

**VERMONT AGENCY OF NATURAL RESOURCES
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

INDIVIDUAL WETLAND PERMIT

In the matter of:

Harry Ryan
PO Box 310
Rutland, VT 05701

**Application for a road relocation to move Avalon Beach Road away from the lake shore
with proposed impacts to 2,457 square feet of wetland and 3,419 square feet of buffer zone.**

Avalon Beach Road, Castleton

File #: 2014-003
DEC ID #: RU13-0360

Date of Decision: December 1, 2015
Decision: **Denied**

Any activity in a Class I or Class II wetland or its associated buffer zone is prohibited unless it is an allowed use under the Vermont Wetland Rules (VWR) or unless it receives a permit allowing such activity. 10 V.S.A. § 913. Applicants for an individual permit for a proposed activity in any Class I or Class II wetland or its buffer zone must demonstrate that the proposed activity complies with the VWR and will have no undue adverse effects on protected functions and values. VWR § 9.5(a).

The Vermont Agency of Natural Resources (Agency) received an application dated September 17, 2014 from Harry Ryan (permittee) seeking an individual Vermont Wetland Permit for a project involving activities in a wetland and associated buffer zone located in Castleton, Vermont. The Agency gave notice of the application in accordance with the VWR. The Agency considered all comments received during the public comment period during review of the application and issuance of this decision.

DECISION

1. Based on the Findings contained in this decision below, the Secretary has determined:
 - a. The proposed activity is taking place in a Class II wetland that has the following significant functions: water storage for flood water and storm runoff (VWR § 5.1), surface and groundwater protection (VWR § 5.2), wildlife and migratory bird habitat (VWR § 5.4), threatened and endangered species habitat (VWR § 5.6).
 - b. The applicant has not demonstrated that the proposed activity will not have an undue adverse effect on those protected functions and values. The applicant has failed to provide information that demonstrates that the proposed activity cannot be

located outside the wetland or on another site owned or controlled by the applicant, or reasonably available to meet the project purpose.

2. Any person with an interest in this matter may appeal this decision pursuant to 10 V.S.A. Chapter 220. Pursuant to 10 V.S.A. chapter 220, any appeal of this decision must be filed with the clerk of the Environmental Division of the Superior Court within 30 days of the date of the decision. The Notice of Appeal must be filed in accordance with Rule 5(b) of the Vermont Rules for Environmental Court Proceedings, available on line at www.vermontjudiciary.org. or 32 Cherry Street 2nd Floor, Suite 303 Burlington, VT 05401.

FINDINGS

1. The Agency received a complete application from Harry Ryan for a Vermont Wetland Permit on September 17, 2014.
2. The wetland and adjacent 50-foot buffer zone are located on the North side of Avalon Beach Road, approximately 20 feet from Lake Bomoseen. Lake Bomoseen lies to the south of the wetland but is cut off by Avalon Beach Road.
3. Alan Quackenbush, Wetlands Program Manager, conducted a site visit to the subject property with Bron Spencer on March 23, 2012. Julie Foley, District Wetlands Ecologist, conducted a site visit to the subject property with Bron Spencer in November or December of 2012. Julie Foley visited the site again on July 16, 2015, accompanied by Harry Ryan, Marilynn Fogarty, Ryan Fogarty, Ray Knudtsen and Bron Spencer.
4. The subject wetland is identified as a palustrine wetland on the Vermont Significant Wetlands Inventory maps and therefore is designated as a Class II wetland under VWR § 4.6.
5. The wetland in question is described in detail in Sections 7 and 8 of the permit application. The wetland complex is approximately two to three acres in size composed of scrub-shrub (40%) and wet meadow (60%) components, located along the base of a long slope. The subject wetland impact area lies along the property line in the southeast corner of the larger wetland complex and adjacent to a summer residence. The impact area is scrub shrub and wet meadow with ponded and saturated soils at the road crossing. The dominant plant species within the subject wetland are sedges (*Carex spp.*, *Scirpus spp.*), and common rush (*Juncus effuses*). Wetland soil is poorly drained with dark grey silt loam. Overall wetland hydrology is provided by seeps, drainage ditch, and surface runoff from agricultural land.
6. The proposed project is described in detail in Sections 10 and 11 of the permit application. The project is described in the application as a road relocation to move Avalon Beach Road away from the lake shore. There is not sufficient evidence that the original Avalon Beach Road will be discontinued.

7. Proposed impacts to the wetland and buffer zone, summarized in Section 12 of the permit application, are as follows:

Wetland Alteration:		Buffer Zone Alteration:	
Wetland Fill:	2,457 sq.ft.		
Temporary:	0 sq.ft.	Temporary:	0 sq.ft.
Other Permanent: :	0 sq.ft.	Permanent: :	3,419 sq.ft.
Total Wetland Impact	2,457 sq.ft.	Total Buffer Zone Impact:	3,419 sq.ft.

