State of Vermont
WATER RESOURCES BOARD

RE: CCCH Stormwater Discharge Permits
Docket No. WQ-02-11 (ANR Permits #1-1556 and #1-1557)

MEMORANDUM OF DECISION

This decision pertains to a preliminary issue in the above-captioned appeal: Do the Appellants, Conservation Law Foundation (CLF) and Friends of the Earth (FOE), lack standing to appeal ANR Permits #1-1556 and #1-1557 (Discharge Permits) to the Water Resources Board (Board). As is explained in more detail below, the Board concludes that CLF and FOE have the requisite standing and, therefore, the Board denies the Motions to Dismiss filed by the Permittee, Vermont Agency of Transportation (VTrans), and the Greater Burlington Industrial Development (GBIC).

I. BACKGROUND

On October 18, 2002, Conservation Law Foundation (CLF) and Friends of the Earth (FOE) jointly appealed the Discharge Permits to the Water Resources Board (Board). The Discharge Permits were issued by the Secretary of ANR, pursuant to 10 V.S.A. § 1264, and they authorize the discharge of stormwater into the Winooski River, Redmond Creek, Allen Brook, and certain unnamed tributaries from proposed Segments A and B of the Chittenden County Circumferential Highway (CCCH). 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 December 2, 2002, VTrans asked for an opportunity to brief the issue whether the Appellants lack standing. On December 10, 2002, the Chair issued a Prehearing Conference Report and Order (Prehearing Order) in which he made certain preliminary rulings and established a filing schedule. He granted party status as of right to VTrans pursuant to Board Rules of Procedure (Procedural Rule) 25(B)(1) and permissive party status to GBIC pursuant to Procedural Rule 25(C).[1] He also established

---

[1] The Chair also granted party status of right to the Agency of Natural Resources (ANR) pursuant to Procedural Rule 25(B)(5) and the Town of Williston pursuant to Procedural Rule 25(B)(2). The Chair further ruled that the Town of Essex and Village of Essex Junction "qualify for intervention of right pursuant to Procedural Rule 25(B)(2), provided that they file new entries of appearance consistent with the instructions in Section VII.C [of the Prehearing Order], on or before 4:30 p.m., December 31, 2002."

On December 20, 2002, the Town of Essex entered its appearance through counsel, William F. Ellis, Esq., McNeil, Leddy & Sheahan, P.C. On December 24, 2002, the Village of Essex

deadlines for the filing of any briefing of standing and party status challenges and any responses, including supplementation of the Appellants' Notice of Appeal. Prehearing Order, XI., Items 2, 4, and 5.

No challenges to the Chair's preliminary rulings on party status were timely filed, however, VTrans and GBIC each challenged the standing of CLF and FOE. On December 31, 2002, VTrans filed a Motion to Dismiss for Lack of Standing. After receiving an extension from the Chair on December 31, 2002, GBIC filed a Motion to Dismiss for Lack of Standing. Both Motions to Dismiss allege that CLF and FOE each lack organizational and representational standing. Neither motion was supported by affidavits.

After receiving an extension from the Chair on January 15, 2003, CLF and FOE jointly filed a Responsive Brief in opposition to the two Motions to Dismiss and provided supporting affidavits and exhibits on January 17, 2003. CLF and FOE filed an additional affidavit on January 22, 2003.

On January 22, 2003, GBIC filed a Reply Brief.[2]

Finally, on January 27, 2003, CLF and FOE jointly filed a Motion for Leave to File a Second Reply Brief and also a Second Reply Brief (together, Second Reply Brief).

The Board held oral argument on January 28, 2003, with counsel for VTrans, GBIC, and the Appellants participating. The Board denied CLF and FOE leave to file its Second Reply Brief.

The Board deliberated on January 28 and March 11, 2003. This matter is now ready for decision.

II. ISSUE

Do CLF and/or FOE each lack standing to appeal the Discharge Permits to the Board?

Junction entered its appearance through counsel, David A. Barra, Esq., Unsworth Powell Barra Orr & Bredice, PLC.

Accordingly, the Board concludes that the Town of Essex and Village of Essex Junction have each timely entered their appearances in accordance with the Prehearing Order and are therefore parties of right, pursuant to Procedural Rule 25(B)(2).

[2] On January 24, 2003, the Town of Williston filed a Response to the Motions to Dismiss and Appellants' Responsive Briefs. On January 28, 2003, the Village of Essex Junction filed a letter supporting the two Motions to Dismiss.

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 stormwater discharge permit, issued pursuant to 10 V.S.A. § 1264, is a decision of the secretary appealable under 10 V.S.A. § 1269. Therefore, the question before the Board is whether CLF and FOE each constitute a "person or party in interest aggrieved" by the secretary's issuance of the Discharge Permits.

"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 and FOE are each "corporations" and therefore fit within the meaning of 10 V.S.A § 1251(8).

The term "aggrieved" is not defined in the 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.")

