

**State Of Vermont
Vermont Natural Resources Board
Water Resources Panel**

In re Silver Lake (Barnard)
No. UPW-05-03

VT Proposed Rule 05P025

MEMORANDUM OF DECISION
(Issued Oct. 25, 2005)

This proceeding involves a Petition, filed pursuant to 10 V.S.A. §1424, which requests that the Water Resources Panel (WRP) of the Vermont Natural Resources Board issue a rule, pursuant to its authority under 10 V.S.A. §6025(d)(4), to prohibit the use of internal combustion motors on boats on Silver Lake in Barnard, Vermont.

For the reasons stated below the WRP denies the petition.

I. History

The instant Petition was filed, pursuant to 10 V.S.A. §1424, on April 14, 2005 by the Barnard Silver Lake Association (BSLA), Cliff Aikens, President. It asks that the WRP adopt the following rule pertinent to Silver Lake:

The operation of vessels powered by internal combustion motors is prohibited.

On May 24, 2005, the WRP voted to propose amendments to the Use of Public Waters Rules prohibiting the operation of vessels powered by internal combustion motors on Silver Lake for the purpose of receiving public comments. The WRP filed the proposed amendments with the Interagency Committee on Administrative Rules (ICAR) on May 26, 2005, met with ICAR on June 13, 2005, and received ICAR's approval of the rule proposal on June 15, 2005. On June 16, 2005, the WRP filed the rule proposal with the Secretary of State's Office.

The WRP sent notice of the proposed rule 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. In addition, the WRP posted the proposed rule on its web site. The WRP visited Silver Lake on the afternoon of August 11, 2005. A public hearing on the proposed rule was convened that evening beginning at approximately 7:00 p.m. in Barnard, Vermont. Twenty-five people signed the attendance sheets for the public hearing and eight provided oral comments. The deadline for filing written comments on the rule proposal, which could be mailed, delivered, or emailed to the WRP, was September 1, 2005. Fifty written comments were filed.

The Panel deliberated at its meetings on September 16, October 11, and November 8, 2005, and voted to deny the petition and not to proceed with rule making.¹

II. Present rules

Certain general Vermont Use of Public Waters (UPW) Rules presently apply to Silver Lake. Personal watercraft are not allowed, UPW Rule 3.3(a), but there is no maximum speed limit for motor boats. See UPW Rule 3.2.

Silver Lake is presently subject to the following specific rule issued by the Water Resources Board (WRB), effective January 1, 1995:

Between the hours of 10:00 a.m. and 6:00 p.m. local time a maximum of four persons at one time may operate motorboats for purposes of the waterskiing on Silver Lake, provided that the use of the lake for waterskiing shall not be conducted to the exclusion of other normal uses and provided further that each person operating a motorboat engaged in waterskiing shall proceed only in a counterclockwise direction.

Vermont Use Of Public Waters Rules, Appendix B (Lake-specific rules regulating the use of particular public waters) (amended Jan. 18, 2005)

III. Discussion

A. The Petition

1. Grounds for the Petition

As grounds for the Petition, the BSLA states:

- a. the lake is small and motorboats present a serious safety hazard, particularly when pulling a waterskier;
- b. internal combustion motors cause oil and noise pollution;
- c. restricting motor boats will decrease the likelihood of threats from invasive aquatic species such as Eurasian milfoil.

¹ Panel Member Nicholls was not present at the September 16 meeting.

2. *Public Comments*

a. *The nature of Silver Lake and invasive aquatic species*

Many commenters who support of the Petition note that Silver Lake is small, shallow and presently clean and free of invasive aquatic species. They contend that motorboats are disruptive to the Lake's peace and tranquility, disturb loons and other wildlife, bring invasive aquatic species, in particular milfoil, damage the shoreline with their wakes; and cause oil pollution.

By contrast, a number of commenters who oppose the Petition contend that there is no milfoil infestation presently in Silver Lake and, more importantly, that because sailboats on trailers and electric motors would still be allowed, and because milfoil can be transported by fishing gear and birds, the proposed rule does not insure that the Lake will be protected from invasive species. They submit that education and a rule requiring boat and trailer washing would be more reasonable.

b. *Conflicts in normal uses*

Proponents of the Petition see conflicts between swimming and motorboats, contending that Silver Lake is more conducive to swimming, that Silver Lake is too small to safely allow powerboats to compete with canoes, kayaks, sailboats and swimmers, and that motorboats are dangerous to swimmers.

Lastly, while one proponent acknowledged that the existing rules do act as restraints on motorboat operation there is a lack of law enforcement to enforce the present rules regarding the operation of motor boats on Silver Lake.

Some opponents note that there is no noise pollution on Silver Lake and that there are no present safety or conflict issues on Silver Lake. They note that Silver Lake shoreline owners have an interest in vigilance against invasive species, that because there is no public boat access, there is no risk that non-riparian owners will bring their boats to Silver Lake and raise safety or tranquility concerns, and limited instances of bad behavior do not justify a ban on all motor boats. They contend further that there are so few motorboats on the lake and that present rules limiting waterskiing are adequate to address safety and tranquility concerns.

B. Findings

1. Silver Lake is 84 acres in size.
2. There is a state park on one end of Silver Lake; the remaining shoreline appears to be all privately owned.

3. There do not appear to be any public boat accesses, although people have sometimes launched motorboats at the park and from a strip of land opposite the general store near the lake's outlet.

4. Motorboats are a "normal use" on Silver Lake, as that term is defined in UPW Rule 5.2.

5. Most, if not all of the motorboats on Silver Lake are owned by shoreline owners or people who rent from shoreline owners, or friends of such owners who are given permission to launch boats from their property.

