State of New Hampshire
DEPARTMENT OF SAFETY
OFFICE OF THE COMMISSIONER
33 HAZEN DR. CONCORD, NH 03305
603/271-2791

JOHN J. BARTHELMES
COMMISSIONER

October 18, 2010

In the Matter of **Barber's Pole,** **Lake Winnipesaukee, Tuftonboro, N.H.** **Motion to Reopen Hearing RSA 541:3**	)))))))

Re: Response to Appellants Motion to Reopen pursuant to RSA 541:3

APPELLANTS

1. Mr. Edward F. Eagan
2. Mr. Stephen E. Clark
3. Mr. Bob Flannery
4. Mr. Chris Hazel
5. Mr. Scott Verdonck
6. Mr. and Ms. Walt and Lynda Johnson
7. Mr. C. Jeff Huberty
8. Mr. Steve Buzzotta
9. Mr. Thomas Marden
10. Mr. Richard Stone
11. Mr. Richard M. Casale

ORIGINAL PETITIONERS

Represented by counsel
Roger F. Murray, III, Esq.

I. INTRODUCTION

I have carefully reviewed the Decision and Order issued July 30, 2010 conducted by my designee on Friday, July 21, 2010 along with the timely appeal for a Motion to Reopen pursuant to RSA 541:3 submitted by eleven Appellants. In preparing my reply, the arguments submitted for consideration from Appellants and the rebuttal statement received via an Offer of Proof from Counsel for the Original petitioners are considered. Each Appellant provided a Petition with specific grounds seeking the reopening; the parties were provided a time, date and location

to present oral argument on October 1, 2010. A synopsis of the collected Appellant arguments was provided to all parties with instruction and authority along with a Scope of the Hearing and how it would be carried out.

II. RELIEF SOUGHT

Taking official notice of the submitted petitions, the following is a synopsis of the relief sought and referenced instruction and notice to all parties within the Motion to Reopen Hearing.

A. The names listed on the original petition are not residents or property owners of the town of Tuftonboro and did not meet the standard of the law.
B. Cause severe hardship, affect scheduling, travel time, and employee payment. Available work cannot withstand price increases due to traveling threw the NWZ, especially during colder months.
C. Enough current rules and laws that can be enforced.
D. NWZ has not been supported in the past by Marine Patrol. If opposed in the past three hearings [they] should have had an opinion at this hearing.
E. If allowed, this NWZ will be the longest on the lake.
F. Boat wakes are bigger when slowing and starting back to speed at the beginning and end of a NWZ causing larger boat wakes than currently experienced and substantial property erosion.
G. Safety hazard to children in the water.
H. Restricts the only North-South route from the northern quadrant of the lake to the Alton/Wolfeboro quadrant.
I. Restriction and negative impact to commercial lake service/trades people
J. Proposal impacts the general boating public.
K. Persons directly affected were not contacted about the public hearing. The hearing was not adequately publicized.
L. Many questionable statements and inaccuracies within the Decision and Order.
M. This area does not experience a high level of boat traffic compared to most other areas of the lake.
N. Merits should be based on facts, data and statistics.
O. Area has an exemplar safety record.
P. A huge negative impact on islanders that commute on a daily/weekly basis.
Q. This NWZ will have blocked three of four ways to exit the Tuftonboro, Moultonborough, Melvin Village bays to travel to all other lake destinations.
R. The decision was premature and further consideration is in order to reach a fair outcome.
S. There is no issue regarding safety or speed.

III. ARGUMENT

A hearing was conducted on October 1, 2010 in Tuftonboro, New Hampshire regarding a Motion to Reopen pursuant to RSA 541:3; RSA 270:12; and Administrative Rule, Saf-C 409. Testimony essentially focuses upon the relief sought within each Appellant's petition. The Appellants arguments, discloses a common thread focusing upon three issues (1) the State failing to provide adequate notice of the July 21, 2010 public hearing; (2) a portion of received public commentary relied on for fact-finding stemming from the July 21, 2010 hearing is biased and untruthful; and (3) the original petitioners did not meet the threshold of names under the law.

