



State of New Hampshire
Department of Safety

James H. Hayes Safety Building, 33 Hazen Drive, Concord, NH 03305

Robert L. Quinn
COMMISSIONER OF SAFETY

DECISION & ORDER

In the Matter of:

Hebron Bay on Newfound Lake Hebron, New Hampshire

Attorney Christopher Casco, Administrator, Bureau of Hearings, conducted a public hearing as designee for Commissioner Robert L. Quinn, Commissioner of Safety.

HISTORY:

The Department of Safety received a petition requesting the establishment of a No Rafting Zone within an area known as Hebron Bay, on Newfound Lake, Hebron, New Hampshire. The petition was submitted by first named signer Martha Twombly in accordance with Saf-C 409.01 and dated July 8, 2019. The petition presented the reasons by which the petitioner put it forward stating that rafting threatens the environment, results in noisy and disorderly behavior, and harms delicate ecosystems in the area, particularly the Charles Bean sanctuary.

In contrast, numerous individuals testified against the petition and presented public comment in opposition to the petition. The opponents strongly questioned the need to implement any regulation for rafting and cited that there is insufficient evidence or legal basis to grant a petition. They question if there really is a problem to be remedied by implementing a rafting regulation in the area. They also presented a cross-petition containing approximately 657 signatures

against it. Moreover, they suggest signage and boater education as a less restrictive way to accomplish the objectives of the petition. Also, a resident of the lake for 50 years commented that he has never seen 24 boats in Hebron Bay. Other opponents expressed a similar experience regarding the number of boats in the area at a time.

Pursuant to RSA 270:12, RSA 270:43 and the New Hampshire Code of Administrative Rules Saf-C 407 and Saf-C 409, a public hearing was held on Wednesday, August 21, 2019 at 6:30 p.m. at the Hebron Town Offices, 7 School Street, Hebron, New Hampshire.

OPENING REMARKS:

Everyone present was informed:

- ➡ The public hearing was recorded;
- ➡ The recording would be preserved for seventy-five (75) days and an explanation of the procedure by which to receive a copy of the recording;
- ➡ The opportunity to sign the appropriate "sign-up sheet" to present comment on the petition;
- ➡ They could review the legal notice published in the paper along with the original petition and any other documents introduced in support of the petition;
- ➡ How and where to submit written comment that must be received within seven (7) days from the hearing date by the Department of Safety;
- ➡ That proper abutter notification had been made by certified mail; and
- ➡ The department posted the petition and hearing notice on the Department of Safety web site at least 2 weeks before the public hearing on or about 7/26/19.

STATISTICS:

Nine (9) people recorded their support of the petition, with seven (7) people speaking in favor and two who chose not to speak but signed up in support. Twenty-two (22) people appeared and signed up to speak against the petition. Written comment was submitted prior

to/and or after the hearing from sixteen (16) people against the petition, no one in favor, and 1 who remained neutral.

The hearing closed to public comment at the conclusion of the business day on Thursday, August 29, 2019.

EXHIBITS:

Petitioner- 7 photographs of area

Opponents- 9 photographs of area

SYNOPSIS OF LETTERS RECEIVED:

Sixteen (16) statements strongly opposed to the petition were submitted. They summarized that a no rafting ban is unnecessary and unwarranted, would interfere with legitimate uses of the lake, frustrate tourism, and that the proof introduced is insufficient to justify a prohibition on rafting. The opponents feel that there is insufficient proof of any environmental or safety concerns under the law to warrant a rafting prohibition because there are no problems in the area to be remedied. They also suggest that the absence of reports to law enforcement in the hearing record supports denial of the petition due to insufficient factual basis. Finally, a cross-petition received contained 657 names of individuals against the petition.

No public comment was received in support of the petition. Another email received from a representative of the Audubon Society of New Hampshire took no position on the petition.

OFFICIAL NOTICE:

Official notice is taken of the Petition submitted by first named person Martha Twombly containing 44 names, all residents or property owners.

