

State of Vermont
WATER RESOURCES BOARD

**In re: Petition to adopt rules
regulating the use of Chittenden
Reservoir, Town of Chittenden,
Vermont, Docket No. UPW-02-02**

10 V.S.A. § 1424

Background

On May 9, 2002, 10 persons registered to vote in the state of Vermont, with Roberta Ballou as their representative, filed a petition (Petition) under the provisions of 10 V.S.A. §1424 with the Vermont Water Resources Board (Board) requesting adoption of rules regulating the use of Chittenden Reservoir. The proposed regulations as noticed were as follows:

- (1) Vessels powered by motor shall not exceed 5 miles per hour or in such a manner as to cause a disturbing wake.
- (2) The use of personal watercraft (i.e. jet skis) are prohibited.
- (3) Waterskiing is prohibited.¹

In response to the Petition, the Board proposed rules as requested by the petitioners for the purpose of receiving public comment. Following public notice, on July 11, 2002, the Board conducted a site visit and held a public hearing on the proposed rules in Rutland, Vermont. Numerous written comments were received prior to the deadline for public comment of July 23, 2002.

The Board is governed in its consideration of petitions for the adoption of rules regulating the use of public waters by the applicable provisions of 10 V.S.A. §§ 1421 - 1426 (1998) (Protection of Navigable Waters and Shorelands), the Vermont Use of Public Waters Rules (2001) (VUPWR), and the applicable provisions of the Vermont Administrative Procedure Act, 3 V.S.A. §§ 801 - 849 (1995 & Supp. 2001).

Decision

At its meetings on August 6 and 27, 2002, the Board reviewed and discussed the Petition and the public comments received both at the public hearing and in writing. It also took official notice of the Vermont Official State Map (2000) and considered its own prior VUPWR lake- and

¹ The petitioners' proposed rules were numbered and sequenced in a different order and contained slightly different wording from the rules initially proposed by the Board and now contained in the Board's final proposed rules. This is because the Board has determined that such minor changes are necessary to correct grammatical errors and to achieve greater consistency with the format of the Board's other water body-specific rules.

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reservoir-specific rules and decisions related to the regulation of personal watercraft and high speed use of motorized craft, including but not limited to: Re: Norton Pond, UPW-02-01; Re: Caspian Lake, UPW-01-01; and Re: Somerset Reservoir, UPW-95-04.

On August 27, 2002, the Board voted unanimously to proceed with the adoption of rules to prohibit the use of personal water craft, waterskiing, and the operation of vessels at speeds greater than 5 mph, for the reasons set forth below.

Findings

1. Chittenden Reservoir is located in the town of Chittenden, Rutland County, Vermont.
2. Chittenden Reservoir constitutes public waters of the State of Vermont within the meaning of 10 V.S.A. § 1422(6) (1998).
3. Chittenden Reservoir has a surface area of approximately 702 acres. The surface elevation of the Reservoir is approximately 1500 feet.
4. Chittenden Reservoir is located in a rural and relatively remote area of Rutland County. Mountains rise on all sides of Chittenden Reservoir, with those on the northeastern side being approximately 2000 feet above the Reservoir's surface elevation.
5. Approximately 10 residences or camps are concentrated along the shoreline near the dam on the western shore of Chittenden Reservoir. The Mountain Top Inn and Resort owns property located on the northern shore of the Reservoir. The vast majority of the shoreline is undeveloped and forested.
6. The Green Mountain National Forest (GMNF) fully surrounds Chittenden Reservoir and includes the Reservoir's 15.7 square mile watershed.
7. The waters of Chittenden Reservoir are clean and clear, and remain free from Eurasian milfoil and zebra mussels.
8. Chittenden Reservoir supports an outstanding lake fishery, including yellow perch, largemouth bass, brown trout, and walleye.
9. Loon, osprey, bald eagle, great blue heron, and merganser, among numerous other bird species, rely upon Chittenden Reservoir as habitat.
10. Chittenden Reservoir functions as habitat for several mammal species, including deer,

moose, otter, mink, and beaver.

11. 10 V.S.A. §1424(b) (1998) provides as follows:

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.

See also VUPWR §2.2 (providing for consideration of these factors in evaluation of petitions and associated public comments).

12. 10 V.S.A. § 1424(c) (1998) states:

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.

