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DATE: August 25, 1994

TO: Legislative Committee on Administrative Rules

FROM: William Boyd Davies, Chair

William Boyd Davies
for WRB

RE: Use of Public Waters Rules - Responsiveness Summary (3 V.S.A. § 841(b))

1. Rulemaking under 10 V.S.A. §1424 - General

The Vermont Water Resources Board (Board) was given the authority by the Legislature to adopt rules regulating the use of public waters under 10 V.S.A. §1424 which is entitled "Use of Public Waters" (see Attachment A) in 1969. In the past 25 years the Board has considered 80 rulings under this authority. Occasionally, these rulings have been by the Board's own initiative, but more often they have been in response to petitions filed by the legislative body of a municipality or by Vermont citizens. As a result of these 80 proceedings, the Board has adopted rules on 48 occasions, although often adopting less restrictive rules than initially requested. The Board has not adopted any rules in response to 25 of the petitions.

In recent years the number of petitions filed with the Board has increased dramatically. In the past ten years alone 46 petitions (nearly 58% of the total over 25 years) have been filed ; a record seven petitions were filed in the past year alone. This trend reflects the increased demand being placed on Vermont's public waters for recreational and other uses as a result of growth in population, tourism and in the number and intrusiveness of recreational uses. As a result of this increased recreational pressure, conflicts between uses, some of which have been unaddressed for a long period of time, have been exacerbated. This problem is also manifested by an increasing militancy in the rules being requested by petition.

In addition to exacerbating recreational conflicts, the increased human usage of Vermont's public waters has potential ramifications on natural resource values, including water quality and wildlife habitat, that make an important contribution to Vermont's quality of life. More people, more recreational uses, more recreational user groups, more demand generally are in a sense "competing" for a finite public

resource. The proposed Use of Public Water Rules (UPW Rules) are an effort to establish the framework for a coherent management policy within which conflicts that develop can be addressed in the best interests of all Vermonters.

In the past, it has been left to those concerned with a particular body of water to petition the Board when they felt a conflict (actual or potential) needed to be addressed by regulation. In the petitions filed over the past 25 years, the Board has repeatedly been asked to adopt rules that either protect the status quo in terms of motorboat use or that in other ways seek the allocation of a finite public resource. The Board believes that such decisions need to be addressed from a regional or statewide perspective guided by a well articulated policy.

In some cases petitions were prompted by specific incidents in which nontraditional recreational uses were suddenly introduced on a particular lake. In other cases, petitions were intended to prevent such incidents. In either case, the burden to act was on those who wanted to preserve the status quo. That is, the pattern and mix of recreational and other uses that had evolved on specific lakes over a long period of time and to which the users of that lake had become accustomed.

While many recreational conflict and resource management issues are best addressed on a lake-by-lake basis, a scheme preserved by the proposed UPW Rules, this "squeaky wheel" approach alone is not an effective or responsible means to the management of a finite public resource. For one thing such a passive approach to the management of a public resource has the potential to ignore or undervalue resource protection and recreational conflicts that are systemic. Such conflicts may not reach the level of intensity on a particular lake until long after the opportunity to manage it in the least restrictive manner has become impractical. In other cases, there may be no readily available advocate to file a petition. Many of these issues, particularly those involving impacts of certain human uses on wildlife and natural resource values, need to be addressed in a comprehensive manner to be effective. This comprehensive approach to management of public waters is clearly contemplated in the statutory policy (10 V.S.A. §1421 and §1424) that provides guidance to the Board's rulemaking.

In recent years it has become increasingly apparent to the Board that a comprehensive policy framework is needed to insure that the issues raised in individual petitions are dealt with in a comprehensive and integrated manner. To do otherwise risks taking actions that create a confusing patchwork of inconsistent policy decisions.

Accordingly, the Board has been working over the past several years to develop what is now its "final proposal" of the Use of Public Waters Rules. In this effort the Board has had the benefit of valuable assistance and constructive comment from the Agency of Natural

Resources, the Department of Public Safety, local and regional officials, lake associations, sportsman's and recreational user groups, environmental groups, and a large number of Vermont citizens.

2. Proposed Use of Public Water Rules

a. Development of proposed rules

Proposed UPW Rules have been under active development since the late 1980's as a result of the Board's involvement with 1988 and 1989 legislative summer study committees on Vermont boating law. One of the results of those legislative study committees was the amendment of 10 V.S.A. § 1423 (c) to encourage a more proactive effort in managing Vermont's lakes. That legislation resulted in the development of both the Vermont Lakes and Ponds Management Study (1990) by the Recreation Division of the Department of Forests, Parks and Recreation as well as the proposed Use of Public Waters Rules.

The concepts embodied in the proposed UPW Rules have been under continuous public discussion since July of 1991. Since that time the Board has offered three successive drafts of these rules for initially informal and later formal public comment. Copies of these drafts have been sent to an ever expanding mailing list of officials, organizations and individuals known to have an interest in the management of Vermont's public waters including affected municipalities, regional planning commissions, state agencies, lake associations, sportsman's and recreational user groups, environmental groups and interested members of the public. The Board has received and considered literally hundreds of written and oral comments. During this period, public informational meetings and public hearings on various drafts of the proposed UPW Rules have been held at a total of 32 locations statewide. A chronology of the development of the proposed UPW Rules is enclosed as Attachment B.

b. Summary of changes between the initial proposal and final proposal

In response to public comment the Board has reduced the scope of this rulemaking in a number of substantive ways. The initial proposal of specific day and night speed limits for all high speed lakes has been withdrawn.

