

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

In re Berlin Pond (Berlin)
Citizens to Protect Berlin Pond Petition
No. UPW-14-01

MEMORANDUM OF DECISION
(Issued August 14, 2014)

The Department of Environmental Resources (DEC) denies the Citizens to Protect Berlin Pond's petition, filed pursuant to 10 V.S.A. § 1424, which requests that DEC issue a rule, pursuant to its authority under 10 V.S.A. § 1424, to prohibit all recreation on the surface waters of Berlin Pond in Berlin, Vermont.

I. Background

Berlin Pond is a natural body of water in the Town of Berlin, Vermont, running on a north-south access, west of Interstate 89. Berlin Pond is the sole source of the public water supply for the residents, businesses and guests of the City of Montpelier, and is also the source of the public water supply for certain areas and facilities in the Town of Berlin, including the Central Vermont Medical Center. Berlin Pond has supplied Montpelier with a gravity-fed water supply since 1884, pursuant to an 1872 charter amendment. The Montpelier Water Treatment facility uses a carbon activated powder treatment unit with state-of-the-art Trident filters capable of removing volatile organic compounds. The facility, however, was not designed with the express intent of removing petroleum products from the raw water. Despite this fact, the required monitoring of Montpelier's drinking water has never shown a violation of pertinent drinking water standards.

Until May of 2012, the City of Montpelier prohibited all recreational use on the surface of Berlin Pond. Although Berlin Pond is a public water and Montpelier does not own the pond itself, Montpelier owns a majority of the land around the pond and has rights to the water contained therein. *City of Montpelier v. Barnett*, 2012 VT 32 ¶ 3, 191 Vt. 441, 444. In May of 2012, the Supreme Court of Vermont held that the State of Vermont, not Montpelier, has the jurisdiction to limit recreational uses on Berlin Pond. *Id.*

Berlin Pond is relatively large and deep as compared to other lakes in Vermont. Berlin Pond is 293 acres in size, the deepest part is 59 feet, and the average depth is 27 feet. It is the fifth largest lake of the lakes 20 acres or larger within 20 miles. Of the lakes 20 acres or larger in size statewide, Berlin Pond is the 39th largest, or among the top 13% largest lakes. Out of the 290 lakes 20 acres or larger in size statewide, Berlin Pond is the 46th deepest lake, putting it in the top 16% deep lakes.

Berlin Pond's shoreline is approximately five miles and the land around the pond is predominantly undeveloped. There is a small five to ten car parking lot on the north-east end of Berlin Pond. Petition from Citizens to Protect Berlin Pond at 6, to Leslie Welts, Esq. Staff Attorney, Dept. of Environmental Conservation, Agency of Natural Resources (July 25, 2013) [hereinafter *Petition*] (available at

http://www.watershedmanagement.vt.gov/rulemaking/docs/petitions/pet_bp02062014_petition.pdf). The remaining surrounding land is predominately wooded and much is owned by the City of Montpelier. *Id.* A small section of the Pond is visible from Interstate 89, but the majority of the pond provides an attractive, scenic refuge for quiet relaxation, wildlife habitat, and non-motorized recreation. *Id.* No facilities such as boathouses, storage, bathrooms, or boat ramps exist on the pond. *Id.* An unpaved class 3 road circumvents the pond. *Id.* at 3. Since the Court's 2012 decision, people use the pond for kayaking, canoeing, fishing, swimming, and wildlife viewing. The water quality (clarity and phosphorus concentration) supports these activities. Its undeveloped shoreline and adjacent wetlands also provide good opportunities for fish and wildlife habitat and wildlife observation, and aesthetic value. Although Interstate I-89 and several town roads are visible or audible from some areas of the pond, it offers a quiet, natural experience that many users seek.