6. Invasive aquatic species, such as Eurasian milfoil, can be carried by all vessels and by birds; while banning motorboats from Silver Lake will eliminate the chances that milfoil will be carried into the lake by such boats, it is not a certainty that milfoil will not be carried into the lake by other means.

7. The WRP is not aware of any reported accidents involving motorboats and swimmers on Silver Lake in recent years.

8. The WRP is not aware of any reported violations of the existing UPW Rules which govern water uses on Silver Lake.

C. The Statute and the Rules

UPW Statute

10 V.S.A. §1424 gives the WRP the authority to regulate the use of the public waters of Silver Lake. It reads, in pertinent part:

(a) The board may establish rules to regulate the use of the public waters by:

(1) Defining areas on public waters wherein certain uses may be conducted;

(2) Defining the uses which may be conducted in the defined areas;

(3) Regulating the conduct in these areas, including but not limited to the size of motors allowed, size of boats allowed, allowable speeds for boats, and prohibiting the use of motors or houseboats;

(4) Regulating the time various uses may be conducted.

(b) 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.

(c) 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.

UPW Rules

Rules relevant to the pending petition are found in the Sections 2, 3 and 5 of the WRB's UPW Rules:

2.2 In evaluating petitions and associated public comments the following factors, at a minimum, will be considered: 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.

The public waters will be managed so that the various uses may be enjoyed in a reasonable manner, considering safety and 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.

2.3 In evaluating normal recreational and other uses, the following uses will be among those considered: 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.

2.6 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.

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.

2.8 When addressing issues common to more than one body of water, uniform and consistent rules shall be adopted when appropriate.

2.9 When regulation is determined to be necessary to resolve conflicts involving the operation of vessels, priority will be given to managing the manner in which vessels are used or operated, such as by imposing speed limits or separating conflicting uses by designating specific times or places where various uses are allowed.

2.10 When regulation is determined to be necessary to resolve conflicts between two or more normal uses, priority will be given to resolving the conflict by separating the conflicting uses, such as by designating specific times or places where various uses are allowed.

3.5 *Use of Internal Combustion Motors.* Use of internal combustion motors to power vessels on lakes, ponds and reservoirs is prohibited where the use of such motors was not a normal use prior to January 1, 1993 (see Appendix A).

5.2 *Normal Use:* 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.

5.3 *Internal combustion motor:* A motor, such as a gasoline or a diesel motor, in which fuel is burned within the motor proper rather than in an external furnace as in a steam engine.

D. Prior WRB decisions on internal combustion motors

1. Vermont lakes and ponds on which motorboats are prohibited

Appendix A to the UPW Rules is a list of 288 public waters in Vermont with a chart of specific rules that apply to each water body. Appendix A indicates that on 144 water bodies (by chance exactly half of the 288 Vermont waters) internal combustion motors are prohibited. These are listed on Appendix 1 to this decision.

As might be expected, the vast majority of the lakes or ponds listed in Appendix 1 are small. There are, however, 19 water bodies with surface areas larger than Silver Lake on which internal combustion motors are prohibited.²

Some of the water bodies on which internal combustion motors are prohibited fall within the general provisions (pre-1993 use) of UPW Rule 3.5, and some are the subject of specific rulemaking.

2. WRB decisions on specific petitions

Petitions to ban the use of internal combustion and electric motors have been considered by the WRB on a number of occasions:³

² *Vermont water bodies with surface areas larger than Silver Lake on which internal combustion motors are prohibited*

<i>Lake, Pond or Reservoir</i>	<i>Town</i>	<i>Surface Area in Acres</i>
Berlin	Berlin	293
Clyde	Derby	186
Colchester	Colchester	186
Flagg	Wheelock	111
Hardwick	Hardwick	92
Inman	Fair Haven	85
Lily	Vernon	41
Little	Franklin	95
Long	Greensboro	100
Lowell	Londonderry	109
May	Barton	85
McConnell	Brighton	87
Mud Creek	Alburg	333
Old Marsh	Fair Haven	131
Silver	Leicester	101
Stiles	Waterford	135
Sunset	Marlboro	96
Thurman W. Dix	Orange	123
Wallingford	Wallingford	87

³ The WRB has banned internal combustion motors on certain waterbodies without providing specific reasons or analysis as to why the motors are prohibited. *In re: Grout Pond (Stratton)*, No. UPW 73-02, Decision (Aug. 28, 1975); *In re: Long Pond (Greensboro)*, No. UPW 74-02, Decision (Sep. 22, 1975); *In re: Lake Paran (Bennington)*, No. UPW 80-01, Decision (Jul. 14, 1980); *In re: Huff Pond (Sudbury)*, No. UPW 83-01, Decision (Aug. 7, 1984); *In re: Emerald Lake (Dorset)*, No. UPW 86-02, Decision (Jan. 1, 1987); *In re: Half Moon Pond*

In re: Black Pond (Hubbardton), No. UPW 85-02, Decision (Aug. 1, 1985)

The WRB banned internal combustion motors on Black Pond. Such motors were not an established use and, further, they would interfere with the Pond's normal uses. There also appears to have been concerns over fuel contamination of the Pond.

In re: May Pond (Barton), No. UPW 87-02, Decision (Jan. 1, 1988)

The WRB banned internal combustion motors on May Pond. There is no final Board Decision, but a memorandum to the Legislative Committee on Administrative Rules from the Executive Officer of the Board indicates that the Board had health concerns over fuel contamination of the Pond, which was at the time the sole source of drinking water for Barton. Further, the Board noted that present use of the Pond by motorboats was low and that its rule would not prohibit the use of electric motors, which are used for trolling.

