

State of Vermont
VERMONT AGENCY OF NATURAL RESOURCES
Department of Environmental Conservation

In re Wolcott Pond (Wolcott)
No. UPW 13-01

MEMORANDUM OF DECISION
(Issued October 22, 2014)

The Department of Environmental Resources (DEC) denies the Friends of Wolcott Pond's petition, filed pursuant to 10 V.S.A. § 1424, which requests that DEC adopt a rule, pursuant to its authority under 10 V.S.A. § 1424, to prohibit the use or presence of internal combustion motors on Wolcott Pond in Wolcott, Vermont.

I. Background

Wolcott Pond is a 74 acre¹ pond in the Town of Wolcott, Vermont. There are five private seasonal camps on the pond and only four of these camps are visible from the water. Four of these five camps are primitive, meaning they have no running water or electricity. The other camp has a composting toilet and power generator.

The State of Vermont owns land adjacent to Wolcott Pond and the Department of Fish & Wildlife maintains a public access area with a concrete boat launching ramp on the western shore of the pond. The pond is used for aquatic recreation, such as swimming, boating, fishing, and wildlife viewing. Various wildlife use the habitat provided by Wolcott Pond. A pair of Common Loons has nested on the pond since 1989 and has been successful at hatching chicks 19 of the last 21 years. Other wildlife in or around Wolcott Pond include ducks, deer, and occasional moose.

Wolcott Pond is a relatively small shallow pond with a maximum depth of 23 feet. It has numerous areas of adjacent wetlands along its shore. The shore or the wetland edges are almost entirely wooded, with the exception of the public access area. Its water is tannic (tea-colored) and somewhat acidic. Aquatic plants found in the pond are those typical of tannic water, water lilies (*Nymphaea* sp and *Nuphar* sp.), burreed (*Sparganium* sp.), and flexible-leaf pondweed (*Potamogeton epiphydrus*). There are no known water quality issues or impairments associated with Wolcott Pond.

There are numerous lakes within 20 miles of Wolcott Pond, including Lake Elmore, Lake Eligo, Green River Reservoir, and Caspian Lake. There are approximately 17 other lakes or ponds within 20 miles of Wolcott Pond with a 5 mph speed limit. Internal combustion motors are prohibited on nine of these lakes or ponds.

The Friends of Wolcott Pond (Petitioners) submitted a petition pursuant to 10 V.S.A. § 1424 on February 22, 2013 (last revised April 24, 2013) asking that DEC make Wolcott Pond a 'quiet pond' by adopting a rule to prohibit internal combustion motors on Wolcott Pond:

¹ DEC Lake Water Quality Summary Report for Wolcott Pond, available at <https://anrweb.vermont.gov/DEC/DEC/LakeSummary.aspx?LakeID=WOLCOTT>.

WE the undersigned petition The Vermont Agency of Natural Resources, the Water Resources Panel and the Town of Wolcott to approve the designation of Wolcott Pond as a quiet pond for the benefit of its recreation users with the inclusion of a single change in the rules, that is, the elimination of the use of internal combustion engines on the pond.

Petition from Jan Roy, President, Friends of Wolcott Pond at 1, to Leslie Welts, Staff Attorney, Department of Environmental Conservation, Agency of Natural Resources (February 22, 2013) [hereinafter *Petition*] (*available at* http://www.watershedmanagement.vt.gov/rulemaking/docs/petitions/pet_wp0222_2013_petition.pdf#zoom=100).

Petitioners state that the Friends of Wolcott Pond is a non-profit, charitable organization and its purpose is to “protect Wolcott Pond and other natural and scenic resources; to protect the natural, scenic and quiet recreational resources of Wolcott Pond as well as its watershed, water quality, wildlife habitat, natural shoreline cover, and surrounding lands while preserving and enhancing its wilderness-like character; and to serve as an advisor and an advocate regarding the management and use of Wolcott Pond and the surrounding lands.” *Petition* at 1. The nature and purpose of Petitioners’ petition to designate Wolcott Pond as a “quiet pond” is in furtherance of this mission. In particular, Petitioners offer three reasons why a prohibition on internal combustion motors is necessary. First, Petitioners contend that the number of quiet users of the pond has increased and the number of fishing boats using electric motors rather than internal combustion motors has increased dramatically. *Petition* at 2. Second, the 5 mph speed limit is often violated because the sign is small and only posted on a bulletin board at a public landing. *Id.* The Petitioners contend that those who violate the 5 mph speed limit disturb the quiet nature of the pond, produce pollution, and create a safety hazard to other users. *Id.*

The Petition has 157 signatures and the Town of Wolcott Selectboard submitted a letter to DEC in support of the Petition on April 3, 2013. DEC sent notice of the Petition to various persons or organizations with an interest in public waters in Vermont, all abutting property owners, and legislators representing the area in which the affected waters are located on July 11, 2013. DEC held a public meeting to receive comments on the petition on August 20, 2013 at the Wolcott Town Offices, 28 Railroad Street, Wolcott, Vermont from 6:00 p.m. to 8:00 p.m. Approximately 50 people attended the public meeting and provided comments at the meeting. The deadline for filing written comments on the petition, which could be mailed, faxed, delivered, or e-mailed to DEC, was September 1, 2013. Over 50 written comments were filed, including comments from the Department of Fish & Wildlife.

