

IN THE COURT OF APPEALS OF THE STATE OF OREGON

COLUMBIA SEAPLANE PILOTS ASSOCIATION, an Oregon non-profit corporation, WALDO LAKE FOR EVERYONE!, an Oregon non-profit corporation, ARON FAEGRE, an individual person, and STEVEN K. STEWART, an individual person.

Petitioners,

vs.

OREGON STATE MARINE BOARD,

Respondent.

OREGON STATE MARINE BOARD

CA No. A

PETITION FOR JUDICIAL REVIEW OF ADMINISTRATIVE RULE

1.

Pursuant to ORS 183.400 and in conformance with Oregon Rule of Appellate Procedure 4.15, Petitioners Columbia Seaplane Pilots Association (“CSPA”), Waldo Lake for EVERYONE! (“WLFE”), Aron Faegre, and Steven K. Stewart seek judicial review of two Oregon Administrative Rules (OARs) promulgated by Respondent Oregon State Marine Board (“the Board”). The rules, OAR 250-020-0221(10) and OAR 250-030-0030(4), contain identical wording that forbids petitioners and others to use “internal combustion motors and float planes” on Waldo Lake, a body of water located in Lane County.

2.

The parties to this review are:

Columbia Seaplane Pilots
Association, Waldo Lake For
Everyone!, Aron Faegre, and Steven
K. Stewart

Oregon State Marine Board
P.O. Box 14145
Salem, OR 97309-5065

Petitioners on Review

Respondent on Review

3.

The names, bar numbers, addresses, and telephone numbers of the
attorneys for the parties are:

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Of Attorneys for Petitioners on
Review Columbia Seaplane Pilots
Association, Waldo Lake For
Everyone!, Aron Faegre, and Steven
K. Stewart

Of Attorneys for Respondent on
Review Oregon State Marine Board

4.

Attached to this petition are copies of OAR 250-020-0221(10) and OAR 250-030-0030(4), the two rules concerning which review is sought. Both rules became final and were filed with the Secretary of State less than two years before the filing of this petition.

5.

Petitioners CSPA and WLFE are Oregon nonprofit corporations in good standing and, therefore, are “persons” who may bring this petition. ORS 183.400(l). Petitioner CSPA represents float plane owners who utilize Waldo Lake as, *inter alia*, (a) a destination, (b) a stopover point when flying cross-country between Oregon lakes and rivers when needed due to conditions affecting safe flight, (c) a stopover point when flight constitutes interstate or international travel when needed due to conditions affecting safe flight, and (d) a precautionary stopping point in the event the pilot in command determines that there is a risk that could affect the future safety of a flight. Petitioner WLFE represents residents of the Waldo Lake vicinity and others who use the lake for pleasure boating, both by sail and by motor. Although such effects are not required to establish standing under ORS 183.400, both non-profit petitioners are adversely affected and aggrieved by the rules, because the rules interfere with some or all of the foregoing activities of their members.

Individual petitioner Faegre is a member and current president of CSPA, and a float plane pilot. Individual petitioner Stewart is a member and current secretary-treasurer of WLFE, and has enjoyed power boating on Waldo Lake for over fifty years. Although such effects are not required to establish standing under ORS 183.400, both individual petitioners are adversely affected by the rules, because the rules interfere with or prohibit the individual petitioners' desires to utilize Waldo Lake.

6.

Petitioners are not willing to stipulate that the agency record may be shortened. Petitioners note that, if the record certified by the Board does not contain certain evidence relevant to this petition, petitioners intend to move this court for the appointment of a special master to take evidence concerning facts relevant to the decision in this case.

7.

Petitioners seek to have the rules in question set aside on one or more of the following grounds:

1. The rules exceed the statutory authority of the Marine Board to promulgate (ORS 183.400(4)(b));
2. The rules were not adopted in substantial compliance with the applicable rulemaking procedures (ORS 183.400(4)(c)).

DATED this 28th day of March, 2011.

SCHWABE, WILLIAMSON & WYATT, P.C.

