

**State of Vermont
WATER RESOURCES BOARD**

**In re: Petition to prohibit the use of personal
watercraft on Norton Pond
in the Town of Norton and Warren Gore, Vermont,
Docket No. UPW-02-01**

10 V.S.A. § 1424

Background

On February 28, 2002, a group of ten or more Freeman filed a petition (Petition) under the provisions of 10 V.S.A. § 1424 with the Vermont Water Resources Board (Board) requesting the adoption of a rule regulating the use of Norton Pond by prohibiting the use of personal watercraft (PWC), commonly referred to as jet skis, on that body of water.

After review by the Interagency Committee on Administrative Rules, the Board, proposed the rule requested by the petition for the purpose of receiving public comment on June 6, 2002.

In accordance with public notice, the Board held a public hearing in Island Pond, Vermont on July 16, 2002, and established July 23, 2002, as the deadline for the filing of written comments regarding the proposed rule. The Board is governed in its consideration of petitions for the adoption of rules regulating the use of public waters by the applicable provisions of 10 V.S.A. §§ 1421-1426 (1998) (Protection of Navigable Waters and Shorelands), the Vermont Use of Public Waters Rules (2001), and the applicable provisions of the Vermont Administrative Procedure Act, 3 V.S.A. §§ 801-849 (1995 & Supp. 2000).

Decision

At its meeting on August 6, 2002, the Board reviewed and discussed the Petition and the public comments received both at the public hearing and in writing. At that meeting the Board voted unanimously to grant the Petition and authorized the Board Chair to sign the decision on their behalf. Accordingly, the Board will proceed with the adoption of a rule to prohibit the use of PWC on Norton Pond for the reasons set forth herein.

Findings

1. Norton Pond is located in the Town of Norton and Warren Gore, Essex County, Vermont.
2. Norton Pond constitutes public waters of the State of Vermont within the meaning of 10 V.S.A. § 1422(6) (1998).
3. Norton Pond (Pond) is relatively long and narrow being almost three miles long

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and approximately half a mile wide. The Pond has a surface area of approximately 667 acres including a number of shallow marsh-like areas. Most of the Pond has a depth of 10 feet or less. Many years ago a sawmill was located on or near the Pond and as a result submerged saw logs periodically float to the surface.

4. The State of Vermont has invested Forest Legacy funds to acquire a conservation easement known as the Hancock Forest Legacy Conservation easement on land that almost entirely encompasses Norton Pond.
5. Approximately 60, mostly summer residences, are located adjacent to Norton Pond. About one third of these summer camps are accessible only by water. Much of the shoreline is undeveloped giving recreational experiences on the Pond a wildness-like feeling.
6. The Pond provides habitat for loons usually supporting two nesting pairs annually. The Pond also provides habitat for bald eagles and great blue herons as well as other birds and wildlife.
7. There are no businesses or commercial enterprises located on Norton Pond.
8. 10 V.S.A. § 1424(b) (1998) provides as follows:

The board in establishing rules shall consider the size and flow of the 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, the scenic beauty and recreational uses of the area.

See also Vermont Use of Public Waters Rule § 2.2 (providing for consideration of these factors in evaluation of petitions and public comments).

9. Under 10 V.S.A. § 1424(c) (1998), "The board shall 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. To the extent possible, the board shall provide for all normal uses." See also Vermont Use of Public Waters Rule § 2.2 (providing for management of public waters so that various uses may be enjoyed in a reasonable manner considering safety, the interests of current and future generations, and the need to provide an appropriate mix of water-based recreational opportunities on a regional and statewide basis).
10. A normal use is defined in the Vermont Use of Public Waters Rules as follows: "Any lawful use of any specific body of public water that has occurred on a regular, frequent and consistent basis prior to January 1, 1993." § 5.2.

