

State of Vermont
VERMONT NATURAL RESOURCES BOARD
Water Resources Panel

In re Echo Lake (Charleston)
No. UPW-05-02

VT Proposed Rule 05P025

MEMORANDUM OF DECISION

(Issued Oct. 14, 2005)

The Water Resources Panel (WRP) denies a petition to prohibit personal watercraft (PWC), commonly known as jet skis, on Echo Lake in the Town of Charleston.

I. Background

The Echo Lake Association has petitioned the WRP to prohibit PWC on Echo Lake in the Town of Charleston. On May 24, 2005, the WRP voted to propose amendments to the Use of Public Waters Rules prohibiting PWC on Echo Lake for the purpose of receiving public comments. The WRP filed the proposed amendments with the Interagency Committee on Administrative Rules (ICAR) on May 26, 2005, met with ICAR on June 13, 2005, and received ICAR's approval of the rule proposal on June 15, 2005. On June 16, 2005, the WRP filed the rule proposal with the Secretary of State's Office.

The WRP sent notice of the proposed rule to various persons or organizations with an interest in public waters in Vermont, all abutting property owners, legislators representing the area in which the affected waters are located, the Personal Watercraft Industry Association, and the American Watercraft Association. In addition, the WRP posted the proposed rule on its web site. The WRP visited Echo Lake on the afternoon of July 19, 2005. A public hearing on the proposed rule was convened that evening beginning at approximately 7:00 p.m. in Newport, Vermont. Forty-five people signed the attendance sheets for the public hearing. The deadline for filing written comments on the rule proposal, which could be mailed, delivered, or emailed to the WRP, was September 1, 2005. Over 60 written comments were filed.

At its meeting on September 16, 2005, the WRP discussed the proposal to prohibit PWC on Echo Lake and voted unanimously to deny the petition and not to proceed with rule making.

II. Discussion

The WRP's decision in this matter is guided by section 2 of the Use of Public Waters Rules and 10 V.S.A. § 1424. Section 1424(c) instructs the WRP to "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." Similarly, the various provisions of section 2 of the Use of Public

Waters Rules generally direct the WRP not to use means more restrictive than reasonably necessary to manage public waters. Sections 2.7, 2.9, and 2.10 in particular indicate that regulation to resolve use conflicts should not be used unless necessary.

As grounds for banning PWC, the petition cites the threats that PWC pose to loons and the need to preserve a safe and quiet environment. Based on the testimony at the public hearing and the written comments, the WRP cannot find a present, demonstrable use conflict warranting regulation. The testimony at the public hearing in this matter and the written comments lead the WRP to conclude that PWC are not prevalent on Echo Lake at the present time. Clearly, some users of Echo Lake do not like PWC. However, it appears that PWC on Echo Lake do not present a problem beyond the personal preferences of these users. The petition rather anticipates a problem that presently does not warrant additional regulation over and above the existing rules governing the operation of PWC in section 3.2.b of the Use of Public Waters Rules and education by lake users and the PWC industry with regard to the appropriate use of PWC.

The WRP's decision to deny the petition is consistent with prior decisions of the Water Resources Board. For example, in *In re Lake Bomoseen (Castleton and Hubbardton)*, No. UPW-95-01, Decision (Nov. 1, 1995), the Water Resources Board denied a petition to prohibit PWC. As the Board explained, "the petitioners have not demonstrated that there is a public safety or recreational use conflict of sufficient magnitude on this lake to warrant additional regulation of personal watercraft, let alone a total prohibition." *Id.* at 3. In *In re Lake Willoughby (Westmore)*, No. UPW-90-04, Decision (Nov. 20, 1991), the Water Resources Board denied a petition to prohibit PWC on Lake Willoughby and to impose a speed limit of 35 m.p.h. on other vessels. The Board explained the basis for this decision as follows:

On the basis of the record in this proceeding, the Board has determined that although there is evidence of developing conflicts regarding the use of personal watercraft and the potential for conflicts involving excessively high-speed boating on Lake Willoughby, the petitioners have not shown that the requested rules are necessary or appropriate under the guidance provided by 10 V.S.A. § 1424(b) & (c). Accordingly, the Board has decided not to proceed with the adoption of such rules at this time.