By: _____

W. Michael Gillette, OSB #660458
Schwabe, Williamson & Wyatt P.C.
1211 SW 5th Ave., Suite 1900
Portland, OR 97204
Telephone 503-222-9981

Of Attorneys for Petitioners on Review

CERTIFICATE OF FILING

I certify that on 28th of March, 2011, I caused an original Petition for
Judicial Review of Administrative Rule to be filed with the State Court
Administrator at the following address by registered mail:

State Court Administrator,
Appellate Courts, Records Section
Supreme Court Building
1163 State Street
Salem, OR 97301-2563



W. Michael Gillette, OSB #660458
Schwabe, Williamson & Wyatt P.C.
Of Attorneys for Petitioners on Review

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of March 2011, I caused to be served the Petition for Judicial Review of Administrative Rule on the following parties at the following addresses by U.S. First-Class Mail and by registered mail:

Oregon State Marine Board
P.O. Box 14145
Salem, OR 97309-5065

Mary Williams
Deputy Attorney General and Acting
Solicitor General
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096



W. Michael Gillette, OSB #660458
Schwabe, Williamson & Wyatt P.C.
Of Attorneys for Petitioners on Review

250-020-0221

Boat Operations on Certain Waters in Lane County

(I) No person shall operate a motorboat in excess of 5 MPH ("Slow-No Wake") in the following areas:

(a) Triangle Lake: Within 200 feet of a marked swimming area or a designated public launching ramp;

(b) Fern Ridge Lake:

(A) Within 200 feet of a marked swimming area or a designated public launching ramp;

(B) In the Coyote Creek Channel;

(C) Between shore and buoy line which extends southerly from the north shore to a point approximately 200 feet of the northern most Eugene Yacht Club mooring dock thence generally south and west approximately 200 feet of the docks to a point approximately 200 feet south of the Tri Pass Club mooring dock thence generally west to the southern tip of the Tri Pass Club dock as buoyed except for the buoyed corridor immediately south of the Eugene Yacht Club southernmost dock;

(D) South of the buoy line which extends easterly from a point approximately 100 yards north of the Perkins Boat Ramp to the adjacent shoreline;

(E) In the Main Long Tom River Channel.

(c) Dexter Dam Reservoir:

(A) Within 200 feet of a marked swimming area or a designated public launching ramp;

(B) Within 50 feet of the causeway crossing the reservoir.

(d) Lookout Point Reservoir:

(A) Within 200 feet of a marked swimming area or a designated public launching ramp;

(B) East of the Southern Pacific Railroad bridge.

(e) Dorena Dam Reservoir:

(A) Within 200 feet of a marked swimming area or a designated public launching ramp.

(B) Southeast of a line between markers on Humphrey Point and the northeast shore.

(f) Cottage Grove Reservoir:

(A) Within 200 feet of a marked swimming area or a designated public launching ramp;

(B) South of a line between a marker on the east shore, near the Wilson Creek area, and on the west shore near Cedar Creek.

(g) Hills Creek Reservoir:

- (A) Within 200 feet of a marked swimming area or a designated public launching ramp;
- (B) On Packard Creek arm west of Rigdon Road (USFS Road #21);
- (C) On Hills Creek south of the Hills Creek Crossing Bridge;
- (D) On the Middle Fork, Willamette River south of the Rigdon Road (USFS #21) (Upper Crossing) Bridge;
- (E) No person shall operate a motorboat for any purpose on Larison Creek arm west of Rigdon Road (USFS Road #21).

(h) Collard Lakes;

(i) Picket Lake;

(j) Munsel Lake — west of the line of marker buoys;

(k) Fall Creek Lake:

- (A) Within 200 feet of a designated public launching ramp or marked swimming area;
- (B) On Fall Creek upriver from the buoys located approximately 200 feet downstream of the Big Fall Creek Road;
- (C) On Winberry Creek upriver from the buoys located approximately 1800 feet downstream of the Winberry Creek Road Bridge.

(l) Siltcoos Lake:

- (A) Within 200 feet of a designated public launching ramp or marked swimming area;
 - (B) Between shore and buoy line at the mouth of Kiechle Arm beginning at a point at the east shoreline of Arrowhead Point and extending northerly approximately 900 yards to a point approximately 100 yards off shore of Camp Baker during the period of June 1 through September 30.
 - (C) In Miller Arm north of the buoy line, located at the entrance near Nightingales' Fishing Camp, during the period of May 1 through September 31.
- (2) No person shall operate a motorboat in excess of 5 MPH on Leaburg Reservoir and the McKenzie River from the dam upstream to Good Pasture Bridge.
- (3) No person shall operate a motorboat in excess of a "Slow-No Wake" speed within 300 feet of a boat launching ramp or a boat moorage on the following bodies of water (for purpose of this regulation, "Slow-No Wake" speed means the speed of a boat shall not exceed 5 MPH):

(a) Cougar Reservoir;

(b) Blue River Reservoir;

(c) Siuslaw River — between the river entrance and the highway bridge at Mapleton.

