

To the Legislative Committee on Administrative Rules
Written Testimony of Phil Dodd, Montpelier, VT
Jan. 29, 2024

Wake Boat Rule

I agree with the vast majority of people who spoke at DEC's hearings on this proposed rule: wake boats are bad for our Vermont lakes. They can erode shorelines, stir up phosphorous and disturb plants on lake bottoms, adversely impact wildlife, and they are potentially dangerous for other lakes users.

We have already decided as a state that we will not allow people to overnight on their motorboats on Vermont-regulated lakes. Let's also forbid people from using specially modified motorboats to generate abnormally large waves. If we can't ban them, let's increase the required distance from shore to 1,000 feet.

That said, I recognize that the focus of this hearing is on whether the proposed rule meets legislative criteria or should be sent back. In my view, the committee should object to the rule and request that the Agency amend the rule because it has two fatal flaws: The proposed rule is contrary to the intent of the Legislature, 10 V.S.A. § 842(b)(2), and the proposed rule is arbitrary, 10 V.S.A. §842(b)(3).

My objection related to the intent of the Legislature is based on the fact the agency did not consider the safety of other lake users. The responsiveness summary shows that many people raised the issue of whether the huge, rogue wakes generated by wake boats are a safety threat to other lake users, but the agency never addresses these concerns, instead focusing on the wave energy when it hits the shore and other factors.

The introduction to the Responsiveness Summary is instructive. The agency states that it anticipates receiving lake-specific petitions regarding wake boats in the future. It goes on: "The Agency expects that such petitions will demand particular focus on aquatic recreation and related safety planning—areas where current Agency staff does not have deep professional expertise. Therefore, in preparation for consideration of waterbody-specific petitions, the Agency will explore retaining services of consultants with relevant expertise."

In essence, the Agency admits it has little expertise in this area and will need to seek it out in the future. I believe it should have obtained that expertise to review this general rule, and in fact the statutes authorizing the Use of Public Water Rules mandate that safety be considered. In particular, see 10 V.S.A. § 1421, describing the policy to be used in these Public Waters rules.

§ 1421. Policy

To aid in the fulfillment of the State's role as trustee of its navigable waters and to promote public health, safety, convenience, and general welfare, it is declared to be in the public interest to make studies, establish policies, make plans, make rules, encourage and promote buffers adjacent to lakes, ponds, reservoirs, rivers, and streams of the State, encourage and promote protected river corridors adjacent to rivers and streams of the State, and authorize municipal shoreland and river corridor protection zoning bylaws for the efficient use, conservation, development, and protection of the State's water resources. **The purposes of the rules shall be to further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish, and aquatic life; control building sites, placement of structures, and land uses; reduce fluvial erosion hazards; reduce property loss and damage; preserve shore cover, natural beauty, and natural stability; and provide for multiple use of the waters in a manner to provide for the best interests of the citizens of the State. (Added 1969, No. 281 (Adj. Sess.), § 13; amended 2009, No. 110 (Adj. Sess.), § 2; 2011, No. 138 (Adj. Sess.), § 7, eff. May 14, 2012.) (Emphasis added).**

Let me add some personal perspective. I am not a lakefront property owner, but I do enjoy getting out on Vermont's lakes. In 2022, after turning 70, I stopped using my old, heavy plastic kayak and bought a lighter pack canoe because it is easier to transport to the various lakes I use. I sit on the bottom and paddle it like a kayak, but it is more tender than most kayaks. A sudden, big wave from a wake boat could easily capsize me and fill the canoe with water, not a happy prospect for this geezer. I also have a Sunfish that I take by trailer to sail on Vermont lakes. That too could potentially be capsized by a wake of the size generated by wake boats.

At the other end of the age spectrum, my 7-year-old granddaughter has her own kayak. She is learning fast, but I know she couldn't handle a two- to four-foot wave. Her mother (my daughter) has her own kayak and often has her other child, a 5-year-old, aboard. If there were one or more wake boats operating on a lake they

visited, I am sure my daughter would turn around and drive home, fearing the lake would not be safe for her family.