CLF and FOE argue that because the Board is not an Article III court,[3] it should not be bound by judicial standing law which, in the opinion of the Appellants, defines too narrowly what it means to be "any person or party in interest aggrieved." CLF and FOE suggest that the purpose and framework of the Board's governing statutes – in this case, primarily the Water Pollution Control Act but also the federal Clean Water Act, 33 U.S.C. § 1251 et seq. – should guide the Board's interpretation of who is an aggrieved or injured person. They point to the fact that the waters of the State are a public resource held in trust for the people of Vermont. Re: Husky Injection Molding Systems, Inc., Docket No. MLP-98-06, Memorandum of Decision at 5 (Feb. 22, 1999) (hereinafter, Husky MOD). They note that a primary purpose of the Water Pollution Control Act is to "control the discharge of wastes to the waters of the state, prevent

[3] U.S. Const. art. III. limits the jurisdiction of federal courts to actual cases and controversies. The Vermont Supreme Court has said that this same limitation on jurisdiction applies to Vermont courts. In re Constitutionality of House Bill 88, 115 Vt. 524, 529 (1949).

degradation of high quality waters and prevent, abate or control all activities harmful to water quality." 10 V.S.A. § 1250(3). Therefore, where the secretary of ANR, the person with delegated authority to regulate such discharges into public waters, has allegedly failed to discharge his or her duties by issuing a discharge permit that is not in conformance with applicable water quality standards, it is CLF's and FOE's position that "persons" demonstrating some measure of "aggrievement" should be able to invoke the jurisdiction of the Board to review de novo the merits of such a permit. CLF and FOE Responsive Brief at 4-6 (Jan. 17, 2003).

In support of this position, CLF and FOE point to the public participation requirements for the permitting of direct discharges into public waters under 10 V.S.A. § 1263(b), which also apply to the review of stormwater discharge permits issued under 10 V.S.A. § 1264. Title 10 V.S.A. § 1263(b) requires the secretary of ANR to provide the "public" with notice and an opportunity to file written comment or request a public hearing or both before making a final ruling on a permit application. 10 V.S.A. § 1263(b). There is no right to a contested case hearing at ANR by which citizens can contest the merits of the application. Therefore, CLF and FOE argue that the exclusive mechanism by which the public is afforded the ability to test and confront the evidentiary basis for a stormwater discharge permit is through a de novo appeal to the Board. This, according to CLF and FOE, is why the General Assembly has chosen to frame the "aggrievement" standard in 10 V.S.A. § 1269 to broadly include "*any person*" aggrieved by an act or decision of the secretary pursuant to Chapter 47, subchapter 1, the Water Pollution Control Act. (Emphasis added.) CLF and FOE Responsive Brief at 4-6 (Jan. 17, 2003).

The Board agrees with CLF's and FOE's argument to a point. The administrative appeals route provided by 10 V.S.A. § 1269 is intended to be remedial and should be construed liberally. Nevertheless, the Board has long taken the position that the words of 10 V.S.A. § 1269 express some limitation on who may invoke the Board's jurisdiction to review a decision of the secretary. Wallace-Senft, Dismissal at 3-4; Re: Dean Leary, Docket No. MLP-94-08, Preliminary Order: Standing and Party Status Issues at 2 (Dec. 28, 1994). A person appealing under this statutory section must allege facts to show some injury to an interest, attributable to the secretary's act, that can be redressed by the Board. In other words, not just any member of the public may appeal any permit decision of the secretary.[4]

[4] Contrary to the assertions of CLF and FOE, this reading of 10 V.S.A. § 1269 is not inconsistent with the requirement of the Clean Water Act that state programs provide the public with an opportunity to file written comment with respect to a draft permit, to request a public hearing, and to receive notice of the State administrator's decision -- in this case, the secretary of ANR's decision. See 33 U.S.C. § 1342(b)(3); 40 CFR § 123.25. Those procedural safeguards are provided for at the ANR level in the secretary's review and action on the permit application. 10 V.S.A. §§ 1263 and 1264.

B. Individual Appellants

As a prerequisite to establishing standing, the Board has not required a citizen appellant to be an owner of land along the particular body of water affected by the secretary's permit decision; nor has the Board required that the interest at stake be a pecuniary interest.[5] Indeed, 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 that use and enjoyment may in some way be impaired if the secretary's decision if allowed to stand. See Husky MOD at 6-7; Re: Dean Leary, Docket No. MLP-94-08 Preliminary Order: Standing and Party Status Issues at 2 (Dec. 28, 1994).

Mere speculation about the impact of some generalized grievance, however, is not a

---

Rather, the question is: What standards should apply to the Board, which has appellate, albeit, de novo, contested case authority to review a permit decision of the secretary? To the extent that federal law offers any guidance, it is minimal. The operative regulation, 40 CFR § 123.30, addresses only appellate review by the *state courts*, not by any intermediate, quasi-judicial administrative agency. This regulation nevertheless provides some insight into what standards should apply. It acknowledges that not all members of the public may have the requisite standing to bring an appeal, by cautioning state program administrators that state-imposed restrictions on the class or classes of persons who may challenge a permit approval or denial must not be more stringent than those imposed by the federal courts. The relevant portions of that regulation state:

> All States that administer or seek to administer a program under this part shall provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard if State law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit [ ]. A state will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits (for example, if only the permittee can obtain judicial review, if persons must demonstrate injury to a pecuniary interest in order to obtain judicial review, or if persons must have a property interest in close proximity to a discharge or surface waters in order to obtain judicial review) . . . .

