

State of Vermont
WATER RESOURCES BOARD

**In re: Petition of Westmore Association, Inc., to
regulate the use of the public waters of Lake Willoughby,
Town of Westmore, Vermont
WRB Docket No. UPW-04-01 (VT Proposed Rule 04P027)**

10 V.S.A. § 1424

DECISION

Issued November 19, 2004

As explained below, the Vermont Water Resources Board (Board) adopts a final proposed rule prohibiting on Lake Willoughby the use of personal watercraft (jet skis) and any other Class A vessel which uses an inboard engine powering a jet pump as its primary source of motive power (herein collectively referred to as PWCs).

I. Background

On February 2, 2004, the Westmore Association, Inc. (Association), filed with the Water Resources Board (Board) a petition requesting the adoption of a rule, pursuant to 10 V.S.A. § 1424, to prohibit the use of PWCs on Lake Willoughby in the Town of Westmore, Vermont (Petition). The Petition was supported by many members of the Association, including more than ten freemen of the State of Vermont, as required by 10 V.S.A. § 1424(e). The Petition was also endorsed by the Selectmen of the Town of Westmore.

In response to the Petition, the Board voted on May 11, 2004, to file the following proposed rule with the Interagency Committee on Administrative Rules (ICAR)¹:

1. The use of personal watercraft (jet skis) and any other Class A vessel that uses an inboard engine powering a water jet pump as its primary source of motive power are [*sic*] prohibited.

ICAR reviewed and approved the proposed rule on June 21, 2004. The committee offered several recommendations for improvement of the covering documents. In response, the Board amended the Proposed Rule Cover Sheet and Economic Impact Statement to clarify that more than one lake in the area surrounding Lake Willoughby currently has restrictions on the use of personal watercraft and also that camp owners on Lake Willoughby who own jet skis are among the persons who might suffer an economic impact if the proposed rule were to be finally adopted. Additionally, in response to a comment from one member of ICAR not present at the

¹ This rule was filed with a companion proposed rule regulating the use of public waters on Mirror Lake in the Town of Calais. Together, they constitute the Board's 2004 amendments to the Vermont Use of Public Waters Rules, VT Proposed Rule 04P027.

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June 21, 2004 meeting, the Board expanded its distribution list for personal notice of the Petition and public hearing to include representatives from the Vermont Personal Watercraft Association and the Personal Watercraft Industry Association.

The Board filed the proposed rule with the Office of the Secretary of State on June 25, 2004. Newspaper notice was published on July 8 and July 15, 2004, and corrective notice was published on August 5 and 11, 2004, all at the direction of the Office of the Secretary of State.² Additionally, direct written notice of the Petition and proposed rule was provided by the Board to interested agencies and persons on July 9, 2004.

The Board received comment regarding the proposed rule at a public hearing held on August 24, 2004, starting at 7:00 p.m., at the Westmore Community Church Fellowship Hall, Hinton Hill Road, in Westmore, Vermont. According to the Board's attendance records, one hundred and eleven persons were present at the hearing, with 41 offering oral comment to the Board.³

The deadline for written comment was the close of business, September 7, 2004. By that deadline, the Board received 47 written comments, some of which were provided by persons who had addressed the Board orally at the public hearing. An additional 6 comments were filed with the Board after the September 7 deadline. These late comments were not considered in the Board's evaluation of the proposed rule, although they have been included in the public comment file as late-filed comment.

The Board members reviewed the oral and written public comment in this matter and deliberated on October 5 and November 16, 2004. The Board was governed in its consideration of the proposed rule by the applicable provisions of 10 V.S.A. ch. 49 (Protection of Navigable Waters and Shorelands), the Vermont Use of Public Waters Rules (eff. Feb. 15, 2004), and the applicable provisions of the Vermont Administrative Procedure Act, 3 V.S.A. ch. 25. The Board also noticed its prior decisions addressing the regulation of personal watercraft, including one regarding proposed regulations for Lake Willoughby prompted by a petition filed in 1990. Re: Petition of 10 freemen to regulate the use of the public water of Lake Willoughby, Town of Westmore, Vermont, Docket No. UPW-90-04 (Nov. 20, 1991) (hereinafter, Petition of 10

² The initial newspaper notice did not include the time of the August 24, 2004, public hearing in Westmore, Vermont; the corrected notices included the time.

³ Board members present for the public hearing were Chair Nicholls and members Bruce, Nagy and Roberts. Member Hebert was not present, but has listened to the tape recording of that proceeding and so is participating in the decision regarding this matter.

Freemen). Based on its review of the record, the Board made the following findings and drew the following conclusions. As required by 3 V.S.A. § 841(b), the Board also prepared a responsiveness summary to address substantial arguments for and against the proposed rule that were overruled by the Board.