While the Board feels that the concept of day and night speed limits on at least some Vermont lakes may have merit, it was convinced by the testimony received in this rulemaking that this is an area in which there is no immediate need to regulate. There were several significant unresolved issues associated with the idea of day and night speed limits that will need to be addressed before the Board revisits this issue on a statewide basis including: (1) more discussion about an appropriate maximum nighttime speed limit on Vermont's high speed lakes, and (2) whether a "one size fits all" 45 mph speed limit is appropriate

on all high speed lakes. In the final analysis the Board was not satisfied that the current lack of numeric speed limits on most high speed lakes is a problem of sufficient magnitude to warrant the adoption of rules in this area. For similar reasons, the Board also decided to withdraw the use of the term "no disturbing wake."

The Board has also modified its proposed rules pertaining to seaplanes to be less restrictive, as discussed in section 3(h) (page 18) below.

Finally on the basis of public comment regarding what uses of specific lakes are "normal uses" the Board has modified the proposed rules for specific uses on specific lakes as compiled in Appendix A. These changes are shown by footnote #12. For example on page A-8 of Appendix A the final proposed rule now allows the use of internal combustion motors on Lily Pond in Poultney and now prohibits their use on Levi Pond in Groton. These changes reflect existing uses of these waters.

c. Summary of final proposed rules

The proposed UPW Rules are intended to serve as a policy framework for avoiding where possible, and resolving when necessary, conflicts in the use of Vermont's public waters. The final proposed rules seek to accomplish these objectives in a manner that enhances the natural resource and recreational values of Vermont's public waters and makes them available to the broadest spectrum of uses and user groups in a manner that is consistent with the guidance provided by 10 V.S.A. § 1424 (Attachment A) and that is in the "best interests of all citizens of the state." Section 3 of the proposed rules has been the focal point of the vast majority of comment.

Section 1 identifies these rules as providing the framework for aquatic resources management under 10 V.S.A. § 1424. It includes a severability clause.

Section 2 outlines the Board's interpretation of the statutory guidance in 10 V.S.A. § 1424 to be used in considering future petitions. Much of this interpretation has been "distilled" from Board decisions over the past 25 years and has been proposed as part of these rules to provide an opportunity for public review and comment.

Section 3 indicates the rules the Board intends to adopt for specific lakes. In general, these rules reflect the current uses of various waters and do not restrict normal or established uses, with the limited exception of the provision in Section 3.3 that potentially limits personal watercraft to high speed lakes larger than 300 acres (see section 3(g) page 11 below).

The rules proposed in Section 3 apply to all 283 lakes, ponds and reservoirs (lakes) that are located entirely within Vermont. The affected lakes are listed alphabetically in Appendix A of the proposed Rules. The proposed UPW Rules do not apply to 11 lakes that are only partially located within Vermont, including Lake Champlain, Lake Memphremagog and the Connecticut River reservoirs.

Because these rules affect a large number of very small bodies of waters, the 283 affected lakes represent, by number, over 95% of all Vermont lakes. However the affected lakes represent, by surface area, less than 20% of the acreage of all Vermont lakes.

The Board has enclosed a statistical summary of various aspects of Section 3 of the proposed UPW Rules for informational purposes (see Attachment C). It should be noted that regardless of whether the 11 lakes not affected by the proposed rules are considered, virtually all of Vermont's larger lakes and therefore most of the surface area of all Vermont lakes will continue to be available to high speed motorized boating as well as to personal watercraft.

Section 4 defines many of the terms used in these rules. Where a statutory definition has been used, the appropriate citation is included at the end of the definition. Perhaps the definition most important to the understanding of the proposed UPW rules is the term "normal use". This term is used in 10 V.S.A. § 1424(c) which provides in part that "To the extent possible, the board shall for all normal uses." For purposes of the proposed UPW Rules, "normal use" means:

any lawful use of any specific body of
public water that has occurred on a
regular, frequent and consistent basis
prior to Jan. 1, 1993.

If the proposed UPW rules are adopted, those seeking to introduce new uses to public waters that conflict with the normal uses of these waters would need to petition for a change in public policy regarding the use of a particular body of water. This would allow for public discussion as to whether or not such a change in use is in the public interest. As noted above, the burden to petition would shift to those seeking to change the status quo.

These rules will make Vermont's management of its public waters more uniform and more predictable. The uses appropriate to each body of water will be easier to understand, and therefore, when necessary, easier to enforce. They will reduce the number of petitions seeking to preserve the status quo, but will continue to allow lake-specific issues to be dealt with on a case-by-case basis.

c. Deadline for public comment

When the UPW Rules were proposed, the deadline for filing written comments was initially March 21, 1994. The Board subsequently extended the deadline for filing written comments to March 31, 1994.

For purposes of this filing with LCAR and for purposes of distinguishing the "record" for this rulemaking, the Board has only considered those comments regarding its proposed UPW Rules that were either offered at public hearings or which were mailed by the deadline of March 31, 1994. The board feels this practice is necessary to be fair to those who filed timely comments and to preserve the integrity of both the record of the rulemaking process and the comment deadlines established as part of that process.

Written comments received after the deadline have been retained in a file that will be reviewed by the Board prior to the commencement of any similar rulemaking of this nature.

The Board has enclosed copies of all written comments received during the comment period. These written comments encompass the range of comments received orally, at public hearings.

In deciding on its final proposal, the Board did not overrule any substantial arguments or considerations pertaining to separate requirements for small businesses.

3. Reasons for the Board's Decision to Overrule Substantial Arguments and Considerations Raised for or Against the Original Proposal (3 V.S.A. §841(b))

a. The proposed UPW Rules constitute excessive regulation on the affected Vermont lakes.