40 CFR § 123.30. Thus, while this regulation is not directly applicable to the Board, it does suggest that the Board, as an administrative body intermediate between the secretary of ANR and the State Supreme Court, should be no more restrictive in its standing analysis than the federal courts.

[5] As noted above in footnote 4, such restrictions on the appellate rights of citizens would conflict with federal law under the Clean Water Act.

sufficient basis to find standing. Re: Town of Cavendish v. Vermont Pub. Power Supply Auth., 141 Vt. 144, 147 (1982). Moreover, 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, 169 Vt. 74, 78 (1998). This is why the Board has previously found that the alleged "injury" to an appellant's interest *must* be something more than a generalized complaint about the secretary's favored approach to approving a specific activity or project involving public waters. This is 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: Appeals of Nathan Wallace-Senft and Anita Bellin-Senft, Docket Nos. WQ-99-04, Dismissal Order (Aug. 19, 1999) (hereinafter, Wallace-Senft Dismissal). In sum, while the bar for establishing standing is not high, some level of injury greater than harm to the general public must be shown by appellants. Re: Village of Ludlow, Docket No. WQ-01-08, Memorandum of Decision at 11 (Apr. 5, 2002) (hereinafter, Village of Ludlow MOD).

C. Organizational Appellants

Organizational appellants such as CLF and FOE, like individuals, must demonstrate that they have the requisite standing to support an appeal before the Board. In previous decisions, the Board has looked to the Vermont Supreme Court for guidance in determining whether organizational appellants have the requisite standing to challenge an ANR permit. See Re: OMYA, Inc., Memorandum of Decision at 8 (Apr. 2, 2002) (hereinafter, OMYA MOD), citing Parker v. Town of Milton, 169 Vt. 74, 76-78 (1998).

There are actually two tests suggested by the Court.[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. This is the test most frequently applied to an organization appealing a government action because in such a proceeding the organization most often seeks to protect from injury the interests of its *members*. The Board describes the applicability of this test in Section D, below.

In the present case, VTrans and GBIC argue that CLF and FOE each lack both organizational and representational standing. They therefore ask the Board to dismiss the pending appeal for lack of jurisdiction. The Board observes, however, that only *one* of the Appellants need demonstrate standing under *one* of the tests in order for the instant appeal to survive the

[6] The Board reiterates that, because it is not an Article III court, it is not strictly bound by the Parker test and it will be guided by relevant Vermont and federal statutes in addition to court precedent in determining who has standing.

VTrans's and GBIC's jurisdictional challenge.

D. Proof of Standing

In the last amendments to its Rules of Procedure (effective January 1, 2002), the Board amended Procedural Rules 19 and 25. It did so 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 and, further, to clarify that the demonstration of standing must be made at the outset of the appeal. See Procedural Rule 19(A)(7) (providing that the notice of appeal must contain "[a] statement of the reasons why the appellant has standing to appeal the Secretary or Commissioner's act or decision").

As noted above, the demonstration of standing need not be onerous or complicated. Even prior to the inclusion of subpart (7) to Procedural Rule 19(A), where a party challenged the standing of an appellant, the Board looked almost exclusively to an appellant's notice of appeal, as originally filed or 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 or her designee. Re: Home Depot, U.S.A., et al, Docket No. WQ-00-06 and Docket Nos. CUD-00-7 and CUD-00-08 (Cons.), Memorandum of Decision on Preliminary Issues and Order at 4 (Sept. 8, 2002) (hereinafter, Home Depot MOD). The Board has always assumed that the signer of a pleading incorporating a petition or memorandum in support of standing has read the document and that to the best of the signer's knowledge, information and belief, formed after reasonable inquiry, the statements contained in that document are well grounded in fact. Based on this assumption, the Board has presumed the veracity of the factual allegations contained in notices of appeals in favor of the appellant. OMYA MOD at 11; Home Depot MOD at 4-5.

Accordingly, the Board has not required an appellant to present affidavits and/or other documentation at the time of the filing of its notice of appeal. Wallace-Senft Dismissal at 5-6; Home Depot MOD at 4. Rather, the Board has left it to each appellant to determine how best to make a prima facie showing that it meets the requisite elements of standing. OMYA MOD at 11. The Board in this decision affirms this practice and clarifies that where a prima facie demonstration has been made, those who seek to challenge the standing of an appellant have the burden of coming forward with argument, affidavits and/or other documentary evidence sufficient to call into question the accuracy or legal sufficiency of the representations made in the notice of appeal. Home Depot MOD at 5.

If the standing of an appellant is challenged, the Board has allowed and will continue to allow the appellant an opportunity to file a responsive memorandum and such supplemental documentation in the form of affidavits and/or exhibits as the appellant deems necessary to rebut the challenge. The Board also has allowed and will continue to allow those challenging an appellant's standing an opportunity to file reply memoranda and it will continue to evaluate the competing allegations contained in all of the various filings to determine whether the appellant

has the requisite standing. OMYA MOD at 11.

