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98-04
Batten Kill

Memorandum

To: Legislative Committee on Administrative Rules

From: William Boyd Davies, Chair

A handwritten signature in black ink, appearing to read "W. Boyd Davies".

Subject: Final proposed amendments to the Vermont Use of Public Waters Rules,
Responsiveness Summary

Date: January 19, 1999

This memorandum and the companion memorandum from the Board's Vice-Chair Gail Osherenko should have been submitted along with the copies of the Board decisions on the Batten Kill, Lake Fairlee, Lake Salem and Lake Morey.

1. Batten Kill

The Board was petitioned by a local group known as the Friends of the Batten Kill to adopt a variety of rules restricting certain recreational uses on that portion of the Batten Kill from the Water Street Bridge in Arlington downstream to the Vermont/ New York border a distance of approximately 7 miles. As explained in the Board's written decision regarding this petition, the Board initially determined that some of the rules requested in the petition were beyond our authority. Some aspects of the rules requested in the petition, specifically those seeking to restrict canoeing and tubing, were the focus of virtually all of the public comment in this proceeding. However those requested rules were rejected by the Board in its written decision in this proceeding.

The Board has decided to proceed with the adoption of only one of the requested rules, specifically the prohibition of the use of motors on this portion of the River. The use of motors on this portion of the River, has occurred only very rarely in the past. Substantial arguments were not raised either for or against the final proposed rule now filed.

2. Lake Fairlee

The Board's final proposal would adopt a rule, as requested by a petition filed by the Lake Fairlee Association, that would prohibit the use of personal watercraft on Lake Fairlee. The Board received no public comment specifically objecting to this rule and has explained its rationale for the final proposed rule in its written decision in this proceeding. The Board's

decision in this proceeding is based largely on the conclusion that the use of personal watercraft is not a "normal use" (i.e. established use) on Lake Fairlee and if allowed to become a common use, would result in a level of conflict with other established uses that is not in the public interest.

3. Lake Salem

When the VUPW Rules were initially adopted PWC usage was not restricted on those lakes on which high speed motorboat use was established and which also had a surface area of 300 acres or more. High speed motorboat uses are established uses on Lake Salem which has a surface area of 764 acres. Accordingly the use of PWC was not restricted on Lake Salem when the VUPW Rules were initially adopted in 1994. Since then, there has not been a petition filed with the Board under 10 VSA §1424 to adopt rules prohibiting PWC usage on Lake Salem.

However in the course of 1996 amendments to the VUPW Rules, which did not involve consideration of any petition involving Lake Salem, a clerical error regarding whether the use of personal watercraft were allowed on Lake Salem was inadvertently included in the amendments to the VUPW Rules adopted that year. In short, without intending to do so, the Board unknowingly "adopted" a prohibition on the use of personal watercraft on Lake Salem in 1996 without having been petitioned to do so and without having held a public hearing on that issue.

This matter did not come to the Board's attention until July of 1998. After discussions with the Secretary of State's Office, the Legislative Council and review by the Board's own legal staff, it was determined that the Board should give public notice of both the error, its intent to take corrective action, and to hold a public hearing to allow comment. Accordingly on August 12, 1998 the Board gave public notice of this situation and of its intent to correct this error in the course of its then pending rulemaking amending the VUPW Rules. The Board held a public hearing on the evening of September 15, 1998 in Derby, Vermont and provided for the filing of written comment until September 22, 1998 on this matter.

The Board has enclosed a copy of its written decision in this matter. As noted in that decision, the Board's action correcting its own error, does not prejudice the opportunity of those who may oppose the continued use of PWC on Lake Salem to subsequently file a petition with the Board.