The Board does not agree that the proposed UPW rules represent excessive regulation. The proposed rules have a very limited impact on existing recreational uses and indeed, as discussed below (Section 3(b) page 13 below), have been criticized for not being restrictive enough. The proposed rules seek to establish clearer and more specific ground rules for addressing conflicts, when and where they need to be addressed by regulation, and to place the burden of persuasion on those who seek to change the status quo with regard to normal or established recreational uses.

The rules proposed by the Board for the 283 affected lakes reflect their current recreational uses and current boating law regarding speed limits. In fact recreational uses on 31 of the larger affected lakes are not subject to any additional regulation as a result of the proposed rules. Moreover, roughly 80% of the lakes on which a 5 mph speed limit

is specified in the proposed rules, are already so limited by the existing law (23 VSA § 3311 (c)) prohibiting motorboats from exceeding 5 mph within 200 feet of any shoreline.

The specific rules proposed in Section 3 of the UPW rules have a very limited impact on established or normal recreational uses. With the limited exception of the provisions of Section 3.3 pertaining to personal watercraft (PWC), discussed in section 3(g) (see page 11 below), the proposed UPW Rules do not restrict any normal recreational uses on any Vermont lake.

The proposed Rules would not restrict the continuation of high speed motorboat use on any of the 75 lakes where such boating has become a normal use. The proposed Rules would not restrict the continued use of internal combustion motors at low speeds on any of the 64 lakes where such boating has become a "normal use." Similarly on the 145, mostly smaller, lakes on which the use of internal combustion motors has not become a normal use, the proposed rules would not restrict the continued use of electric motors.

What these rules do accomplish is to clarify which uses are appropriate on specific lakes and insure that those normal uses will not be preempted, without careful public consideration.

On many of the smaller lakes where a 5 m.p.h. speed limit is provided for, the proposed rules are simply reinforcing and clarifying existing state law (23 V.S.A. § 3311(c)) which prohibits motorboats from operating at speeds in excess of 5 mph within two hundred feet of the shoreline. On many smaller lakes that requirement effectively eliminates motorboating at speeds in excess of 5 m.p.h. Thus to a significant extent the proposed UPW rules simply restate existing law in a way that is easier to understand (and, if needed, enforced). While the proposed UPW Rules bring a significant degree of clarity and consistency in describing what uses are appropriate on particular lakes, they do not restrict lawful recreational uses that have evolved over a long period of time.

In every situation, the effect of the proposed UPW Rules on any body of water can be changed by petition. The basis for successfully petitioning the Board to change the effect of the proposed UPW Rules is clearly articulated in Section 2. The procedures articulated in Section 2 are equally available to those arguing for more restrictive as well as for less restrictive approaches on any particular body of water.

- b. The proposed rules are not restrictive enough and should be based on those uses that were normal uses in 1969 when the enabling legislation for UPW rulemaking was first enacted.**

The Board does not agree that rules proposed in 1994 should be based on the predominate uses of specific lakes in 1969. Quite aside from the

practical problem of determining what uses were normal (i.e. occurred on a regular, frequent and consistent basis) 25 years ago, the Board feels that such an approach would be overly restrictive and not consistent with the legislative guidance in 10 V.S.A. § 1424(b), which provides that in establishing rules the Board should consider "the predominant use of waters prior to regulation" (emphasis added).

The proposed UPW Rules recognize the principle that if a recreational use has become a normal use on a particular body of water it will not be eliminated by regulation unless a compelling public policy reason is clearly demonstrated. The burden of persuasion in such circumstances is on the petitioners (see proposed Rules §§ 2.2, 2.6, 2.7 and 2.10). The Board believes that this approach, which it has followed for the past 25 years on a petition-by-petition basis, is fully consistent with the legislative intent as expressed in 10 V.S.A. § 1424 (c):

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.

It may be that in particular cases certain normal or established uses on specific bodies of water are inappropriate. However, such determinations must be made on a case-by-case basis guided by the policies articulated in Section 2.

- c. All recreational users should be treated alike. The proposed UPW Rules should allow all uses on all lakes. The proposed UPW Rules are unfair to motorboat uses. The proposed UPW Rules are unfair to nonmotorboat uses.**

The Board has rejected all of these arguments in its final proposal. The proposed UPW rules have been characterized by some as "a bill of rights for motorboaters" and by others as "discrimination against motorboaters." The Board believes these characterizations are inaccurate and reflect the extreme views of those who seek to polarize discussion of this issue.

The Board agrees that all recreational users should be treated fairly and equitably. However, not all recreational uses are alike in their impact on the public resource they use or on others seeking to use the same resource in a different way. The Board agrees that Vermont's public waters as a whole need to be managed to provide for multiple use and to accommodate, to the extent possible, all normal uses. However the Board does not believe that this means all recreational uses can be accommodated on every body of water. Indeed if this were allowed some normal uses would be eliminated or

substantially diminished. Not every lake can be managed to be all things to all people.

Clearly, some recreational uses have the potential at some point to diminish and even preclude other uses. That does not mean that Vermont's 283 lakes need to be allocated exclusively to any particular recreational use. However, it may mean that some lakes may need to be regulated to insure that all uses are reasonably available. The proposed UPW Rules are intended to provide a framework for making such decisions when and where necessary, so that all normal uses can be enjoyed to the greatest extent possible with the minimum amount of conflict.

For purposes of these rules, the Board has discounted arguments that the interests of certain user groups should be given special consideration or treatment based on their payment (or nonpayment) of fees and taxes. The payment of local property taxes by shoreland property owners or of registration fees by motorboat owners does not elevate their interests over those of other Vermonter's in deciding how to manage Vermont's public waters. As a practical matter, all Vermont citizens have invested through both state and federal taxes and fees of all kinds in this public resource.

