

**State Of Vermont
Vermont Natural Resources Board
Water Resources Panel**

In re Somerset Reservoir (Somerset and Stratton)
No. UPW-05-04

VT Proposed Rule 05P025

**Memorandum Of Decision
(Issued Nov. 10, 2005)**

This proceeding involves a Petition, filed pursuant to 10 V.S.A. §1424, which requests that the Water Resources Panel (WRP) of the Natural Resources Board issue a rule, pursuant to its authority under 10 V.S.A. §6025(d)(4), to limit the horsepower of internal combustion motors on boats on Somerset Reservoir in Somerset and Stratton, Vermont.

For the reasons stated below the WRP denies the petition but will adopt a rule that restricts wakes on the Reservoir.

I. History

The instant Petition was filed, pursuant to 10 V.S.A. §1424, on April 25, 2005, by the Adam Gebb. It asks that the WRP adopt the following rule pertinent to Somerset Reservoir:

No boats with motors exceeding 15hp are allowed on the Somerset Reservoir except by the land owners, state officials, the Forest Service, or in case of emergency.

On May 24, 2005, the WRP voted to propose amendments to the Vermont Use of Public Waters (VUPW) Rules prohibiting the operation of vessels powered by motors exceeding 15hp on Somerset Reservoir 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, and legislators representing the area in which the affected waters are located. In addition, the WRP posted the proposed rule on its web site. The WRP visited Somerset Reservoir on the afternoon of August 9, 2005. A public hearing on the proposed rule was convened that evening beginning at approximately 7:00 p.m. in Wilmington, Vermont. Sixty-two people

signed the attendance sheets for the public hearing and thirty provided oral comments. The deadline for filing written comments on the rule proposal, which could be mailed, delivered, or emailed to the WRP, was September 1, 2005. One hundred and ninety written comments were filed.

The Panel deliberated at its meetings on September 16, October 11, and November 8, 2005, and voted to deny the petition and not to proceed with rule making.¹ However, the Panel voted to proceed with an alternative rule, one which would prohibit the operation of motorboats in a manner that creates a wake.

II. Somerset Reservoir

Somerset Reservoir sits at the end of a nine mile gravel road off of Route 9 in Somerset and Stratton. The Reservoir is five miles long, 1568 acres in size and has twelve islands and approximately 16 miles of coastline. The Reservoir is wholly owned by the Trans Canada power corporation; the shoreline is wholly undeveloped. The reservoir, surrounded by 15,000 acres of forest, provides a unique wilderness experience to all who use it.

On the west side of the Reservoir are ponds, streams and wetlands, with a large tussock sedge marsh and many black spruce bogs. A 60-acre marsh blends into a bog and fen on the eastern shore. The Catamount trail follows the east shore. The 86-acre Grout Pond lies to the north of the Reservoir.

Two other, large Vermont lakes presently provide a similar experience to that of Somerset Reservoir. In the north, the Green River Reservoir in Hyde Park and Eden is 653 acres; in the central part of the State, the Chittenden Reservoir in Chittenden is 702 acres.

III. Present rules

Certain general VUPW Rules apply to Somerset Reservoir. Personal watercraft are not allowed, waterskiing is not allowed, and there is a 10 mph speed limit for motor boats.² See UPW Rules, *Appendix B* (Lake-specific rules regulating the use of particular public waters) (amended Jan. 18, 2005).

¹ Panel Member Nicholls was not present at the September 16 meeting.

² This mph limit does not apply to boats operated by Trans Canada in conjunction with its operation of the reservoir.

IV. Petition

The instant Petition was filed, pursuant to 10 V.S.A. §1424, on April 29, 2005, by Adam Gebb. As amended on May 19, 2005, the Petition asks that the WRP to restrict the horsepower of internal combustion motors. As proposed and filed with the Secretary of State, the new rule³ for Somerset Reservoir would read:

- d. Vessels powered by motors exceeding 15 horsepower are prohibited except as provided for in rule e. below.
- e. The prohibitions established by rules c. and d. above shall not apply to vessels operation on behalf of Trans Canada in conjunction with its operations of the reservoir.

V. Grounds for Petition

As grounds for the Petition, Gebb states:

- 1. the present 10 mph speed limit is unenforceable
- 2. Harriman Reservoir is better suited to motorboats
- 3. Somerset Reservoir should provide a rustic, quiet, wilderness experience suitable for kayaks and canoes

VI. Site visit and hearing

The WRP held a site visit and hearing on August 9, 2005. The comments of the people who testified at the hearing and those of people who filed written comments are summarized below.

