

**State of Vermont  
WATER RESOURCES BOARD**

**RE: City of South Burlington and Town of Colchester  
Docket No. WQ-03-02**

**MEMORANDUM OF DECISION**

This decision pertains to a preliminary issue in the above-captioned appeal: Does the Appellant, Conservation Law Foundation (CLF) lack standing to appeal ANR Permit #3-1278 (Discharge Permit) to the Water Resources Board (Board). As explained in more detail below, the Board concludes that CLF has the requisite standing and, therefore, the Board denies the Motions to Dismiss filed by the Permittee, City of South Burlington (CSB).

**I. BACKGROUND**

On February 28, 2003, CLF appealed the Discharge Permit to the Board. The Discharge Permit was issued by the Secretary of ANR pursuant to 10 V.S.A. § 1263, and it authorizes the Permittee to discharge from the Airport Parkway Wastewater Treatment Facility (WWTF) to the Winooski River. The appeal was filed pursuant to 10 V.S.A. § 1269. There were no cross appeals.

At the prehearing conference convened by the Board Chair on March 26, 2003, the Chair inquired whether there were any objections to CLF's standing to bring this appeal. The Attorney for CSB objected to the adequacy of the representations made by CLF in the notice of appeal to establish standing in that the representations made in the notice of appeal did not meet the requirements for establishing standing set forth by the Board in Re: CCCH Stormwater Discharge Permits, Docket No. WQ-02-11 (Memorandum of Decision) (March 21, 2003) (hereinafter, CCCH MOD). The Chair made the preliminary ruling that CLF would be granted provisional standing to bring the appeal. However, the Chair also ordered that any party would have until April 4, 2003 to submit a written challenge to CLF's standing to the Board and that a final determination on CLF's standing would be made after considering the outcome of any challenges to standing and CLF's reply.

CSB filed an objection to the preliminary ruling granting CLF standing and a motion to dismiss the appeal on April 4, 2003.

After receiving an extension from the Chair, CLF filed a letter in response to CSB's objection to CLF's standing and motion to dismiss on April 18, 2003. CLF's letter included supporting affidavits and a request that the Board sanction CSB's attorney for making a frivolous challenge to CLF's standing.

On April 24, 2003, CSB filed objections to the fact that the Prehearing Conference Report and Order did not provide an opportunity for parties to respond to CLF's April 18, 2003 filing and a reply to CLF's letter in response to CSB's objection to the preliminary ruling granting CLF standing and CSB's motion to dismiss. No party objected to CSB's April 24, 2003 filing. Accordingly, the Board grants CSB's objection and will consider its April 24, 2003 reply in deciding this matter.

On May 1, 2003, CLF filed the original affidavits to CLF's April 18, 2003 filings. Finally, on May 5, 2003 CSB filed a copy of a map of the relevant portion of the Winooski River related to the permit on appeal.

No party requested oral argument with regard to any of the issues raised in the filings. The Board deliberated on May 13, 2003. This matter is now ready for decision.

## **II. ISSUE**

1. Does CLF lack standing to appeal the Discharge Permit to the Board?
2. Should the Board issue sanctions against the attorney for CSB for filing a frivolous challenge to CLF's standing to appeal the Discharge Permit to the Board?

## **III. DISCUSSION**

### **A. Standing - General Rule**

The jurisdictional basis for this appeal is 10 V.S.A. § 1269, which provides, in pertinent part, that "[a]ny person or party in interest aggrieved by an act or decision of the secretary [of ANR] pursuant to [the Water Pollution Control Act] may appeal to the board within thirty days." 10 V.S.A. ch. 47, sub. ch. 1, § 1269. A discharge permit, issued pursuant to 10 V.S.A. § 1263, is a decision of the secretary appealable under 10 V.S.A. § 1269. Therefore, the question before the Board is whether CLF constitutes a "person or party in interest aggrieved" by the secretary's issuance of the Discharge Permit.

"Person" is defined broadly in the Water Pollution Control Act as including individuals as well as "public or private corporation[s]." 10 V.S.A. § 1251(8). CLF is a "corporation" and therefore fits within the meaning of 10 V.S.A. § 1251(8). Having established that CLF meets the definition of "person" the Board next must analyze whether CLF is "aggrieved" by the act or decision of ANR as required by 10 V.S.A. § 1269."

