

**State of Vermont
WATER RESOURCES BOARD**

**Re: Calvin Murray
Docket No. WET-03-03**

**ADMINISTRATIVE DETERMINATION
(Issued Oct. 27, 2003)**

A wetland reclassification petition is granted in part and denied in part.

A petitioner must provide actual notification of a wetland reclassification petition to persons who own land within or adjacent to the mapped wetland polygon and buffer zone of which reclassification is sought. A petitioner is not required to provide actual notification to additional persons who may own land within or adjacent to contiguous wetlands and their buffer zones. The Vermont Water Resources Board (Board), in its discretion, may require such notification on a case-specific basis. In this case, the Board decides that providing actual notification of the reclassification petition to the owners of land within or adjacent to contiguous wetlands is not necessary because the Board's decision preserves the regulatory status quo of the contiguous wetland complex.

The Board determines that an area of a mapped wetland polygon that in fact consists of exposed bedrock is not a wetland. However, the Board also determines that this mapped polygon, consisting mostly of upland but containing a small amount of significant wetland that does not match the Vermont Significant Wetland Inventory (VSWI) wetland designation ascribed to that polygon, continues to confer Class 2 regulatory status on both the small wetland within the polygon and all contiguous wetlands. The Board's evaluation of the functions of the small wetland within the mapped polygon is based on this wetland's connection to the contiguous wetland complex. In addition, the Board determines, based on the evidence presented in this matter, that the contiguous wetland complex on the petitioner's property is significant. The Board directs the Vermont Agency of Natural Resources (ANR) to update the VSWI maps to reflect the significant wetlands on the petitioner's property.

I. Procedural Background

A. Wetland Reclassification Petition

The petitioner, Calvin Murray, by his consultant, Brian Tremback of the consulting firm Lamoureux & Dickinson, filed a petition to reclassify wetlands with the Board on July 29, 2003. The wetlands at issue are located in Milton, Vermont on a 172-acre parcel owned by the petitioner. The petitioner intends to develop this parcel by creating four residential lots, along with areas for sewage disposal systems to service these lots.

The petition indicates that the VSWI maps depict a wetland on the petitioner's parcel and that the VSWI maps describe this wetland as a palustrine open water wetland. The petition states that the area of the petitioner's parcel within the wetland polygon of the VSWI maps consists not of open water, but mostly of a bedrock knoll. The petition acknowledges that a swath of forested wetland arcs around the northeastern edge of this knoll, within the mapped wetland polygon. According to the petition, this area of forested wetland within the polygon consists of only 0.02 acre. However, the petition points out that this small area of forested wetland within the polygon is connected to other forested and wet-meadow wetlands on the petitioner's property. The petition notes that the proposed development will be "several hundred feet from the VSWI polygon."

The petition asks the Board to determine that the entire wetland polygon was erroneously mapped and is therefore not a Class 2 wetland because most of the polygon is bedrock and because the wetland type described on the VSWI map (palustrine open water) does not exist anywhere in the area. The petition states that "wetlands mapped in obvious error and designated as a wetland type that does not exist anywhere in the area should not be given the power to arbitrarily establish the classification of other adjacent wetlands." The petition suggests that the Board would need to specifically classify the unmapped wetlands contiguous to the polygon as Class 2 before they could be regulated as such.

On August 8, 2003, the Board's Executive Officer, Jon Groveman, wrote to Mr. Tremback to acknowledge receipt of the petition and to offer the petitioner an opportunity to clarify and supplement the petition. Mr. Groveman explained that it is not clear from the original petition whether the petition merely seeks a determination that the area of the polygon that encompasses the bedrock is not a wetland or whether the petition also seeks a determination that the forested wetland within the polygon is not a Class 2 wetland. Mr. Groveman expressed the opinion that the forested wetland within the polygon and any contiguous wetlands are Class 2 unless and until determined to be otherwise by the Board.