VII. Comments

A. Comments supporting the Petition

Comments in support of the Petition generally fall into a number of categories:

³ The proposed rule also makes minor grammatical and housekeeping changes; these are not in controversy.

The unique nature of Somerset Reservoir

1. Somerset Reservoir should provide a rustic, quiet, wilderness experience suitable for kayaks and canoes; motorboats interfere with this experience
2. large, quiet, pristine, undeveloped lakes like Somerset Reservoir are a rare refuge in the region; Somerset Reservoir is the largest wild lake in the state; once it is gone, it cannot be reclaimed
3. Somerset Reservoir is threatened and irreplaceable, and should be protected for future generations
4. Somerset Reservoir is haven for wildlife (loons, osprey, moose, eagles, bear)
5. Somerset Reservoir is the only southern Vermont lake which has had a nesting pair of loons since 1978; it is the primary waterbody for loon activity within a 30 – 50 mile radius; motorboats impact loon populations; Somerset Reservoir is the only Reservoir that is required to hold its water level steady during the loon nesting period
6. the land around the reservoir is wholly undeveloped.
7. the wilderness experience at Somerset Reservoir provides educational opportunities not available elsewhere (from the Board of Leland & Gray Union HS, which owns 50 acres on the Somerset)
8. there is a need for at least one lake where people can go for a quiet wilderness experience

Conflicts

9. paddlers are the predominant use on Somerset Reservoir; the lake should be preserved for this use
10. there should be some lakes where motorboat are not allowed
11. while many people who use motorboats on Somerset Reservoir are respectful of others, there are those who are irresponsible
12. motorboat and paddlers are not compatible uses, since the quiet that paddlers seek is disrupted by the noise of motors

Enforcement

13. the present 10 mph speed limit is frequently and increasingly violated and unenforceable; it is therefore not enough to regulate motorboat usage on Somerset Reservoir

14. enforcement of a horsepower limitation is easier than enforcement of a speed limit, even if motor housings can disguise a motors true horsepower

15. there should be more money put into enforcement; signage is not enough

Harriman Reservoir

16. Harriman Reservoir, only nine miles away, is available and better suited to motorboats

Problems caused by motorboats

17. motorboats pollute

18. motorboats, and their wakes, pose a safety hazard to swimmers and paddlers

19. motorboats are noisy

20. motorboats transport aquatic nuisance plants

21. motorboat wakes cause beach erosion; high horsepower motors are not needed to fish in Somerset Reservoir

Economics

22. a wilderness lake is valuable to the tourist economy

G. Responses to comments of those opposed to the Petition

23. paddlers are aware of weather conditions; high horsepower motorboats are not needed for safety reasons

24. a small horsepower motor is sufficient to get from one end of Somerset Reservoir to the other

25. a small horsepower motor is adequate to move even a large boat

General

26. a horsepower limit is a reasonable solution; it allows motors for fishing but not for speeding

27. limitations on horsepower at Somerset Reservoir is a reasonable resolution to promote the management of water resources for different experiences

28. the rule should be temporary to see what happens

29. better signage would help; signs should warn violators that they will be fined

B. Comments opposing the Petition

Comments in opposition to the Petition generally fall into a number of categories:

Motorboats have rights to use the Reservoir

1. paddlers should not restrict use of Somerset Reservoir by others

2. some people with motorboats enjoy getting away from Harriman, too

3. paddlers can go to other quiet ponds in the area; large motorboats cannot

4. boaters enjoy fishing which would be affected were the horsepower limitation to be adopted

5. fishermen and quiet motorboaters should be allowed to use Somerset Reservoir, too

Historical use

6. a horsepower limit would take away an historical use

Safety

7. motorboats have rescued paddlers who were caught in the sudden weather changes that occur on Somerset Reservoir

8. large boats are safer than small boats in bad weather

9. large boats are needed to allow older and handicapped people to use Somerset Reservoir

Economics

10. a horsepower limit would be class legislation against owners of larger boats

11. owners with horsepower motors greater than 15 horsepower cannot afford to buy smaller motors just to use Somerset Reservoir

Enforcement is a better solution

12. better posting of the speed limit would result in better compliance; the petition is not necessary

