

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

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Catamount Trail Association (CTA) appeals from Land Use Permit #5W0905-7 (Permit) and accompanying Findings of Fact, Conclusions of Law, and Order (Commission Decision), 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,¹ throughout the 2,695-acre project tract known as Phen Basin in the Town of Fayston, Vermont (Project). Specifically, CTA challenges Condition 12 of the Permit which requires CTA to relocate a portion of the Catamount Trail/Trail 17A (Trail) away from a wetland complex. CTA and the Agency of Natural Resources (ANR) have filed several stipulations of fact and proposed permit conditions to replace Condition 12. The Environmental Board holds that, with the conditions discussed below, the Project will comply with Criteria 1(G), 8(A) and 9(K) without Condition 12.

I. PROCEDURAL SUMMARY

On July 15, 2003, the District 5 Environmental Commission (Commission) issued the Permit and Commission Decision to the Vermont Department of Forests, Parks and Recreation.

On August 14, 2003, 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 Permit and Decision, challenging Condition 12 of the Permit.

On January 8, 2004, Board Chair Patricia Moulton Powden convened a Prehearing Conference with the following participants:

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As noted in the Commission Decision, part of the Project is collocated with snowmobile trails under the control of the Vermont Association of Snowmobile Travelers (VAST). The Commission opted not to address the VAST trails in the Commission Decision because the issue of Act 250 jurisdiction over the VAST trails remained pending during the Commission's review of the Permit application. The Board has since determined that the VAST trails require Act 250 review. *Re: Vermont Association of Snow Travelers*, Declaratory Ruling 430, Findings of Fact, Conclusions of Law, and Order (Altered) (Jun. 7, 2005).

ANR and the Department of Forests, Parks and Recreation (Department), by Elizabeth Lord, Esq.

CTA, by Ted Milks, with CTA Board member John Riley, Esq.

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 parties requested, and were given 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, and 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.

II. ISSUES

The issues on appeal are:

1. Whether the Project complies with Criterion 1(G) without Condition 12 of the Permit.
2. Whether the Project complies with Criterion 8(A) without Condition 12 of the Permit.
3. Whether the Project complies with Criterion 9(K) without Condition 12 of the Permit.

III. FACTS

The following findings are based on facts and exhibits stipulated to by the parties, as well as on evidence taken at the hearing and site visit. To the extent that any proposed findings of fact are included herein, they are granted; otherwise, they are denied. See *Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corp.*, 167 Vt. 228, 241-242 (1997); *Petition of Village of Hardwick Electric Department*, 143 Vt. 437, 445 (1983). Facts stated and terms defined in the procedural summary are incorporated herein. Topic headings are used only for organizational purposes.

General

1. CTA is a Vermont non-profit corporation formed in 1984 with the purpose of establishing a cross-country (nordic) ski trail over the length of Vermont.
2. The Project includes 200 feet of mountain bike trail, 1,000 feet of cross-country ski trail known as the Catamount Trail, with three replacement trail bridges, and a previously built recreational trail system, portions of which are collocated with certain snowmobile trails.
3. The Project is on a 2,695-acre tract known as the Phen Basin in Fayston, Vermont. The Phen Basin tract is one of four lots of a 3,425-acre tract that was subdivided in 1986 pursuant to Land Use Permit # 5W0905.
4. The Phen Basin tract was acquired by the State of Vermont in 1995.

Wildlife Habitat

5. There is a large, Class Two wetland complex in the center of the Phen Basin tract, which includes a beaver pond, and which has important wildlife habitat

functions.

6. This wetland is highly valuable habitat for wetland-dependent wildlife such as black bear, waterfowl, otter, mink, beaver, and wading birds such as great blue heron. It supports feeding, breeding and nesting habitat for waterfowl and wading birds, and is critical to the survival of these groups of wildlife species.
7. These wetland-dependent wildlife species are considered habitat specialists, that is, they require very specific types of habitat for feeding, reproduction and overall survival. Mink, beaver, otter, black bear and bobcat all rely on such wetland habitat for important feeding areas at certain times of the year. Otter, for instance, rely on the wetland as a critical source of food and may use it as a site for rearing young.
8. Birds, including herons and bitterns, and other wildlife species including mink, bear, and otter, are most sensitive to disturbances during periods of breeding, nesting, and rearing young. This critical period occurs in spring and early summer, from May or June through August.
9. Many other species of wildlife, including moose, deer and a variety of amphibian species, use the wetland complex.
10. This wetland is considered regionally significant due to the lack of other wetlands of similar size and character within the Mad River watershed, and due to the remote, undeveloped nature of the Phen Basin tract.
11. There is a short path from the Catamount Trail to the beaver pond in the southwestern area of the wetland complex. The path leads from the Trail to a clearing, and from the clearing down to the water.