If as some have argued, these taxes or fees should be more equitably assessed, that is an issue to be addressed by the Legislature by statute and not by this Board through rulemaking.

d. The proposed UPW Rules are in conflict with federal requirements related to the funding of access areas.

The ANR and the Board, based on separate evaluations of this issue, have independently concluded that no such conflict exists or is likely to exist. In its written comments to the Board dated March 31, 1994 (comment #182), ANR commented:

The Agency has investigated the implications of proposed rules in regard to potential federal funding questions, i.e., the concern that certain public access areas on lakes where internal combustion engines would be prohibited by the proposed rules may have been constructed, and are being maintained, using federal funds partially derived from a marine gasoline tax. It has been determined that this situation is not common, and the current Board proposal does not have significant implications for the Agency in regard to federal funding of existing access areas.

In response to the Board's request that it comment further on this issue, ANR further indicated that the proposed UPW Rules did not "need to be modified due to federal funding concerns."

The Board's independent evaluation of this issue, which included the evaluation of 50 CFR Part 80, "Administrative Requirements, Federal Aid in Fish and Federal Aid in Wildlife Restoration Acts," also concluded that there is no conflict between the proposed UPW Rules and federal requirements related to the funding of access areas.

- e. The proposed UPW Rules will have significant adverse economic impacts due to their effect on tourism, property values and businesses dependent on the recreational use of public waters.**

The Board strongly disagrees with the argument that the proposed UPW Rules would have adverse economic impacts. Rather the Board believes quite strongly that the economic impact of these rules on Vermont generally and on tourism, property values, and businesses specifically, will be very positive. As discussed above, the proposed rules impose few restrictions on existing recreational uses. Therefore, to the extent that tourism, property values, or local businesses are dependent on established patterns of recreational uses on Vermont's public waters, they will be largely unaffected. Moreover, as noted in Attachment C, the proposed rules do not substantively reduce the amount of Vermont's waters available to any particularly recreational use. Finally the proposed rules preserve a reasonable distribution geographically of all recreational uses.

One of Vermont's most important and valuable economic assets is its physical environment and the associated quality of life opportunities. Vermont's public waters and the recreational and natural resource values they provide are an integral part of that economic asset for Vermont residents, landowners, business interests and tourists. By taking responsible steps now to manage these public waters to preserve an appropriate quality and mix of recreational uses and natural resource values, Vermont will be protecting and enhancing an important part of its economic base. Accordingly, the Board believes that the proposed UPW Rules will have a beneficial economic impact generally and will benefit tourism, property values, local businesses dependent on recreational uses of public waters, as well as Vermonters.

- f. The proposed UPW Rules will be unenforceable, or they will burden already overworked enforcement capabilities.**

The Board believes that the proposed UPW Rules will make Vermont boating law easier to enforce in several ways. First, the rules will standardize, to the extent possible, existing Board rules adopted over the past 25 years. Secondly, on many lakes the proposed rules will make existing law restricting the operation of motorboats to 5 m.p.h. within 200 feet of the shoreline easier to understand and therefore enforce.

Because the 200 foot "rule" is often difficult for boaters to interpret in many settings, it is the most commonly cited violation of boating law. The proposed UPW Rules should help with this problem by making it clear which lakes due to their size or configuration are off limits to motorboats operating at speeds in excess of 5 mph.

Third, by focusing attention on the finiteness of Vermont's lakes and encouraging user groups to organize to represent their interests, the proposed rules have helped create the incentive to develop an organizational structure that will make future efforts in education, self-policing, and other nonregulatory approaches to managing Vermont's public waters more viable.

Finally, since the proposed rules largely reflect current practice, they will primarily serve an educational function for boaters who may not be familiar with local norms. Over time, the pattern of high speed, low speed and motor-free lakes which already exists, but which has not previously been formally articulated, will become better known. This in turn should reduce conflicts and enforcement demands based on the lack of such knowledge.

g. The proposed restrictions on personal watercraft are discriminatory, arbitrary, and excessive

Section 3.3 of the proposed UPW Rules limits personal watercraft (PWC) to those lakes on which high speed motorized boating is currently a normal use and that have a surface area of over 300 acres. This provision of the proposed UPW Rules does not take effect until the 1997 boating season, thus allowing more than two years for the filing of petitions seeking to modify this general rule on a case-by-case basis (see § 3.3(b)).

There is relatively little if any dispute that the use of PWC should be restricted to those lakes on which high speed motorboat uses are normal. What has been disputed by some is whether PWC should be restricted on any lakes where high speed motorboat use normally occurs and, if so, on what basis.

High speed boating is a normal use on 75 of the 283 lakes affected by the UPW Rules, as well as on all 11 boundary water lakes. Public comment in this rulemaking indicates that there is some dispute as to whether the use of PWC is in fact a normal use (i.e. has "occurred on a regular, frequent and consistent basis prior to 1993") on all 75 high speed lakes. However, for purposes of this responsiveness summary, the Board has assumed PWC is a normal use on all such lakes in analyzing the impact of the proposed UPW Rules on this recreational activity.

Attachment C summarizes the impact of the proposed UPW Rules on lakes of various sizes and on various recreational activities, including PWC. The proposed UPW Rules might ultimately prohibit PWC from 44 of

Vermont's smaller lakes where high speed uses are presumed for purposes of this rulemaking to be normal. These 44 lakes range in size from 75 to 300 acres and have a combined surface area of 6,300 acres.

