

Enforcement Actions Relating to Constructed Wetlands at Coburn Pond

Overview:

Beginning in 2005 and until the court-ordered resolution in 2010, Renée Carpenter and Ross Hazel were parties to Act 250 Case #5W1017-1 (also known by the VT Agency of Transportation (VTrans) as Cabot-Danville Rt.2) to protect Coburn Pond as an historic swimming hole in East Montpelier. By documenting decades of existing use as a swimming hole and place of community recreation, said parties—in alignment with the Town of East Montpelier Planning Commission and Selectboard, statutory parties in the Act 250 process—were able to protect the “existing uses” of the swimming hole known as Coburn Pond, including public access and water quality.

Vermont Environmental Court Order Docket No. 250-12-09 Vtec (Settlement Agreement) modified the Act 250 Permit to allow VTrans to construct wetlands south of Coburn Pond to mitigate for the construction of ONLY ONE Highway Segment One along US Route 2. The court-ordered Settlement Agreement protects public access to the swimming hole, its shorelines, and water quality.

That Settlement Agreement issued on September 17, 2010, was based on a stipulation for settlement and proposed order filed by Jon Groveman, Esq., for parties Renée Carpenter and Ross Hazel; and the Vermont Agency of Transportation. The settlement stipulations evolved as a result of two mediation sessions entered into at the direction of the environmental court judge in lieu of a full appeal by VTrans.

However, VTrans neglected to uphold various parts of the court-ordered agreement as negotiated by parties Hazel and Carpenter with VTrans in lieu of VTrans’ appeal. The two main issues of concern involve: (1) violations to the agreements that impact the water quality of the open water body and its shoreline; and (2) violations regarding the reconstruction of the VAST snowmobile trail which now traverses an open-water wetland across the “wet meadow buffer” for significant portions of the winter. Counter to the agreement, parties were not notified of impending changes to the construction plan before those changes were implemented—especially regarding placement of the snowmobile path, the depth of excavations specifically where identified as “least disruptive connecting wetland,” and where the shoreline was disturbed. This is a direct violation of the court ordered Settlement Agreement. Parties Carpenter and Hazel seek remedial action to amend the current site conditions to meet the intentions of the agreement.

Two Main Issues of Concern:

1— Unauthorized excavations were made along the shoreline at the southernmost tip of Coburn Pond. This created an outlet during high water seasons (spring and early summer) and an inlet during low water level in the pond (late summer into the fall) threatening the water quality of a once-contained pond. Concerns include Water Quality impacts having to do with temperature of the water in early spring and early autumn, and increased and ongoing sedimentation from increased flow and fluctuations within a once-stable ecosystem. In addition to affecting human recreation—swimming, fishing, desire for clear and clean water, etc.—this also raises concerns about detrimental

ecological affects. Creating an outlet where there had not been one in the past is a significant change, and a violation of both the initial Act 250 Permit and the amended negotiated Settlement Agreement.

2—The snowmobile path was not built according to Exhibit A, and without any discussion or notification to parties. The current snowmobile path crosses the constructed wetlands through the “wet meadow buffer” area, which was excavated to the maximum (or more) rather than with the “least disruptive” means to connect existing wetlands. This area now has standing water throughout much of the winter season, causing snowmobiles to re-route off the designated snowmobile path and onto the higher ground of the constructed wetlands. This is undesirable for the snowmobilers crossing from Coburn Road to Route 2 and is likely detrimental to the wetlands. During the five-year monitoring period, we have observed several winters where, the snowmobile path as originally planned crosses the “wet meadow” which still has ample snow, even when the open water of the “wet meadow buffer” has significantly deep standing water. This is a significant change to the agreement, is not acceptable, and needs to be remediated.

Shoreline Damage and Open Water Body Violations (documented proof):

The first issue of concern involves the unauthorized excavation on the shoreline at the southern-most tip of the pond and the resulting connection between the open-water body and the surrounding wetlands. (2014 report by Thomas Weiss, “Investigations of Ground Elevations in Wet Meadow Buffer,” completed November 18, 2014 after analyzing data collected by kayaking through the pond to the wetlands in April of 2014. VTrans was given a copy of that report; figures 15 through 19 - May 2, 2018).

