

**State of Vermont
WATER RESOURCES BOARD**

In re: Kane Farm Ponds, Town of Sheldon, Vermont
Docket No. WET-02-02

ADMINISTRATIVE DETERMINATION

Thomas and Nancy Kane (Petitioner) request a determination that two man-made ponds on their property in the Town of Sheldon, Vermont, are not jurisdictional wetlands subject to the Vermont Wetland Rules (VWR).

As explained below, the Water Resources Board (Board) has determined that the two ponds are a man-made manure storage pond and a livestock watering pond, not wetlands within the meaning of the VWR.

I. Procedural History

On May 9, 2002, Petitioner filed a request for an administrative determination with the Board, pursuant to Rule 7.1(e).¹ Joanne Yousten of the St. Albans USDA-NRCS assisted in the writing and development of the petition.

On May 14, 2002, 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 the Petitioner a letter of acknowledgment.

Under Board Rule of Procedure 17, an administrative determination regarding wetlands shall be conducted in accordance with the provisions of Part III of the Rules of Procedure, as appropriate. On May 14, 2002, in accordance with VWR §7.4(a) and Board Procedural Rule 22(C), the Board provided personal notice of the petition to persons required to receive notice, including neighbors Robert S. and Diane Parent. As the Petitioner's property is subject to an easement held by the Vermont Land Trust, the Vermont Department of Agriculture, Food, and Markets, and the Vermont Housing and Conservation Board, the Board also provided personal notice to these entities. In addition, the Board published notice of the petition in the *St. Albans Messenger* on May 15, 2002.

¹ This petition was treated by the Board as an administrative determination pursuant to VWR § 7.1(e) (eff. Jan. 1, 2002). Prior to 2002, the Board would have issued a declaratory ruling pursuant to Board Rule of Procedure 16(B). See: In re: Technology Park Associates, No. WET-95-02, Decision (Vt. Water Res. Bd. Feb. 1, 1996).

In conformance with VWR §7.4(a), the Board provided the public with an opportunity to file written comments or to request a hearing within 30 days from the issuance of written notice and published notice. The deadline to file written comments or to request a hearing (or both) was June 14, 2002. No comments were filed, and no person requested a hearing. Accordingly, the Board did not hold a hearing in this matter.

Carl Pagel of the Vermont Wetlands Office at the Agency of Natural Resources (ANR), officially endorses the petition. See: Petition at 2.

At its regular meeting on June 25, 2002, the Board deliberated with respect to the petition. The Board's deliberations were based solely on the information in the petition. As set forth herein, the Board grants the petition by declaring that the two man-made ponds on Petitioner's property are not wetlands within the meaning of the VWR.

II. Findings of Fact

1. The two man-made ponds are located on Petitioner's property off Route 105 in the Town of Sheldon.
2. The two man-made ponds are listed on National Wetlands Inventory (NWI) Map 21, and are designated as POWH, permanent palustrine open water wetlands.
3. The first pond, Pond 1, is the old manure storage pond, built in the late 1970s, west of and in close proximity to an existing barn.
4. The second pond, Pond 2, is a livestock watering pond, approximately 0.2 acres in size, built in the late 1970s, that holds water sufficient to water the Kane's cows. Pond 2 is located in the pasture/exercise lot north of the existing barn, and east of and in close proximity to a new barn site, in an upland area.
5. Pond 1 does not contain wetland vegetation, wetland soils, or wetland hydrology.
6. Pond 2 does not contain wetland vegetation or wetland soils; however it does contain wetland hydrology.

III. Conclusions of Law

The Board is charged with the protection of Vermont's significant wetlands, pursuant to 10 V.S.A. §905(7)-(9). It has implemented its authority through adoption of the VWR.

Because the two ponds at issue in this proceeding appear on the NWI map, they are presumed to be Class Two wetlands, unless determined otherwise by the Board pursuant to VWR §7. See also: VWR § 4.2(b). The NWI maps for the State of Vermont, annually revised by the ANR to conform with the VWR and the actions of the Board pertaining to the reclassification wetlands or other administrative determinations, are known as the Vermont Significant Wetland Inventory (VSWI) maps. VWR § 4.5(a).

While many marshes, bogs, fens, and open water wetlands are significant and therefore subject to the Board's protection, not all wet areas are wetlands. Consequently, the Board has authority, pursuant to §§ 4.4 and 7 of the VWR, and Board Rule of Procedure 17, to determine that an area shown as a wetland on an NWI map is not in fact a wetland. In re: Burlington Country Club, No. WET-01-08DR, Decision (Vt. Water Res. Bd. Oct. 30, 2001); In re: Stanley Gawet (Marble Quarry), No. WET-95-03DR, Decision (Vt. Water Res. Bd. Feb. 15, 1996).

To be considered a wetland under the VWR, an area must be characterized by three parameters: wetland soils, wetland vegetation, and wetland hydrology. VWR §3.2(a). All three of these elements must be present for an area to constitute a wetland under the VWR. See In re: Technology Park Associates, No. WET-95-02, Decision (Vt. Water Res. Bd. Feb. 1, 1996). (Board determined that man-made retention ponds having wetland hydrology, but lacking wetland soils and significant wetland vegetation did not meet the jurisdictional threshold for regulation under the VWR).

Although both of the Kane Farm ponds appear on the NWI map, and as such, have been presumed to be Class Two wetlands, the Board concludes that they are not wetlands. Pond 1 lacks wetland soils, wetland vegetation, and wetland hydrology. Likewise, Pond 2 lacks wetland vegetation and soils. Thus, these man-made ponds do not meet the jurisdictional threshold for regulation under the VWR.

In conclusion, the Board determines that, based on the uncontroverted evidence, the two ponds on the Kane Farm do not constitute wetlands within the meaning of the Vermont Wetland Rules.

IV. Order

It is hereby Ordered:

1. Both man-made ponds, Pond 1 and Pond 2, located in the Town of Sheldon, Vermont, on the Kane Farm, currently classified as Class Two wetlands, are hereby declared not to be wetlands within the meaning of the VWR; and
2. Pursuant to VWR § 4.5(a), the Wetlands Office shall update the applicable VSWI map by removing these areas from that map.

Dated at Montpelier, Vermont this 25th day of June, 2002.

WATER RESOURCES BOARD

/s/ David J. Blythe
David J. Blythe, Chair

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