When specifically requested, the Board will convene oral argument on standing challenges. Home Depot MOD at 3; Wallace-Senft Dismissal at 2. Only rarely will the Board hold a limited evidentiary hearing on the standing question. Village of Ludlow MOD at 3; OMYA MOD at 2. The Board does not favor holding evidentiary hearings on standing questions, because, as noted above, the factual issues related to standing can usually be resolved through allegations made in the notice of appeal and supplemental filings, including affidavits when necessary.

In the present case, as indicated by the procedural background at page 3, the Appellants and other parties to this proceeding were provided with the opportunity to brief and augment their filings with affidavits and other supporting documents. Prehearing Order, XI., Items 2, 4-6, as modified by subsequent order. They also presented oral argument to the Board.

E. "Representational" Standing

CLF and FOE appealed two Discharge Permits issued by the secretary of ANR. Discharge Permit #1-1556 authorizes the Permittee to discharge stormwater runoff from the proposed Chittenden County Circumferential Highway (CCCH) (Construction Segment B, and portion of construction Segment A) to the Winooski River, unnamed tributaries to the Winooski River and Redmond Creek. Discharge Permit #1-1557 authorizes the discharge of stormwater runoff from the proposed CCCH (a portion of Construction Segment A) to Allen Brook and unnamed tributaries to Allen Brook. All of the waters to which discharges have been authorized by the secretary of ANR are "waters of the state,"[7] and are subject to protection under 10 V.S.A. ch. 47, the State's Water Pollution Control Act and the federal Clean Water Act. In their Notice of Appeal, CLF and FOE alleged that they each have members residing in Chittenden County who make specific recreational and other uses of Allen Brook, the Winooski River, and/or Lake Champlain and that their members' use and enjoyment of these waters will be adversely affected by the pollution allegedly attributable to the stormwater discharges from the CCCH authorized by the secretary of ANR. Notice of Appeal at 6-7. After their standing was specifically challenged by VTrans and GBIC, CLF and FOE supplemented their Notice of Appeal with affidavits from their Chittenden County members specifically describing those members' recreational and other uses of the waters in question and the alleged injuries to those interests arguably attributable to the secretary's action. See Affidavits (Jan. 17 and 22, 2003).

The Board has held previously that an organization has "representational" standing to

---

7 All of these waters drain into Lake Champlain, which is both a "water of the state" and an interstate and international body of water shared by Vermont, New York State, and the Province of Quebec, Canada.

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. Re: Clyde River Hydroelectric Project, Docket No. WQ-02-08(A), (B), and (C), Prehearing Conference Report and Order at 8 (Oct. 25, 2002) (hereinafter, Clyde Prehearing Order); Village of Ludlow MOD at 11; OMYA MOD at 9, citing Parker at 78; see also, Hunt v. Washington State Apple Adver. Comm., 432 U.S. 333, 343 (1977).

1. Membership

Since Vtrans and GBIC have specifically challenged CLF's and FOE's claims that they are membership organizations and therefore lack "representational" standing, the Board must first decide whether CLF and FOE each have "members." The Board has stated previously that what constitutes "membership" may vary, depending on the formality of the organization. Clyde Prehearing Order at 8, ftn.6; OMYA MOD at 13. For example, the Board will not necessarily look to the laws governing corporations for adhoc associations and other informal organizations. Moreover, what constitutes "membership" for a corporation may vary, depending on the nature of the corporation itself and the requirements of corporate law within the jurisdiction in which the corporation in question has been incorporated. Clyde Prehearing Order at 8, ftn. 6.

In its Motion, VTrans merely challenged the specificity of CLF's allegations and offered no affidavits or other documents to disprove CLF's claim of membership. VTrans Motion to Dismiss at 5. GBIC, on the other hand, filed CLF's Articles of Organization and offered argument concerning the requirements of Massachusetts corporate law for the purpose of challenging whether CLF is a bonafide membership corporation. GBIC Motion to Dismiss at 13-16. GBIC's argument may be summarized as follows: CLF can only have representational capacity if its members have voting rights – the authority to control the course of the corporation, including its litigation. Since Massachusetts corporate law allows non-profit corporations to have different classes of members, and since under CLF's Bylaws only the corporation's Directors and Trustees are "voting members" with authority to authorize the present appeal, and, further, since none of these "voting members" appear to be persons residing in South Burlington, Williston, or elsewhere in Chittenden County," CLF has failed to explain the basis for how its non-voting members can support a claim of representational standing. GBIC Motion to Dismiss at 15-16.