(4) No person shall operate a motorboat for any purpose on the following lakes: Scott, Melakwa, Hidden, Blair, Upper Erma Bell, Middle Erma Bell, Lower Erma Bell, Torrey, Whig, Wahanna, Rigdon, Lower Rigdon, Kiwa, Upper Eddeleo, Round, Betty, and Alameda.

(5) No person shall operate a motorboat for any purpose in excess of 10 MPH on Munsel Lake east of the line of marker buoys, except from June 1 through September 30, between the hours of 10 a.m. and 5 p.m.

(6) No person shall operate a motorboat on the McKenzie River above Good Pasture Bridge, except a representative of the Oregon State Police or the County Sheriff's Office pursuant to a criminal investigation or search and rescue operation.

(7) No person shall operate a motorboat, except with an electric motor:

(a) In the Old Long Tom River Channel;

(b) On Fern Ridge Reservoir south of State Highway 126;

(c) On Hult Reservoir.

(8) No person shall operate a propeller-driven airboat or non-displacement hull type hovercraft in the following areas on Fern Ridge Reservoir where there is emergent vegetation present:

(a) Coyote Creek area — east of a line beginning at the West Coyote Creek bridge at Highway 126 extending north approximately one mile to a point near the mouth of Coyote Creek, then extending north approximately 1.4 miles to a point located approximately 100 yards off shore of the northwest corner of Gibson Island;

(b) Amazon Bay area — east of a line beginning at a point located approximately 100 yards off shore of the northwest corner of Gibson Island extending northeast approximately one mile to the Shore Lane access;

(c) South Marsh area — west of a line extending from a point on the shoreline at the southern boundary of Zumwalt Park near the end of Vista Drive extending southeast approximately one mile to a point on the shoreline at the tip of Perkins Peninsula;

(d) Long Tom Area — southwest of a line beginning at a point on the shore line at the end of Moyer Lane extending southeast approximately 0.9 miles to a point on the west shoreline of the Jeans Peninsula at the north end of Winter Lane.

(9) No person shall operate a motorboat north and east of a line across the entrance of Bannister Cove on Lookout Point Reservoir, as marked.

(10) Use of internal combustion motors in boats and floatplanes operating on the surface of Waldo Lake is prohibited year round. "Watercraft" includes boats and floatplanes operating on the surface of Waldo Lake. Official use of internal combustion motors in watercraft operated on the surface of Waldo Lake by local, state or federal governmental officials or agents is allowed for the following activities: search and rescue, law enforcement and fire suppression. Previous

approval by the Willamette National Forest Supervisor is required for other activities undertaken by local, state or federal government officials or agents that involve use of internal combustion motors in watercraft operated on the surface of Waldo Lake. Emergency landings of private or governmental floatplanes on Waldo Lake are allowed without previous approval.

Stat. Auth.: ORS 830.110 & 830.175

Stats. Implemented: ORS 830.175

Hist.: MB 21, f. 8-23-63; MB 27, f. 6-3-65; MB 31, f. 6-20-66; MB 42, f. 12-3-68; MB 44, f. 8-21-69; MB 48, f. 6-28-71, ef. 7-25-71; MB 49, f. 8-14-72, ef. 9-1-72; MB 3-1979(Temp), f. & ef. 6-22-79; MB 5-1979, f. 7-31-79, ef. 8-1-79; Renumbered from 250-020-0131; MB 8-1981, f. & ef. 11-16-81; MB 5-1982, f. & ef. 6-1-82; MB 6-1982, f. & ef. 6-1-82; MB 15-1984, f. 11-30-84, ef. 12-1-84; MB 6-1995, f. & cert. ef. 7-14-95; MB 9-1996, f. & cert. ef. 5-29-96; OSMB 2-2000, f. & cert. ef. 7-14-00; OSMB 2-2001, f. & cert. ef. 1-25-01; OSMB 1-2008, f. & cert. ef. 1-15-08; OSMB 3-2010, f. & cert. ef. 1-15-10; OSMB 9-2010(Temp), f. & cert. ef. 5-6-10 thru 9-30-10; Administrative correction 10-26-10; OSMB 13-2010, f. & cert. ef. 11-1-10

Regulations

The State Marine Board is authorized to carry out the provisions of the Federal Wild and Scenic Rivers Act (PL 90-542) and the State Scenic Waterways Act (ORS 390.805 to 390.925) under ORS 830.175 by regulating boat use through a permit system initiated by the Board. Authority to limit or prohibit motorboat use is also granted by this statute. The specific regulations which follow are adopted in accordance with these statutory provisions:

(1) In order to meet the goals and objectives of management and recreation plans for the subsequently named rivers, the State Marine Board will regulate commercial and noncommercial boat use, both for non-powered boats and for motorboats, by means of a permit system. On occasion the Board may find it necessary to establish interim boat use levels in order to protect the riverine environment and assure to the users a quality recreation experience. Such limits may be prescribed in those instances where, in the absence of river management or recreation plans, it finds it necessary to act to assure compliance with the objectives of appropriate federal and state laws.