Access to the Beaver Pond and Wetland Complex

12. The Catamount Trail approaches the wetland complex from both the north and the south. The southern approach begins at the Battleground Condominium parking area off Route 17.
13. The Catamount Trail ascends from the Battleground Condominium property, onto the Phen Basin tract, and crosses three bridges. The Catamount Trail joins the VAST snowmobile trail (VAST Trail 17A) at a "Y" intersection.
14. To the north of this intersection the Catamount Trail plateaus at a clearing just west of the wetland complex. This is where the clearing and path to the beaver pond are located.

15. The portion of the Catamount Trail along the southwestern edge of the wetland, near the clearing and path to the pond, allows direct access to the wetland. The pond is a point of visual interest that tends to draw trail users into the clearing and down the path to the pond.
16. From the point where it meets the path to the clearing and the pond, the Catamount Trail turns away from the wetland complex, in a northwesterly direction, and towards Huntington Gap.
17. The trail is relatively narrow, like a double-width footpath, from the Battleground Condominiums access to the intersection with Trail 17A, then widens out from there to approximately ten or twelve feet in width.
18. Access to the Catamount Trail from the Battleground Condominiums is allowed by an agreement between CTA and the Battleground Condominium Association.
19. Access to the Phen Basin wetland complex from the Battleground Condominium trailhead for motorized vehicles is restricted by the width of each of three wooden bridges. Each bridge has wooden siderails that block anything from crossing that is wider than approximately three feet. At least one of these bridges crosses very steep, rocky terrain that would be difficult or impossible for an all-terrain vehicle or other motorized vehicle to cross.
20. ATV use is prohibited on state land.
21. The Catamount Trail and wetland complex can also be accessed from the north, via VAST trails 17 and 17A. These VAST trails may be accessed by the Phen Basin Road/Chaingang Trail, Stagecoach Road/Town Highway 15 right-of-way, and Bassett Hill Road/VAST trail 100. The northern approach is collocated with VAST Trail 17 at the northern boundary of the Phen Basin tract.
22. The Department has posted signs along the trail informing users of the sensitivity of the habitat and requesting avoidance of the habitat. One type of sign is yellow, with black lettering that reads: "This area is designated as an Ecological Protection Zone—No Mt. Bikes, No Horses, No ATVs." Another type of sign is bright green, with red lettering that reads: "Sensitive Wildlife Habitat Ahead — Please Stay Out — April 1 Thru Nov. 1." Some of these signs were posted by the Department within a few weeks before the June 3, 2005 site visit.
23. Despite this signage, and other attempts to restrict access, mountain bike and ATV tracks were observed on a portion of the Catamount Trail south of the path to the beaver pond and wetland complex.

24. The week before the site visit, a small group of people from the Department walked the Catamount Trail from the Battleground Condominium access to the wetland complex. However, no pedestrian tracks or other indications of foot traffic were visible at the time of the site visit, except for some that were visible in the area near the pond.
25. Gates are not an effective way to prevent people from using a trail on bike or on foot.
26. The Catamount Trail had seen considerable use by mountain bikers until the Department undertook public education efforts. Since that time, mountain bike use in this area has dropped off significantly.

