VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 22-ENV-00054

City of Rutland WWTF NPDES

DECISION ON MOTION TO DISMISS

Title: Motion to Dismiss (Motion: 1)
Filer: Aaron Kisicki, Esq.
Filed Date: April 7, 2023

Appellant Vermont Agency of Natural Resources Memorandum in Opposition filed on March 22, 2023, by Attorney Jon Groveman, Esq.

Agency of Natural Resources Reply in Support of Motion filed on June 12, 2023, by Attorney Aaron Kisicki.

The motion is DENIED.

This is an appeal by the Vermont Natural Resources Council (VNRC) of national Pollutant Discharge Elimination System (NPDES) Permit #3-1285 (the Permit) issued by the Vermont Agency of Natural Resources (ANR) to the City of Rutland (City) Wastewater Treatment Facility (WWTF) authorizing it to discharge to the Otter Creek pursuant to certain permit conditions. Presently before the Court is ANR's motion to dismiss this appeal pursuant to V.R.C.P. 12(b)(1), 12(b)(6), and 12(b)(7). Alternatively, should this Court deny ANR's motion, it requests that this Court join certain parties it deems necessary. For the reasons set forth herein the motion is **DENIED**.

Conclusions of Law

While we address each of ANR's main arguments in turn, we begin by addressing a threshold matter. Specifically, the parties dispute what is at issue in this case. ANR argues that VNRC is seeking to attack agency action and impermissibly attack agency rules outside the scope

of this Court's jurisdiction and review. VNRC proffers that this appeal is, functionally, a typical appeal of an environmental permit in which it seeks to challenge the adequacy of the permit.

The apparent confusion between the parties is prompted by ANR's reading of the Questions before the Court. Questions 1 and 2 are phrased in a manner which ask whether ANR needed to impose certain conditions on the WWTF. This phrasing is contrary to our de novo review, in which we consider Applicant's application anew to determine whether it complies with ANR's regulations implementing the Federal Clean Water Act. Furthermore, our review considers only the evidence presented to the Court, not the evidence that was presented to ANR during the proceeding below.[1] V.R.E.C.P. 5(g) ("In an appeal by trial de novo, all questions of law or fact as to which review is available shall be tried to the court, which shall apply the substantive standards that were applicable before the tribunal appealed from."); see Chioffi v. Winooski Zoning Bd., 151 Vt. 9, 11 ("A de novo trial 'is one where the case is heard as though no action whatever has been held prior thereto'") (quoting In re Poole, 136 Vt. 242, 245 (1978)). Because the Court will hear the appeal anew, Appellant's questions related to alleged procedural or evidentiary shortcomings of ANR below have no bearing on the final disposition of the case. Baker v. Town of Goshen, 169 Vt. 145, 152 (1999) (stating that questions on appeal "must be a necessary part of the final disposition of the case to which it pertains"); In re Britting, No. 259-11-07 Vtec slip op. at 5 (Vt. Envtl. Ct. Apr. 7, 2008) (Wright, J.) (describing the limited jurisdiction of this Court).

VNRC has, through its opposition to the pending motion, proffered that these Questions address whether appliable law requires additional conditioning of the WWTF. This posture and interpretation recognizes the de novo nature of this appeal. VNRC's reading of the questions are properly before the Court.[2] Thus, we interpret these Questions as such, declining to review the proceedings below and declining to address matters outside the scope of this Court's jurisdiction.

[1] We note, however, the proceedings below are relevant because parties seeking to appeal the permit decision are limited to the scope of their public comments before ANR. See 10 V.S.A. § 8504(d)(2)(A).

[2] For this reason, we conclude that this appeal is not an impermissible collateral attack on any ANR rule. Additionally, VNRC is not obligated to exhaust any other administrative remedies prior to appealing the Permit and raising the issues as understood herein. To the extent that the parties dispute the applicability of any rule to the present Permit, we will rule upon such a dispute at the appropriate time. To the extent VNRC would seek to challenge any rule or action outside of the scope of the Permit appeal, that is not before the Court.

With this clarification in mind, we turn to the pending motion. Because ANR's motion is made subject to different rules, we address each applicable standard in the relevant section.

I. VNRC's Standing to Appeal

When reviewing a Rule 12(b)(1) motion, this Court accepts all uncontroverted factual allegations as true and construes them in the light most favorable to the nonmoving party, the Applicant here. Rheaume v. Pallito, 2011 VT 72, ¶ 2, 190 Vt. 245.