II. Findings

A. Lake Willoughby and its Context

1. Lake Willoughby constitutes public waters within the meaning of 10 V.S.A. § 1422(6).
2. Lake Willoughby is located in the Town of Westmore and has a surface area of 1687⁴ acres, making it the fourth largest lake located entirely within Vermont. Only three lakes located entirely within Vermont are larger: Harriman Reservoir (2046 acres) in far southern Vermont, Lake Bomoseen (2415 acres) in south central Vermont, and Seymour Lake (1763 acres) in northeastern Vermont. The largest lake within less than 20 miles of Lake Willoughby is Lake Memphremagog, which is located within both Vermont and Quebec Province, Canada. It has a surface area of approximately 25,000 acres.
3. The greatest length of Lake Willoughby is five miles. At its greatest width, the lake is one mile wide. The elevation is 1169 feet above sea level.
4. Lake Willoughby is noted for its clear and clean water, and its fine lake trout and salmon fisheries.
5. Lake Willoughby is surrounded by majestic mountains and hills. Mount Pisgah, on the southeastern side of the lake, rises over 1600 feet above the lake; Mount Hor, on the southwestern side of the lake, is over 1500 feet above the lake.
6. Lake Willoughby is noted for its scenic beauty and serenity. In 1967, Willoughby Lake Natural Area was designated a Registered Natural Landmark under the provision of the Historic Sites Act of August 21, 1935. Lake Willoughby is often favorably described as the "Lucerne of Vermont," due to its resemblance to the popular resort lake in the Swiss Alps.

⁴ This acreage figure is based on the latest information provided by the Agency of Natural Resources, using the most recent ortho-photographs from VCGI and Geographic Information Systems (GIS) technology. The previous acreage figure given to the Board by ANR and published in Appendix A, VWQS (eff. Feb. 15, 2004) was 1712 acres.

7. There are approximately 300 homes either adjacent to Lake Willoughby or within one-eighth of a mile from the lake. The vast majority of these are used as summer residences. Lake Willoughby is a water supply for a substantial number of these homes, since no town water system is available.
8. Commercial accommodations adjacent to or near the north end of Lake Willoughby are the WilloughVale Inn and the Fox Hall Bed & Breakfast. Both are well-known Northeast Kingdom vacation retreats, with clientele that return year after year to enjoy the quiet and beauty of the lake.
9. There are a number of rental cabins on Lake Willoughby. The largest number of cabins for rent is at Willoughby Lake Cabins, located half way down the east side of the lake.
10. There are a number of other small businesses that rely on the seasonal tourists attracted to Lake Willoughby.
11. The Town of Westmore owns and maintains a public beach, called North Beach, at the northern end of Lake Willoughby.
12. The State of Vermont owns real property at South Beach on the south end of Lake Willoughby and a State Fishing Access on the eastern shore of the Lake.

B. Normal Uses of Lake Willoughby

13. In November 1991, the Board found that among the established uses on Lake Willoughby were: swimming, sailing, sailboarding, rowing, paddling, fishing, waterskiing, scuba diving, wildlife observation, and the peaceful enjoyment of the Lake's aesthetic values. The list of established uses did not include the use of personal watercraft. Petition of 10 Freeman, Decision at 2, Finding 2.
14. In November 1991, the term "established uses" was used by the Board to mean "the uses of public waters which have occurred on a regular, frequent and consistent basis." Vermont Water Resources Board Use of Public Waters Policy (Nov. 13, 1991; 11/13/91 discussion draft; Vermont Water Resources Board Use of Public Waters Preliminary Draft Policies, October 24, 1991).

C. Personal Watercraft Usage of Lake Willoughby

15. In November 1991, the Board found that personal water craft had been present on the Lake Willoughby "for the past several years, but in limited numbers." Petition of 10

Freemen, Decision at 2, Finding 2.

16. Today, less than a half dozen property owners on Lake Willoughby are known to possess PWCs.
17. In the last five or six years, there has been a noticeable increase in use of PWCs on Lake Willoughby. Most PWCs used on the lake appear to be brought in by "day users" who launch them from the public boating access area (State Fishing Access) or the beaches. See Findings 11 and 12. Some PWCs are brought to the lake by persons who rent cabin units on the Lake.
18. The number of PWCs being used on Lake Willoughby at any one time ranges from one or two to as many as ten. One hearing participant estimated that there were six PWCs operated on the lake during the weekend of July 4, 2004.
19. The use of PWCs is allowed on a number of lakes in the vicinity of Lake Willoughby, including Crystal Lake, Seymour Lake, and Lake Memphremagog, to name a few.

D. History of Use Conflicts on Lake Willoughby

20. In November 1991, the Board found that conflicts between personal watercraft and other uses of Lake Willoughby seemed to be concentrated at the swimming area at the north end of the Lake at North Beach. See Finding 11. Because use conflicts seemed to be highly localized, the Board concluded that it was not appropriate to prohibit or restrict the use of PWCs on a lake-wide basis. Petition of 10 Freeman, Decision at 3, Finding 7.
21. In November 1991, the Board found that enforcement of existing laws regarding the use of PWCs would result in fewer recreational use conflicts. Therefore, the Board recommended community participation in reporting conflicts to the Department of Public Safety Marine Police Division to aid in the enforcement of existing laws. Petition of 10 Freeman, Decision at 3, Finding 10.
22. In November 1991, the Board offered two other recommendations for addressing recreational use conflicts on Lake Willoughby: (1) the use of buoys to demarcate the 200 foot boundary from shore or high use areas (swimming areas); and (2) educational programs to inform recreational users of existing boating laws. With respect to the latter, the Board recommended that the Lake Willoughby community initiate educational programs to inform recreational users of appropriate "jetskiing behavior" as a means for reducing conflicts. Petition of 10 Freeman, Decision at 3, Finding 11.