Impacts of Access

27. Human disturbance can result in complete abandonment of otherwise suitable habitat by wetland-dependent birds.
28. Human use of the Catamount Trail during the winter does not pose a concern with respect to the wildlife functions and values of the wetland. However, recreational activities, such as hiking, picnicking, all-terrain vehicle riding, and mountain bike riding, during non-winter months, has the potential to cause some wetland-dependent wildlife such as nesting herons to temporarily or permanently abandon the habitat. Such human disturbance would effectively destroy or significantly imperil this necessary wildlife habitat.
29. Similarly, dogs that are allowed to run unleashed in this wetland complex during the non-winter months could create enough disturbance to destroy or significantly imperil the wildlife habitat.
30. The current level of non-winter recreational use of the Trail has not been documented.
31. It is reasonable to expect that the Project will allow greater access to the wetland from this part of the Trail. This would affect the wetland ecosystem generally, and the wildlife habitat specifically.

Buffer; Mitigation and Alternative Sites

32. Based on the Department's recommendation, the LRMP (defined below) recommended the establishment of a 300-foot buffer around the wetland.

33. The Department recommended the 300-foot buffer because the wetland supports important wildlife functions, to protect and conserve critical values associated with unique and sensitive habitats. A buffer width of 300 feet is supported by the contemporary research on the topic of wildlife response to disturbance, although optimal buffer widths may vary, depending on topography and vegetative characteristics of the land.
34. The Department no longer recommends a 300-foot buffer in this case, in part because there is no indication of the current level of non-winter use. However, the LRMP has not been amended to delete the 300-foot buffer recommendation.
35. As the Catamount Trail continues north of the clearing and path to the pond, the brush and forest growth between the trail and the wetland complex increases in density. This growth is sufficient to block the view of the beaver pond just north of the clearing, and, by a point approximately one hundred feet up the Catamount Trail from the path to the pond, the brush and forest growth are heavy enough to prevent human disturbance of other parts of the wetland complex.
36. Similarly, the beaver pond and wetland complex are well screened by natural vegetation by a point approximately one-hundred feet south of the path to the pond.
37. Until recently, there had been a picnic table and fire ring in the clearing that overlooks the beaver pond and wetland complex. The Department recently removed this picnic table and fire ring.
38. The clearing near the beaver pond is revegetating naturally with recent growth including bushes, small shrubs, and saplings. There is no evidence of new growth on the path approaching the log landing and beaver pond from the south, due to highly compacted soils.
39. At the current rate of natural revegetation, the clearing and path down to the beaver pond would take several years to fill in completely, due to the slower rate of natural revegetation on the highly compacted soils in the path.
40. Applying the 300-foot buffer in compliance with the Commission permit would require part of the trail southwest of the intersection with VAST Trail 17A, to be relocated across a steep, rocky ridge.
41. Use of heavy equipment for earth moving to decommission or relocate the trail near the clearing and path could significantly imperil the habitat that decommissioning and relocation would be intended to protect.

42. The terrain near the clearing is relatively flat, with no steep slopes within one hundred feet to the west of the Trail.
43. There are no waterways within the area one hundred feet to the west of the section of Trail near the clearing.

Easements

44. In 1994 and 1995, CTA participated in the public and private efforts to conserve the Phen Basin tract for public use, and was deeded a trail easement for the Catamount Trail, which remains in the same location today.
45. The Phen Basin tract is subject to an easement entitled "Grant of Development Rights, Conservation Restrictions, Public Access Easement and Executory Interest," (Easement) held by the Vermont Land Trust and the Vermont Housing and Conservation Board. The Easement provides that its principal objective is to "conserve the native flora and fauna, and the biotic environments and ecological processes which support them, non-commercial public recreational opportunities, forestry values, and scenic resources."
46. The wetland complex and Catamount Trail segment at issue fall within the Easement's designated ecological protection zone. The Easement defines restrictions, restricted uses, and permitted uses of the ecological protection zone. The Easement specifically authorizes trails "for walking, hiking, cross-country skiing, and other non-motorized and non-mechanized recreational activities within and across" the ecological protection zone, and provides that mountain biking and horseback riding may be permitted in the ecological protection zone.

LRMP and MRPA

47. In 2002, the Agency of Natural Resources, Department of Forests, Parks and Recreation completed a Long Range Management Plan (LRMP) for the Phen Basin tract.
48. The LRMP was intended in part to address the potential impacts of non-winter recreational use on the sensitive habitat of the wetland complex, due to the proximity of the Catamount Trail to the wetland.
49. The LRMP proposed the exploration of relocation of the trail and the consideration of other management techniques for limiting non-winter use. In the event that relocation of the Trail was not feasible, the LRMP committed the Agency to implementing a program that included: 1) installing gates, 2) installing signs and taking efforts to educate the public, 3) working with local trail

organizations and the community at large to further public education efforts, 4) monitoring trail use and enforcing public use and access.

