

BERLIN POND TESTIMONY

Good morning, I am Representative Warren Kitzmiller of Montpelier, here to speak with you today about H.871, which is a request for a change to the Charter of your Capitol City.

This request changes two things: First, it asks that we be allowed to add a local option tax, and Second, it asks that we be allowed to regulate the use of Berlin Pond, which is our city's only source of drinking water. I am not going to speak to the first part, for two reasons: First, I am not sure of my own personal feeling on the subject, and second, I'm happy to leave that to our Mayor, our City Manager and others, who are more familiar with it.

I am going to speak about our drinking water. As I begin, I'd like to say this: I know that I am "on the record" here, but that I am not "under oath." I wish I were! I want to tell you, very directly, that everything I say to you today is the honest truth, as I know it, and that I am neither embellishing nor exaggerating a single word, to the very best of my knowledge.

I'd like to begin by dispelling a rather persistent myth that has been circulating for a number of years. It's the idea that the Supreme Court was responsible for opening the Pond. I can't tell you how often I hear that. I know that in this committee, the thought has been expressed in a form that says, essentially, "The Supreme Court opened the Pond, why are we dealing with it?"

Understand this, please . . . This thought is not true, nor has it ever been. It was the Agency of Natural Resources, acting through their Department of Environmental Conservation that opened this pond to recreation. They did it by doing NOTHING other than allowing the pond to be regulated by the same rules that govern every other body of water in the State, They did no research, they did no baseline studies, they certainly never consulted the people who pay for and drink the water.

I believe the myth of the Supreme Court's role was an intentional deception on the part of the DEC, an attempt to distance themselves from their action, an attempt to, in a sense, "keep their hands clean."

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The Supreme Court was, I believe, actually surprised that their consideration of this case led them to find that Montpelier had lost its ability to control the use of Berlin Pond. The plain language of their decision is almost apologetic. Here are a few quotes from their decision:

"Our decision today does NOT hold that recreational use of Berlin Pond must be permitted. We conclude only that valid regulation would require action by the State either by direct regulation or by delegating such power to the City and this has not yet occurred."

And "The State . . . May delegate certain authority to regulate its use to another body, in this case the City of Montpelier."

And "A municipality may thus assume the state's authority to regulate public waters consistent with the public trust but only where that authority has been conveyed to the municipality by the state."

And ". . . the 1894 charter specifically granted the city council the power to make all regulations and ordinances for preventing the corruption and for the protection of the water supply of said city. . . ."

And ". . . If more powers are needed, more must be asked for."

Folks, that is exactly what we are doing. Our drinking water has been opened for recreation, against our wishes, and in order to prevent its further corruption we need the authority to regulate its use. We had that authority for well over 100 years, but that has disappeared through a series of regulatory changes, errors, and omissions, and frankly, very political decisions at the highest levels of state government.

The authority we seek is only the authority we had for a very long time, and the authority that a number of other communities enjoy.

Today, you are going to hear from several experts about our need to regulate the use of Berlin Pond, but I'd like to set the stage for you.

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To begin, please listen to these quotes from the "Resolution and Policy Concerning Recreational use of Public Water Supplies". This comes from the New England Water Water Works Association. This is the organization of all the people and plants that treat drinking water in New England. Vermont is a participating member and sends people to all their conferences.

They wrote:

It is a fundamental principle of water supply development and protection that water should be obtained from the highest quality source feasible, and EVERY effort should be made to prevent contaminants from entering the source.

When faced with efforts by recreational users or others to increase recreational access to water supply reservoirs and/or surrounding land, utilities should oppose such efforts on the basis of increased risk and communicate those risks accordingly.

Maximizing drinking water quality to protect public health is of the highest priority to public water suppliers. Public water suppliers recognize that multiple barrier protection of drinking water supplies and their watersheds is essential in order to meet these goals.

Body-contact recreation introduces disease-causing organisms into water bodies, and many other forms of water-dependent recreation are known to introduce contaminants into source waters as well.

As the science of pathogen detection improves, new waterborne diseases associated with drinking water continue to emerge.

Most surface water treatment facilities are designed to greatly reduce, but not completely eliminate, the activity of known pathogenic organisms present in the source water.

NOW, THEREFORE, BE IT RESOLVED:

That the New England Water Works Association (NEWWA) opposes legislation or any administrative action that would permit or require the opening of domestic water supply reservoirs and adjacent lands to increased recreational use, and

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POLICY –

Body-contact recreation (e.g., swimming, bathing, water skiing, wind surfing, and use of personal watercraft) should not be allowed on water bodies used as sources of public water supply.

Non-body-contact water-based recreation, particularly the use of two-stroke carbureted gasoline engines that discharge exhaust into the water and the use of petroleum-powered vehicles and tools on the ice, should be discouraged. Where it is allowed to occur, it should be separated from the water intake by the greatest distance possible, and it should not be expanded or increased.