In re: Lowell Lake (Londonderry), No. UPW 87-04, Decision (Apr. 13, 1988)

The WRB banned internal combustion motors on Lowell Lake. There is no final decision in the files of the Board, but preliminary findings indicate that internal combustion motors were not a long-established use on the Lake, that the Lake had been traditionally used by nonmotorized vessels, that the introduction of motorboats for occasional use was a recent development. Further, the shoreline was relatively little developed. The preliminary findings also noted the fact that Harriman Reservoir and Somerset Reservoir and some other smaller lakes, all of which allowed internal combustion motors, were nearby.

In re: Mill Pond (Windsor), No. UPW 88-02, Decision (Mar. 9, 1989)

The WRB banned internal combustion motors on Mill Pond. There is no final decision in the files of the Board, but preliminary findings indicate that internal combustion motors were not an established use on the Pond.

In re: Lewis Pond (Lewis), No. UPW 89-03, Decision (Nov. 20, 1991)

Although it found the established uses on Lewis Pond included "low speed boating," the WRB banned internal combustion motors, because such a prohibition would not prevent the continued enjoyment of established uses, the Pond was in a wilderness setting which provided habitat for wildlife, the agitation of motors would be harmful to trout, and the noise of motors had disturbed wildlife.

(Hubbardton), No. UPW 86-03, Decision (Jan. 1, 1987); *In re: Lake Shaftsbury (Shaftsbury)*, No. UPW 86-04, Decision (Jan. 1, 1987); *In re: Adams Reservoir (Woodford)*, UPW 86-05, Decision (Jan. 1, 1987); *In re: Elfin Lake (Wallingford)*, No. UPW 87-03, Decision (Jan. 1, 1988); *In re: Indian Brook Reservoir (Essex)*, No. UPW 88-06, Decision (Apr. 20, 1989).

In re: Sunrise Lake, (Benson and Orwell), No. UPW 89-05, Decision (Nov. 20, 1991)

The WRB decided not to prohibit internal combustion motors on Sunrise Lake because such a prohibition would disallow an established use, and the establishment of a 5 mph speed limit would substantially achieve the results sought by the petition.

In re: Cole Pond (Jamaica), No. UPW 90-02, Decision (Nov. 20, 1991)

The WRB prohibited the use of internal combustion motors on Cole Pond because they were not regularly used on the pond and thus their prohibition would not affect any established use.

In re: Colchester Pond (Colchester), No. UPW 91-03, Decision (Dec. 22, 1992)

The WRB banned internal combustion motors on Colchester Pond, finding that there was no development on its shoreline, there has never been public access and public access had been prohibited for 30 years, boating had not occurred on the Pond on a regular, frequent or consistent basis, the Winooski Valley Park District intended to acquire hundreds of acres of land within the Pond's watershed and to create a totally motor-free recreational experience on the Pond, an effort supported both by the town of Colchester and the Chittenden Regional Planning Commission. Since internal combustion motors were not established uses, the proposed rule would not adversely affect an established use and was thus consistent with the UPW Rules.

The Board did not prohibit the use of electric motors, however. Proponents of such a prohibition had argued that it would protect against milfoil infestation, but the Board found that "there are many potential sources of milfoil infestation that pose an equal or greater threat such as SCUBA equipment, fishing tackle, anchors, etc." and thus prohibiting electric motors on this basis "would be arbitrary and would do little to enhance the Pond's protection in this regard." Decision at 4 – 5.

In re: Echo Lake (Sudbury and Hubbardton), No. UPW 91-05, Decision (Dec. 22, 1992)

The WRB decided not to prohibit the use of internal combustion motors on Echo Lake because the petitioners had not established that there was a basis for the arguments in support of the prohibition. There was no evidence that the use of internal combustion motors was incompatible with the use of the lake as a domestic water supply, and motorboats were an "established use"⁴ on the lake. Since the rules in effect at the time favored the preservation of established uses unless public safety or environmental limitations demanded otherwise and

⁴ Note that this finding occurred before the adoption of UPW Rule 5.2, so the term "normal use" had not yet been defined by rule.

provided that the Board must manage use conflicts using the least restrictive approach possible, the Board did not prohibit motorboats from the lake.

In re: Somerset Reservoir, (Somerset and Stratton), No. UPW 95-04, Decision (Nov. 1995)

Internal combustion motors were banned on the northern part of Somerset Reservoir by the WRB in 1994. *In re: Somerset Reservoir (Somerset and Stratton)*, No. UPW 94-05, Decision (Oct. 26, 1994). The Board based its decision on the grounds that the use that would be prohibited was not a major use and that internal combustion motors were not compatible with the preservation of the Reservoir's traditional uses and character. The Board further found that the rule was "needed to protect the Reservoir's important natural resource values and the increasingly rare opportunity it affords for enjoying certain recreational uses in a wilderness-like setting, both for this generation, and future generations." The Board also noted the proximity of Harriman Reservoir, a waterbody that it found to be "more appropriate" for high speed motorboating. The Board wrote further, at page 3 of the Decision:

The prohibition of internal combustion motors north of the narrows will make access to this area for some users more difficult, but not unreasonably so. Not every water body can be all things to all people. With the adoption of the proposed rules, the northern portion of the Reservoir would be one of a very small number of bodies of water of any appreciable size in Vermont, and the only one in southern Vermont, on which internal combustion motors are prohibited. The Board finds it hard to imagine a more appropriate body of water to serve this role in the management of Vermont's lakes for multiple uses.