In addition to Party Carpenter’s concerns that altering the shoreline of a once-contained pond to create water flow where there was none before—which was and is the most desirable condition to uphold water quality for existing uses—this directly violates the agreement. The agreement outlined that “VTrans agrees not to fill or physically alter the existing open-water body or its shoreline . . . [t]he open water body includes all waters within the existing edge of the pond as shown on Exhibit A.” (Settlement Stipulation 8, pp. 9-10; Court order item 18, p. 18). “VTrans is no longer proposing any development that will affect the open water pond and shoreline.” This phrase replaces much of the original agreement and its repetition throughout the Settlement Agreement highlights this condition as a vital part to the settlement.

Yet, the current conditions show the water quality of the pond and the integrity of the shoreline were not maintained. (Field notes from May 2nd show 19” of water at the newly created outlet; figures 16 through 18 show water flowing through the newly-created outlet and the connection between the pond and the wet meadow buffer.) The fact that the construction of the wetlands violated this most significant requirement of the court-ordered Settlement Agreement, which is the permit, indicates the need for restoration and remediation of the shoreline.

The project as redesigned as per the Settlement Stipulation should have “*maintain[ed] existing manmade shoreline in its current condition.*” (Court order item 18, p. 18-emphasis added). Further, the Settlement Agreement outlined VTrans’ intent for the project as “creat[ing] wet meadow . . . that will not affect the water level of the pond.” (Settlement Stipulation 2a, p. 6).

Of related concern is that the excavation of the area between the pre-existing wetlands far exceeded the required conditions of the Settlement Agreement. The language in the permit allowed *only* for the “least disruptive” connecting wetland. In actuality—documented by measuring the depth of water between the pre-existing wetlands—those areas were excavated at least a foot and a half deeper than what one would have expected as “least disruptive.” (Figures 1 and 2 show the area where it should have been the “least disruptive” connecting wetland. Figure 15 shows a portion of the pre-existing wetland, which is above water. By contrast, figure 16 and 19 show that the area connecting the pre-existing wetlands is inundated.)

VTrans agreed to keep the open water pond and the shoreline intact and not alter the water quality or the condition of the pond whatsoever. The reality depicts a different result and requires remedial action. Given that VTrans’ original plan to fill in the swimming hole as a significant part of their proposed constructed wetlands was emphatically denied by the Act 250 process—which acknowledged decades of Existing Use of the pond as a swimming hole—this violation of the shoreline, compounded with excessive excavation in the adjacent constructed Wet Meadow Buffer area designated to be the “least disruptive” means to create connecting wetland, is particularly egregious. VTrans needs to make amends and restore the pond and the shoreline at least to their original condition.

This restoration must include repairs to the damaged shoreline by filling in the newly created connection between the pond and the wetlands. Because of the excessive excavation between the pre-existing wetlands, the degree of the restoration of the shoreline must be significant enough to prevent the flow of water from those wetlands back into the pond regardless of seasonal water levels. The end result should be a contained body of water, as it had been before the construction of wetlands. That remediation must be significant enough to assure that the reconstructed shoreline between the pond and constructed wetland will maintain the integrity of the pond’s boundary.

Snowmobile Path Location (documented proof):

The second issue of concern involves the location of the VAST snowmobile trail (which is a section maintained by a local group, “The Gully Jumpers”).

According to Exhibit A of the Settlement Agreement, the “final location” of the snowmobile path was “to be determined at the time of construction.” Exhibit A depicts the proposed snowmobile trail running along the westerly side of the proposed wet meadow buffer, running to the south. However, the VAST snowmobile trail was not built as designed, as shown in Exhibit A. In addition, the Settlement Agreement clearly stated numerous times that the parties Carpenter and Hazel would be notified of any proposed changes before they were made. (Settlement Stipulation 1e, p. 4). The parties were not notified; and as a result of the unplanned change, the trail now goes through the wet meadow buffer constructed at such excessive depth as to hold standing water even throughout most of the coldest winter months. (Figures 1 & 2, based on Exhibit A, show the current location of the trail as marked with posts, as well as the snowmobile trail as initially designed. Figures 3 through 7, and 9, show the trail on February 21, 2018. Figures 10 through 13 show the trail on March 12, 2018. Figures 8 and 14 show the

topsoil test plot on those two days. The bench of the topsoil test plot is the reference of dryness stipulated in Stipulation 3, page 7 of the Court-Ordered Settlement Agreement.)

