



State of New Hampshire

DEPARTMENT OF SAFETY

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

JOHN J. BARTHELMES
COMMISSIONER OF SAFETY

ROBERT QUINN & RICHARD BAILEY, JR.
ASSISTANT COMMISSIONERS

DECISION & ORDER

In the Matter of:

**Long Pond,
in the towns of
Danville & Kingston, N.H.**

HISTORY:

Commissioner Barthelmes' designee, Christopher Casco, Bureau Administrator, conducted a public hearing on Thursday, September 28, 2017 at 1:00 p.m. at the Danville Community Center, 169 Main Street, Danville, New Hampshire. The public hearing authority is pursuant to RSA 270:74-a, and the New Hampshire Code of Administrative Rules Saf-C 411.

The Department of Safety received a petition to prohibit the use of "ski craft" as defined within RSA 270:73, V on Long Pond in the towns of Danville and Kingston, New Hampshire. The petition received August 16, 2017 was signed by at least ten (10) co-petitioners who are residents or property owners in Danville.

The petition asks for a ruling to prohibit or regulate all ski craft.

OPENING REMARKS:

Everyone present was informed:

- ➔ The public hearing is 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;
- ➔ The legal notice from the newspaper, along with the original petition and any other documents were available for review;
- ➔ How and where to submit written comment that must be received within five (5) days from the hearing date by the Department of Safety; and,

The Notice of Hearing and petition were read into the record. All of the supporting documents were displayed for review by interested persons.

STATISTICAL INFORMATION:

(7) people spoke in favor of the petition, and (1) person signed in favor of the petition but did not speak. No one spoke against the petition or signed in opposing the petition.

(3) written documents for the petition were received in support of the petition.

The Ski Craft hearing was closed to public comment at the end of the business day, Tuesday, October 3, 2017.

EXHIBITS:

- ➔ 1. Email from Captain Timothy Dunleavy dated 8/28/18
- ➔ 2. Handout of Presentation
- ➔ 3. Long-Term Variable Milfoil Management Plan for Long Pond
- ➔ 4. Environmental Fact Sheet- DES
- ➔ 5. Colorado State Parks PWC and Two Stroke Engine Issue Summary
- ➔ 6. Marine Engines and the Environment

SYNOPSIS OF TESTIMONY:

Mr. Michael Fleck testified in favor of the petition. He introduced several exhibits in addition to his testimony. He introduced a detailed presentation in support of the petition. Long Pond is small and shallow. The depth in most places is less than 8 feet. He has used a depth finder and never gotten a depth of 15 feet. The deepest reading he has obtained is 12 feet. Ski craft are dangerous because they are propelled by water coming out of a jet in the rear of the vessel and when the throttle is turned off, the operator loses control of the vehicle because it cannot be steered. He has observed ski craft operating closer than 30 feet to the shore at high speeds. The petition is an effort to mitigate the negative impact of ski craft only and is not an effort to ban all boats.

In addition to safety concerns, the pond has a milfoil problem documented by the NH Department of Environmental Services, (Exhibit 3), that may be exacerbated by ski craft. Some Ski craft have 2 stoke engines that cause gas and oil to spill into the pond. The pond is home to wildlife including loon and otter. These craft stir up the bottom of the pond which releases nutrients into the water which feeds plant and algae causing them to increase. Moreover, they are loud.

In addition, the small area of navigable water where ski craft may legally operate is approximately 150 feet. In other areas, operating is too close to shore. Most of the craft on the pond are brought in and launched by nonresidents.

Marcia Dolgin spoke in favor of the petition. She uses a kayak in the pond many times per week. She has observed a ski craft operator using the pond every night and she feels that it is unsafe to kayak at the same time. This limits her ability to use the pond.

Robert Loree spoke in favor of the petition. He uses a row boat and swims. The pond is shallow and he can almost wade across.

Twelve and ½ feet is the deepest portion. He has observed ski craft driving back and forth at high rates of speed. They are really loud and he can hear them from his home with the windows closed. They have a negative impact on wildlife because he has noticed that birds go away when the ski craft are on the water. This is a small pond not suited for ski craft.

Andrea Lindenmayer stated that noise is her primary concern. It is hard to tolerate when ski craft are operating. She is unable to enjoy outdoors and goes inside during times that these vessels are on the water.

James O'Leary supports the petition. He read testimony into the record. He observed a ski craft operating too closely to a raft which demonstrated the safety issue presented by ski craft.

Larry Wood testified that this is a small and tranquil pond. As a result, there is less boat traffic than on larger lakes, which he prefers.

SYNOPSIS OF RECEIVED WRITTEN COMMENT:

All public comment received was in support of the petition. No comment against the petition was received.

Jim VonDerheide wrote that he has witnessed a man operating a ski craft on weekends and evenings coming closer than 300 feet to shore and at high speeds. He reported this to Marine Patrol and spoke to an officer. The officer opined that the operator was too close to shore. His main concern is that ski craft pose a safety issue on this small body of water where many users of small craft like kayaks are present. They also are noisy.

James and Denise O'Leary also expressed safety concerns. These vessels operate at high rates of speed within 50 feet of the shore line. They also witnessed ski craft racing. Due to the small available area for ski craft to legally operate, they would have to operate in a small circle in order to comply with existing law. As a result, most ski craft that they have observed violate the law. Ski craft also contribute to the existing milfoil problem.

Finally, Mr. Fleck submitted an additional article in support of the petition describing the prevalence of personal water craft accidents. The accidents are due to inexperienced riders and the unique handling characteristics of these craft. Because they are controlled by water being propelled from the stern, if an operator releases the throttle, they

are unable to steer the vessel which can cause accidents as it does not have a rudder to control steering.