See also VUPWR §2.2 (providing for management of public waters so that various uses may be enjoyed in a reasonable manner considering safety, the interests of current and future generations, and the need to provide an appropriate mix of water-based recreational opportunities on a regional and statewide basis).

13. A “normal use” is defined in the VUPWR as follows: “Any lawful use of any specific water body of public water that has occurred on a regular, frequent and consistent basis prior to January 1, 1993.” VUPWR §5.2. In evaluating normal recreational and other uses, the following uses are among those considered by the Board: “fishing, swimming, boating and related activities including waterskiing, fish and wildlife habitat, wildlife observation, the enjoyment of aesthetic values, quiet solitude of the water body, and other water-based activities.” VUPWR §2.3.
14. VUPWR §2.6 provides that “[u]se 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.” Under §2.7, “[w]hen regulation is determined to be necessary, use conflicts shall be managed using the least restrictive approach practicable that adequately addresses the conflicts.”
15. VUPWR §2.9 provides that “[w]hen regulation is determined to be necessary to resolve conflicts involving the operation of vessels, priority will be given to managing the

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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.”

16. The normal uses of Chittenden Reservoir include fishing, canoeing, kayaking, motor boating at slow speeds, wildlife observation, swimming (including long-distance swimming), and the enjoyment of the Reservoir’s aesthetic values, including quiet solitude.
17. Personal watercraft (PWC) were not used on a regular, frequent, and consistent basis prior to January 1, 1993. The use of PWC is not a “normal use” on Chittenden Reservoir.
18. The loud noise, high speed, and erratic pattern of use associated with the use of PWC conflicts with several of the normal uses of Chittenden Reservoir, including most of those listed in Finding 16 above.
19. Allowing the use of PWC to become an established use will create an unacceptable level of conflict with the normal uses of Chittenden Reservoir.
20. There is limited public access to Chittenden Reservoir. The only public boat access to the Reservoir is located on land owned by Central Vermont Public Service Corporation (CVPS) and the only parking area exists in association with this boat access.
21. The Vermont Department of Fish and Wildlife (DF&W) leased the boat access and parking area from CVPS prior to 1987 and after 1997. While the boat access was under the management of DF&W, there were no restrictions regarding use of the boat access or lake-specific restrictions regarding use of the Reservoir.
22. While under the direct management of CVPS between 1989 and 1997, use of the boat access was limited to motor boats using motors not exceeding 15 horsepower. This horsepower limit de facto prohibited waterskiing and other forms of high speed motorboat use but allowed the use of motorboats for fishing and low speed sightseeing.
23. The VUPWR were a topic of broad public policy discussion during the period between 1991 and 1994 and were first adopted as rules by the Board in 1994.
24. While waterskiing and other forms of high speed motorboat use occurred on Chittenden Reservoir prior to 1989, such uses appear to have been largely confined to a small number of shoreline property owners as distinguished from the broad participation of the general public as a whole.

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25. The record in this proceeding is not conclusive as to whether waterskiing occurred on a "regular, frequent, and consistent basis prior to January 1, 1993." Therefore, waterskiing and other forms of high speed motorboat use may or may not be "normal uses" of Chittenden Reservoir within the meaning of VUPWR Section 5.2.
26. Accordingly, even if waterskiing were a normal use of Chittenden Reservoir, it occurred at a low level of frequency, was not a regular or consistent use by the general public as a whole, and did not occur at all between 1989 and 1997, which includes the period during which the VUPWR were first adopted.
27. CVPS manages Chittenden Reservoir as part of a hydroelectric generation system. The water level of the Reservoir fluctuates significantly in response to changes in the weather and demands for power generation. Such fluctuations can occur in a relatively short period of time. During the recreation months of May through October, the Reservoir is subject to a potential five-foot drawdown.
28. The location and number of hazards to high speed motor boating created by submerged rocks, stumps and other obstacles changes depending upon fluctuations in the Reservoir's water level.
29. Due to the significant water level fluctuations associated with the Reservoir's primary use as a flood control and hydroelectric facility, allowing waterskiing or other forms of high speed motorboat use to either continue,² or become an established use, would represent an unacceptable risk to public safety for the reasons stated in Findings 27 and 28 above.
30. Regulating the time, place, or manner of waterskiing on Chittenden Reservoir would not adequately address the safety concerns related to the fluctuation in water level and subsequent exposure of rocks, stumps, and other submerged obstacles.
31. Allowing waterskiing and/or other forms of high speed motor boat uses to continue or become established uses is very likely to create an unsafe condition and an unacceptable level of conflict with the normal uses of Chittenden Reservoir.
32. The operation of motor boats at slow speeds on Chittenden Reservoir is a normal use. CVPS previously regulated the operation of motor boats on Chittenden Reservoir by limiting the size of motors allowable on vessels to 15 horsepower (hp).

