

**State of Vermont  
Water Resources Board**

*Re: Lowe's Home Centers, Inc.*

Docket No. WQ-03-15

**Memorandum of Decision**

This is an appeal to the Water Resources Board (Board) from a Notice of Intent (NOI) #1076 for coverage under General Permit No. 3-9001 (2003) issued by the Commissioner of the Department of Environmental Conservation (DEC) to Lowe's Home Centers Inc. (Lowe's). The permit authorizes the permittee to discharge stormwater from the construction site in South Burlington, Vermont off of Route 7 to Potash Brook.

**I. History**

On July 10, 2003, the Commissioner issued the NOI.

On August 7, 2003, the Conservation Law Foundation (CLF) appealed the NOI to the Board.

On September 23, 2003, Board Chair David J. Blythe issued a Prehearing Conference Report and Order. In the Prehearing Order, Lowe's raised questions concerning CLF's standing to bring the appeal and the breadth of the issues on appeal.

The Prehearing Order identified four Issues:

1. Does the discharge from Lowe's construction site "cause, or have reasonable potential to cause or contribute to, a violation of water quality standards" and therefore requires an individual permit? General Permit 3-9001(2003) §I(C)(6); see also *id.*, §IV.
2. Does the discharge comply with the terms and conditions of the General Permit?
3. Can the discharge be authorized under the [Vermont Water Quality Standards] VWQS as a so-called "Limited Duration Activity"?
4. Can the discharge be authorized under the General Permit prior to final approval of the Erosion Prevention and Sediment Control Plan and submission and approval of the Special Winter Erosion and Sediment Control Plan?

On October 1, 2003, Lowe's filed an *Objection to Prehearing Order* and a *Motion to Dismiss*. CLF filed replies to the *Objection* and *Motion* on October 13, 2003.

The Board deliberated on the *Objection* and *Motion* on November 13, 2003.

## II. Discussion

### A. *Objection to Prehearing Order*

#### 1. *Lowe's objection*

Lowe's objects to the Issues identified in the Prehearing Order, arguing that the scope of an appeal is limited by the language of 10 V.S.A. §1263(b). Section 1263(b) reads:

*Any person or party in interest aggrieved by a final ruling of the secretary on an application for permission to discharge under the terms of a previously issued general permit may appeal to the board pursuant to section 1269 of this title, provided, however, that this appeal shall be limited in scope to whether the discharge complies with the terms and conditions of the general permit.*

(Emphasis added)

Specifically, Lowe's objects to Issue 3, contending the issue is stated too broadly and constitutes a public policy question related to the legality of the Limited Duration Activity (LDA) provision of the WQS as it is implemented by the Agency of Natural Resources (ANR) rather than an issue specific to the permit. Lowe's also argues that Issues 3 and 4 constitute collateral attacks on the General Permit.

#### 2. *Analysis*

Lowe's is correct in its reference to the statutory limitations on the scope of this appeal. Issue 2 follows the statutory language, so it should stand as an issue on appeal.

However, Issues 1, 3 and 4 are subsumed within Issue 2.

As to Issue 1, General Permit 3-9001(2003) §I(C)(6) states that :

The following discharges are not covered by this permit:

6. Stormwater runoff from construction sites where the discharge will cause, or have reasonable potential to cause or contribute to, a violation of water quality standards... .

Thus, if Lowe's discharge violates the VWQS, then, by its own terms, the General Permit is not applicable, and such discharge inherently will not comply with the General Permit (Issue 2).

As to Issue 3, again, if Lowe's discharge is not authorized as a "Limited Duration Activity" under the VWQS, it violates the VWQS, and, again, such discharge cannot comply with the terms and conditions of the General Permit, because the General Permit does not apply.

As to Issue 4, this is a claim that the General Permit allows a "condition subsequent." A "condition subsequent" exists when a Permit is issued before an applicant has submitted of all the required elements of an application. If Lowe's plans to engage in winter construction, it should have filed with ANR a Special Winter Erosion and Sediment Control Plan, so that all parties could examine such Plan *before* the General Permit was issued. Arguably, the failure to submit this Plan (or to state that no winter construction will occur) is a violation of §III(B)(5) of the General Permit and therefore, a winter discharge may not "comply with the terms and conditions of the General Permit." (Issue 2)

Because they are subsumed by Issue 2, Issues 1 - 4 remain viable. The Board affirms the Prehearing Order.