8. Under 10 V.S.A. § 913 and VWR § 9.5, the Secretary is prohibited from authorizing any activity in a Class II wetland or in its buffer zone if the Secretary determines that it will have an undue adverse effect on the protected functions and values. Based on the permit application, the site visit(s) by Agency staff, and the below findings and analysis of those findings, the Secretary has determined that the proposed project will have undue adverse effects on the protected functions and values of the subject Class II wetlands.
9. The protected functions of the wetland include the following: water storage for flood water and storm runoff (VWR § 5.1), surface and groundwater protection (VWR § 5.2), wildlife and migratory bird habitat (VWR § 5.4), threatened and endangered species habitat (VWR § 5.6).
10. The following functions are either not present or are present at such a minimal level as to not be protected functions: fish habitat (VWR § 5.3), exemplary wetland natural community (VWR § 5.5), education and research in natural sciences (VWR § 5.7), recreational value and economic benefits (VWR § 5.8), open space and aesthetics (VWR § 5.9), and erosion control through binding and stabilizing the soil (VWR § 5.10).
11. The subject wetland is significant for the water storage for flood water and storm runoff function as demonstrated in Section 16 of the permit application. Evidence of the wetland's flood storage function is apparent where the wetland seasonally ponds on the south end. The wetland has no defined outlet and has dense woody and emergent vegetation that slows flood waters and provides evapotranspiration. The project is proposing to fill 2,457 square feet of the wetland in the lower portion of the wetland that provides this function, which will decrease the wetland's water storage capacity more than minimally.
12. The wetland is significant for the surface and ground water protection function as described in Section 17 of the permit application. The wetland is adjacent to the surface waters of Lake Bomoseen and provides water quality treatment of runoff from the dirt road and upslope agricultural fields, including reduction of contaminants in Lake Bomoseen and moderation of the adverse water quality effects of soil erosion and stormwater runoff. The wetland contains microtopography and dense vegetation that helps filter sediment and pollutants. Seeps within the wetland provide cold water recharge. The proposed road will be located in a portion of the wetland that provides this function and will therefore decrease the wetland's surface and groundwater protection function more than minimally.
13. The wetland is significant for the wildlife and migratory bird habitat function as described in Section 19 of the permit application. Based on the stream association, ponded

- characteristics and proximity to the Lake, the wetland provides the habitat to support mink as well as amphibians. The proposed road will transect portions of this wetland providing wildlife habitat and the close proximity of vehicles to the habitat may create additional disturbance which will have a minimal impact on the wildlife function of the wetland.
14. The wetland is significant for the rare, threatened and endangered species function as demonstrated in Section 21 of the permit application. There was a 2003 sighting of a rare damselfly in the vicinity of the wetland. This species prefers open water and is not likely to utilize the portion of the wetland that is proposed to be impacted by this project. Therefore, the proposed project will not result in an undue adverse impact to this function.
 15. The Agency provided a 15-day public notice period of the application from December 12, 2014 thru December 26, 2014, in accordance with the VWR 9.3. The Agency considered all comments received during the public comment period during review of the application and issuance of this decision. Seven public comments were received, all of which generally opposed the project due to wetland impacts and the fact that the road cannot actually be discontinued or closed as represented in the application. Comments relating to the wetland impacts included concerns that the new road would disturb waterfowl and other wildlife, and that the application does not address how increased stormwater runoff from the road would be managed. Comments related to the road discontinuance included testimony that the section of existing road is adequate to provide access and is owned or deeded to those landowners who commented, precluding the applicant from discontinuing the road as described in the application. Commenters questioned the need for the project in the proposed location as there is an existing road and alternate access could be gained through the Applicant's other properties.
 16. On August 18, 2015 the Wetlands Program sent a written notification to the applicant notifying him that the project had more than minimal impact on protected wetland functions and values. The letter explained that the applicant needed to demonstrate that those impacts could not practicably be avoided, in accordance with VWR 9.5(b). The notification offered the following three options to the Applicant:
 - a. Within 30 days of this letter, submit proof that you have the ability to discontinue the use of the existing road, and provide a legitimate traffic study which indicates that the current alignment is unsafe, and describe any alternative alignments that were considered, including why they were not selected; or
 - b. Within 30 days of this letter withdraw your application; or
 - c. The Program issues a permit denial.
 17. In response to the August 18, 2015 letter, the Applicant submitted Affidavits from some landowners on the existing Avalon Beach Road stating they would close the section of the road on their property upon completion of the new road. The Applicant stated he would close the existing road to traffic as soon as possible without providing a date certain and without providing for removal of the existing road.
 18. The applicant has not provided sufficient information to demonstrate that the proposed project cannot practicably be located outside the wetland as required under VWR 9.5(b).

This failure to provide information is particularly compelling in light of the fact that the existing Avalon Beach Road functionally serves the purpose of the proposed project without further disturbing the wetland. Furthermore, the applicant has not provided the information requested by the Wetlands Program in the August 18, 2015 letter, to demonstrate that he has the legal authority to discontinue the existing road, given that the existing road crosses several properties to which the applicant does not hold legal title. Because the applicant has failed to meet his burden under VWR 9.5, it is presumed that the adverse effects on protected functions of the wetland, as articulated in paragraphs 11 and 12 above, constitute undue adverse effects, and the proposed activity is prohibited.

Alyssa B. Schuren, Commissioner
Department of Environmental Conservation

by: _____
Laura Lapierre, Program Manager
Wetlands Program
Watershed Management Division

Dated at Montpelier, Vermont
this first day of December, 2015

ABS/LVPL/JF