

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

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 a stipulation of facts asserting that Condition 12 of the Permit is unnecessary to satisfy Criteria 1(G), 8(A) and 9(K). As set forth below, the stipulated facts are not sufficient to show that the Project will comply with the criteria on appeal 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:

¹ As noted in the Commission Decision, two snowmobile trail corridors have been created through the Project tract and are under the control of the Vermont Association of Snowmobile Travelers (VAST). These trails were not reviewed by the Commission because a jurisdictional opinion on whether they are subject to Act 250 jurisdiction remained pending during the Commission's review of the Permit application. The jurisdictional opinion was issued on January 7, 2004, and holds that the VAST trails do require Act 250 review. This jurisdictional opinion is currently on appeal before the Board in Declaratory Ruling #430.

ANR and the Department of Forests, Parks and Recreation, 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.

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.

(PCRO at 3, Section III, Issues.)

III. STIPULATED FACTS

The parties have stipulated to the following facts:

General Findings

1. The 2,695-acre 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. The original permittee, New England Land Associates (NELA), represented in its application submittals that the tract has been used as timberland and that no change in use or activity was planned beyond the mere subdivision of the tract. A network of logging and farm roads was present on the land.

2. Catamount Trail Association (CTA) is a Vermont non-profit corporation formed in 1984 with the purpose of establishing a nordic ski trail the length of Vermont.
3. In 1985 CTA published its "Catamount Trail Map of Vermont." The map depicted a "Finn Basin" trail on NELA's parcel as part of then existing Mad River Barn Nordic Center Trail Network. From 1979 to 1984, the Touring Center's Trail Network included a trail that ascended from the Battleground Condominiums adjacent to Route 17 and the Beaver Pond Complex.
4. In the late 1980's, CTA, in conjunction with the local VAST chapter, Mad River Ridge Runners, constructed a trail extending above the beaver pond/wetland complex to Huntington Gap. Presently in the vicinity of the wetland complex, Catamount Trail is co-located with VAST Trail 17A (Trail or Catamount Trail).
5. The Phen Basin tract was acquired by the State of Vermont in 1995. The acquisition in title was preceded by actions by the Trust for Public Land (TPL), Vermont Land Trust (VLT), and Vermont Housing Conservation Board (VHCB) resulting in the purchase of tract from American Wilderness Corporation (AWC) which had bought the property from NELA.
6. While the State holds fee simple title to the property, the tract is subject to conservation easements co-held by TPL, VLT, and VHCB. The easement is intended to foster the conservation of wildlife habitats, forestry and other natural resources. The easement specifically seeks to protect what is designated as an environmental protection zone, to authorize limited non-commercial public recreational activities, and to preserve scenic resources for present and future generations by restricting activities.
7. In 1994 and 1995, CTA participated in the public and private efforts to conserve and place in public ownership the Phen Basin tract and was deeded a trail easement in the Catamount Trail's then current location, which remains its present location today.
8. As part of its efforts to conserve the tract, the Trust for Public Land commissioned an ecological assessment. The report of F. Brett Engstrom and Charles V. Cogbill titled "An Ecological Assessment of Phen Basin, Fayston, Vermont" was issued June 8, 1995.
9. Cogbill and Engstrom performed field surveys over four days in May 1995 and the report represents a preliminary ecological assessment of the large tract. At page 6, the report describes the large "maximum 30 acres" wetland in Phen Basin proper as consisting of two beaver flowage systems: "The main system runs along Phen Brook. It contains nine dams of which only three impound any water of significance. Aerial photographs showed

that the beaver activity dated back to at least 1963, at which times the dams appeared newly created. 1942 photos showed no evidence of beavers in Phen Basin.

