

STATE OF VERMONT  
WATER RESOURCES BOARD

In re: Petition regarding the  
Recreational use of Lake Elmore,  
Town of Elmore

10 V.S.A. § 1424

BACKGROUND

In October of 1994 the Water Resources Board (Board) adopted the Vermont Use of Public Waters Rules (VUPW Rules) to provide uniform and consistent guidance for the management of recreational use conflicts on Vermont's public waters. The VUPW Rules provide that the use of personal watercraft ("jet skis") will be prohibited effective May 1, 1997, on lakes, ponds and reservoirs that have a surface level of less than 300 acres unless the Board, on a lake specific basis, agreed to modify this prohibition.

In May of 1996 a petition seeking to allow the use of personal watercraft on Lake Elmore to continue without restriction was filed with the Board. In response to this petition, the Board proposed the rule requested and, following public notice, held a public hearing on August 21, 1996, at the Elmore Town Hall for the purpose of receiving public comment on the proposed rule. Representing the Board at the August 21 hearing as hearing referees or fact finders were Board Chair William Boyd Davies, Board member Gail Osherenko and the Board's Executive Officer William Bartlett.

The Board initially established September 13, 1996, as the deadline for filing written comment. The deadline for filing written comment was extended until October 7, 1996.

DECISION

On the basis of its record in this proceeding, the Board decided on January 8, 1997, to grant the petition, with modifications, to allow the use of personal watercraft to continue on Lake Elmore within the time limits indicated. Accordingly the Board will proceed with the adoption of the following rule applicable to Lake Elmore which would be added to Appendix B of the VUPW Rules.

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The provisions of Section 3.3 (a) (1) (of the Vermont Use of Public Waters Rules) notwithstanding, the use of personal watercraft is allowed between 10:00 a.m. and 7:00 p.m.

**FINDINGS**

The Board received comments filed by Kim Bolduc in a letter dated October 2, 1996 (received October 7, 1996) regarding the findings issued by its hearing referees. These comments were considered by the full Board which, on the basis of that review, adopted without modification the findings as issued on September 16, 1996 by its hearing referees.

**RESPONSIVENESS SUMMARY**

In reaching this decision, the Board considered and overruled the following arguments offered at the public hearing and in writing by the deadline of October 7, 1996 for the reasons indicated below (3 V.S.A. § 841(b)):

- 1. Personal watercraft should be prohibited as of May 1, 1997 as originally contemplated by the VUPW Rules.**

The VUPW Rules as adopted in October of 1994 do provide that personal watercraft (PWC) use will be prohibited on those lakes, such as Lake Elmore, on which high speed motor boating is a normal use that also have a surface area of less than 300 acres as of May 1, 1997. However these same rules also make it clear (see VUPW Rules at § 3.3(b)) that this prohibition can be modified on a case-by-case basis in response to a petition filed pursuant to 10 V.S.A. § 1424.

When the Board adopted the so-called 300-acre "rule" regarding PWC (§ 3.3 VUPW Rules) it clearly acknowledged that this was a "rule-of-thumb" policy subject to reconsideration with regard to any specific affected lake within a two plus year period between the adoption of the rules in October 1994, and the effective date of the PWC prohibition in May 1997. Accordingly the decision in this proceeding to allow PWC usage to continue on Lake Elmore is not inconsistent with the VUPW Rules as adopted in 1994.

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Lake Elmore has a surface area of well over 200 acres. The Lake's historical use for a variety of high speed recreational activities combined with the fact that its shape and shoreline configuration make it more suited to accommodating high speed motorboat uses than many bodies of water its size also contributed to the Board's decision in this matter.

In deciding to allow PWC usage to continue, the Board notes in particular the position of the Agency of Natural Resources and the widely expressed sentiment among a wide variety of users of Lake Elmore that the most appropriate result was to allow PWC usage to continue but to constrain their use to minimize actual and potential conflicts.

The Board believes that this decision is consistent with several provisions of the VUPW Rules including:

- 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.
- 2.9 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.

Finally the Board notes that its decision to allow PWC usage to continue despite concerns about compliance with Vermont boating safety requirements does not preclude its future consideration of further restrictions including prohibition of PWC usage on Lake Elmore. It is the Board's hope that a fair trial of its final proposed rules in this case and the spirit of community evident at the public hearing will eliminate the need for any further consideration of this issue.

As discussed below, the Board has explained its rationale for granting an exception to the 300-acre rule-of-thumb policy in

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the case of Lake Elmore. Should future experience show that reconsideration of this decision is warranted, either to make it more permissive or more restrictive, the Board would of course be willing to give this matter further consideration after the rule granting the exception has had a reasonable time to be tested.