23. Since November 1991, recreational use conflicts have continued to increase on Lake Willoughby. First, use conflicts involving PWCs are no longer restricted to the northern end of the lake. Second, while the number of PWCs operated on the lake on average remains small, the number of transient, primarily weekend PWC users has increased, thereby resulting in a perceptible increase in recreational use conflicts with a wide range of recreational lake users. Third, despite efforts by the Town of Westmore to demark North Beach with buoys and by the Association to educate the public about existing boating laws, operators of PWCs continue to exhibit "bad jet ski behavior."

E. Public Safety Concerns and Lack of Enforcement

24. PWCs may be operated at speeds over 60 miles per hour, although the typical cruising speed is more like 40 miles per hour.
25. PWCs have no brakes or clutch to aid maneuvering and are extremely difficult to steer at high speeds and virtually impossible to steer when the throttle is cut.
26. PWCs are designed so that they may be operated in shallow waters.
27. Shoreline property owners and recreational users of Lake Willoughby report numerous recent instances of PWCs being operated at speeds well in excess of five miles per hour and within two hundred feet or less of shoreline, swimmers, and other vessels. Others report the operation of PWCs in a careless or negligent manner likely to jeopardize the safety of other persons. One hearing participant reported how a PWC nearly missed a collision with her grandchildren who were standing in only 12 inches of water.
28. Shoreline property owners and recreational users of Lake Willoughby report that PWCs are being operated by persons under 16 years of age or by persons who are intoxicated. They also report some usage of PWCs at 9:00 p.m. or later.
29. Swimmers on Lake Willoughby, especially long-distance swimmers, express fear that they may be hit by PWCs. Due to the speed at which PWCs travel and the noise they generate during operations, PWC operators may not be able to detect swimmers, or their cries of warning, in time to avoid a collision.
30. PWCs are designed to turn on a short radius, and, as a consequence, operators of PWCs often "jump" over the wake created by their own watercraft. On Lake Willoughby, "wake jumping" near kayaks and canoes has threatened to swamp or roll these vessels.
31. Despite the use of divers-down flags and other warnings, scuba divers in Lake

Willoughby, engaged by the Town of Westmore to remove Eurasian Milfoil from the bottom of the Lake, have been harassed by PWCs operated within very close proximity of the divers. See Finding 44.

32. Since most of the camps and other residential properties are located at the northern end of Lake Willoughby, there continue to be reports of use conflicts involving the operation of PWCs and swimmers in this area. Complaints, however, are no longer restricted to the North Beach area. Additionally, some persons express concern for the safety of long-distance swimmers who use other portions of the Lake.
33. In November 1991, the Board found that enforcement of existing laws regarding the use of personal watercraft would result in fewer recreational use conflicts, and the Board recommended community participation in reporting conflicts to the Department of Public Safety Marine Police Division to aid in the enforcement of existing laws. Petition of 10 freeman, Decision at 3, Finding 10.
34. Enforcement of state boating laws has been ineffective. Although some community members have reported alleged violations of existing boating laws by PWC operators, their efforts have been hampered due to a number of factors. These include the fact that complainants are often unable to read the registration numbers of PWCs operated at high speed, and, since the offending operators of PWCs tend to be transients rather than known shoreline property owners, it is often impossible to confirm their personal identities. Also, due to the distance between the Town of Westmore and the State Police barracks in Derby, state enforcement officials are unable to respond to complaints in a timely enough fashion to be able to catch PWC operators in the actual act of violating existing laws. Accordingly, residents report that they have largely given up on calling in their complaints to the State Police.
35. Westmore's Selectmen considered retaining a local law enforcement officer to police the waters of Lake Willoughby, but they have not been able to secure funds for paying for this service.

F. Noise Pollution and Conflict with Quiet Enjoyment of the Lake

36. Shoreline property owners and recreational users of Lake Willoughby complain that the high-pitched, chainsaw-like whine of PWCs ruin their outdoor experience.
37. Lake Willoughby is a long, narrow lake, tightly flanked by steep mountains to the west, south, and east. See Finding 5. Due to the Lake's configuration and the surrounding topography, the noise from the operation of motorized craft, but especially PWCs, is

accentuated in some areas of the Lake.

38. PWCs may produce noise levels in the range of 85 to greater than 100 decibels (dB) per unit.
39. Vermont boating law requires that “[t]he exhaust of every internal combustion engine used on any motorboat shall be effectively muffled by equipment so constructed and used as to muffle the noise of the exhaust in a manner which reduces the maximum operating noise level to not more than 83 decibels on the A scale at 50 feet, in a normal operating environment.” 23 V.S.A. § 3309.
40. PWC industry representatives assert that enormous technological strides have been made in reducing the noise emitted by jet pump-operated vessels since 1998. They assert that recent-model PWCs can now be operated so as to meet state and federal noise regulations. Even if this is so, older PWCs may not achieve these standards.
41. The design of PWCs results in noise that is particularly disturbing to humans. The jet drive emerges from the water every time a PWC goes over a wave or its own wake. See Finding 31. This causes the engine noise to increase in loudness and pitch. Thus, even if a particular PWC meets state noise regulations in a normal operating environment, the continual change in loudness and pitch produced by PWCs in “wake-jumping” is much more disturbing than the constant sounds of conventional motorboats.
42. Lakeshore residents and camp owners on Lake Willoughby complain that PWC operators tend to circle for extended periods of time in one location in order to “wake jump.” The practice of “wake-jumping,” particularly in close proximity to shoreline properties, exacerbates the noise disturbance factor of PWCs.
43. Lakeshore residents, camp owners, and guests at lakeshore rental properties and bed and breakfasts, complain that their quiet enjoyment of Lake Willoughby is seriously impaired by the noise produced by PWCs operated on the lake. Owner/operators of bed and breakfast properties and rental cabins also claim that the “noise pollution” from PWCs has annoyed their guests and may discourage repeat visitation to their businesses.