50. A local group, Mad River Path Association (MRPA), actively participated in the public hearings and process that led to the adoption of the LRMP by the Department of Forests, Parks and Recreation. MRPA has expressed a willingness to cooperate with the Department in educating the public as to which trails are available for public use and during which seasons. CTA and MRPA are also willing to participate in signage and other efforts to discourage public use of the beaver pond area in non-winter months.

IV. CONCLUSIONS OF LAW

A. Permit Condition 12 and the Proposed Condition

CTA challenges Condition 12 of the Permit, which requires the Trail to be relocated away from the wetland complex. Condition 12 states that, “[t]he Permittee shall file a revised site plan depicting the relocation of the CTA trail as discussed in more detail under Criterion 8(A) in the attached Findings of Fact. The relocation must be accomplished by 2005.” The parties propose to replace Condition 12 with the following condition:

The Permittee shall install and maintain signs which inform users of the sensitivity of the wetland habitat and requesting avoidance of the habitat between May 1st and July 15th. The Permittee shall work with trail user groups and the holders of conservation easements on the parcel to monitor and evaluate trail use in the vicinity of the wetland complex. To assist in these efforts, the Permittee may enlist the help of volunteers through local trail organizations. In the event that the proposed management methods do not prove effective for minimizing disturbance to the wetland habitat, the Permittee shall implement additional mitigation measures as may be necessary after consultation with trail user groups and holders of conservation easements.

The question is whether the Project will comply with Criteria 1(G)(wetlands), 8(A)(necessary wildlife habitat), and 9(K)(use and enjoyment of public lands), with the proposed condition in place of Condition 12. As set forth below, the Board concludes that a lesser relocation of a smaller portion of trail is necessary to ensure the Project’s compliance with the criteria on appeal.

The Board notes that the segment of the Catamount Trail that must be relocated is also part of an as-built VAST trail. The VAST trail in question requires Act 250 review, in accordance with the Board’s June 7, 2005 decision in *Re: VAST, Declaratory Ruling #430*. No Act 250 permit has been issued for that VAST trail. To the extent

that the conditions of this permit may preclude another use by VAST or any other applicant on the affected segment of existing trail, any such applicant may apply to construct improvements on the new segment of the Catamount Trail authorized by this decision.

B. Criterion(8)(A)(Necessary Wildlife Habitat)

Under Criterion 8(A), a permit cannot be granted if the project “will destroy or significantly imperil necessary wildlife habitat or any endangered species,” and:

- (i) the economic, social, cultural, recreational, or other benefit to the public from the development or subdivision will not outweigh the economic, environmental, or recreational loss to the public from the destruction or imperilment of the habitat or species, or
- (ii) all feasible and reasonable means of preventing or lessening the destruction, diminution, or imperilment of the habitat or species have not been or will not continue to be applied, or
- (iii) a reasonably acceptable alternative site is owned or controlled by the applicant which would allow the development or subdivision to fulfill its intended purpose.

10 V.S.A. § 6086(a)(8)(A). Criterion 8(A) requires a three-stage inquiry: (a) whether there is “necessary wildlife habitat”; (b) if so, whether the project will destroy or significantly imperil that habitat; and (c) if so, whether one or more of the sub-criteria (i)-(iii) is true. With regard to the burden of proof under Criterion 8(A), the Board has held that “it is clear that the opponents bear the burden of proof on the first two-stages of the three-stage inquiry identified above.” See *Re: Gary Savoie, #2W0991-EB*, Findings of Fact, Conclusions of Law, and Order at 10 (Oct. 11, 1995).

It is undisputed that the wetland complex constitutes necessary wildlife habitat for several species, including great blue heron and other types of wetland-dependent birds. See 10 V.S.A. § 6001(12)(defining necessary wildlife habitat as “concentrated habitat which is identifiable and is demonstrated as being decisive to the survival of a species of wildlife at any period in its life including breeding and migratory periods”); see also, *In re Southview Assocs.*, 153 Vt. 171, 174-76 (1989).