(2) It is the policy of the State Marine Board to provide for equitable use of certain designated rivers by commercial and noncommercial boaters. A system of permits for all boaters, whether they plan to run a river as private individuals or as patrons of a commercial entrepreneur, may be initiated on controlled rivers when use approaches or exceeds approved levels or capacity.

(3) No person, other than a member of the Department of State Police, county sheriff, and governmental agencies of this state and the federal government having jurisdiction over the following described waters, shall use a motor for propelling a boat for any purpose on the following described waters, with the exceptions stated:

(a) Deschutes River:

(A) That portion bordering the Warm Springs Reservation, no motors year round. (ORS 830.180)

(B) Between the northern boundary of the Warm Springs Reservation and the mouth of Buckhollow Creek (downstream from Sherars Falls), no person shall operate a motorboat with the exception of ingress/egress by landowners under permit issued by the Board.

(C) Between the mouth of Buckhollow Creek and Macks Canyon Campground, no motors from June 15 to September 30, with the exception of ingress/egress by landowners under permit by the Board.

(D) Between Macks Canyon Campground and the Heritage Landing boat ramp, motors will be prohibited during alternating Thursday, Friday, Saturday and Sunday periods commencing with the first Thursday to Sunday period that falls on or after June 15, continuing until September 30. No daily restrictions on motorized use from October 1 to June 14.

(E) Between Heritage Landing boat ramp and the confluence with the Columbia River, no prohibitions on motors, except for OAR 250-030-0041 rule for slow no wake, maximum 5 MPH.

(b) Illinois River -- From Deer Creek downstream to Nancy Creek, which is located in the area immediately upstream of Oak Flat.

(c) John Day River -- From State Highway 218 bridge at Clarno downstream to Tumwater Falls between May 1 and October 1.

(d) Minam River -- From Minam Lake downstream to the Wallowa River.

(e) Owyhee River System:

(A) West Little Owyhee;

(B) North Fork Owyhee; and

(C) The mainstem Owyhee River above approximately river mile 70 at Pinnacle Rock, as marked.

(f) Rogue River -- from Grave Creek downstream to the lowermost portion of Blossom Bar Rapids approximately 250 feet upstream of the top of Devil's Staircase Rapids as marked, between May 15 and November 15.

(g) Sandy River -- From Dodge Park downstream to Dabney State Park.

(4) Use of internal combustion motors in boats and floatplanes operating on the surface of Waldo Lake is prohibited year round. "Watercraft" includes boats and floatplanes operating on the surface of Waldo Lake. Official use of internal combustion motors in watercraft operated on the surface of Waldo Lake by local, state or federal governmental officials or agents is allowed for the following activities: search and rescue, law enforcement and fire suppression. Previous approval by the Willamette National Forest Supervisor is required for other activities undertaken by local, state or federal government officials or agents that involve use of internal combustion motors in watercraft operated on the surface of Waldo Lake. Emergency landings of private or governmental floatplanes on Waldo Lake are allowed without previous approval.

Stat. Auth.: ORS 830.110 & 830.175

Stats. Implemented: ORS 830.110 & 830.175

Hist.: MB 53, f. 9-25-73, ef. 1-1-74; MB 64, f. 2-18-75, ef. 3-11-75; MB 66, ef. 4-22-75(Temp), 5-11-75(Perm); MB 76, f. & ef. 5-27-76; MB 79, f. 1-20-77, ef. 5-27-77; MB 89, f. 12-27-77, ef. 1-1-78; MB 12-1984, f. 8-13-84, ef. 8-14-84; MB 12-1985, f. & ef. 7-31-85; MB 21-1985, f. & ef. 12-4-85; MB 3-1993, f. 2-4-93, cert. ef. 5-15-93; MB 4-1994, f. & cert. ef. 3-23-94; MB 15-1996, f. & cert. ef. 12-4-96; MB 6-1997, f. & cert. ef. 5-30-97; OSMB 5-1998, f. & cert. ef. 4-3-98; OSMB 5-2010(Temp), f. & cert. ef. 1-15-10 thru 6-30-10; OSMB 10-2010, f. & cert. ef. 5-6-10