13. enforcement of the existing rules regarding speed limits would negate the need for the horsepower limitation

The horsepower limitation is not needed

14. there is no conflict between motorboat and kayak use on the Reservoir

15. motorboats go at slow speeds and often use electric motors

16. the access road effectively excludes the larger boats

17. Somerset Reservoir is big enough accommodate all uses

18. speeding on Somerset Reservoir is rare; the WRP should not create a solution that is larger than the problem (Comment 96 from Sen. Sheppard)

19. the present speed limit is the least restrictive way to resolve conflict problems

A horsepower limitation does not solve the stated problems

20. small horsepower does not necessarily equate to slower speeds

21. at trolling speeds, a large horsepower motor can be quieter than a small motor

Responses to comments of those opposed to the Petition

22. motorboats do not upset loons; paddlers do, because they go closer to where the loons nest

23. Harriman Reservoir is too crowded now; forcing Somerset Reservoir boats there will make it worse

General

24. motorboat owners pay annual state fees (and many have fishing licenses); paddlers do not

C. Comments beyond the scope of the Petition

Some commenters proposed alternatives to the Petition:

1. all motorboats should be banned or that horsepower should be limited to 10 horsepower because 15 horsepower engines allow 20 mph speeds
2. if 15+ horsepower motors are banned, kayakers should be banned, too
3. all restrictions on motorboat on Somerset Reservoir should be lifted

While these suggestions may have some merit, the WRP cannot consider them within the context of this Petition, as they are so divorced from the Petition as to require new notice, hearing and comment. Vermont law does not require that a final rule adopted by a Board or agency be identical to the rule as proposed, but there are limits as to how far a final rule's language can stray from the proposed language. The relevant statute reads:

The following shall not affect the validity of a rule after its adoption: ...

- (2) amendment after public hearing of the text of a proposed rule in a manner that does not cause the published summary of the rule to become misleading or inadequate.

3 V.S.A. §846(b)(2). The Board has taken these limitations on the scope of permitted amendments seriously. It has written, "It is simply not appropriate for the Board to give public notice regarding one regulatory approach (i.e. horsepower limits) and then consider the adoption of a totally different regulatory scheme (i.e. speed limits)." *In re: Waterbury Reservoir (Waterbury)*, No. UPW 93-02, Decision at 2 (Oct. 26, 1994).

Similarly, in *In re: Somerset Reservoir (Somerset and Stratton)*, No. UPW 94-05, Decision at 2 - 3 (Oct. 26, 1994), the Board wrote:

As a matter of proper procedure, as well as fairness to those affected, the Board cannot expand the scope of the rulemaking beyond that contemplated in the initial public notice. This rulemaking was initiated by a petition requesting the prohibition of internal combustion motors on only that portion of the Reservoir north of the narrows. The public notice for this rulemaking reflects the intent of that petition. Accordingly, the Board does not feel that it could, in this rulemaking, proceed with the adoption of a rule prohibiting all motorized boating on the entire reservoir.

In its decision in *In re Silver Lake (Barnard)*, No. UPW-05-03, Memorandum of Decision at (Oct. 25, 2005), the WRP recently rejected compromise suggestions which likewise were beyond the scope of the petition, and it must do so here. If these commenters wish to propose these suggestions as rules, they can do so in accordance with the WRP's procedural rules.

VII. The Statute and Rules

The Statute

10 V.S.A. §1424 gives the WRP the authority to regulate the use of the public waters of Somerset Reservoir. It reads, in pertinent part:

- (a) The board⁴ 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.

⁴ The "board" is defined as the "water resources panel of the natural resources board." 14 V.S.A. §1422(2).

(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 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.

The Rules

Rules relevant to the pending petition are found in the Water Resources Board's UPW Rules:

2.2 In evaluating petitions and associated public comments the following factors, at a minimum, will be considered: 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, and the scenic beauty and recreational uses of the area.

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 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.

2.3 In evaluating normal recreational and other uses, the following uses will be among those considered: fishing, swimming, boating, waterskiing, fish and wildlife habitat, wildlife observation, the enjoyment of aesthetic values, quiet solitude of the water body, and other water-based activities.

2.6 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.

2.7 When regulation is determined to be necessary, use conflicts shall be managed using the least restrictive approach practicable that adequately addresses the conflicts.

2.8 When addressing issues common to more than one body of water, uniform and consistent rules shall be adopted when appropriate.