Even under such "worse case" circumstances, the proposed UPW rules would still allow PWC on about 60% of the surface area of all 283 lakes subject to the UPW Rules. PWC would still be allowed on more than 80% of the surface area of Vermont's high speed lakes. When the 11 boundary water lakes not subject to the proposed UPW Rules are included, PWC will be allowed on 42 lakes which comprise over 90% of the surface area of all Vermont lakes.

On a national basis personal watercraft are the fastest growing type of vessel. Regrettably, Vermont's current method of boat registration does not allow a determination as to whether this national trend is being experienced to the same extent (or a lesser or greater extent) in Vermont. Nevertheless, it is clear that the number of PWC on Vermont's lakes has grown in recent years and will continue to grow in the future.

Accordingly, the Board feels that Vermont, like a growing number of other states and local jurisdictions, needs to establish a clear policy to guide the future development of this intrusive recreational activity. In that regard, Section 3.3 is a preventative measure, an effort to establish needed public policy before the recreational conflicts and resource impacts the rule seeks to address become acute. PWC have demonstrated the potential to adversely impact other recreational and shoreland uses as discussed below. Accordingly, the Board has proposed a relatively aggressive regulatory approach to be phased-in over a period of time, with provisions for case-by-case modifications for specific lakes.

In the course of the development of the proposed UPW rules over a period of several years, no issue has received more attention than PWC. In addition to the extensive public comment it has received on this topic, the Board evaluated how other jurisdictions in New England and throughout the county have addressed this issue.

One of the difficulties the Board faced in developing its proposed policy in this area was the fact that the extent to which PWC is a "normal use" on specific lakes is not clearly established in every case. This is because PWC, unlike other forms of high speed boating, is a relatively new use. The Board concluded that a large number of contentious proceedings to determine exactly where PWC was or was not a normal or established use would be unproductive. Accordingly the Board eventually decided to propose a bright line standard to be phased in over a period of time sufficient to allow consideration of petitions seeking exceptions to the general standard of 300 acres.

In deciding on its final proposal with regard to PWC the Board overruled the following substantial arguments against the original proposal:

- (1) PWC should not be regulated differently than other Class A or other motorized vessels.

The Board does not agree with the simplistic argument that when there are grounds for regulating one form of a general category of recreational activity, in this case motorized boating, all forms of that activity need to be regulated in exactly the same manner. While consistency of regulation is important and is acknowledged in § 2.6 of the proposed UPW Rules, so is the principle of not regulating any more than is necessary under the circumstances (see § 2.7 of the proposed rules).

Over the past 25 years, wherever the Board has determined that regulation is needed, it has often regulated specific forms of motorized boating differently based on their respective impacts on either the resource value of the waters or on other recreational uses. For example, the Board has often restricted certain types of motorboat use (e.g. prohibiting high speed motorboat use or the use of internal combustion motors) while continuing to allow other forms of motorized boating (e.g. continuing to allow low speed motorboat use or the use of electric motors).

PWC are clearly distinguishable from other types of motorized vessels, including other Class A watercraft, in ways that warrant a different regulatory approach. PWC are fundamentally different from other motorized vessels in their design, safety record, common method of operation, and impacts on other uses. Among the differences between PWC and conventional motorized vessels are: the unconventional manner in which passengers are accommodated, their greater maneuverability, their ability to operate in very shallow waters, the intrusiveness of the noise they create, and their tendency to operate in a confined location for extended periods of time.

The design of PWC distinguishes this type of vessel from other motorized vessels including other Class A vessels. This distinction is already recognized in Vermont law which differentiates between "personal watercraft" (defined in 23 V.S.A. § 3302(9)) and "motorboats" (defined in 23 V.S.A. § 3302(5)).

"Motorboat" means 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.

"Personal watercraft" means 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.

Thus it is clear that PWC are defined as a specialized type of motorboat that is both powered by a water jet pump and "... 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" (23 V.S.A. §3302 (8)).

In this regard, the Board notes that there seems to be a common misconception that all vessels powered by a water jet pump are by definition PWC. However existing state law, which the Board is following in the proposed UPW Rules, distinguishes PWC on the basis of both the use of the water jet pump and its design for the accommodation of passengers in a nonconventional manner.

Therefore vessels powered by water jet pump that accommodate passengers in a conventional manner do not fall under the existing, statutory definition of PWC and therefore are not affected by Section 3.3 of the proposed rules. The Board recognizes the practical difficulties that this existing statutory definition may present as the design of this type of vessel evolves. However the Board notes that as water jet pump powered vessels acquire the characteristics of conventional motorboats, associated changes in their design may discourage the type of operation that has prompted the need to regulate PWC differently from motorboats generally.

Class A vessels, are defined in 23 V.S.A. § 3304 are motorboats less than 16 feet in length. This designation is used solely for purposes of determining registration fees for various classes of motorboats. The Board does not believe that this means that PWC must in all other respects be regulated exactly like all other Class A vessels. Typically, Class A vessels are small, cartop fishing boats powered by electric or low horsepower internal combustion motors. Clearly, from a practical as well as a regulatory point of view, there is a huge difference between cartop fishing boats with small motors and PWC.

PWC are designed to encourage their operation in a manner that is not typical of motorboat use generally. PWC are, in a sense designed to be, the conceptual equivalent of an "aquatic all-terrain vehicle." Many PWC are capable of rapid changes in direction, making their route less predictable and therefore less safe for other vessels and swimmers. PWC are capable of operating in very shallow waters, including wetland areas that are not commonly accessible by motorized vessels. The noise

typically created by PWC, particularly when the water jet pump comes out of the water, causing the engine to operate at high speed, is an irritating whine. This type of noise can be highly intrusive to wildlife habitat and human recreational uses and shoreland owners, when operated for extended periods in a confined location by making repeated circuitous trips around one another or other vessels. This type of operation is rare in conventional motorboats.

