

**STATE OF VERMONT
AGENCY OF NATURAL RESOURCES
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
CHAPTER 32 – USE OF PUBLIC WATERS RULES - WAKEBOATS**

Description of Edits for February 8, 2024 LCAR Meeting

The Agency of Natural Resources will make two adjustments related to the February 1, 2024 testimony of Meg Handler on behalf of Petitioner Responsible Wakes for Vermont Lakes.¹

1. Definitions of “wakeboat” and “wakesports”

The Petitioner proposes that the Agency modify the definition of “wakeboat” at Rule § 5.16 to include “design features” used to increase the size of the motorboat’s wake. This request was not made during the public comment period on the proposed rule despite voluminous comments, placing the Agency in an unfortunate position nearing the adoption of its proposed rule. Agency staff conferred with one member of the wakeboat user group on this change, and they did not raise significant concerns but did note the proposal is late in the process and unlikely to have a basis in actual wakeboat designs. The Agency expects LCAR to accept any further public input offered on this change during its review.

In addition, the Agency suggests that the definition of “wakesports” at Rule § 5.17 should be similarly modified to capture the scenario of such “design features” being engaged to increase the size of the boat’s wake.

With recognition of this background, the Agency is willing to propose the following revisions:

5.16 “Wakeboat” means a motorboat that has one or more ballast tanks, ballast bags or other devices or design features used to increase the size of the motorboat’s wake.

5.17 “Wakesports” means:

- A. to operate a wakeboat with ballast tanks, bags, or other devices or design features engaged to increase the size of the boat’s wake; or
- B. to use a surfboard, wakeboard, hydrofoil, or similar device to ride on or in the wake:
 - i. directly behind a wakeboat without a rope; or
 - ii. directly behind a wakeboat with or without a rope, when the wakeboat has ballast tanks, bags, or other devices or design features engaged as described in Section 5.17.A.

¹ Available at <https://legislature.vermont.gov/Documents/2024/WorkGroups/LCAR/23-P17%20-%20Vermont%20Use%20of%20Public%20Waters%20Rules/Meg%20Handler%20Testimony/W~Meg%20Handler~23-P17%20-%20Meg%20Handler%20Testimony~1-29-2024.pdf>.

2. Clarification regarding the Agency's choice not to determine whether wakesports are a "normal use."

The Petitioner has raised concerns that ANR's final rule filing may have recognized "wakesports" as a "normal use," meaning "any lawful use of any specific body of public water that occurred on a regular, frequent, and consistent basis prior to January 1, 1993." Use of Public Waters Rules § 5.6.

The proposed Rule amendment itself has never included a determination that "wakesports" is or is not a "normal use." The Petition did not ask the Agency to make such a determination, and the Agency did not undertake any evaluation to do so. The Agency has authority and justification to adopt the proposed Rule without making this determination.

The Agency notes that its "Proposed Rule Filing" inadvertently included the statement that "Wakeboats produce wakes that are significantly larger than conventional boats and are not a 'normal use' of public waters as defined in the rules." May 17, 2023 filing forms at page 5.

One comment received during the formal public comment period (Responsiveness Summary Comment #25) warranted a pointed consideration of the "normal use" subject. In evaluating the comment and response, and preparing its "Final Rule Filing," the Agency removed statements as to whether wakesports are a "normal use." It appears that Response #25 has caused uncertainty as to the Agency's approach or outcome on the topic.

In addition to the information in this memo, the Agency further clarifies the record by revising the Comment Responsiveness as follows:

Comment 25: This activity (wakeboarding) is not a normal use that existed on January 1, 1993 when normal uses were defined and anything not a normal use on any body of water by that date was banned. A wake boat being used as motor boat would certainly be allowed. But when that boat used for wakeboarding which is not a normal use and therefore should be prohibited from all Vermont lakes and ponds. Easy discussion and resolution.

Response 25: For this rulemaking, the Agency declines to address whether or not wakesports are a "normal use" pursuant to Use of Public Waters Rules § 5.6, as this is not necessary to support the proposed rule. Wakeboating and wakesports are a subcategory of motorized recreation. The Agency notes that wakeboating and wakesports are subject to the Use of Public Waters Rules pertaining to "vessels powered by motor" and the use of "internal combustion motors to power vessels." These include certain express prohibitions on waterbodies where motorized vessels or motorized vessels exceeding certain speeds did not occur on a specific public water on a regular, frequent, and consistent basis prior to January 1, 1993. UPW Rules §§ 3.2(a), 3.5. The Agency acknowledges that the design of certain motorized boats evolved

~~to allow for a different wave shape and size, however, this feature alone does not take them out of the motorized vessel use category.~~

Moreover, the comment incorrectly asserts that any use that is not a “normal use” “was banned” or “should be prohibited.” The UPW Rules direct the Agency’s charge is to protect and provide for all “normal uses” (UPW Rules §§ 1.1(a); 2.6(a)); this does not necessarily require that the Agency prohibit anything that does not qualify as “normal use,” though that option is available when necessary to adequately protect a normal use. In other words, even if “wakesports” as a motorized vessel subcategory does not qualify as a “normal use,” a specific ban on wakesports is not mandatory.

**Description of Edits for February 1, 2024 LCAR Meeting
(as submitted to LCAR on January 29, 2024)**

1. Based upon review of GIS data and calculations associated with the 200-foot minimum width requirement (incorporated following public comment period):

Appendix A: Added “Wakesports are prohibited (VUPW Rule 3.8)” for Lake Groton.

Appendix E: Removed Lake Groton from List of Lakes, Ponds, and Reservoirs with Defined Wakesports Zones.

Note this also resulted in changes to the APA filing forms and Responsiveness Summary to describe 30 wakesports-eligible waterbodies, rather than 31.

2. **Section 1.1(a):** Added language to note that the Use of Public Waters Rules, authorized by 10 V.S.A. § 1424 (use of public waters) include aquatic nuisance control provisions that are also authorized under 10 V.S.A. § 1460 (aquatic nuisance control rulemaking). Note the reference to § 1460 is already included in Sec. 1.2 and on the APA filing form coversheet.
3. **Section. 1.2:** Replaced “promulgated” with “adopted.”
4. **Section 3.8(c):** Removed the quotation marks around the term “home lake.” The quotation marks were a carryover from earlier drafting of the home lake concept and no longer serve a purpose in the final proposed rule.
5. **Section 5.7:** Revised cross reference to 23 V.S.A. § 3302(10) to align with redesignation of statutory term.
6. **Section 5.10:** Revised cross reference to 23 V.S.A. § 3302(11) to align with redesignation of statutory term.
7. **Appendix A, Note 4:** Corrected to “Administrative Procedure Act” (not “Administrative Procedures Act”).
8. **Appendix A, Note 5:** Added ellipses to show the omitted portion of Section 3.2 as quoted.