10. There are two bear-scarred beech stands used as important feeding habitat by black bears that are located in the northeastern and southwestern portions of Phen Basin. These have been identified as necessary wildlife habitats. The Catamount Ski Trail is not in the vicinity of these feeding areas and does not pose a threat to the habitat.
11. There is also a wetland complex in the interior of the tract adjacent to which the ski trail passes that has been identified as significant wildlife habitat.
12. The Catamount Trail accesses the Phen Basin tract via an agreement with the Battleground Condominium Association. The Condominium Association limits access through its property to skiers and snow shoers using the Catamount Trail. The access permission does not extend to mountain bikers or other non-winter trail users.
13. The Catamount Ski Trail ascends from the Battleground Condominiums following an old logging road that plateaus at a clearing just west of the interior wetland complex. This point was the terminus of the "Finn-Basin" trail that was part of the now defunct Mad River Barn Touring Center from 1979 to 1984. From this point, the Catamount Trail turns left into the woods (northwesterly) and follow a route towards Huntington Gap. See base map at page 8 of the Long Range Management Plan.
14. The Agency of Natural Resources is responsible for managing state-owned lands for a variety of purposes. As part of its stewardship of public lands, the Agency develops long range management plans. These plans are used to, among other things, identify areas where different public uses are allowed and to describe how these uses will be managed to ensure the protection of natural resources.
15. In 2002, the Agency of Natural Resources, Department of Forests, Parks and Recreation finalized a Long Range Management Plan (LRMP) for the Phen Basin tract.
16. 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.
17. 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. Both parties remain committed to the provisions established in the Agency's Long Range Management Plan intended to properly conserve all the functions and values of the wetland.

18. Since at least 1979 a nordic ski trail has been in existence in the vicinity of the beaver pond wetland complex; first, as part of the now defunct Mad River Barn Touring Center, and then since the mid-1980's as part of the CTA's length of Vermont ski trail.
19. Within the interior of the Phen Basin tract there are two significant wetland complexes. The focus of the present proceeding is on the larger wetland complex in the center of the parcel. Its location is depicted on the Base Map of the LRMP.

Section 6086(a)(1)(G)(Wetlands)

20. The large wetland complex is a Class II wetland. It provides important wildlife habitat functions that will be discussed under Criterion 8(A).
21. The Board incorporates by reference findings stated under Criterion 8(A) with respect to impacts on the habitat functions of the large wetland complex.

Section 6086(a)(8)(A)(Necessary Wildlife Habitat)

22. The remote undeveloped nature of the Phen Basin tract makes it important habitat for a variety of wildlife species. A large beaver-influenced wetland complex exists in the central portion of the property. This wetland is highly valuable for wetland-dependent wildlife such as black bear, waterfowl, wading birds (e.g., great blue heron are known to nest in this wetland), otter, mink, and beaver. Many other species of wildlife use the wetland complex including moose, deer and a variety of amphibian species.
23. These types of 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, other black bear and bobcat will all rely on wetland habitat of this sort for important feeding areas at certain times of the year. Otter, for instance, will rely on a wetland of this nature as a critical source of food, and may use it as a site for rearing young. They are also considered habitat specialists that require this sort of wetland habitat for their survival.
24. This wetland is considered regionally significant due to the paucity of other

wetlands of similar size and character within the Mad River watershed. It supports feeding, breeding and nesting habitat for waterfowl and wading birds, and is critical habitat for these groups of wildlife species. This sort of wetland habitat is not common within the region and therefore is critical for the survival of these species of wildlife in Vermont.

25. The location of the Catamount Trail along the western and southern edges of the wetland is a potentially conflicting use that may impact its wildlife functions and values. The existence of the Trail may give rise to increased human presence with the result of displacing certain species. Wetland-dependent birds in particular, are vulnerable to human disturbance, particularly during the breeding, nesting and brood-rearing periods (typically June through August in northern Vermont). Studies have shown complete abandonment of otherwise suitable habitat by some of these wetland bird species as a result of frequent human disturbance.
26. The wintertime use of the Trail does not pose a concern with respect to the wildlife functions and values of the wetland. However, recreational activities such as hiking, picnicking, and mountain bike riding are non-winter uses that are a concern. These activities may cause a level of disturbance sufficient to cause some wetland-dependent wildlife (e.g., nesting herons) to temporarily or permanently abandon the habitat.
27. The level of use from non-winter recreational activities occurring within the vicinity of the Trail and has not been documented; nor have field studies been conducted to document the use of the wetland over the years by the wetland-dependent species.
28. A nordic ski trail has existed in some form in the present location since 1979.
29. In order to protect and conserve critical values associated with unique and sensitive habitats, the Department of Fish and Wildlife typically recommends the establishment of a 300-foot buffer around wetlands that support these types of wildlife-related functions. The 300-foot buffer distance is reflected in the contemporary research on the topic of wildlife response to disturbance. A buffer distance may vary depending on topography and vegetative characteristics of the land.
30. A portion of the Catamount Trail is in close proximity to the wetland complex. Based upon a site visit conducted last fall by a Department of Fish and Wildlife Biologist, it is estimated that the trail comes within 100 feet of the wetland in one location. The segment of the Trail that is of concern is between 500 and 1000 feet long, and is located on the southwest edge of the wetland complex.

