

**State of Vermont
WATER RESOURCES BOARD**

**Re: Town of West Rutland
West Rutland, VT 05777
Docket No. WET-02-03**

ADMINISTRATIVE DETERMINATION

This decision pertains to a petition filed by the Town of West Rutland with the Water Resources Board (“Board”), seeking reclassification of a wetland located on property owned by the Town of West Rutland in the Town of West Rutland, Vermont, from Class Two to Class Three, pursuant to 10 V.S.A §§ (7) - (9) and Section 7 of the Vermont Wetland Rules (“VWR”). The subject wetland is a man-made pond located on Town property at the end of Fairview Avenue, south of West Rutland, Vermont. As explained below, the Board concludes that the wetland is not a significant wetland and therefore reclassifies the wetland from Class Two to Class Three.

I. PROCEDURAL HISTORY

The petition was filed on June 27, 2002, by Tom Yennerell, the Town Manager of the Town of West Rutland.

On July 1, 2002, the Board’s Executive Officer determined that the Town of West Rutland’s petition was in substantial compliance with VWR § 7 and the Board’s Rules of Procedure, and he docketed the petition as WET-02-03. On that same day, 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 in the *Rutland Herald* on July 2, 2002. The Notice of Petition set a deadline of August 2, 2002, for the filing of any written comments or requests for hearing or both, pursuant to VWR § 7.4.

On July 1, 2002, Shannon Morrison, Wetlands Ecologist for the Department of Environmental Conservation, Agency of Natural Resources (“ANR”) filed a letter with the Board, indicating that ANR supports the reclassification request. On July 15, 2002, Ms. Morrison filed another letter with the Board, clarifying ANR’s position and providing supplemental information. No other written comments were filed by the August 2, 2002, deadline, nor did any person request a hearing. Accordingly, the Board did not hold a public hearing in the matter, but instead considered the petition in deliberations on August 6, 2002, based solely on the information filed by the Town of West Rutland and the ANR.

As discussed in more detail below, the Board determines that the man-made pond located on the Town of West Rutland’s property is a wetland, but it lacks significance for all ten wetland functions identified in VWR § 5. Therefore, the Board concludes that the reclassification of the subject wetland from Class Two to Class Three is warranted, and it so orders.

II. FINDINGS OF FACT

1. The subject wetland is located on property owned by the Town of West Rutland at the dead-end of Fairview Avenue in West Rutland, Vermont. The wetland consists of a small man-made pond less than an acre in size.
2. The subject wetland is located within the West Rutland Recreation Area owned by the Town of West Rutland. This recreation area is thirty acres in size and includes various playing fields. The subject wetland was initially excavated to be used as a swimming area. However, it is no longer used for such purpose.
3. Due to its proximity to the Clarendon River, the subject wetland has a small amount of ground water entering the excavated area. However, the main source of water to the wetland is piped by gravity from the adjacent river.
4. The soil surrounding the wetland is fill material without hydric soil characteristics.
5. The vegetation surrounding the wetland is lawn mowed close to the edge of the pond. A few shallow aquatic plants grow sparsely at the edge of the pond.
6. The Vermont Significant Wetland Inventory (“VSWI”) Map #16D shows a polygon in the area of the subject wetland identified as POWZ (palustrine, open water with an intermittently exposed/permanent hydric regime).
7. In 1993, ANR Wetlands Office staff conducted two site visits to the subject wetland in connection with a Conditional Use Determination (CUD) application filed by the Town of West Rutland. On February 22, 1994, ANR issued CUD #1993-358 authorizing grading and placement of fill in the wetland complex and its buffer zone to create three baseball fields, a footpath, and a parking lot. The subject wetland is part of the wetland complex addressed in the CUD.
8. In Finding 12 of CUD # 1993-358, ANR reached the following conclusion with respect to functions 5.8 and 5.9:

The [ANR] finds that the only protected functions of the Palustrine open water wetland are open space and aesthetics, and recreational value.
9. In Finding 13 of CUD # 1993-358, ANR reached the following conclusion with respect to

functions 5.1 - 5.7, and 5.10:

The [ANR] finds that for the Palustrine open water wetland the following functions are either not present or are present at such a minimal level as to not be protected functions: water storage for flood water and storm runoff, water quality protection, fisheries habitat, wildlife and migratory bird habitat, hydrophytic vegetation habitat, threatened and endangered species habitat, education and research in natural science, and erosion control through binding and stabilizing the soil.