The term "aggrieved" is not defined in 10 V.S.A. ch. 47 (hereinafter, Water Pollution Control Act). Standing alone, it is commonly understood to mean "[h]aving suffered loss or injury." Black's Law Dictionary, Abridged Sixth Edition (1991) ("aggrieved"). Paired with the word "person" or "party," however, it takes on a more

particularized meaning. “Aggrieved” in this context means “a substantial grievance, a denial of some personal, pecuniary or property right, or the imposition upon a party of a burden or obligation.” Id. (“aggrieved party”) This is analogous to the standing requirements of courts, wherein “the plaintiffs have been injured or been threatened with injury by the governmental action complained of, and [it] focuses on the question of whether the litigant is the proper party to fight the lawsuit, not whether the issue itself is justiciable.” Id. (“standing.”)

In its recent decision on standing in the appeal of stormwater discharge permits issued by ANR for the Circumferential Highway, the Board clarified that organizational appellants such as CLF, like individuals, must demonstrate that they have the requisite standing to support an appeal before the Board. CCCH MOD at 6. The Board also clarified that it looks to the Vermont Supreme Court for guidance in determining whether organizational appellants have the requisite standing to challenge an ANR permit.<sup>1</sup> CCCH MOD at 6.

In CCCH, the Board determined that there are actually two tests suggested by the Court. CCCH MOD at 6. First, there is the basic standing test which, when applied to an organization, would require it to demonstrate that it has a tangible organizational interest (for example, a pecuniary or contractual interest) which is threatened with injury by the secretary of ANR’s action and which is redressable by the Board. This first test is generally referred to by the Board as the “organizational” standing test. The second test, known as the “associational” standing test by both the federal courts and the Vermont Supreme Court, has been described by the Board as the “representational” standing test.

For an organization to establish standing under the representational standing test, that organization must prove that (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. CCCH MOD at 9. CSB’s main argument in the present appeal is that CLF has not met the first prong of representational standing test.

#### B. Representational Standing

CSB argues that CLF has not met the first prong of the representational standing test. As noted above, the first prong of the test requires CLF to establish that its members have standing individually to bring the appeal.

CSB argues that CLF’s notice of appeal makes generalized statements that its members have an interest in the waters affected by the discharge that are insufficient to

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<sup>1</sup>The Board reiterates that, because it is not an Article III court, it is not strictly bound by the Supreme Court in Parker v. Town of Milton, 169 Vt. 74, 78 (1998), and it will be guided by relevant Vermont and federal statutes in addition to court precedent in determining who has standing.

establish standing for the members in this appeal. CSB notes that state and federal case law on standing requires that an individual “suffer an injury-in-fact - an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical,” to establish standing. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); Friends of the Earth v. Laidlaw Environmental Service, 528 U.S. 167, 181-183 (2000); Vermont Agency of Natural Resources v. U.S. x. rel. Stevens, 529 U.S. 765, 771 (2000).

In CCCH, the Board acknowledged that mere speculation about the impact of some generalized grievance is not a sufficient basis to find standing. CCCH MOD at 6. Moreover, the Board stated that the “injury” to the appellant’s interest must be concrete and particularized, not an injury affecting the common rights of all persons. CCCH MOD at 6 citing Parker v. Town of Milton, 169 Vt. 74, 78 (1998). Accordingly, in CCCH the Board agreed with CSB’s argument in this case that more than generalized statements of grievance are required to establish standing to bring an appeal.

In CCCH, the Board stated that the administrative appeals route provided by 10 V.S.A. § 1269 is intended to be remedial and should be construed liberally. CCCH at 4. As the Board stated in CCCH, “the Board has construed 10 V.S.A. § 1269 liberally such that standing has been found where an individual asserts that he or she uses or enjoys the water resource in issue and alleges that use and enjoyment may in some way be impaired if the secretary’s decision is allowed to stand.” CCCH MOD at 5, Citing Husky MOD at 6-7; and Re: Dean Leary, Docket No. MLP-94-08 Preliminary Order: Standing and Party Status Issues at 2 (Dec. 28, 1994). In this context, the affidavits provided by CLF clearly establish that its members have standing individually to bring an appeal.