*B. Motion to Dismiss*

In its *Motion*, Lowe's asserts that CLF does not have standing to bring this appeal.

CLF argues that it has both organizational standing and representational standing.

*1. Issues of Fact*

As a threshold matter, the Board must determine whether the CLF's legal standing to bring this appeal may be determined as a matter of law or whether any factual arguments relating to the standing issue must be resolved first. See *Re: Vermont Agency of Transportation (Route 7)*, No. WQ-03-01, Memorandum of Decision at 6 (Vt. Water Res. Bd. Jun. 4, 2003).

While an appellant may be required to prove the allegations supporting his standing and party status at a hearing if those allegations are controverted, see *Re: Village of Ludlow (Ludlow Wastewater Treatment Facility)*, No. WQ-01-08 Memorandum of Decision at 8 (Apr. 5, 2002), citing *Re: Dannenberg*, No. WQ-99-07, Findings of Fact, Conclusions of Law, and Order (Dec. 29, 2000), the Board generally attempts to resolve claims concerning standing without holding an evidentiary hearing. As the Board states in *Vermont Agency of Transportation (Route 7)*, *supra*, at 1 n.1:

Pursuant to Board Rules of Procedure 23 and 28, the Board generally identifies any issues with regard to legal standing at the prehearing conference and then resolves any standing objections as preliminary matters. These procedures avoid the inefficiency and potential confusion of addressing standing objections at merits hearings. If a reasonable objection to legal standing is made, either at the prehearing conference or within a time-certain provided by a prehearing conference report and order, the burden of proving standing shifts to the appellant.

To resolve any standing objection prior to the merits hearing, the Board typically requires the appellant to file a supplemental notice of appeal or a statement making out a prima facie case of legal standing. The permittee is then afforded an opportunity to challenge the legal sufficiency of the appellant's allegations. In appropriate circumstances, the Board may require the appellant to file affidavits supporting its supplemental notice of appeal or statement on standing. These affidavits must detail the factual basis for the appellant's alleged standing and allow the permittee to dispute any relevant issues of fact relating to standing.

In most cases, the facts surrounding the standing issue are not in dispute and the Board can therefore decide the standing issue as a matter of law, based on the filings of the parties. However, if a factual argument relating to standing occurs, the Board may convene a limited evidentiary hearing to decide the facts before applying the law. See, generally, *In re CCCH Stormwater Discharge Permits*, No. WQ-02-11, Memorandum of Decision at 7-8 (Vt. Water Res. Bd. Mar. 21, 2003) (describing procedures for resolving disputes relating to legal standing before the Board).

The Board has reviewed the factual allegations of the parties with respect to standing and has determined that there are no genuine issues of material fact. The issue of standing may therefore be resolved as a matter of law.

## 2. Case law on standing

Board precedent on the question of standing can be found in some significant recent decisions. *Re: Vermont Agency of Transportation (Route 7)*, No. WQ-03-01, Memorandum of Decision (Jun. 4, 2003); *Re: Village of Ludlow (Ludlow Wastewater Treatment Facility)*, No. WQ-01-08, Memorandum of Decision (Apr. 5, 2002); and *Re: OMYA, Inc.*, No. WQ-01-09, Memorandum of Decision (Apr. 2, 2002).

The following analysis is drawn directly from these decisions, as they provide the framework for the Board's decision in this matter:

The Board's jurisdiction to decide the merits of an appeal is contingent upon a finding that an appellant has the requisite "standing," *Re: Village of Ludlow, supra*, at 8, – 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. See *In re CCH Stormwater Discharge Permits, supra*, at 4-6; *Re: OMYA, Inc., supra*, at 8; *Re: Home Depot, U.S.A., Inc., et al.*, No. WQ-00-06 and Nos. CUD-00-07 and CUD-00-08 (Cons.), Memorandum of Decision on Preliminary Issues and Order at 3 (Sept. 8, 2000). 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).<sup>1</sup>

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). *Re: Village of Ludlow, supra*, at 9. This is an important distinction. *Re: OMYA, Inc., supra*, at 8.