The Board concludes that the Project currently allows a level of human disturbance that has the potential to significantly imperil or destroy this habitat, at the clearing and path out to the beaver pond and wetland complex. See, *Re: Killington, Ltd., #1R0584-EB-1*, Findings of Fact and Conclusions of Law at 21 (May 11, 1989)(denying a permit because of the adverse effects associated with the “intrusion of humans” in bear habitat); *Re: Robert P. Foley and Theodore R. Barnett, #5L1018-1-EB/5L0426-6-EB*, Findings of Fact, Conclusions of Law, and Order at 6-7 (July 19, 1991)(requiring a 300-foot buffer zone between construction and deeryard to mitigate

human disturbance); *Re: Northeast Land Investment, Inc.*, #2S0039-4-EB, Findings of Fact, Conclusions of Law, and Order at 8 (“[a] minimum of a 300-foot buffer from human activity is critical to minimize disturbance and energy losses to wintering deer.”); *Re: Alpine Stone Corp.*, #2S1103-EB, Findings of Fact, Conclusions of Law, and Order at 20 (Feb. 4, 2002)(stating, “[h]uman disturbance, especially unpredictable, loud noises can lead to various physiological responses by wildlife in general . . .”). The Board also concludes that the public benefits of this part of the Trail do not outweigh the risk to wildlife habitat, and that there are steps that can be taken to mitigate this impact on the Project tract.

The question is how best to keep Trail users, and their unleashed dogs, away from the wetland and the clearing during non-winter months. The parties seek to remove Condition 12 from the permit, and with it, the requirement that the trail be relocated away from the wetland complex. The proposed conditions would require that ANR “install and maintain signs” and “work with trail user groups and the holders of conservation easements on the parcel to monitor and evaluate trail use.” In addition, the proposed conditions provide that “the Permittee shall implement additional mitigation measures as may be necessary after consultation with trail user groups and holders of conservation easements” if the proposed management methods are “not . . . effective for minimizing disturbance to the wetland habitat.” The parties’ proposal to use signage to limit human disturbance and to monitor non-winter use and explore additional mitigation if needed, represents a good start, but is insufficient to bring the Project into compliance with Criterion 8(A) because there are other reasonable and feasible means to mitigate the impacts on this necessary wildlife habitat. The parties’ signage proposal would help educate trail users about the sensitive wildlife habitat and may help reduce impacts to that habitat, with the changes discussed below. The parties’ monitoring proposal will not help the Project comply with the criteria on appeal, but it may provide a source evidence in the future should the permit require amendment. The additional mitigation provision, however, is not appropriate as a permit condition. The parties’ continued efforts to determine how best to comply with Act 250 on an ongoing basis are commendable. However, in the event of an amendment application, enforcement action or revocation proceeding, it will be for the Commission or the Court to determine compliance with Act 250. Although it is likely that parties’ experience and expertise will be helpful in that regard, the Board cannot delegate this duty to the parties.

The proposed signage can help educate trail users about the wildlife habitat and the harm of intrusion or disturbance by trail users and their dogs during the nesting and breeding season. The signs proposed by the parties would use a May 1 to July 15 timeframe. There was credible evidence, however, that the most sensitive period may extend into August. To maximize the protective benefit of these signs, the July 15 date should be extended to August 15. In addition, the educational purpose of these signs would benefit from additional language that explains the reason for the warning. The permit will require signs at either end of the rerouted trail segment, and any other

location at the discretion of the Department that warn trail users about the risk to wildlife during the critical nesting and breeding period, May 1 – August 15, and require that trail users stay on the trail and keep dogs leashed. The Board recognizes that the Department has considerable experience in developing and using signage to educate the public about wildlife habitat, so the Department should have flexibility in developing the signs, provided that these minimum requirements are met. For instance, the signs could state: “CAUTION: Even minimal human contact can harm wildlife during critical nesting and breeding periods, May 1 – August 15. Stay on the trail. Dogs must be leashed.”

