

Watershed Management Division
1 National Life Drive, Davis 3
Montpelier VT 05620-3522
<https://dec.vermont.gov/watershed>

January 20, 2022

Gilbert Nadeau
Karen Godnick Barber
Representing the residents along Indian Point
P.O. Box 534
Bomoseen, VT 05732

Via U.S. Mail and Email at giljr2006@comcast.net

Re: Petition to prohibit the anchoring of non-resident boats along Indian Point, Lake Bomoseen

Dear Mr. Nadeau, et. al.:

On October 21, 2021, the Watershed Management Division of the Department of Environmental Conservation (DEC) received a petition from you, on behalf of a group of residents owning property along the southern shore of Lake Bomoseen in an area known as Indian Point. The petition was signed by 25 residents of Indian Point. The petition requests DEC exercise its authority under 10 V.S.A. § 1424 to amend the Vermont Use of Public Water Rules (UPW) to establish a new lake-specific rule for a section of Lake Bomoseen. Specifically, the petition requests the following lake-specific rule be adopted for Lake Bomoseen:

RULE: Motorized Vessels are prohibited from anchoring within 200 feet of the shoreline at the southern end of Lake Bomoseen known as Indian Point which runs from the eastern end for approximately 1,500 feet to the channel located at the western end. This rule applies for the months of May through September. This rule is intended to provide a safety zone marked by buoys placed two hundred feet from the shoreline and some 30- feet apart along the length of Indian Point. Local property owners along Indian Point and other rights-of-way holders are exempt from this Rule.

The petition was reviewed by appropriate staff within the Watershed Management Division, as well as the Department of Fish and Wildlife (FWD) and Department of Forests, Parks and Recreation (FPR). DEC denies Petitioner's request to initiate rulemaking to amend the Use of Public Waters rule for Lake Bomoseen because Petitioners failed to demonstrate that anchoring of non-resident boats conflicts with the use of Indian Point for swimming and boating, and the proposed rule is inconsistent with the Agency's regulatory policy of managing public trust waters such that all normal uses of the water may be enjoyed in a reasonable manner. Additionally, the safety concerns articulated by the petitioner are currently addressed by existing statutory and regulatory requirements.

MEMORANDUM OF DECISION

I. Background

Lake Bomoseen is a large warmwater lake with a surface area of approximately 2,360 acres, located in the towns of Castleton and Hubbardton. It currently ranks as one of the top 5% of lakes in Vermont for biodiversity. The shoreline is extensively developed and consists primarily of residential properties, as well as Bomoseen State Park on the western shore. The Lake currently has two public swimming areas: Crystal Beach, a municipal public beach, and multiple swimming access points at Bomoseen State Park. Lake Bomoseen has infrequent cyanobacteria blooms in the summer, and does not typically suffer from beach closures due to unsuitable *E. coli* concentrations.

The specific area subject to the proposed rule, Indian Point, is described in the petition as an area extending 200 feet from the shoreline of Indian Point, and extending 1,500 feet from the eastern end of the shoreline to the channel opening at the western end of Indian Point, an area of approximately 6.89 acres of surface water. *Petition* at 3. The Indian Point area contains, notably, a large shallow sandbar that extends approximately 500 feet from the shore, making it particularly suitable for recreational swimmers and boaters.

Lake Bomoseen currently has no lake-specific rules, other than those general rules adopted under Section 3 of the UPW (see Use of Public Water Rules, Appendix A; Section 3). Motorized vessels, personal watercraft, and internal combustion motors are allowed to be used on the Lake, but are subject to all safety and operational requirements imposed under 23 V.S.A. Chapter 29 (“Snowmobiles, Vessels, and Water Sports”) and Section 3 of the Use of Public Waters Rules.

Petitioners assert that the proposed rule is necessary to address a conflict between non-residents anchoring their boats in the sandbar along Indian Point, and property owners along Indian Point who swim and use both small, non-motorized watercraft as well as motorized watercraft. *Petition* at 3. According to the petition, large numbers of boaters anchor in the sandbar and remain anchored there for hours, particularly during good weather and holiday weekends. The petition alleges that between 70-100 boats per day have been anchored at the sandbar, depending on the weather and time of year. *Id.* Residents of Indian Point requested to install buoys to delineate the 200-foot shoreline safety zone.¹ The Agency reviewed the request and determined that as long as buoy placement does not impede navigation, the buoy placement is exempt from Lake Encroachment permitting 29 V.S.A. § 403(b); for a number of years now buoys have been in place demarking the boundary of the safety zone along Indian Point. Petitioners claim the number of boaters anchoring inside the buoys has increased, resulting in tense exchanges between boaters and residents. *Petition* at 4. Petitioners express concern about the safety of swimmers within the shoreline safety zone. They also assert that anchored boats within 200 feet of shore are impeding the ability of private landowners along Indian Point to navigate their own boats past anchored boats out to the Lake. *Petition* at 5.

II. Standard of Review

¹ The shoreline safety zone is the portion of the surface area of all public waters within 200 feet of the shoreline. (UPW § 5.13). Vessels are allowed within the shoreline safety zone, but are required to operate at speeds of less than five miles per hour and are prohibited from creating a wake. 23 V.S.A. § 3311(c)(1).

