

State of Vermont
WATER RESOURCES BOARD

**In re: Petition seeking the
prohibition of the use of
personal watercraft on
Lake Morey, Town of Fairlee**

10 V.S.A. § 1424

Background

In April of 1998, the Vermont Water Resources Board (Board) was petitioned (the petition) by the Lake Morey Protective Association under the provisions of 10 V.S.A. § 1424 to amend the current rules regulating the use of Lake Morey (the Lake) by adopting a rule prohibiting the use of personal watercraft frequently referred to by the brand name "jet skis." Currently the use of personal watercraft is allowed on the Lake by virtue of the fact that other high speed motorboat uses are allowed and the fact that it has a surface area greater than 300 acres.

In response to this petition, the Board proposed to amend the current rules for Lake Morey as requested by the petition for purposes of receiving public comment. Following public notice, the Board held a public hearing at Fairlee, Vermont on July 21, 1998, and established August 14, 1998, as the deadline for the filing of written comment regarding the proposed amendment.

Decision

At its meetings on September 15, 1998, October 6, 1998, and October 27, 1998, the Board reviewed and discussed the public comment received both at the public hearing and in writing. At its meeting on October 27, 1998, those Board members present voted on a motion by Gail Osherenko, seconded by Jane Potvin, to grant the petition and proceed with the adoption of a rule to prohibit the use of personal watercraft on Lake Morey. This motion failed on a vote of two in favor (Gail Osherenko and Jane Potvin) and two opposed (William Boyd Davies and Ruth Einstein).

The Board then issued a preliminary decision dated October 29, 1998, which provided that "absent a successful motion to reconsider the action taken on October 27, 1998, the Board will not proceed with the adoption of a rule to prohibit the use of personal watercraft on Lake Morey".

On November 9, 1998, the Lake Morey Protective Association, the petitioner in this proceeding, filed a letter questioning whether the Board's action on October 27, 1998, was

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consistent with Rule 10 of the Board's Rules of Procedure (see Attachment A) and requested reconsideration or alteration of that action by the Board.

The Board considered the Association's November 9, 1998, filing at its meeting on November 23, 1998, at which all five Board members were present. At that meeting the Board determined that its action on October 27, 1998, as reflected in its preliminary decision dated October 29, 1998, was not in accordance with Rule 10 of its Rules of Procedure and therefore the issue of what action to take in this proceeding was still pending before the Board. On a motion by Gossens, seconded by Osherenko, the Board by a vote of three in favor (Gerry Gossens, Gail Osherenko and Jane Potvin) and two opposed (William Boyd Davies and Ruth Einstein), decided to grant the petition and proceed with the adoption of a rule prohibiting the use of personal watercraft on Lake Morey.

The Board reviewed drafts of its decision in this matter at its meetings on December 1, and December 22, 1998, and on January 12, 1999 prior to the issuance of this decision. At the January 12, 1999 meeting, Board member Ruth Einstein decided to join the majority in its decision.

Findings

1. Lake Morey is located in the Town of Fairlee and has a surface area of approximately 547 acres.
2. Lake Morey 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 Lake Morey in 1994 when it adopted the Vermont Use of Public Waters Rules (VUPW Rules) under 10 V.S.A. § 1424.
4. The current VUPW Rules do not prohibit the use of PWC on Lake Morey. The current VUPW Rules, however, do prohibit so-called "wake jumping" by all motorized vessels including PWC on all lakes including Lake Morey. Specifically § 3.2 (b) requires that PWC and other motorboats shall:

not be operated in such a manner that either the hull of the vessel or its underwater exhaust outlet completely leaves the water as a

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result of crossing or jumping the wake of any vessel, including its own wake, or for any other reason.

5. The Lake is situated between Echo Mountain on the west and Morey Mountain on the east. Accordingly sound generated upon the Lake's waters is amplified by reverberation between those two mountains.
6. 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.
7. There are several children's summer camps on the Lake all of which have active water programs involving swimming and nonmotorized boating uses of the Lake.
8. When the VUPW Rules were first being developed in the early 1990's the Lake Morey Association filed written comments in a letter dated August 20, 1993, asserting that the use of personal watercraft on the Lake was a rare occurrence and was not then a "normal use," as that term was defined in the VUPW Rules on the Lake.
9. A "normal use" is defined in the VUPW Rules (see §5.2) as follows:

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.
10. Testimony at the July 21, 1998, public hearing and written comment show that while PWC have been used on Lake Morey, their use prior to 1993 was not on a regular, frequent or consistent basis and therefore they are not a "normal use" of Lake Morey within the meaning of the VUPW Rules.
11. There was extensive testimony by users of Lake Morey that allowing the use of PWC to become an established use is likely to create an unacceptable level of conflict with other normal or established uses of the Lake.
12. Where use of PWC on lakes larger than 300 acres in size is not a normal use within the meaning the VUPW Rules, the Rules do not require the Board to leave lakes open to unrestricted access by PWC, thus inviting the development of conflicts with normal or established uses.
13. The Board concluded that adopting a rule preventing the use of PWC from becoming an