IV. ANSWER TO APPELLANTS MOTION TO REOPEN

1. Adequate notice of the July 21, 2010 public hearing.

The authority for the public hearing is pursuant to RSA 270:12, and New Hampshire Code of Administrative Rules, Saf-C 409. The law and rule define and regulate the procedure for scheduling and receiving public comment. In addition, the law establishes the scope of the petition sought and what may be considered. Hearings conducted by the Department of Safety are conducted in accordance with RSA 541-A, and Administrative Rule, Saf-C 200 (et seq.) The hearing held October 1, 2010 was scheduled in accord with RSA 541:3, RSA 270:12 and Administrative Rule, Saf-C 409. The notice of hearing was sent via mail or email directly to the eleven Appellants and Counsel representing the Original Petitioners. In addition, the Town of Tuftonboro was sent a copy of the legal notice published in the Union Leader, a newspaper of statewide circulation, on Friday, September 17, 2010. RSA 270:1,II states in part … [I]n the interest of maintaining the residential, recreational and scenic values which New Hampshire public waters provide to residents of the state and to the promotion of our tourist industry, (emphasis added) and in light of the fact that competing uses for the enjoyment of these waters, if not regulated for the benefit of all users, may diminish the value to be derived from them, it is hereby declared that the public waters of New Hampshire shall be maintained and regulated in such way as to provide for the safe and mutual enjoyment of a variety of uses, both from the shore and from water-borne conveyances. Such provisions shall take into consideration the following: the variety of special uses appropriate to our lakes, public safety, protection of environment and water quality, and the continued nurture of New Hampshire's threatened and endangered species.

RSA 270:11 requires the Commissioner of Safety to adopt rules under RSA 541-A. Public notification to all New Hampshire

residents interested in the State of New Hampshire public waters (RSA 270:1,II) should be provided not just to the residents of the town where the body of water is located, or to the owners of waterfront property. The most realistic process and the longstanding practice utilized by many State Boards, Commissions and Agencies is a newspaper of statewide circulation. I find that there is adequate notice to the residents of the State of New Hampshire.

2. A portion of received public commentary relied on for fact-finding stemming from the July 21, 2010 hearing is biased and untruthful.

The persons providing public commentary in person at the July 21, 2010 public hearing were not placed under oath. The Commissioner's Designee as a practice follows a procedural routine explaining a number of ministerial and legal steps that meet the standard of RSA 541-A including timeframes for submission of commentary and exhibits, appellant rights, an overview of the gathering of commentary and that persons will be truthful. The law allows commentary for several days thereafter and although those persons have not been given that same instruction, must still have what is submitted reviewed and given appropriate weight. The Appellants presented arguments that generally proffer that the comments were not from people residing in the area of Barber's Pole, and/or have a personal addenda; however, no specificity to those arguments have been garnered. I find that there is not adequate proof to show the persons, or group of persons, were biased to a point that there were facts presented that are not truthful.

The listed reasons for appeal published in the Notice of Hearing listed as **A** through **S** (*Supra*) is answered. **A** and **K** is replied to within **IV,2;** **L** and **N** within **IV,3.** Arguments **B**,**C**,**D**,**E**,**F**,**G**,**H**,**I**,**J**,**M**,**O**,**P**,**Q**,**R**, and **S** are opinions that may be considered as public comment, but are not a basis for a Motion to Reopen, consequently are not considered in this reply. I have determined and find that the public commentary was properly considered at the July 21, 2010 hearing, for that reason a protracted analysis is not required.

3. The Original Petitioners not meeting the threshold of names under the law.

The five Appellants arguing this issue are Appellant #1, Mr. Eagan; #2, Mr. Clark; #3, Mr. Flannery; #7, Mr. Hubarty; and, #11, Mr. Carale.

The submitted petition provided the requisite number of co petitioners seeking a No Wake Zone in Barber's Pole, located within Lake Winnipesaukee, in Tuftonboro, New Hampshire. The signatures and addresses supplied reveal locations within the town of Tuftonboro. Access to the lawful authority and procedure(s) to follow are found at New Hampshire Government website locations, the New Hampshire State Library, and many municipality libraries; counselors at law and Department of Safety employees. I understand that restrictions to gathering information not allowed under the right to know law (RSA 91-A); however, jurisdictional issues are properly addressed during the fact-finding based on public comment. As addressed within the Appellant(s) argument, the matter was brought forth within the appeal and reinforced during the proceeding October 1, 2010. Counsel for the Original Petitioners relies on the verbiage within Administrative Rule Saf-C 409 saying in [his] Offer of Proof that the rule does not require "resident" or "property owner".