The Board disagrees with GBIC's characterization of the Board's prior decisions and applicable case law. The Board has never ruled that only "voting" members of a corporation can support a claim of standing. Rather, as CLF has correctly noted, the Board in its OMYA MOD reached the narrow conclusion that the appellant *Vermont-incorporated,* non-profit organization, was not a membership corporation and therefore it could not have representational standing because its "members" did not have the right to vote for its board of directors, *as required by the Vermont Nonprofit Corporations Act*. CLF and FOE Responsive Brief in opposition to two

Motions to Dismiss at 24; OMYA MOD at 15-17 (Apr. 2, 2002). Furthermore, in the Village of Ludlow appeal, the Board, did not actually decide the question whether the organizational appellant had bonafide members. The Board *assumed* that the organization did have "members" for the purposes of conducting its representational standing analysis. Village of Ludlow MOD at 4, ftn. 5, and 11-13. Instead, the Board concluded that the organization's members lacked standing in their individual capacities under the first prong of the Parker test and therefore the organization lacked representational standing. Village of Ludlow MOD at 13.

In the present matter, CLF persuasively argues that its Bylaws provide for different classes of membership consistent with Massachusetts corporate law. CLF and FOE Responsive Brief in opposition to two Motions to Dismiss at 25-26 and Exhibit E (By-Laws, Art. III., Sec.1). The requirements for CLF membership are payment of dues and acceptance of those dues by the corporation. CLF claims to have 1000 Vermont members. Notice of Appeal at 3. While only CLF's Board of Directors are voting members, all persons who pay dues and whose dues are accepted are members of CLF. Accordingly, CLF argues that the Board should consider these non-voting members as "members" for the purpose of determining representational standing. In support of its argument, CLF cites a line of federal cases, beginning with Hunt v. Washington State Apple Adver. Comm., 432 U.S. 333, 343 (1977), that stand for the proposition that even non-membership organizations may represent the interests of their "members" if there is some indicia of membership.[8] CLF and FOE Responsive Brief in opposition to two Motions to Dismiss at 27-28. The Board finds, however, that CLF *is* a membership organization within the meaning of Massachusetts corporate law and that it is therefore qualified to represent its members, even non-voting Vermont members, if those members can demonstrate that they would have standing in their individual capacities and CLF can meet the other two prongs of the representational standing test.

In its Notice of Appeal, FOE alleged that it has 350 members in Vermont and that some of its members live in the towns that will be hosting the CCCH and "will be directly affected by the increased pollution discharges from the highway. Notice of Appeal at 7. VTrans did not challenge FOE's assertion that it has members, only that it failed to provide specific information regarding the identity of its members, their specific uses of water resources at issue and their alleged "injuries." VTrans Motion to Dismiss at 6. GBIC, however, did raise the question whether FOE, as a non-profit organization incorporated in Washington, D.C., has voting

---

8

Even if the Board were to agree with GBIC, as articulated in its Reply Brief, that the existence of member voting rights is persuasive evidence that an association-membership relationship exists between the directors of the organization and its members, the Board does not believe that the "indicia of membership" test woodenly requires that corporations provide their members with voting rights in order to represent them in litigation, especially where the juris-dictions of incorporation do not require those corporations to provide its members with voting rights.

members which control the affairs of the corporation, based on its review of FOE's Form 990s and information about the organization published on FOE's web site. GBIC Motion to Dismiss at 11.

The Board finds, after reviewing FOE's corporate documents and other submissions, that FOE is a bonafide membership corporation under the laws of Washington, D.C. FOE's Bylaws establish that the corporation has one class of members who are required to make dues payments. CLF and FOE Responsive Brief in opposition to two Motions to Dismiss at 25-26 and Exhibit B-2 (Bylaws, Art. III., Sec.1, and Art. XI). Article XI establishes annual dues of not less than $15. Moreover, FOE members have the right to elect five of the twenty-one members of the Board of Directors at the annual meeting of the members of FOE. Exhibit, B-2 (Bylaws, Art. V, Sec. 3). Thus, FOE's Vermont members have some voting rights. Even if this were not the case, it would still be the opinion of the Board that FOE is a bonafide membership corporation under the laws of Washington, D.C., given that its Bylaws provide for a membership.

In conclusion, CLF and FOE are each non-profit membership corporations within the meaning of the laws of their respective jurisdictions of incorporation.

2. Members' individual standing

Returning now to the first of the three-prongs of the representational standing test, the Board must determine whether CLF and FOE have members who qualify for standing in their own right. As noted previously, individuals may demonstrate standing pursuant to 10 V.S.A. § 1269 by showing that they have an interest (such as the use and enjoyment of the waters at issue) which may be injured should the act or decision of the secretary be allowed to stand and the Board has authority to redress that "injury."

