



October 4, 2017

Emily Boedecker  
Commissioner  
Vermont Department of Environmental Conservation  
1 National Life Drive  
Main Building, 2<sup>nd</sup> Floor  
Montpelier, VT 05620-3520

Re: Proposed Rule for Great Hosmer Pond

*Via E-mail*

Dear Commissioner Boedecker:

*Introduction*

The Vermont Natural Resources Council (VNRC) is writing to express significant concerns about the legality of the Department of Environmental Conservation's (DEC) draft proposed rule for Great Hosmer Pond. VNRC is intervening in this matter as an organization with a long history of working to ensure that Vermont's public trust waters are properly managed in accordance with applicable laws. In addition, VNRC's comments are made on behalf of our members that use and enjoy Great Hosmer Pond, including many individuals who comprise the Friends of Great Hosmer Pond. Based on the legal issues raised below, VNRC requests that DEC withdraw its draft proposed rule for Great Hosmer Pond.

*Legal Deficiencies with Great Hosmer Rule*

VNRC has identified a number of legal deficiencies with the draft amendment to the Vermont Use of Public Waters (VUPW) Rules regarding Great Hosmer Pond. Most of these deficiencies are based in DEC's failure to follow the VUPW Rules. My analysis of the draft Great Hosmer Pond VUPW rule is informed by the fact that I was the Executive Director of the former Water Resources Board (WRB), which administered the VUPW Rules before the WRB was eliminated by the Vermont Legislature in 2004. I am very concerned that DEC is not implementing the VUPW program consistent with the rules and the precedent set by the WRB for managing use conflicts that were developed over the almost 30 years that the WRB was responsible for the program.

The following are legal issues with the draft proposed rule:

1. VNRC questions ANR's authority to propose a VUPW rule on its own motion without the filing of a petition. The VUPW Rules establish the petition process for a citizen or group of citizens in Vermont to request that state government address use conflicts on lakes, ponds and reservoirs. VNRC is not aware of the WRB ever proposing a comprehensive VUPW rule governing uses on a waterbody on its own without a citizen petition.<sup>1</sup> As described below, one reason for this is likely that a significant amount of information must be presented to develop a complete Petition under the VUPW Rules. By taking on the responsibility of proposing a VUPW rule, the DEC has also taken on the burden of meeting the petition requirements for proposing a VUPW rule. DEC's draft Great Hosmer Pond VUPW rule fails to meet the basic requirements for filing a VUPW petition.
2. Even if DEC has the authority to propose a VUPW rule on its own motion, DEC must follow the requirements for proposing use restrictions on lakes, ponds and reservoirs set forth in the VUPW Rules. Nothing in Vermont statutes or the VUPW Rules indicates that DEC is exempt from following the substantive or procedural requirements for the regulation of uses on Vermont waters.
3. The VUPW Rules require that ANR consider the following factors: "the size and flow of navigable waters, the predominant use of adjacent lands, the depth of the water, the predominant use of waters prior to regulation, the uses for which the water is adaptable, the availability of fishing, boating and bathing facilities, and the scenic beauty and recreational uses of the area." Vt. Admin. Code 16-5-102:2.2(a), *VUPW Rules* § 2.2 (a); see also 10 V.S.A § 1424(b). VNRC has reviewed the record of the proposed draft rule on DEC's website and the records DEC has provided to VNRC in response to our request to access documents related to this matter. VNRC has not been able to identify that DEC has gathered and analyzed any of the information required by *VUPW Rules* § 2.2 (a). To the contrary, a review of the documents provided to VNRC indicates that DEC has essentially taken suggestions proposed by individuals seeking to limit rowing on Great Hosmer Pond, and is putting those suggestions forward without providing any basis for the draft rule as embodied in the factors set forth in *VUPW Rules* § 2.2 (a). DEC's failure to produce the information set forth in *VUPW Rules* § 2.2 (a) makes the proposed rule contrary to law (it does not meet the requirements of the VUPW rules) and arbitrary.<sup>2</sup>

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<sup>1</sup> In at least one case, the WRB found that it does not have the authority to initiate rulemaking in the absence of a petition, *In re Lake Raponda* (Wilmington) No. UPW 72-07, Memorandum (Apr. 7, 1976).