SYNOPSIS OF TESTIMONY:

Seven people spoke in support of the petition. They stated that Hebron Bay is a small area that is of critical importance to the environment, the Charles Bean Sanctuary, which is quite fragile. This area contains a sandbar, which makes it popular for boats, and at times hosts up to 24 boats, which makes it a congested area and it is too small for so many boats. The number of boats harms loon, duck and other shore birds. There is a no wake zone in the area but it is not complied with by boaters. Moreover, people on rafting boats bring dogs to the area, which causes improper waste from the animals. People also play loud music which is disruptive.

Twenty-two people spoke in strong opposition to the petition. They argued that the petition contained procedural irregularities that warranted its denial including incorrect legal citations and not having 25 signatures from residents in each of the four towns on the lake impacted by a rafting restriction. Moreover, they suggest that the petition is an attempt to create an exclusive area for property owners, and that many other people bring boats to this area which is ideal due to the shallow water and lack of boat traffic. If a ban is implemented, the boaters who enjoy the area will be pushed to other parts of the lake with deeper water, where rafting is unsafe. Moreover, they argue that the proof is insufficient to warrant rulemaking to establish a no rafting zone. Finally, that granting the petition takes the water from the general public and will harm the State's tourism industry.

DISCUSSION:

In gathering findings of fact, the following legal authority is given consideration and is provided for reference.

RSA 270:12. Operating Restrictions.

- I. The commissioner of safety shall, after receiving a petition signed by 25 or more residents or property owners of each affected town or towns in which a lake, pond or river is located and after notice and hearing, at which it appears that the public interest requires, adopt rules governing the maximum horsepower of boat engines and outboard motors or prescribe maximum speed limits for the operation of such boats or outboard motors applicable to or upon all or any portion of the public waters of this state. The commissioner of safety shall, in like manner and after notice and hearing, prohibit the use of motorboats and outboard motors on bodies of public water having an area of 35 acres or less; provided, that said prohibition shall not be construed as affecting the bodies of water covered by RSA 270:75 through 270:132. Hearings under this section shall be held in the vicinity of the body of water under consideration during the months of June, July, August, and September following the date of the petition.
- II. Notwithstanding the provisions of RSA 270:12, I, any hearings regarding the closing or restricting of any body of water to seaplanes shall be addressed to and heard by the commissioner of safety or his designee. Prior to issuing a decision, the commissioner shall consult with the director of aeronautics, rail, and transit, department of transportation.
- III. Persons petitioning the commissioner requesting a change of use or restriction of the use of any public waters shall notify, by certified mail, all abutters with deeded waterfront property or deeded water access rights of the proposed change or restriction and the department shall post the petition

on its official website at least 2 weeks prior to a public hearing scheduled by the department.

- IV. In this section, "abutter" means any person who owns property immediately adjacent and contiguous to the area on which the change of use or restriction of use will take place. If the change of use or restriction of use is located in an area which by its configuration would cause the change or restriction to affect noncontiguous properties, owners of those properties are considered as abutters. The term does not include the owner of a parcel of land located more than 1/4 mile from the limits of the proposed change or restriction.

270:43: Rules; Enforcement

- I. The commissioner of safety, pursuant to RSA 541-A, shall adopt rules which shall be binding on all persons owning, leasing or operating boats and which:

(a) Further define and regulate the practice of rafting of boats; and
(b) Designate prohibited locations or times, in or during which the size of rafts is limited and a minimum distance is required between boats and rafts in accordance with the provisions of RSA 270:44. Such prohibited locations and times shall include:

- (1) The following locations on Lake Winnepesaukee, which shall be more specifically defined in such rules:

- (i) The Kona mansion area, so-called, in the town of Moultonborough;
(ii) Small's cove, in the town of Alton; and
(iii) Wentworth cove, southwest of Governor's island bridge in the town of Gilford; and
(2) Such other locations and times as the commissioner of safety shall prescribe.

II. The provisions of this subdivision and the rules adopted under this section shall be enforced by any law enforcement officer having jurisdiction in the area in which any violation of such provisions or rules occurs or by the commissioner of safety and his duly authorized agents, who shall have all the powers of a peace officer in any county of the state regarding such enforcement.

Saf-C 409.04 Criteria for Review.