There are 36 lakes 20 acres or over in size located within 20 miles of Berlin Pond. Of these lakes, approximately 28 have some form of public access, including road access or carry-in boating. These lakes offer a variety of recreational experiences. However, there are few lakes similar to Berlin Pond in size, with little or no shoreland development, and where internal combustion motors are prohibited. Only Kettle Pond in Groton State Forest and Thurman Dix Reservoir in Orange are over 100 acres in size, within 20 miles from Berlin Pond, and prohibit internal combustion motors. Therefore, large lakes with an undeveloped shore offering a quiet, scenic and natural recreational experience are rare in the area.

Citizens to Protect Berlin Pond (Petitioners), a non-profit organization, submitted a petition pursuant to 10 V.S.A. § 1424 on February 6, 2014 asking that DEC adopt the following rules regarding Berlin Pond:

The following are prohibited on Berlin Pond:

- a. The use of all vessels and machines, regardless of how they are propelled.
- b. Swimming, wading, paddle boarding, or any activity that places humans or domestic animals in contact with the surface water or on the ice.
- c. Fishing, including fishing from boats, ice, or from shore.
- d. Hunting and shooting.
- e. The construction of any access to the pond from the shore.

On April 25, 2014, 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. DEC held a public meeting to receive comments on the Petition on May 27, 2014 at the Berlin Elementary School Library, 372 Paine Turnpike North, Berlin, Vermont from 6:00 p.m. to 8:00 p.m. 121 people signed the attendance sheets for the public meeting and approximately 50 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 June 3, 2014. Over 300 written comments were filed.

Many comments in favor of the Petition discussed the risk of contamination that recreation poses, asserted that there are many recreational bodies of water nearby, the importance

of protecting Berlin Pond's pristine habitat, the risk of invasive species, the impacts on wildlife, and the possibility of a terrorist attack on Berlin Pond. Many comments in opposition to the Petition discussed Vermont's public trust doctrine, the concept that Berlin Pond is not a unique, pristine, or undisturbed habitat, the concept that typical recreational users pose no threat to Berlin Pond, and the fact that there are other bodies of water in Vermont that both allow recreation and are a source of drinking water.

II. Present Rules

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

Berlin Pond is presently subject to the following specific rule issued by the Water Resources Board:

Berlin Pond, Town of Berlin (293)

- a. Vessels powered by motor shall not exceed 5 mph (UPW Rule 3.2(a))
- b. Use of personal watercraft is prohibited (UPW Rule 3.3)
- c. Use of aircraft is prohibited May 1 – November 30, except where authorized under 5 V.S.A. Ch. 9 (UPW Rule 3.4)
- d. Use of internal combustion motors is prohibited (UPW Rule 3.5).

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 DEC's decision in this case. It is the State of Vermont's policy to provide for multiple uses of its navigable waters in a manner to provide 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 uses to the extent possible. 10 V.S.A. § 1424(c). The UPW Rules direct the Secretary to manage public waters so 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. The Secretary should avoid unnecessary regulation to resolve use conflicts and such regulation should manage use conflicts "using the least restrictive approach practicable that adequately addresses the conflicts." UPW Rule 2.6, 2.7, 2.7, 2.9, 2.10; *In re Somerset Reservoir*, UPW 05-04 (2005). 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).

The forthcoming analysis asks two questions: 1) “What is the purpose of the petition?” and 2) “Is there a less restrictive method to accomplish that same purpose?” The Citizens to Protect Berlin Pond’s petition, generally, defines several purposes for change in use proposed in its petition: a) environmental conservation/preservation; b) maintaining the quiet enjoyment of Berlin Pond; c) limiting/preventing the spread of invasive species; d) preventing water contamination by recreation; and e) preventing water contamination by terrorist attacks.

IV. Discussion

The Petitioners contend that recreation (boating, swimming, fishing, etc.) conflicts with other uses such as drinking water, environmental conservation, and quiet enjoyment under UPW Rule 2.6. Further, the Petitioners contend that the only way to solve this conflict is to prohibit all recreational uses since, according to the Petitioners, recreational use is not a “normal use” on Berlin Pond.