B. Supplemental Wetland Reclassification Petition

On August 27, 2003, Mr. Tremback filed supplemental materials seeking a reclassification of the wetlands within the polygon from Class 2 to Class 3. The supplemental petition asks the Board to determine only that the 0.02-acre wetland area within the polygon is Class 3, and the supplemental petition includes a functional analysis of that area only. The supplemental petition does not ask the Board to reclassify the larger wetland complex that is contiguous to the mapped polygon, and the supplemental petition does not provide any functional analysis of these wetlands. The supplemental petition thus focuses only on the very small (0.02-acre) wetlands within the

polygon without discussing the significance, if any, of their connection to the adjacent wetland complex. The logic of the supplemental petition is that if the polygon, looked at in isolation, is determined to consist of non-wetlands (bedrock) and insignificant wetlands (0.02 acres of forested wetland), then the contiguous wetland complex on the petitioner's parcel would not be Class 2 because these wetlands are not mapped and because these would not be contiguous to mapped wetlands once the Board directs ANR to remove the polygon from the VSWI maps.

On August 29, 2003, Mr. Groveman acknowledged receipt of the supplemental petition and arranged for notice of the petition to be published and distributed. The original petition indicates that the mapped polygon is located centrally on the petitioner's 172-acre parcel and that no other persons own property within or adjacent to the mapped area. It was not clear from the original or supplemental petitions whether anyone owns property within or adjacent to the larger wetland complex and buffer zone that are contiguous to the mapped polygon or whether any such persons have been made aware of this matter.

In his August 29, 2003 letter, Mr. Groveman suggested to Mr. Tremback that "the submission of a map depicting the location of the forested portion of the wetland would facilitate the Board's consideration of this matter." Pursuant to section 7.4.a of the Vermont Wetland Rules (VWR), the thirty-day deadline for comments or requests for a hearing in this matter was Friday, October 3. Except for comments received from the Wetlands Office of ANR, as reported below, no other comments or requests for a hearing have been received. Mr. Tremback ultimately submitted the requested map at the Board's meeting on October 7, 2003. In the memorandum attached to this map, Mr. Tremback explained that the Wetlands Office had previously expressed ambivalence about how to classify the wetlands on the petitioner's property. Mr. Tremback reiterated his position that "If it is decided that the polygon itself is not a significant wetland, there doesn't appear to be a reason to consider the larger wetland."

C. Information Provided by ANR's Wetlands Office

The original and supplemental reclassification petitions filed in this matter use the wetland reclassification forms that were created by the Board's legal staff with the input of ANR's Wetlands Office. One area of these forms asks whether the Wetlands Office supports the petition. In this case, none of the options (yes, no, or don't know) are checked, but the original petition does state that ANR Wetlands Ecologist April Moulart intends to treat the contiguous wetlands as Class 2 unless and until determined to be otherwise by the Board.

Because this is not a contested case, the rules against ex parte communication do not apply, and the Board is free to gather facts on its own initiative. On September 23, 2003, the Board's legal counsel assigned to this case, Daniel D. Dutcher, telephoned April Moulaert to determine the position of the Wetlands Office in this matter. Ms. Moulaert advised that a large, ecologically significant forested wetland of some twenty acres is contiguous to the 0.02 acres of forested wetlands within the mapped polygon and that this larger wetland includes a number of streams.

At Mr. Dutcher's request, Ms. Moulaert filed with the Board on September 23, 2003 a copy of a June 4, 2003 letter she had sent to Mr. Tremback. On September 24, 2003, Ms. Moulaert filed a site plan that Mr. Tremback had prepared for the petitioner's property and that Ms. Moulaert had referred to in her June 4, 2003 letter to Mr. Tremback. In her June 4, 2003 letter, Ms. Moulaert suggested revision of the proposed development plans to avoid impacts to the contiguous wetlands, which this letter describes as "significant for several functions and values, including but not limited to wildlife habitat, water quality protection, and flood storage." The site plan delineates the wetland on the petitioner's property and shows the areas of the property proposed for development.

