

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001- 6092

Re: Vermont Department of Forests,
Parks, and Recreation (Phen Basin)

Land Use Permit Amendment
#5W0905-7-EB

MEMORANDUM OF DECISION

The Agency of Natural Resources (ANR) moves to alter the Findings of Fact, Conclusions of Law, and Order (Decision) and Land Use Permit Amendment #5W0905-7-EB (Permit) issued on September 7, 2005. In addition, the Vermont Association of Snow Travelers (VAST) moves to intervene as a party and moves to alter the Decision and Permit. As set forth below, the Board grants VAST's motion to intervene and denies both motions to alter in part, vacating the Permit.

I. PROCEDURAL SUMMARY

On July 15, 2003, the District 5 Environmental Commission (Commission) issued Land Use Permit #5W0905-7 (Commission Permit) and accompanying Findings of Fact, Conclusions of Law, and Order (Commission Decision) to the Vermont Department of Forests, Parks and Recreation, authorizing the construction of 200 feet of mountain bike trail, 1,000 feet of cross-country ski trail and three replacement trail bridges, and a previously built recreational trail system excluding certain snowmobile trails, on a 2,695-acre project tract known as the Phen Basin in the Town of Fayston, Vermont (Project).

On August 14, 2003, Catamount Trail Association (CTA) filed a Motion to Alter Condition 12 of the Permit which requires relocation of the Trail. On November 3, 2003, the Commission issued a Memorandum of Decision denying CTA's Motion to Alter.

On December 2, 2003, CTA filed an appeal with the Environmental Board (Board) from the Commission Permit and Commission Decision, challenging Condition 12 of the Commission Permit, which requires CTA to relocate a portion of the Catamount Trail/Trail 17A (Trail) away from a wetland complex.

Board Chair Patricia Moulton Powden convened a Prehearing Conference on January 8, 2004. A Prehearing Conference Report and Order was issued on January 12, 2004 (PCRO). The PCRO, among other things, identified issues on appeal and set the matter for hearing.

After the PCRO was issued, several continuances were granted at the parties' request. ANR and CTA filed joint stipulated proposed findings and conclusions on May 7, 2004.

The Board deliberated on the stipulation on June 23, 2004. On July 15, 2004, the Board issued a Memorandum of Decision holding that the stipulation was insufficient to demonstrate compliance with the criteria on appeal, and a Scheduling

Order setting the matter for hearing. After these orders were issued, several continuances were granted at the parties' request.

On October 13, 2004, the Board convened a public hearing at its offices in Montpelier. At the hearing, the Board granted the parties' request to file supplemental stipulated facts and a revised proposed permit condition to address some of the concerns raised at the hearing. On October 29, 2004, the Board issued a Hearing Recess Order, which formalized this action and which also set the matter for a site visit in November 2004.

On December 17, 2004, the Chair granted the parties' requests to extend the deadline for the supplemental filings to December 22, 2004, and to delay the site visit until June 2005. On December 22, 2004, ANR and CTA submitted their joint stipulated supplemental findings of facts and proposed permit conditions.

On June 3, 2005, the Board conducted a site visit and reconvened the hearing in this matter, taking testimony and making observations on the record. The Chair granted the parties' request to have until June 17, 2005 to file supplemental proposed findings and conclusions, stipulated exhibits, and any supplemental or revised proposed permit conditions.

The Board deliberated on June 3, 2005, July 20, 2005, August 17, 2005. Based on the record, related argument, and the parties' proposed findings of fact and conclusions of law, the Board declared the record complete and adjourned. The Decision and Permit were issued on September 7, 2005.

On September 22, 2005, VAST filed a Motion to Intervene and a Motion to Alter. ANR filed a Motion to Alter on the same date. The Board deliberated on October 19, 2005.

II. DISCUSSION

A. VAST's Motion to Intervene

VAST moves to intervene as an interested person. Board rules ordinarily require interested persons to petition for party status on or before the date of the prehearing conference. EBR 14(C). However, the rule authorizes the Board to grant an untimely petition if there is good cause for the delay, and if the late appearance will not delay the proceedings or prejudice any party. *Id.* Such is the case here.

As noted in the Decision, part of the Project is collocated with VAST snowmobile trails. In fact, the trail segment in question is a VAST Trail as well as a

CTA trail. It is axiomatic that Act 250 permits run with the land. *In re Estate of Swington*, 169 Vt. 583, 585 (1999)(mem.). Therefore, the Permit and Decision in this appeal necessarily affect part of VAST's trail network. VAST not only has an interest that may be affected by the Project, it has an interest in the Project itself since part of the Project is actually part of the VAST trail project.