Id. at 1.

In its 1991 decision in *Lake Willoughby*, the Board suggested the use of buoys to demarcate swimming areas and educational programs initiated locally with regard to appropriate behavior by the operators of motorized vessels. *Id.* at 3-4. In 2004, the Water Resources Board granted a petition to prohibit PWC on Lake Willoughby only after finding that the use of PWC

and associated use conflicts on Lake Willoughby had increased despite efforts by the town to demarcate swimming areas and to educate the public with regard to the operation of PWC. *In re Lake Willoughby (Westmore)*, No. UPW-04-01, Decision (Nov. 19, 2004). *See also, e.g., In re Echo Lake (Sudbury and Hubbardton)*, No. UPW-91-05, Decision (Dec. 22, 1992) (finding that petitioners failed to show an actual or prospective use conflict and denying petition to prohibit internal combustion motors and limit speeds to five m.p.h.).

In 2005, a pair of loons nested on Echo Lake for the first time since monitoring began in 1978. The existence of a pair of nesting loons and their one chick on Echo Lake does not necessarily indicate that Echo Lake provides productive loon habitat and that the surface uses of Echo Lake do not require additional regulation to protect and enhance loon populations. Indeed, wildlife may be drawn to certain areas, known as habitat sinks, in which mortality may exceed reproductive success and in which population density may be maintained by immigrants from source populations. While loons are no longer listed as a threatened or endangered species in Vermont, section 2.3 of the Use of Public Waters Rules lists wildlife habitat among the uses that warrant protection.

As noted in written comments filed in this matter by the Agency of Natural Resources (ANR), wildlife biologist Eric Hanson with the Vermont Loon Recovery Project “attributes the success of this loon chick [on Echo Lake] to cooperation from adjacent landowners in redirecting their shoreline and boating activity away from this nest.” ANR has advised that, depending upon their operation, all vessels, motorized or nonmotorized, may impact loons. PWC may lead to greater stress in loons because PWC tend to continually change direction, whereas motorboats tend to follow established routes. Although PWC may as a general matter potentially limit the ability of loons to survive and reproduce, the WRP cannot conclude that prohibiting PWC on Echo Lake is currently necessary to protect loons. As ANR noted, loon habitat on Echo Lake is “very limited.”

The use of buoys and written materials to educate and inform lake users would represent a less restrictive means than prohibiting PWC to protect swimming and loon nesting areas from PWC and other vessels. Under 29 V.S.A. § 403(b)(5), an encroachment permit is not needed for buoys that do not unreasonably impede navigation or boating. Section 3.6 of the Use of Public Waters Rules prohibits persons and vessels from public waters within 300 feet of loon nesting sites that ANR has identified with signs, buoys, and other means. The WRP suggests that any locally initiated efforts to protect loon nesting areas be undertaken in consultation with state wildlife officials. PWC on Echo Lake do not appear to represent more of a threat than other motorized vessels to distance swimmers, who may therefore be well-advised to swim accompanied by a safety boat regardless of the concerns that PWC may present to unaccompanied swimmers in open water.

Nonmotorized sports, including canoeing and kayaking, have been increasing in Echo Lake in recent years. However, the WRP cannot conclude that prohibiting PWC is necessary to resolve use conflicts between PWC and nonmotorized vessels. Here again, education and the courtesy of lake users currently represent more narrowly tailored means of accommodating differing user preferences than eliminating certain uses altogether.

Dated at Montpelier, Vermont this 14th day of October, 2005.

VERMONT NATURAL RESOURCES BOARD
Water Resources Panel

/s/ Patricia Moulton Powden

Patricia Moulton Powden, Chair
Michael J. Hebert, Member
W. William Martinez, Member
Joan B. Nagy, Member
John F. Nicholls, Member