The Board fully understands that not all PWC are in fact operated in the manner described above, and that many PWC operators are very conscientious about complying with Vermont boating law. The Board is not seeking to regulate for the prudent or imprudent operator of PWC, rather the Board is responding to the design and operational characteristics of this type of vessel. Moreover, the Board has extensive testimony indicating that the method of operation described above is in fact common on Vermont lakes, and that it results in real and serious impacts to other recreational uses, shoreland owners, and wildlife and resource values of Vermont's public waters.

The Vermont Legislature, the legislative bodies of a large number of other jurisdictions, and various federal agencies charged with the responsibility to manage public waters and/or natural resources apparently agree that PWC are different from other forms of motorized boating in ways that warrant different regulatory treatment.

Under Vermont law, in addition to being defined in 23 V.S.A. § 3309 as a unique type of motorboat based on differences in their design and operational characteristics, PWC are subject to a series of restrictions (23 V.S.A. § 3312) that are more severe than those imposed on other motorboats. These restrictions clearly recognize that PWC, as a category of vessel, are different from other types of motorboats, both in terms of their potential impacts on public safety and on other uses of Vermont's public waters.

For safety reasons, the operator of a PWC must be at least 16 years old. All other types of motorboats can be operated by a 12 year old, (or in some cases even younger children). An operator of a PWC must be actually wearing a personal floatation device. An operator of a conventional motorboat need only have a personal floatation device available for each person on the vessel. PWC are restricted to certain hours of operation, presumably due to concerns about safety and noise. Conventional motorboats are not limited as to hours of operation.

The Board's proposed UPW Rules are not unique among Vermont rules in addressing the impacts of PWC in a more restrictive manner than other forms of motorboating. The Vermont Department of Forests, Parks and Recreation, in its rules regulating state parks and other recreational areas (adopted December 14, 1993), provides in Rule 12.8 that:

Personal watercraft are prohibited from landing, taking off from, retrieving or exchanging operators and passengers at State Park facilities.

There is no similar prohibition for other forms of motorboat use at State Park facilities.

(2) The 300 acre provision of Section 3.3 of the proposed UPW Rules is arbitrary and overly restrictive.

The Board believes that its approach on PWC is reasonable and fair to all users of Vermont's public waters, including PWC users, shoreland property owners and other recreational users.

Although PWC are often operated in a responsible manner, their design and operational characteristics often result in their being operated in a manner that imposes increased safety risks on other recreational users. This increased risk is illustrated by the summary of boating accidents involving PWC, as reported by the U.S. Coast Guard shown in Attachment D.

According to U.S. Coast Guard figures, (see Attachment D) PWC constitute only about 1% of all vessels in the United States, but are involved in 25% of all boating accidents. The percentage of boating accidents in which PWC are involved is increasing. Vermont boating accident statistics are insufficient to draw any statistically valid conclusions. However, the Board sees no reason to assume that once PWC usage in Vermont is fully developed, the national experience would not be replicated here.

Over the 25 years that the Board has been adopting rules regulating the use of public waters, it has frequently addressed situations in which potentially intrusive uses have become established on lakes that are marginally capable of sustaining those uses without significantly diminishing other uses. Typically, what begins as an occasional or low frequency intrusive recreational use that is tolerable, over time expands to the point that it threatens to exclude or significantly diminish other uses. In such cases, the Board is confronted with a recreational use conflict (or a wildlife or resource value conflict) in which resolution is more difficult because the intrusive use has in some sense become vested.

In drafting the proposed UPW Rules, the Board has developed a number of "rules of thumb" for determining when, and on what basis, the more intrusive recreational uses may need to be regulated. In general, lake size and to a lesser extent lake configuration (as reflected in the number of contiguous acres outside the shoreland safety zone) have been the primary bases contained in the proposed UPW Rules (see, for example, §3.2 of the proposed rules).

Legislative Committee on Administrative Rules

August 25 , 1994

Page 17

Because there is a general correlation between the size of lakes and their capacity to accommodate more intrusive uses, the Board has used surface area in combination with other factors specified in § 3.3 as a basis for the regulation of PWC. Of particular concern to the Board is the impact of noise created by some of the common methods of PWC operation. The Board understands that many, perhaps most PWC comply with the minimum requirements of Vermont law regarding decibel limits (23 V.S.A. § 3309). Nevertheless, PWC operators and indeed the manufacturers of these vessels should be aware that commonly practiced methods of operation result in highly intrusive noise impacts to other users of the water and adjacent shoreland. On this basis, the proposed UPW Rules presume that certain lakes greater than 300 acres are appropriate for use by PWC and that lakes less than 300 acres are not.

For any specific lake, this presumption may be inappropriate and would need to be changed. Some lakes of less than 300 acres may be appropriate for use by PWC while some lakes greater than 300 areas may not be appropriate for PWC. For that reason, the proposed UPW Rules provide for the 300 acre presumption to be reconsidered on a case-by-case basis by petition in accordance with the provisions of Section 2.

The process for petitioning the Board is well established and is not overly burdensome. Section 2 of the proposed UPW Rules, which will govern the Board's consideration of future petitions, provides the opportunity to argue on the basis of clearly articulated policies that the operation of PWC should (or should not) be allowed on any particular body of water. If petitioners can show that PWC is a "normal use" on a lake less than 300 acres, Section 2.6 invites the argument that such a use should be preserved "to the greatest extent possible." Similarly, sections 2.7 and 2.9 provide a basis for arguing that PWC should be allowed on specific lakes.