(a) The commissioner shall, after the hearing, adopt rules of the type authorized by RSA 270:12 if it appears that, consistent with RSA 270:1, II, the rule shall provide for the safe and mutual enjoyment of a variety of uses, taking into consideration the factors in (b) below.

(b) In determining whether to adopt such rules the commissioner shall consider the following:

- (1) The size of the body of water or portion thereof for which action is being

considered;

(2) The effect that adopting or not adopting the rule(s) would have upon:

- a. Public safety;
- b. The maintenance of residential, recreational and scenic values;
- c. The variety of uses of the body of water or portion thereof;
- d. The environment and water quality; and
- e. Threatened and endangered species;

(3) The number of people affected, either directly or indirectly, by adopting or not adopting the rule(s); and

(4) The availability and practicality of enforcement of the rule(s).

The Commissioner of the Department of Safety, pursuant to RSA 541-A, and New Hampshire Code of Administrative Rules Saf-C 407 and 409 (*et seq.*) defines and regulates the practice of rafting of boats. RSA 270:43 Rules; Enforcement further defines designation of prohibited locations or times during which the size of rafts is limited and a minimum distance is required between the boats and rafts in accordance with the provisions of RSA 270:44.

The Petitioner provided concern for the environment, particularly in the area of the Charles Bean sanctuary and its integrity, disorderly behavior, noise, and a large volume of boats that congregate in Hebron Bay in support of the petition. In addition, the petition alleged that the Audubon properties, the loon and other animals in the sensitive ecosystem are negatively affected by rafting. The petition did not cite to any calls for service from the Marine Patrol concerning any of the complained behaviors.

Moreover, the Marine Patrol did not submit any formal position, as they have in other cases, which reflects their opinion. For example, in the matter of Johnson Cove on Lake Winnepesaukee, in Wolfeboro, New Hampshire in 2008, then Director of Safety Services David Barrett submitted a letter that expressed concerns about the petition. Director Barrett indicated that while the rights of shorefront property owners should be respected and considered, granting a no rafting petition acts to take public waters from the public, and therefore, must be carefully scrutinized. Moreover, granting a petition only causes rafting to be displaced to another part of the body of water. In that hearing, there

was evidence of 50 to 70 boats being in that small cove at a time. Based on the evidence presented, Commissioner Barthelmes denied the petition.

On the other hand, in 2013, in the matter of Camp Starfish Cove on Lake Monomonac in Rindge, Sgt. Robertson of the Marine Patrol conducted a site investigation of the area and submitted a report for consideration at the hearing. The report documented complaints of disorderly conduct, excessive drinking, urinating, and defecating and a general disregard for others that went back to 2010. Also, there was a camp for troubled children negatively impacted by the behaviors. Sgt. Robertson concluded that rafting frustrated the camp's use of its property and that a rafting prohibition was a necessary enforcement tool. Efforts to patrol the area and address the behaviors were first attempted but proven to be unsuccessful. Commissioner Barthelmes granted the petition.

Furthermore, the number of people in attendance at the hearing and the numbers of persons recorded for or against the proposed petition are given weight in determining findings, however, greater significance is given to the specific laws that govern the practice of rafting and the variety of uses by the public of Newfound Lake. The Commissioner of Safety balances the petition and governing law with the variety of uses of the lake. Within RSA 270:1 the language for deliberation speaks to competing uses for the enjoyment of the waters; regulating that use for the benefit of all users, keeping in mind what may diminish the value to be derived from them.

In addition, the public waters of New Hampshire shall be maintained and regulated in such ways as to provide for the safe and mutual enjoyment of a variety of uses, both from the shore and from water-borne conveyances. The law places the responsibility on the Commissioner of Safety to consider several statutory factors: 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. The intent of the legislature to recognize in RSA 270:42-46 that the cumulative effect of boats congregated as "rafts" differs from that of the same number of boats separated, and therefore, requires specific appropriate regulation in certain instances where a problem has been established.

The exhibits and public comment at the hearing each provided the fact-finder with some information in reference to the size and configuration of the area under consideration. The petition did not include a map of the area. The Petitioners provided photos, although such do not depict any disorderly conduct or an unreasonable number

of boats in the area. Likewise, the photographs given by the opponents do not evidence a considerable problem from rafting, or depict a large number of boats in the area.