In 1995, the Board was petitioned to lift the ban. *In re: Somerset Reservoir, (Somerset and Stratton)*, UPW 95-04. The Board's 1995 decision removed the ban but imposed a 10 mph speed limit. Consistent with UPW Rules 2.6 and 2.7,⁵ the Board concluded that a total prohibition of internal combustion motors was not warranted. The Board found that fishermen had historically used the northern part of Somerset Reservoir (which is roughly two-thirds of its surface area), and that the existing rule would be a significant impediment to this use. The Board further could not find that there was an inherent conflict between motorboats and non-motorized uses of the reservoir; at best, the potential for conflict was very low. Indeed, the Board found that a total ban might increase such conflicts by polarizing two potentially compatible recreational uses. Finally, the Board found that wildlife protection was not a basis for keeping the ban in force.

⁵ As noted above, UPW Rules 2.6 and 2.7 mandate that, if there are use conflicts, normal uses be allowed to the extent possible and that the least restrictive means be employed to manage use conflicts.

In re: Notch Pond (Ferdinand), No. UPW 97-0, Decision 1 (Oct. 14, 1997)

In 1994, when the UPW Rules were initially adopted, the WRB was advised that internal combustion motors were not a normal use on Notch Pond, and it therefore adopted a rule prohibiting their use on the Pond. In 1996, the Board was informed that the use of such motors for low speed fishing was a normal use on the Pond, and it therefore adopted a rule, *sua sponte*, to correct its earlier error.

In re: Fern Lake (Leicester), No. UPW 97-0, Decision 2 (Oct. 14, 1997)

The WRB denied a petition to prohibit the use of internal combustion motors on Fern Lake because it was not convinced that such a prohibition was warranted on the grounds presented. The Board could not conclude that such a rule would control the spread of milfoil, and it noted further that a decision to ban motors to prevent the spread of milfoil would be quickly followed by other such petitions. Nor could the Board find that there were sufficient recreational use conflicts that rose to the level to warrant a motorboat ban, especially since internal combustion motors were an established use on the lake. The Board held that education and enforcement should first be explored (and found to be inadequate) before it would consider a total ban on motors.

In re: Batten Kill (Arlington), No. UPW 98-04, Decision (Oct. 29, 1998)

In deciding to prohibit the use of internal combustion motors on parts of the Batten Kill River, the WRB found that while use of such motors may have occurred on very rare occasions, it was not a normal or established use of the regulated portion of the Batten Kill. Further, “given the shallowness of the regulated portion of the Batten Kill coupled with the nature and intensity of established recreational activities, the use of motors to power vessels is not appropriate and is not compatible with established uses.” Decision at 4.

In re: Star Lake (Mt. Holly), No. UPW 98-05, Decision (Oct. 29, 1998)

The WRB, in deciding to not prohibit the use of electric motors on Star Lake, found that the use of internal combustion motors to propel vessels at speeds of up to five miles per hour was a normal use of Star Lake. The Board further found that, while milfoil spreads from fragments of established plants breaking off and drifting to new locations where the fragments develop into rooted plants, milfoil fragmentation can occur at any time from human disturbance of established plants due to motorized and nonmotorized boating, or swimming.

In re: Indian Brook Reservoir (Essex), No. UPW 99-02, Decision (Sep. 19, 2000)

In deciding to not prohibit the use of electric motors on the Indian Brook Reservoir, the WRB found that while the Reservoir is infested with milfoil and fragmentation causes the spread of milfoil, as in *In re: Star Lake*, motorboats are not the only cause of fragmentations.

The Board further found that no evidence was presented to show that persons operating vessels powered by electric trolling motors are more likely to promote the spread of milfoil due to fragmentation than are swimmers or those paddling nonmotorized vessels.

E. Analysis

The Panel has considered the grounds asserted for the Petition and the comments of those who support it. While these are admirable goals, they do not support a conclusion that a prohibition against vessels with internal combustion motors is warranted at this time.

One of the grounds presented for the proposed rule is that restricting motor boats will decrease the likelihood of threats from invasive aquatic species such as Eurasian milfoil. As is apparent from WRB precedent, the Board has never found this reason to be sufficient to be a basis for a prohibition, as invasive aquatic species are transported to lakes by many carriers.⁶ The Panel is certainly concerned about the transportation of milfoil from lake to lake, but it agrees with the prior WRB decisions that the solution does not lie with a prohibition on internal combustion motors.

The Panel is also not convinced from the information before it that a ban on motorboats is necessary to resolve recreational use conflicts. First, the evidence does not indicate that such conflicts exist or have risen to the level that restrictions on certain uses should be implemented. To the Panel's knowledge, there have been no reported accidents between motorboats and swimmers. Further, the Panel takes seriously the principle, as expressed in WRB precedent and in UPW Rules 2.6 and 2.7, that favors the preservation of normal (or established) uses unless a prohibition against such uses is necessary *and* there are no lesser restrictive means by which conflicts can be resolved. Here, present rules on Silver Lake appear to provide reasonable means to separate uses that may have the potential for conflict, and the Panel sees no need to impose prohibitions beyond those that already are in place on the lake.

The Panel will therefore not proceed further in the adoption of proposed rule.

F. Riparian rights, the public trust doctrine, takings, and the common law

Although the WRP denies the Petition because it finds that grounds for it are lacking, there were a number of other comments that were presented to the Panel in the course of this proceeding that warrant responses.