31. The 2002 Long Range Management Plan (LRMP) for Phen Basin was developed with the intent of addressing the potential conflicts of the non-winter recreational use on the sensitive habitat of the wetland complex, and to address the proximity of the Catamount Trail to the wetland.
32. The Agency recognizes that caution must be exercised to minimize the Trail impacts, and thus the LRMP proposes an action plan that calls for an 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 is not feasible, the LRMP commits the Agency to implementing a program that includes: 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.

Section 6086(a)(9)(K)(Development Affecting Public Investments)

33. Phen Basin is a block of land located within the Camel's Hump State Park and is a public investment recognized under Criterion 9(K).
34. The LRMP for all state lands are prepared in accordance with eleven overarching management standards. These standards are biological diversity, ecosystem health, legal constraints, such as conservation easements, natural resource science, wildlife management, recreational uses and needs, sustainable forestry, public involvement, historical/cultural and scenic values, best management practices and regional availability of resources and activities.
35. The Phen Basin tract was conveyed to the State of Vermont subject to several easements. The tract is subject to a conservation easement that establishes an environmental protection zone and also to be easement for use by the Catamount Trail.

IV. DISCUSSION

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, "[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 as part of the comprehensive system of signage under Condition 9 erect signs along the Catamount Trail below the wetland complex advising that the Catamount Trail is limited to wintertime use.² Also, as provided at page 20 of the Long Range Management Plan, the Agency will explore the potential for relocating the section of Catamount Trail in the vicinity of the wetland complex. In the event no alternative is identified, then the agency shall consider other management options for minimizing and reducing impacts to the wetland habitat including gating of the existing trail to limit non-winter use, additional signage and other public educational efforts, and working with local trail organizations and the community at large to further public education efforts and the monitoring and enforcing of public access and use to this property. The Agency will monitor levels of compliance with the non-winter trail use restrictions and levels of use of the wetland by wetland-dependent wildlife. Based on the findings of these monitoring efforts and in the event an alternative trail route is not identified, the Agency may consider the implementation of additional mitigation measures as may be necessary.

Commission Permit, Condition 9. The question is whether the stipulated facts demonstrate that 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 stipulated facts do not demonstrate compliance with the criteria on appeal.

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

The stipulation would remove Condition 12 from the permit, and with it, the requirement that the Trail be relocated away from the wetland complex. The proposed condition requires only that ANR “*explore whether relocation is possible*” (emphasis added). It is undisputed that the wetland complex constitutes

2

Condition 9 of the Commission Permit states: “The Permittee shall install and maintain a comprehensive system of signs for the recreational trail network. The signs will advise trail users of seasonal openings and closings of the trail as well as limitations on the uses of each specific trail, all as discussed in more detail under criteria 4, 8, and 8(A) in the attached Findings of Fact.”

necessary wildlife habitat under Section 6086(a)(8)(A). The parties' submission does not demonstrate compliance with Criterion 8(A) because it does not include enough stipulated facts for the Board to conclude that the Trail's present location does not jeopardize the wetland complex's viability as a necessary wildlife habitat, even with the other provisions of the proposed condition. Also, the stipulated facts do not demonstrate that the 50-foot buffer, the minimum required under the Vermont Wetland Rules and Criterion 1(G), will adequately protect the necessary wildlife habitat. 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., ADA Chester Corp., and Ugo Quazzo*, #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...").