In reviewing petitions for new regulation, the Agency's objective is to ensure that public waters are 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. To the extent possible, the Agency shall provide for all normal uses in regulating public waters.² See 10 V.S.A. § 1424(c); UPW § 2.2. The Agency also considers the uses for which the water is adaptable, as well as normal recreational uses of the water. Lake Bomoseen is a large lake with significant acreage outside of the shoreline safety zone, and a heavily developed shoreline. It currently supports a number of recreational uses including fishing, swimming, boating, and waterskiing. The Agency's objective is to ensure that all of these uses may continue to be enjoyed by all Vermonters in a reasonable manner.

When normal uses of a public water conflict, conflicts shall be managed in a manner that provides for *all normal uses to the greatest extent possible*. UPW § 2.6. (emphasis added). In instances where regulation is deemed necessary, conflicts shall be managed using "the least restrictive approach practicable that adequately addresses the conflicts." *Id.* Further, when specific regulation of vessels is determined necessary to resolve conflicts, "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." UPW § 2.8. Similarly, when addressing conflicting uses priority is given to strategies that separate existing uses by time or place. UPW § 2.9. The objective of these review standards is to ensure that additional regulation of normal uses is not imposed unless absolutely necessary. *In re Berlin Pond (Berlin)*, No. UPW-13-02, Decision (2014). Finally, the Petitioner has the burden to show that additional regulation is necessary to address a conflict. UPW § 3.7; *In re Echo Lake (Keeler Pond) (Hubbardtown, Sudbury)*, No. UPW 91-05, Decision (Dec. 22, 1992) (placing the burden on petitioners to show that conflicting uses are incompatible).

III. Discussion

The petition at hand alleges that the proposed rule is necessary to address a conflict of uses in the area, namely between swimmers and boaters, and between non-resident boaters and resident boaters attempting to navigate into the lake. *Petition* at 3-5. In this case, Petitioners have failed to demonstrate how the proposed rule would meet the Agency's criteria for addressing conflicting uses under Sections 2.6 – 2.9 of the UPW. As stated, conflicting uses shall be managed in a manner that provides for *all normal uses to the greatest extent possible*. UPW § 2.6.

The proposed rule would not allow all normal uses to continue in a reasonable manner: It would prohibit non-resident boats from anchoring in the designated area, regardless of whether boats are being operated in a reasonable and lawful manner. The petition fails to demonstrate that prohibiting non-resident boats from anchoring is necessary to resolve the perceived conflict. As described above, Petitioners allege that non-resident boats conflict with swimming and navigation for resident-boaters. The petition describes safety concerns for children swimming near anchored boats, and provides anecdotal description of residents having difficulty navigating small watercraft around anchored boats. The petition also includes pictures of large numbers of boats anchored near Indian Point, and swimmers gathered near the anchored boats, as well as documentation of a conflict between a boater and a resident. *Petition* Exhibits A and C. But it is not clear from the petition that the anchoring of motorized vessels at Indian Point is incompatible

² "Normal use" is defined as "any lawful use of any specific body of public water that occurred on a regular, frequent, and consistent basis prior to January 1, 1993." UPW §5.6.

with other uses such as swimming and non-motorized boating, as the area continues to be heavily used by boaters and swimmers alike. *Petition* at 4; 6-8; Exhibits A-3-A-9. In fact, Petitioners propose that they would continue to be allowed to use and anchor motorized vessels within the safety zone, indicating that the use of motorized vessels in the area is not incompatible with other normal uses.

Further, as described in greater detail below, law enforcement patrols of Indian Point have not found any violations of safe boating operation laws or the speed limit and wake requirements within the shoreline safety zone (see attached comments from the Vermont Fish & Wildlife Department (FWD)). In fact, the only recorded complaint regarding navigation came from anglers at Indian Point, who found the buoys installed by residents along the sandbar to be an impediment to navigation. As stated in the petition, the area continues to be a very popular destination for boaters and swimmers alike. It is not clear from the information provided in the petition that anchoring needs to be prohibited in the area in order for swimming to be safely enjoyed as a recreational use.

If in fact the anchoring of motorized vessels in the area conflicts with other normal uses of the water, petitioners would need to demonstrate that the proposed rule is the least restrictive approach practicable that adequately addresses the conflicts. UPW § 2.6(b). Again, Petitioners have failed to meet this burden. In this case, a less restrictive regulatory approach designed to address the safety concerns articulated in the petition is already in effect: individuals are statutorily prohibited from operating vessels in a careless or negligent manner, or in any manner to endanger or jeopardize the safety, life, or property of another person. 23 V.S.A. § 3311(a). Operating any vessel while intoxicated is also prohibited. *Id.* at (b). Vessels are prohibited from being operated “within 200 feet of the shoreline; an individual in the water; a canoe, rowboat, or other vessel; an anchored or moored vessel containing any individual; or anchorages or docks, except at a speed of less than five miles per hour that does not create a wake.” 23 V.S.A. § 3311(c)(1). Under current statute, law enforcement officers have the authority to enforce these operational requirements for any vessel on any public water in the state.³ Consistent enforcement of these regulations should address concerns Petitioners have expressed regarding the safety of swimmers and non-motorized vessels in the area.