On September 25, 2003, Mr. Dutcher telephoned Mr. Tremback and informed him of the materials filed by the Wetlands Office and invited him to the Board's October 7 regular meeting. Mr. Dutcher also asked Ms. Moulaert to attend this meeting and to submit a letter to the Board describing the perspective of the Wetlands Office on this matter. Ms. Moulaert filed her letter on October 6, 2003. In her letter, Ms. Moulaert advised that the petitioner's property includes portions of a large Class 2 wetland of about twenty acres, most of which is contiguous to a mapped wetland polygon on the petitioner's property and some of which extends "off site." Ms. Moulaert confirmed that she had visited the site in the spring of 2003 and determined that the Class 2 wetland (including the mapped wetland and the wetland contiguous to the mapped wetland) is a large forested wetland that includes numerous streams that flow into Mallets Creek after leaving the petitioner's property. Ms. Moulaert "found the wetland to be significant for several functions and values including wildlife habitat, water quality protection, erosion control, and flood storage." With regard to the functional analysis submitted by Mr. Tremback, Ms. Moulaert commented "that he only looked at the functions and values of the 0.02 acre of wetland found within the polygon, and did not evaluate the large wetland that is contiguous to that wetland."

D. October 7, 2003 Water Resources Board Meeting

On October 7, 2003, beginning at approximately 11:30 a.m., the Board met in its conference room in Montpelier to discuss this matter. The petitioner was represented at

this meeting by Mr. Tremback. Ms. Moulaert was accompanied by Department of Environmental Conservation General Counsel Glen Gross.

At the Board's meeting, Mr. Tremback agreed with the determination of the Wetlands Office that the larger wetland complex is significant. Mr. Tremback also agreed that the mapped wetland within the polygon is significant when considered in connection with the larger wetland at the site. Mr. Tremback explained that it is difficult to state how much the 0.02-acre wetland within the mapped polygon contributes to the significance of the larger wetland complex, but Mr. Tremback stated that he would not find that the mapped wetland is not significant when considered in conjunction with the larger wetland complex. Finally, Mr. Tremback confirmed that the larger wetland on the petitioner's property does touch properties owned by persons other than the petitioner. Mr. Tremback and the Wetland's Office thus agreed at the Board's meeting that the essential facts in this matter are not in dispute. This matter is therefore ready for decision.

II. Issues

The central issues presented for decision in this matter may be framed as follows:

1. Whether a petitioner must provide notification of the filing of a wetland reclassification petition not only to persons who own land within or adjacent to the mapped wetland polygon and buffer zone of which reclassification is sought, but also to persons who own land within or adjacent to wetlands and their buffer zones that are contiguous to this mapped wetland polygon.
2. Whether part of an area of the petitioner's property that appears as a Class 2 wetland on the VSWI maps is in fact not a wetland but an exposed bedrock knoll.
3. Whether a mapped polygon consisting mostly of upland but containing a small amount of significant wetland that does not match the VSWI wetland designation ascribed to that polygon confers Class 2 regulatory status on both the small wetland within the polygon and all contiguous wetlands.
4. Whether unmapped wetlands on the petitioner's property that are contiguous to mapped wetlands are in fact significant enough to be classified as Class 2.

III. Findings of Fact

1. The petitioner, Calvin Murray, owns a 172-acre parcel in Milton, Vermont. The petitioner intends to develop this parcel by creating four residential lots, along with areas for sewage disposal systems to service these lots.
2. VSWI map 12C depicts a wetland on the petitioner's parcel. The VSWI map describes this wetland as a palustrine open water wetland. The area of this mapped wetland polygon is located approximately 2,700 feet east of East Road and 1,570 feet south of Westford Road.
3. The area of the petitioner's parcel within the mapped wetland polygon consists not of open water, but mostly of an exposed bedrock knoll. However, a swath of forested wetland arcs around the northeastern edge of this bedrock knoll, and about 0.02 acre of this forested wetland lies within the area of the mapped wetland polygon.
4. The small area of forested wetland within the mapped polygon for the petitioner's property is connected to a larger forested and wet-meadow wetland complex on the petitioner's property. This wetland complex includes a number of tributaries to Mallets Creek.
5. The mapped polygon is centrally located on the petitioner's property. No persons other than the petitioner own property within or adjacent to the mapped polygon or its fifty-foot buffer zone.
6. The larger wetland complex on the petitioner's property consists of about twenty acres and extends to properties owned by persons other than the petitioner. The petitioner did not provide notice of his original or supplemental wetland reclassification petitions to these persons.
7. The wetland complex that is contiguous to the forested wetland located within the mapped polygon for the petitioner's property is significant for several functions and values, including but not limited to wildlife habitat, water quality protection, erosion control, and flood storage.
8. The 0.02 acre of forested wetland within the mapped polygon for the petitioner's property is significant for wildlife habitat, water quality protection, erosion control, and flood storage when considered in conjunction with the larger wetland complex on the petitioner's property.