G. Spread of Eurasian Milfoil

44. Starting a few years ago, a fairly large infestation of Eurasian milfoil was discovered in Lake Willoughby. The Town of Westmore quickly began an eradication campaign by hiring scuba divers to dig up this aquatic nuisance plant. At present, the Town employs two sets of divers for this task, at an annual expenditure of more than \$20,000 per year.

The Eurasian milfoil is continuing to spread and the Town may need to spend additional money to address this problem.

45. PWCs may be contributing to the spread of Eurasian milfoil in Lake Willoughby. According to Town officials and officers of the Association, PWCs race through and circle in the beds of Eurasian milfoil, cutting off the tops of the plants which then spread to other sections of the lake. They argue that motorboats equipped with regular outboard motors can also cut off the tops of this aquatic nuisance plant, but that they do not usually maneuver in these aquatic weed beds, because their operators prefer deeper waters for boating, waterskiing, and fishing.
46. The Agency of Natural Resources (ANR) is responsible for assisting towns throughout Vermont with the control and eradication of Eurasian milfoil. Staff from ANR acknowledge that the chopping and fragmentation of Eurasian milfoil by various vessels results in the dispersal of this aquatic nuisance plant. They maintain, however, that PWCs are only a small part of the problem. It is ANR's position that prop-driven and deeper draft vessels are more likely to churn and fragment Eurasian milfoil than PWCs, which have very shallow draft.

H. Adverse Impact on Wildlife

47. Lake Willoughby contains a large population of ducks and other waterfowl, including mergansers and loons. Although loons regularly feed on the lake, no loons are known to nest on the lake.
48. Several persons who own shoreland properties or make recreational use of Lake Willoughby report instances of PWCs being used to chase or otherwise harass waterfowl on the lake. The Association claims that its members have observed, on more than one occasion, a PWC chasing a loon for several minutes at a time.
49. Lake Willoughby does not have well-developed wetlands that provide nesting habitat for loons and other waterfowl. PWCs, due to their more erratic operational patterns, may create greater disturbance to resting and foraging waterfowl and wading birds than other conventional watercraft, which tend to travel in a more linear pattern. Nevertheless, ANR staff with wildlife management expertise are unprepared to state that disturbance impacts from PWCs affect the ability of these species to survive and reproduce on Lake Willoughby.
50. Although it has been reported that the operation of PWCs has resulted in mass mortality of crayfish "larvae" on Lake Willoughby, there is no credible, scientifically-based

evidence to indicate that PWCs have an adverse impact on crayfish populations or that the observed invertebrates were in fact young crayfish.

I. Water Quality Impacts

51. Jet-pump driven vessels, regardless of type of watercraft, typically have poor fuel economy because of water friction inside the drive and also due to hull drag. Poor fuel economy can result in increased water pollution. ANR reports that in vessels powered by two-stroke engines, 20 to 30 percent of the fuel/oil mixture is discharged unburned into the water.
52. Newer model PWCs utilize less polluting, direct-injection two-stroke and four-stroke engines. The average life of PWCs is approximately five to seven years, so it is likely that there will be a complete turnover in the PWC fleet in the next couple of years.
53. There is no credible, scientifically-based evidence that PWCs are contributing more to the water pollution of Lake Willoughby than other conventional, prop-driven, four-stroke engine, watercraft.

III. Discussion

Pursuant to 10 V.S.A. § 1424(a), the Water Resources Board has been authorized to adopt rules to regulate the use of public waters in the State of Vermont 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.

Pursuant to 10 V.S.A. § 1424(b), the Board, in establishing rules, is required to consider such factors as 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.

The Board is directed, pursuant to 10 V.S.A. § 1424(c), to: “. . . attempt to manage the public waters so that the various uses may be enjoyed in a reasonable manner, in the best interest

of all the citizens of the state. To the extent possible, the board shall provide for all *normal uses*.” 10 V.S.A. § 1424(c) (emphasis added).

“Normal uses” is not defined in statute. Prior to 1994, when the Board adopted comprehensive revisions to the Use of Public Waters Rules, the Board used the term “established uses” to describe “the uses of public waters which have occurred on a regular, frequent and consistent basis.” See Finding 14. Indeed, this was the term used by the Board in November 1991 when it last considered use conflicts on Lake Willoughby. See Finding 13, Petition of 10 Freeman, Decision at 2, Finding 2. The Board shortly thereafter proposed a definition of “normal use” to assist it in its implementation of 10 V.S.A. § 1424, particularly in response to lake-specific petitions filed pursuant to 10 V.S.A. § 1424(e). This definition was codified in October 1994. It combined the definition of “established uses” with a fixed benchmark date for determining those uses. See Vermont Use of Public Waters Rules, Section 4.2 (Definitions, “Normal Use” (adopted Oct. 5, 1994; eff. Jan 1, 1995). Thus, “Normal Use” was defined, and continues to be defined, as “[a]ny lawful use of any specific body of public water that has occurred on a regular, frequent and consistent basis prior to January 1, 1993.” See Vermont Use of Public Waters Rules, Section 5.2 (Definitions; “Normal Use”) (adopted January 20, 2004; amend. eff. Feb. 15, 2004).