² Assuming, arguendo, that waterskiing is in fact a normal use at all.

33. In the experience of the Board, imposing horsepower limitations on motorized craft results in arbitrary administration of the regulations and difficulties in enforcement.
34. Regulating the time and place of operation of high speed motor boat use on Chittenden Reservoir would not be practical, but regulating the speed at which motor boats are operated would allow the coexistence of various normal uses, with the least amount of restriction possible.
35. Allowing the operation of motor boats at speeds *greater* than 5 mph to become an established use would create an unacceptable level of conflict with many of the normal uses of Chittenden Reservoir, including but not limited to long-distance swimming, wildlife observation, and the enjoyment of the Reservoir's aesthetic values, including the quiet solitude of the water body.
36. VUPWR §2.11 provides that "[t]hose water bodies which currently provide wilderness-like recreational experiences shall be managed to protect and enhance the continued availability of such experiences."
37. Based on the location of Chittenden Reservoir within the GMNF (see Finding 6), the existence of a robust wildlife population (see Findings 8, 9, and 10), and limited shoreline development and associated human impacts (see Findings 5 and 6), Chittenden Reservoir provides opportunities for a wilderness-like recreational experience to a degree that is increasingly uncommon in Vermont.
38. The undisputed normal uses of Chittenden Reservoir, such as fishing, swimming, canoeing and kayaking, wildlife observation, and enjoyment of the water body's aesthetic values are compatible with and enhanced by the wilderness-like environment that the Reservoir currently provides.
39. Few water bodies in the state of any size are capable of providing such recreational experiences in a wilderness-like setting. Specifically, Somerset Reservoir in the southern portion of the state, and Green River Reservoir in the far north, are the only water bodies over 500 acres within Vermont that have rules restricting motor boats to slow speeds and which prohibit waterskiing and jet skiing on all or portions of those waters. There is a lack of opportunity for enjoyment of wilderness-like recreational experiences in the central region of Vermont.
40. Waterskiing, jetskiing, and motorboating at high speeds are allowed at many other water bodies throughout the state, with more public access, including several within close proximity to the Rutland area such as Lakes Bomoseen, Dunmore, and St. Catherine.

41. The final proposed rules, which support wilderness-like recreational experiences and which resolve existing or potential conflicts between uses, are consistent with the provisions of 10 V.S.A. §1424 (1998) and Section 2 of the Vermont Use of Public Waters Rules.

Response Summary

The comments received at the public hearing and in writing overwhelmingly support the Petition's requested rules. However, the Board received several comments in opposition to all or portions of the proposed rules. Prior to addressing these arguments, the Board offers the following comments with respect to: (1) the Board's charge to protect and enhance wilderness-like recreational opportunities, and (2) the Board's duty to regulate public waters such that an appropriate mix of water-based recreational opportunities exist on a regional and statewide basis.

A. **Wilderness-like Recreational Opportunities and the Provision of a Regional and Statewide Mix of Water-based Recreational Opportunities**

Section 2.11 of the VUPWR provides that "[t]hose water bodies which currently provide wilderness-like recreational experiences shall be managed to protect and enhance the continued availability of such experiences." Several factors may combine to provide a wilderness-like recreational experience including, but not limited to the existence of a robust water-dependent wildlife population, limited shoreline development and human impacts, the location of the body of water within a state or national forest, the relative remoteness of the water body and its history of limited public access, and the aesthetic value of that water body, including its ability to provide quiet solitude. However, as shoreline development and associated human impacts to the state's water resources increase, the number of public water bodies available to provide wilderness-like recreational experiences decreases. Accordingly, under Section 2.11 of the VUPWR, the Board has a duty to manage the few public water bodies that remain capable of providing wilderness-like recreational opportunities in a manner consistent with protection of those characteristics that make those water bodies capable of supporting such water-based recreational uses.

