VCE has not claimed that the Board or its Acting Chair prevented it from presenting such evidence as might have been relevant to demonstrating that it has the requisite interest and injury attributable to the discharge authorized by the Secretary. Indeed, VCE had two opportunities to build an evidentiary record in support of its organizational standing claim, and it availed itself of both opportunities. VCE cannot now claim error or harm when it had the burden to demonstrate it had the requisite interest and it failed to do so.

Accordingly, the Board **denies** VCE's request to alter its conclusions of law based on a reconsideration of the record.

3. Request for Alteration of the Board's Conclusions of Law re: Representational Standing

VCE asks the Board to alter Section IV. of its Memorandum of Decision with respect to its conclusions of law on the question of VCE's representational standing. VCE argues that the Board's conclusions are erroneous as a matter of law and are not supported by the evidence.

VCE argues that the Board's conclusions of law with regard to representational standing are erroneous because there is no requirement in 10 V.S.A. ch. 47, in the Board's Rules of Procedure, or in Board precedent that "voting members" are a prerequisite to standing for a non-profit corporation. VCE therefore argues that the Board's Memorandum of Decision has imposed a "new" representational standing requirement. In consequence, it asks permission to file new evidence in support of its claim that the "retroactive application" of this "new" standard will cause "injustice and hardship" to VCE based on its reliance on prior Board precedent. VCE's Motion to Alter at 9.

VCE's claim that the Board's conclusions of law are erroneous is based on VCE's reading of the Vermont Supreme Court's recent decision in Ferrill v. North American Hunting Retriever Association, Inc., Vt. No. 2001-047 (Feb. 25, 2002) (hereinafter, Ferrill). VCE repeats a previous argument that it meets the requirements of representational standing because it has "participatory members," which VCE argues is provided for in the Court's decision in Ferrill. VCE's Motion to Alter at 7.

Based on both claims of error, VCE asks the Board to alter its conclusions of law with respect to representational standing. Although VCE does not address in its briefing how its requests meet the standards for Motions to Alter under Board Procedural Rule 34(D), the Board, offers the following responses.

a. Board's conclusions based on application of Title 11B V.S.A. are not erroneous as a matter of law

The test for standing of organizations, in their so-called "representational" capacity, has three elements. An organization has standing to bring suit *on behalf of is 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 does not require the participation of individual members in the action. Memorandum of Decision at 9; Parker v. Town of Milton, 169 Vt. 74, 78 (1998). As a prerequisite to claiming representational standing, an organization must demonstrate that it has "members." The question squarely raised in this appeal by OMYA's challenge to VCE's claim of representational standing is what does it mean to be a "member" of an organization?

Title 10 V.S.A. Chapter 47 does not define what it means to be a "member" of an organization and, as VCE has observed, this chapter does not require corporate appellants to demonstrate that they have voting members in order to sustain a claim of representational standing. This is because 10 V.S.A. Chapter 47 is Vermont's Water Pollution Control Act, not Vermont's law governing the form and requirements of organizations.

Likewise, the term "membership" is not defined in the Board's Rules of Procedure. As noted at page 5 of this decision, however, Board Procedural Rule 25(A) requires organizational appellants to provide the Board with "a description of the organization, its membership and its purposes." This provision does not require an organization to *be* a membership organization; rather, it requires an organization to describe its form, its membership and its purposes so that the Board can evaluate whether it meets a particular standing test or qualifies for party status.

In its Memorandum of Decision at 13, the Board acknowledged that it has had little opportunity to develop a body of decisional law interpreting whether a given organization has the requisite "membership" to support standing in its representational capacity. Nevertheless, the Board explained:

> What constitutes "membership" of an organization 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.

As further discussed in the Board's Memorandum of Decision at 15-17, "state law," for the

purpose of determining whether a non-profit corporation has a "membership," is the body of statutes contained in Title11B V.S.A.