A threshold issue in assessing this petition is DEC’s interpretation of whether recreation qualifies as a “normal use.” This term is important for two reasons. First, the purpose of the UPW Rules is to “establish a number of general management rules to protect normal uses on all lakes, ponds and reservoirs.” UPW Rule 1.1. Second, DEC must manage use conflicts “in a manner that provides for all normal uses to the greatest extent possible consistent with the provision of Section 2.2 of these Rules.” UPW Rule 2.6.

The definition of “normal use” is “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.” UPW Rule 5.2. The Petition relies on a very narrow interpretation of “normal use.” Specifically, the Petitioners contend that prior to 1993 and up until 2012, the only “normal use” of Berlin Pond was as a source of drinking water. According to the Petition, recreation is not a normal use and therefore, DEC must prohibit all forms of recreation on Berlin Pond.

However, the use of this narrow, technical definition of “normal use” is contrary to the policy and goals of the UPW Rules and statutes regarding water quality and recreation. The state water quality statutes and policy reflect the state’s goals to provide for mixed uses of Vermont’s waters. 10 V.S.A. §1250(7) (“It is the policy of the state of Vermont to...manage the waters of the state to...increase the opportunities for use of the state’s forest, park and recreational facilities, and to allow beneficial and environmentally sound development.”).

The UPW Rules also reflect the State’s mixed-use policy: “The Rules attempt to avoid [and solve conflicts] in the use of public waters...so that the various uses may be enjoyed in a reasonable manner, considering the best interests of both current and future generations....” UPW Rule 1.1. Further, UPW Rule 2.2 repeats this exact same language. UPW Rules 2.6, 2.7, and 2.10 then reiterate this same purpose. Each of these rules explains that DEC must use the least restrictive method in order to accommodate various uses of the public body of water.

Lastly, the Vermont Water Quality Standards include “boating, fishing, and other recreational uses” and “swimming and other primary contact recreation” as two of five management objectives for public water supplies. VWQS, Sec. 3-03(4). As a result, even if

DEC accepted the Petitioners' narrow interpretation of "normal use," such an analysis is not necessary because there is no inherent conflict of use between a public water supply and recreation on that body of water. In fact, the VWQS seem to declare these uses as complementary. *Id.* The Petitioner must establish that, in this case, recreation on Berlin Pond is incompatible with the use of the pond as a water supply. *In re Echo Lake (Keeler Pond) (Hubbardton, Sudbury)*, No. UPW 91-05, Decision (Dec. 22, 1992). As discussed in this decision, the Petitioners have failed to meet their burden.

These statutes and policies reflect the State's strong preference for a variety of uses, including recreational use in Vermont's public waters and drinking water supplies. Neither the courts', the Water Resources Board's, the Water Resources Panel's, nor the Agency's previous holdings discuss the conflict between the goals and purposes of the UPW Rules and the narrow interpretation of "normal use." On this issue, DEC looks to the goals and purposes of the UPW and finds that the Petitioners' narrow definition of "normal use" is unduly burdensome on the State's goals regarding various uses for its bodies of water.

For the foregoing reasons, DEC holds that recreation is a normal use of Berlin Pond. The remainder of this decision will evaluate the alleged conflict between recreation, and drinking water and the other purposes raised by the Petitioners. In accordance with the UPW Rules and state policies, DEC will look to the least restrictive ways to manage all of these uses.

a) Environmental Conservation and Preservation

i) *Petroleum and Litter*

The first purpose the Petitioners raise is environmental conservation and preservation. In furtherance of this purpose, the Petition describes the significant wetlands on the shore of Berlin Pond and the unique ecosystem of Berlin Pond. *Petition* at 17–21 (describing the wetlands and the sensitive and fragile ecosystem of Berlin Pond). The Petitioners contend that recreational activities will threaten the unique ecosystem by encouraging littering and put the pond at risk of being contaminated by petroleum products. In other words, the Petitioners contend that recreation is a conflicting use, and further, incompatible with environmental conservation and preservation. *Id.*

DEC acknowledges that Berlin Pond and its surrounding wetlands are important natural resources. However, the Petitioners have failed to meet their burden to show a prohibition of all recreation is necessary to achieve environmental conservation and preservation. Although such a prohibition is likely to eliminate most threats to the natural environment of Berlin Pond, DEC must balance a variety of different uses and to allow different users to enjoy Berlin Pond. Additionally, existing laws, rules, and regulations deal with many concerns discussed in the Petition.