<sup>2</sup> The WRB rejected petitions that failed to include the information required by the UPW rules. See *In re Lake Bomoseen* (Castleton, Hubbardton), No. UPW 91-02, Memorandum (May 13, 1991) (Board cannot act based on limited information in petition; memorandum states requirements); *In re St. Albans Bay Mooring Management Zone* (St. Albans; Lake Champlain), Unnumbered, Letter (May 17, 1988) (Board cannot act based on limited information in petition); and *In re Cole Pond* (Jamaica), No. UPW 87-05, Letter (Oct. 7, 1987) (Board cannot respond to "generalized concerns" expressed in petition; statute contemplates that petitioners will identify a specific regulation that it seeks Board to adopt).

4. Under *VUPW Rules § 2.1 (a)*, unless “public safety or emergency situations require otherwise, or for other good cause,” the initial public meeting regarding a proposed rule affecting summer recreation must be held during the months of June through September. Accordingly, unless DEC identifies safety issues, and emergency or good cause, the process to consider a proposed rule on Great Hosmer Pond cannot begin until June of 2018 or it would be contrary to law.
5. The VUPW Rules clearly state that the petitioner has the burden of persuasion to prove that a use restriction on a given waterway is warranted. *VUPW Rules § 3.7*. Accordingly, absent a petition, DEC has taken on the burden to prove that restricting rowing meets the requirements of the VUPW Rules and appropriately balances uses on a public trust water. VNRC argues that meeting this burden is of particular importance in this case because this represents the first time that VNRC is aware of the state of Vermont proposing to restrict the use of non-motorized boating in favor of motorized boating.
6. The UPW rules require that DEC “identify all normal uses affected by the petition and include a statement as to why the petition complies with Section 2 [of the VUPW Rules] and applicable statutory requirements.” *VUPW Rules § 3.7(b)(1)*. As noted, DEC has not provided any analysis or data to demonstrate how the proposed rule meets the criteria of Section 2 of the VUPW Rules. Moreover, DEC has provided no analysis of what the “normal uses” on Great Hosmer Pond are, nor has DEC shown the proposed rule appropriately balances these uses. Absent this information, the proposed rule put forward by DEC is arbitrary and contrary to law.
7. DEC seems to recognize that its proposal to restrict the non-motorized use of rowing in favor of motorized use is in conflict with state law that prohibits high speed motor boating within 200 feet of a shoreline. In a draft memorandum to the Vermont Secretary of the Agency of Transportation and the Vermont Commissioner of the Department of Motor Vehicles, the Vermont Secretary of the Agency of Natural Resources wrote: *“From a policy perspective, ANR is concerned about codifying in rule specific times when high speed boating is more likely to occur without also giving boaters a means of legally traversing the length of the pond. Without an amendment to the 200-foot safety zone, it is likely that violations of the safety zone in the narrows will continue to occur, creating additional tensions between conflicting users, particularly between high speed boaters, and those opposed to the allowance of high speed boats on the Pond.”* This statement is an admission by DEC that it is proposing to promote motorized use of the pond in a manner that will likely create safety risks is in direct contravention of the VUPW Rules. Moreover, DEC’s concern about the 200 foot rule demonstrates their understanding that the Pond is unsuited for high speed motor boat use. DEC’s interest in overturning the rule signals to the public a lack of regard for the safety of swimmers, paddlers, and other non-motorized users.

### *Conclusion*

As set forth above, there are clear and significant legal deficiencies with the draft VUPW rule for Great Hosmer Pond proposed by DEC. If DEC proceeds to move the draft rule forward into the rulemaking process, VNRC will, at a minimum, continue to raise these objections throughout the rulemaking process. Moreover, if DEC adopts the rule without addressing these deficiencies, VNRC will challenge the final rule in court.

As former Executive Director of the WRB, I am extremely concerned about the manner in which DEC is implementing the VUPW program. The WRB developed the VUPW Rules and program to be a petition driven process that relied on people who use and live near the Vermont waters in question to gather the information necessary to create a complete petition. As a result, conflicts were often resolved, and almost always ameliorated, by the fact that petitioners were required to collect data, interact with other water users, and craft a thoughtful proposal.

By proposing a rule on its own, without the benefit of the petition process, DEC has not only failed to meet the minimum requirements of the UPW rules, but has also exacerbated an already difficult situation on Great Hosmer Pond. Accordingly, VNRC reiterates our request that DEC withdraw the draft Great Hosmer VUPW rule.

Please contact me if you have any questions.

Sincerely,



Jon Groveman  
VNRC Policy and Water Program Director

cc: Gina Campoli  
Judy Davis