Standing is a "necessary component to the court's subject matter jurisdiction." Bischoff v. Bletz, 2008 VT 16, ¶ 15, 183 Vt. 235.[3] We evaluate a motion to dismiss for lack of standing under V.R.C.P. 12(b)(1) as motions to dismiss for lack of subject matter jurisdiction. See, e.g., Wool v. Off. of Pro. Regul., 2020 VT 44, ¶ 9, 212 Vt. 305. When a V.R.C.P. 12(b)(1) motion is before this Court, we accept as true all uncontroverted facts set out by the nonmovant and construe them in the light most favorable to him or her. Rheaume v. Pallito, 2011 VT 72, ¶ 2, 190 Vt. 245.

Any person aggrieved may appeal an act or decision of ANR. 10 V.S.A. § 8504(a). A "person aggrieved" is one "who alleges an injury to a particularized interest protected by the provisions of law listen in section 8503 of [Title 10], attributable to an act or decision by . . . the Secretary [of ANR] . . . that can be redressed by the Environmental Division . . . ." 10 V.S.A. § 8502(7). When a party's standing is challenged, it must demonstrate that it has standing to appeal to this Court. See In re Silver Birch Props., LLC, No. 22-ENV-00070, slip op. at 3 (Vt. Super. Ct. Envtl. Div. Mar. 29, 2023) (Durkin, J.) (citing Bischoff v. Bletz, 2008 VT 16, ¶ 15, 183 Vt. 235) ("While the Court initially accords persons who enter a timely appearance party status, if challenged, the party must demonstrate, at a minimum, that they are vested with constitutional standing to remain as a party before the Court in the pending appeal.").

VNRC has demonstrated that it has standing to appeal to this Court. It is undisputed that VNRC appeared before ANR during the permitting process and provided comments relative to the application before ANR.[4] VRNC has asserted that its injury relative to the Permit is that the Permit is insufficient to control combined sewer overflows (CSOs) from the WWTF into Otter

[4] The substance of those comments and the impact on the pending appeal are addressed in Section II of this Order.

Creak in violation of appliable law and that this insufficiency will impact its members' use and enjoyment of Otter Creek due to resulting pollution.[5] VNRC asserts that its alleged injury could be redressed by more stringent conditions with respect to CSOs, which it asserts are authorized and warranted under the relevant law and facts. Viewing all uncontroverted facts in a light most favorable to VNRC, we must conclude that VNRC has standing to appeal the Permit.[6]

Further this alleged injury is directly related to the Questions VNRC raises on appeal. The Questions each ask, with respective specificity, whether additional conditions to address CSOs must be imposed at the WWTF. This is directly related to VNRC's alleged injury with respect to the inadequacy of the Permit's conditions.

Further, to the extent that ANR's motion argues that VNRC was required to lay out its entire case, including its standing, in its Notice of Appeal and that its failure to do so is grounds for dismissal, ANR points to no law requiring such a demonstration. In fact, this is contrary to the simple requirements of a Notice of Appeal set forth in this Court's rules of procedure. A Notice of Appeal must:

> [S]pecify the party or parties taking the appeal and the statutory provisions under which each party claims party status; must designate the act, order, or decision appealed from; must name the court to which the appeal is taken; and must be signed by the appellant or the appellant's attorney. In addition, the notice of appeal must (A) advise all interested persons that they must enter an appearance in writing with the court within 21 days of receiving the notice, or in such other time as may be provided in subdivision (c) of this rule, if they wish to participate in the appeal and (B)

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[5] VNRC provides an affidavit of member Kathy Doyle in support of its memorandum in opposition to the motion to dismiss. Ms. Doyle resides in Rutland County and swims, boats, and walks along the Otter Creek, into which the at-issue Permit authorizes certain discharges.

[6] ANR has not challenged VRNC's organizational standing to appear in this matter, but to the extent this Court is tasked with evaluating VRNC's standing to appear on behalf of its members, we conclude that it has standing to do so. For an organization to have standing, it must demonstrate 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." Parker v. Town of Milton, 169 Vt. 74, 78 (1998), discussed in In re: Entergy Nuclear/Vt. Yankee Thermal Discharge Permit Amendment, No. 89-4-06 Vtec, slip op. at 6-9 (Vt. Envtl. Ct. Jan. 9, 2007); In re: Unified Buddhist Church, Inc., Indirect Discharge Permit, No. 253-10-06 Vtec, slip op. at 2-4 (Vt. Envtl. Ct. Aug. 15, 2007). VNRC has provided an affidavit showing that at least one member has individual standing to appear in this matter and has represented that it has many more members with individual standing. Further, VRNC's mission includes protecting and enhancing Vermont's natural environments, which includes water pollution. Thus, the interests it asserts are germane to the organization's purpose. Finally, the appeal of an environmental permit and the relief requested (i.e., more stringent conditioning of the WWTF) are not the type of claim that requires individual participation.