According to the Settlement Agreement, VTrans had “the overall intent of creating wet meadow buffer *that does not result in standing water or affect the water level of the pond* by creating wet meadow.” (Settlement Stipulation 2a, p. 6 - emphasis added). In addition, the settlement stipulation defines wet meadow as “a wetland dominated by grasses, sedges, and other forbs with saturated soil *near the surface but without standing water* for most of the year.” (Settlement Stipulation 2a, p. 6 - emphasis added). Both the description of intended outcome and the definition of a wet meadow and a wet meadow buffer indicate that the wet meadow buffer—where the snowmobile trail now exists—was never designed to be comprised of standing water. This was a standing and constant theme throughout the entire process of our negotiated agreements: The VAST snowmobile path would remain above water and in full use throughout the winter snowmobile season.

In addition, the Settlement Stipulation explicitly cites that “VTrans will share with parties Hazel and Carpenter copies of draft changes in design relating to the compensation site.” (Settlement Stipulations 1e and 1g, p.4). This part of the agreement was not executed. Had we been afforded the “the opportunity to comment on any changes to the project that are not consistent with this agreement” or provided any “copies of draft changes in design relating to the compensation site,” we might have averted this process altogether. (Settlement Stipulation 1g, p. 4). The final design of the snowmobile trail was never relayed to Hazel and Carpenter and this violates the Settlement Agreement.

As it now stands—and especially so during the winter of early 2018—the depth of water across the current snowmobile path, starting no later than late January (even after an extremely cold December), caused the snowmobilers to skirt the water by riding up on the muddied bank of the wet meadow buffer to the north of the standing water. It is not acceptable for the snowmobilers to be compelled to leave the marked trail in order to connect from Coburn Road across to Route 2 because of standing water. VTrans changed their plan, and without consulting with parties as to the proposed change. (These shifts are shown in figures 3 through 5 and 9 through 12.)

These winter conditions alone should raise concerns and be reason enough to relocate the trail based on the original intent: That the proposed location of the snowmobile path was intended for snowmobile use and stipulated to never have standing water. The Settlement Stipulation stated that “the upper bench in the existing, on-site test plot is representative of a wet meadow condition” and is the reference used when constructing the wet meadow. This confirms that the snowmobile path should be moved as originally planned.

However, if VTrans prefers that the snowmobile path remain as it is currently routed across the “wet meadow buffer” from the gate south of Coburn Pond to the gate behind Plainfield Hardware, we would have no objection *as long as they build a causeway that assures that the snowmobile path remains dry throughout the winter months* as the Act 250 Permit and Court-Ordered Settlement Stipulation Agreement intended.

Finally, Thomas Weiss, agent for the parties and expert witness throughout the Act 250 hearing process and mediations pointed out that Vermont Wetland Rules specify that areas defined as “wet meadow buffer” should be higher and drier than areas defined as “wet meadow.” (Vermont Wetland Rules 2.05). In this case, the “wet meadow buffer” just south of the gate where the snowmobile path is currently routed is significantly wetter than the “wet meadow” crossing area as defined by Exhibit A and Settlement Stipulation 3. While this situation may have confused the Parties who, as laypersons, participated in the Act 250 and mediation process in good faith, engineers at VTrans and their contractors surely knew what the expected outcome of their excavations would be.

To route the snowmobile path through the “wet meadow buffer” as designed was either a significant error or an intentional violation to the stated purpose: to protect existing uses on a snowmobile path throughout the winter.