The comments received fall under the following general categories: comments in support of the Petition and comments in opposition to the Petition. The comments in favor of the petition discussed the unenforceability of the speed limit, swimmer safety, the quiet and tranquil nature of the pond, wildlife disturbance from internal combustion motors, the availability of other bodies of water that are deemed better suited for internal combustion motors, and the ability and technology of electric motors. The comments opposing the Petition discussed the importance of public access for all to Vermont’s lakes and ponds, the lack of citations or reports regarding use conflicts, the expense and possible burden of purchasing an electric motor and necessary

accessories, and the concern that prohibiting internal combustion motors would not necessarily create a quiet and safe experience for other users. A majority of commenters agreed that safety concerns stem from high speed boaters rather than the internal combustion motors operators who obey the speed limit.

II. Present Rules

Certain general Vermont Use of Public Waters (UPW) Rules presently apply to Wolcott Pond. Vessels powered by motor shall not exceed 5 mph. *See* UPW Rule 3.2. The use of personal watercraft is also prohibited. *See* UPW Rule 3.3. In addition, aircraft are prohibited from May 1 through November 30. *See* UPW Rule 3.4.

In summary, Wolcott Pond is presently subject to the following specific rules:

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- a. Vessels powered by motor shall not exceed 5 mph (VUPW Rule 3.2(a))
- b. Use of personal watercraft is prohibited (VUPW Rule 3.3)
- c. Use of aircraft is prohibited May 1 – November 30, except where authorized under 5 V.S.A. Ch. 9 (VUPW Rule 3.4)

UPW Rules, Appendix A (providing lake-specific rules regulating the use of particular public waters) (amended Dec. 30, 2011).

III. Standard of Review

10 V.S.A. Chapter 49 and the UPW Rules guide the DEC's decision. It is the State of Vermont's policy to provide for multiple uses of its navigable waters in a manner that provides for the best interests of the citizens of the State. 10 V.S.A. § 1421. The Secretary must "attempt to manage the public waters so that the various uses may be enjoyed in a reasonable manner, in the best interests of all the citizens of the State," and to provide for all normal uses² to the extent possible. 10 V.S.A. § 1424(c). The various provisions of Section 2 of the UPW Rules direct the Secretary to manage public waters so that users can enjoy various types of uses taking into account safety, the best interests of both current and future generations of citizens of the state, and the need to provide an appropriate mix of water-based recreational opportunities on a regional and statewide basis. *See* UPW Rule 2.2; UPW Rule 2.6. Section 2.7, 2.9, and 2.10 indicate that regulation to resolve use conflicts should not be used unless necessary and such regulation should manage use conflicts "using the least restrictive approach practicable that adequately addresses the conflicts." UPW Rule 2.7. Finally, it is the Petitioner's burden to show a prohibition is necessary. UPW Rule 3.7; *In re Echo Lake (Keeler Pond) (Hubbardtown, Sudbury)*, No. UPW 91-05, Decision (Dec. 22, 1992) (placing the burden on petitioners to show that conflicting uses are incompatible).

² The UPW Rules defines "normal use" as "any lawful use of any specific body of public water that occurred on a regular, frequent and consistent basis prior to January 1, 1993." UPW Rule 5.5.

In addition, the UPW Rules provide that in evaluating petitions and associated public comments, DEC must consider the following factors, at a minimum: “the size and flow of navigable waters, the predominant use of adjacent lands, the depth of the water, the predominant use of the waters prior to regulation, the uses for which the water is adaptable, the availability of fishing, boating, and bathing facilities, and the scenic beauty and recreational uses of the area.” UPW Rule 2.2.