Since the provisions of the proposed UPW Rules pertaining to PWC (Section 3.3) do not take effect until the 1997 boating season, the Board has provided more than two years for the filing and consideration of petitions seeking case-by-case adjustments to the 300 acre policy. Therefore, the 300 acre policy should be seen for what it is, a rule of thumb that serves as a point of departure for the consideration of this issue on a case-by-case basis when and where warranted.

(3) The 300 acre policy will concentrate PWC on a small number of lakes, thereby increasing conflicts.

To some extent, the capacity of Vermont's lakes to accommodate PWC, like any other use, is dependent on the extent to which that use impacts competing uses. As noted above, PWC are the fastest growing class of vessels nationwide. They are a relatively new use in Vermont that has not yet expanded to its full potential.

Therefore, in a relatively few years the number of PWC on Vermont's larger lakes will increase, whether or not the 300 acre policy is adopted. It may be true that the adoption of this policy will slightly accelerate the pace at which the impact on Vermont's larger lakes will be felt.

If, as some opponents of the regulation of PWC argue, the modest growth of PWC on Vermont's larger lakes as a result of the 300 acre policy does in fact result in significantly more conflict, that would seem to be evidence of the need to regulate this new and rapidly expanding use by directing it to lakes where its impacts will be less intrusive. That is exactly what the proposed UPW rules generally, and the 300 acre policy specifically, seek to do.

The Board believes that the need to further regulate PWC can be avoided, and the need for the current proposed restrictions on PWC can be reduced, if PWC users proceed with the noteworthy efforts at self-policing already begun by the Vermont Personal Watercraft Association (VPWA). The Board would welcome the opportunity to continue to work with this group of dedicated and responsible PWC enthusiasts. The VPWA's program of PWC user education, modeled on the success of the Vermont Association of Snowtravelers (VAST) in dealing with problems encountered during the formative years of the growth in snowmobiling, is a very positive development that should be encouraged.

In conclusion, the Board feels the proposed Section 3.3 is an effort to responsibly address both existing and potential conflicts associated with the growth in the use of PWC on Vermont's public waters.

h. Seaplanes should be allowed on any lake on which the use of internal combustion motors is allowed.

The Board feels that allowing seaplanes on any lake on which internal combustion motors are a normal use, without any acreage limitation, is too permissive. Internal combustion motors have become normal uses on many very small lakes on which seaplane use seems both unnecessary and inappropriate. However, the Board has agreed to modify its initial proposal to allow seaplanes on all lakes on which internal combustion motors are a normal use and that have a surface area of at least 75 acres. This restriction is subject to preemption by actions taken under 5 V.S.A. Chapter 9 by the Agency of Transportation in accordance, with the limitation on the Board's authority as provided for in 10 V.S.A. §1424 (d), or by petition to this Board.

The Board has also modified its initial proposal as it pertains to seaplanes in response to public comment by agreeing that the proposed UPW Rules should be limited to seaplanes using public waters during the boating season (May 1 - November 30).



STATE OF VERMONT
WATER RESOURCES BOARD
MONTPELIER, VERMONT 05602
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10 V.S.A., §1424. Use of public waters

- (a) The board may establish rules to regulate the use of the public waters 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.
- (b) The Board in establishing rules shall consider the size and flow of 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.
- (c) 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.
- (d) If another agency has jurisdiction over the waters otherwise controlled by this section, that 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 320 and 321 of Title 25.
- (e) On a petition signed by not less than ten freemen or the legislative body of a municipality the board shall hold a hearing and consider the adoption of rules authorized or promulgated under the section.
- (f) By rule, the board may delegate authority under this section for the regulation of public waters where:
 - (1) the delegation is to a municipality which is adjacent to or which contains the water; and
 - (2) the municipality accepts the delegation by creating or amending a bylaw or ordinance for regulation of the water. Appeals from a final act of the municipality shall be taken to the board. The board may terminate a delegation for cause or without cause upon six months notice to the municipality.

VERMONT USE OF PUBLIC WATERS RULES - CHRONOLOGY

- mid-1980's - The need for of a statewide policy for managing conflicts in the use of Vermont's public waters first discussed by WRB.
- 1988-89 - WRB raises many of the issues addressed in the proposed UPW Rules with two successive Legislative summer study committees reviewing Vermont boating law. WRB informally advised to proceed with development of rules.
- July 1991 - WRB considers a record seven petitions for lake-specific rules. Many of the petitions involve essentially identical conflicts.
- July 1991 - Board conducts informational meeting to discuss the concept of what is now known as the Use of Public Waters (UPW) Rules via Vermont Interactive Television.
- 7/16/91 3:00 p.m. (VIT) Randolph
South Burlington
Lyndonville
Newport
Springfield
- Nov. 1991 - WRB develops an outline of UPW Rules for discussion with ANR and Department of Public Safety.
- Jan. 1992 - WRB completes first draft of UPW Rules.
- Feb. 1992 - WRB reviews draft UPW Rules with House and Senate Natural Resources committees and other interested committees and is encouraged to proceed.
- May thru Sept. 1992 - WRB distributes draft UPW Rules for informal comment to all affected state agencies, municipalities, regional planning commissions, lake associations, organized recreational user groups and others expressing an interest.
- winter 92/93- WRB revises first draft of UPW Rules in response to written comment received during summer of 1992.
- March 1993 - WRB advised by ANR that necessary GIS mapping of affected lakes will not be completed on schedule. WRB decides on a second round of informal comment while mapping is completed.
- June 1993 - WRB distributes revised draft of UPW Rules for second round of informal comment.
- July thru 1993 - WRB conducts informal meetings/public hearings regarding the June 1993 draft UPW Rules at various Aug.

locations including on Vermont Interactive Television (VIT).