The Original Petitioners failed to read the entire passage within Saf-C 409.1,(a). ["Any group of 25 or more persons, any association having not less than 25 members, or any governmental subdivision or agency may, pursuant to RSA 270:12, (emphasis added) petition the commissioner for a hearing to determine whether a problem exists which could be alleviated by the adoption, in accordance with RSA 541-A, of the following types of rules: …". The rule, a passage which I have published in part above, allows twenty-five or more persons to petition pursuant to RSA 270:12,I. The statute clarifies the criteria necessary to be a petitioner.

This dispute now raised is a jurisdictional issue disputing the validity of the petition and the signors initiating the July 21, 2010 public hearing. In this case, it is the number of signors (co petitioners) to the petition meeting the language of RSA 270:12 focusing upon each signor being a resident or landowner in the town of Tuftonboro. As an example, if the petition did not have the required number of co petitioners, the petition would be returned without action. The argument of the Original Petitioners in response to a request to clarify by the fact-finder establishes a position that Administrative Rule, Saf-C 409 says the petition needs only any group of twenty-five or more persons, any association having not less than 25 members, or any governmental subdivision or agency.

An administrative rule cannot amend the clear meaning of a statute. The Original Petitioners interpretation does not meet the unambiguous need for the Original Petitioners to establish signatures from twenty-five or more residents or property owners of the town, (Tuftonboro) in which a lake, pond or river is located. Therefore, I find that the Original Petition fails to

provide the requisite number of signatures establishing that each signor is either a resident or land owner in the town of Tuftonboro, New Hampshire pursuant to RSA 270:12,I.

V. FINDINGS

After careful review and consideration I find

(#1) That there was adequate legal notice of the July 21, 2010 public hearing;

(#2) That the public commentary was properly considered at the hearing; and,

(#3) That the Offer of Proof referencing Saf-C 409.01,(a) arguing that the rule does not require a need for a co petitioner to establish residency or property ownership is not a correct interpretation of the administrative rule as the language requires the basis of each be pursuant to RSA 270:12. The validity of the petition and jurisdiction to have conducted the public commentary hearing is in jeopardy.

(4) That the Petition to Reopen does supply supporting reference to a statute or administrative rule that I should consider to amend the published Order. The information the Appellants have presented offers sufficient argument to alter my original conclusion.

VI. DECISION

I have made findings (Section V), that there was adequate legal notice of the July 21, 2010 public hearing; that the public commentary was properly considered at the hearing; and, that the Original Petition fails to provide the requisite number of signatures with supporting proof that the co petitioners are either residents or property owners pursuant to RSA 270:12,I. Based upon my response within section IV, (Sub. 3), the Appellants Motions to Reopen pursuant to RSA 541:3 are granted. The Original Petitioners not establishing the mandatory criteria compulsory within RSA 270:12,I; therefore, the July 30, 2010 Decision and Order issued requesting the establishment of a No Wake Zone in Barber's Pole is Ordered reopened.

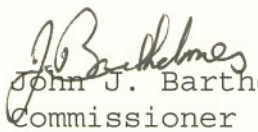
The Original Petitioners are instructed to provide to me that a minimum number of the twenty-five co petitioners listed within the original document submitted are each, either a resident, or a property owner of the town of Tuftonboro New Hampshire. There is no need to establish a hearing for the parties. Documentation considered from official town records as of the date of submission of the petition shall be considered. I will review and consider the submission of documents and place the

appropriate weight to the credentials. Copies submitted by the Original Petitioners shall be forwarded to the Appellants. Counsel for the Original Petitioners is notified that document submission shall be considered timely, if received within thirty days from the date of this Decision and Order.

VII. APPEAL

RSA 541:6. Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal by petition to the Supreme Court.

Very truly yours,



John J. Barthelmes
Commissioner

JJB/

Via US Mail or Email

Copy sent to Appellants
Original Petitioners' Counsel
Town of Tuftonboro
Director of Safety Services
File