IV. Discussion

In applying 10 V.S.A. § 1424 and the UPW Rules, DEC looks to the purpose of the petition and determines whether less restrictive means can meet that purpose. *In re Berlin Pond (Berlin)*, No. UPW-13-03 (2014); *In re Berlin Pond (Berlin)*, No. UPW 14-01 (2014); *In re Somerset Reservoir (Somerset and Stratton)*, No. UPW 05-04 (2005). UPW Rules 2.6 and 2.7 also support this method of evaluating petitions. The forthcoming analysis asks two questions: (a) “What is the purpose of the petition?” and (b) “How else can that same purpose be reached?” DEC is not required to adopt the exact language of the petition, but the DEC is limited in how far the adopted rule can stray from the proposed rule. *In re Somerset Reservoir*, UPW 05-04, 4 (2005). This limited flexibility allows DEC to attain the petition’s purpose without unnecessarily restricting other uses of Wolcott Pond. *Id.*

Petitioners assert that internal combustion motors conflict with Wolcott Pond’s use as a quiet recreation pond. *Petition* at 2. In particular, Petitioners contend that the high speed boaters who violate the 5 mph speed limit disturb the quiet nature of the pond, produce pollution, and create a safety hazard to other users. *Id.* Thus, the purpose of Petitioners’ proposal to prohibit internal combustion motors is to reduce the risk of disturbance of quiet, to reduce the risk of pollution, and to reduce the risk to swimmer safety posed by speeding motor boats.

As a threshold matter, it is important to note that internal combustion motors are a ‘normal use’ on Wolcott Pond under the UPW Rules. In evaluating normal recreational and other uses, the following uses are considered under UPW Rule 2.3: “fishing, swimming, boating, waterskiing, fish and wildlife habitat, wildlife observation, the enjoyment of aesthetic values, quiet solitude of the water body, and other water-based activities.” Unlike in *In re Colchester Pond (Colchester)*, No. UPW 91-03, Decision (Dec. 2, 1992), where the Water Resources Board (WRB) prohibited all motors on Colchester Pond because motors of any sort were not a normal use, internal combustion engines have been a normal, accepted use on Wolcott Pond since before the UPW Rules were adopted in 1994. Consequently, DEC cannot prohibit internal combustion motors unless no less restrictive alternatives exist. *In re Wrightsville Reservoir (Montpelier, East Montpelier, Middlesex)*, No. UPW 84-01, Decision (Aug. 7, 1984).

Since the Secretary must “attempt to manage the public waters so that the various uses may be enjoyed in a reasonable manner, in the best interests of all the citizens of the State,” and provide for all normal uses to the extent possible pursuant to 10 V.S.A. § 1424(c) and UPW Rule 2.6, DEC will examine whether Petitioners’ proposed prohibition is the least restrictive way to accomplish the Petition’s purposes.

A. Protection of the Quiet Nature

The first purpose of the Petitioner's proposal to prohibit internal combustion motors is to reduce the risk of motors disturbing the quiet nature of the pond. Petitions explain that because the pond is host to only a few camps, which are largely primitive, "visitors using the pond are seldom subjected to urban noise such as lawn mowers or to electric light pollution." *Petition* at 2. As a result, according to Petitioners, "[t]his makes Wolcott Pond especially attractive to those seeking quiet enjoyment of a wilderness pond where they can fish quietly or watch wildlife." *Id.* In addition, Petitioners' concerns regarding noise extend to wildlife on the pond, including the pair of nesting Common Loons.

In addressing the noise arising from internal combustion motors, DEC must determine the best way to limit noise without restricting normal uses more than necessary. *In re Lewis Pond (Lewis)*, No. UPW 92-01, Decision (Feb. 16, 1993). In *Lewis Pond*, the WRB lifted a ban on internal combustion motors, but maintained a 5 mph speed limit because the WRB found that motorboats were an established use on Lewis Pond; a 5 mph speed limit met the concerns of the petitioners, which included noise, wildlife harassment, and public safety; and the speed limit accounted for the concerns of the petitioners without instituting a prohibition of an established use. *Id.* Similarly, the WRB held in *In re Lake Somerset Reservoir* that a 10 mph speed limit and a 'no wake' rule on Lake Somerset Reservoir was less restrictive approach to addressing noise than the petitioner's request for a horsepower limitation on internal combustion motors. *In re Lake Somerset Reservoir (Somerset and Stratton)*, No. UPW 05-04, Decision (Nov. 10, 2005). The WRB's reasoning was that these restrictions effectively addressed the petitioner's concerns without prohibiting an established, normal use. *Id.*

Although prohibiting internal combustion motors on Wolcott Pond would certainly eliminate noise, such a prohibition is not the least restrictive way to accomplish the Petitioners' goal. The WRB has held that 10 mph and 5 mph speed limits are more appropriate ways of addressing noise concerns than disallowing an established, normal use. Therefore, enforcement of Wolcott Pond's 5 mph speed limit is the preferred way to achieve Petitioners' purpose of protecting the quiet nature of the pond.

