

**State of Vermont  
WATER RESOURCES BOARD**

**Re: Markowski Quarry Ponds  
Town of Brandon, Vermont**

**Docket No. WET-01-01**

**ADMINISTRATIVE DETERMINATION**

Markowski Excavating, Inc. (Markowski), through its consultant, A.T. Stout Land Use Consulting, petitions the Water Resources Board (Board) to reclassify two wetlands in the Town of Brandon, Vermont from Class Two to Class Three, pursuant to the Board's authority under 10 V.S.A. §§ 905(7)-(9) and Section 7 of the Vermont Wetland Rules (VWR).

As explained below, the Board determines that the subject wetlands (Markowski Quarry Ponds) are not significant wetlands and therefore should be reclassified from Class Two to Class Three.

**I. PROCEDURAL HISTORY**

Markowski filed its wetland reclassification petition with the Board on February 16, 2001. On February 23, 2001, the Board's Executive Officer determined that Markowski's petition had been filed in substantial compliance with VWR § 7 and the Board's Rules of Procedure. On that same date, the Board docketed the filing, and the Board's Executive Officer sent Markowski a letter of acknowledgment.

The petition includes various correspondence from Peter Keibel, District Wetlands Ecologist with the Wetlands Office of the Vermont Agency of Natural Resources (ANR), to Markowski. That correspondence indicates that Mr. Keibel had visited the site and worked with Markowski on the site's wetland management issues. Mr. Keibel's letters support reclassification of the Markowski Quarry Ponds from Class Two to Class Three.

Review of the petition, including Mr. Keibel's letters, raised some questions about whether the Markowski Quarry Ponds are wetlands at all. Accordingly, pursuant to section 808 of the Vermont Administrative Procedure Act, 3 V.S.A. § 808 (1995), and Board Rule of Procedure 16(B), the petition was initially treated as both a petition to reclassify the Markowski Quarry Ponds from Class Two to Class Three and as a petition in the alternative for a declaratory ruling that the Markowski Quarry Ponds are not wetlands. Under Board Rules of Procedure 16(B) and 17, a petition seeking the reclassification of wetlands is reviewed as an administrative determination, whereas a petition for a declaratory ruling is reviewed as a contested case.

The Executive Officer's February 23, 2001, acknowledgment letter advised that the reclassification and the declaratory-ruling cases would be treated together. In that letter, the Board's Executive Officer encouraged Markowski to provide the Board with credible supplemental information sufficient to enable the Board to determine whether or not the Markowski Quarry Ponds are wetlands. The acknowledgment letter pointed to the methodology

for identifying wetlands in VWR § 3.2 and the definitions of hydrophytic vegetation, hydric soils, and wetland hydrology in VWR § 2.

In its petition, Markowski represented pursuant to VWR § 7.2(e) that no other persons own property within or adjacent to the subject wetlands and their buffer zones. On February 23, 2001, the Board provided personal notice of the petition to persons required to receive notice pursuant to VWR §§ 7.3 and 7.4. In addition, the Board published notice of the petition in the *Rutland Herald* on February 27, 2001. Pursuant to VWR § 7.4.a, the Board provided 30 days from the date of written notice of the proposed reclassification to file written comments or to request a hearing.

The deadline to file written comments or to request a hearing (or both) was March 29, 2001. No comments were filed, and no person requested a hearing. Accordingly, the Board did not hold a hearing in this matter.

On March 30, 2001, the Board received a letter from Peter Keibel, in which he advised as follows:

The subject quarry ponds on the Markowski property in Brandon possess the characteristics of a wetland as defined in the Vermont Wetland Rules. The functions and values of the quarry ponds do not rise to the level of significance that warrant protection under the State Rules. Therefore we support the petition to reclassify the quarry ponds from Class Two to Class Three.

At its regular meeting on April 3, 2001, the Board deliberated with respect to Markowski's petition. The Board's deliberations were based solely on the information in the petition and the March 30, 2001, letter from Peter Keibel. As set forth herein, the Board grants Markowski's petition for reclassification. The question of whether the Board should issue a declaratory ruling that the quarry ponds are not wetlands is thereby rendered moot. Accordingly, the Board determines nunc pro tunc that the petition is not a request for a declaratory ruling and that the Board's initial treatment of the petition as such is null and void.

## **II. FINDINGS OF FACT**

1. The Markowski Quarry Ponds are located in the Town of Brandon, south of the village, in an existing sand and gravel pit on the west side of U.S. 7, opposite the intersection of McConnell Road, and about 3/4 mile north of Otter Valley Union High School.
2. Vermont Significant Wetland Inventory (VSWI) Map 15D denotes the Markowski Quarry Ponds as permanent open water palustrine wetlands (POWZ). (Markowski's petition

includes a copy of the area of the VSWI map depicting the Markowski Quarry Ponds. A copy of that map is attached.)

