

**Vermont Department of Environmental Conservation**

Watershed Management Division

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January 6, 2015

Harry Ryan  
P.O. Box 310  
Rutland, Vermont 05701

Re: Request for Reconsideration of denial of Individual Wetland Permit # 2014-003

Dear Mr. Ryan:

The Vermont Agency of Natural Resources (Agency) received your Request for Reconsideration of Individual Wetland Permit #2014-003, dated December 15, 2015, via email. I have reviewed your request and the comments that you provided to the Agency subsequent to the issuance of the permit. Based on my review of the information that you submitted, associated Department of Environmental Conservation (DEC) files, and discussion with DEC Wetlands Program staff, I have decided to deny your request and uphold the decision of the Watershed Management Division to deny the permit.

A. Background

The Agency received an application on September 17, 2014. The Agency gave notice of the application in accordance with Section 9 of the Vermont Wetland Rules (VWR). The Agency considered all comments received during the public comment period during review of the application and issuance of the permit. The permit was deemed denied on December 1, 2015.

The subject wetland and adjacent 50-foot buffer zone are located on the north side of Avalon Beach Road, approximately 20 feet from Lake Bomoseen. 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. 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. As described more fully in Sections 7 and 8 of the permit application and the permit findings, the wetland is a significant wetland for the following 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)..

Julie Foley, District Wetlands Ecologist, conducted a site visit with Bron Spencer on November 28, 2012. During this site visit, the District Wetlands Ecologist gathered the information necessary to verify the applicant's permit application and to make subsequent decisions about permitting the project.

The proposed impacts of the project consist of 2,457 square feet of wetland and 3,419 square feet of buffer zone. These impacts would result from the construction of a new roadway, intended to replace an existing roadway.

## B. Analysis

Section 9.5 of the VWR provides the standard of review for an Individual Wetland Permit:

### 9.5 Individual Permit Review Standards

#### a. Burden of Proof

Applicants for an individual wetland permit shall have the burden to show that a proposed activity in any Class I or Class II wetland or its buffer zone complies with these rules and will have no undue adverse effect on protected functions and values. In determining whether this burden has been met, the potential effect of any proposed activity shall be evaluated on the basis of both its direct and immediate effects as well as on the basis of any cumulative or on-going effects on the significant wetland.

#### b. Mitigation Sequencing

An adverse effect on any protected function, other than a minimal impact, shall be presumed to constitute an undue adverse effect unless:

- (1) The proposed activity cannot practicably be located outside the wetland or on another site owned or controlled by the applicant or reasonably available to satisfy the basic project purpose; and
- (2) If the proposed activity cannot practicably be located outside the wetland, all practicable measures have been taken to avoid adverse impacts on protected functions; and
- (3) If avoidance of adverse effects on protected functions cannot be practically achieved, the proposed activity has been planned to minimize adverse impacts on the protected functions and a plan has been developed for the prompt restoration of any adverse impacts on protected functions.

Using the information available to me, I have reconsidered the permitting decision using the foregoing standard. Although the Applicant has taken steps to minimize impacts to protected functions of the wetland, the adverse effects of the project will have more than a minimal impact. Therefore, the Applicant must demonstrate how the project satisfies the mitigation sequencing set forth in VWR § 9.5(b). Using the information available to me, it is my conclusion that the Applicant has not demonstrated that the project meets the requirements in the mitigation sequencing.

The first step of the mitigation sequencing is to determine whether the proposed activity can be located outside the wetland. The Applicant did not demonstrate that the “proposed activity cannot be practicably located outside the wetland or on another site owned or controlled

by the applicant or reasonably available to satisfy the basic project purpose.” VWR § 9.5(b)(1). A road already exists on the Applicant’s property, completely outside of the wetland and buffer zone, which is used by landowners to access their properties. The stated purpose of the project, as described in Section 10 of the permit application, is to move Avalon Beach Road away from the lakeshore, and provide safer access to the property. But the Applicant has not provided sufficient documentation to demonstrate that the project would satisfy its stated purpose. Relocation of a road involves closing the existing road and removing it. The Applicant has stated that he and several of his neighbors would close sections of the existing road should the new road be constructed, but during the public comment period, neighboring landowners stated their intent to continue to use the existing road where it crosses their property. No specific plans for removal of the road were discussed in the application. Therefore the existing road along Lake Bomoseen will continue to be used in portion, the entirety of the existing road will remain, and the proposed project will not serve the stated intended purpose.

Since the Applicant has not demonstrated that the project cannot practicably be located outside the wetland or on another site owned or controlled by the Applicant or reasonably available to satisfy the basic project purpose, and a road currently exists outside the wetland on the property controlled by the Applicant, the Applicant has not satisfied the mitigation sequencing requirements of VWR § 9.5(b).

#### C. Response to Comments Submitted in Request for Reconsideration

In issuing Individual Wetland Permit Denial #2014-003, the Wetlands Program considered the public comments, and responded to those comments in the permit. Below are responses to the comments (paraphrased) you posed in your request for reconsideration.

**Comment 1:** A date certain for the removal of the existing road cannot be provided until a permit is issued. When the new road is constructed, the old road will be closed right away.