Because VCE elected in 1999 to take advantage of the benefits of non-profit incorporation in Vermont, it assumed the obligations of corporate form and formalities imposed by Title 11B V.S.A. Accordingly, Vermont corporations law, not the Board, has defined what it means to be a "member" of a non-profit corporation, and Vermont corporations law, not the Board, has determined what formalities are necessary to become a bonafide membership corporation. Memorandum of Decision at 15.

Applying state law governing non-profit corporations, the Board concluded that VCE is *not* a non-profit *membership* corporation. Memorandum of Decision at 15-16. Indeed, VCE conceded in its closing statement that it did not have corporate members. Accordingly, the Board reasonably concluded that VCE could not meet even the first prerequisite of representa-tional standing, since it had no members on whose behalf it could bring an appeal. Memorandum of Decision at 15 and 17.

VCE asserts that if the Board's standing test requires all non-profit corporations to have voting members, the Board hasn't been consistent in applying this test in *all* prior proceedings brought by non-profit corporations. VCE's Motion to Alter at 8. As a general rule, the Board decides only such issues as are brought to its attention based on the record of the pending appeal. It presumes that jurisdiction exists, absent a motion challenging jurisdiction on standing or other grounds. If a party opponent has failed to raise jurisdictional objections in a prior appeal, the Board's determinations are nonetheless conclusive under the rule of finality. See OMYA's Reply to VCE's Motion to Alter at 12-15. Thus, the ruling in this case does not affect the validity of previous decisions of the Board involving non-profit appellants.

Finally, VCE has not made a convincing demonstration of "manifest injustice" warranting the opportunity to present new evidence.

Accordingly, the Board **denies** VCE's request to alter its conclusions of law with respect to representational standing and **denies** VCE's request for permission to submit new evidence.

b. Board's conclusions of law based on application of the Ferrill decision are not erroneous as a matter of law

VCE asserts that the Board erred in its interpretation and application of the Supreme Court's recent Entry Order in the Ferrill appeal. VCE repeats in its Motion to Alter the argument that it previously made in its Supplemental Findings of Fact and Conclusions of Law and Closing Statement (Mar. 15, 2002). According to VCE, Ferrill stands for the proposition that a person

can be a "member" of a non-profit corporation even if he or she lacks voting rights. VCE's Motion to Alter at 9. By extension and implication, therefore, a non-profit corporation with no corporate members, like VCE, can nonetheless sue or appeal on behalf of its so-called "participatory members." Therefore, VCE requests that the Board alter its conclusions of law consistent with VCE's interpretation of the Ferrill decision and its application to Vermont corporations law.

The Board **denies** VCE's request to alter its conclusions of law to accommodate VCE's interpretation of Ferrill. The Board articulated its reasons for rejecting this interpretation in its Memorandum of Decision at 15-16 and it sees no reason to repeat its analysis and conclusions here. See also, OMYA's Reply to VCE's Motion at Alter at 15-16. As stated previously at page 3 of this decision, mere disagreement with the Board's conclusions of law is not a basis for correction, or alteration, of a decision.

C. Conclusion

VCE has failed to convince the Board that it should alter its Memorandum of Decision as VCE has proposed. Therefore, the Board's conclusions that VCE lacks standing in both its organizational and representational capacities remain in force.

IV. ORDER

It is hereby ordered:

1. The Motion to Alter filed by VCE is **denied** in entirety.

2. The Board's Memorandum of Decision, dated April 2, 2002, stands as issued.

3. In accordance with that Memorandum of Decision, this appeal is dismissed for lack of jurisdiction and DEC Permit #3-0395 remains in full force and effect.

Dated at Montpelier, Vermont, this 16th day of May, 2002.

WATER RESOURCES BOARD
By its Acting Chair,

/s/ Lawrence H. Bruce, Jr.

Lawrence H. Bruce, Jr., Esq.

Concurring:
William Boyd Davies *
W. Byrd LaPrade *
Mardee Sánchez

Not Participating: Jane Potvin

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