For example, the Petitioners raise their concern that recreational activities that use petroleum products will contaminate the water and threaten the natural environment of Berlin Pond (this decision discusses petroleum contamination as a threat to drinking water below). *Petition* at 7 ("Among the dangers that the [water treatment facility] cannot adequately process are petroleum, including gasoline and oil products..."). Similarly, the Petitioners present their concern about litter around Berlin Pond.

Existing laws already protect against such threats. In particular, statute already prohibits the discharge of any substance into Vermont waters without a permit, 10 V.S.A. § 1259(a), and another statute prohibits littering. 24 V.S.A. § 2201(a)(1) (“A person shall not throw, dump, deposit, cause, or permit to be thrown, dumped, or deposited any solid waste as defined in 10 V.S.A. § 6602, refuse of whatever nature, or any noxious thing outside a solid waste management facility...”). Additionally, the existing UPW Rule that prohibits internal combustion motors on Berlin Pond further alleviates this concern. UPW Waters Rules, Appendix A (providing lake-specific rules regulating the use of particular public waters) (amended Dec. 30, 2011); *see also In re Berlin Pond (Berlin)*, No. UPW 13-02 Decision (Aug. 14, 2014) (reiterating the prohibition of internal combustion motors on Berlin Pond and prohibiting motor vehicles, all-terrain vehicles, snowmobiles, and motorized ice augers in response to a petition from the City of Montpelier).

Proper enforcement of these statutes and rules is the preferred way to achieve the Petitioner’s purpose without unnecessarily prohibiting a normal use of the pond. *In re Star Lake (Mt. Holly)*, No. UPW 98-05, Decision (Oct. 29, 1998) (refusing to adopt a prohibition on internal combustion motors and holding that proper education and enforcement is a more effective way to solve a conflict); *In re Lake Iroquois (Hinesburg and Williston)*, No. UPW 77-01 (1978) (holding speed limits are unnecessary because proper signage and area designations are better able to protect swimmer safety); *In re Echo Lake (Charleston)*, No. UPW 05-02, at 3 (2005) (“The use of buoys and written materials to educate and inform lake users would represent a less restrictive means than prohibiting [personal watercraft] to protect swimming and loon nesting areas...”). The Petition does not demonstrate how the existing legislation is insufficient to manage any conflicts between recreational uses and environmental conservation. Therefore, DEC finds these statutes and rules adequately manage petroleum products and litter.

ii) Hunters, Anglers, and Fish Stocks

The Petitioners also allege that hunters and anglers pose a safety threat and a threat to the wildlife of Berlin Pond. *Petition* at 8 (“Anglers, boaters and hunters have initially had access to a ‘sportsman’s paradise’: a place full of undisturbed and unafraid nature.”). However, existing regulations already deal with the concern about hunting and shooting, with prohibitions on hunting and shooting within 25 feet of a road and to shooting across or over a public highway. *VT Fish and Wildlife Digest*, (available at <http://www.eregulations.com/vermont/general-hunting-information>).