⁶ The Panel also notes that access to Silver Lake by motorboats is effectively restricted to lakeshore property owners and their guests, and these people already have an incentive to guard against the importation of invasive species.

Several shoreline owners (who note that people buy lakeshore in order to engage in water-related activities) raise certain specific arguments against the Petition: they contend that shoreline owners have riparian rights (including boating rights) to use Silver Lake which are greater than those of the general public and that restricting motor boats constitutes a taking which reduces shoreline owners property values. These owners filed a comment that includes a brief memorandum with citations to case law from Vermont and other jurisdictions. This memorandum takes the position that owners of shoreline property have interests in Silver Lake that are protected from State regulation.

1. Riparian rights

There is no question that shoreline owners have riparian⁷ or littoral rights in the water bodies that they abut. What rights owners have are defined by state statute or common law. See *Federal Power Commission v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 252 (1954): (“Riparian water rights, like other real property rights, are determined by state law.”); 78 Am Jurisdiction 2d §31. Thus, riparian rights in Oregon or Michigan may be different from those in Vermont or Maine.⁸

There are only a few statutory provisions in Vermont that specifically address riparian rights. For example, with some restrictions, a “riparian owner may remove up to 50 cubic yards of gravel per year from that portion of a watercourse running through or bordering on the owner's property.” 10 V.S.A. §1021. In addition, there are several references in Vermont law to “riparian rights,” *see*, 10 V.S.A. §§1001, 1023, 1080, 1276; 29 V.S.A. §701, but nowhere (other than in §1021) are these rights specifically defined; there is no Vermont statute that states what “riparian rights” are. Thus, riparian rights are those that have been developed through the common law (the law that is made through judicial opinions).

⁷ “Riparian” rights concern rights in streams and rivers; “littoral” rights concern rights in lakes, ponds and oceans. The concepts addressed by these terms are, for all intents and purposes, interchangeable. The Panel will refer to the rights at issue here as “riparian rights.”

⁸ The cases cited in the shoreline owners’ memorandum are accurately stated. As most of such cases are from jurisdictions other than Vermont, however, they have limited applicability to the present matter. Thus, the memorandum’s reference to *Bach v. Sarich*, 445 P.2d 648, 651 (Wash. 1968), for the proposition that riparian rights on lakes include swimming, fishing, boating and bathing, may hold true in Washington but not necessarily in other states.

Similarly, the case of *Stupak-Thrall v. Glickman*, 988 F. Supp. 1055 (W.D. Mich. 1997), which the shoreline owners cite as an instance where the loss of the right to use motorboats constituted a taking of their riparian rights which required compensation, relies heavily on Michigan case law which establishes a substantial property interests in riparian rights. Vermont law does not afford similar interests.

It is apparent that a person's riparian rights may come into conflict with the public trust doctrine or, as here, the statutory authority of the WRP to promulgate "rules regulating the surface use of public waters." 10 V.S.A. §6025(d)(4); and see 10 V.S.A. §1424.

2. *The public trust doctrine*

The shoreline owners' memorandum cites a Vermont public trust case, *State v. Quattropani*, 99 Vt. 360 (1926), to support a claim that "as lake property owners we have riparian (or littoral) rights, the taking of which reduces the value of our property." Comment 4 at 4. But while *Quattropani* does state that a lakeshore owner has "certain privileges incidental to his ownership of riparian land" which "are valuable, and in law, are property," 99 Vt. at 363, the case as a whole lends no support to the shoreline owners' argument. In fact, it defeats the shoreline owners' claims.

In *Quattropani* the state board of health, pursuant to its statutory authority, promulgated an order prohibiting boating on Berlin pond, then the source of the water supply of the city of Montpelier. Quattropani violated this order, and was prosecuted. He then brought a challenge to the validity of the order, claiming that it exceeded the limits of a valid exercise of the police power, in that it invaded the right of private ownership and violated constitutional guaranties.

The Court first held that the order was presumptively valid under the State's police powers and that it "must be enforced unless it is made manifest that it has no just relation to public health protection, or that it is a plain, palpable invasion of constitutional rights."

The Court cited several cases which supported the State's claim that the order was valid as a measure to promote the safe and advantageous use of the water for drinking purposes, and thus not unreasonable and arbitrary.

As regards Quattropani's takings claims, the Court wrote:

Berlin pond being public, the respondent has no ownership of its waters or the land beneath them; these belong to the people in their sovereign character, and are held for the public uses for which they are adapted. *Hazen v. Perkins*, 92 Vt. 414, 105 A. 249, 23 A. L. R. 748. All he has is certain privileges incidental to his ownership of riparian land. *State v. Morse*, [84 Vt. 387, 80 A. 189 (1911)], *supra*. That these are valuable and, in law, are property may be conceded; but this is not determinative of the validity of this order. A valid exercise of the police power does not amount to a taking of property as by eminent domain, and compensation is not required, though property values are impaired. *Aitken v. Wells River*, 70 Vt. 308, 40 A. 829, 41 L. R. A. 566, 67 Am. St. Rep. 672; *State v. Morse, supra*; *Mugler v. Kansas*, 123 U. S. 623, 8 S. Ct. 273, 31 L. Ed. 205; *Calhoun v. Massie*, 253 U. S. 170, 40 S. Ct. 474, 64 L. Ed. 843. The case first cited affords a notable application of this rule. Therein, to protect the public highway during a freshet, village authorities burned the plaintiff's mill and blew

up his dam, for which he sued. But this court held that there was no liability, because the destruction of the property was, in the circumstances, a valid exercise of the police power, and not of eminent domain.