Recreation on land adjacent to the water supply source and its tributaries should be restricted to prevent the disturbance of soil and vegetation, the depositing of waste or other contaminants, and the channelization of overland flow; and to maintain the ability of the

buffer to trap nutrients, sediment, and other pollutants and to infiltrate runoff.

The suggested minimum distance based on maintaining the functions of an undisturbed buffer is several hundred feet.

A proponent of recreational use near or on a public water supply must be required to provide technical evidence supporting the claim that such activity will not adversely affect the water quality, or public health and safety of the water consumer served by said water supply. When a proposal for recreational use is inconsistent with this policy it should be opposed by the water supplier.

The water utility and its ratepayers should not be forced to bear the burden of financing recreational use. Consequently, any cost for water quality monitoring, evaluations and mitigation programs should be borne by those proposing or benefiting from the recreational activity, not by the water utility or its customers.

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Having heard their attitude, I'd like to follow with the Mission Statement of our Department of Environmental Conservation. It's only one sentence long:

"To preserve, enhance, restore, and conserve Vermont's natural resources, and protect human health for the benefit of this and future generations."

This statement is followed by their guiding principles, among which is this:

" Always consider the consequences of today's decisions for future generations."

Even Vermont's water quality policy, which is found in 10 VSA, paragraph 1250, begins with, "(1) protect and enhance the quality, character and usefulness of its surface waters and to assure the public health; (2) maintain the purity of drinking water And then goes on to say, "It is further the policy of the state to seek, over the long term, to upgrade the quality of waters and to reduce existing risks to water quality".

What I have just read contains a lot of flowery language, with high and lofty principles. It's really sad that, in spite of what we SAY we do,

what we actually DO here in Vermont is to open ponds to recreation with absolutely NO base-line studies, no consideration of best practices, and worst, NO value given to the clearly expressed wishes of the people who pay for and drink the water.

The authority to regulate the use of Berlin Pond was, for many, many years, in the Montpelier City Charter. Somewhere around 40 years ago, the City reorganized it's charter, with the permission of this committee, and we removed the language that gave us that control. Why did we do that? Did we think we wanted to open the pond. NO! We had every good reason to believe that the pond was closed, and that it would forever remain so. Had anyone suspected that devious minds would conspire to take that control away, you can be sure we would never have removed that language.

ANR, through the DEC, took a pond that had been closed for a very, very long time and casually opened it to recreation. They did put a few restrictions on the use. Gasoline powered outboard motors are not allowed, and you cannot land an airplane on the water, but electric trolling motors are OK, and swimming is allowed. Gasoline powered ice augers are fine, so are kerosene heaters in the ice shantys.

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I know that the DEC contends that their weak regulations are protecting the pond, but I honestly don't think anyone really believes this. It is simply not credible and wouldn't pass muster in any other New England state, all of which are ahead of Vermont in protecting their drinking water sources.

My friends, every other New England state goes to GREAT lengths to protect drinking water. In Connecticut and Rhode Island, surface water ponds that are sources of drinking water are closed. They are fenced, they are patrolled and they are off limits to any human use.

Massachusetts, New Hampshire and Maine have, in some very limited cases, allowed tightly controlled use, but it is only with severe restrictions. In every New England state, the default position is that the local communities know best what level of regulation is needed. The state provides guidelines, surely, but they defer to those who treat and drink the water to determine whether and to what extent they should allow or restrict various activities on a pond or lake.

The Maine Water Utilities Association wrote, in a position paper, "Short of raw sewage discharge, human body contact with the water is the most threatening human activity." They also wrote this: "Recreational use of terminal reservoirs and adjacent land is contrary to the basic function of furnishing a safe, palatable water supply to customers, and should be prohibited to the greatest extent possible, BUT IN NO EVENT SHOULD

DIRECT CONTACT WITH THE RESERVOIR BE ALLOWED."

Yet, Vermont seems to think that swimming and other water contact recreation is just fine. When the Commissioner of DEC was pressed about the effect of this new policy for Berlin Pond, his response was, "If there's a problem, we'll deal with it." That comment astonishes me! Folks, that is NOT protection or preservation, that is REMEDIATION! After the pond is messed up! That is what we are attempting in Lake Champlain, and for those of you whose towns get their drinking water from our Great Lake, I would ask, "How's that working out?" I would further note that DEC is not patrolling the pond or enforcing their regulations in any way. They say only that they are willing to work with any user groups to help them set up patrols or whatever. Thus any costs related to increased treatment or remediation would fall on the people who drink the water and pay for running the treatment plant. In my Commerce Committee a colleague said, just the other day, "Rules, without enforcement, are useless."

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In my opinion, continuing to allow recreational use of Berlin Pond will inevitably lead to increased pollution and force increased costs onto the people who drink it's water. The damage is inevitable! Look around you and think of ponds nearby. Can any of you point to a time, at any point in history or any place in the world, where human activity has IMPROVED a body of water?