In addition, there is existing legislation that addresses the Petitioners’ concerns regarding fish stocks in Berlin Pond. The Commissioner of the Department of Fish & Wildlife is able to place appropriate fishing limits on the species of fish in Berlin Pond. 10 V.S.A. § 4081(a) (“The State, through the Commissioner of Fish and Wildlife, shall safeguard the fish...of the State for the people of the State...”). The Agency has also declared a “Test Water Designation” of Berlin Pond. 10 V.S.A. § 4142 (available at http://www.vtfishandwildlife.com/testWaters%5CBerlin_Pond_Test_Waters.pdf). This designation allows the Agency to limit takings of fish and gives the Agency time to learn about the existing population in Berlin Pond. The designation period is January 26, 2013 to December 31, 2015. The Petition does not offer evidence demonstrating the inadequacy of the existing

hunting and fishing laws in protecting environmental conservation. Therefore, DEC finds that Petitioners have failed to demonstrate that hunting and fishing on Berlin Pond are in conflict with that water's use for environmental conservation and preservation.

iii) Rare and Shy Bird Species

The Petitioners also raise concerns regarding rare and shy bird species, in particular, the common loon. *Petition* at 20, 333–341. The Vermont endangered species law protects, not just avian species, but other threatened or endangered organisms that may live near Berlin Pond. 10 V.S.A. App. § 10(4.1). This law prohibits the taking of any endangered or threatened species. *Id.* In this context, “taking” is a very broad term and includes “*all lesser acts*, such as disturbing, harrying, or worrying...” an endangered or threatened species. *Id.* (emphasis added). Moreover, the UPW Rules already prohibit all persons and vessels from within 300 feet of any loon nesting site identified by signs, buoys, or other clear on-site markings. UPW Rule 3.6. Necessary signage, markings, and education are much less restrictive means to prevent users from harassing common loons. The Petitioners do not demonstrate how existing regulatory controls regarding rare and shy bird species are insufficient to manage any conflicts between recreational uses and wildlife protection. Therefore, DEC finds that the Petitioners have failed to demonstrate a conflict regarding rare and shy bird species and recreational uses.

All of these existing restrictions described above, if properly enforced, are less restrictive alternatives than prohibiting all forms of recreation on Berlin Pond.

b) Maintaining the Quiet Enjoyment of Berlin Pond

The Petition shows concern for the loss of the tranquility and quiet nature of Berlin Pond. *Petition* at 17 (“the perimeter road of Berlin Pond provided a safe, peaceful area, with only slow residential traffic...”); *see also Petition* at 146–155 (pointing out that “quiet” is much wanted characteristic in a body of water) (citing Wachusett Reservoir Watershed 2011 Public Access Plan Update at 115–124 *available at* <http://www.mass.gov/eea/docs/dcr/watersupply/watershed/2011wachusettaccessplan.pdf>). Petitioners contend that recreation is not compatible with maintaining the quiet enjoyment of Berlin Pond.

First, state law already prohibits unreasonable noise and disturbances. 13 V.S.A. § 1022 (prohibiting “unnecessary and offensive noise” during the nighttime); 13 V.S.A. § 1026 (prohibiting disorderly conduct, which includes “mak[ing] unreasonable noise...”).

In addition, the UPW Rules already prohibit the use of internal combustion motors and limit speeds on Berlin Pond to 5 mph. UPW Rule 3.2(a). Although the Petitioners contend that increased recreational use will damage the tranquil nature of Berlin Pond, the Petitioners do not demonstrate how the existing rules are insufficient in addressing the potential conflict between recreational uses and maintaining the quiet enjoyment of Berlin Pond. Berlin Pond is considered a “quiet pond” because internal combustion motors are prohibited, personal watercraft is prohibited, and a 5 mph speed limit already exists on Berlin Pond. *See In Re: Mirror Lake (Pond No. 10) in the Town of Calais, Vermont*, UPW-04-02 (2004) *available at* <http://www.anr.state.vt.us/imaging/decdocs/decisions/upw/2004/upw0402dec.pdf>. Therefore, DEC finds the existing laws and rules are adequate to address the Petition's concerns regarding

the quiet enjoyment of Berlin Pond. Moreover, in *Star Lake*, the Water Resources Board (WRB) did not adopt a prohibition of internal combustion motors, but instead, created a 5 mph speed limit to address noise concerns. No. UPW 98-05, Decision (Oct. 29, 1998). Berlin Pond already has both of these restrictions. UPW Rules, Appendix A (providing lake-specific rules regulating the use of particular public waters) (amended Dec. 30, 2011). The WRB also held that proper education and enforcement is preferable to prohibition. *In re Star Lake*, No. UPW 98-05, Decision (Oct. 29, 1998).