Any one of the affidavits provided by CLF establishes that a CLF member uses Lake Champlain and the Winooski River and their use and enjoyment of the river is threatened by the discharge. For example, the affidavit by Paul E. Bakeman, Jr. states that Mr. Bakeman lives 50 yards from Lake Champlain, that he regularly swims, boats and sails in the Lake, that he and his family hike along the Winooski River and that some of these areas will be affected by the discharge from the Airport Parkway WWTF, and many of the places he uses are downstream from the proposed discharge. The affidavits of Leanora M. Terhune, Michael Turner and Marilyn Sowles make similarly persuasive claims.<sup>2</sup>

CSB’s argument that the CLF members who provided affidavits did not show a “substantial likelihood” that the discharge in question causes their alleged harm seems to confuse the standard for bringing an appeal with the standard for winning the appeal. It would create a catch 22 for appellants if the Board required proof that a discharge would cause harm at the outset of the proceeding. Such proof can only be established

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<sup>2</sup>CSB argues that affidavits filed by Ms. Babbott and Mr. Boyan should be disregarded by the Board because they are not acknowledged. The Board agrees with CSB and, therefore, the Board did not consider these affidavits in deciding this matter.

through taking evidence when the case commences, not at the beginning of a case when an appellant is merely seeking the right to appeal.

The issue of whether there is a substantial likelihood that the discharge affects an appellant's interests or that the appellants harm is fairly traceable to a discharge could come into play if, for example, the appellant's use and enjoyment of a resource was upstream from a discharge. In such a case the appellant's harm might not be fairly traceable to a discharge and the appellant might not have standing. For all the reasons set forth above, this is not the case in the present appeal.

Finally, CSB argues CLF's letter to the Board's Counsel is not an appropriate form of a response to its written motion to objecting to CLF's standing and to dismiss the appeal. The Board agrees CLF's letter is not consistent with Board Rules of Procedure (Rule). For example, Board Rule 9 requires that replies to motions be double spaced and include an address and phone number under the signature line. In addition, Board Rule 10 requires that motions be accompanied by legal memoranda. While CLF's letter does not meet these requirements, the Board will not disregard this filing for these reasons. However, the Board cautions CLF to follow the Board Rules in future filings with the Board.

#### C. Sanctions

The Board finds that CLF's request for sanctions against CSB's attorney is without merit. CSB was simply exercising its right to challenge CLF's standing and it should not and will not be sanctioned for doing so. In addition, the Board agrees with CSB that standing must be established in each case separately and the fact that CLF was granted standing in CCCH is not dispositive in this appeal. See e.g., Biodiversity Legal Foundation v. Badgley, 309 F.3d 1166, 1178 (9<sup>th</sup> Cir. 2002); Friends of Tilden Park v. District of Columbia, 806 A.2d 1201, 1206 (D.C. 2002). CLF could have submitted new affidavits comparable to the affidavits it filed in CCCH as part of this appeal and asked the Board to consider them as part of its request for standing. However, CLF did not do so. Accordingly, the Board will not consider the factual basis for granting standing to CLF in CCCH as factual evidence that CLF has standing to bring this appeal. Therefore, there is no support for CLF's argument that CSB's standing challenge was frivolous because CSB should have known that CLF had standing in this case by virtue of the fact that the Board granted CLF standing in CCCH.

#### IV. ORDER

For the reasons stated above, it is hereby ordered:

1. CLF has the requisite “representational” standing to confer jurisdiction on the Board pursuant to 10 V.S.A. §1269.
2. The Motion to Dismiss filed by CSB is dismissed.
3. CLF’s request for sanctions against CSB is denied.

Dated at Montpelier, Vermont, this 20th day of May, 2003.

WATER RESOURCES BOARD  
By its Chair,

/s/ David J. Blythe

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David J. Blythe, Esq.

Concurring:

Lawrence H. Bruce, Jr.

Jane Potvin

John D.E. Roberts

Michael J. Hebert