2.9 When regulation is determined to be necessary to resolve conflicts involving the operation of vessels, priority will be given to managing the manner in which vessels are used or operated, such as by imposing speed limits or separating conflicting uses by designating specific times or places where various uses are allowed.

2.10 When regulation is determined to be necessary to resolve conflicts between two or more normal uses, priority will be given to resolving the conflict by separating the conflicting uses, such as by designating specific times or places where various uses are allowed.

2.11 Those water bodies which currently provide wilderness-like recreational experiences shall be managed to protect and enhance the continued availability of such experiences.

5.2 *Normal Use:* Any lawful use of any specific body of public water that has occurred on a regular, frequent and consistent basis prior to January 1, 1993.

5.3 *Internal combustion motor:* A motor, such as a gasoline or a diesel motor, in which fuel is burned within the motor proper rather than in an external furnace as in a steam engine.

VIII. Prior Water Resources Board decisions

There are a number of prior Water Resources Board⁵ (WRB) decisions on petitions to restrict horsepower on Vermont's lakes and ponds.⁶ All such petitions have

⁵ Prior to the 2004 amendments to 10 V.S.A. Ch. 49, the WRB regulated the use of public waters; this responsibility now resides in the WRP.

⁶ Note that on half of the waterbodies in Vermont, internal combustion motors are not allowed at all.

been denied,⁷ usually on the grounds that speed limits represent a less restrictive and less arbitrary means to accomplish the purposes of the petitions.

In re: Shadow Lake (Glover), No. UPW 72-02, Decision (Sep. 13, 1972)

The WRB declined to adopt a rule restricting motors to 40 horsepower and other restrictions. There is no discussion as to why the rule was not adopted.

In re: Lake Raponda (Wilmington), No. UPW 72-07, Decision (undated)

There appears to be an informal petition from the Wilmington Selectboard and a homeowners association in the files to restrict motors 10 horsepower. There is no decision in the files, but it appears that the petition was not adopted.

In re: Lake Iroquois (Hinesburg and Williston), No. UPW 77-01, Decision (Aug. 7, 1978)

The WRB declined to adopt any rules regulating surface use on Lake Iroquois. As to horsepower restrictions, the Board found that restricting speeds and motors to 10 horsepower would eliminate the use of the lake for waterskiing and other established recreational uses, many of the identified problems could be better addressed by education, greater enforcement, and the placement of buoys to mark swimming areas can occur without prior state approval.

In re: Holland Pond (Holland), No. UPW 79-01, Decision (Mar. 14, 1979)

There appears to be a suggestion from the Agency of Natural Resources in the files to restrict motors 25 horsepower. There is no decision in the files, but it appears that the petition was not adopted as a rule because the present rules include no such restriction.

In re: Curtis Pond (Calais), No. UPW 80-03, Decision (Jul. 3, 1980)

The WRB declined to adopt a rule restricting motors to 10 horsepower because such a rule would eliminate the use of Curtis Pond for waterskiing and other established

⁷ Early rules promulgated by the WRB prohibited boats powered by motors of more than 10 horsepower on certain waterbodies. See, *In re: Little Hosmer Pond (Craftsbury)*, No. UPW 73-01, Decision (Oct. 4, 1973); *In re: Beebe Pond (Hubbardton)*, No. UPW 72-05, Decision (Oct. 4, 1973). There is, however, no discussion in either of these matters of the basis or rationale for this restriction.

recreational uses, such a restriction would be arbitrary in that many of the concerns raised in support of the petition, such as noise and safety, were not directly related to the size of the motors, many of the problems identified could be better addressed by education, greater enforcement, and individual efforts to avoid confrontational behavior, and the placement of buoys to mark swimming areas can occur without prior state approval.

In re: Curtis Pond (Calais), No. UPW 86-06, Decision (Sep. 9, 1986)

The WRB declined to adopt a rule restricting motors to 10 horsepower because such a rule would be “inconsistent with the legislative intent of 10 V.S.A. Section 1424(c) which states that the Board shall attempt to manage public waters so that all normal or established uses of the water can be enjoyed in a reasonable manner,” the rule would “arbitrarily prohibit motors larger than ten horsepower regardless of their manner of use,” and the “bona fide conflicts and potential safety concerns which prompted this petition can be resolved in a manner which does not prohibit any existing recreational use.” As to the latter reason, the Board encouraged users to work toward developing consensus as to how all existing uses can be managed to minimize potential conflicts.

