

**State of Vermont
WATER RESOURCES BOARD**

**Re: New England Container Company
Town of Swanton, Vermont
Docket No. WET-01-05**

ADMINISTRATIVE DETERMINATION

This decision pertains to a petition filed by New England Container Company (“Petitioner” or “NECC”) with the Water Resources Board (“Board”), seeking reclassification of wetlands located primarily on Petitioner’s real property from Class Two to Class Three, pursuant to 10 V.S.A. §905(7) to (9) and Section 7 of the Vermont Wetland Rules (“VWR”). The wetlands are located between Jonergin Drive and Vermont Route 78 in the Town of Swanton, Vermont (“subject wetlands”).

As explained below, the Board concludes that the subject wetlands are not significant wetlands and therefore it reclassifies the wetlands from Class Two to Class Three.

I. PROCEDURAL HISTORY

The petition was filed on July 2, 2001, by Petitioner’s consultant, Peter W. Spear of Natural Resource Consulting Services, Grand Isle, Vermont.

On July 3, 2001, the Board’s Executive Officer determined that Petitioner’s filing was in substantial compliance with VWR § 7 and the Board’s Rules of Procedure, and docketed the reclassification request as WET-01-05. In his letter acknowledging receipt of the petition, the Executive Officer advised Petitioner’s consultant that, while the petition was substantially complete, additional information was needed to document the consultant’s authority to represent the Petitioner and to verify the size and locations of the wetlands subject to the reclassification request. The Executive Officer set a deadline of July 18, 2001, for the filing of this supplemental information.

On July 3, 2001, a Notice of Petition was sent to all persons required to receive notice pursuant to VWR §§ 7.3 and 7.4. The Notice of Petition was published by the Board in the *St. Albans Messenger* on July 5, 2001. The Notice of Petition set a deadline of August 17, 2001, for the filing of any written comments or requests for hearing or both, pursuant to VWR § 7.4. The Notice of Petition further provided that if a hearing was requested by the above deadline, such hearing would be held on August 28, 2001, at 1:00 p.m. at the Village of Swanton Auditorium, Swanton Municipal Offices, Swanton, Vermont.

On July 10, 2001, the Petitioner filed a memo authorizing Natural Resource Consulting Services to represent it in the pending wetland reclassification proceeding. On July 12, 2001,

Petitioner's consultant filed the additional supplemental information requested by the Board's Executive Officer. On July 16, 2001, Petitioner's consultant sent a letter confirming service of the above supplemental information to persons listed on the Board's certificate of service.

On August 14, 2001, Padraic Monks, Environmental Analyst for the Water Quality Division, Department of Environmental Conservation ("DEC"), Agency of Natural Resources, filed formal comments concerning the merits of the petition. The DEC did not oppose the petition, but questioned some of the representations made by the Petitioner's consultant in support of the reclassification request and the relevancy of one of its submissions.¹ The DEC did not request a hearing in this matter.

No other written comments were filed by the August 17, 2001, deadline, nor did any person request a hearing. Accordingly, persons listed on the Board's service list were advised by staff memorandum on August 22, 2001, that no public hearing would be convened in this matter.

The Board considered the petition in deliberations at its regular meeting on August 28, 2001 in Morrisville, Vermont. Representing the Petitioner and present to answer the questions of the Board were Roland B. Devost, President of NECC, and Peter W. Spear, by phone. The Board continued its deliberations to its regular meeting on September 18, 2001, and instructed the Petitioner's consultant to file with the Board a map, based on an orthophotograph, showing the entirety of the larger of the two wetlands for which reclassification is sought and identifying the other real properties within or adjacent to this wetland.

On September 5, 2001, the Board's staff issued a memorandum providing the Petitioner with further guidance concerning the supplemental information and map to be submitted to the Board. On September 6 and 12, 2001, the Petitioner's consultant filed copies of the requested maps and information.

The Board reviewed the supplemental filing on September 18, 2001, and, based on this and other submissions in the petition file, voted unanimously to grant Petitioner's reclassification request.

¹ DEC specifically objected to the characterization and relevancy of a letter submitted to the Board by the Petitioner. This letter, dated April 15, 1997, was from DEC staff member Karen Bates to Petitioner's consultant regarding the classification of a wetland on Vermont Fasteners Manufacturing Company's real property on the opposite side of Jonergin Drive from NECC's real property. The Board agrees with the DEC that this letter is not germane. The Board therefore declines to base its reclassification determination on the facts set forth in this letter.