99 Vt. at 363.

Thus, *Quattropani* lends no support to the position put forward in the shoreline owners' comments.

Significantly, *Quattropani* makes reference to two decisions which are important to the issue at hand, *Hazen v. Perkins*, 92 Vt. 414 (1918), the seminal Vermont public trust case,⁹ and *State v. Morse*, 84 Vt. 387 (1911).

The public trust doctrine states that navigable rivers, lakes, and ponds (and the lands beneath them) are held by the state in its sovereign capacity as trustee for the benefit of all the people. The doctrine was first stated in the federal courts in *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 452 (1892):

(T)he state holds title to the lands under the navigable waters.... It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty in fishing therein freed from the obstruction or interference of private parties.

In a long line of cases beginning with *Hazen v. Perkins*, and most recently in *Community National Bank v. State*, 172 Vt. 616 (2001), the Vermont Supreme Court has consistently "invoked the public trust doctrine in rejecting claims of private rights with respect to public waters."¹⁰ *State v. Central Vermont Railway, Inc.*, 153 Vt. 337, 344 (1989), citing, *In re Lake Seymour*, 117 Vt. 367 (1952); *State v. Malmquist*, 114 Vt. 96 (1944); *State v. Quattropani*, *supra*. .

Thus, any rights of ownership that the shoreline owners may enjoy as a result of their riparian rights do not include ownership of the waters of Silver Lake.

⁹ The shoreline owners, citing *In re Lake Seymour*, 117 Vt. 367 (1952), concede that Silver Lake is a public water body.

¹⁰ The United States Supreme Court has recognized that each state is empowered to establish the boundaries of its own "public trust" doctrine; each state may develop its own body of law on the "public trust" and define the circumstances under which control over public waters may be passed by the sovereign to private persons. *Shively v. Bowlby*, 152 U.S. 1 (1894). The Vermont Supreme Court has similarly held. *State v. Central Vermont Railway, Inc.*, 153 Vt. 337, 342 (1989).

3. Takings

Nor, it is apparent, do the riparian rights of the shoreline owners given them any property interest in the waters of Silver Lake such that a restriction on those rights is the equivalent of an unconstitutional taking of those rights. The case of *State v. Morse, supra*, which is cited in *Quattropani*, is controlling.

Morse was a case similar to *Quattropani* in that it also involved regulating uses in Berlin Pond. At the request of the City of Montpelier, the State Board of Health promulgated a rule that prohibited bathing in the pond, the source of the City's drinking water. Like *Quattropani*, *Morse*, a shoreline owner, was prosecuted for violating this regulation, and like *Quattropani*, *Morse* challenged the regulation. After disposing of certain preliminary claims, the Court turned to a discussion of whether *Morse's* riparian rights had been taken by the State's assertion of its police powers:

Coming now to the more serious and important question in the case - the validity of the regulation - the position of the respondent is that it is utterly invalid and void, for to give effect to it would be to deprive him of his property without compensation and without due process, contrary to the guaranties of the organic law.

That a riparian owner has a right to the reasonable use of the water of such a pond, we agree; that this ordinarily carries the right to bathe and swim therein, we agree; that this right is a property right, we agree. This right is an incident to the ownership of the land. It is to be observed, however, that it is not primary, but incidental. The land is the principal; the water the incident. In other words, the water goes with the land, and not the land with the water. *Avery v. Vt. Elec. Co.*, 75 Vt. at page 242, 54 Atl. 179, 59 L. R. A. 817, 98 Am. St. Rep. 818. Can it be said that it is always and under all circumstances a reasonable use of such waters to bathe therein? Reasonable use varies with circumstances. It depends, among other things, upon what use is made of the water by the lower owners, whose equal rights must be respected. *Lawrie v. Silsby*, 82 Vt. 505, 74 Atl. 94. If bathing in a pond from which a city takes its water supply contaminates, or in circumstances reasonably to be apprehended may contaminate, such waters, thereby endangering the health of the community, can it then be said that the riparian owner is making a reasonable use of his incidental right? The answer must be negative.

Such use in such circumstances may be prohibited in a valid exercise of the police power. The owner's rights are not then "taken" in a constitutional sense; or, if this statement savors too much of refinement of reasoning, as some suggest, the "taking" is not such as the Constitution prohibits. The beneficial use

of the property is curtailed in some measure, but all the other incidents of ownership are left unimpaired. The fact that this is a property right does not determine the question. There remains the question whether the promulgation and enforcement of the regulation is a legitimate exercise of the police power. For, as we suppose every one now agrees, the possession and enjoyment by the individual of all his rights, even that of liberty itself, are subject to such reasonable regulations and restraints as are essential to the preservation of the health, safety, and welfare of the community. The proposition is well stated in Wood, Nuisances (3d Ed.) § 1: "It is a part of the great social compact to which every person is a party—a fundamental and essential principle in every civilized community - that every person yields a portion of his right of absolute dominion and use of his own property in recognition of and obedience to the rights of others, so that others may also enjoy their property without unreasonable hurt or hindrance." It follows, then, that whenever any of the rights of the individual come into conflict with those of the public which concern the interests named, the former must yield and the latter prevail.

State v. Morse, supra, 84 Vt. at 392 - 93. The Court went on to find that the regulation was a legitimate exercise of the State's police power to protect public health.

Thus, in Vermont, riparian rights can be restricted without causing a taking.

The *Morse* decision's distinction between curtailing the "beneficial use of the property ... in some measure" while "the other incidents of ownership are left unimpaired" shows admirable foresight by the Vermont Supreme Court in 1911 as to the direction that the law on takings would take many decades later.