> give the address or location and a description of the property or development with which the appeal is concerned and the name of the applicant for any permit involved in the appeal. An appeal will not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

V.R.E.C.P. 5(b)(3). At no point does the Rule require that an appellant establish its standing to appeal in a Notice of Appeal. We will not read such a requirement into the Rule.

Thus, for the foregoing reasons, we conclude that VNRC has standing to appeal to this Court.

II. The Scope of VNRC's Public Comment

The Court again notes the applicable Rule 12(b)(1) standard, addressed above. Additionally, ANR moves to dismiss this appeal pursuant to Rule 12(b)(6) on the grounds that VNRC has not complied with 10 V.S.A. § 8504(d)(2)(A).[7] Section 8504(d)(2)(A) sets forth additional requirements a would-be appellant must meet to qualify as an appellant before this Court. This is, effectively, a standing principle and therefore we apply the standards of Rule 12(b)(1).

ANR moves to dismiss the pending appeal, asserting that the Questions VNRC raises before the Court are beyond the scope of the comments it provided to ANR during the permitting process in violation of 10 V.S.A. § 8504(d)(2)(A).

In addition to the general standing requirements, an additional requirement is placed on parties seeking to appeal an ANR decision to this Court. Specifically, a would-be appellant of an ANR decision must have "submitted to the Secretary a written comment during the comment period or an oral comment at the public meeting conducted by the Secretary. In addition, the person may only appeal issues related to the person's comment to the Secretary." 10 V.S.A. § 8504(d)(2)(A). A party moving to dismiss an appeal or issue within an appeal under this standard has the burden of proving that those requirements were not satisfied. 10 V.S.A. § 8504(d)(2)(A)(iii). Thus, ANR has the burden of demonstrating dismissal is warranted here.

[7] ANR's Rule 12(b)(6) motion also addressed its assertion that this appeal was an impermissible collateral attack. For the reasons set forth above, we conclude that it is not and, therefore, the motion in this regard has been denied.

Further, when interpreting § 8504(d)(2)(A), this Court has adopted the principle applicable to Statements of Questions which states that issues intrinsic to the questions in a Statement of Questions may be preserved for review on appeal. In re Champlain Parkway SW Discharge Permit, No. 76-7-18 Vtec, slip op. at 8 (Vt. Super. Ct. Envtl. Div. Apr. 29, 2019) (Durkin, J.) (citing In re Jolley Assocs., 2009 VT 132, ¶ 9). The purpose of § 8504 must be kept in mind, which was to "require that an issue raised on appeal be identified or related to an issue identified in a comment to the Secretary while guarding against an overly technical approach to the preservation of issues for the purpose of appeal when interpreting whether an appeal satisfies [the statutory requirement]." 2015, No. 150 (Adj. Sess.), § 5b.

VNRC presented three comments during ANR's proceedings. VNRC provides these comments as Exhibit 1 to their Opposition. Comment III is entitled "Climate change is exacerbating CSO issues and [ANR] has not adequately addressed the impacts of CSOs in the NPDES permit for the Rutland Facility under the [Vermont Water Quality Standards]." VNRC Ex. 1 at 6. The comment then goes on to state that CSOs will continue at the WWTF after the Permit is issued and that the CSOs must be controlled, in part by additional conditioning. Id. at 6–7. The comment cites to specific Vermont statutory law, which notes compliance with applicable federal laws, and the Vermont Water Quality Standards. ANR responded to this comment, and referred to additional responses, stating that the CSOs were properly addressed through various means available to ANR and through the Permit, and the responses included the interrelation between CSOs, Long-Term Control Plans, and potentially applicable state and federal laws and standards. See ANR Attachment 1, Response #1, 2, 4, and 14 (incorporating Responses #1, 2 and 4).

This is the crux of the Questions before the Court: the sufficiency of the Permit to control CSOs and the potential need for additional conditioning to prevent such discharges pursuant to the laws applicable to the Permit and WWTF. A review of the comment and response shows that VNRC specifically raised concerns about the Permit's CSO conditions and the need for more stringent conditioning under relevant law. ANR was further aware of VNRC's position, as it relates to long-term control plans, ANR's CSO Rule, Vermont Water Quality Standards, and other relevant state and federal laws, as addressed by its responses to comments cited in its response to VNRC's comment.