The Board concludes that all of the uses identified by the Board in 1991 as “established uses” of Lake Willoughby are in fact “normal uses” of the lake since they existed prior to January 1, 1993. These include swimming, sailing, sailboarding, rowing, paddling, fishing, waterskiing, scuba diving, wildlife observation, and the peaceful enjoyment of the lake’s aesthetic values. The Board also concludes that boating using conventional, propellor-driven, Class A vessels powered by internal combustion and electric motors, is also a “normal use” in that these motorboats were used on a regular, frequent and consistent basis to support fishing, waterskiing and other normal uses prior to January 1, 1993.⁵ The Board, however, does not conclude that the use of PWCs is a “normal use” of the lake. Therefore, consistent with 10 V.S.A. § 1424(c) and VUPWR 2.2 and 2.6, the Board concludes that it has a duty to resolve conflicts in use so as to protect the “normal uses” of Lake Willoughby “to the greatest extent possible.”⁶

⁵ Indeed, in November 1991, the Board decided to not adopt a speed limit of 35 m.p.h. on Lake Willoughby, because this “could prevent some forms of waterskiing on the lake.” Petition of 10 Freeman, Decision, Finding 8.

⁶ VUPWR 2.2 includes the following standard for evaluating the merits of a petition:

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

“Personal Watercraft” are expressly distinguishable from other motorboats under Vermont boating law. Title 23 V.S.A. § 3302(4) defines “motorboat” as “any vessel propelled by machinery, whether or not such machinery is the principal source of propulsion, but shall not include a vessel which has a valid marine document issued by the bureau of customs of the United States government or any federal agency successor thereto.” Motorboats are divided into four classes with Class A vessels being less than sixteen feet in length. 23 V.S.A. § 3304.

Personal watercraft are a specific subset of Class A vessels regulated under Vermont boating law. First, 23 V.S.A. § 3302(8) defines “personal watercraft” as “a Class A vessel which uses an inboard engine powering a water jet pump as its primary source of motive power and which is designed to be operated by a person or persons sitting, standing or kneeling on, or being towed behind the vessel rather than in the conventional manner of sitting or standing inside the vessel.” Second, boating law has specific regulations governing the operation of personal watercraft, recognizing that these craft are designed to operate differently than conventional motorboats and present particular dangers to the operator as well as to other members of the public. For example, 23 V.S.A. § 3312a includes the following specific proscriptions:

- (a) A person under the age of 16 shall not operate a personal watercraft.
- (b) All persons operating or riding on a personal watercraft shall wear Type I, II or III United States Coast Guard approved personal flotation device.
- (c) Personal watercraft shall not be operated at any time during the hours between one-half hour after sunset and one-half hour before sunrise.
- (d) Every person operating a personal watercraft equipped by the manufacturer with a lanyard type engine cut-off shall attach the lanyard to his or her wrist, clothing or personal flotation device as appropriate for the specific craft.

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.

VUPWR 2.6 states:

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. (Emphasis added.)

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The Petition filed by the Association asks the Board to adopt a rule prohibiting the use on Lake Willoughby of “personal watercraft (jet skis) and any other Class A vessel that uses an inboard engine powering a water jet pump as its primary source of motive power.” This rule calls for a ban not only on the vessels defined in 23 V.S.A. § 3302(8), but also other jet pump-powered Class A vessels in which a person or persons sit, stand, or kneel *inside* the vessel. This request has been made, because the definition of “personal watercraft,” which was added to 23 V.S.A. § 3302 in 1989, did not contemplate advances in technology that would allow for larger and more powerful jet pump powered watercraft. Act No. 65. § 1 (1989). Nevertheless, the Board has adopted, without previous objection by the Legislative Committee on Administrative Rules, rules which have specifically prohibited such vessels. See Caspian Lake, Town of Greensboro, Rule (c); In re: Petition to prohibit the use of personal watercraft and similar vessels on Caspian Lake in the Town of Greensboro, Vermont, Docket No. UPW-01-01, Decision (Oct. 10, 2001).

The Board has carefully weighed the oral and written comments both in favor of and opposed to the rule proposed by the Association and supported by the Town of Westmore Selectmen. It has concluded that a ban on personal watercraft and other jet pump-powered Class A vessels is warranted by the record on the basis: (1) that the use of these vessels is not a “normal use” of Lake Willoughby; (2) the operation of these vessels has created and, indeed, increased conflicts with “normal uses” of the lake; and (3) voluntary measures identified by the Board in 1991 to address public safety hazards posed by personal watercraft have proven inadequate or unworkable.