In re: South Pond (Eden), No. UPW 88-03, Decision (May 31, 1989)

The WRB declined to adopt a rule restricting motors to 25 horsepower. The Board wrote:

4. The Board has a long-standing policy dating from 1973 of not adopting rules which restrict the use of public waters on the basis of horsepower rating of motors because such rules tend to be arbitrary. In the Board’s experience, public safety concerns or conflicts in recreational uses are generally the result of the manner in which vessels are operated, rather than the horsepower of their motor. Many boaters might have only one motor which might, for example, be used both for low speed boating uses such as fishing and high speed uses such as waterskiing.

The Board further found that the petitioners had not presented information to suggest that the use of higher horsepower motors has been, or was likely to become, a problem on the pond, nor had they presented convincing arguments as to why the Board should abandon its policy in favor of speed limits and against horsepower limitations.

In re: Caspian Lake (Greensboro), No. UPW 91-02, Decision (Nov. 20, 1991)

The WRB adopted rules limiting, *inter alia*, speeds at certain times, but did not adopt a horsepower limitation, because it believed that the horsepower limit would be

arbitrary and that speed limits would resolve conflicts while allowing the continuation of established uses.

In re: Lewis Pond (Lewis), No. UPW 92-01, Decision (Dec. 22, 1992)

The WRB declined to adopt a rule restricting motors to six horsepower, stating “the Board has decide not impose what might be an artificial limit on motor size in light of the existing rule limiting speed.” Note, however, that the Board decision was also driven by a finding that it would be consistent with a proposed Board policy favoring speed limits over horsepower limitations. This policy is not presently in effect, and the statute specifically mentions horsepower limits as being within the Board’s authority.

In re: Waterbury Reservoir (Waterbury), No. UPW 93-02, Decision (Oct. 26, 1994)

The WRB declined to adopt a rule, *inter alia*, restricting motors to 7.5 horsepower. The Board found that such a result would be neither necessary nor warranted to address the underlying use conflicts are the reservoir, nor had the petitioners showed that such a rule would be consistent with sections of the UPW Rules, including provisions that the Board allow normal uses (which include high speed motorboating) to the greatest extent possible and that any regulation be the least restrictive approach possible.

In re: East Long Pond (Woodbury), No. UPW 94-02, Decision (Oct. 26, 1994)

The WRB declined to adopt a rule, *inter alia*, restricting motors to 7.5 horsepower. The Board found that such a rule would eliminate several normal uses of the Pond (fishing and waterskiing)⁸ without a showing that such a result is either necessary or warranted to address the issues of safety, public resource protection or recreational use conflicts. Nor had the petitioners showed that such a rule would be consistent with Section 2 of the UPW Rules, including provisions that the Board manage use conflicts “to the greatest extent possible’ in a manner that allows all normal uses.

In re: Somerset Reservoir (Somerset and Stratton), No. UPW 94-05, Decision (Oct. 26, 1994)

While limiting the use of motors north of the “narrows” in Somerset Reservoir, the Board declined to place horsepower limitations on motors. The Board wrote at page 2 of its Decision:

The Board agrees that some additional regulation of high speed motorboat use south of the narrows ... may be needed. However, the Board is

⁸ Note that waterskiing is not presently allowed on Somerset Reservoir.

concerned that horsepower limits appear to be an arbitrary and overly restrictive method of addressing this need.

No matter which of the numerical horsepower limitations discussed in this proceeding were selected (the petitioners requested 15 hp, the Somerset Town Plan refers to 25 hp and the NEPCo recreational management plan calls for 35 hp), none would fully accomplish the apparent intent of preventing high speed motorboating use. Yet each of these horsepower limits would prevent some “low impact” users, principally anglers, hunters, and sight seers, from using the Reservoir based solely on the size of the motors on their boats, rather the manner in which the vessels would be operated. The Board is convinced that with further discussion, a less arbitrary approach could be found. In addition, the Board is concerned that some of the horsepower limitations suggested in this proceeding could result in underpowered motorboats attempting to use the Reservoir.