A taking that raises constitutional concerns (and the *Morse* decision states that regulating the use of state waters does not) can occur in one of two ways. First, there can be a *physical taking*, the hallmarks of which are "absolute exclusivity of the occupation, and absolute deprivation of the owner's right to use and exclude others from the property." *Killington, Ltd. v. State of Vermont et al.*, 164 Vt. 253, 259 n. 3 (1995), citing *Southview Assocs. v. Bongartz*, 980 F.2d 84, 93 (2d Cir.1992), *cert. denied*, 507 U.S. 987 (1993). When the State takes a person's property to build a road, for example, a physical taking has occurred. Clearly, were the WRP to prohibit motorboats from Silver Lake, a physical taking would not occur for two reasons. First, only something that a person owns can be taken, and the shoreline owners' riparian rights do not give them an ownership interest in the waters of the lake; that interest is held by the State under the public trust doctrine.

Second, even assuming that the shoreline owners' riparian rights were to be considered to be the equivalent of an ownership interest in the waters of Silver Lake, a restriction on motorboats is not an "absolute deprivation of the owner's right to use ... the property."

The second type of taking is a *regulatory taking*, - also known as inverse condemnation - which when regulatory restrictions go “too far” and the purpose of government regulation and its economic effect on the property owner render the regulation substantively equivalent to an eminent domain proceeding. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 -16 (1922): “The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” *And see, Southview Associates, Ltd., supra*, 980 F.2d at 93 n.3.

Whether a regulation goes “too far” depends on what it leaves the landowner. Our Supreme Court has followed the lead of the federal courts in determining how far is too far and has held that a regulatory taking occurs only when a person has lost "all economically beneficial use of [his] land." *OMYA, Inc. v. Town of Middlebury*, 171 Vt. 532, 533 (2000), citing *Chioffi v. City of Winooski*, 165 Vt. 37, 41(1996) (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)). Again, a prohibition against motorboats on Silver Lake does not deprive shoreline owners of "all economically beneficial use" of the lake, even assuming (and the Panel does not so assume) that the lake is theirs to own.

4. *The common law and the WRP’s statutory authority to regulate the use of public waters*

As noted earlier, riparian rights are derived from the “common law” - - the law that the courts make by their opinions. In its earliest acts, the Vermont legislature has recognized the validity of the common law, but only to a certain extent:

So much of the common law of England as is applicable to the local situation and circumstances and is not repugnant to the constitution or laws shall be the laws of this state and courts shall take notice thereof and govern themselves accordingly.

1 V.S.A. §271.

Case law holds that a statute that is inconsistent with the common law impliedly repeals such common law. *State v. Sylvester*, 112 Vt. 202 (1941). As noted, the legislature has given to the Water Resources Panel the authority to promulgate “rules regulating the surface use of public waters.” 10 V.S.A. §6025(d)(4); and see 10 V.S.A. §1424. To the extent that the Panel’s actions in this case may conflict with the riparian rights asserted by the shoreline owners in their memorandum, it can be argued that those rights have been abrogated.

G. *Compromise comments*

1. Some commenters suggested compromise rules:
 - a. motorboats with 40 horsepower engines should be banned
 - b. all motorboats should be limited to 5 mph

While these suggestions may have some merit, the WRP cannot consider them within the context of this Petition, as they are so divorced from the Petition as to require new notice, hearing and comment. Vermont law does not require that a final rule adopted by a Board or agency be identical to the rule as proposed, but there are limits as to how far a final rule's language can stray from the language as proposed. The relevant statute reads:

The following shall not affect the validity of a rule after its adoption: ...

- (2) amendment after public hearing of the text of a proposed rule in a manner that does not cause the published summary of the rule to become misleading or inadequate.

3 V.S.A. §846(b)(2). The Board has taken these limitations on the scope of permitted amendments seriously. It has written, "It is simply not appropriate for the Board to give public notice regarding one regulatory approach (i.e. horsepower limits) and then consider the adoption of a totally different regulatory scheme (i.e. speed limits)." *In re: Waterbury Reservoir (Waterbury)*, No. UPW 93-02, Decision at 2 (Oct. 26, 1994).

Similarly, in *In re: Somerset Reservoir (Somerset and Stratton)*, No. UPW 94-05, Decision at 2 - 3 (Oct. 26, 1994), the Board wrote:

As a matter of proper procedure, as well as fairness to those affected, the Board cannot expand the scope of the rulemaking beyond that contemplated in the initial public notice. This rulemaking was initiated by a petition requesting the prohibition of internal combustion motors on only that portion of the Reservoir north of the narrows. The public notice for this rulemaking reflects the intent of that petition. Accordingly, the Board does not feel that it could, in this rulemaking, proceed with the adoption of a rule prohibiting all motorized boating on the entire reservoir.

If these commenters would like to propose these suggestions as rules, they can do so in accordance with the Panel's procedural rules.

2. One commenter proposes that riparian owners should be allowed to have motorboats, but all others should not. This comment goes to some lengths to argue that such discrimination between people would be legal.

The WRP questions why this proposal is necessary. Because there appears to be no feasible access to Silver Lake except through lands owned by riparian owners (there appears to be no public access), only riparian owners (or their friends) can presently have motorboats on Silver Lake.

The WRP also has serious concerns about this suggestion. The commenter, in effect, asks the WRP to transform Silver Lake into a private enclave. But the waters of lakes and ponds, as noted above, are held by the State in trust for *all* the people, not just shoreowners. The WRP cannot grant a benefit in a public resource to a particular class of citizens while denying it to others; beyond the fact that this action may very well be illegal, the WRP finds that it would be bad public policy to adopt such a position.