With regard to item (2), the Board has found that the use of PWCs on Lake Willoughby threatens the safety of swimmers, scuba divers, paddlers, and other recreational users of the lake, not only at North Beach but in other areas of the lake. The number of complaints made by members of the public concerning alleged violations of state boating laws by PWC operators, even in the absence of corroborative State Police statistics, is sufficient to convince the Board that enforcement of state boating regulations is a serious continuing problem at Lake Willoughby.⁷ While increasing efforts to educate the public, including PWC operators, about

⁷ Some of the boating laws governing the operations of vessels that may have been violated by PWC operators are: 23 V.S.A. § 3311(a) (prohibition against careless and negligent operation of a vessel); 23 V.S.A. § 3311(b) (prohibition against the operation of a vessel while “under the influence of intoxicating liquor, narcotic drugs or barbiturate”); 23 V.S.A. § 3311(c)(1) (prohibition against operation of a vessel “within 200 feet of the shoreline, a person in the water, a canoe, rowboat or other vessel, an anchored or moored vessel containing any person, or anchorages or docks, except at a speed of less than five miles per hour which does not create a wake”); 23 V.S.A. § 3311(c)(2) (prohibition of a motorized vessel, except a police

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state boating laws is necessary,⁸ and any efforts to date by the Association and others to provide such instruction is laudable, it is apparent that without effective and consistent enforcement of state boating laws at Lake Willoughby, the safety issues related to the operation of PWCs have become worse since 1991 rather than better. Given the Board's determination that PWCs do not constitute a "normal use" of the lake, the Board has concluded that there is "no least restrictive approach practicable" that would allow the continued operation of PWCs on Lake Willoughby where the safety of the public to pursue "normal uses" of the lake is compromised.

Additionally, the Board concludes that "noise pollution" is a bonafide issue at Lake Willoughby, given both the configuration of the lake and surrounding mountains and the adjacent land uses. With 300 camps and residences in the immediate vicinity of the lake, two public beaches, and a number of tourist facilities, the Town of Westmore has become a mecca for recreational users seeking water-based recreational opportunities in a quiet and scenic setting. While under VUPWR 2.7, the Board is charged with managing use conflicts in "the least restrictive approach practicable that adequately addresses the conflicts," the Board concludes that simply regulating the time, place, and manner of use of PWCs on Lake Willoughby would not protect recognized "normal uses" of the lake, including the public's right to "the peaceful enjoyment of the lake's aesthetic value." Petition of 10 Freemen, Decision, Finding 2.

Accordingly, the Board adopts as its final proposed rule the rule proposed by the Association and supported by the Town of Westmore, considering the safety of the public and the best interests of both current and future generations of the state. The final proposed rule shall read:

1. The use of personal watercraft (jet skis) and any other Class A vessel that uses an inboard engine powering a water jet pump as its primary source of motive power is prohibited.

or emergency vessel, "within 200 feet of a divers-down flag"); and 23 V.S.A. § 3312a (regulations governing operations of personal watercraft.) Additionally, VUPWR 3.2(b) requires that vessels powered by motor, including PWCs, shall "not be operated in such a manner that either the hull of the vessel or its underwater exhaust outlet completely leaves the water as a result of crossing or jumping the wake of any vessel, including its own wake, or for any other reason."

⁸ 23 V.S.A. § 3305b(a) requires that "A person born after January 1, 1974 shall not operate a motorboat of the public waters of this state without first obtaining a certificate of boating education." Subsection (k) requires that out-of-state operators obtain out-of-state boating certificates as evidence of some type of training. Without continuing education and enforcement, however, it is apparent that state boating laws continue to be ignored by PWC operators at Lake Willoughby.

IV. Responsiveness Summary

In reaching its decision the Board rejects the following substantive arguments raised in the petition or addressed in oral and written public comments.

PWCs are primarily responsible for the spread of Eurasian milfoil at Lake Willoughby

The Association cited in the petition concerns about the role of PWCs in the spread of Eurasian milfoil at Lake Willoughby. At the public hearing and in written comments, some members of the public also singled out PWCs for the dispersion of this plant.

While the Board appreciates the effort and expense undertaken by the Town of Westmore to eradicate Eurasian milfoil in Lake Willoughby, the record is inconclusive that PWCs are any more responsible for the spread of this aquatic nuisance than other vessels plying the lake. Given that ANR, the agency responsible for assisting towns with the control and eradication of this plant, has not offered the Board with any evidence that the operation of PWCs is a principle cause of the spread of Eurasian milfoil in Lake Willoughby, the Board is unprepared to base its decision to prohibit the use of these vessels on such a finding.

PWCs harass loons and other waterfowl on Lake Willoughby, thereby making the lake inhospitable for future, potential nesting sites.

Both the Association and persons who testified at the public hearing or offered written comments expressed concern about the impact of PWCs on wildlife, particularly loons and other waterfowl.

The Board does not condone the harassment of loons or waterfowl by *any* watercraft operators, and so it is particularly distressing to learn that PWCs may have been used to chase or otherwise disturb these birds. The statements of ANR staff suggest, however, that the operation of PWCs is not the likely cause of loons and other waterfowl failing to establish nests at Lake Willoughby. Rather, other factors are at work, such as the lack of adequate wetland habitat.

The operation of PWCs on Lake Willoughby is resulting in the death of significant numbers of crayfish young.

At least one member of the public based her support of the petition on the claim that the operation PWCs was resulting in mass deaths of crayfish "larvae."

The Board received a similar comment in November 1991 and found at that time that: "There is no credible, scientifically based evidence to indicate that the use of personal watercraft has an adverse impact on crayfish populations." Petition of 10 Freeman, Decision, Finding 6. The Board has considered the statements of ANR professionals in wildlife management and it concludes that there may be any number of explanations for the appearance of dead invertebrates on Lake Willoughby. There is no credible, scientifically-based evidence that PWCs are responsible for this phenomenon or that they are having an adverse impact on the lake's crayfish population.

The operation of PWCs on Lake Willoughby is resulting in significant water pollution

The Board received testimony and written comments about the contribution of PWCs to water quality degradation through the discharge of petroleum products.