The public waters of Vermont are a natural resource that provide for a wide range of water-based and water-related recreational opportunities. However, not all recreational uses are compatible with all other recreational uses, and indeed some water-based recreational uses can actually diminish the quality of other water-based recreational uses, especially those that are dependent on the wilderness-like character of a water body. The Vermont Use of Public Waters

Rules do not require that all recreational uses be accommodated on all bodies of water, but rather that such public resources be managed both individually and collectively to provide for an appropriate mix of water-based recreational opportunities on a regional and statewide basis, taking into account the needs of current and future generations of citizens of the state.

The majority of the public water bodies in Vermont over 500 acres in surface area are managed to allow waterskiing, jet-skiing, and/or high-speed boating. In comparison, very few public waters of the state over 500 acres in surface area are managed for wilderness-like recreational experiences. Of the twenty-one water bodies in Vermont over 500 acres in surface area, only two -- Somerset Reservoir and Green River Reservoir -- provide a wilderness-like recreational experience similar to that provided by Chittenden Reservoir. Green River Reservoir is located in northern Vermont, and Somerset Reservoir is located in southern Vermont. Therefore, creating or protecting an environment in central Vermont that is conducive to wilderness-like recreational opportunities is justified and required. Chittenden Reservoir, located as it is in the GMNF, with its diversity of water-dependent wildlife species and excellent wildlife habitat, limited shoreline development and associated human impacts, and aesthetic value as a water body adapted to quite solitude, is a prime candidate for protection as a water body providing wilderness-like recreational opportunities.

B. Response to Arguments in Opposition to All or Portions of the Proposed Rules

In reaching its decision in this matter, the Board considered and hereby overrules the following arguments for the reasons indicated below. See 3 V.S.A. § 841 (b) (1995).

1. Several comments support a speed limit for motorized vessels, but feel that 10 mph is a more reasonable speed limit than the proposed 5 mph rule.

Several comments pointed out that a 5 mph speed limit may be overly restrictive to the fishing community. The Board recognizes the importance of Chittenden Reservoir to the fishing community, and understands that a lower speed limit will increase the length of time necessary to reach a fishing destination. In fact, in UPW-95-04, the Board determined that a 10 mph speed limit on Somerset Reservoir would be more reasonable than a 5 mph speed limit for that very reason. In that case, however, the configuration of the reservoir combined with a 5 mph speed limit, would have made travel to the far end of the reservoir extremely long in duration. This is not the case with Chittenden Reservoir. At 5 mph, the furthest point on the Reservoir from the boat launch can be reached within approximately 30 minutes. The Board finds that the 5 mph speed limit maintains and regulates the normal uses in a manner such that they can coexist now and in the future. In addition, there are several alternative locations in close proximity to Chittenden Reservoir that allow boating at higher speeds, including Lake Bomoseen,

Lake Dunmore, and Lake St. Catherine.

2. One commentator argued that waterskiing is a normal use on Chittenden Reservoir, and that in the alternative to a complete ban on waterskiing, the Board should create an exception for riparian landowners.

The Board acknowledges that some small number of riparian landowners and perhaps others have waterskiied on Chittenden Reservoir in the past. However, for waterskiing to be a normal use, it must have occurred on a regular, frequent, and consistent basis prior to January 1, 1993. It is not clear from the record that waterskiing by the general public occurred on a regular, frequent, and consistent basis prior to January 1, 1993. Even if it did at some period in the past, the record shows that waterskiing was prohibited on Chittenden Reservoir from 1989 to 1997, at a time both prior to and after the Board's significant amendments to the Vermont Use of Public Waters Rules in 1994 establishing what constitute "normal uses."

The argument was made that submerged obstacles in the Reservoir did not present a significant hazard to water skiers and other high speed uses of motorized craft. The Board acknowledges that because of their ready access to and frequent usage of the Reservoir, riparian landowners may be able to develop a high degree of knowledge of the Reservoir and its submerged obstacles and water hazards. However, the general public to whom the waters of the state, including Chittenden Reservoir, are available does not have ready knowledge of the location of submerged obstacles and water hazards, especially given the fluctuations in the surface level of the Reservoir described in Findings 20 and 21. VUPWR § 2.2 requires the Board to consider the safety of all citizens of the state, both current and future, in its management of public waters. With regard to Chittenden Reservoir, the Board must take into consideration the danger that the public may encounter due to exposure of submerged obstacles as a result of a drawdown of the lake surface level for hydroelectric generation or flood control. In addition, as stated previously, numerous alternative locations for waterskiing exist in close proximity to Chittenden Reservoir.