The limitation on internal combustion motors in the north part of the Reservoir was lifted in a later WRB decision. *In re: Somerset Reservoir, (Somerset and Stratton), No. UPW 95-04, Decision (Nov. 1995)*

IX. Discussion

The WRP recognizes that the UPW Rules contain internal conflicts. Some rules support the Petition, some do not. UPW Rules provisions that favor adoption of the proposed rule include:

1. “the need to provide an appropriate mix of water-based recreational opportunities on a regional and statewide basis.” *UPW Rule 2.2*

2. uses to be considered include “wildlife observation, the enjoyment of aesthetic values, quiet solitude of the water body.” *UPW Rule 2.3*

3. when regulation is necessary “to resolve conflicts involving the operation of vessels, priority will be given to managing the manner in which vessels are used or operated, such as by ... separating conflicting uses by designating specific places where various uses are allowed.” *UPW Rule 2.9.*

Thus, these sections support moving boats with 15+ horsepower motors to Harriman Reservoir.

4. “When regulation is determined to be necessary to resolve conflicts between two or more normal uses, priority will be given to resolving the conflict by separating the conflicting uses, such as by designating specific times or places where various uses are allowed.” *UPW Rule 2.10.*

Since both 15+ horsepower motors and paddlers are normal uses, this rule might argue in favor of time-limiting provisions on such horsepower motors or moving such motors to Harriman.

5. “Those water bodies which currently provide wilderness-like recreational experiences shall be managed to protect and enhance the continued availability of such experiences.” *UPW Rule 2.11.*

There is apparent universal agreement that Somerset Reservoir provides a “wilderness-like recreational experience.” In fact, it appears to be the only such resource in the southern part of Vermont. Similar resources exist in other parts of the state; Green River Reservoir is in northern Vermont, and Chittenden Reservoir is in central Vermont.

Conversely, UPW Rule provisions that would militate against the WRP adopting the rule which is proposed in the instant petition are:

1. “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.” *UPW Rule 2.6.*

2. uses to be considered include fishing and boating *UPW Rule 2.3*

3. when regulation is necessary, “use conflicts shall be managed using the least restrictive approach practicable that adequately addresses the conflicts.” *UPW Rule 2.7.*

Motors with 15+ horsepower motors are normal uses on Somerset Reservoir and the WRB concluded that speed limits are less restrictive than horsepower limitations.

4. when regulation is necessary “to resolve conflicts involving the operation of vessels, priority will be given to managing the manner in

which vessels are used or operated, such as by imposing speed limits... .”
UPW Rule 2.9.

Thus, part of §2.9 argues for speed limits over bans of 15+ horsepower motors.

While the statute has, since its adoption in 1969, clearly allowed the WRB to regulate “the size of motors allowed’ on public waters, 10 V.S.A. §1424(a)(3), as the decisions above indicate, the WRB consistently opted to address conflicts by regulating speed limits, as such regulation has been considered the least restrictive approach to resolving conflicts. The question presented in this case is whether such a speed limit has proven to be effective.

Response to comments received and analysis

The WRP is sensitive to the needs and desires of both sides to this debate and its analysis here responds to the many comments it received for and against the proposed rule.

On the one hand, those who support the Petition argue for a quiet, rustic experience on Somerset Reservoir and assert that those who wish to use larger motors may do so on Harriman Reservoir. To the extent that supporters argued that motorboat and paddlers are not compatible uses, the focus was on the noise created by motors and the damage to the shoreline and the annoyance to paddlers caused by the wakes that motorboat cause. They contend that a horsepower limit is a reasonable solution; it allows motors for fishing but not for speeding.

On the other hand, those fishermen and quiet motorboaters who own larger horsepower motors also wish to enjoy the unique aspects of the Reservoir. They contend that it would be unfair to ban larger motors on Somerset Reservoir, thereby requiring them to purchase smaller motors.

There is some common agreement, however. All commenters noted the absence of enforcement on the Reservoir. Those who support the Petition note that enforcement of a horsepower limitation is easier than enforcement of a speed limit. Those who argued against the Petition suggested that better efforts be made to enforce existing rules instead of imposing further regulation. Further, even those who argue against the Petition contend that they respect the speed limit on the Reservoir and note that, as fishermen, their use of their motors is limited to traveling from the access to other parts of the Reservoir. Once they arrive at their chosen fishing spot, they troll slowly or stop their motors entirely.

The WRP chooses to approach this matter by an examination of the goals which the Petition seeks to attain. The Petition seeks quiet waters. But a limitation on the size

of the motors does not necessarily accomplish this result. As those who oppose the Petition note, even a small horsepower motor, if mounted on a light boat, can travel fast, causing noise and wakes which may disturb the quiet experience of Somerset Reservoir; and a larger horsepower motor can be driven quietly at speeds which do not.