Indian Point has historically been a popular destination for boaters, anglers, and swimmers, and while residents have filed complaints in the past regarding unsafe boating practices, the Agency is not aware of any violations of boating laws found following investigation of those complaints (see comments from FWD). Petitioners have not provided any documentation of violations of current boating operation laws. As a result of complaints filed, law enforcement officers have intentionally conducted regular patrols of Indian Point, but have not found evidence of the reported violations or safety issues reported. Indian Point residents have also installed buoys demarking the 200-foot safety zone, making it clear to all recreational users where the safety zone begins. FWD has not documented any violations of the safety-zone speed limit requirements at Indian Point.

In this case, the Agency finds that enforcement of existing laws and regulations is appropriate to address the concerns raised regarding safety and conflict of uses. Consistent with the UPW criteria for adopting new regulation, it is the Agency’s policy to not further regulate normal uses when adequate enforcement of existing laws and regulations would appropriately resolve the issues raised. See *In re Halls Lake (Newbury)*, No. UPW 74-01, Memorandum (Aug.

³ Law enforcement officers include enforcement officers as defined in 23 V.S.A. § 4(11), including deputy State Game Wardens and auxiliary State Police Officers.

28, 1975); *In re Lake Fairlee (Fairlee, West Fairlee, Thetford)*, No. UPW 74-03, Memorandum (Aug. 20, 1975); Preliminary Memorandum (Jul. 22, 1975)

Finally, when regulation of vessels, or any other normal use, is determined to be necessary, priority is given to a regulatory strategy that separates uses rather than eliminating them. UPW § 2.8. The petition does not propose a management strategy that would truly separate uses, because private residents would still be able to use and anchor motorized vessels in the designated area. The rule would instead prohibit use by the public, essentially establishing a privatized area for residents to continue to enjoy all normal uses of the public water. This proposed regulatory scheme does not meet the criteria established in Sections 2.8 – 2.9 of the UPW, and it is inconsistent with public trust principles applicable to all public waters.

As codified in 10 V.S.A. § 1421, all navigable waters, including Lake Bomoseen, are public trust resources and the Agency is the trustee of those resources, responsible for providing for multiple use of the waters in a manner to provide for the best interests of the citizens of the State. The public trust doctrine establishes that “navigable waters and the land below them are held in common by the people of this state.” *City of Montpelier v. Barnett*, 191 Vt. 441, 450 (2012), citing *Hazen v. Perkins*, 92 Vt. 414, 419, 105 A. 249, 251 (1918). As the trustee of this resource, the Agency is not prohibited from regulating the use of public waters for the benefit of Vermonters, but any regulation of use must have “a special public character, both in its aims and in its formation.” *Id.* at 451. Vermont case law supports the premise that any regulation of a public trust resource must serve the public good, and privatization of public trust resources is prohibited except under extremely limited circumstances. *State v. Central Vermont Railway*, 153 Vt. 337, 344, 571 A.2d 1128, 1131 (1989); see also, *Hazen v. Perkins*, 92 Vt. 414, 419, 105 A. 249, 251 (1918).

The proposed rule would effectively exclude members of the general public from anchoring their boats within the designated area, while allowing private landowners to continue to use and enjoy this popular recreational destination. This de facto privatization of a popular recreational area is inconsistent with public trust principles and the Agency’s statutory obligation to manage public waters for the greatest public benefit. This decision is consistent with a previous Water Resources Board decision regarding a similar proposed prohibition of anchored vessels at Indian Point, which found that regulation excluding public use is not a solution “in the public interest.” *In re Petition for the Adoption of Rules Regulating the Use of Lake Bomoseen* (Castleton, Hubbardton), UPW 95-01, Decision (November 1995).

The safety of swimmers and non-motorized boaters is of great importance to the Agency, but the Petitioners have failed to demonstrate that the proposed rule is necessary or appropriate to address safety concerns. In this instance, the Agency finds that enforcement of existing laws and regulations is appropriate to address the concerns raised regarding safety and conflict of uses. The Agency also proposes to coordinate with law enforcement officers from FWD and the State Police Marine Auxiliary Unit to ensure that adequate patrols of this popular spot are made, particularly during busy summer weekends. Further, the Agency is willing to discuss with petitioners the possibility of installing additional signage at the access area and on the existing buoys to indicate where the shoreline safety zone begins, and to warn boaters of the requirement to stay 200-feet from swimmers and other moving vessels. In instances where boaters threaten residents or trespass on private property, the Agency urges residents to contact local law enforcement.

Dated at Montpelier, Vermont, January 20, 2022

VERMONT AGENCY OF NATURAL RESOURCES
Department of Environmental Conservation

A handwritten signature in black ink, appearing to read "Peter Walke", is centered on the page. The signature is fluid and cursive, with a large initial "P" and "W".

Peter Walke, Commissioner

CC: Pete LaFlamme, Director, Watershed Management Division, DEC
Oliver Pierson, Manager, Lakes and Ponds Program, DEC