The Petitioners have failed to meet their burden to show that further prohibition is necessary to accomplish the goal of quiet enjoyment. Again, proper education and enforcement are less restrictive approaches for addressing alleged use conflicts between recreational use and quiet enjoyment of Berlin Pond than a prohibition on recreation.

c) Limiting/Preventing the Spread of Invasive Species

The Petitioners assert that recreation on the pond will lead to the increase and introduction of invasive species on Berlin Pond. *Petition* at 23 (“The introduction of invasives [sic]...all pose risks and raise the potential for increased maintenance costs and user rates....Limiting boats which are transported between water bodies would curb the Pond’s exposure to new species.”). The Petitioners also cite the Wachusett Reservoir 2011 Public Access Plan Update to show invasive species are a threat to Berlin Pond. *Petition* at 109 (“Aquatic Invasive Species (AIS)...can pose a serious threat to water supplies.”) (quoting Wachusett Reservoir Watershed 2011 Public Access Plan Update at 78). The Petitioners contend that recreation is incompatible with limiting and preventing the spread of invasive species. *Id.*

State law already prohibits the transportation of any nuisance species without a permit. 10 V.S.A. § 1454. Proper enforcement can help to accomplish this purpose of the Petition. Additionally, the Agency of Natural Resources has the ability to temporarily close waters to “prevent, control or contain the spread of aquatic nuisance infestations...” UPW Rule 4.1(b). If necessary, a private citizen or group of citizens can submit a petition that requests the Agency to act. Lastly, other less restrictive methods can help to limit and prevent the spread of invasive species into Berlin Pond. These include access area greeters, signage, and education efforts. The Agency will also make itself available to work with any user groups to ensure an adequate prevention program is in place at Berlin Pond.

The Petitioners fail to demonstrate that current laws and rules are insufficient in achieving the Petition’s purpose to prevent the spread of invasive species. Enforcement of existing laws, regulations, and employing other methods of preventing the spread of invasive species are much less restrictive ways to accomplish this purpose of the Petition than a ban on recreational uses.

d) Preventing Water Contamination by Recreation

The Petitioners allege that recreation on the surface of Berlin Pond will contaminate Berlin Pond as a source of drinking water. *Petition* at 12 (“The link between direct water contact activities, such as swimming and wading, and the spread of water borne disease is well documented.”) (quoting Wachusett Reservoir Watershed 2011 Public Access Plan Update at 21).

Petitioners argue that recreation and public drinking water are conflicting uses that cannot coexist on Berlin Pond. *Id.*

The Petitioners do not demonstrate that prohibiting all recreation is necessary to prevent contamination of Montpelier's drinking water. *In re Echo Lake (Keeler Pond) (Hubbardton, Sudbury)*, No. UPW 91-05, Decision (Dec. 22, 1992) (placing the burden on petitioners to show that conflicting uses are incompatible). There is little credible evidence that the water treatment plant cannot handle the contaminants that would enter Berlin Pond from recreational users. In fact, bacterial and viral contamination already exists in Berlin Pond due to the abundance of wildlife in the area and recreational uses that include body to water contact, such as boating, fishing, and swimming will cause a negligible increase at most in these contaminants. Memorandum from Christine Thompson, Division Director, Drinking Water & Groundwater Protection Division Director to Leslie Welts, Staff Attorney, Dept. of Environmental Conservation (July 10, 2014) (on file with the Watershed Management Division, Agency of Natural Resources). As a result, the Montpelier Water Treatment Facility is able to appropriately filter and clean the water from Berlin Pond even with recreational users. Additionally, the Montpelier Water Treatment Facility is adequately able to monitor any petroleum contamination. *Id.*