IV. Conclusion

For the reasons stated above, the WRP denies the petition.

Dated at Montpelier, Vermont this 25th day of October 2005.

Natural Resources Board
Water Resources Panel

/s/ Patricia Moulton Powden

Patricia Moulton Powden, Chair
Michael J. Hebert
W. William Martinez
Joan B. Nagy
John F. Nicholls

Appendix 1

Vermont water bodies on which internal combustion motors are prohibited

<i>Lake, Pond or Reservoir</i>	<i>Town</i>	<i>Surface Area in Acres</i>
Abenaki	Thetford	44
Adams	Woodford	21
Athens	Athens	21
Austin	Hubbardton	28
Baker	Barton	51
Bean	Sutton	30
Beaver	Holland	40
Beaver	Weathersfield	49
Berlin	Berlin	293
Billings	West Haven	56
Black	Hubbardton	20
Black	Plymouth	20
Blueberry	Warren	48
Bourn	Sunderland	48
Branch	Sunderland	34
Buck	Woodbury	39
Burbee	Windham	50
Burr	Pittsford	20
Chandler	Wheelock	68
Charleston	Charleston	40
Clyde	Derby	186
Cobb	Derby	27
Coggman	West Haven	20
Coits	Cabot	40
Colchester	Colchester	186
Cole	Jamaica	41
Cranberry	Woodbury	28
Crescent	Sharon	20
Cutler	Highgate	25
Deer Park	Halifax	22
Dennis	Brunswick	49
Deweys Mill	Hartford	56
Elfin	Wallingford	16
Emerald	Dorset	28
Flagg	Wheelock	111
Gates	Whitingham	30
Gillett	Richmond	30
Great Hosmer	Craftsbury	149

<i>Lake, Pond or Reservoir</i>	<i>Town</i>	<i>Surface Area in Acres</i>
Greenwood	Woodbury	96
Grout	Stratton	84
Half Moon	Hubbardton	23
Halfmoon	Fletcher	21
Halfway	Norton	22
Hancock	Stamford	51
Hardwick	Hardwick	92
Hardwood	Elmore	44
Harriman	Newbury	20
Haystack	Wilmington	27
High	Sudbury	20
Hinkum	Sudbury	60
Howe	Readsboro	52
Huff	Sudbury	16
Indian Brook	Essex	50
Inman	Fair Haven	85
Jacksonville	Whitingham	20
Kenny	Newfane	26
Lakota	Barnard	20
Lamson	Brookfield	24
Lefferts	Chittenden	80
Levi	Groton	22
Lily	Londonderry	21
Lily	Vernon	41
Little	Franklin	95
Little Elmore	Elmore	24
Long	Eden	97
Long	Greensboro	100
Long	Milton	47
Long	Sheffield	38
Love's Marsh	Castleton	62
Lowell	Londonderry	109
Mansfield	Stowe	35
Martin	Williamstown	28
May	Barton	85
McAllister	Lowell	25
McConnell	Brighton	87
Mile	Ferdinand	26
Mill	Benson	39
Mill	Windsor	77
Milton	Milton	24
Minards	Rockingham	46

<i>Lake, Pond or Reservoir</i>	<i>Town</i>	<i>Surface Area in Acres</i>
Mitchell	Sharon	28
Molly's	Cabot	38
Mud	Craftsbury	35
Mud	Granby	55
Mud	Leicester	23
Mud	Morgan	35
Mud	Peacham	34
Mud	Thetford	20
Mud Creek	Alburg	333
Mudd	Hubbarton	20
Norford	Thetford	21
North	Brookfield	24
North	Whitingham	20
Noyes	Groton	39
Nulhegan	Brighton	37
Old Marsh	Fair Haven	131
Osmore	Peacham	48
Oxbow	Swanton	27
Patch	Rutland	20
Paul Stream	Brunswick	20
Perch	Benson	24
Pine	Castleton	40
Pinneo	Hartford	50
Pleasant Valley	Brattleboro	25
Reading	Reading	22
Richmond	Richmond	24
Roach	Hubbarton	20
Round	Milton	22
Round	Newbury	30
Runnemedede	Windsor	62
Schofield	Hyde Park	29
Searsburg	Searsburg	25
Shaftsbury	Shaftsbury	27
Shippee	Whitingham	24
Silver	Georgia	27
Silver	Leicester	101
Sodom	East Montpelier	21
South	Marlboro	68
South America	Ferdinand	29
Spring	Shrewsbury	66
Spruce	Orwell	25
St. Albans (North)	Fairfax	35

<i>Lake, Pond or Reservoir</i>	<i>Town</i>	<i>Surface Area in Acres</i>
St. Albans (South)	Fairfax	27
Stannard	Stannard	25
Stevens	Maidstone	26
Stiles	Waterford	135
Stratton	Stratton	46
Sugar Hollow	Brandon	21
Sunset	Brookfield	25
Sunset	Marlboro	96
Sweet	Guilford	20
Thompson's	Pownal	28
Thurman W. Dix	Orange	123
Toad	Charleston	22
Turtle	Holland	27
Tuttle	Hardwick	21
Upper Symes	Ryegate	20
Wallingford	Wallingford	87
Wantastiquet	Weston	44
Wapanacki	Wolcott	22
West Hill	Cabot	46
West Mountain	Maidstone	60
Worcester	Worcester	35
Zack Woods	Hyde Park	23
Batten Kill	Arlington	N/A