

State of Vermont
VERMONT NATURAL RESOURCES BOARD
Water Resources Panel

In re General Amendments
No. UPW-05-05

VT Proposed Rule 05P025

MEMORANDUM OF DECISION AND RESPONSE SUMMARY
(Issued Oct. 14, 2005)

The Water Resources Panel (WRP) of the Vermont Natural Resources Board will proceed with the adoption of amendments to the Use of Public Waters Rules reflecting Permit Reform.

I. Background

Permit Reform, effective January 31, 2005, eliminated the Vermont Water Resources Board, created the Vermont Natural Resources Board, transferred the Water Resources Board's appellate functions to Environmental Court, and transferred the Water Resources Board's rule making functions to the Natural Resources Board's WRP. *See* The Act Relating to Consolidated Environmental Appeals and Revisions of Land Use Development Law, 2004 Vt. Acts and Resolves No. 115.

Prior to Permit Reform, 10 V.S.A. § 1424(e) required the Water Resources Board to hold a hearing and to consider adopting rules with respect to the surface uses of public waters upon the receipt of "a petition signed by not less than 10 freemen or the legislative body of a municipality." As amended by Permit Reform, section 1424(e) requires the WRP to consider the adoption of rules based on a written request "by not less than one person" without requiring the WRP to hold a hearing.

Section 1424(f) previously authorized the Water Resources Board, and now authorizes the WRP, to delegate the authority to regulate surface uses of public waters to a municipality adjacent to or containing the waters provided the municipality accepts the delegation by creating or amending an ordinance that implements the delegation. Section 1424(f)(2) previously provided that appeals from a final act of the municipality were appealable to the Water Resources Board. As amended, section 1424(f)(2) now makes clear that these appeals go to Environmental Court.

Section 1424 still does not specify the time for taking an appeal. Under 10 V.S.A. § 8504, appeals to Environmental Court must be filed within 30 days. However, section 8504 addresses state land use, agency, and planning and zoning appeals. Appeals from municipal actions with regard to delegated authority to regulate surface waters are not listed among the types of appeals

over which Environmental Court has jurisdiction. *See* 10 V.S.A. § 8503. The WRP believes this problem is the result of oversight and that the legislature intended appeals from municipal actions under section 1424(f) to be taken within 30 days.

On May 24, 2005, the WRP voted to propose amendments to the Use of Public Waters Rules to make these rules consistent with Permit Reform. 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. In addition, the WRP posted the proposed rule on its web site. The deadline for filing written comments on the rule proposal, which could be mailed, delivered, or emailed to the WRP, was September 1, 2005. Public hearings were scheduled for the evenings of July 19, August 9, and August 11, 2005, in each case just before public hearings on other rule proposals. No one testified or filed written comments with respect to the proposed rules.

It came to the WRP's attention in the course of its work on proposed rules to extend the City of Newport's delegated authority to regulate moorings under 10 V.S.A. § 1424(f) that Rule 12 of Appendix D of the Use of Public Waters Rules needs to clarify not only that appeals from the City's actions now go to Environmental Court, but also that these appeals need to be filed within 30 days. The WRP has modified its original rule proposal accordingly. The WRP mentioned this change to officials representing the City of Newport at the public hearing on proposed rules to extend the City's delegated authority until January 1, 2011. *In re City of Newport*, No. UPW-05-01. The City advised the WRP that it has no objection to this change.

At its meeting on September 16, 2005, the WRP discussed its proposed general amendments to the Use of Public Waters Rules and voted unanimously to proceed with the adoption of these amendments with one modification, which is to clarify in Appendix D of the Use of Public Waters Rules that appeals from the City of Newport's actions with regard to its delegated authority to regulate moorings must be taken to Environmental Court within 30 days.

II. Discussion

Amendments to the Use of Public Waters Rules are needed to make these rules consistent with Permit Reform.

In keeping with recent amendments to 10 V.S.A. § 1424, the WRP proposes to amend Rule 3.7 to eliminate the requirement to document that petitions for lake-specific rules were filed by 10 freemen.

In section 5.1, the definition of “Board” will reflect the elimination of the Water Resources Board and the transfer of the Water Resources Board’s rule making functions to the WRP. Thus, Board now means the WRP of the Natural Resources Board or delegated municipality. The WRP has chosen to use the term “Board” rather than “Panel” in the rules because that will be consistent with the enabling authority for the rules, located in Chapter 49 of Title 10. Footnote 7 to Appendix A of the rules now refers to the Board rather than to the Water Resources Board. Similarly, in Appendix D, “Water Resources Board” has been replaced with “Board.”

Rule 12 in Appendix D will provide that appeals from the City of Newport’s actions with respect to its delegated authority to regulate moorings now go to Environmental Court rather than to the Water Resources Board. In addition, the proposed rule clarifies that these appeals must be filed within 30 days. The text of the proposed rules filed with ICAR and the Secretary of State did not include the 30-day appeal period. Rather, the ambiguity with respect to the appeal period came to the WRP’s attention in the course of its work on rule proposals to extend the City of Newport’s delegated authority for a second five-year period. The proposal extending the City of Newport’s delegated authority and the proposal to make the Use of Public Waters Rules consistent with Permit Reform are part of the same rule-making package (VT Proposed Rule 05P025). In the WRP’s view, changing the text of the rule as initially proposed to include a 30-day appeal period in Appendix D is a logical outgrowth of the rule making process and therefore falls within the published notice of rule making. *See* 3 V.S.A. § 846(b)(2) (providing that amending text of proposed rule after public hearing in manner that does not cause published notice of rule to become misleading or inadequate does not affect validity of rule after adoption).

Finally, the WRP has proposed adding a table of contents to the Use of Public Waters Rules.

Because these amendments will make the Use of Public Waters Rules consistent with Permit Reform and easier to use, and because there has been no opposition to these amendments, there does not appear to be any reason for the WRP not to adopt them.

The WRP will file with the Legislative Committee on Administrative Rules (LCAR) final proposed amendments to the Vermont Use of Public Waters Rules consistent with this decision. LCAR will then review the final proposed rules and decide whether to approve or object to all or a portion of the final proposals. After meeting with LCAR, the WRP may withdraw the final proposed rule in whole or in part or adopt a final rule. Any rule that the WRP adopts may reflect changes from the final proposal germane to any objections or expressed concerns of LCAR. *See*

3 V.S.A. §§ 841-843. Information about the rule making process is available on-line at <http://vermont-archives.org/apa/rules.html>. Additionally, information about LCAR meetings and procedures can be obtained by contacting the Committee's Clerk, Katie Pickens, at 802-828-2231 or kpickens@leg.state.vt.us.

III. Response Summary

As noted, no one opposed the rule proposal at the public hearing in this matter and no written comments were filed.

Dated at Montpelier, Vermont this 14th day of October, 2005.

VERMONT NATURAL RESOURCES BOARD
Water Resources Panel

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