3. One of the Markowski Quarry Ponds is 4/10ths of one acre. The other is 1/10th of one acre.
4. The Markowski Quarry Ponds are remnants of former sand quarry excavations. Excavation of these areas last occurred in the 1950s, and the resulting pits have since filled with water. The resulting ponds lack well-developed soil layers, significant shallow areas that could support emergent plants, or other significant wetland vegetation.
5. Markowski intends to dredge the sand and gravel in the area that includes the Markowski Quarry Ponds, leaving a thirteen-acre lake from twenty to forty feet deep.
6. The petition evaluates the Markowski Quarry Ponds with regard to each of the ten functions identified in VWR § 5. These wetlands do not serve any of those functional criteria:
  - 1) The Markowski Quarry Ponds are not significant for the storage of flood water or storm water. They are not part of the natural drainage system, they receive little surface runoff from the surrounding landscape, and they have no outlets.
  - 2) Because they receive little drainage from the surrounding landscape and contain little vegetation for the filtration and absorption of nutrients, the Markowski Quarry Ponds are not significant for surface and ground water protection.
  - 3) The Markowski Quarry Ponds, which are isolated from surface streams and contain no known fisheries, do not constitute significant fisheries habitat.
  - 4) The Markowski Quarry Ponds contain little vegetative growth that would support significant breeding or forage habitat for wildlife or migratory birds. Although water fowl could use the open water for resting, it is not significant for that function.
  - 5) Dredging the Markowski Quarry Ponds will not affect significant hydrophytic vegetation.
  - 6) The Markowski Quarry Ponds do not constitute significant habitat for threatened or endangered species, none of which are known to use these wetlands.
  - 7) The Markowski Quarry Ponds are of no significant scientific or educational value.

- 8) Due to their small size, the Markowski Quarry Ponds offer no significant recreational value or economic benefit.
- 9) The Markowski Quarry Ponds are not visible from outside the sand and gravel pit and therefore provide no significant value for open space or aesthetics.
- 10) Finally, all drainage will continue to flow into the sand and gravel pit, which is substantially lower than the surrounding areas and which has no outlet. The Markowski Quarry Ponds therein consequently serve no significant function for erosion control.

### III. CONCLUSIONS OF LAW

In a recent decision that reclassified a wetland from Class Two to Class Three, the Board outlined Vermont's wetland classification system:

The Board has the power and duty to identify and protect significant wetlands through rule making and by acting on petitions or on its own motion to designate specific wetlands as significant. 10 V.S.A. §§ 905(7)-(9). The determination that a particular wetland is significant must result from an evaluation of at least the criteria set forth in 10 V.S.A. § 905(7). The Board has implemented its rule-making authority to identify and protect significant wetlands through the adoption of the VWR. Section 5 of the VWR enumerates detailed factors to be considered in the analysis of whether a wetland is significant.

Under Section 4.1 of the VWR, Class One wetlands are "exceptional or irreplaceable . . . and are therefore so significant that they merit the highest level of protection." VWR § 4.1.a. Class Two wetlands, while not as ecologically significant as Class One wetlands, are nevertheless significant enough to merit protection. VWR § 4.1.b. Class Three wetlands are "determined not to be sufficiently significant to merit protection." VWR § 4.1.c. A mapped wetland is presumed to be a Class Two wetland, unless determined to be otherwise by the Board. VWR § 4.2.b. Class Two wetlands are presumed, unless the Board determines otherwise, to serve all the functions specified in Section 5 of the VWR. VWR § 4.2.b(2).

Administrative Decision (Vt. Water Res. Bd. March 25, 1992) (reclassifying fire pond from Class Two to Class Three wetland)).

Upon receipt of a petition from an affected landowner, the Board may reclassify a wetland to a lower classification. VWR §§ 4.4, 7.1. The Board will reclassify wetlands from Class Two to Class Three where the wetlands do not serve any of the ten wetland functions described in VWR § 5. See Re: Hogback/Hollister Wetland, No. WET-90-05, Administrative Decision at 2-4 (Vt. Water Res. Bd. July 23, 1991) (reclassifying from Class Two to Class Three wetlands failing to serve any functional criteria of VWR).

The Markowski Quarry Ponds appear on VSWI Map 15D. However, the Board concludes that these wetlands are not so significant that they merit protection. The Board reaches this conclusion on the basis of the uncontroverted evaluation of the wetlands' functions performed by Markowski. That evaluation is credible in that it thoroughly investigated the functions of the wetlands according to the criteria specified in the VWR and in that it was supported by ANR's Wetlands Office.

#### **IV. ORDER**

The Markowski Quarry Ponds, two wetlands located in the Town of Brandon, currently classified as Class Two wetlands, are hereby reclassified to Class Three wetlands. The Wetlands Office shall update the VSWI map containing these wetlands to show the reclassifications.

Dated at Montpelier, Vermont this 9th day of May, 2001.

WATER RESOURCES BOARD

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David J. Blythe, Chair

Concurring:  
Lawrence H. Bruce, Jr., Member  
Jane Potvin, Member  
John D. E. Roberts, Vice Chair  
Mardee Sánchez, Member