There is already a speed limit on the Somerset Reservoir, which, if respected or enforced, should result a satisfactory solution for all parties involved in this matter. But speed limits are often difficult to judge, and an enforcement presence is not always in attendance. A better approach, the WRP believes, is one which limits the *impacts* caused by motorboats on the Reservoir - primarily the noise and the wakes that they create – impacts which are at the heart of the reasons advanced by those who support the Petition.⁹ Thus, the WRP believes that a “no wake” rule, in conjunction with the existing 10 mph speed limit on the Reservoir will meet to goals of those who support the Petition while not affecting those who seek to use motors – a normal use – for fishing and other quiet recreational activities.¹⁰

The WRP’s decision in this matter is consistent with a decision that was recently issued by the Water Resources Board in *In re: Mirror Lake (Calais)*, No. UPW-04-02, Decision at 5 - 6 (Oct. 7, 2004). The petition filed in that matter asked that all internal combustion motors be banned from the lake, or, in the alternative, a 5 mph speed limit be adopted. Although rejecting the petition’s request to ban motors, the Board adopted a speed limit and a “no wake” rule. The Board wrote:

The Board denies the rule proposed by the Petitioners, prohibiting internal combustion motors, because it is not consistent with the Board’s interpretation of the provisions of 10 V.S.A. §1424 or the requirements of Vermont’s Use of Public Water Rules. Application of a 5 mph speed limit and a “no wake” zone to the entirety of Mirror Lake will avoid eliminating a long-standing normal use and is the least restrictive means available to address the conflict.

The Board also believes that with these regulations in place, a safe and quiet water experience can be enjoyed by both motorized and non-motorized users of Mirror Lake. The fundamental conflict between these uses of the pond appears to stem from illegal and disrespectful behavior of a few boaters. The Board concludes that abuse of the regulations will be inhibited by a uniform speed limit, a no-wake requirement, and

⁹ The WRP notes that the Petition does not seek to ban all motors on Somerset Reservoir; it seeks only to reduce their impacts on the quiet nature of the waterbody.

¹⁰ A “no wake” provision was suggested in comments from the Windham Regional Commission.

heightened public awareness of the regulations. In this regard, the Board will provide speed limit and no-wake signs of suitable size and will encourage their placement in appropriate locations. To further this effort, the Petitioners, individually and/or through the formation of a lake association, could also take measures to promote the quiet nature of Mirror Lake's environment.

.... By adopting rules that restrict the *manner* in which vessels are operated, the Board is accommodating all normal uses while using the least restrictive approach available. VUPWR §2.6 and §2.7.

The WRP will follow the precedent set by the Water Resources Board in the *Mirror Lake* decision. While it will deny the Petition to limit the horsepower of motors on Somerset Reservoir, the WRP will adopt the following rules:

- d. A "no-wake" zone shall apply to the entire Somerset Reservoir.
- e. The prohibitions established by rules c. and d. above shall not apply to vessels operated by or on behalf of Trans Canada in conjunction with its operations of the reservoir, by law enforcement officials or governmental agencies in the performance of official duties, or in cases of emergency.

The WRP will also amend paragraph (c) of the rules which presently apply to Somerset Reservoir to change the reference from paragraph (d) to paragraph (e):

- c. The use of vessels powered by internal combustion motors at speeds in excess of 10 miles per hour is prohibited except as provided for in rule e. below.

Dated at Montpelier, Vermont this 10^h day of November 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

Notice to Interested Persons

The WRP will file with the Legislative Committee on Administrative Rules (LCAR) final proposed amendments to the VUPW Rules consistent with this decision. LCAR will then review the final proposed rules and decide whether to approve or object to all or a portion of the final proposals. After meeting with LCAR, the WRP may withdraw the final proposed rule in whole or in part or adopt a final rule. Any rule that the WRP adopts may reflect changes from the final proposal germane to any objections or expressed concerns of LCAR. See 3 V.S.A. §§ 841-843. Information about the rule making process is available on-line at <http://vermont-archives.org/apa/rules.html>. Additional information about LCAR meetings and procedures can be obtained by contacting the Committee's Clerk, Katie Pickens, at 802-828-2231 or kpickens@leg.state.vt.us.