

**State of Vermont
WATER RESOURCES BOARD**

**RE: Village of Enosburg Falls
Docket No. WQ-03-03**

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 #3-1234 (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 objection to CLF's right to bring this appeal filed by the Permittee, Village of Enosburg Falls (VOE).

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 Village of Enosburg Falls Wastewater Treatment Facility (WWTF) to the Missisquoi 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 of the prehearing conference participants whether there were any objections to CLF's standing to bring this appeal. Mr. Champy, the representative for VOE, objected to CLF's standing. VOE generally questioned if CLF had any members in Franklin County, where the project is located. 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 CLF's standing and CLF's reply.

VOE filed an objection to CLF's party status on April 2, 2003. After receiving an extension from the Chair, CLF filed a letter in response to VOE's objection on April 18, 2003. CLF's letter included supporting affidavits. Finally, on May 1, 2003 CLF filed the original affidavits to CLF's April 18, 2003 filings.

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?

III. DISCUSSION

A. Standing - General Rule

VOE objects to CLF obtaining party status to pursue this appeal pursuant to Board Rule of Procedure 25. In its last amendments to the Board's Rules of Procedure (eff. Jan. 1, 2002), the Board specifically amended Board Procedural Rules 19 and 25 in order to distinguish between what an appellant must demonstrate in order to show standing from what a person seeking to intervene as a party in another's appeal must demonstrate to establish party status pursuant to Board Rule 25.¹ These amendments also require an appellant to state at the outset of the appeal the basis for its assertion of standing. Accordingly, the issue before the Board is not whether CLF has the right to intervene in the appeal under Rule 25. The issue is whether CLF has standing to bring the appeal in the first place.

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

¹ Board Procedural Rule 19(A) was amended to add a new subsection (7), requiring an appellant to include in his Notice of Appeal the following: "A statement of the reasons why the appellant has standing to appeal the Secretary or Commissioner's act or decision." Board Procedural Rule 25(A) was amended to delete the reference to "appellants" so as to clarify that Rule 25 deals with the party status of those seeking intervention in appeals brought by others. Thus, the annotated text of that rule, showing the deleted clause, reads as follows: "All persons seeking to participate in a contested case or administrative determination, must petition the Board for party status. . . ."

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 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. Re: CCCH Stormwater Discharge Permits, Docket No. WQ-02-11 (ANR Permits #1-1556 and #1-1557) (March 21, 2003) (hereinafter, CCCH MOD). 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.² 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.

In order 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. In its filing, VOE raises questions about whether CLF has members who live in Franklin County that are aggrieved by the decision. Accordingly, VOE is in effect challenging whether CLF meets the first prong of the representational standing test.

In addition, VOE requests that the Board require CLF to provide a list of all Vermont CLF members and that the Board deny CLF standing to appeal because CLF did not comment on the permit during the notice and comment period provided by ANR.

B. Representational Standing

²The 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.

VOE argues that CLF has not proven that it has members who live in Franklin County that are aggrieved by the decision. 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 if 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 Missisquoi River and their use and enjoyment of the river is threatened by the discharge. For example, the affidavit by Lewis R. Rose states that Mr. Rose lives in Enosburg Falls a short distance from the Missisquoi River, that he regularly bikes the recreational trail that runs along the Missisquoi River from Enosburg Falls to St. Albans and occasionally hikes the trail, that he and his family view wildlife and birds along the river, that he enjoys paddling in the vicinity of the Missisquoi National Wildlife Refuge, that some of these areas will be affected by the discharge from the VOE WWTF, and many of the places he uses are downstream from the proposed discharge. The affidavit of Katherine F. Stewart makes a similarly persuasive claim.

Based on the above, the Board finds that CLF’s members have standing in their own right to pursue an appeal of the permit. VOE did not challenge CLF’s compliance with the other prongs of the representational standing test - that the interests CLF members asserts are germane to the organization’s purpose and that the claim and relief requested do not require the participation of individual members in the action. Accordingly, the Board concludes that CLF has representational standing.

C. List of CLF Vermont Members

VOE argues that CLF must submit a list of all its Vermont members to ensure that VOE does not hire any professionals to assist it in its permitting efforts that are CLF members opposed to its project. VOE reasons that it would create a conflict of interest if CLF members opposed to its project attempted to work for VOE to address the very issues CLF has raised. VOE further argues that it has a fiduciary obligation to its ratepayers to act in their best interest and VOE cannot do this without knowing which Vermont residents are CLF members.

VOE’s concerns about its fiduciary responsibility to ratepayers are not relevant to the standing inquiry under 10 V.S.A. § 1269, which provides any person aggrieved may appeal an ANR decision to issue a discharge permit to the Board. There is simply no provision in law that authorizes the Board to consider VOE’s fiduciary responsibility and

the possibility that VOE may hire some CLF members to work on permitting issues in deciding standing in this appeal.

D. CLF's Participation at ANR

VOE argues that the fact that CLF did not comment on the permit during the notice and comment period provided by ANR demonstrates that no CLF member is aggrieved by the issuance of the Discharge Permit. There is no requirement in state or federal law that a person comment to ANR as condition precedent to bringing an appeal to the Board. See Re: Town of Shoreham Waste Treatment Facility, Docket No. WQ-00-11 (DEC Amended Permit #3-1459) (May 2, 2001). Legally, any person has the right to wait until a permit is issued to appeal it to the Board, whether the person commented on that permit or not. At the time the appeal is filed parties may object to the appellant's standing, as VOE has done in this case. If an objection is made, the Board will evaluate it, as it is doing here, and make a decision based on the evidence and arguments submitted at that time.

IV. ORDER

For the reasons stated above, it is hereby ordered that:

CLF has the requisite "representational" standing to confer jurisdiction on the Board pursuant to 10 V.S.A. §1269.

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

WATER RESOURCES BOARD
By its Chair,

/s/ David J. Blythe

David J. Blythe, Esq.

Concurring:

Lawrence H. Bruce, Jr.

Jane Potvin

John D.E. Roberts

Michael J. Hebert