Accordingly, as discussed in more detail below, the Board determines that the subject wetlands lack significance for all ten of the wetland functions identified in VWR §5. Therefore, the Board concludes that reclassification of the subject wetlands from Class Two to Class Three is warranted and it so orders.

II. FINDINGS OF FACT

1. NECC owns two adjacent lots, Lots #3 and #4, in the Swanton Industrial Park off Jonergin Drive in the Town of Swanton, Vermont. The subdivision of these two lots was authorized by an Act 250 permit issued in 1976.
2. There are two Class Two wetlands located on NECC's real property. They appear as part of a wetland polygon, in association with other wetland polygons, on the National Wetland Inventory ("NWI") map for this portion of the Town of Swanton, NWI Map # 11A.
3. The smaller of the two wetlands is located entirely within Lot #4 and is bounded on the southwest by Jonergin Drive ("small wetland"). It is isolated from the other wetland on the lot by upland. The small wetland is estimated to be between 1,200 and 1,220 square feet in area. See Exhibit A.
4. The larger of the two wetlands has been ditched. It extends along the northeasterly boundary of Lots #3 and #4 and is primarily located on these lots ("large wetland"). The large wetland is bounded on the northwest by Jonergin Drive and extends in a south-easterly direction. The estimated area of the large wetland within Lots #3 and #4 is 76,665 square feet. See Exhibit A.
5. In addition to being located on the real property owned by NECC, the large wetland involves approximately 11,400 square feet of real property owned by other persons, including residential properties along Vermont Route 78 and to the southeast of Lot #4. Specifically, those persons owning property within or adjacent to the large wetland and its buffer zone are: Stephen and Joanne Fernandez; Pierre Rheauric; Richard Laroche; Anne Lamphere; Warren and Gloria Fournier; James and Joyce Crannie; and Robert and Ruth Thomas. See Exhibit B. These persons received notice of the petition and filed no comment with respect to NECC's requested reclassification.
6. Cumulatively, the area of the two wetlands within NECC's real property totals approximately 77,885 square feet or 1.79 +/- acres.

7. The subject wetlands are seasonally saturated. The source of the hydrology for the subject wetlands is a combination of surface and ground water, but primarily surface water. The large wetland drains toward Vermont Route 78 through two or three ditches and culverts, eventually discharging into the Mississquoi River. Due to years of road construction and other development, the two wetlands are no longer hydrologically connected to the waters of adjacent wetlands.
8. The subject wetlands are identified on NWI Map #11A as PFO1A: palustrine, forested, broad-leaved deciduous; with a temporary water regime.
9. The subject wetlands and their buffer zones have been disturbed in recent years. Although some disturbance may be attributable to former agricultural use of the area and other development in the Swanton Industrial Park, such as the construction of Jonergin Drive, most recently the owners of Lots #3 and #4 have cut trees, filled and graded portions of the wetlands, and maintained the large wetland as a drainage ditch through periodic excavation.
10. The DEC staff conducted site visits of the subject wetlands on April 26, 2000 and April 27, 2001, and evaluated them with regard to each of the ten functions identified in VWR §5. Based on field observations, a review of neighboring sites, and a review of aerial photographs, DEC staff concluded that the subject two wetlands are not contiguous with other Class Two wetlands in the area of the Swanton Industrial Park and that the two wetlands do not have any significant wetland functions or values.
11. The Board finds, based on the Petitioner's submissions and DEC's evaluation, that the small and large wetlands do not serve any of the ten functions identified in VWR §5 at a significant level.
12. Function 5.1 (Water storage for flood water and storm runoff) - The drainage area of the subject wetlands is less than one percent of the watershed. The large wetland and its small tributaries are ditched, greatly reducing the residence time of all incident waters. Thus, the subject wetlands are not significant for the temporary storage of floodwater or stormwater runoff to the extent that they make an important contribution to reducing risks to public safety or damage to public or private downstream property or by enhancing the stability of habitat for aquatic life.
13. Function 5.2 (Surface and ground water protection) - The subject wetlands do not significantly contribute to the protection or enhancement of the quality of surface or of

ground water. Because the large wetland is ditched, surface waters run off it too quickly to reduce levels of contaminants, or otherwise protect or enhance water quality through chemical action, removal of nutrients, or retention and removal of sediments or organic matter. The ground waters in the area of NECC's real property are overlain by a dense till layer, thereby prohibiting movement of surface water to aquifers. Thus, the subject wetlands are not significant for ground water protection.

