

**VERMONT ENVIRONMENTAL BOARD**  
**10 V.S.A. §§ 6001-6092**

RE: OMYA, Inc.	Land Use Permit
61 Main Street	#1R0271-14-EB
Proctor, Vermont 05765	(Revocation Request)

**DISMISSAL ORDER**

The Conservation Law Foundation (CLF), petitioner in this revocation proceeding, requests that its petition be dismissed without prejudice. As set forth below, the Board grants this request.

**I. PROCEDURAL SUMMARY**

On October 13, 1998, the District #1 Environmental Commission (Commission) issued Land Use Permit #1R0271-14 (Permit), and accompanying Findings of Fact, Conclusions of Law, and Order (Decision), to OMYA, Inc. (OMYA). The Permit authorizes OMYA to build a 10,000 square-foot expansion on the previously permitted OMYA west plant, also known as the Verpol plant, in Florence, Vermont (Project).

On January 17, 2001, CLF filed a petition for revocation of the Permit with the Vermont Environmental Board (Board), pursuant to 10 V.S.A. § 6090(c) and Environmental Board Rule (EBR) 38(A), alleging that OMYA has violated Condition 4 of the Permit. Condition 4 of the Permit provides in part that OMYA "shall construct or cause to be constructed a rail line" pursuant to a certain Memorandum of Understanding by and among OMYA, CLF, and other parties to the proceeding.

On February 5, 2001, OMYA filed a response to CLF's petition, and a Motion to Dismiss. OMYA requested oral argument on the Motion to Dismiss. OMYA served its reply brief and its Motion to Dismiss on CLF on February 13, 2001.

On February 15, 2001, Board Chair Marcy Harding convened a Prehearing Conference with the following participants:

OMYA by Edward Van Schweibert, Esq.  
CLF by Mark Sinclair, Esq.  
Vermont Agency of Natural Resources (ANR) by Elizabeth Lord, Esq.  
Vermont Agency of Transportation (VTrans) by Michael Pologruto  
Vermont Agency of Commerce and Community Development (VACCD) by John Kessler, Esq., Jacob Humbert, Esq., and Colgate Selden.

On February 20, 2001, Chair Harding issued a Prehearing Conference Report and Order (PCRO). Among other things, the PCRO identified preliminary

issues and set them for oral argument and deliberations before the Board on Wednesday, March 21, 2001.

OMYA filed objections to certain portions of the PCRO on February 28, 2001.

On March 20, 2001, CLF and OMYA filed a Motion to Continue this revocation proceeding for sixty days.

Also on March 20, 2001, Chair Harding issued a Continuance Order granting the joint motion, and requiring that the parties file a status report on or before May 23, 2001. The Continuance Order also cancelled the oral argument and other events scheduled in the PCRO, pending further order of the Board or the Chair.

On May 23, 2001, the CLF and OMYA filed a Status Report and a second Request to Continue, requesting a continuance to September 3, 2001.

On May 25, 2001, the Chair issued a Second Continuance Order granting the second joint request to continue, and requiring that the parties file a status report on or before September 4, 2001.

On September 4, 2001, CLF and OMYA filed a Second Status Report and Renewed Request to Continue, requesting a continuance until December 3, 2001.

On September 6, 2001, the Chair issued a Third Continuance Order granting the third joint request to continue, and requiring that the parties file a status report on or before December 4, 2001.

On December 4, 2001, CLF filed a motion to withdraw its petition. OMYA filed a response in support of CLF's motion on December 10, 2001.

On January 2, 2002, Chair Harding issued a Chair's Proposed Dismissal Order. The Order stated that, unless a party filed an objection to the proposed dismissal on or before January 16, 2002, the Order would be binding on all parties and a final Dismissal Order would be issued.

On January 17, 2002, OMYA filed objections to the Chair's Proposed Dismissal Order. The Board deliberated on February 20, 2002.

## **II. DISCUSSION**

### **A. OMYA's Objections to Chair's Proposed Dismissal Order**

OMYA objects to the Chair's Proposed Dismissal Order, which it reads to indicate that CLF had standing to bring the revocation petition. OMYA had challenged CLF's standing, and raised other issues, in a motion to dismiss filed in February 2001. This case was continued at the parties' joint request, however, before the Board addressed these issues and others raised in OMYA's objections to the PCRO. The parties now agree that the petition should be withdrawn. Dismissal, as proposed by the Chair and ordered herein, renders OMYA's motion to dismiss and objections to the PCRO moot.

The Chair's Proposed Dismissal Order does not constitute a ruling on OMYA's motion to dismiss for lack of standing, nor does it otherwise rule on the issue of CLF's standing. It addresses dismissal of the petition, and OMYA's objection to CLF's request that the dismissal be granted without prejudice. Should CLF file a new petition for revocation of the Permit, nothing in the Chair's Proposed Dismissal Order or this Dismissal Order would preclude OMYA from raising the issue of CLF's standing in that proceeding. Therefore, OMYA's objections are overruled.

#### **B. CLF's Motion to Dismiss**

CLF seeks to withdraw its revocation petition, and asks that the Board dismiss the petition without prejudice. OMYA supports CLF's voluntary withdrawal of its revocation petition, but originally argued that any dismissal need not be without prejudice.

