

**State of Vermont
Water Resources Board**

**Re: Lake Bomoseen Wetland
Town of Hubbardton, Vermont**

Docket No. WET-02-04

MEMORANDUM OF DECISION

This decision pertains to a Motion to Alter filed by Alan and Claudia Wulff of Hubbardton, Vermont, asking the Water Resources Board (Board) to modify the protective buffer zone imposed by the Board as part of its Administrative Decision reclassifying the Lake Bomoseen Wetland (LBW) from Class Two to Class One. As explained below, the Board denies the Motion to Alter.

I. PROCEDURAL BACKGROUND

From February 23, 1990 to February 6, 2003, the LBW was a Class Two protected wetland with a presumptive buffer zone 50-feet in width, pursuant to Sections 4.2 and 4.3 of the Vermont Wetland Rules (VWR).

On February 6, 2003, the Board issued an Administrative Determination reclassifying the LBW from a Class Two to a Class One protected wetland. The Board, pursuant to Sections 4.3 and Section 7, VWR, also expanded the buffer zone surrounding the LBW from 50-feet to the presumptive 100-feet in width, except in a small area adjacent to Ledgemere Point Road where the Board retained a 50-foot buffer zone. Re: Lake Bomoseen Wetland, Docket No. WET-02-04, Administrative Determination at 19-20 (Feb. 6, 2003).

On February 19, 2003, Alan and Claudia Wulff timely filed with the Board a Motion to Alter pursuant to Rule 34(D) of the Board's Rules of Procedure. The Wulffs asked the Board to modify its Administrative Determination so as to impose a 50-foot wide rather than a 100-foot wide protective buffer zone on their property at 872 Jason's Way in the Town of Hubbardton.

On February 20, 2003, the Board received a letter in support of the Motion to Alter from Roy Pilcher of the Rutland County Audubon Society. See Docket Item 123.

On February 28, 2003, the Board's Executive Officer acknowledged receipt of the Motion to Alter.

On March 3, 2003, the Wulffs provided evidence that they had perfected service of their Motion to Alter on February 29, 2003, by filing copies on persons required to receive notice pursuant to Section 7.3(a), VWR. On March 5, 2003, the Wulffs also filed a letter clarifying the professional qualifications of Mr. Pilcher.

On March 11, 2003, the Board deliberated on the Motion to Alter. This matter is now ready for decision.

II. DISCUSSION

Pursuant to Rule 17 of the Board's Rules of Procedure, the Board is authorized to use the procedural rules applicable to contested case proceedings, "as appropriate," in administrative proceedings to reclassify wetlands and configure wetland buffer zones. The Board has previously recognized the appropriateness of Motions to Alter with regard to wetland reclassification determinations. See Re: Moon Brook Wetland, Docket No. WET-94-02, Memorandum of Decision (Apr. 3, 1996).

Rule 34(D) of the Board's Rules of Procedure provides that a "party" may file a motion to alter within 15 days from the date of the Board's decision. The primary purpose of Rule 34(D) is to allow parties to petition the Board to reconsider the existing record of the proceeding and to bring to the Board's attention laws or facts previously presented that the Board may have overlooked or misapprehended. Thus, Rule 34(D) provides, in relevant part:

(1) All motions to alter shall be premised upon a proposed reconsideration of the existing record. New arguments are not allowed, with the exception of arguments in response to permit conditions or typographical, technical, and other manifest errors, provided that the party seeking the alteration reasonably could not have known of the conditions or errors prior to decision. New evidence shall not be submitted unless the Board acting on a motion to alter, determines that it will accept new evidence in order to avoid manifest injustice.

The Wulffs own real property adjacent to the western portion of the LBW. They submitted both written and oral comment in the present reclassification proceeding. On September 11, 2002, they filed a letter advising the Board that the LBW is "exceptional and irreplaceable" for eight of ten wetlands functions, and that they would support reclassification of the wetland to Class I, "if the current 50 foot buffer zone were to remain intact." Docket Item 40. They presented similar oral testimony at the public hearing on September 17, 2002. In response to the Board's notice that it would reopen the public comment period to allow the filing of additional written comment on the limited question of what protective buffer zone should be imposed, the Wulffs filed a letter on December 2, 2002, explaining why the Board should retain a 50-foot buffer zone with respect to their property due to certain physical limitations restricting development of their property. Docket Item 103.