Thus, we conclude that ANR has not demonstrated that the comments provided do not encompass the issues presented on appeal and the responses show that ANR generally understood that conditions related to CSOs pursuant to various aspects of applicable law, were raised before it.[8] Viewing all facts in a light most favorable to VNRC, we conclude that the public comments provided encompass the issues presented on appeal.

III. Joinder

ANR moves to dismiss this matter pursuant to V.R.C.P. 12(b)(7) on the grounds that Appellant has failed to join ten municipal wastewater treatment facilities that it asserts are necessary parties under V.R.C.P. 19(a)(2). This Court concludes that they are not.

Typically, the party requesting joinder under Rule 19 has the initial burden of persuasion. *G*rassy Brook Vill., Inc. v. Richard D. Blazej, Inc., 140 Vt. 477, 482 (1981) ("The moving party bears the burden of advancing a cogent argument on why the absent party is needed to prevent inconsistent or inadequate judgments."). Rule 19 "states pragmatic tests for determining when joinder of parties is necessary in order for the court adequately to dispose of the action and when, where joinder is necessary, the action should be dismissed in the absence of the parties who cannot be joined." Reporter's Notes, V.R.C.P. 19. The first step is to decide whether the absent parties are "necessary" pursuant Rule 19(a).

ANR's motion cites Rule 19(a)(2). Pursuant to this subpart, a necessary party is one who:

> [C]laims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the person's claimed interest.

V.R.C.P. 19(a)(2). Determining whether an absent-party is a necessary party in a case is a fact-specific inquiry that can only be determined in the context of each specific litigation. Rep. of

[8] To the extent that ANR argues that VNRC failed to identify which comment its appeal is based in, we conclude that VNRC complied with this provision. When challenged, VNRC identified Comment 3 as the comment it asserts encompasses its appeal and the statute does not specify a specific manner in which to identify the comment. Further, ANR correctly and easily identified the at-issue comment when challenging VNRC's appeal under § 8504(d)(2)(A). Thus, as the purpose of § 8504 was to require clear identification to issues on appeal, ANR was able to clearly identify the at-issue comment.

Philippines v. Pimentel, 553 U.S. 851, 863 (2008) ("[T]he issue of joinder can be complex, and determinations are case specific.").[9]

ANR asserts that the other municipal wastewater treatment facilities are subject to similar CSO oversight to the WWTF at issue here. Because of that, it argues that these wastewater facilities have a substantial or similar interest in the outcome of this action because the outcome of this appeal may potentially result in additional CSO-specific obligations on their individual facilities and their interest in limiting that potential cannot be protected if they don't participate in this appeal.

ANR has provided bald assertions that the other municipal wastewater treatment facilities have interests that must be protected by participation in this specific permit appeal.[10] Further, this is an appeal of a permit issued to the Rutland WWTF. The scope of this permit is limited to the Project as defined therein and the specific facts and circumstances relevant to this single WWTF. Effectively, ANR argues that, if a party has an interest that may be impacted by precedent by this Court ruling upon a specific permit it is a necessary party to the appeal of that specific permit. It has provided no citation to any law or precedent that would stand for the type of interest ANR alleges being grounds to conclude that the parties are, in fact, necessary here. If the standard was "impacted by precedent," land use litigation would be overrun by voluminous necessary parties.

Thus, joining these municipalities is not required. We, therefore, deny both ANR's motion to dismiss this matter pursuant to Rule 12(b)(7) and its alternative request to join necessary parties in this case.

Conclusion

For the foregoing reasons, we **DENY** ANR's motion. In so denying, we conclude that VNRC has standing to appeal to this Court and the scope of the issues presented are within the

[9] Because Vermont's Rule 19 is similar to the federal rule, Vermont courts have found federal case law persuasive. Reporter's Note Rule 19; Grassy Brooke Vill., 140 Vt. at 481.

[10] We further note that ANR has not represented that any municipality has expressed desire to participate in this appeal nor has any municipality independently presented such a position to this Court.

requirements of § 8504(d)(2)(A). Further, we conclude that this matter need not be dismissed for failure to join other municipal wastewater treatment facilities with similar CSO regimes.

Electronically signed this 28th day of July 2023 pursuant to V.R.E.F. 9(D)

Thomas G. Walsh, Judge
Vermont Superior Court, Environmental Division