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July 30, 1971

Honorable Martin Johnson
Commissioner of Water Resources
Montpelier, Vermont

Re: Opinion No. 760

Dear Martin:

I am advised that the Water Resources Board is in receipt of a petition filed pursuant to 10 V.S.A. §1103(e) by ten or more freemen of the state requesting the board to hold a hearing and consider the adoption of rules under 10 V.S.A. §1103 which would prohibit water skiing on the North Springfield Flood Control Reservoir also known as Stoughton Pond. You have requested the advice of this office relative to the following questions in regard to this petition:

- (1) Does the Water Resources Board have authority to promulgate such a rule under §1103?
- (2) What procedures should be followed by the Water Resources Board in response to this petition?

Initial reference should be had to 10 V.S.A. §1103 which was enacted during the 1969 Adjourned Session of the Vermont General Assembly to provide as follows:

"(a) The board may establish rules to regulate the use of the public waters and public shorelands by:

- (1) Defining areas on public waters and public shorelines 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;

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(4) Regulating the time various uses may be conducted.

(b) 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 and lands are adaptable, the availability of fishing, boating and bathing facilities, the scenic beauty and recreational uses of the area.

(c) The board shall attempt to manage the public waters and public shorelands 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.

(d) If another agency has jurisdiction over the waters and lands otherwise controlled by this section, such other agency's rules shall apply, if inconsistent with the rules promulgated under this section. The board may not remove the restrictions set forth in sections 318 and 319 of Title 25.

(e) On a petition signed by not less than ten free-men or the legislative body of a municipality the board shall hold a hearing and consider the adoption of rules authorized or promulgated under this section."

Since water skiing is a use which can be made of waters and Section 1103 grants to the Water Resources Board the authority to define and regulate the uses which may be conducted on public waters, it is obvious that the Water Resources Board has authority to promulgate rules such as the petitions request if the waters in issue constitute "public waters" as defined in this statute. The definition of "public waters" is contained in 10 V.S.A. §1101(5) as follows:

"'Public waters' means navigable waters excepting those waters in private ponds and private preserves as set forth in sections 5204, 5205, 5206 and 5210 of this title."

The definition of "navigable water" is set forth in that same section as follows:

"'Navigable water' or 'navigable waters' mean Lake Champlain, Lake Memphremagog, the Connecticut River, all natural inland lakes within Vermont and all streams, ponds, flowages and other waters within the territorial limits of Vermont, including the Vermont portion of boundary waters, which are boatable under the laws of this state."

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It is my understanding that the North Springfield Flood Control Reservoir is not a natural body of water. However, I believe this body of water does fall within the meaning of the phrase "all streams, ponds, flowages and other waters within the territorial limits of Vermont." Since gramatically the word "natural" does not modify the last quoted phrase, conclude that the waters of this reservoir are "navigable I water" and "public waters" as defined in this statute.

Subsection (d) quoted above establishes the superiority of rules of other agencies which are inconsistent with rules of the Water Resources Board issued pursuant to §1103. In my opinion the word "agency" as used here is intended to mean agency of the State of Vermont. Since I am not aware of any inconsistent rules issued by any other agency of the State of Vermont having jurisdiction and authority in this regulatory area, it is my opinion that the Water Resources Board does have authority to promulgate such a rule pursuant to 10 V.S.A. §1103, at least, insofar as Vermont law is concerned.

It is my understanding that the waters in issue are a part of the Black River impounded by a federal flood control project. This being the case, it is necessary to refer to federal law to determine if and to what extent it may affect and modify the jurisdiction and authority of the Vermont Water Resources Board over these water. Reference should be had initially to 16 U.S.C. Section 460d which authorizes the Corps of Engineers of the Department of the Army to construct, maintain and operate public park and recreational facilities in such reservoir areas. In one pertinent part this federal statute provides as follows:

"The water areas of all such reservoirs shall be open to public use generally, without charge, for boating, swimming, bathing, fishing, and other recreational purposes, and ready access to and exit from such water areas along the shores of such reservoirs shall be maintained for general public use, when such use is determined by the secretary of the army not to be contrary to the public interest, all under such rules and regulations as the secretary of the army may deem necessary."

Rules have been issued by the Secretary of the Army pursuant to this section and are contained in 36 CFR Part 311 which specifically refers to the North Springfield Reservoir area as one of the bodies of water to which the rules apply. In Part 311.3(a) we find that the operation of boats for recreational use is permitted except in prohibited areas designated by the district engineer of the reservoir area and subject to regulations contained in this part. Further along in Part 311.3(c) we find the following language:

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"All boats permitted in the reservoir shall be equipped for safe operation and operated in a safe manner in accordance with instructions issued by the district engineer. These instructions may provide that the operation of speedboats and water skiing activities shall be confined to areas of water designated by the district engineer for such activities."

It is obvious from a reading of the above mentioned federal statute and regulations that the federal government also has jurisdiction and authority to regulate water use on this body of water.

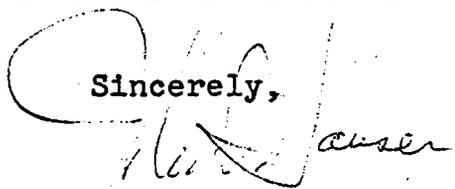
The existence of authority to regulate use of this water body in both the federal and state government raises the possibility that the federal officials may claim exclusive jurisdiction over this pond under the doctrine of federal pre-emption. In recent discussions with attorneys in the office of the district engineer, however, the federal authorities appear willing and anxious to resolve the issues raised by the petition on an amicable basis without having to face and decide the pre-emption question. I concur wholeheartedly with this attitude inasmuch as the possibility of conflicting exercise of regulatory power by federal and state agencies is at this point only a matter of conjecture. However, insofar as it is necessary for the purposes of this opinion, I believe that a court faced with the pre-emption issue might well conclude that there is not federal pre-emption of this regulatory area under the guidelines set forth in Florida Lime and Avocado Growers, Inc. v. Paul, 373 US 132 (1963). Consequently, I recommend that the State of Vermont approach this matter in the posture that there is concurrent state and federal jurisdiction to regulate the use of these waters.

In view of the above, I suggest that the Water Resources Board contact the district engineer of the U. S. Army Corps of Engineers for the purpose of arranging for a joint hearing to consider the adoption of rules regulating the use of this water body. Obviously, the participation of the Vermont Water Resources Board in such a hearing would be pursuant to and in compliance with 10 V.S.A. §1103(e) and should be in accordance with the procedural rules generally followed by the board in rule making proceedings.

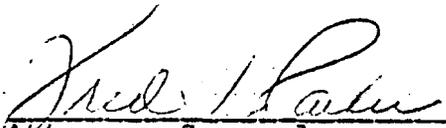
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I hope and trust that this opinion answers the specific questions raised in your inquiry. Please feel free to call upon me if I can be of further assistance in this regard.

Sincerely,


JOHN D. HANSEN
Assistant Attorney General

APPROVED BY:


Attorney General

JDH:ee

cc: Robert Williams, Secretary, Environmental Conservation
Agency
Ray McCullough, Army Corps of Engineers, Waltham, Mass.
William Moeser, Esq., Springfield, Vermont