The proposed 500-foot rule seems primarily designed for shoreline protection, and ignores what happens between the 500-foot line and the shore. It means that if I am in a small craft 400 feet from shore, I might be only 100 feet from a wake boat and could be hit pretty hard by a wake boat wave.

This draft rule suggests I should hug the shore when kayaking or sailing and not venture into the deeper parts of a lake farther from shore. But when wake boats are active, why should so much of the lake be essentially off limits to those – the majority, by far – who want to fish, kayak, canoe, paddleboard, sail, swim, waterski, or use their normal motorboats or pontoon boats?

Moreover, looking to the future, wake boats are likely to get bigger and make bigger waves, and there will be more of them. Safety issues will likely multiply.

The Agency, in this rulemaking, completely ignores and fails to address the safety of other lake users, which is contrary to the intent of the Legislature. For that reason, I believe this rule should be sent back to the Agency for further review with safety in mind.

My second issue with the proposed rule is that it is arbitrary because it considers wake boats to be a “normal use.”

The Use of Public Waters rule, section 5.6 defines a normal use 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.” By this definition, wake boats are clearly not a normal use.

Wake boats are not like traditional motorboats, and have only turned up in Vermont in recent years. They have wake plates to lower the stern into the water to create a bigger, broader wake. Many have internal ballast to the hull and make it go deeper into the water and make huge waves as it pushes through.

The most notable feature of wake boats are their ballast tanks, either a hard ballast tank or soft bags, which are designed to be filled with water to increase the weight of the boat and create more water displacement. Many wake boats can carry up to 3,000 pounds of water ballast, or about one and a half tons, and some carry more.

They are a new and unusual boats designed to facilitate a sport that was not regular, frequent and consistent on Vermont lakes in 1993.

During my publishing career, I often reported on the Water Resources Board rule-making procedures. I just looked back at an article I wrote in 1994 when the original rules – including the normal use definition – were being adopted. I wrote at the time: “The Board has said the rules are an attempt to formalize the status quo with regard to existing use of lakes.”

The status quo in 1993 certainly did not include wake boats. Indeed, when this rule-making was announced back in May, ANR recognized this: “Wakeboats produce wakes that are significantly larger than conventional boats **and are not a ‘normal use’ of public waters as defined in the rules.** (Emphasis added.)

ANR has changed its tune and now asserts that wakeboarding and wakesports are a subcategory of motorized recreation, though it acknowledges that the design of certain motorized boats evolved to allow for a different wave shape and size. It goes on to say that “even if “wakesports” as a motorized vessel subcategory does not qualify as a “normal use,” a specific ban on wakesports is not mandatory.

However, UPW Rule §2.6(a) states: “Use conflicts shall be managed in a manner that provides for all normal uses to the greatest extent possible consistent with the provisions of Section 2.2 of these Rules.”

If wake boats are not a normal use, then the conflicts they cause should be managed in a way that the normal uses existing in 1993 – swimming, fishing, boating, sailing, paddling waterskiing, etc. – can be enjoyed “to the greatest extent possible.” As we know and have heard from many, wake boats can severely limit these traditional use of Vermont lakes.

In fact, the Agency acknowledges that it has the power to prohibit anything that does not qualify as a normal use when necessary to adequately protect a normal use, and I believe it should be doing so in this case by resolving this use conflict in favor of longstanding traditional activities.

This committee can object to a rule if it is arbitrary. The Administrative Procedures Act says a rule can be considered arbitrary if “[t]he decision made by the agency would not make sense to a reasonable person.” 3 V.S.A. §801(13)(a).

I don't think a reasonable person could conclude that wake boats are a normal use as defined in the Use of Public Waters Rules, and therefore I believe this committee should object on this basis as well.

Please send this rule back to address public safety, strip wake boats of their status as a normal use, and consider ways to protect truly normal uses.