

**State of Vermont  
WATER RESOURCES BOARD**

**In Re: Petition to Prohibit the Use of Personal  
Watercraft on Great Averill and Little Averill  
Ponds in the Towns of Norton and Averill, Vermont  
Docket No. UPW-03-01**

**10 V.S.A. § 1424**

**Background**

On March 14, 2003, a group of ten or more individuals qualified to file a petition under the provisions of 10 V.S.A. § 124 with the Vermont Water Resources Board (Board) requested the adoption of rules prohibiting the use of personal watercraft (PWC) on Great Averill and Little Averill Ponds.

After review and approval by the Interagency Committee on Administrative Rules, the Board proposed the rule requested by the petition, for the purpose of receiving public comment and gathering information to determine what action to take, on July 11, 2003.

In accordance with public notice of the petition, the Board held a public hearing on August 26, 2003 in Island Pond, Vermont and established September 2, 2003 as the deadline for submitting 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), the Vermont Use of Public Waters Rules (VUPWR) and the applicable provisions of the Vermont Administrative Procedure Act, 3 V.S.A §§ 801-849 (1995 & Supp. 2000).

**Decision**

At its meeting on September 24, 2003, the Board reviewed and discussed the petition and public comments received both at the public hearing and in writing. At that meeting the Board determined that the petitioners had established that under the standards set forth in VUPWR that the use of PWC should be prohibited on Great Averill and Little Averill Ponds. The Board requested that staff draft a formal written decision on the petition for Board review and approval consistent with its instructions. At its October 7, 2003 meeting, the Board members 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 rules to prohibit the use of PWC on Great Averill and Little Averill Ponds for the reasons set forth herein.

**Findings**

1. Great Averill and Little Averill Ponds are located in the towns of Norton and Averill, Essex County, Vermont.
2. Both Ponds constitute public waters of the State of Vermont within the meaning of 10 V.S.A. 1422(6) (1998).

3. Great Averill Pond and Little Averill Pond have surface areas of 828 square acres and 467 square acres respectively. Significant portions of both lakes have a depth of 10 feet or less.
4. Great Averill Pond and Little Averill Pond provide habitat for loons and each has supported a nesting pair for the last two years. Other birds and wildlife have been observed at the Ponds as well.
5. PWC first appeared on Great Averill Pond and Little Averill Pond over the last three to four years. Since then, there has been a gradual increase in usage of PWC on both Ponds.

6. 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).

7. 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).
8. 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.
9. 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.”
10. The normal and predominate uses of Great Averill and Little Averill Ponds include fishing, swimming (including long distance swimming), boating, water-skiing, canoeing, kayaking, wildlife observation, and the enjoyment of observing the tranquil nature of the scenic beauty that surrounds both lakes. Motor boating at other than low speeds, including water-skiing, occurs on both Ponds at a relatively low level of intensity.

11. Based on the testimony at the August 26, 2003 public hearing and the written comments received, the Board finds that while PWC have been used on Great Averill and Little Averill Ponds over the last three to four years, 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, within the meaning of the Rules, on either Pond.
12. On those occasions when PWC have been used on Great Averill and Little Averill Ponds, their use has been incompatible with several of both Ponds' normal uses, especially long distance swimming, wildlife observation and the enjoyment of the tranquil nature and aesthetic values, including quiet solitude. PWC have conflicted with these normal uses due to the speed at which PWC are operated at and the noise created by the use of PWC.
13. The hills surrounding both Great Averill and Little Averill Ponds tend to amplify and reverberate the noise inherently associated with the operation of PWC on those Ponds making PWC's especially incompatible with the normal quiet uses of swimming, wildlife observation and the enjoyment of the tranquil nature and aesthetic values including quiet solitude on these bodies of water.
14. PWC are permitted on a number of nearby bodies of water including Island Pond, Holland Pond, Lake Seymour and Lake Memphremagog. All except Lake Memphremagog are within 30 minutes of both Great Averill and Little Averill Ponds.
15. The proposed rule is consistent with the provisions of 10 V.S.A. § 1424 (1998) and section 2 of the Vermont Use of Public Water 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 the following written and oral comments made by two individuals opposed to the petition. See 3 V.S.A. § 841 (b) (1995).

#### **Comment 1**

**The petition should be denied because a similar ban on PWC in New Hampshire has recently been defeated.**

#### **Response**

Although the Board respects and takes into consideration neighboring States' regulations and determinations, they are not binding upon the Board's final actions. The comment suggests that the Board should adopt and follow New Hampshire's rationale, however each of Vermont's Lakes and Ponds is a unique body of water that requires independent review and analysis based on Vermont's Use of Public Waters Rules, relevant statutes and past Board decisions. As noted in the Findings above, based on the standards in Vermont's Use of Public Waters Rules, PWC are not normal uses and the use of PWC conflicts with established normal uses on Great Averill

and Little Averill Ponds. Accordingly, under Vermont law the Board finds that the petition should be granted.

**Comment 2**

**A ban on PWC alone would not address the issues and conflicts outlined in the petition. If PWC's are incompatible with other uses on the lakes, other motorized uses are incompatible as well. All such uses should be addressed otherwise the Board would be discriminating against the use of PWC.**

**Response**

The Board is only authorized to act on the petition before it. The petition submitted to the Board only seeks to prohibit the use of PWC. Accordingly, the Board may not consider whether other motorized uses should be prohibited on the Ponds. The Board is simply limited by law to considering the petition at hand, which focuses solely on PWC, as part of this rulemaking.

Dated at Montpelier, Vermont this 20<sup>th</sup> day of October 2003.

WATER RESOURCES BOARD

  
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David J. Blythe, Chair

Concurring:

Lawrence H. Bruce, Member  
Michael J. Hebert, Member  
Jane Potvin, Member  
John D.E. Roberts, Member