In support of their claims of standing, CLF and FOE supplemented their joint Notice of Appeal with additional information about their Vermont members and their historical and current use and enjoyment of Lake Champlain and the tributaries at issue in this appeal for various recreational and other purposes. CLF and FOE Responsive Brief in opposition to two Motions to Dismiss at 21-23. Additionally, CLF filed affidavits for Stephen Crowley, Jeffrey Meyers, Stephan Boyan, and Tammy Newmark, all of whom attested to being members of CLF.[9] Stephen Crowley and Jeffrey Meyers also attested to being members of FOE. CLF and FOE Responsive Brief in opposition to two Motions to Dismiss, Exhibit F (Affidavits). Each of these individuals attested to how they and, in some instances, their families or students have made regular and specific recreational use (swimming, canoeing, kayaking, sailing, birdwatching,

---

9 At oral argument, in response to a question from the Board, the counsel for CLF and FOE confirmed that these persons were members of their respective organizations at the time of the filing of the Notice of Appeal.

and/or fishing) of Lake Champlain between Shelburne Bay and Malletts Bay and of Allen Brook and/or the lower reaches of the Winooski River, all downstream from the proposed discharges of the CCCH. They also described how their specific uses and enjoyment of these waters may or will be impaired by further degradation of water quality if the secretary of ANR's decision is allowed to stand and the CCCH is authorized to discharge additional pollutants into these already water quality-impaired waters. For example, some of the affiants indicated that they would be less likely to swim or fish in or boat on these waters due to the diminution of the ecological and scenic value these waters or because of concerns for their personal health. See Affidavits of Stephen and Jeffrey Meyers; see also Affidavit of Duane Peterson (Jan. 22, 2003). In the Board's opinion, such averments of "injury" are not so subjective and unreasonable that they fail to support the individual standing of the Appellants' members. See Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 181-184 (2000) (regarding use of affidavits to show injury).

The Board therefore concludes that CLF and FOE have made a prima facie demonstration that they have members whose individual "interests" and "injuries" support claims of aggrievement pursuant to 10 V.S.A. § 1269. This demonstration was not rebutted by VTrans or GBIC. Accordingly, CLF and FOE have met the first prong of the representational standing test.

3. Interests are germane to the organization's purpose

The next prong of the "representational" standing test requires the Board to consider whether the individual members' "interests" are germane to CLF's and FOE's corporate purposes. Clyde Prehearing Order at 9. Neither VTrans nor GBIC presented arguments with respect to this specific part of the "representational" standing test, although, with respect to organizational standing, they asserted that CLF's and FOE's organizational purposes are so broad as to not be distinguishable from the "interests" of the general public in protecting water resources. VTrans Motion to Dismiss at 3-4; GBIC Motion to Dismiss at 5-6. Therefore, the Board believes that it is necessary to address the question of the specificity of CLF's and FOE's "purposes" here.

a. CLF

In its notice of appeal, CLF stated that it was founded in 1966 as a non-profit organization, working "to solve the environmental problems that threaten the people, natural resources, and communities of New England." Notice of Appeal at 3; see also, Articles of Organization. CLF further stated that it has maintained an advocacy center in Vermont since 1988, and has participated in numerous environmental permitting proceedings in Vermont, including appeals before this Board, has taken concerted efforts to enforce and improve Vermont's environmental laws, and has been active in addressing important environmental policy issues affecting, among other resources, Vermont's water quality. Notice of Appeal at 3. CLF further asserted that "its work in Vermont is dedicated, in significant part, to the protection

and responsible use of Vermont's water resources, including waters currently impaired or threatened by stormwater runoff." Notice of Appeal at 3.

When its organizational standing was challenged by VTrans and GBIC, CLF filed with its joint Responsive Brief certain corporate documents, including its Massachusetts Articles of Organization as amended, its Bylaws as amended, and portions of its 2001 Annual Report identifying CLF's work in Vermont. See CLF and FOE Responsive Brief in opposition to two Motions to Dismiss, Exhibits C, D, and E. The statement of purpose in the Articles of Organization, while broad, identifies CLF as organized for the purpose of fostering and promoting the use of law "to conserve and enhance, in the public interest, the natural resources of the United States of America" and that this includes conducting legal research, opinions, briefs, publications, forums, and providing advice and representation to conserve and enhance, among other resources, "water." Exhibit D. The Bylaws, which merely reference the corporation's purpose in the Articles of Organization, shed no further light on CLF's purposes. See Exhibit E.

The Board agrees with GBIC that CLF's corporate purpose is broad. Nevertheless, CLF has articulated through its corporate governing documents that it has an organizational purpose which is *germane* to the protection of water resources, including water resources in Vermont. CLF's Articles of Organization also contemplate that CLF will engage in or support others in litigation, legal research, and other law-related activities to protect public water resources, including "waters" in Vermont.

If this were not enough, the Board has previously examined non-governing corporate documents to better assess the purpose of an organization and it sees no reason to depart from that practice here. In some instances, those documents demonstrate that what an organization actually does is inconsistent with its alleged corporate purpose. OMYA MOD at 12-13. In other instances, those documents help clarify the purpose of the organization. Clyde Prehearing Order at 7, ftn. 5. In this instance, the Board finds that CLF's 2001 Annual Report actually bolsters CLF's claim that its organizational purpose is realized in Vermont through litigation intended to protect and improve the water quality of specific water resources, including Lake Champlain and its tributaries. CLF's advocacy center in Vermont has actively engaged in litigation to protect Vermont's water resources, including administrative litigation before this Board. Indeed, CLF has been or is currently an appellant in several matters before the Board involving the impairment of public waters draining into Lake Champlain, including impairment by stormwater, in whole or in part. See CLF and FOE Responsive Brief in opposition to two Motions to Dismiss, Exhibit C.[10] CLF's 2001 Annual Report also reveals that CLF has engaged in other

