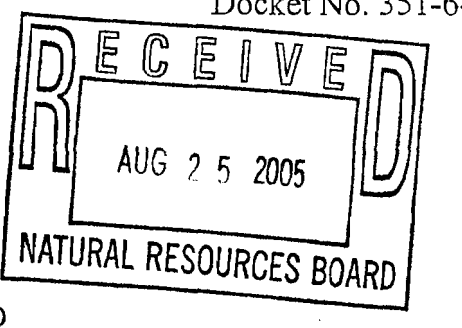
STATE OF VERMONT
Washington County, ss.:

SUPERIOR COURT
Docket No. 351-6-03 Wncv



BYERS

v.

WATER RESOURCES BOARD

ENTRY

Plaintiff Robert Beyers seeks a 3 V.S.A. § 807 declaration that an amendment to the Water Resources Board's Use of Public Waters Rules affecting the Chittenden Reservoir is invalid in part. The amendment establishes new restrictions on recreational uses of the Reservoir by prohibiting personal watercraft (such as Jet Skis) and waterskiing, and limits motorboat speed to five miles per hour. Plaintiff, a longtime shoreline landowner, objects to the waterskiing and speed limit restrictions.

The Use of Public Waters Rules (Rules) include a set of use restrictions generally applicable to bodies of water depending on size, recognized "normal uses," and other factors. A normal use is a lawful use of a body of water "that has occurred on a regular, frequent and consistent basis prior to January 1, 1993." Rules § 5.2. The specific applicability of these rules is itemized by body of water in Appendix A. Additional water body-specific rules are set out in Appendix B. Prior to the amendment in this case, the Reservoir was subject only to the generally applicable rules.

The amendment process in this case began when a petition was filed seeking the noted use restrictions. Members of the public may petition the

Water Resources Board (WRB) to exert its rulemaking authority pursuant to 10 V.S.A. § 1424(e). The WRB received comments, held a hearing, and eventually issued a decision essentially granting the petition. The legislative committee on administrative rules, 3 V.S.A. § 842, did not object to the amendment. The WRB has adopted several rules which apply to its consideration of 10 V.S.A. § 1424(e) petitions. Rules §§ 2.1 – 2.11. Plaintiff claims that the WRB misapplied several of these § 2 rules to produce a wrong result, and hence the amendment is invalid. Otherwise, he does not argue that any of the Rules are outside the scope of the WRB's rulemaking authority, or that the WRB failed to comply with any other rules or law.

We note that the WRB's promulgation of the amendment "enjoys a presumption of validity." Vermont Ass'n of Realtors, Inc. v. State, 156 Vt. 525, 530 (1991). Ordinarily, we will defer to the WRB's judgment absent a "compelling indication" that the WRB misinterpreted its authority. Id. "[W]e point out that it is not the role of a reviewing court to impose its judgment on whether administrative regulations promulgated within the expertise of an agency are good or bad policy." Id. at 533.

One broad policy of the state in its role as trustee of its waters and in the interest of "public health, safety, convenience and general welfare" is to "provide for multiple use of the [state's] waters in a manner to provide for the best interests of the citizens of the state." 10 V.S.A. § 1421. The related, specific rulemaking authority of the WRB regarding the use of public waters is set out at 10 V.S.A. § 1424. Generally, the WRB may define which uses are permissible, when they are permissible, and where on the water certain uses may occur. Id. § 1424(a). In so doing, the WRB must consider the qualities of a water body and its surrounding area, such as by determining the predominating use of adjacent land, water depth, use of the water before regulation, and scenic beauty. Id. § 1424(b). A mandatory goal of rulemaking is to "manage the public water so that the various uses may be enjoyed in a reasonable manner, in the best interests of all citizens of the state. To the extent possible, the board shall provide for all normal uses." Id. § 1424(c).