This matter has been continued at the parties' joint request several times, in order to allow time for negotiations. In its motion to withdraw, CLF states that there has been "some progress" on the issues raised in its petition, and that it would rather spend resources on resolving those issues than pursuing revocation. This is a valid reason for withdrawal, provided there is no prejudice to any party or other public interest that the Board is charged to protect. See, *Re: Marty Keene, Andre And Patricia Martel, #4C1025-EB* (Revocation), Dismissal Order at 1-2 (Jul. 10, 2001)(citing *Ronald L. Saldi, #5W1088-1-EB*, Memorandum of Decision at 3 (Oct. 1, 1996)(administrative agency has discretion to reject a withdrawal or dismissal of an appeal if it would prejudice the public interest that the agency is charged to protect); *Rockwell Park Associates and Bruce J. Levinsky, #5W0772-5-EB*, Dismissal Order (Feb. 17, 1994); *H.A. Manosh Corp., Declaratory Ruling #247* (Dec. 13, 1991)); see also, 10 V.S.A. § 6085(e)(board shall promote expeditious, informal and non-adversarial resolution of issues)); accord, EBR 16(D). The Board and district commissions are charged to protect and conserve the lands and environment of the state. 1969 Vt. Laws, No. 250 § 1 (Adj. Sess.). In this case, the permit will

remain in force, and any violation may furnish grounds for a new revocation proceeding by CLF, the Board, or any other party having standing under EBR 38(A). Moreover, OMYA concurs in CLF's request to withdraw. For these reasons, dismissal is appropriate.

The only remaining question is whether the matter should be dismissed with or without prejudice. CLF requests that the Board dismiss the petition without prejudice so that CLF may re-file the petition in the event that "substantial progress" is not made in negotiations in the "next few months." (CLF's Request to Withdraw, at 3.) OMYA argues that it is not necessary for the Board to dismiss this petition without prejudice, because the Board, "on its own, can protect the public interest that it, not CLF, is charged to protect." (OMYA's Response, at 2.)

While OMYA is correct that the Board is charged with protecting the public interest, certain others are permitted to bring petitions for revocation. EBR 38(A)(revocation petition may be brought by "any person who was a party to the application, by any adjoining property owner whose property interests are directly affected by an alleged violation, by a municipal or regional planning commission, or any municipal or state agency having an interest which is affected by the development or subdivision"). A dismissal with prejudice is treated as an adjudication of the case on its merits, and would bar the petitioner from bringing the same action again in the future. *See, Littlefield v. Town of Colchester*, 150 Vt. 249, 251 (1988)(dismissal with prejudice tantamount to concession on the merits). The fact that the Board may bring its own revocation petition to protect the public interest does not require that this petition be dismissed with prejudice.

The Vermont Rules of Civil Procedure (VRCP), while not binding upon the Board, provide useful guidance here. *See, Glass v. Delaware & Hudson RR Co.*, 135 Vt. 419 (1977)(cited in *Re: Vermont Integrated Waste Solutions and Meridian Group*, Air Toxic Permit Application AP-91-013-WFP, Dismissal Order at 1 (Dec. 16, 1992)(rules of civil procedure do not bind administrative agencies)); *see also, City of Barre v. Town of Orange*, 139 Vt. 437 (1981)(in cases of voluntary dismissal, the court has discretion to dismiss with or without prejudice). Voluntary dismissal is governed by VRCP 41(a), which in relevant part allows a party bringing a civil action to dismiss that action without prejudice, one time. As the Reporter's Notes state, VRCP 41(a) "limits plaintiff's right to dismiss without prejudice by providing that, where plaintiff has once dismissed, a second dismissal . . . operates as an adjudication upon the merits." Reporter's Notes to VRCP 41(a).

In *Vermont Integrated Waste Solutions*, the Board's Waste Facility Panel applied this rule to hold that voluntary dismissal of an appeal should not have

the same preclusive effect as an adjudication on the merits. *Vermont Integrated Waste Solutions*, Dismissal Order at 1. The Panel's reasoning in that appeal is persuasive in this revocation proceeding. *Cf. Re: Vermont Institute of Natural Science, #3W0441-EB* (Revocation Petition), Dismissal Order at 2 (Feb. 16, 2000)(dismissing with prejudice revocation proceeding withdrawn at petitioner's request pursuant to stipulation of parties).

The fact that this is a revocation request rather than an appeal, as in *Vermont Integrated Waste Solutions*, does not weigh against application of VRCP 41(a). To the contrary. A revocation proceeding based on alleged violations is an enforcement mechanism which has no filing deadline, unlike an appeal. See, EBR 40(A)("An appeal shall be filed with the board within 30 days after the date of the decision of the commission.") The parties in this revocation proceeding have been engaged in settlement negotiations for months, and have been granted several continuances to facilitate the settlement process. Providing CLF one opportunity to withdraw its petition without prejudice will allow it to focus its resources on settlement negotiations rather than the contested case. Should CLF re-file all or part of the same petition, and then seek to withdraw that petition, then that dismissal would operate as an adjudication on the merits. Applying VRCP 41(a), as adopted in *Vermont Integrated Waste Solutions*, is both fair and practical in this case. It also helps promote the "informal and non-adversarial resolution of issues," consistent with 10 V.S.A. § 6085(e) and EBR 16(D).

Accordingly, this petition is dismissed without prejudice.

### III. ORDER

1. OMYA's objections to the Chair's Proposed Dismissal Order are OVERRULED.
2. CLF's Motion to Dismiss is GRANTED. This petition for revocation is DISMISSED without prejudice.

DATED at Montpelier, Vermont this 21st day of February, 2002.

ENVIRONMENTAL BOARD

/s/Marcy Harding  
Marcy Harding, Chair  
John Drake  
Samuel Lloyd  
W. William Martinez  
Alice Olenick\*  
A. Gregory Rainville  
Jean Richardson  
Don Sargent

\* Board member Alice Olenick was unable to participate in the February 20, 2002 deliberations, but has reviewed and joins in the Board's decision.