The Board agrees that older model PWCs, like many motorboats operated by two-stroke engines, contribute significantly to the pollution of lakes in Vermont and elsewhere. The record, however, does not demonstrate that the operation of PWCs of Lake Willoughby poses a particularly significant threat of pollution. Given the fact that PWCs do not have a history of being used on Lake Willoughby on a regular, frequent, and consistent basis, and also given advances in PWC technology, the Board is not persuaded that it should base its final proposed rule to prohibit these vessels on water quality considerations.

More enforcement of existing laws is needed rather than a ban on PWCs

A number of persons opposing the proposed rule suggested that the use conflict problems at Lake Willoughby could be resolved through better enforcement of existing laws.

The Board agrees that better and more consistent enforcement of state boating laws at Lake Willoughby could resolve many use conflicts, not just those between PWCs and the "normal uses" of the lake. However, as the Board has discussed at length above, the voluntary measures suggested by the Board in November 1991 have not resulted in more enforcement by State Police. On the contrary, the record demonstrates that the public has given up calling B Troop in Derby and Town officials have explored (without success to date) the possibility of using municipal resources to police the lake. While state law seems to permit constables and other local law enforcement officers to enforce boating laws, the extent of municipal authority

and financial resources to establish and manage a local “lake” police program is in question.⁹ Therefore, it is unrealistic to expect the Town of Westmore to solve the enforcement issues at Lake Willoughby, including use conflicts between PWCs and other “normal uses.”

Mandate training for new licensed PWC operators instead of banning PWCs.

Several persons opposed to the proposed rule recommended that new PWC licensed operators be required to receive appropriate training in state boating laws.

Vermont law currently requires that a person born after January 1, 1974, “shall not operate a motorboat on public waters of this state without first obtaining a certificate of boating education.” 23 V.S.A. § 3305b(a). Since PWCs are operated principally, although not exclusively, by young people subject to this provision, one would expect better compliance with state boating laws. However, as the record in this proceeding amply suggests, education in “good boater etiquette” is having little effect on the conduct of PWC operators. Therefore, until such time as there is better enforcement of state boating laws coupled with boater education, the Board is not convinced that mandatory PWC training will result in a reduction in use conflicts on Lake Willoughby.

Motorboats go at high speeds and make just as much wake as PWCs

The Board heard this and similar arguments from persons opposed to the proposed rule.

State law currently prohibits “wake jumping” by all motorboats. VUPWR 3.2(b) states that vessels powered by motor, including PWCs, shall “not be operated in such a manner that either the hull of the vessel or its underwater exhaust outlet completely leaves the water as a result of crossing or jumping the wake of any vessel, including its own wake, or for any other reason.” Therefore, even if conventional motorboats can “wake jump,” the law requires that their operators not do so.

⁹ The statutory provisions that are applicable to the question of local enforcement authority are 23 V.S.A. §§ 4(11), 3302(2), and 3318(c).

“Local” PWC operators are not the problem; it’s the folks from elsewhere

The Board heard this comment from several persons, both in favor and in opposition to the proposed rule. The suggestion was that people who own property on Lake Willoughby are more responsible PWC operators and therefore a ban on PWCs should not be imposed, at least on these persons.

The Board has rejected in the past the adoption of UPW regulations that impose different regulatory requirements on persons who are “local” versus persons who are from out-of-state or outside the municipality where the water body in question is located. Such regulations are discriminatory and unenforceable. See, e.g., In re: Petition to adopt rules regulating the use of Chittenden Reservoir, Town of Chittenden, Docket No. UPW-02-02, Decision (Aug. 30, 2002) (Board declined to exempt from prohibition on waterskiing those persons who owned lakeshore property.)

A ban on PWCs on Lake Willoughby will create economic hardship for persons who already own and operate these vessels on the lake

The Interagency Committee on Administrative Rules asked the Board to amend its cover documents for this rulemaking, including its economic impact statement, to include persons owning PWCs and retailers and manufacturers of such watercraft as among the people and enterprises that might be affected by the Lake Willoughby proposed rule.

The Board received no testimony or written comment regarding any adverse economic impact upon the above classes of persons or entities.

A ban on PWCs on Lake Willoughby will force PWC traffic onto other, smaller lakes in the region.

The Board heard this comment from ANR staff and from several members of the public, including some owning camps on other Northeast Kingdom area lakes.

This is a legitimate concern. There is no statute that establishes either a uniform jurisdictional threshold for prohibiting the use of PWCs or statutory criteria, specific to PWCs, to help the Board make determinations when such prohibitions are appropriate. Given the lack of Legislative leadership in this area, the Board in 1994 adopted comprehensive revisions to the VUPWR that, among other things, prohibited personal watercraft effective May 1, 1997, on lakes, ponds and reservoirs that have a surface area less than 300 acres or which had other restrictions that effectively made the use of PWC impossible. VUPWR 3.3(a). Since 1994, the

**In re: Petition of Westmore Association, Inc., Lake Willoughby, Town of Westmore,
VT WRB Docket No. UPW-04-01 (VT Proposed Rule 04P027)
Decision (Issued November 19, 2004)
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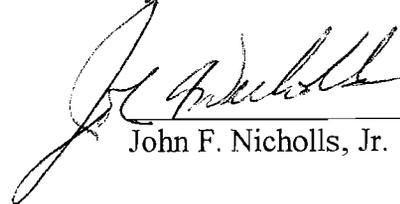
Board has received an increasing number of petitions seeking bans on the operation of personal watercraft on lakes with surface areas greater than 300 acres. The Board acknowledges that a petition-by-petition approach to regulating PWCs on Vermont lakes has its limitations; however, in the absence of a legislative directive as to how best to manage state waters so as to maintain their "normal uses," the Board has little other recourse.