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<sup>1</sup> The doctrine of standing is derived from the case-or-controversy requirement of Article III of the United States Constitution. *Hinesburg Sand & Gravel, supra*, 166 Vt. at 340. The Vermont Supreme Court has stated that "[t]he standing and case or controversy requirements . . . enforce the separation of powers between the three different branches of government by confining the judiciary to the adjudication of actual disputes and preventing the judiciary from presiding over broad-based policy questions that are properly resolved in the legislative arena." *Parker, supra* 169 Vt. at 77. The standing doctrine helps to ensure that judicial decisions are factually based, which assists with the writing of well-grounded decisions and the development of reliable precedent. See, *id.* at 79.

With regard to standing to appeal, the Vermont Water Pollution Control Act, 10 V.S.A. §§ 1250-1283, provides as follows: "Any person or party in interest aggrieved by an act or decision of the secretary pursuant to this subchapter may appeal to the board within thirty days." 10 V.S.A. § 1269. As used in this provision, the term "person" is defined as "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." 10 V.S.A. § 1251(8). *Re: Vermont Agency of Transportation (Route 7), supra*, at 7.

While the word "person" is defined, the terms "in interest" and "aggrieved" are not defined in 10 V.S.A. ch. 47. Thus, 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. *Re: OMYA, Inc., supra*, at 8, citing *Home Depot* at 3-4; *Re: Appeals of Nathan Wallace-Senft*, Nos. WQ-99-04 and CUD-99-05, Dismissal Order (Sept. 8, 1999); *Re: Aquatic Nuisance Control Permit #C93-01-Morey*, 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: OMYA, Inc., supra*, at 8, citing *Re: Husky Injection Molding Systems, Inc.*, No. MLP-98-06, Memorandum of Decision at 5 (Feb. 22, 1999).

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.*, No. MLP-98-06, Chair's Preliminary Ruling at 4 (Jan. 13, 1999). A would-be appellant's interest may or may not be a riparian property interest or a pecuniary interest. *Wallace-Senft, supra*, at 4. The Board has held that an appellant does not need to own property along a water resource to be sufficiently "aggrieved" to have legal standing and party status; an appellant's present and historical use and enjoyment of the water resource at issue for boating, swimming, fishing, and other water-based recreational uses, coupled with an allegation that the appellant's use and enjoyment of the waters will be adversely affected if the permit under appeal is allowed to stand, may constitute the necessary "interest" to support standing. *Re: Dean Leary*, 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, supra*, 141 Vt. 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, supra*, 169 Vt. 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. Re: *OMYA, Inc.*, *supra*, at 9, citing *Wallace-Senft*, *supra*, at 4-5.<sup>2</sup>

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 (Apr. 10, 1992) (Appellant, an incorporated environmental organization, was granted "party status" pursuant to 10 V.S.A. §1099(a) as a "person in interest"). Thus, legal standing is available not only to individuals, but also to organizations.

An organization may have standing in its own right, known as organizational standing, or standing to act on behalf of its members, known as representational standing. Organizational standing requires a tangible organizational interest to be threatened with injury by the action appealed and the redressability of this injury by the Board. Representational standing requires that the members on whose behalf an organization is appealing would have standing individually, that the interests the organization asserts on behalf of its members are germane to the organization's purposes, and that the relief the organization requests does not require the participation of these individual members in the appeal.

*Vermont Agency of Transportation (Route 7)*, *supra*, at 7(internal citations omitted).

In discussing the two types of standing that an organization may seek, the Board in the *OMYA* case has written:

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.

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<sup>2</sup> This Board has written, "Persons advancing generalized complaints about ANR's actions, or appellants seeking to prevent environmental degradation generally, without more, do not have standing to appeal. The alleged injury to the appellant's interests must be concrete, actual, and particularized. Litigants without a personal stake in the proceedings beyond those affecting the common rights of all persons do not have standing to act on behalf of the public interest. Abstract concern or mere speculation about the effects of a generalized grievance cannot substitute for the threat of actual injury." Re: *Village of Ludlow*, *supra*, at 9.

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.*

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 use and enjoyment is germane to its corporate purposes. 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. 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.