Given what we now understand about the excessive standing water throughout the so-called “wet meadow buffer,” and the originally-proposed snow mobile path as identified on Exhibit A, we are seeking remediation through a good faith agreement with VTrans. If VTrans prefers not to build a causeway over the “wet meadow buffer” where the current snowmobile path is currently located, we recommend and suggest, in good faith to all parties, a minor routing change from that initially mapped on Exhibit A.

We suggest that the snowmobile path follow the direction of the original plan from the gate; however, rather than dipping down into the “wet meadow buffer” (that we now know has standing water throughout most of the winter season), we suggest that the snowmobile path run along the dry ridge before dropping down close to the originally-planned wet meadow crossing.

We are NOT requesting for excessive excavations be filled in to reflect a “wet meadow buffer” as defined by Vermont Wetland Rules, or as might be expected, given the common use of language, especially “least disruptive.” And we are open to including VAST/ The Gully Jumpers in a conversation to determine the best level along a contour across the ridge and the best angles to drop down across the original wet meadow crossing for the snowmobilers to travel safely on snowy ground throughout winter months. One way or another, however, these violations of our agreement must be remediated: The snowmobile path must be altered in order for the path to be mostly dry (other than snow) and usable throughout the winter months.

In Conclusion:

First, unauthorized excavations made along the shoreline at the southernmost tip of Coburn Pond need to be restored at least to its original condition. These excavations created an outlet during high water seasons and an inlet during low water levels in the pond. This threatens the water quality of a once-contained pond by causing temperature fluctuations and increased sedimentation. These water quality concerns threaten the this once-stable ecosystem used for recreation, including swimming and fishing, and wildlife observation. This excavation is a violation of both the initial Act 250 Permit and the amended negotiated Settlement Agreement and requires restoration and remediation.

Finally, the snowmobile path was not built according to Exhibit A, and without any

discussion or notification to parties. The current snowmobile path crosses the constructed wetlands through the “wet meadow buffer” area, which has standing water throughout much of the winter season. This standing water causes snowmobilers crossing to re-route off the designated snowmobile path onto the banks of the constructed wetland. This cannot be beneficial to newly created wetlands. The snowmobile path as originally planned still has ample snow during most of the winter, when the current path contains standing water. The design change without notification across standing water throughout much of the winter violates the agreement, impedes snowmobile travel connecting Rt. 2 and Coburn Road, and is damaging to the integrity of the constructed wetlands. Remediation should involve moving or reconstructing the trail the trail so it can be used throughout the winter.

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Figure 1. East Montpelier Coburn Road Wetland Mitigation Site, large. Note VAST trail as built (purple) and as initially proposed (blue). (Coloring, legend, & notes added to Exhibit A).