The vast majority of people present opposed the petition. All of the public comment submitted was against the petition. In fact, opponents presented a counter petition with more than 600 names against it, far more than signed in favor. This testimony and public comment must be weighed considering the statutory factors in determining whether there is sufficient evidence, based on a preponderance of the evidence, to grant the petition.

Based upon the testimony and totality of public comment considered, balanced with the intent of the legislature established within the reviewed laws, the Commissioner needs to measure the variety of uses that Newfound Lake in the area identified as Hebron Bay provides. That measurement included noise level, unsanitary conditions due to the presence of dogs and urination in the water, and sometimes boisterous, unruly behavior. In testimony, the Petitioners also cited to the ecology and the environment, which is damaged by people barbequing and dripping waste from grills into the water. Also, they contend that rafting boaters bath in the water. Thus, is their position, that these behaviors pollute the water and negatively affect the Charles Bean sanctuary and the surrounding environment.

This must be balanced against the statements of the opponents that presented the opinions of hundreds of people who indicated that rafting is not a problem. The petition's concerns must also be balanced against the interests and right of the general public to use the area. The opposition group represents a significant number of people who expressed that the petition is unsubstantiated and an attempt by a few property owners to restrict access to the lake. Also, that if a restriction is imposed, that will only move people from that section of the water to another. Moreover, that the law provides for a variety of uses and that such should not be restricted without very good and supportable reasons.

Based on all of the evidence presented, more specific proof of a widespread, longstanding problem which should include specific proof of a safety and environmental problem caused by rafting is required in order to justify depriving the public of rafting in the area. Moreover, instances of improper behavior are police issues that must first be reported and addressed by the police or Marine Patrol on a case-by-case basis rather than by imposing a rafting ban in the first instance. If such law enforcement efforts are unsuccessful, at that point, a

rafting prohibition may be considered at that time if no less restrictive alternative exists.

The Petitioners have failed to provide sufficient evidence of persuasive reasons under the law that meet a preponderance of the evidence standard to allow the Department of Safety to implement a permanent rafting ban by administrative rule, as such is defined in RSA 270:44, taking into consideration the exceptions to rafting provided in RSA 270:45.

After carefully considering all of the evidence, exhibits, testimony and all public comment presented, Findings of Fact are issued.

FINDINGS OF FACT:

1. That pursuant to RSA 270:12, twenty-five (25) or more residents or property owners petitioned Robert L. Quinn, Commissioner of the Department of Safety to conduct a public hearing to regulate motor boat usage by a ban on rafting within an area identified as Hebron Bay on Newfound Lake, Hebron, New Hampshire.
2. The specific area requested was identified as: **HEBRON BAY DESIGNATED BY AN IMAGINARY LINE WEST FROM THE SOUTHERNMOST POINT OF CHARLES BEAN SANCTUARY, TAX MAP 17A-LOT 2 EXTENDING WEST TO THE SOUTHERNMOST POINT OF TAX MAP 18A- LOT 12.**
3. That official notice for the hearing was published in a newspaper of statewide circulation, The Union Leader, Manchester, N.H. on July 29, 2019.
4. The petition and notice of hearing were posted on the Department of Safety web site pursuant to RSA 270:12-III for more than 2 weeks before the hearing date on or about July 26, 2019.
5. The Petitioner notified all abutters by certified mail and provided evidence of the return receipts before the hearing pursuant to RSA 270:12-III and RSA 270:12-IV and in compliance with the statutory requirement.
6. That a public hearing was held at 6:30 PM on Wednesday, August 21, 2019 for public comment regarding the issue and was conducted pursuant to RSA 541, RSA 270:12, RSA

270:43 and Administrative Rules Saf-C 407, and Saf-C 409 at the Hebron Town Offices Building, 7 School Street, Hebron, New Hampshire.