---

10

Indeed, CLF included in its list of water-related litigation, its participation in certain prior or ongoing appeals before the Board. See Exhibit C; see also, Re: City of South Burlington (Bartlett Bay Wastewater Treatment Facility), Docket No. WQ-01-04, Chair's Order (June 14, 2002) (CLF

environmental protection activities in the Lake Champlain basin, and specifically in Chittenden County, with the purpose of improving the water quality.[11]

b. FOE

The Board has examined FOE's statements in support of standing contained in its joint Notice of Appeal and supplementary filings. Notice of Appeal at 7; CLF and FOE Responsive Brief in opposition to two Motions to Dismiss and Affidavits. Based on these, the Board finds that FOE is a national non-profit environmental advocacy organization, founded in 1969 and incorporated in Washington D.C. Its mission "is to protect the planet from environmental degradation; to preserve biological and cultural diversity; and to empower citizens to affect the quality of their environment and their lives." Notice of Appeal at 7. FOE notes that it has an office in Burlington, Vermont, as well as offices in Washington, D.C., and Seattle, Washington. FOE stated that one of its programs "involves work to understand how public fiscal investments contribute to sprawl and impact Lake Champlain's water quality." Notice of Appeal at 7.

Taking into consideration FOE's supplemental filings which include its corporate governing documents, the Board finds that FOE's purpose, while broad, is sufficiently germane to the matter at hand. In its Bylaws, in the original and as amended, FOE's purpose encompasses the matters identified in its Notice of Appeal. The Bylaws state that among the ways that FOE fulfills its corporate purpose are programs "to combat and eliminate water pollution . . . and the ill health resulting from water pollution." CLF and FOE Responsive Brief in opposition to two Motions to Dismiss, Exhibit B (Bylaws, Art. 1, Sec. 1). Additionally, FOE filed an affidavit from its Executive Director, Norman Dean, in which Mr. Dean describes FOE's other water-quality related work, including the release of a Clean Water Report Card in 2001, which evaluated the existence of expired Clean Water Act permits in Vermont and other states.

---

was sole appellant); Re:Hannaford Bros., Co. and Lowes Home Centers, Inc., Docket No. WQ-01-01, Findings of Fact, Conclusions of Law and Order (Jan. 18, 2002) (CLF was one of two appellants); Re: Town of Shoreham Wastewater Treatment Facility, Docket No. WQ-00-11, Findings of Fact, Conclusions of Law, and Order (Nov. 30, 2001) (CLF was sole appellant). CLF is an appellant in the pending appeal, Re: Morehouse Brook, Englesby Brook, Centennial Brook, and Bartlett Brook, Docket Nos. WQ-02-04, WQ-02-05, WQ-02-06 and WQ-02-07 (Consolidated). The Board notes that participation in past Board cases is not conclusive of organizational standing or a pre-requisite to standing. It is, however, a supporting factor that can bolster an appellant's claim of standing based on the organization's purpose.

[11] Some of the non-litigation activities that CLF has engaged in to improve water quality in Vermont and which are identified in the 2001 Annual Report are support of agricultural stream buffer protection and technical assistance to create an innovative sewer ordinance as part of Lake Champlain/Shelburne Bay clean-up efforts.

Exhibit B (Declaration of Norman Dean; B-4). In the Board's opinion, FOE has made a prima facie case that its corporate purpose, while broad, is nonetheless germane to the instant appeal.

The question, then, is whether FOE has articulated a corporate purpose that is specific enough to contemplate that the organization will engage in legal research and legal advocacy to protect the water quality of Vermont's water resources? FOE's Articles of Incorporation, like the appellant's incorporation document in OMYA, only states that the corporation is authorized "to do any and all lawful acts and things which may be necessary, useful, suitable or proper for the furtherance or accomplishment of the purposes of the [c]orporation. Exhibit B-1 (Articles of Incorporation, Sec. III.(7)) and B-2 (Articles of Incorporation, as amended, Sec. 1). See OMYA MOD at 13. However, FOE's brochure, entitled "Protecting New England From Environmental Destruction," informs the public that FOE North East is "dedicated to stopping environmental destruction through the entire region" and by "[w]orking with state and other local organizations, FOE North East uses public education, coalition building, and *legal analysis* in five critical issue areas." (Emphasis added.) The first of these areas is "[p]rotecting natural resources and public lands, like National Forests, lakes, rivers, and streams." Therefore, unlike the appellant in OMYA, FOE as a corporation has an articulated interest in protecting the water resources of New England, including those in Vermont, through legal advocacy.[12] See OMYA MOD at 12-13. Indeed, FOE, like CLF, attests that "an important organizational objective of ... FOE is engaging in administrative and court litigation to protect the environment, including water resources." CLF and FOE Responsive Brief in opposition to two Motions to Dismiss at 9-10. Therefore, the Board concludes that FOE is acting consistent with and in furtherance of its purpose in representing its members in the protection of their "interests" in the continued use and enjoyment of the waters that are the subject of the secretary of ANR's permitting decision.

