

**State of Vermont
WATER RESOURCES BOARD**

**Re: Burlington Country Club
City of Burlington, Vermont**

Docket No. WET-01-08DR

DECLARATORY RULING

Burlington Country Club (BCC) petitions the Water Resources Board (Board) to issue a declaratory ruling that two golf-course water hazards, known as the Upper Pond and the Lower Pond, in the City of Burlington, Vermont, and identified as wetlands on the Vermont Significant Wetland Inventory (VSWI) maps, are not wetlands. The Board determines pursuant to 3 V.S.A. § 808 (1995), 10 V.S.A. § 905(7) (1999), and Board Rule of Procedure 16(B) that the Upper Pond and the Lower Pond are not wetlands within the meaning of the Vermont Wetland Rules (1990) (VWR) and that the VSWI maps should be updated accordingly. The Board does not determine whether or not a wetland adjacent to the Upper Pond should be reclassified from Class Two to Class Three because BCC's request that the Board do so was not included in its petition and did not comply with the notice requirements of the VWR.

I. PROCEDURAL HISTORY

BCC filed its petition for a declaratory ruling with the Board on August 23, 2001. On September 17, 2001, the Board's Executive Officer determined that the petition had been filed in substantial compliance with the Board's Rules of Procedure, docketed the petition, and sent BCC a letter of acknowledgment. The letter of acknowledgment advised that although the petition included a certification of support signed by wetland biologist April Moulart from the Wetlands Office of the Agency of Natural Resources (ANR), neither the Wetlands Office nor a qualified wetland consultant provided documentation of having visited the site or the basis for determining that the areas in question do not include wetlands. The letter of acknowledgment therefore encouraged BCC "to file credible documentation sufficient to enable the Board to determine whether or not the golf-course ponds at issue are wetlands."

Under Board Rule of Procedure 16(B), a petition for a declaratory ruling is reviewed as a contested case. BCC's petition identified the persons whose interests may be affected by issuance of the relief requested, as required by Board Rule of Procedure 16(B)(2). On September 17, 2001, the Board provided personal notice of the petition to persons required to receive notice pursuant to Board Rule of Procedure 22. In addition, the Board published notice of the petition in Seven Days on September 19, 2001. In conformance with Board Rule of Procedure 22, the Board provided at least 7 days from the issuance of written notice for interested persons to file written comments or to request a hearing.

The deadline to file written comments or to request a hearing (or both) was October 5,

2001. No comments were filed, and no person requested a hearing. Accordingly, the Board did not hold a hearing in this matter.

On October 16, 2001, BCC filed a letter with the Board from its consulting ecologist, Jeffrey Severson. Mr. Severson's letter summarized his wetland evaluation of the Upper Pond and Lower Pond. Mr. Severson visited BCC's golf course on October 4, 2001, and investigated the soils, hydrology, and vegetation of the areas in question. Mr. Severson concluded that "The Upper Pond and Lower Pond do not meet the three-parameter definition of a wetland within the meaning of the Vermont Wetland Rules." During his visit, Mr. Severson also located an area that he described in his letter as a "potential wetland" comprising about 200 square feet immediately up slope from the northern end of the Upper Pond. Mr. Severson's letter concluded that this area merits reclassification from a Class Two to a Class Three wetland because it is not significant for any of the wetland functions described by the VWR.

At its regular meeting on October 30, 2001, the Board deliberated with respect to BCC's petition. The Board's deliberations were based on the information in the petition and the October 16, 2001, letter of support from BCC's consulting ecologist. As set forth herein, the Board grants the petition for a declaratory ruling by declaring that the Upper Pond and the Lower Pond at BCC's golf course are not wetlands within the meaning of the VWR. However, the Board does not determine whether or not the area of approximately 200 square-feet immediately to the north of the Upper Pond should be reclassified from Class 2 to Class 3 because neither the petition nor the notice of the petition included that request.