10. As a result of a May 2, 2002, site visit, ANR currently finds that the subject wetland no longer serves functions 5.8 and 5.9 at a significant level. In addition, ANR finds that the subject wetland continues to not serve functions 5.1 - 5.7, and 5.10, to a significant level.
11. The wetland, due to its small size, location, and condition, does not serve any of the wetland functions specified in §5 of the VWR at a significant level.

III. CONCLUSIONS OF LAW

The Board may 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 property owner. VWR § 7.1. The Town of West Rutland is an affected property owner for purposes of VWR § 7.1.

A wetland appearing on a National Wetlands Inventory (“NWI”) Map for the State of Vermont (1978) is presumed to be a Class Two wetland, unless determined otherwise by the Board as provided by VWR § 7. VWR § 4.2 (b). The NWI Map for the West Rutland area is VSWI Map #16D and the subject wetland appears as a wetland polygon on this map.

A Class Two wetland is presumed, unless the Board determines otherwise, to serve all the functions specified in VWR § 5. VWR § 4.2(b). Accordingly, unless otherwise determined by the Board, the subject wetland is presumed to serve all the functions in VWR § 5 at a significant level.

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: Ladd’s Landing, Ltd. et.al., Docket No. WET-01-09,

Administrative Determination (Nov. 21, 2001); Re: The Orvis Company, Inc., Docket No. WET-01-06, Administrative Determination (Nov. 21, 2001).

The Board requires any wetland petition submitted to the Board to contain all informal determinations or decisions previously issued by the Secretary pertaining to the wetland in question. VWR §7.2(f)(eff. 1/1/02). Attached to Ms. Morrison's July 1, 2002, letter to the Board was a copy of CUD #1993-358 issued by ANR in 1994. This CUD contained findings that the subject wetland served only functions 5.8 (recreational value) and 5.9 (open space and aesthetics).

Based on a site visit to the subject wetland on May 2, 2002, ANR staff observed that with lack of maintenance or use for swimming purposes, or any other recreational use, the subject wetland has filled in with a variety of aquatic species and muck. Hence, ANR Wetlands Office staff find that the subject wetland no longer serves function 5.8 at a significant level. Based upon the site visit mentioned above, ANR staff also observed that the subject wetland does not possess special or unique aesthetic qualities or values as open space and, does not possess prominence as a distinct feature in the surrounding landscape. Therefore, ANR Wetlands Office staff find that the subject wetland no longer serves function 5.9 at a significant level. In sum, based on ANR's assessment, the subject wetland does not serve any of the ten wetland functions at a significant level.

Accordingly, the Board has considered the uncontroverted assessment of the subject wetland's functions by ANR and concludes that the wetland is not a significant wetland meriting protection under the VWR. Accordingly, the Board determines that the subject wetland should be reclassified from Class Two to Class Three and that the Wetlands Office, ANR, should remove this wetland from VSWI Map #16D.¹

1

The Petitioner is placed on notice that regulation of the subject wetland may also be within the jurisdiction of the Army Corps of Engineers, and that it should consult with that agency's staff prior to conducting any development activities, including filling and grading, within the subject wetland.

IV. ORDER

It is hereby ordered:

1. The subject wetland described above and located on the Town of West Rutland's property in the Town of West Rutland, Vermont, is reclassified from Class Two to Class Three; and
2. The Wetlands Office, ANR, is directed to remove the subject wetlands from VSWI Map #16D.

Dated at Montpelier, Vermont, this 7th day of August, 2002.

WATER RESOURCES BOARD

/s/ David J. Blythe

David J. Blythe, Chair

Concurring:

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