VAST was a party below and was given notice of the prehearing conference in this appeal. VAST did not attend the prehearing conference or otherwise notify the Board of any interest in this appeal until it filed these motions. It did, however, appeal from the Coordinator's rulings that jurisdiction attached to the VAST project.¹

VAST has since conceded that an Act 250 permit amendment is required for the trail segment in question, and the Board's decision establishing jurisdiction over the VAST trails has not been appealed. *Re: Vermont Association of Snow Travelers*, Declaratory Ruling 430, Findings of Fact, Conclusions of Law, and Order (Altered) (Jun. 7, 2005). To continue to operate its trails, including the segment in question in this appeal, VAST must obtain a permit amendment from the Commission. There is no question that VAST's interests stand to be affected by the instant appeal, since it involves the same trail segment, and facts found and conclusions reached by the Board concerning that trail segment may bind the Commission in deciding any permit application VAST may file concerning this identical trail segment.

There has been no opposition to VAST's motion to intervene, and no reason to believe that VAST's untimely motion to intervene will cause prejudice to any party or interest protected by Act 250. VAST's participation will cause no delay in this matter since VAST has only sought consideration of its request to alter, and has not asked to reopen the hearing. Given the absence of delay or prejudice from VAST's late appearance, and the unresolved nature of Act 250 jurisdiction over VAST's trails at the time of the prehearing conference in this appeal, the Board finds sufficient good cause to consider VAST's untimely petition.

VAST's motion to participate as a party is granted.

¹ The parties were given the option of consolidating the cases, but did not wish to do so. The Board has respected the parties' wishes procedurally, however, the fact that VAST was not a coapplicant or party to this appeal until now cannot affect the Board's decision on the merits.

B. Motions to Alter

ANR and VAST each challenge the trail relocation and reclamation requirements in the Permit and related findings and conclusions in the Decision. As set forth below, the Board grants these motions in part to delete the relocation and reclamation conditions. However, the Project cannot comply with Act 250 without blocking visual and physical access to the wetland from the existing trail segment by replanting the path and placing some form of barrier on either end of the trail segment. In addition, the trail segment must be moved at least 100' away from this sensitive area, as set forth in the Decision, if it is going to continue to exist. Accordingly, the Board grants the parties' request to alter the Decision and Permit by removing the relocation and reclamation requirements. This necessarily results in denial of the parties' permit application.

However, the parties may submit a new amendment application to the Commission pursuant to EBR 31(B). This would provide a practical way for all the parties to work together to address the relocation issues, including those unrelated to Act 250. Whether VAST and the parties in this appeal should be coapplicants is an issue for the Commission. EBR 10(A).

C. ANR's Motion to Alter

ANR challenges the Board's holding that Criteria 8(A), 1(G) and 9(K) require relocation and reclamation of a segment of trail near the wetland complex, arguing that it is unsupported by the evidence, that the relocation and reclamation are not reasonable mitigation, and that they conflict with an easement over the Project tract.

Sufficiency of Evidence; Mitigation Specifics

The record in this appeal contains ample evidence of the habitat value of this unique wetland complex to many species of wildlife including waterfowl and wading birds, the sensitivity of these waterfowl and wading birds to disturbance during important periods in their life cycle such as nesting, and the visual draw of this area to trail users in all seasons. For instance, with respect to species such as great blue heron, American bittern, Virginia rail, or wood ducks, ANR's wildlife biology expert testified that:

a few people on the wrong day, or the right day as the case may be, while the birds are trying to either lay eggs or incubate eggs in the nest, and they're gone. They won't come back. . . . They're just very sensitive.

Testimony of John Austin, Oct. 13, 2004 Mr. Austin also testified that ANR originally recommended the 300' buffer due to concerns that the wetland complex "wasn't capable of supporting a lot of human activities during, in particular in June, July and August, the months when you would have nesting and breeding activity by birds like bitterns and herons and rails and waterfowl," and that these species "would be displaced by people just milling about; doing the things that we do and there's no harm in doing them other than they are just too close to this area – it can't buffer itself from loud noises and activities by people." *Id.*

ANR later revised its position on the buffer requirement based in part on a lack of evidence of the level of actual nonwinter use, and in part on the erroneous assumption that the unpermitted VAST trail would remain in place. However, the record supports the Board's finding that there already is some nonwinter use of the area by hikers, bikers and ATV users. The Board observed mountain bike and all-terrain vehicle tracks visible on the trail in close proximity to the wetland, despite the fact that recent foot traffic had not left visible tracks. More important, it is clear that this trail segment provides direct and easy access to the wetland and the wildlife habitat it provides. This, coupled with the significance of the habitat and sensitivity of waterfowl and wading birds to human disturbance, requires that the permit be denied unless the trail segment is relocated, the existing trail segment and path to the pond are replanted to facilitate revegetation, and physical access blocked at either end of the existing trail segment.

With respect to the installation of boulders at either end of the existing trail segment, ANR argues the use of heavy equipment "is an unnecessary disturbance which should be avoided." (ANR's Motion at 4.) The Board shares ANR's concern, which is supported by the record, and which is why the Permit prohibited any such disturbance between April 1 and September 1. The existing trail segment is situated in a way such that the wetland pond is a real draw from both directions, so it must be replanted and access blocked. In addition, ATVs can access this part of the trail from the north. Although the Board did not conduct its site visit in those northerly areas at ANR's suggestion, there was an ATV track in the vicinity of the trail segment to the south of the wetland and testimony that ATVs and mountain bikes can access the trail segment from the north. There was also credible evidence that gates are not an effective way to block access on trails. Although placing boulders at either end of the existing trail segment is a reasonable and feasible means of blocking access to the path and the pond, as long as the use of heavy equipment is prohibited between April 1 and September 1, there may be some other effective way to blocking physical access to the existing trail segment. Should the parties return to the Commission for reconsideration of a revised amendment application, the Commission will have the flexibility to require that access be blocked by something other than boulders or gates.

