

**STATE OF VERMONT
WATER RESOURCES BOARD**

**In re: petition seeking the
prohibition of the use of
internal combustion motors on
Fern Lake, Town of Leicester**

10 V.S.A. § 1424

Background

In April of 1997 the Vermont Water Resources Board (Board) was petitioned (the petition) under the provisions of 10 V.S.A. § 1424 to amend the current rules regulating the use of Fern Lake (the Lake) by prohibiting the operation of vessels powered by internal combustion motors. Currently the use of such motors is allowed on the Lake at speeds not exceeding five (5) miles per hour.

In response to this petition, the Board proposed to amend the current rules for Fern Lake as requested by the petition for purposes of receiving public comment. Following public notice, the Board held a public hearing at Leicester, Vermont on August 27, 1997, and established September 5, 1997, as the deadline for the filing of written comment regarding the proposed amendment.

Decision

At its meetings on September 16, 1997, and again on October 14, 1997, the Board reviewed and discussed the public comment received both at the public hearing and in writing. At its meeting on October 14, 1997, the Board voted unanimously to deny this petition and to issue this decision. Accordingly, the Board will not proceed with the adoption of the amendments to the current rules for Fern Lake requested by the petition. At the same time the Board, in a separate memorandum, has expressed its views on the need for all involved state agencies, including itself, to be more proactive in responding to the issue of containing the spread of exotic, aquatic nuisances including but not limited to Eurasian water milfoil.

The Board has denied the petition because it is not convinced, based on the testimony at the public hearing and in written comment, that a total prohibition of the use of internal combustion motors on Fern Lake is warranted at this time. The use of such motors is a normal, long-established use of Fern Lake. The Board is simply not persuaded by the evidence that the prohibition of this use is warranted on the grounds of any of the

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three major arguments presented by the proponents of the petition: (1) to reduce or eliminate recreational use conflicts at the town access area; (2) to reduce or eliminate recreational use conflicts on the Lake itself; or (3) to reduce the Lake's exposure to infestation by exotic aquatic nuisances, principally Eurasian water milfoil (milfoil).

With regard to the possible recreational use conflicts at the town access area, the Board concludes simply that such issues are beyond its authority under 10 V.S.A. § 1424. The Board is authorized to adopt rules regulating the use of "public waters" not public access to such waters. The Board has no authority to regulate the use of the Town of Leicester's access area. The proper body to address any issues related to the use of this access is the Leicester Select Board.

With regard to recreational use conflicts on the Lake itself involving the use of internal combustion motors, the proponents of the petition have failed to meet their burden of showing that such conflicts rise to a level that warrants further regulation, particularly the prohibition of the long established use of internal combustion motors at relatively low speeds. The current rules have been in place for the past 17 years with no documented history of serious problems or conflicts. If there are occasional violations of the five mile per hour speed limit, the first remedy would be to insure that boaters are aware of the speed limit and if needed to seek enforcement through the Vermont State Police. There is little if anything in the record of this proceeding to show that such remedies have been tried to the point that they can be said to have proven inadequate. The Board would note that on the date of the hearing when it visited the Town access area, there was no information posted to indicate the five mile per hour speed limit established by the current rules. With the concurrence of the Town, the speed limit rules could be displayed at the access area. The Board makes posters for displaying its rules available on request at no charge.

Finally, the Board is not persuaded at this time that the requested rule would reduce risk of possible infestation to an extent that warrants the prohibition of internal combustion motors. While the Board shares the concern expressed by many regarding the risk of milfoil infesting Fern Lake, it is simply not convinced that the degree of risk reduction that would be achieved warrants the regulatory restrictions requested. While the requested rule might have the affect of discouraging some trailered boats from using Fern Lake, it does not prohibit the use of trailers. Nor does it address the Lake's exposure to zebra mussels due to the failure to wash a vessel after use on an infested Lake.

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While the petitioners were principally concerned with Fern Lake and its possible infestation with milfoil, the Board cannot ignore the fact that any decision to prohibit internal combustion motors on one lake to reduce possible exposure to one exotic aquatic nuisance would quickly be requested on other lakes with similar concerns. Without a clearer sense of what long term net benefit will be achieved and a determination that there are not more effective ways of achieving similar results, the Board is very reluctant to endorse such a drastic regulatory approach simply for the sake of "doing something."

However, the petitioners have made the point, that state agencies charged with the management of public resources such as Fern Lake, including but not limited to this Board, need to be proactive in searching for the most effective strategy for responding to this concern about the transport of exotic aquatic nuisances including milfoil. The Board's response in that regard is outlined in the attached covering memorandum.

FINDINGS

1. Fern Lake is located entirely in the Town of Leicester and has a surface area of 69 acres.
2. Fern Lake constitutes public waters of the state of Vermont within the meaning of 10 V.S.A. § 1422 (6).
3. The Water Resources Board (Board) adopted the current rules regulating the use of the public waters of Fern Lake in 1980 in response to a petition filed under 10 V.S.A. § 1424.
4. The current rules allow the use of internal combustion motors on Fern Lake at speeds of up to five miles per hour.
5. The petition that led to the adoption of the current rules in 1980 sought the total prohibition of the use of internal combustion motors on Fern Lake at that time. The Board at that time decided to adopt a five miles per hour speed limit but not to prohibit the use of internal combustion motors entirely.
6. The use of internal combustion motors at speed of up to five miles per hour continues to be a normal use of Fern Lake.
7. The Lake is used for a variety of recreational uses including but not limited to: boating by both motorized and nonmotorized vessels, fishing and swimming.

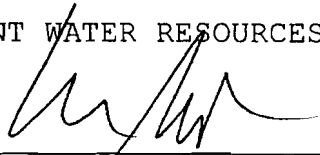
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8. The only public access to the Lake is owned by the Town of Leicester and is located at the southerly end of the Lake. This access is used for a variety of recreational purposes including boat access by both cartop and trailered vessels and swimming.
9. Fern Lake is in close proximity to several lakes that are already infested with Eurasian water milfoil.
10. In 1996 a single plant of Eurasian water milfoil (milfoil) was found near the Town access area. This plant was removed by hand pulling and no subsequent observations of milfoil in Fern Lake have been made since that date.
11. Inspections of trailered vessels using the Lake Dunmore public access area conducted by the Lake Dunmore Association in 1996 and 1997 found that approximately 5% of them were unknowingly transporting milfoil. The most common circumstance in which milfoil was found in those inspections was trapped between the hull of the vessel and the carriage on the trailer.
12. The Board has not been presented with any statistically reliable or scientifically valid evidence to show any specific correlation between the use of internal combustion motors and the degree of risk of spreading exotic aquatic nuisances.
13. Some Vermont lakes where boating is not permitted and which do not have a public boat access are currently infested with milfoil.

Dated at Montpelier, Vermont on this 14th day of October 1997.

VERMONT WATER RESOURCES BOARD



William Boyd Davies, Chair

Board members concurring:

Gerry Gossens
Gail Osherenko
Ruth Einstein
Jane Potvin