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11. Vermont Use of Public Waters Rule § 2.6 provides that "Use conflicts shall be managed in a manner that provides for all normal uses to the greatest extent possible consistent with the provisions of Section 2.2 of these rules." Under § 2.7, "When regulation is determined to be necessary, use conflicts shall be managed using the least restrictive approach practicable that adequately addresses the conflicts."
12. The normal and predominate uses of Norton Pond include swimming (including long-distance swimming), canoeing, kayaking, fishing, motor boating, waterskiing, fish and wildlife habitat, wildlife observation, and the enjoyment of the aesthetic values including quiet solitude. Motor boating at other than low speeds, including waterskiing, occurs on Norton Pond at a relatively low level of intensity.
13. Based on the testimony at the July 16, 2002, public hearing and the written comments received, the Board finds that while PWC have been used on Norton Pond since 1999 infrequently, their use prior to 1993, if it occurred at all, was not on a regular, frequent, or consistent basis (see § 5.2 Vermont Use of Public Waters Rules). Accordingly the use of PWC has never been normal on Norton Pond.
14. On those few occasions when PWC have been used on Norton Pond, their use has created an irreconcilable conflict with several of the lake's normal uses, especially long distance swimming, wildlife observation and the enjoyment of aesthetic values including quiet solitude. On those occasions, PWC have been operated at high speeds close to the shore, at erratic speeds and in erratic patterns, and in a manner causing the exhaust jet to come out of the water in violation of Vermont Use of Public Waters Rule § 3.2.b. When the exhaust jets of PWC come out of the water, the muffling effect of the water is lost, and a thump is heard when the PWC returns to the water's surface. The variable nature of the resulting noise increases its intrusion on other recreational uses. The hills surrounding Norton Pond tend to amplify and reverberate the noise inherently associated with the operation of PWC on the Pond.
15. Even if it were enforced, the provisions of Vermont Use of Public Waters Rule § 3.2.b would not adequately address the conflict between the use of PWC and several of the normal uses of Norton Pond, such as wildlife observation and the enjoyment of aesthetic values, including quiet solitude.
16. Regulating the time, place, or manner of the use of PWC on Norton Pond would not be practical and would not adequately address the conflict between the use of such vessels and the normal or established uses of that body of water.
17. PWC are allowed on a number of nearby bodies of water including Island Pond, Great Averill Pond, Little Averill Pond, Holland Pond and Lake Seymour.

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18. The proposed rule is consistent with the provisions of 10 V.S.A. § 1424 (1998) and section 2 of the Vermont Use of Public Waters Rules.

Response Summary

The comments received at the public hearing in this matter and in writing overwhelmingly support the petition. In reaching its decision in this matter, the Board considered and overruled the following arguments received in a single written comment for the reasons indicated below. See 3 V.S.A. § 841(b) (1995).

One commentator opposed the proposed rule on several grounds making reference to §§2.2, 2.6, 2.7 and 2.10 of the Vermont Use of Public Waters Rules which are adopted by this Board. After consideration of these objections, the Board has overruled each of these comments for the reasons indicated below:

1. The Vermont Use of Public Waters Rules at § 2.2 and § 2.6 do articulate a general policy of seeking to accommodate all uses when they can all be enjoyed in a "reasonable manner" but only after taking into consideration factors such as public safety, the best interests of both current and future generations, and the "need to provide an appropriate mix of water-based recreational opportunities on a regional and statewide basis." Having weighed all of these factors in this proceeding, the Board concludes that its decision to proceed with the adoption of a rule prohibiting the use of PWC from becoming established on Norton Pond is fully consistent with the general policies enunciated in §2.2 and §2.6.

These provisions do not require, as the commentator suggests, that all recreational uses must be accommodated on all bodies of water, but rather that such public resources be managed both individually and collectively to provide for an "appropriate mix of water-based recreational opportunities" with an emphasis on trying to preserve all normal or established uses. With regard to Norton Pond, the Board has concluded that a rule prohibiting PWC from becoming a new use of this body of water is necessary to preserve a number of normal or established uses of this body of water, especially wildlife observation and the enjoyment of aesthetic values including quite solitude. Such uses are an increasingly rare and valuable aspect of the recreational experience provided by Norton Pond.

On the basis of public comment, the Board has concluded that adopting the rule requested by the petition is fully consistent with ensuring an appropriate mix of water-based recreational opportunities on a regional and statewide basis.

2. The Vermont Use of Public Waters Rules, §2.7 does not, as the commentator argues, require that the Board **MUST** in every instance adopt a rule separating conflicting uses before it can consider adoption of a rule prohibiting a use.

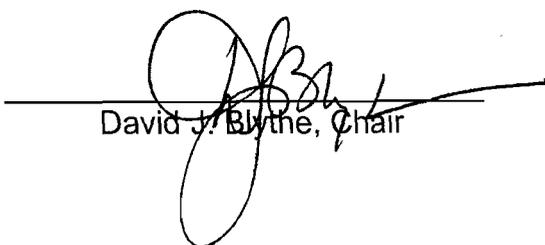
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Rather, this provision provides that the Board use the least restrictive approach that is both practicable and adequately addresses the conflicts. The Board believes that it has done just that in this case.

The Board has on other occasions adopted rules separating conflicting uses (See Appendix B: Arrowhead Mountain Lake at page B-1, Greenwood Lake at page B-4, and Waterbury Reservoir at pages B10-12), especially conflicting normal or established uses. However, the Board does not interpret its own rules to blindly mandate such an approach in every circumstance especially when, as in this case, the use being prohibited is not a normal or established use on the body of water affected. Because PWC is not a normal or established use of Norton Pond, §2.10 of the Vermont Use of Public Waters Rules is not applicable.

Dated at Montpelier, Vermont this 9th day of August, 2002.

WATER RESOURCES BOARD


David J. Blythe, Chair

Concurring:

Lawrence H. Bruce, Member
Jane Potvin, Member
Mardee Sánchez, Member
John D. E. Roberts, Member