Our bodies shed billions of coliform bacteria every day. If we allow canoes and kayaks, it will only take one dirty hull or one contaminated bait bucket to bring zebra mussels or spiny water fleas. We already have a patch on Eurasian milfoil, and if we continue to allow electric trolling motors, the props will shred that milfoil and spread it throughout the pond. The amount of trash and filth that careless users have left behind is already more than a nuisance. When you visited the south end of the pond last week, you didn't see the normal amount of trash. It made me wonder who might have visited there Friday morning to do a quick pick up of the area. The increased turbidity is already causing our water treatment plant to flush their filters far more often than before. What you saw last week was pretty clear water; please come back, unannounced, in July or August.

In the winter, the current rules allow ice fishing shanties. It would be quite legal to place one right on top of our water plant's intake pipe. I am told that it is very common for people to pour anti-freeze into the hole to prevent the rapid formation of ice. And, let me ask you a rhetorical question: Have you ever seen a porta-potty out there on the ice? In testimony last year, the Vermont Federation of Sportsmen said that fishermen are FORCED to urinate and defecate into the pond. On the record, they actually blamed that on the City for posting the

surrounding land, so that no porta potties are allowed. I guess they never heard of a bucket!

My friends, this issue is absolutely critical to my community. Protecting the water we drink is something we MUST do!

You will hear others say that the pond isn't all that pristine anyway . . . Is that a reason to cause it to degrade further?

I'm pretty sure you're going to hear that there is no science to back up our position. Well, if a person refuses to read it, or believe it, then maybe that person would actually believe that the science doesn't exist. It does exist. Tons of it, from every reputable source in the water business. So consider the source, please.

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You will hear others say that they see no conflict between use as a drinking water source and use for recreation. If that were true, why do all the other New England states go to such great lengths to protect drinking water sources? Is everybody else wrong? Everybody else? Please ask my opponents to explain why they need to use this pond. They can only say they WANT to use the pond.

How is it that our administration can, for political purposes only, allow the recreational desires of a small number of people outweigh the valid health concerns of about 20,000 people who drink this water?

By the way, I should point out that there are dozens and dozens of ponds within a 30 mile radius, plus all the rivers and streams. It's not like this is the only place to go fishing, hunting, kayaking or canoeing . . . or swimming.

Yes, Berlin Pond is a beautiful place to canoe and kayak. So is Wrightsville Reservoir and Mollys Falls Pond. The Green River Reservoir is incredibly beautiful. We've got so many good choices for wonderful recreation! Why is it that some folks just have to get their hands on the last relatively untouched pond? A pond that 20,000 people rely on for drinking water?

You might hear someone say that the state does not want a "hodge-podge" of varying regulation. Well, heck, they already have that, and there is NO chance that will ever change I do NOT want every lake and pond treated the same way. Right now, there are several towns who get their drinking water from ponds that are in a neighboring community. Barre City, St Johnsbury, Bellows Falls . . . All have charter provisions that allow them to protect the pond. Why is it OK for them, but not for Montpelier?

There is an additional, and very important, point that I want to discuss. When the responsibility for regulating drinking water ponds was taken away from the Department of Health and placed in the Agency of Natural Resources, that set up a very serious conflict of interest. Because the Department of Fish & Wildlife also resides within ANR, and because Fish & Wildlife cares deeply about providing the maximum amount of access for sporting uses, they have vigorously opposed any effort to restrict access to any body of water. They do not care about the need to protect drinking water and they carry a lot of weight within ANR. I rather expect that many of you have been lobbied by Louis Porter, the Commissioner of Fish & Wildlife, speaking to this very point.

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The State requires Montpelier to have a "source protection plan" that we must follow, to protect to the highest degree possible the water that flows into the pond. Our people measure coliform bacteria counts on all the little streams and rills that end up in the pond. If they notice a coliform spike in any stream, they'll walk upstream to find whatever critter may have died in or near the stream, and drag it away.

HOWEVER, once the water actually reaches the pond, we are not allowed to protect it at all, and the state isn't doing it, either. Is that fair?

You know, I could go on and on at great length, but I think you understand my concern. To my mind, this is the single most important issue I have ever raised on behalf of my community and your Capitol City. It is my fundamental belief that the State of Vermont is failing miserably in it's responsibility to protect my drinking water, and the drinking water of many residents not only of Montpelier, but many of the citizens of Berlin, and the Central Vermont Medical Center.

To place the recreational desires of a few, who have a plethora of alternatives, above the critical need for safe, clean drinking water for about 20,000, who have no alternative source is, to my thinking, a near criminal dereliction of their responsibility. To have the State ignore the overwhelming body of evidence and science that has developed around New England, the country, and indeed, the world, deeply angers me.

To have the people who are charged with protection of this pond, casually open it to body contact recreation staggers my mind. To ignore the clear fact that continued recreational use on this small pond will certainly and inevitably lead to increased contamination, simply **MUST NOT** be allowed.

I believe that the people who **PAY** for the water, who **DRINK** the water, should be the people who control the use of the water, not the State.