

State of Vermont
WATER RESOURCES BOARD

Re: Bald Hill Fish Culture Station
No. WET-04-02

ADMINISTRATIVE DETERMINATION

(Issued Feb. 24, 2005)

A petition to reclassify two constructed fish-rearing ponds from Class Two wetlands to Class Three wetlands is treated as a petition to determine that these areas are not wetlands, and relief is granted on that basis.

I. Background

On December 1, 2004, pursuant to section 7 of the Vermont Wetland Rules (VWR) and Water Resources Board (Board) Rule of Procedure 17, Christian J. Thompson, Supervisor of the Vermont Agency of Natural Resources (ANR), Department of Fish and Wildlife (DFW), Bald Hill Fish Culture Station in Newark, Vermont, filed a petition (Petition) with the Board seeking reclassification of areas depicted as wetlands on Vermont Significant Wetland Inventory (VSWI) maps from Class Two to Class Three. The mapped areas at issue, totaling approximately two acres, consist of two constructed fish-rearing ponds located entirely on real property owned by DFW. The petition includes a letter of support signed by Shannon Morrison, District Wetland Ecologist with the Wetlands Office of ANR's Department of Environmental Conservation, indicating that the mapped areas do not warrant protection as wetlands.

On December 1, 2004, after reviewing the Petition, counsel for the Board contacted District Wetland Ecologist Shannon Morrison. On December 2, 2004, Ms. Morrison sent a facsimile letter to the Board's counsel. In her letter, Ms. Morrison recommended that the Board determine that the ponds at issue are not wetlands rather than reclassify them from Class Two to Class Three.

Pursuant to section 7.4.a of the Vermont Wetland Rules and Procedural Rule 22, the Board provided personal notice of the Petition to persons required to be so notified on December 23, 2004, and the Board published notice of the Petition in the *Newport Daily Express* on December 28, 2004. In its personal and published notice, the Board stated, in part, that it would consider the Petition "both as a petition to reclassify wetlands from Class Two to Class Three and, in the alternative, as a petition to determine that the mapped areas are not wetlands." As provided by the Board's personal and published notice of the Petition, and in accordance with section 7.4.a of the Vermont Wetland Rules, the deadline for submitting comments or requesting a hearing on the petition was January 27, 2005. No comments or requests for a hearing were

received by the January 27, 2005 deadline, and the Board did not determine on its own initiative that a hearing would be necessary. The Board deliberated on the Petition at its February 22, 2005 meeting in Randolph, Vermont. This matter is now ready for decision.

II. Facts

1. The DFW manages two constructed fish-rearing ponds (Fish-Rearing Ponds) at the Bald Hill Fish Culture Station, which is located at 60 Abbott Hill Road near Newark Road in the Town of Newark, Vermont. These ponds, totaling approximately two acres, are located entirely on real property owned by DFW.
2. The Fish-Rearing Ponds are presently identified as Class Two wetlands on VSWI maps for the Town of Newark. National Wetland Inventory maps for the State of Vermont classify these ponds as POWH (palustrine, open water, permanent).
3. DFW built the Fish-Rearing Ponds in the late 1940's or early 1950's for the purpose of fish production. Their size and function has not changed since their construction.
4. The Bald Hill Fish Culture Station continues to use the Fish-Rearing Ponds annually as part of its fish-rearing programs and anticipates that it will continue to use these ponds for this purpose. If funding becomes available, the Bald Hill Fish Culture Station may construct several additional fish-rearing ponds in the area of the existing ponds.
5. The Fish-Rearing Ponds receive water solely through an enclosed piping system. Neither ground water nor surface water is known to influence these ponds.
6. The Fish Culture Station stocks the Fish-Rearing Ponds with young fish in late May and removes these fish in early July. When the Fish-Rearing Ponds are not in use, the Fish Culture Station frequently leaves them unfilled for several months, and these ponds may be dry for extended periods.
7. The Fish-Rearing Ponds have constructed clay-lined bottoms.
8. The Fish-Rearing Ponds do not support aquatic vegetation other than algae species. The areas surrounding these ponds are forested and undeveloped and do not contain habitat for hydrophytic vegetation.
9. ANR District Wetland Ecologist Shannon Morrison toured the site of the Fish-Rearing Ponds on September 16, 2004 with Christian J. Thompson, Supervisor of the Bald Hill

Fish Culture Station, and in a letter sent to the Board by facsimile on December 2, 2004, offered her opinion that these ponds are not wetlands.

10. The Fish-Rearing Ponds lack hydric soils, hydrophytic vegetation, and wetland hydrology and are therefore not wetlands.

III. Analysis

The Board's standard of review of a petition to reclassify a wetland is governed by section 7.4.b of the Vermont Wetland Rules, which directs the Board to determine whether a wetland is significant on the basis of the functional criteria for evaluating wetlands set forth in section 5 of the Vermont Wetland Rules. However, the Board may not only "determine whether to reclassify any wetland to a higher or lower classification," VWR § 4.4.a, but also "determine whether an area shown as a wetland on the VSWI maps is not a wetland." VWR § 4.4.e. A regulated wetland under the Vermont Wetland Rules is characterized by hydric soils, hydrophytic vegetation, and wetland hydrology. *See* VWR § 3.2.a. *See also* VWR §§ 2.14, 2.15, 2.29, 2.31 (defining hydric soils, hydrophytic vegetation, wetlands, and wetland hydrology, respectively).

Based on the facts contained in the Petition and the information provided by ANR District Wetland Ecologist Shannon Morrison, the Board concludes, pursuant to sections 4.4.e and 7.1.e of the Vermont Wetland Rules, that two existing fish-rearing ponds at the Bald Hill Fish Culture Station in the Town of Newark, Vermont, currently depicted as wetlands on VSWI maps, lack hydric soils, hydrophytic vegetation, and wetland hydrology and are therefore not in fact wetlands. Accordingly, the Board treats the petition to reclassify these areas from Class Two to Class Three wetlands as a petition to determine that these areas are not wetlands. The Board grants the Petition on that basis and directs ANR's Wetlands Office to update the VSWI maps for the Town of Newark accordingly.

IV. Order

It is hereby Ordered:

1. A petition to reclassify two constructed fish-rearing ponds at the Bald Hill Fish Culture Station in Newark, Vermont, filed on behalf of the DFW, is treated as a petition to determine that these areas are not in fact wetlands.
2. Two fish-rearing ponds at the Bald Hill Fish Culture Station, located in the Town of Newark, Vermont, currently classified as significant wetlands, are hereby determined not to be wetlands within the meaning of the Vermont Wetland Rules.

3. ANR's Wetlands Office shall remove these two fish-rearing ponds from the VSWI maps for the Town of Newark.

Dated at Montpelier, Vermont this 24th day of February, 2005.

WATER RESOURCES BOARD

/s/ John F. Nicholls

John F. Nicholls, Chair

Concurring:

Lawrence H. Bruce, Jr., Member
Michael J. Hebert, Member
Joan B. Nagy, Member
John D. E. Roberts, Vice Chair