7/15/93	7:00 p.m.	Ludlow
7/22/93	1:30 p.m.	Montpelier
7/29/93	7:00 p.m.	Barton
8/4/93	7:00 p.m.	(VIT) Bennington Brattleboro Newport Randolph Center Rutland South Burlington Springfield St. Johnsbury, and Waterbury
8/9/93	7:00 p.m.	Castleton
8/17/93	7:00 p.m.	Lyndonville

Sept. thru - WRB reviews additional public comment (over 350
Dec. 1993 written and oral comments) and develops initial
proposed UPW Rules.

Jan. 13, 1994 WRB files proposed UPW Rules with Secretary of
State's Office initiating formal rulemaking process.

February & - Informational meetings and Public hearings on
March 1994 proposed Use of Public Waters Rules.

1/31/94	7:00 p.m.	White River Jct.
2/7/94	7:00 p.m.	Waterbury
2/15/94	7:00 p.m.	Rutland
3/10/94	1:30 p.m.	Montpelier
3/22/94	7:15 p.m.	(VIT) Bennington Brattleboro Newport Randolph Center Rutland South Burlington Springfield St. Johnsbury Waterbury

Mar. 29, 1994 WRB decides not to adopt rules that would regulate
recreational activities on lakes and ponds during
the 1994 boating season and to conduct an in-depth
review of its proposal in light of extensive public
comment.

June 22, 1994 Having conducted the in-depth review decided upon
at its March 29 meeting, the WRB decides to proceed
with the development of its final proposed rule and
responsiveness summary.

Aug 10, 1994 Board decided on its final proposed rule and files
with Legislative Committee on Administrative Rules.

STATISTICAL SUMMARY OF PROPOSED USE OF PUBLIC WATERS RULES

1. OVERVIEW

	<u># of lakes</u>	<u>surface area (acres)</u>	<u>% of surface areas all lakes</u>
Lakes subject to UPW Rules	283	44,300	<20%
Lakes <u>not</u> subject to UPW Rules	<u>11</u> ¹	<u>180,000</u> ¹	<u>>80%</u>
Total all Vermont lakes	294	224,300	100%

2. NUMBER AND SIZE OF VERMONT LAKES SUBJECT TO UPW RULES

<u>size</u>	<u>high speed</u>	<u>(PWC allowed)</u>	<u>low speed</u>	<u>no internal combustion motors</u>	<u>total # of lakes</u>
<50 acres	0	(0)	24	106	130
50-100 acres	12	(0)	26	28	66
101-300 acres	32	(0)	13	9	54
301-500 acres	11	(11)	0	1	12
>500 acres	<u>20</u>	<u>(20)</u>	<u>0</u>	<u>1</u>	<u>21</u>
Total	75	(31)	63	145	283

3. NUMBER AND SURFACE AREA VERMONT LAKES SUBJECT TO UPW RULES

	<u># lakes subject to UPW</u>	<u>surface area (acres)</u>	<u>% of surface area lakes subject to UPW</u>
high speed motor lakes	75	32,300	73%
(PWC allowed lakes) ²	(31)	(26,000)	(59%)
low speed motor lakes	63	4,600	10%
electric only & no motors lakes ³	<u>145</u>	<u>7,400</u>	<u>17%</u>
Total	283	44,300	100%

4. NUMBER AND SURFACE AREA OF ALL VERMONT LAKES

	<u># of lakes</u>	<u>total surface area</u>	<u>as % of surface area of all lakes</u>
high speed lakes	86	212,300	95%
PWC allowed lakes	(42)	(206,000)	(92%)
low speed motor lakes	63	4,600	2%
electric only and no motor lakes	<u>145</u>	<u>7,400</u>	<u>3%</u>
total all VT lakes	294	224,300	100%

FOOTNOTES - Statistical Summary

1. Lakes, Ponds and Reservoirs not affected by Proposed UPW Rules

	surface area (acres)
Lake Champlain (VT portion)	172,800
Lake Memphremagog (VT portion)	5,966
Wallace Pond (VT portion)	107
Connecticut River Reservoirs	
- Gilman Reservoir	394
- Moore Reservoir	3,475
- Comerford Reservoir	732
- McIndoes Reservoir	543
- Ryegate Reservoir	297
- Wilder Reservoir	3,100
- Bellows Falls	2,804
- Vernon Reservoir	<u>2,500</u>

Estimated total surface area located in VT 180,000 +/-

(NOTE: The acreage for Connecticut River reservoirs includes surface area of the entire reservoirs. While the majority of the 13,900 acre surface area these reservoirs are located in New Hampshire, a portion of their surface area is in Vermont).

2. Personal watercraft would be allowed on 31 of the 75 lakes subject to the UPW Rules as well as on the 11 bodies of water listed in footnote 1 above.
3. Electric motors are allowed on all Vermont Lakes except two: Lake Paran and Colchester Pond.

Attachment D

Summary of boating accidents involving personal watercraft as reported
by the U.S. Coast Guard

	1991	1992
Total Recreational Boats	20,000,000	20,300,000
Total Estimated PWC's (Cum. NMMA Sales Figs)	160,000	240,000
Total Boats Evaluated by CG	11,068,440	11,132,386
PWC's Evaluated by CG	48,990	60,950
Total Boating Accidents	6,573	6,048
Total Vessels Involved	8,821	8,206
Accident Rate-all vessels	0.08%	0.08%
PWC's Involved in these Accidents	1,513	1,650
Accident Rate-PWC's	3.1%	2.7%
PWC's as Percent Involved Vessels	17.2%	20.1%
PWC's Accidents as Percent Total Accidents	23.0%	27.3%