The LRMP recommends a 300-foot buffer to protect wildlife habitat. However, the research on which that recommendation is based indicates that the appropriate buffer width may vary, based on topography and vegetation. In this case, the lay of the land, and the density of forest cover and other vegetation in the area, indicate that a less extensive buffer is needed to protect the wildlife habitat in question, and that this reduced buffer should be applied only to the part of the Catamount Trail that allows access to the beaver pond. Moreover, application of a 300-foot buffer may be neither feasible nor reasonable, given the topography of the area. For instance, there is a ridge that crops up to the west of the Trail that would make application of a 300-foot buffer very difficult in places.

The Department no longer recommends a 300-foot buffer in this case, in part because of the lack of evidence of non-winter use. The actual level of use during non-winter months is unknown. During the site visit, there was some evidence of mountain bike and motorized vehicle use of the Trail in the vicinity of the wetland. Other than some footprints in the mud near the pond, there was no evidence of the visit by Department personnel earlier the same week. It is clear that, without the monitoring effort the Department proposes, it will be difficult to tell how much use the area near the wetland and the pond is getting at any given time in the year. Actual use levels may be difficult to gauge even with monitoring. Nevertheless, there is no question that the Project does provide access to the wetland and its sensitive wildlife habitat. Criterion 8(A) protects this necessary wildlife habitat, whether the disruption occurs now or in the future.

A reasonable means of preventing the imperilment of necessary wildlife habitat would be to reroute a small portion of the trail so it is at least 100 feet away from the point where the Trail meets the path to the pond. The Trail would be rerouted from a point at least 100 feet to the north of where the path meets the pond bank, out to a minimum distance of 100 feet to the west, and back to the existing Catamount Trail at least 100 feet to the south of where it currently meets the path. The parties have considerable flexibility to reconfigure this trail segment beyond those parameters.

To ensure that the clearing and path revegetate more quickly and effectively, the highly compacted soils in the path that are 50 feet beyond the wetland must be turned and aerated, and native plants and saplings planted in these areas. This may be accomplished by transplanting vegetation currently growing near the path and clearing, such as, young maples, aspen, birches, pines, beech, hemlock, pin cherry and ash, as well as plantings appropriate for the shrub layer, such as hobble bush and striped maple. Vegetation and new saplings growing in the area to be cleared for the new trail segment may also be used. These plantings must be maintained, and replaced as reasonably necessary, for five years to ensure that they are established and will continue to grow in. These plantings will help obscure the pond from view, and will help block physical access to the pond, making the wetland less of a draw to individuals who might otherwise leave the new trail segment to visit the pond.

In addition, access to the abandoned trail segment shall be blocked at both ends in a manner that will encourage trail users to follow the new trail segment year-round. Large boulders and any logs from the new trail segment may be used for this purpose. Some digging up of the soil at each end of the abandoned trail segment, and transplanting of saplings and other vegetation would also help screen it from view and make it less inviting. This, in turn, will protect the wildlife habitat and the new plantings in the clearing and path. This should provide considerable flexibility in accomplishing these goals.

With these conditions, in addition to the signage and monitoring conditions proposed by the parties, the Board concludes that this Project complies with Criterion 8(A).

C. Criterion (1)(G)(Wetlands)

Under Criterion 1(G), the Project must "not violate the rules of the water resources board (WRB), as adopted under section 905(9) of this title, relating to significant wetlands." 10 V.S.A. § 6086(a)(1)(G). Put another way, to comply with Criterion 1(G), a project must comply with the Vermont Wetland Rules. The applicant bears the burden of proving compliance with Criterion 1(G). *Id.* § 6088(a).

The wetland complex is a Class Two wetland, and the Vermont Wetland Rules require at least a 50-foot undisturbed buffer around the wetland. Vermont Wetland Rules § 4.3. In addition, human disturbance in the buffer may violate the Vermont Wetland Rules by interfering with protected wildlife habitat functions of that wetland. *See, Re: Larry Westall, (CUD-99-02) and James and Catherine Gregory, (CUD-99-03) (Consolidated), Findings of Fact, Conclusions of Law, and Order (Vt. Water Res. Bd. Mar. 15, 2000).* As with Criterion 8(A), the central issue under Criterion 1(G) is access to the beaver pond and wetland complex in the area adjacent to the clearing and path.