14. Function 5.3 (Fisheries habitat) - The subject wetlands are seasonally saturated and therefore no fisheries habitat is present.
15. Function 5.4 (Wildlife and migratory bird habitat) - The subject wetlands are very small and do not have extensive high-quality wetland vegetation or a naturally vegetated buffer zone to support wetland dependent wildlife, nor do they meet four or more conditions indicative of wildlife habitat diversity. Moreover, the wetlands are located within an operating and nearly built-out industrial park, bounded by single-family homes, and therefore the site is largely subject to human disturbance. Thus, the subject wetlands are not significant for wildlife and migratory bird habitat.
16. Function 5.5 (Hydrophytic vegetation habitat) - The subject wetlands do not provide significant hydrophytic vegetation habitat. The wetlands are not bogs, fens, alpine peat lands or black gum swamps. They are not important wetland community types. They do not contain disjunct rare plant populations or plant species at their range limits. Indeed, native plants, soils and hydrology have been disturbed on Lots #3 and #4, with the result that purple loosestrife, Japanese knotweed, and Giant reed grass are now present in the subject wetlands.
17. Function 5.6 (Threatened and endangered species habitat) - There is no documentation of rare, threatened, or endangered species at these wetlands, nor do the wetlands have important habitat to support any known occurrence of rare, threatened, or endangered species on Lots #3 and #4.
18. Function 5.7 (Education and research in the natural sciences) - The subject wetlands have no significance for education and research in the natural sciences. The area is not publicly owned nor are the wetlands readily accessible to the public.
19. Function 5.8 (Recreational value and economic benefits) - The subject wetlands do not provide substantial recreational value or economic benefits. Given their inaccessibility to the public and close proximity to industrial uses and single-family homes, the wetlands are not significant for this function.

20. Function 5.9 (Open space and aesthetics) - The subject wetlands cannot be readily observed by the public from a public road or right-of-way. They do not provide special or unique aesthetic qualities as open space. The wetlands themselves are not prominent as distinct features in the surrounding landscape. Thus, the subject wetlands are not significant for open space and aesthetics.
21. Function 5.10 (Erosion control through binding and stabilizing the soil) - The subject wetlands do not provide an erosion control function as there are no erosive forces present in or adjacent to the wetland.

III. CONCLUSIONS OF LAW

The Board may determine whether to reclassify any wetland to a higher or lower classification. VWR §§ 4.4 and 7.1. It may do so upon receipt of a petition from an affected landowner. VWR §7.1. NECC qualifies as such a landowner.

A wetland appearing on a National Wetlands Inventory map for the State of Vermont (1978) is presumed to be a Class Two wetland on the Vermont Significant Wetland Inventory (“VSWI”), unless determined otherwise by the Board. VWR §4.2; §4.5a; § 7. The subject two wetlands appear on NWI Map #11A and therefore are presumed to serve all ten wetland functions specified in VWR §5 at a level so significant as to merit state protection as Class Two wetlands until determined otherwise by the Board pursuant to VWR § 7.

A Class Three wetland, on the other hand, is a wetland “determined not to be sufficiently significant to merit protection” under the VWR. VWR § 4.1.c. The Board may determine that a mapped, Class Two wetland is not sufficiently significant to merit protection under the VWR based on an evaluation of that wetland’s functions. If the Board concludes that the wetland does not serve any of the ten functions at a significant level, it may reclassify the Class Two wetland to a Class Three wetland. See Re: Crystal Haven Road Wetland, Docket No. WET-00-06, Decision and Order Reclassifying Wetland (Jan. 2, 2001); Re: Hogback/ Hollister Wetland, Docket No. WET-90-05, Administrative Determination (July 23, 1991).

The Board has considered the uncontroverted evaluation of the wetland functions performed by the Petitioner’s consultant and by staff at DEC and concludes that the subject wetlands are not significant wetlands meriting protection under the VWR. Accordingly, the Board determines that the subject wetlands should be reclassified from Class Two to Class Three and that the Wetlands Office, DEC, should remove the subject wetlands from the VSWI. The DEC should refer to Exhibits A and B in determining the location of the reclassified wetlands.

IV. ORDER

It is hereby ordered:

1. The subject two wetlands in the Town of Swanton are Class Three wetlands; and
2. The Wetlands Office, DEC, is directed to remove the subject wetlands from the VSWI (NWI Map #11A).

Dated at Montpelier, Vermont, this 18th day of September, 2001.

WATER RESOURCES BOARD

/s/ David J. Blythe

David J. Blythe, Chair

Concurring:

Jane Potvin

John D.E. Roberts

Mardee Sánchez

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