In summary, CLF and FOE were organized, at least in part, to promote environmental protection including the protection of water quality in Vermont, through legal advocacy and litigation. Their members' demonstrated historical and continuing recreational use of Allen Brook, the lower reaches of the Winooski River, and Lake Champlain, coupled with their material concerns about the effects of additional water quality impairments from the CCCH on their future recreational uses and enjoyment of these resources, is the raison d'être for CLF's and FOE's respective litigation and legal advocacy programs, as evidenced by their corporate purposes. Accordingly, the Board concludes that their members' respective interests are

---

12

The record demonstrates that, like CLF, FOE participated in the public comment process initiated by the Secretary preliminary to the issuance of the Discharge Permits under appeal. Additionally, FOE has been an appellant in federal citizen suit litigation under the CWA seeking injunctive and other relief against holders of NPDES permits. See, for example, Friends of the Earth, Inc., et al. v. Laidlaw Environmental Services, Inc., 528 U.S. 167 (2000).

germane to the corporate purposes of the two appellants.[13]

4. Claim and relief do not require the participation of individual members

As evidenced by their joint Notice of Appeal, the claims of error, statement of issues, and requests for relief presented by CLF and FOE are matters that may only be properly resolved in a de novo hearing before the Board, since this is the only avenue for appellate relief from the secretary of ANR's decision to issue the Discharge Permits under the Vermont Water Pollution Control Act. As the members of CLF and FOE have indicated in their affidavits, they haven't the financial means, personal time, or the legal and technical expertise to litigate the complicated issues raised in this appeal. Even if they were prepared to make such an investment, none of the claims for relief requested by CLF and FOE implicate a specific real property, contractual, or pecuniary interest personal to one or more of these affiants. Therefore, their individual participation in this appeal is not required to resolve any one of the claims or to perfect some aspect of the relief requested.

Accordingly, the Board concludes that CLF and FOE have satisfied the third prong of the "representational" standing test.

5. Conclusion

Finally, it should be noted that GBIC argues that FOE, a foreign corporation, cannot represent its members before the Board because it had not applied for and obtained a Certificate of Authority (COA) from the Vermont Secretary of State prior to filing its appeal pursuant to the Vermont Nonprofit Corporations Act, 11B V.S.A. § 1.01 et seq. GBIC Motion to Dismiss at 12-13. The Board rejects this argument for the following reasons.

Assuming that FOE did not obtain a COA until *after* the filing of its Notice of Appeal, the Board concludes that this is a fact immaterial to the jurisdictional question whether FOE has a right to participate in an administrative proceeding as a person in interest aggrieved by the secretary of ANR's decision under 10 V.S.A. §1269. The Board has reviewed the entirety of the COA provisions, in particular 11B V.S.A. § 15.01 regarding the authority of foreign corporations to transact business in Vermont, and the Board finds that there is no prohibition against a foreign non-profit corporation engaging in a Vermont administrative proceeding without a COA. Even

---

13

This is in contrast with the situations in the Husky and Clyde appeals, where the corporate purposes of the organizational appellants's were unrelated to their members's use and enjoyment of the water resources at issue. Clyde Prehearing Order at 9; Husky MOD at 9-10 and Chair's Preliminary Ruling at 6 (Jan. 13, 1999). This appeal, then, provides a good example of how individuals's interests in the protection of water quality are in concert with and may be well protected through their association with appellant organizations.

if the law stated otherwise and FOE were required to obtain a COA to maintain its appeal, the Board believes that it would have the inherent authority to stay its proceeding to allow FOE to obtain such a certification. See 11B V.S.A. § 15.02(c) (A court may stay a proceeding commenced by a foreign corporation to determine whether it must obtain a COA and, if a COA is needed, it may further stay the proceeding to allow the foreign corporation to obtain such a certification.). Accordingly, the failure of FOE to obtain a COA prior to the commencement of its appeal is not a flaw fatal to the Board's jurisdiction.

In conclusion, CLF and FOE each meet all three prongs of the "representational" standing test and therefore may appeal the Discharge Permits on behalf of their members pursuant to 10 V.S.A. § 1269. As non-profit corporations whose members would qualify for standing in their individual capacities, whose members' interests are germane to the corporate purposes of the two organizations, and whose members' individual participation is not required to address and resolve the claims and relief raised in this appeal, CLF and FOE have demonstrated that they have the requisite "representational" standing to support the Board's jurisdiction to hear their appeal.

Given that the Board has determined that CLF and FOE have the requisite "representational" standing to support an appeal under 10 V.S.A. § 1269, the Board concludes that it is not necessary to decide whether either CLF or FOE or both have the requisite "organizational" standing to support their appeal.

IV. ORDER

For the reasons stated above, it is hereby ordered:

1. CLF and FOE each have the requisite "representational" standing to confer jurisdiction on the Board pursuant to 10 V.S.A. §1269.

2. The Motions to Dismiss filed by VTrans and GBIC are dismissed.

Dated at Montpelier, Vermont, this 21st day of March, 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
Mardee Sánchez