IV. Legal Background

A. Classification of Wetlands

All wetlands in Vermont are classified by the Vermont Wetland Rules as Class 1, Class 2, or Class 3. Class 1 wetlands are exceptional and merit the highest level of protection. Class 2 wetlands, while not exceptional, are ecologically significant enough to merit protection under the Vermont Wetland Rules. Class 3 wetlands are not significant enough to merit protection. Most wetlands shown on the VSWI maps are considered Class 2 unless determined to be otherwise by the Board. Similarly, unmapped wetlands, which are Class 3, may be reclassified by the Board as Class 1 or Class 2 and added to the VSWI maps. *See* VWR § 4. Certain categories of riverine and lacustrine wetlands shown on the VSWI maps (none of which are at play in this case) are exempt from the general rule that mapped wetlands are Class 2 unless and until reclassified or determined not to be wetlands. *See* VWR § 4.2.b.

The VSWI maps denote only the approximate location and configuration of mapped wetlands. *See* VWR §§ 3.2.b, 4.5.b. The actual boundaries of the wetlands depicted on these maps can be determined only through a wetland delineation. VWR §§ 3.2.b, 4.6. The Board may reclassify wetlands to higher or lower classifications and determine whether an area shown as a wetland on the VSWI maps is not a wetland. *See* VWR §§ 4.4, 7.1. ANR is required to revise the VSWI maps to reflect the actions of the Board pertaining to the classification of wetlands. *See* VWR § 4.5.a.

The Vermont Wetland Rules establish a fifty-foot buffer zone around every Class 2 wetland unless this buffer zone is changed by the Board. VWR § 4.3 Class 2 wetlands are presumed to serve all of the ten significant wetland functions described by section 5 of the Vermont Wetland Rules. VWR § 4.2.b. Except for certain limited activities known as allowed uses, uses of a significant wetland require a conditional use determination. VWR § 6. The CUD provisions are intended to avoid, minimize, and mitigate adverse effects on protected wetland functions. *See* VWR § 8.5.

B. Contiguous Wetlands

All wetlands contiguous to mapped wetlands are presumed to be Class 2 and are therefore protected unless and until reclassified by the Board. VWR §§ 4.2.b., 4.5.b. Contiguous means a surficial connection by sharing a boundary or touching or a hydrological connection such that the water level of the mapped wetland is directly influenced by the water level of the adjacent wetland. VWR § 2.07 (defining contiguous). In determining whether a wetland is significant, the Board must consider the functions that the wetland serves not only as a discrete wetland, but also in

conjunction with other wetlands. VWR § 5. *See also In re Plains Road*, No. WET-92-05, Decision at 5-7 (Vt. Water Res. Bd. Apr. 29, 1994) (determining contiguity by finding that the three parameters defining wetlands (hydric soils, wetland hydrology, and hydrophytic vegetation) were found continuously between the two areas). *See generally* VWR §§ 2.14, 2.15, 2.29, and 2.31 (defining hydric soils, hydrophytic vegetation, wetlands, and wetland hydrology).

In *In re New England Container Co.*, No. WET-01-05, Administrative Determination at 2, 4 (Vt. Water Res. Bd. Sept. 18, 2001), the Board made clear that a reclassification petition must provide information on the entirety of the wetland, including any contiguous wetland. Similarly, *In re Franklin Fire Pond*, No. WET-92-01 at 2 (Vt. Water Res. Bd. March 25, 1992), the Board reclassified a wetland from Class 2 to Class 3 only after considering the wetland's significance both alone and in conjunction with other wetlands. *See also In re Moon Brook Wetland*, No. WET-94-02, Decision at 16, 20 (Aug. 9, 1995) (considering wetland's connection to other wetlands in review of functional analysis).