On February 1, 2005, jurisdiction over Use of Public Waters rulemakings will have shifted from the Water Resources Board to the Water Panel of the newly created Natural Resources Board. 2003, Act 115 (H.175) (Adj. Sess), eff. Jan. 31, 2005. The Board sincerely hopes that the appropriate committees of the Legislature and the Water Panel will join in a productive discussion about how best to address regulation of the use of PWCs in Vermont.

In conclusion, the Board believes that it is in the best interest of current and future generations of Vermonters to eliminate the operation of PWCs on Lake Willoughby in order to preserve and promote the traditional and "normal uses" of that lake: namely, motorboating, swimming, sailing, sailboarding, rowing, paddling, fishing, waterskiing, scuba diving, wildlife observation, and the peaceful enjoyment of the lake's aesthetic values. The Board believes that the adoption of the rule proposed by the Association, and supported by the Selectboard of the Town of Westmore, furthers important state water management goals set forth in the VUPWR and state statute.

Dated at Montpelier, Vermont, this 19th day of November, 2004.

Water Resources Board
by its Chair



John F. Nicholls, Jr.

Board Members Concurring:

Lawrence H. Bruce

Joan Nagy

John D. Roberts

Board Member Dissenting, Mike Hebert. I decline to join the other members of the Water Resources Board in offering a final proposed rule prohibiting on Lake Willoughby the use of personal watercraft and other Class A vessels powered by jet pumps. I have several reasons for

doing so.

First, I question how such a ban fits within the Board's statutory duty "to manage the public waters of this state so that various uses may be enjoyed in a reasonable manner, in the best interest of all the citizens of this state," even taking into consideration the fact that the Board is required to "provide for all normal uses." 10 V.S.A. § 1424(c). I understand that the term "normal use" is defined in VUPWR 5.2, as being "[a]ny lawful use of any specific body of public water that has occurred on a regular, frequent and consistent basis prior to January 1, 1993."

In November 1991, the Board found that personal watercraft had been present on Lake Willoughby "for several years, but in limited numbers." Petition of 10 Freeman, Decision at 2, Finding 2. However, at that time, the general availability of personal watercraft was limited. Exactly how many PWCs need to operate on a lake, how many times a season, in order to meet the regular, frequent and consistent test? Given the newness of the technology and the relatively recent general availability of PWC, I question whether PWCs could qualify as a "normal use" on any lake in Vermont. This raises numerous questions about other recent advances in technology and recreational activities.

On the issue of public safety, I'm troubled that much of the public comment received by the Board focused on the personality or behavior of PWC operators. Clearly the problem is not with the vessels themselves, but with how they are used. In fact, one could argue that any vessel can be operated in a reckless and irresponsible manner, and yet we do not single out other types of vessels for prohibition the way the Board does PWCs. There are numerous boating laws on the books intended to protect public safety. The Board should recognize that many of the issues raised here are matters of enforcement and do not require the drastic measure of banning vessels. The Department of Public Safety needs to have the resources necessary to adequately enforce the laws of the State of Vermont to eliminate "bad behavior." Considering the limited state resources available, property owners organizations, such as the Westmore Association, may find it advantageous to investigate the use of constables or service contracts with the county sheriff for enforcement.

While noise pollution is a serious concern, it is not clear to me that other motorized watercraft on Lake Willoughby do not also contribute to this problem.

The fact is, personal watercraft are lawfully registered motorized vessels, just like any other registered motorized vehicles. We don't ban motorcycles from public highways just because we object to their noise, speeding, and the operator's "bad behavior." Why should we ban PWCs because some operators behave in an irresponsible or inconsiderate manner?

I'm also concerned with the NIMBY (not in my backyard) tone of petitions such as this

one. Many witnesses are quick to point to other water bodies that would certainly, at least in their opinion, be more appropriate for PWC use than their “special,” “pristine,” “spiritual ... place.” A ban on the use of PWCs on Lake Willoughby will only shift the use of these watercraft to other water bodies – lakes, ponds, and reservoirs that may or may not be better suited to PWC use than Lake Willoughby. This shift to some other person’s “special place” would prompt more people to petition the Board for bans on the use of PWCs. A domino effect could be expected to continue until these vessels are banned on all water bodies in this state.

If in fact the reasons to ban PWC use are legitimate and real – concerns about public safety, noise pollution, impact on wildlife, inappropriate behavior, whatever – then the Board should seek a statewide ban on the use of these vessels. I believe that such a ban would require legislative action and an opportunity for the public to fully comment on such a proposal before it is enacted into law.

I encourage this Board, as long as it is around, and the Water Panel of the new Natural Resources Board, to pick up the baton left by the decision makers in the first Lake Willoughby Decision. See Re: Petition of 10 Freeman, Decision at 1. Head to the Legislature for a frank and full discussion about what needs to be done to address boating law enforcement problems, how best to educate owner operators on the requirements of Vermont boating law, and what should be done on a statewide basis to address the so-called “personal watercraft problem.”