*OMYA, supra*, 9 - 10 (emphasis in original; internal citations omitted); and see *CCCH Stormwater Discharge Permits, supra*, at 9.

*a. Representational standing*

Lowe's makes a series of arguments concerning representational standing in its October 1, 2003 Motion to Dismiss. Importantly, in its Motion at 3, Lowe's concedes the last two elements for representational standing, that "(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." *OMYA, supra; CCCH Stormwater Discharge Permits, supra*.

Lowe's does, however, contend that, in its Notice of Appeal, CLF has not met the first element, that "(1) its members have standing individually." *OMYA, supra; CCCH Stormwater Discharge Permits, supra*.



While its Notice of Appeal is lacking in this regard, CLF has now submitted the Affidavit of Fred Kosnitsky, which addresses the first element of representational standing.<sup>3</sup>

In *CCCH*, the Board stated that the administrative appeals route provided by 10 V.S.A. §1269, the statute under which CLF appeals, is intended to be remedial and should be construed liberally. *CCCH Stormwater Discharge Permits, supra*, at 4CCCH 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." *Id.*, at 5.

The Board concludes that the affidavit is sufficient to meet the "interest" requirements. See *Re: Dean Leary, supra; CCCH, supra*.

The Board concludes that CLF has representational standing in this matter.

*b. Organizational standing*

Lowe's contends that "CLF has, in no manner, indicated how Lowe's coverage, among the multiple other construction sites covered under the same general permit, harms the organization." A mere "formulaic recital of its activities," or one in which CLF asserts that it is "active in addressing important environmental policy issues affecting Vermont's water and air quality," Lowe's argues, is insufficient to support an organizational standing claim; rather, a showing of harm is required. Lowe's notes that the *OMYA* decision for the proposition that "addressing public policy interests" is not enough to show that an organization's interests are in jeopardy.<sup>4</sup> Lastly, to the extent

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<sup>3</sup> The Board allows an appellant to make supplemental filings to establish standing. *CCCH Stormwater Discharge Permits, supra*, at 7.

<sup>4</sup> Lowe's points to the language in the *Village of Ludlow* case that holds:

To bring suit in its own right, an organization must demonstrate that the matter on appeal may injure or threaten to injure the organization's interests. An organization whose interest in the protection of the resource at issue is no different from that of the general public does not have legal standing. An organization may not lift itself by its bootstraps into a position of legal standing merely by defining its organizational purpose as the protection of natural resources. Like an individual, an organization's interest in the outcome of a proceeding must be direct and immediate in order for the organization's appeal to be legally cognizable and justiciable by the Board.

that CLF may argue against ANR's authority to grant general permit coverage to Lowe's, Lowe's cites to *Wallace-Serfft's* statement that "Violation of the law alone, is not a sufficient harm."

CLF addresses its claim to organizational standing as follows:

As set forth in the NOA, CLF has organizational standing in this matter based on our corporate documents, mission statement and past activities in Vermont. In fact, CLF has a specific organizational program focused on clean water in Lake Champlain and its tributaries known as the Lake Champlain Lakeskeeper. This program includes a full-time position that is focused solely on water quality issues in the Champlain watershed including stormwater runoff from construction sites. CLF's organizational interests are harmed by Lowe's construction site discharge because the discharge does not comply with the terms and conditions of the general permit and will exacerbate the existing degraded condition of Potash Brook and Lake Champlain.

CLF's *Response to Lowe's Home Center's Objection to Standing* at 2 (Oct. 13, 2003).

Because the Board has determined that CLF has presented sufficient evidence on which information on which to obtain standing under the representational standing theory, the Board need not address CLF's organizational standing arguments.

III. Order

Accordingly, it is hereby Ordered:

1. The Board overrules Lowe's *Objection to Prehearing Order*. The issues in this matter are as stated in the Prehearing Order.
2. The Board denies Lowe's *Motion to Dismiss*. CLF has standing to bring this appeal.

Dated at Montpelier, Vermont this \_\_\_\_ day of November 2003.

Water Resources Board  
By its Chair

\_\_\_\_\_  
David J. Blythe

Concurring:

Lawrence Bruce, Member  
Michael J. Hebert, Member  
Jane Potvin, Member

John D.E. Roberts, Vice Chair, did not take part in this decision.