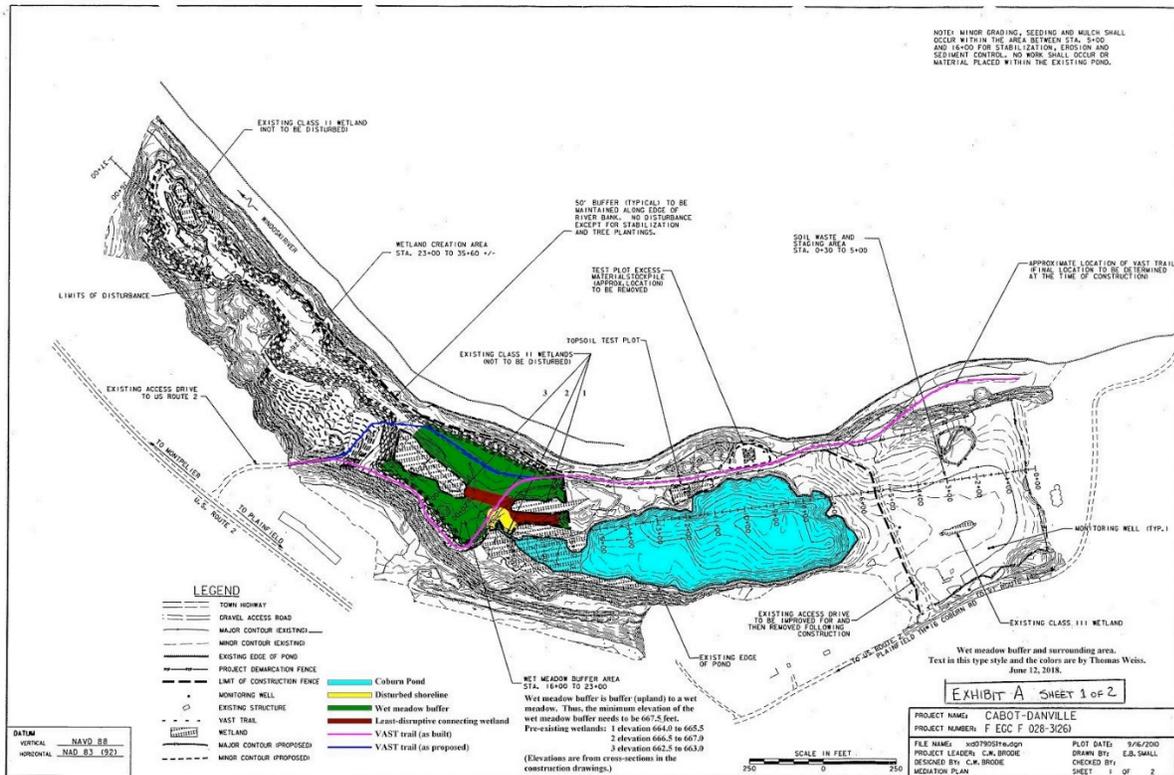
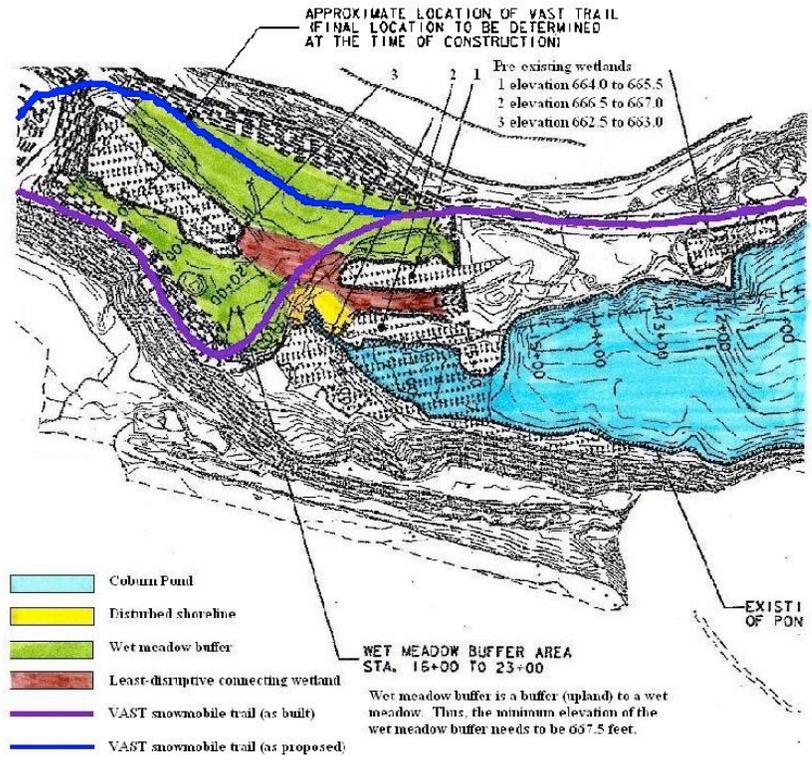


Figure 2. East Montpelier Coburn Road Wetland Mitigation Site, close-up. Note: VAST trail as built (purple) and as initially proposed in Exhibit A. (blue)



Wet meadow buffer and surrounding area.
 This map is a portion of Sheet 1 of 2 of Exhibit A of the court order.
 Modifications in this style and the colors are by Thomas Weiss,
 June 11, 2018.