B. Protection Against Pollution

Petitioners' proposed prohibition on internal combustion motors is also proposed to achieve the purpose of protection of Wolcott Pond against pollution caused by internal combustion motors. However, DEC is unaware of any water quality issues or impairments associated with Wolcott Pond.

Moreover, existing law already prohibits the discharge of any substance into Vermont waters without a permit. 10 V.S.A. § 1259(a). As the WRB and DEC have found, proper enforcement of existing statutes and rules is the preferred way to achieve a petitioner's purpose without unnecessarily prohibiting a normal use of the pond. *See In re Berlin Pond (Berlin)*, No. UPW 14-01, Decision (Aug. 14, 2014); *In re Star Lake (Mt. Holly)*, No. UPW 98-05, Decision (Oct. 29, 1998). The Petitioners do not carry their burden to demonstrate how existing regulatory controls regarding pollution are insufficient to address pollution. Therefore, DEC finds Petitioners failed to demonstrate a conflict regarding internal combustion motors and water

quality pollution. Such a demonstration is necessary for DEC to prohibit a normal use. Accordingly, DEC finds that enforcement of existing law is sufficient to address Petitioners' concerns.

C. Protection Against Safety Risks

Petitioners contend that internal combustion motors pose a safety hazard to those who swim in Wolcott Pond. *Petition* at 2. Petitioners and the commenters submitted to DEC indicate that the two uses are in conflict. However, the WRB, in *In re Fern Lake*, found that the recreational use conflicts did not justify banning boats powered by internal combustion motors. No. UPW 97-02, Decision (Oct. 14, 1997). In *In re Wrightsville Reservoir*, the WRB found there are several other means for addressing concerns regarding swimmer safety, including speed limits, wake restrictions, and marked swimming areas. No. UPW 84-01, Decision (Aug. 7, 1984). In making a similar determination that motorboats should continue to be allowed on Silver Lake, the WRB found that education and enforcement should be explored before prohibiting internal combustion motors outright. *In re Silver Lake*, No. UPW 05-03, Decision (Oct. 25, 2007).

Swimmer safety on lakes and ponds is an important concern that DEC takes seriously. However, there is no indication that recreational uses are incompatible or that other reasonable alternatives to prohibiting a normal use are insufficient. The local game warden, who has covered the pond since 1995, has observed only light motorized boat traffic on the pond and has not received reports of problems related to boat use prior to this Petition. Without such evidence, there is no reason to believe that a prohibition on internal combustion motors is necessary to solve the use conflict on Wolcott Pond. *In re Mirror Lake (Pond No. 10) (Calais)*, No. UPW 04-02, Decision (Oct. 7, 2004) (denying part of a petition seeking a ban on internal combustion motors because there was no "sufficient showing that such a result is necessary or warranted to adequately address the underlying recreational use conflict."). Petitioners even acknowledged at the public meeting that boaters who obey the 5 mph speed limit pose little risk to swimmers and that when boaters are made aware of the speed limit, they typically conform their speed accordingly. As a result, a less restrictive alternative for ensuring swimmer safety is increased posting and enforcement of the current 5 mph speed limit.

Petitioners argue that enforcement of the existing speed limit is inadequate, but DEC is not convinced that Petitioners' argument satisfies their burden of showing a prohibition is necessary. In *Mirror Lake*, the WRB determined that the conflict between uses was limited to the disrespectful and illegal behavior of a relatively small number of boaters. Similarly, the WRB held in *In re Somerset Reservoir* and *In re Star Lake* that education and proper enforcement are better suited to resolving such a recreational conflict than a prohibition. No. UPW 91-05, Decision at 11 (Dec. 22, 1992); No. UPW 98-05, Decision (Oct. 29, 1998).

V. Conclusion

DEC hereby denies the Friends of Wolcott Pond's petition for two important reasons. First, internal combustion motors are a normal use on Wolcott Pond. DEC is reluctant to prohibit a normal use, unless such a prohibition is necessary. Second, there is no evidence that the conflicting uses arises to the level where a prohibition is necessary. DEC must use the least restrictive method to resolve conflicts between uses. As the Petition states, most conflicts that occur are a result of a boater violating the speed limit on Wolcott Pond. As the WRB wrote in *Star Lake*, the violation of speed limits is best addressed through education and enforcement rather than a prohibition. Further, in *Mirror Lake*, the WRB rejected the argument that boaters often ignore speed limits. Again, enforcement of the speed limit, not a prohibition is the best way to solve this problem.

Dated at Montpelier, Vermont this 22th day of October, 2014.

VERMONT AGENCY OF NATURAL RESOURCES
Department of Environmental Conservation



David K. Mears, Commissioner