The Board considered these comments, along with others, in deciding what buffer zone should be imposed to protect the functions that make the LBW so exceptional and irreplaceable in its contribution to Vermont's natural heritage. In particular, the Board determined that the 100-foot wide presumptive buffer zone was needed to protect significant wildlife habitat, as well as the LBW's water quality and aesthetic and open space functions. Administrative Determination at 14-16. In particular, the Board expressed concern for the protection of the western and northern portions of the LBW, which are particularly significant for wildlife feeding, nesting, brooding and staging areas. Administrative Determination at 10, Finding 22, and at 16, Finding 58. Accordingly, the Board concluded that a 100-foot wide buffer zone in the area where the Wulffs live is necessary to protect the significant wildlife and migratory bird habitat provided by the LBW. Administrative Determination at 19.

In support of the Motion to Alter, the Wulffs have presented new argument and filed new evidence to supplement what they had previously filed with the Board.

The new arguments put forward by the Wulffs do not address conditions or errors that the Wulffs could not have reasonably known before the issuance of the decision. While they may not have known prior to the issuance of the Administrative Determination that the Board would impose a 50-foot buffer zone in the area of Ledgemere Point Road, because Section 4.3, VWR, expressly provides for a presumptive buffer zone of 100-feet in width for all Class One wetlands, the Wulffs were put on notice at the earliest stage of this proceeding that the Board might well impose a 100-foot buffer zone and that they should provide the Board with information to rebut this presumption. See Notice of Petition Seeking Wetland Reclassification (Aug. 13, 2002), Docket Item 5. Therefore, new argument concerning why the Board should treat their real property like the Ledgemere Point properties is not persuasive and certainly does not address the question whether the Board has committed “manifest error.” Re: OMYA, Inc., Docket No. WQ-01-09, Memorandum of Decision at 2 (May 16, 2002) (defining “manifest error”); see also, Re: Robert A. Gillin, Docket No. MLP-94-01, Memorandum of Decision at 2 (Oct. 4, 1194).

Likewise, while the Board acknowledges and appreciates the Wulff’s efforts to protect the important wildlife habitat on their property and the adjacent western portion of the LBW, their long history of natural resource stewardship is not the type of “new evidence” which the Board may consider in deciding whether to reduce the protective buffer zone to 50-feet in width. In any event, even if the Board accepted the Wulffs’ *argument* that they are good stewards of the land adjacent to the LBW, this argument is not persuasive as the next owner of this property may not be so concerned with the protection of the LBW’s wetland functions. Neither is additional information concerning the physical limitations of the Wulffs’ property for development appropriately considered. The Board has previously stated that “new evidence” will be allowed *only* to avoid “manifest injustice,” which is the “obvious, indisputable and self-evident withholding or denial of justice” as the result of negligence, mistake or omission of the Board. Re: OMYA, Inc., at 2-3; Re: Lamoille River Hydroelectric Project, Memorandum of Decision at 3 (May 10, 1996). The Wulffs have not explained to the Board why their new submissions should be considered by the Board applying this standard.

III. ORDER

Accordingly, the Board hereby denies the Wulffs’ Motion to Alter.

Dated at Montpelier, Vermont, on this 21st day of March, 2003.

Water Resources Board
By its Chair
/s/ David J. Blythe

David J. Blythe *
Lawrence H. Bruce, Jr.
Jane Potvin
John D.E. Roberts
Mardee Sánchez

* Signed by the Chair pursuant to 3 V.S.A. § 812(b).

Dissenting: David J. Blythe, Chair.

I dissent from the majority's decision. I would treat Roy Pilcher's letter of February 20, 2003, as "new argument" or "new evidence" supporting reconsideration of the Administrative Determination. Docket Item 123. Mr. Pilcher is an authority on avian wildlife and long-time member and officer of the Rutland County Audubon Society, a co-Petitioner in this wetland reclassification proceeding. Mr. Pilcher has stated with reference to the Wulff property that he can think of "no negative impact to the values and functions of the Class I wetland that would occur in retaining the 50-foot buffer due to human activity." In my opinion, this statement, along with other argument submitted by the Wulffs, provides a sufficient justification for the Board to reconsider the record of this proceeding to determine whether it is reasonable and appropriate to impose the presumptive 100-foot buffer zone to the Wulff property where a 50-foot buffer zone has allegedly sufficed to protect the wetland resource during the past 23 years.