Although the stipulation indicates that ANR will consider relocating the Trail in the future, the Project must comply with Criterion 8(A) now in order for a permit to be issued. *Re: Norman R. Smith, Inc. and Killington, Ltd.*, #1R0593-1-EB, Findings of Fact, Conclusions of Law, and Order (Part II) at 18 (Sept. 21, 1990)(Board must make positive findings before issuing permit and cannot issue permit based upon incomplete information that is conditional upon future efforts to comply with the law); *Re: Killington, Ltd. and International Paper Realty Corp.*, #1R0584-EB-1, Findings of Fact, Conclusions of Law, and Order at 25 (Sept. 21, 1990), *aff'd*, *In re Killington, Ltd.*, 159 Vt. 206 (1992). The stipulation does not include facts sufficient to persuade the Board that non-winter use of the Trail or its buffer will not have impermissible impacts on this necessary wildlife habitat.

In particular, the facts do not establish that the proposed gate, signage, and monitoring will keep people off the Trail and out of the buffer in non-winter months, or that ANR has adequate staff resources to accomplish this without relocating the Trail. While the management options proposed by the parties may satisfy Criterion 8(A), see, e.g., *Re: Mt. Mansfield Co, Inc. d/b/a Stowe Mountain Resort and State of Vermont Dept. of Forests, Parks, and Recreation*, Findings of fact, Conclusions of Law, and Order, Land Use Permit Amendment #5L1125-10 and 10R-EB at 7 (Dec. 28, 1995)(monitoring sufficient to prevent undue adverse impacts to natural areas and habitat), the stipulated facts are insufficient to establish this.

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

The wetland complex is a Class II wetland, and the Vermont Wetland Rules require at least a 50-foot undisturbed buffer around the wetland. Vermont Wetland Rules § 4.3. It is clear from the stipulated facts that the Trail is located at least 50 feet away from the wetland. However, the stipulation does not establish that non-winter users will, in fact, stay outside of the 50-foot buffer if the Trail is not relocated. The Wetland Rules require that the buffer remain undisturbed to protect functions of the wetland. See Vermont Wetland Rules § 2.05 (defining “buffer zone”). Human disturbance in the buffer may interfere with protected wildlife habitat functions of that wetland, and violate the Vermont Wetland Rules. 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)*. The stipulated facts do not prove compliance with the Vermont Wetland Rules and Criterion 1(G).

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

The proposed condition does not comply with Criterion 9(K), as the stipulation does not establish that the natural resources and wildlife at stake will be protected from non-winter use. Phen Basin, including the CTA 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)*. Approval of the Trail would authorize the public’s recreational use of the Park, promoting one goal of Criterion 9(K). However, as previously discussed, the Board is concerned that the Park’s natural resources and wildlife may be jeopardized by non-winter use of the Trail. *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)*. For these reasons, the Board cannot conclude that Criterion 9(K) is satisfied.

V. CONCLUSIONS

The stipulated facts do not demonstrate compliance with Criteria 8(A), 1(G),

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

Land Use Permit Application #5W0905-7-EB

Memorandum of Decision

Page 11

and 9(K) without Condition 12 and with the proposed condition. At the very least, to approve the removal of Condition 12 without a hearing, the Board would need more information regarding the frequency and impacts of non-winter use of the Trail, as well as a tighter proposed condition supported by facts demonstrating that non-winter use would not occur. The Board appreciates the parties' work in developing the stipulation, see, 10 V.S.A. § 6085(e); EBR 16(D)(informal and nonadversarial resolution of issues encouraged), however, the parties' submission simply does not provide enough information or assurance on these issues. Accordingly, the Chair shall set this matter for hearing.

VI. ORDER

1. The stipulation does not demonstrate compliance with Criteria 8(A), 1(G) and 9(K).
2. The Chair shall issue a Scheduling Order setting this matter for hearing.

DATED at Montpelier, Vermont this 15th day of July, 2004.

ENVIRONMENTAL BOARD

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