ANR also argues that the path could be revegetated down to the pond without a Conditional Use Determination (CUD). Although ANR's suggestion is made in the context of its request to delete the trail relocation requirement, which the Board declines to grant, the suggestion does have merit. Therefore, the Board grants this part of ANR's Motion to Alter. The hand aeration and replanting of the compacted path need not be restricted by the 50-foot buffer.

Without relocation of this trail segment as set forth in the Decision, and blocking access to the existing trail and replanting the compacted path as modified herein, the Board concludes that the Project significantly imperils the necessary wildlife habitat, and that the environmental loss to the public from the imperilment of the species is not outweighed by the recreational and other benefits of the trail. *Re: Southview Associates, #2W0634-EB (6/30/87), aff'd, In re Southview Associates, 153 Vt. 171 (1989).* The Decision is altered accordingly, and the Permit vacated.

Reasonableness and Feasibility; the Easement

ANR's second argument is that the relocation is not "reasonable and feasible" mitigation. ANR is correct that the Board did not take extensive evidence on the details of the trail relocation and how best to block access to the old trail segment. ANR is also correct that there was evidence that the Long Range Management Plan (LRMP) and the conservation easement may render these mitigation measures infeasible. Accordingly, the Board grants this part of ANR's motion. Without this mitigation, however, the Board cannot issue an Act 250 permit. The Commission might be able to issue a permit, however, if an alternate route within the parameters provided by the Board were approved.

While the Board appreciates that the LRMP and the conservation easement may pose legal and practical difficulties for the parties in decommissioning and relocating this trail segment, these are property rights issues beyond the Board's jurisdiction. *In re Estate of Swingleton, 169 Vt. 583, 585-586 (1999).* The Board's jurisdiction is limited to deciding whether the proposed development complies with the criteria on appeal. Without meeting the requirements previously ordered by the Board and modified in this decision, the Project does not comply with Criteria 1(G), 8(A), and 9(K).

Denial of this permit application is not only required by Act 250, it may prove to be a more sound and efficient approach in the long run. This way, the Commission can take evidence from all affected parties on where and how best to relocate the trail segment in question, and any proposal to block physical access with means other than boulders or gates.

D. VAST's Motion to Alter

VAST argues that the Board lacks jurisdiction over the VAST trail. As noted above, the VAST trail includes the trail segment in question in the instant appeal, and the law is clear that Act 250 permits run with the land. *In re Estate of Swington*, 169 Vt. 583, 585 (1999)(mem.). Moreover, the Board has ruled that the VAST trail is subject to Act 250 jurisdiction. While it is true that VAST opted not to participate in this appeal until this point, neither that fact, nor the fact that these trails were improved without a permit amendment, affects the extent of Act 250 jurisdiction over this trail segment.

With respect to the relocation of the trail segment, discussed above, VAST also requests that findings 42 and 43 be deleted. VAST is correct that extensive evidence was not taken on the topography to the immediate west of the trail segment, and this part of VAST's motion is granted. This will provide the parties and the Commission more flexibility to explore the best alternate route for this portion of the trail.

VAST also argues that the Board cannot "impede or relocate the real property interest in the conservation easement." (VAST's Motion at 3.) As discussed herein, VAST is correct that the Board lacks jurisdiction to determine property interests unrelated to Act 250, but the requirements of relocation and decommissioning to protect the necessary wildlife habitat are well within the Board's authority. Although this decision results in the Permit being vacated and jurisdiction being returned to the Commission, the parties may file an amendment application within the parameters set in the Decision and Permit and as modified herein. This will allow the parties to address any legal, topographical or other practical issues in a manner that complies with Act 250.

III. ORDER

1. VAST's Motion to Intervene as an Interested Person is GRANTED.
2. ANR's Motion to Alter is GRANTED in part and DENIED in part.
3. VAST's Motion to Alter is GRANTED in part and DENIED in part.
4. Land Use Permit #5W0905-7-EB is VACATED.

DATED at Montpelier, Vermont this 18th day of November, 2005.

ENVIRONMENTAL BOARD

/s/ Patricia Moulton Powden
Patricia Moulton Powden, Chair
George Holland*
Patricia Nowak*
Alice Olenick
Richard C. Pembroke, Sr.*
Jean Richardson
Christopher D. Roy

* **Board members George Holland, Patricia Nowak and Richard C. Pembroke, Sr., DISSENT:** We would grant ANR's and VAST's Motions to Alter to remove the relocation and reclamation requirements, consistent with our dissent from the Board's Decision and Permit.