- 2. Personal watercraft usage has been and is likely to continue to be conducted in such a manner, including violations of existing boating safety laws, that it unreasonably interferes with other normal uses of the Lake.**

Several individuals testified either at the public hearing or in written comment that in their experience, PWC usage interferes with other normal uses of the Lake and that PWC users have violated a variety of provisions in existing state boating safety law. The most common infraction cited was the violation of the requirement that all motorboats, including PWC, not exceed speeds of 5 m.p.h. within 200 feet of: the shoreline, another occupied vessel or a person in the water (23 V.S.A. § 3311(c)). Other infractions cited were careless and negligent operation (23 V.S.A. § 3311 (a)) and the operation of PWC by persons under 16 years of age (23 V.S.A. § 3312a (a)).

Much of this testimony was anecdotal and it is difficult to evaluate whether it, and a video tape submitted as testimony in this proceeding, accurately and fairly reflects typical PWC usage on Lake Elmore. Nevertheless, it is clear that violations of current boating law have occurred. The Board is deeply concerned about such violations, as should be the advocates of the continued usage of PWC on Lake Elmore. However, the Board has concluded in this proceeding that PWC usage on Lake Elmore does not inherently conflict with the reasonable enjoyment of other normal uses, particularly if PWC use is limited to the time periods contemplated in the Board's final proposed rule and if PWC users comply with all applicable boating safety laws.

- 3. If PWC usage is not prohibited large numbers of additional PWC displaced from other Vermont lakes by the VUPW Rules.**

The Board does not agree that there is any reason to assume that substantial numbers of PWC will be displaced by the provision in the VUPW Rules prohibiting PWC usage on several Vermont lakes that are less than 300 acres in size. First, the vast majority of the surface area of Vermont lakes on which PWC usage is a normal use are not affected by the VUPW Rules. Secondly,

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there is no evidence to show that the amount of PWC usage that may be displaced on the 40 or so affected lakes is significant. In addition the affected lakes are widely distributed throughout Vermont so that the impact on any given lake where PWC will still be allowed is likely to be minimal. Few of the lakes on which PWC usage will be prohibited are within reasonable commuting distance of Lake Elmore.

- 4. Personal watercraft usage should be allowed to continue without any additional restrictions including any additional restrictions as to what time of day they can be used.**

The Board has overruled this argument by deciding to limit PWC usage to the times of day when this use has been most common and which are less likely to result in some of the conflicts with other uses of Lake Elmore including fishing and the enjoyment of quite solitude. The Board feels the testimony presented reflected sufficient evidence of levels of conflict between PWC usage in the early morning and in the evening to warrant the proposed time restrictions in conjunction with the decision to allow PWC usage to continue during most of the day at times when this use has been most common historically.

The Board notes that many of those testifying in favor of allowing PWC usage to continue indicated some time constraints,, albeit not necessarily those now set by the Board, would be reasonable limitations.

- 5. Personal watercraft usage should be restricted to shore land property owners or by number of vessels in use at any one time.**

The Board has rejected these suggestions in its decision. Limiting PWC use, or any recreational use for that matter, to the owners of shoreline property is simply inconsistent with the fact that the waters in question are public waters. Accordingly the Board believes that any rules that it adopts must treat all users of such public waters the same.

With regard to the suggestion that the Board limit the number of PWC using Lake Elmore at any one time, the Board has concluded that there is no need for such regulation at this time. Moreover the Board, although not ruling out the consideration of such an approach in the future, has serious reservations as to the practical application of such an approach.

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- 6. If personal watercraft usage is prohibited or restricted it will or is likely to lead to prohibitions or restrictions of other normal uses of the Lake.**

The Board does not agree that a decision to regulate conflicts between one specific recreational use, in this case PWC, and other normal uses of a body of water will inevitably lead to the regulation or potentially the prohibition of other uses. In fact there are several policies in the VUPW Rules that mitigate against such a result including:

2.2 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.

2.6 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.

2.10 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.

- 7. Personal watercraft should be prohibited in order to reduce the likelihood of the introduction of exotic aquatic species such as Eurasian milfoil or zebra mussels.**

The Board recognizes the growing public concern with the potential spread of exotic aquatic species such as Eurasian milfoil and zebra mussels. The trailering of vessels, including but certainly not limited to PWC, between lakes is one of several potential means of spreading such exotic species. However, PWC

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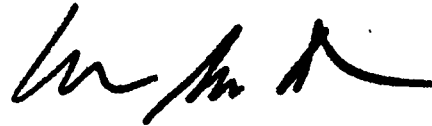
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apparently represents a very minor fraction of vessels trailered to Lake Elmore. There is no evidence to suggest the PWC are any more likely to result in the transfer of exotic species than any other type of vessel. Accordingly, the Board does not believe that prohibiting PWC on the grounds that it will reduce the likelihood of the introduction of exotic aquatic species to any significant extent. Moreover, absent some strong indication from the ANR, and/or corroborating scientifically based evidence, that such an approach is an effective and appropriate means of controlling the spread of such problems, the Board is reluctant to address this issue on a lake-by-lake basis.

Dated at Montpelier, Vermont this 8th day of January, 1997.

Vermont Water Resources Board



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William Boyd Davies, Chair

Board members concurring:

William Boyd Davies  
Ruth Einstein  
Gail Osherenko  
Jane B. Potvin

Board member opposed:

Stephen J. Dycus