II. FINDINGS OF FACT

1. The Upper Pond and the Lower Pond are water hazards located on BCC's golf course in the City of Burlington. The Upper Pond is located near the third hole and twelfth tee. The lower pond is located near the fourth and thirteenth holes.
2. VSWI map 13A denotes the Upper Pond and the Lower Pond as palustrine open-water intermittently exposed/permanent wetlands (POWZ). (The petition includes an aerial photograph of the area including the Upper Pond and Lower Pond. A copy of that photograph is attached.)
3. The Upper Pond and the Lower Pond lack wetland hydrology, wetland soils, and wetland vegetation.
4. Wetland biologist April Moulaert from ANR's Wetlands Office concurs with BCC and BCC's consulting ecologist that the Upper Pond and the Lower Pond do not constitute wetlands under the VWR.

III. CONCLUSIONS OF LAW

In Re: Lime Kiln Quarries, No. WET-01-04DR, Declaratory Ruling at 2-3 (Vt. Water Res. Bd. July 11, 2001), the Board recently set forth its legal authority to declare that areas mapped as wetlands on the VSWI maps are not wetlands subject to regulation under the VWR:

The Board has the power and duty to protect significant wetlands. See 10 V.S.A. §§ 905(7)-(9). Under the VWR, an area identified as a wetland on the VSWI maps is presumed to be a significant wetland. VWR § 4.2.b. However, not all areas designated as wetlands on the VSWI maps are in fact wetlands within the jurisdiction of the VWR. Re: Shirley Urie, No. WET-96-04DR, Decision at 2 (Vt. Water Res. Bd. Jan. 8, 1997). To be considered a wetland under the [VWR], an area must be characterized by hydric soils, hydrophytic vegetation, and wetland hydrology. See VWR § 3.2.a. See also VWR §§ 2.14, 2.15, 2.29, 2.31 (defining hydric soils, hydrophytic vegetation, wetlands, and wetland hydrology, respectively).

The Board has the authority to issue declaratory rulings as to the applicability of laws within its jurisdiction. See 3 V.S.A. § 808 (1995), Board Rule of Procedure 16(B). The Board's authority to issue declaratory rulings extends to declaring that a particular body of water or other feature identified as a wetland on the VSWI maps is not a wetland. Re: Stanley Gawet (Marble Quarry), No. WET-95-03DR, Decision (Vt. Water Res. Bd. Feb. 15, 1996); Re: Gold Stone Marble Co. Quarry, No. WET-91-03DR, Decision (Vt. Water Res. Bd. Oct. 30, 1991).

The Upper Pond and the Lower Pond appear on VSWI map 13A. However, the Board concludes that these ponds are not wetlands. The Board reaches this conclusion on the basis of the uncontroverted evaluation of the ponds performed by BCC, through its consultant, Jeffrey Severson. That evaluation is credible in that it investigated the ponds according to the criteria for identifying wetlands specified in the VWR and because the evaluation was supported by ANR's Wetlands Office.

Under the VWR, "All wetlands shown on the National Wetlands Inventory maps for the State of Vermont (1978) . . . , and all wetlands contiguous to such mapped wetlands, are presumed to be class Two wetlands, unless determined otherwise by the Board . . . as provided for in these rules" VWR § 4.2b. The Board is authorized to reclassify a wetland from Class Two to Class Three, thereby eliminating protection of the wetland under the VWR. See Re:

Crystal Haven Road, No. WET-00-06, Order Reclassifying Wetland from Class Two to Class Three (Vt. Water Res. Bd. Jan. 2, 2001). The letter from BCC's consultant that BCC filed with the Board on October 16, 2001, suggested that an area of about 200 square feet adjacent to the Upper Pond merits reclassification from Class Two to Class Three. However, BCC's petition did not request the Board to take that action, see VWR § 7.2, and notice of this reclassification request was not provided. See VWR § 7.4. Accordingly, the Board does not in this decision determine whether or not to reclassify the wetland adjacent to the Upper Pond from Class Two to Class Three.

IV. ORDER

It is hereby Ordered:

1. The Upper Pond and the Lower Pond, located in the City of Burlington on BCC's golf course, currently classified as significant wetlands, are hereby declared not to be wetlands within the meaning of the VWR. The Wetlands Office shall update the VSWI map accordingly.
2. BCC's request that a wetland of approximately 200 square-feet immediately to the north of the Upper Pond be reclassified from Class Two to Class Three is denied without prejudice.

Dated at Montpelier, Vermont this 30th day of October, 2001.

WATER RESOURCES BOARD

/s/ David J. Blythe

David J. Blythe, Chair

Concurring:

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