At the same time, however, DEC acknowledges the importance of minimizing such a risk and finds the prohibition of internal combustion motors does, indeed, adequately minimize this risk. Finally, as discussed above in regards to litter, statute already prohibits the dumping of petroleum products or other chemicals that may contaminate the City of Montpelier's drinking water. 10 V.S.A. § 1259(a) (prohibiting the discharge of any substance into Vermont's waters); 24 V.S.A. § 2201(a)(1) (prohibiting the dumping, depositing, throwing, etc. of any solid waste). Again, without adequate evidence indicating the current laws are insufficient, DEC finds that proper enforcement of current law and adequate education is adequate to manage the perceived conflict.

e) Preventing Water Contamination by Terrorist Attacks

Lastly, the Petitioners allege that recreation on Berlin Pond will make the pond an easier target for terrorists. *Petition* at 16 ("A vulnerable and far-reaching target is a public drinking water source....[recreational] access to Berlin Pond...certainly increases the possibility of [a terrorist attack]."). Petitioners argue that, due to an increased risk in terrorism, recreational use and using Berlin Pond as a water supply are incompatible uses. *Id.*

The Petitioners have not submitted any significant evidence that such a broad prohibition will prevent or limit contamination by terrorist attacks. Although a terrorist attack is certainly possible, the connection between recreational use of the pond and such an attack is missing. The Petitioners submitted the Wachusett Reservoir Watershed 2011 Public Access Update to show the necessity of preventing contamination by terrorist attacks. *Petition* at 11 (citing Wachusett Reservoir Watershed 2011 Public Access Plan Update at 1). However, Petitioners provide little compelling evidence that the similarities between Berlin Pond and the Wachusett Reservoir are such that comparison is useful.

Federal anti-terrorism laws help prevent such an act from occurring in Berlin Pond. 18 U.S.C. § 2332f (prohibiting use of a lethal device in a public waterway with intent to cause

death, serious bodily injury, or extensive destruction of property). Additionally, as discussed above, current state law prohibits the dumping or depositing of petroleum or other hazardous materials into the waters of Vermont. 10 V.S.A. § 6616.

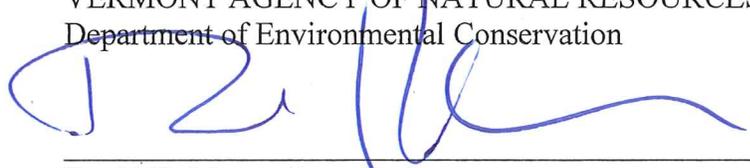
Ultimately, the Petitioners' evidence does not adequately demonstrate the likelihood of a terrorist attack rises to the level where prohibition is necessary. *In re Star Lake (Mt. Holly)*, No. UPW 98-05, Decision (Oct. 29, 1998). DEC holds that existing federal and state statutes properly manage the conflicting uses the Petition claims exist. Moreover, DEC finds that drinking water source use and recreation are compatible uses on Berlin Pond.

V. Conclusion

DEC hereby denies the Citizens to Protect Berlin Pond's petition. DEC has determined that the Petitioners have, in each instance, failed to demonstrate that a prohibition on recreational uses is necessary to address alleged conflicts. Moreover, Petitioners have failed to demonstrate a conflict between recreational uses and the use of the water as a drinking water source. DEC must use the least restrictive approach practicable to resolve conflicts between uses and less restrictive approaches are available to address the perceived conflicts. Most often, the least restrictive approach is proper enforcement of the current laws and public education. As for the Petitioners' argument that there are other bodies of water for on-water recreation, although true, segregating uses from pond to pond is an inefficient management method, especially when enforcement of the existing statutes and rules are adequate to address the Petitioners' concerns. Moreover, DEC has determined that the drinking water use and quiet recreation use are compatible uses on Berlin Pond.

Dated at Montpelier, Vermont this 14th day of August, 2014.

VERMONT AGENCY OF NATURAL RESOURCES
Department of Environmental Conservation



David K. Mears, Commissioner