7. That the petition seeks to adopt a rule to prohibit rafting within an area known as Hebron Bay, Newfound Lake in Hebron, New Hampshire, as identified in the petition, and described above in paragraph 2.
8. Newfound Lake is approximately 6 miles long and 2.5 miles wide.
9. That the effect which adopting or not adopting the rule(s) would have upon the public safety is considered. The law requiring banning watercraft from rafting or limiting the location and times is defined in RSA 270:12, RSA 270:43, RSA 270:44 and administrative rule, Saf-C 407, and Saf-C 409. This legal authority is taken into account and given weight. There is insufficient evidence that not adopting the rule would compromise public safety. The petitioner introduced no evidence of any calls for service of the Marine Patrol for any incident in this area. In fact, an opponent indicated that he contacted the Marine Patrol and learned that there have been no calls for service in Hebron Bay.
10. The department received testimony in support of the petition by property owners familiar with the area that testified to disorderly behavior, conduct that harms the environment like barbequing and dripping the grill waste in the water, and harming the delicate ecosystem of the Charles Bean Sanctuary. The lack of documented calls to the Marine Patrol of such incidents is indicative that a ban is unnecessary and that such incidents of bad behavior are isolated and not widespread.
11. The department received little public comment in reference to recreational and scenic values being damaged by the activity of rafting. There was no evidence that rafting has devalued property in Hebron Bay, or otherwise had a specific negative impact on the ability of property owners to use and enjoy their properties. In contrast, a significant amount of testimony and comment was received about proper, meaningful, and safe uses of this area by many citizens.

12. That no testimony was received referencing the maintenance of residential values being negatively impacted by rafting.
13. The department received public comment referencing the variety of uses of the waters within Hebron Bay on the environment and water quality, although there was no direct proof that rafting has a negative environmental impact. The water in the area is of high quality. The lack of evidence of a problem from the Department of Environmental Services or other expert is indicative that a ban is unnecessary to protect the environment. While the Petitioners cited the Charles Bean Sanctuary as a reason for a ban, the Commissioner did not receive specific proof of environmental harm to the sanctuary caused by the rafting of boats.
14. The number of people affected, either directly or indirectly, by adopting or not adopting the rule(s) was discussed from the standpoint of the negative impact on property owners due to noise, improper waste disposal from people and dogs, and drippings from grills going into the water. This is a smaller number of people than would be negatively impacted if the department imposed a rafting restriction.
15. There was testimony concerning negative impact on animals including loon, although there was no evidence as to whether this animal is a threatened or endangered species, or how rafting negatively impact loon.
16. The availability and practicality of enforcement of the rule(s) was presented. Law enforcement presence is available and ongoing by the Marine Patrol, and there is no evidence that a ban is required to address problems that the agency is unable to address, although there was testimony that there are very few instances of Marine Patrol being in the Hebron Bay area.
17. That the Department of Safety, Division of Safety Services, Marine Patrol enforces the statutes and rules governing the public waters within this area and navigational law is enforced through that agency.

I recommend that the following Conclusion of Law and Disposition be approved based upon the Findings of Fact listed within this report.

Respectfully,



Christopher Casco, Administrator
Bureau of Hearings

CONCLUSION OF LAW:

The evidence demonstrates that the petition is not in the public interest fulfilling the purpose of law. There is insufficient evidence that the petitioners have met a burden of proof by a preponderance of the evidence showing cause that a "No Rafting Prohibition" be adopted for Hebron Bay on Newfound Lake in Hebron pursuant to RSA 270:12, RSA 270:43 and Administrative Rules Saf-C 407; 409.

DISPOSITION:

It is hereby Ordered that the petition be respectfully **DENIED**.



Robert L. Quinn
Commissioner of Safety

RSA 541:3 Motion for Rehearing.

Within 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.

I certify that a copy of the order has been forwarded to the below named via first-class mail or electronic mailing (as applicable).



Christopher Casco, Administrator

Date of order: 10/3/19

A copy of this order was sent to the following:

Petitioner Designee, Ms. Suzanne
Smith

Town Clerk/Administrator Hebron,
New Hampshire

Colonel Christopher Wagner,
Director
NH State Police/Marine Patrol
Unit and Captain Timothy
Dunleavy

CC: File