Although the mapping and contiguity system of the Vermont Wetland Rules may be less than perfectly efficient, this system has survived legal challenge. In *Secretary, Vermont Agency of Natural Resources v. Irish*, 169 Vt. 407, 738 A.2d 571 (1999), the Vermont Supreme Court upheld an enforcement action for an unauthorized encroachment into an unmapped wetland that was contiguous to a mapped wetland. The *Irish* Court rejected the argument that the Vermont Wetland Rules did not provide adequate notice that the unauthorized activity was unlawful.

C. Notification Requirements

Reclassification of wetlands may occur by petition or by the Board's initiative. VWR § 7.1. Petitioners must provide actual notice of the petition to "all persons owning property within or adjacent to the wetland or buffer zone in question." VWR § 7.3.b. In *New England Container*, Administrative Determination at 2, the Board instructed a petitioner seeking reclassification of mapped wetlands from Class 2 to Class 3 to file a map showing the entirety of the wetlands for which reclassification was sought and identifying all real properties within or adjacent to these wetlands. However, it appears that this larger wetland complex, which extended beyond the petitioner's property boundaries, was not contiguous to a mapped wetland but within the mapped polygon. *Id.* at 3. The Board ensured that those within or adjacent to this wetland received notice of the petition, but the Board had no occasion to decide whether those within or adjacent to a contiguous wetland must receive notice of a petition to reclassify a mapped polygon.

V. Analysis

A. Notice

A petitioner must provide notice of a wetland reclassification petition to, among others, “all persons owning property within or adjacent to the wetland or buffer zone in question.” VWR § 7.3.b. The wetland reclassification form upon which the petitioner relied similarly indicates that notice of the petition must be provided to “all persons owning real property within or adjacent to the wetland or area in question and associated existing and proposed buffer zone.” Neither the original wetland reclassification petition nor the supplemental wetland reclassification petition identified the landowners adjacent to the larger contiguous wetland involved in this matter, and neither of these petitions indicated that any of these adjacent landowners received notice of these petitions. Thus, a preliminary issue in this matter is whether these proceedings have been adequately noticed.

The Board concludes that “all persons owning property within or adjacent to the wetland or buffer zone in question,” VWR § 7.3.b, does not include persons owning property within or adjacent to wetlands contiguous to the mapped wetland. Because contiguous wetlands may be extensive, and because contiguity itself is sometimes at issue, interpreting the rules differently would be unworkable. However, the Board retains the discretion to require petitioners to provide actual notice to owners of land adjacent to contiguous wetlands on a case-specific basis. *See* VWR § 7.3.

In the instant case, the larger wetland complex that is contiguous to the 0.02 acre wetland within the mapped polygon is currently regulated as Class 2 and its protection would be removed if all of the relief that the petitioner has requested is granted. Although all landowners potentially affected by the relief the petitioner has requested have not received actual notice of the petition, the Board concludes that this matter does not need to be re-noticed. As set forth below, the Board determines that the bedrock portion of the mapped polygon, which is surrounded by land owned by the petitioner, is not a wetland. However, this does not affect the wetlands that are contiguous to the mapped polygon because the Board denies the relief sought by the petitioner with regard to the wetlands in the remainder of the polygon, thus preserving the regulatory status quo of this wetland and the wetlands contiguous to this wetland that extend into properties adjoining those of the petitioner. The Board’s determination that the larger wetland complex on the petitioner’s property is significant apart from its contiguity to the mapped polygon provides an independent basis for the existing classification of this wetland as Class 2 but does not change the classification of this wetland. The Board therefore finds no need to notify landowners adjacent to the larger wetland complex of the Board’s actions in this matter.

B. Bedrock Knoll

The petitioner asks the Board to determine that the area of a mapped wetland polygon that in fact contains a bedrock knoll is not a wetland. It is undisputed that most of this mapped polygon is a bedrock knoll. Under section 4.4.e of the Vermont Wetland Rules, the Board is authorized to “determine whether an area shown as a wetland on the VSWI maps is not a wetland.” This portion of the relief that the petitioner requests is granted.