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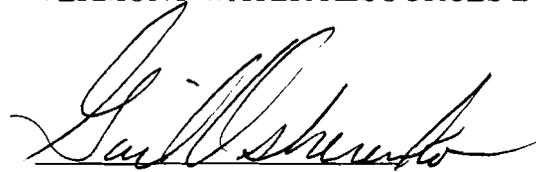
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established use is the least restrictive approach practicable that adequately addresses the potential conflicts.

14. With regard to the issue of the emission of unburned gasoline into the Lake due to the operation of PWC, the Board finds that it simply does not have sufficient information regarding the extent to which this may occur upon which to base its actions in this proceeding.

Dated at Montpelier, Vermont on this 12th day of January 1999.

VERMONT WATER RESOURCES BOARD



Gail Osherenko, Vice-Chair

Board members concurring:

Ruth Einstein

Gerry Gossens

Jane Potvin

DISSENT

In considering the adoption of a rule regulating the use of the surface waters, the Water Resources Board must first determine the appropriate statutes and rules to be followed. In the instant case, we need to look to the following directives for guidance:

Title 10, Section 1424(c), which sets forth the charge by the legislature to the Water Resources Board:

“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.**”
(emphasis added)

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Section 2.7 of the Vermont Use of Public Waters Rules, adopted on October 5, 1994:

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

Section 2.9 of the VUPW Rules:

“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.”

I respectfully submit that the majority has failed to follow its statutory and regulatory charge in adopting a rule creating an outright ban of personal watercraft from operating on Lake Morey.

First, as implicitly acknowledged by the majority, the problem giving rise to the new regulation is not as much a present conflict between uses, but, rather, the fear that a conflict may come into existence in the future if and when personal watercraft use increases on Lake Morey. A review of the existing statutory and regulatory provisions shows that as a prerequisite to the board's authority to impose new regulations on the use of the waters, the Board must first determine that a conflict exists, a finding absent from the majority's decision. The majority appears to be ignoring the Board's unanimous 1995 Decision in In re: Petition for the adoption of Rules regulating the use of Lake Bomoseen, Towns of Castleton and Hubbardton, wherein the Board, in declining to adopt a rule banning personal watercraft on Lake Bomoseen, stated:

“. . . 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.”

After making a finding that a conflict exists, the next step for the board to undertake is to make a determination as to what measures short of total prohibition of an activity will adequately address the problem. The majority undertook no such analysis.

During the public hearing held in this matter, no testimony was presented asserting that

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the use of personal watercraft had increased on Lake Morey since the 1994 rules were adopted. However, considerable testimony was received indicating that many users of personal watercraft do not obey the existing rules and regulations concerning the operation of personal watercraft. Section 2.4 of the Board's own VUPW Rules requires that the Department of Public Safety shall be consulted with reference to the consideration of a new rule. In this instance, no such consultation occurred; therefore, the majority has apparently determined that since existing rules are not obeyed in all instances, a total prohibition of the activity is required. It has failed to consider regulatory steps short of total prohibition, as is required by its own rules.

Nothing in the record in this proceeding establishes that the configuration of Lake Morey results in any greater amplification of sound than at any other lake within Vermont. To the extent that the rule the majority has adopted is premised upon the amplification of sound, it is without factual basis.

As the legislature has directed, the waters of the State of Vermont should, to the greatest extent possible, remain open to all citizens for the many various uses to which our waters are put. I have not been convinced that the majority has followed the Board's own rules, nor do I believe that the majority has followed its statutory charge in prohibiting personal watercraft on Lake Morey.

Finally, I do not believe that the record sufficiently establishes that the use of personal watercraft on Lake Morey is not a "normal use" as the term is defined in Section 5.2 of the VUPW Rules. The testimony received at the hearing, as well as the written comment received following the hearing, fails to conclusively show that personal watercraft were not used regularly, frequently and consistently on Lake Morey. Although the testimony does show that the personal watercraft were not used constantly on Lake Morey, the definition of "normal use" does not require that the use be constant.

Dated at Montpelier, Vermont on this 12th day of January, 1999.



William Boyd Davies, Chair

ATTACHMENT A

Water Resources Board - Rules of Procedure (Effective April 25, 1988)

Rule 10 **Tied Votes**

In the event of a tied vote in any rulemaking proceeding the Board shall recess until at least one additional Board member can review the record, and participate in the Board's decision.