**Response 1:** For the stated project purpose to be satisfied, the existing road would need to be removed. For reasonable assurances that the road would be removed, the permit would need to be conditioned with a timeline for removal, whether it be 30 days after the closing of the road or a specific date. The applicant did not explain how or when the road would be removed. It was simply stated that use would be discontinued.

**Comment 2:** The application was not correctly or fairly understood. I have stated that I have the legal ability to close the road where it crosses my property, in effect closing the road. In addition several other landowners all intend to and will close that section of the old road where it crosses their properties.

**Response 2:** Although a portion of the existing road may be closed, the Application does not demonstrate that closing the section of road across the Applicant’s property would effectively close the road. Several neighboring property owners submitted comments during the public comment period stating that they intended to continue to use the existing road to access their property. Applicant does not demonstrate that he has the legal authority to prevent neighboring property owners from using the existing road where it crosses their property. Furthermore the Applicant does not sufficiently demonstrate the need for the closure, or demonstrate that the impacts cannot be avoided. There is insufficient proof that the road needs to be relocated, or that the relocated road would satisfy the project purposes. The Applicant has not satisfied his

burden under VWR § 9.5, and keeping the existing road is the only option that appears to satisfactorily comply with the Wetland Rules.

**Comment 3:** I request a hearing on this request for reconsideration to address the issues raised in the denial and the sufficiency of the basis for the denial.

**Response 3:** The permit decision reconsideration process (Vermont Wetland Rules §9.6) does not allow for a hearing on a reconsideration request. The reconsideration process is narrowly intended to allow an applicant to submit supplementary evidence concerning the adequacy of the permit application, mitigation measures, or any other material that may clarify some aspect of the project or application. 10 V.S.A. § 917 and the Wetland Rules allow for the appeal of a permit decision to the Environmental Division, for a de novo evidentiary hearing according to the provisions of 10 V.S.A. § 8504 et al.

**Comment 4:** Moving the road will result in a net positive impact on the subject wetland and Bomoseen when all aspects are considered.

**Response 4:** Neither the application nor the reconsideration request explains how locating a portion of the proposed new road in the wetland and buffer zone would provide a net positive impact on the subject wetland. The Wetland Program disagrees with the Applicant's statement.

**Comment 5:** The 2,457 square feet of wetland which the road will occupy does not have the typical characteristics of the overall wetland. It runs along the route of an old farm road.

**Response 5:** The area of wetland proposed for impact is concave, and densely vegetated which are the same characteristics of the remaining lower portions of the wetland that support water storage and water quality protection function.

**Comment 6:** The reduction in silt reaching the lake by discontinuing the project should weigh heavily on the way the project is viewed.

**Response 6:** The portion of the existing Avalon Beach Road to remain is directly adjacent to Lake Bomoseen and directly adjacent to the wetland. If a primary purpose of the project is to reduce silt in our waters from vehicular traffic, then relocation and remediation of this portion of road should be considered as well. Furthermore, the jurisdiction of the Wetlands Program extends to impacts to wetlands and wetland buffer zones. The permit decision was based on the information presented regarding the impact of the proposed project on a wetland and is not based on undetermined impacts to various other surface waters. There are various other methods for slowing traffic and reducing siltation that do not involve impacts to wetlands.

**Comment 7:** If some neighbors do not close their portions of the road, it will not negate the environmental gain.

**Response 7:** The addition of a new road to a Class II wetland and buffer is not considered an environmental gain.

**Comment 8:** The impact is minimal and the new road cannot avoid the wetland.

**Response 8:** Wetland loss (such as filling for road construction), is more than a minimal impact. The continued use of the existing road avoids additional wetland impacts.

**Comment 9:** Paragraph 11 incorrectly asserts that the response to section 16 of the application form demonstrates that the wetland is significant for water storage. It is not.

**Response 9:** The wetland is significant for water storage based on the information that was provided in the application, and by observations from the District Wetlands Ecologist. 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 comment continues on to state that runoff does accumulate within the wetland. The area which will be impacted is concave and therefore filling will cause displacement and a more than minimal impact to this significant function.

**Comment 10:** The wetland is not significant for surface and ground water protection functions.

**Response 10:** The wetland is adjacent to the surface waters of Lake Bomoseen and has the ability to provide 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 pit and mound microtopography and dense vegetation that helps filter sediment and pollutants. Seeps within the wetland provide cold water recharge. Whether the wetland stores polluted or clean runoff water does not negate the fact that it provides this function.

D. Decision

Based on the foregoing analysis and information available to me, the project as proposed will result in undue adverse effects on the protected functions and values of the wetlands on the subject property. This is consistent with the decision in Individual Wetland Permit Denial #2014-003.

E. Appeals

The filing of your Request for Reconsideration tolled the 30-day period for filing on appeal of Individual Wetland Permit #2014-003 with the Environmental Division of the Superior Court. Please note that the address for the Environmental Division has changed and is now 32 Cherry Street, 2<sup>nd</sup> Floor, Suite 303, Burlington, VT 05401 (Tel. # 802-951-1740). The full 30-day period for appeal shall now commence to run, and shall be computed from the date of the issuance of this decision.

Sincerely,

Peter LaFlamme, Director  
Watershed Management Division