The conditions requiring decompacting of soils and replanting apply only to land outside the 50-foot buffer. This will avoid the question of whether a Conditional Use Determination (CUD) is required by the Vermont Wetland Rules. Blocking both ends of the abandoned trail segment, and replanting the affected area outside the 50' buffer will be sufficient to decommission or reclaim the abandoned trail segment and prevent human disturbance in the area in question.

With the conditions set forth above in Section IV(B), this Project complies with Criterion 1(G).

D. Criterion (9)(K)(Public Lands)

Phen Basin, including the Catamount Trail, is located in the Camel's Hump State Park (Park). It is undisputed that Phen Basin, which is part of the Park, is a public land recognized and protected under Criterion 9(K). To comply with Criterion 9(K), the Board must conclude that the Project will not "unnecessarily or unreasonably endanger the public or quasi-public investment in the . . . lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to the . . . lands." 10 V.S.A. § 6086(a)(9)(K).

The purposes of Criterion 9(K) include promoting the Park's recreational values, while protecting its scenic and natural qualities. *Re: Vermont Dept. of Forests, Parks, and Recreation, #1R0488-EB*, Findings of Fact, Conclusions of Law, and Order at 7 (Jan. 11, 1984). The public's recreational use of the park will be preserved by the conditions described herein, because a small segment of trail will simply be rerouted. However, preservation of public access is not the only issue of concern under Criterion 9(K). The Project would violate this criterion if it jeopardizes the park's natural resources and wildlife, in this case, by providing human access to an ecologically important wetland complex in non-winter months. *See, Re: Mt. Mansfield Co., Inc. d/b/a Stowe Mountain Resort, #5L1125-10-EB and #5L1125-10R-EB* Findings of Fact, Conclusions of Law, and Order at 13 (Base Lodge) (Altered) (Mar. 27, 1996)(concluding that the project complies with Criterion 9(K), in part, because wildlife habitat will not be jeopardized by non-winter use).

The conditions set forth above in Section IV(B) will protect the park's natural resources in a manner that will not interfere unduly with the public's access to the Phen Basin tract. The Project complies with Criterion 9(K).

V. ORDER

1. With the conditions discussed herein, the Project complies with Criteria 8(A), 1(G) and 9(K). Condition 12 is stricken.
2. Land Use Permit #5W0905-7-EB is issued herewith.

DATED at Montpelier, Vermont this 7th day of September, 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 member George Holland DISSENTS, joined by Board members Patricia Nowak and Richard C. Pembroke, as follows:**

I dissent from this decision and concur with the Department of Forests, Parks and Recreation and the Catamount Trail Association that relocation of a small segment of the trail near the wetland is unnecessary. The trail in this vicinity is already approximately 100 feet from the wetland and buffer regeneration is progressing, albeit slowly. Further, in the Agency's Supplemental Proposed Findings of Fact and Proposed Permit Conditions, the Department of Fish and Wildlife is recommending the trail be avoided during the critical May 1 – July 15 wildlife breeding and nesting period. With appropriate signage and recognizing that hikers are the only authorized trail users during this period, effective wetland protection can be achieved.

I would add that any hiker on this trail will be fully cognizant that a large wetland exists as they pass nearby even with the trail moved 100 feet farther away and with the wetland out of view. The same curiosity to go and have a look will be there whether there is a 100-foot or 200-foot buffer.

The Board in this decision is forcing the Agency to concentrate limited state resources on a project providing, in my opinion, no benefit, whereas there no doubt exist innumerable other important works that go begging.

I am authorized to say that Board members Patricia Nowak and Richard C. Pembroke join in this dissent.

‡ Board member Patricia Nowak was unable to participate in the June 3, 2005 site visit, reconvened hearing and deliberations but has reviewed and joins in the Board's decision and permit, except as noted above.

‡ Board member Richard C. Pembroke, Sr. was unable to participate in the June 3, 2005 site visit and reconvened hearing but has reviewed and joins in the Board's decision and permit, except as noted above.

**** Board member Jean Richardson** was unable to participate in the July 20, 2005 and August 17, 2005 deliberations but has reviewed and joins in the Board's decision and permit.