The rules the WRB employs when considering rulemaking petitions, Rules §§ 2.1 – 2.11, are an expression of its § 1424 authority. Section 2.2 states that "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." Normal uses the WRB will consider include fishing, swimming, and boating as well as wildlife observation, enjoyment of aesthetic values, and quiet solitude. Rules § 2.3. Consistent with the *whole* purport of 10 V.S.A. § 1424(c), "[u]se 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." Rules § 2.6 (emphasis added). Use conflicts will be resolved with the least restrictive approach "practicable" and adequate. Rules § 2.7. Priority is given to managing the operation of vessels (such as by speed limits or time-and-place regulations) when vessel operation causes conflicts. Rules § 2.9. Finally, "[t]hose water bodies which currently provide wilderness-like recreational experiences shall be managed to protect and enhance the continued availability of such experiences." Rules § 2.11.

Neither 10 V.S.A. § 1424 nor the WRB's § 2 rules command specific results in specific circumstances. This is so even where mandatory language ("shall") is used. For instance, though under § 1424(c), the WRB "shall provide for all normal uses," it only *must* do so "[t]o the extent possible," and that in the larger context of providing *reasonably* for the "best interests of all the citizens of the state." Section 1424(c) elevates the goal of harmonizing normal uses rather than eliminating them; it does not necessarily require, however, the WRB to provide for any particular normal use in any particular circumstances. The WRB's rules are to the same effect. See, e.g., Rules § 2.6 (the mandate of which is tempered by reference to § 2.2). Both § 1424 and the WRB's § 2 rules provide a framework for, and only generally guide, the WRB's consideration of competing circumstances and interests primarily as a policy-development matter.

Plaintiff's argument about the validity of the amendment is incongruous with the relevant statutes and rules, and how we review the WRB's rulemaking in this context. Plaintiff argues, essentially, that the new waterskiing ban and motorboat speed limit are invalid because they "violate" the WRB's mandatory duties to take the least restrictive approach and to provide for all normal uses. Because Plaintiff can imagine what is in his view a less restrictive approach than that chosen by the WRB – an exception for shoreline landowners, for instance – he believes the amendment must be, to that extent, invalid. Because waterskiing is a normal use – a contention the WRB has not agreed with – and the amendment does not provide for it, he believes the amendment must be, to that extent, invalid. The applicable statutes, rules, and standards, however, do not operate in this fashion.

Lastly, plaintiff points out that different lakes around Vermont are treated differently from his, although he suggests they share similar characteristics. While citizens may be protected from arbitrary discrimination, lakes are not. In fact, the state has a significant interest in classifying what may be similar bodies of water in a different way. In that way, citizens of a particular part of the state may enjoy varying experiences on the water. Hence, someone in Rutland county is benefited by being able to choose a "quiet lake" or a "motorized," depending on whether they are seeking birdwatching, kayaking or water skiing on a particular day. And the fact that one lake's physical characteristics suggest it ought to be classified similarly to some other's, whether some other which is nearby or located in the Northeast Kingdom, does not point to a requirement for such classification. Making a variety of experiences available to residents of one part of the state enhances a significant public interest.

The terms of the WRB's amendment are, above all else, a matter of policy, not law. Plaintiff's real argument is not that the WRB violated this or that rule, but that it could have made a better policy choice. For its part, the WRB, both in its underlying decision and in this case, cites myriad reasons why the amendment is the best policy. We need not determine who

articulates the finer policy position. "The hope for correctness lies in the design of the agency's policymaking process and courts must avoid interfering with the workings of that process." 3 Charles H. Koch, Jr., Administrative Law and Practice 2d § 12.31, at 237. It is enough to determine whether the WRB, acting within the scope of its authority, took a "hard look" at the policy issues confronting it, and arrived at its result after an "appropriate intellectual process." Id. § 12.31, at 240. Manifestly, it did.

Petition dismissed.

Dated at Montpelier, Vermont, August 22, 2005.

Judge