C. Wetlands within the Mapped Polygon and Contiguous Wetlands

The petitioner’s functional analysis of the 0.02 acre wetland within the polygon did not consider the larger wetland complex that is contiguous to the mapped wetland. However, under section 5 of the Vermont Wetland Rules, the Board must evaluate the functions that a wetland serves not only as a discrete wetland, but also in conjunction with other wetlands. The petitioner agrees that when the mapped wetland is considered in conjunction with the larger wetland complex that is contiguous to the mapped area, then the mapped area is significant. The petitioner’s request that the Board reclassify the forested wetland within the mapped polygon from Class 2 to Class 3 is therefore denied.

The petitioner asserts that the polygon on the VSWI map for the petitioner’s property was drawn in error because this polygon consists mostly of bedrock, rather than open water, and because the 0.02-acre forested wetland that lies within the polygon is classified on the maps as open water rather than as forested. The petitioner thus asks the Board to order ANR to remove the entire polygon from the VSWI maps, in which case all the wetlands on the petitioner’s property would become unregulated Class 3 wetlands because they would no longer be contiguous to a mapped area and because they are not at this time mapped in their own right.

Speculation about the thinking of those interpreting the aerial photographs upon which the VSWI maps were originally based is not necessary. As noted above, certain categories of wetlands shown on the VSWI maps are exempt from the general rule that mapped wetlands are Class 2. *See* VWR § 4.2.b. Otherwise, the mapping system of the Vermont Wetland Rules does not give any regulatory consequence to the designations ascribed to wetlands on the VSWI maps. Thus, the fact that the 0.02-acre forested wetland that lies within the mapped polygon is classified on the maps as open water rather than as forested does not defeat the effect of the maps, as the petitioner contends. Similarly, the fact that some but not all of the mapped polygon is not in fact a wetland does not remove the regulatory effect of the wetlands within the polygon.

The reclassification system of the Vermont Wetland Rules is designed to allow the correction of errors in the mapping system so that wetland mapping and regulation in Vermont become more accurate over time. Thus, even if the entire mapped polygon for

the petitioner's property turned out not to be a wetland, the appropriate solution to such a mapping error would not be to remove the actual wetlands on the petitioner's property from the regulatory purview the VSWI maps but to add the larger wetland complex on the petitioner's property to the VSWI maps in order to ensure that these wetland resources are responsibly managed. As it is, this larger wetland complex remains regulated as a Class 2 wetland both because of its contiguity to the mapped wetland on the petitioner's property and also because the facts of this case independently demonstrate that this larger wetland complex is significant. The CUD process rather than the reclassification process is the appropriate manner of addressing the wetlands at issue in this case.

ANR is instructed to correct the VSWI maps to reflect that some of the existing mapped polygon is not a wetland at all but that the remainder of the polygon is a forested wetland rather than open water. ANR is further directed to modify the VSWI maps to depict the larger wetland complex on the petitioner's property that is contiguous to the wetlands within the currently mapped polygon for this property.

VI. Order

Accordingly, it is hereby Ordered:

1. The wetland reclassification petition filed by the petitioner on July 29, 2003 and supplemented on August 27, 2003 is granted in part and denied in part.
2. The Board determines that the area of the mapped polygon for the petitioner's property that consists of an exposed bedrock knoll is not a wetland.
3. The Board determines that the forested wetland within the area of the existing mapped polygon for the petitioner's property and the larger wetland complex on the petitioner's property that is contiguous to this forested wetland shall continue to be classified as Class 2 wetlands.
4. ANR is directed to update the VSWI maps by removing the area of bedrock knoll from the mapped polygon for the petitioner's property.
5. ANR is directed to update the VSWI maps by replacing the existing polygon for the petitioner's property with a new polygon that depicts both the forested wetland within the existing polygon and the wetland complex on the petitioner's property that is contiguous to the existing polygon.

6. ANR is directed to provide appropriate wetland designations for the wetlands on the petitioner's property on the updated VSWI maps.

Dated at Montpelier, Vermont this 27th day of October, 2003.

WATER RESOURCES BOARD

/s/ David J. Blythe

David J. Blythe, Chair

Concurring:

Lawrence H. Bruce, Jr., Member
Michael Hebert, Member
Jane Potvin, Member
John D.E. Roberts, Vice-Chair