3. Several comments opposed the proposed rules based on a general position that rules currently exist that address the conflicts at issue at Chittenden Reservoir, and hence no new rules are necessary.

At the July 12, 2002, public hearing, the Board received a petition signed by almost 600 people in opposition to any rules governing Chittenden Reservoir and surrounding land use. That petition urges the Board to keep the Reservoir "open at all times with no new restrictions."

To the extent that the petition addresses conflicts in the uses of the Reservoir, the Board provides the following response. Conflicts have arisen in the past amongst users of the Reservoir requiring Board action and clarification. According to VUPWR § 1.1, “some conflicts and management issues require solutions tailored to the unique circumstances of particular bodies of water.” Section 1.1 authorizes the Board to consider such conflicts on a case-by-case basis. With regard to Chittenden Reservoir, the Board concludes that the Reservoir supports wilderness-like recreational experiences, and that high speed boating, waterskiing, and jet skiing conflict with those normal uses. The proposed rules are intended to address these conflicts. The Board has a duty to regulate the Reservoir so that the various normal uses can coexist in a manner that attempts to avoid all conflicts now and in the future.

C. Board Decision to Not Grant Request to Include a “No Disturbing Wake” Clause in Final Proposed Rule (1)

The Petition requested that the Board adopt the following rule: “Vessels powered by motor shall not exceed 5 miles per hour nor shall they create a disturbing wake.” The Board’s initial proposed rules filed with the Interagency Committee on Administrative Rules and the Office of the Vermont Secretary of State, and also noticed for public comment and hearing, were amended slightly to read as follows: “Vessels powered by motor shall not exceed five miles per hour or in such a manner as to case [sic] a disturbing wake.”

In previous VUPWR rulemakings involving the regulation of specific bodies of water, and especially in conjunction with the Board’s major rulemaking in 1994, the Board adopted several rules prohibiting the operation of motorized vessels in such a manner as to cause a disturbing wake. Such rules now govern operation of motor boats on Echo Lake (Keeler Pond) in the Towns of Sudbury and Hubbardton and Fern Lake in the Town of Leicester, to name two examples. However, the Board has not consistently adopted such provisions in conjunction with rules restricting high speed boating. See, for examples, rules governing Beebe Pond in the Town of Hubbardton, Caspian Lake in the Town of Greensboro, and Curtis Pond in Town of Calais, to name a few. Indeed, the Board believes that such provisions are too vague to be readily enforced. Furthermore, in an instance where, as in this rulemaking, other regulatory provisions are proposed for adoption which would prohibit high speed use of motorized vessels and there is a general statute prohibiting the creation of wakes under many circumstances, a “no disturbing wake” provision is, in the Board’s view, largely redundant and unnecessary. See 23 V.S.A. § 3311(c)(1).³ While the Board received no public comment with respect to the necessity of

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“A person shall not operate any vessel ... within 200 feet of the shoreline, a person in the water, a canoe, rowboat or other vessel, an anchored or moored vessel containing any person, or anchorages or docks, except at speeds of less than five miles per hour which does not create a

inclusion of a "no disturbing wake" provision, the Board concludes that such a provision should not be included in the Board's final proposed rules, consistent with the command in 3 V.S.A. § 833 that all rules "shall be written in a clear and coherent manner."

Accordingly, the Board's final proposed Rule (1) prohibiting high speed use of motorized vessels on Chittenden Reservoir is amended to read:

- (1) Vessels powered by motor shall not exceed 5 miles per hour.

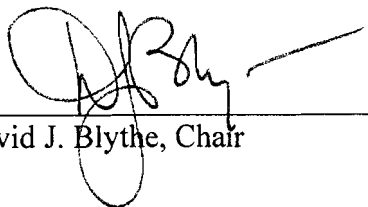
Conclusion

In conclusion, the Board hereby adopts the following final proposed rule governing the surface use of Chittenden Reservoir:

- (1) Vessels powered by motor shall not exceed 5 miles per hour.
- (2) The use of personal watercraft (as defined in 23 V.S.A. § 3302(8)) is prohibited.
- (3) Waterskiing is prohibited.

Dated at Montpelier, Vermont, this 30th day of August, 2002.

WATER RESOURCES BOARD



David J. Blythe, Chair

Concurring:
Mardee Sánchez
John D.E. Roberts
Lawrence H. Bruce Jr., Esq.
Jane Potvin

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