DISCUSSION:

After careful review of the testimony received at the public hearing and having reviewed and considered the letters and documents received, the following is given consideration in determining Findings of Fact:

RSA 270-D: 2 General Rules for Vessels Operating on Water.

"...Vessels shall be operated at headway speed only, while passing under all bridges. VI. (a) To provide full visibility and control and to prevent their wake from being thrown into or causing excessive rocking to other boats, barges, water skiers, aquaplanes or other boats, rafts or floats, all vessels shall maintain headway speed when within 150 feet from: (1) Rafts, floats, swimmers; (2) Permitted swimming areas; (3) Shore; (4) Docks; (5) Mooring fields; (6) Other vessels. . . ."

270:1 Declaration of Policy.

I. In the interest of public safety and the protection of property, it shall be the duty of the commissioner of safety, in all cases not provided for by the United States inspection laws and in all cases in which inspections are not regularly made thereunder, to provide for the inspection on any public waters of the state of all commercial and private boats and the machinery, appliances, and equipment thereof, such inspections to be performed by said commissioner of safety or his duly authorized representative. Said commissioner of safety shall also supervise the safety of navigation and the establishment of aids to navigation, and all lights and buoys maintained at public expense on the inland waters of the state shall be under the jurisdiction of said commissioner of safety. Said commissioner of safety shall make such alterations and improvements in existing lights and buoys as may be desirable, place additional lights and buoys where required to promote the safety of navigation, remove obstructions tending to impede navigation, and maintain all lights and buoys under its jurisdiction.

II. In 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, 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.

270:74 Operation of Ski Craft.

- I. No person shall operate a ski craft on any lake, pond, or river unless the person is 16 years of age or older.
- II. No person shall operate a ski craft on any lake, pond, or river between the hours of sunset and sunrise.
- III. No person shall operate a ski craft unless he is wearing a personal floatation device, which is Coast Guard approved type 1, 2, or 3.
- IV. No person shall operate a ski craft on a lake, pond, or river, or area thereof, on which the operation of ski craft is prohibited by law.
- V. No person shall operate a ski craft on a lake, pond, or river, or area thereof, on which the operation of ski craft is prohibited as a result of a hearing pursuant to RSA 270:74-a.
- VI. No person shall operate a ski craft on a lake, pond, or river, or area thereof, in violation of a restriction imposed pursuant to RSA 270:74-a.
- VII. No person shall operate a ski craft within 150 feet of another ski craft or of a boat, raft, float, or swimmer unless the speed of the ski craft is reduced to headway speed. No person shall operate a ski craft in a cove, as designated by the commissioner, or within 300 feet of shore, except as provided in paragraph VIII or pursuant to RSA 270:74-a, V. For the purpose of this paragraph "cove" is defined as a bay or inlet which at its widest point does not exceed 1,000 linear feet.
- VIII. A person may operate a ski craft from the shore to any area where the operation of ski craft is allowed, provided that the ski craft shall not be operated at a speed exceeding headway speed within 300 feet from shore or in a cove as defined in RSA 270:74, VII and provided that the ski craft shall be operated in a direct line between the shore and the area where operation is allowed.
- IX. A person may operate a ski craft on the lakes, ponds, and rivers of the state except in areas which are prohibited by the department and those lakes, ponds, and rivers specifically prohibited by RSA 270:75-109 and other legislative acts.
- X. A person who violates any of the provisions of this section shall be guilty of a violation.

The number of people attending the hearing or writing letters is not necessarily controlling on whether the petition should be granted; however, the positions described articulate many good reasons in support of the petition and are entitled to be given weight. Moreover, the comments against the petition are likewise considered and given weight. Also, no one testified or introduced documentation against the petition.

After careful consideration of all of the testimony and letters received, much of the public comment describes that ski craft present a safety issue on this small, shallow pond. These craft have been observed operating at high rates of speed recklessly by coming in close proximity to docks and swim rafts. At other times, they have been observed operating after sundown, a violation of law. There was also an instance of a ski craft speeding closely to a kayaker exiting the pond. Another witness reported a craft speeding and jumping its wake and the wake of other boats while being within 100 to 150 feet of the shoreline. And, two ski craft have been seen circling each other, driving closely to

docks and rafts and within 50 feet from the shoreline, all while operating aft greater than headway speed.

The navigable area where ski craft may be legally operated is limited to a very small area in the middle of the pond, which is not where most ski craft are observed operating. Due to the shallow depth of the pond, most motor boats operate in that same small area. Most use of long pond is by non-motorized vessels. A usage survey conducted by the petitioner supported this assertion. Those who spoke in favor of the petition have witnessed many instances of illegal operation of ski craft. Moreover, there are environmental concerns due to vegetation, which the operation of ski craft exacerbates.

The Marine Patrol provided detailed information to be considered pursuant to Saf-C 411.04(f)(1) through (6). The size of the pond is 103 acres. In the past 5 years, a safe passage violation has been reported and an instance of ski craft racing up and down the pond, although a fisherman who witnessed it stated that he didn't believe that there had been a violation of law. Long Pond overall has very light boat traffic and most usage is by residents with very few transient boaters. Sixty percent of the shoreline is undeveloped. The boat ramp does not have a parking lot and street parking near the boat ramp accommodates only 2 to 4 vehicles with trailers at a time. Long Pond is very quiet and the Marine Patrol has only had two calls for service in the previous 5 years. There have not been any accidents reported in the previous 10 years. Finally, no boating citations for violations have been issued.

Therefore, based on the evidence presented, the following findings are issued.

FINDINGS OF FACT:

1. That pursuant to RSA 270:74-a, II; and New Hampshire Code of Administrative Rules Saf-C 411; ten (10) or more residents or property owners within the subject towns of Danville and Kingston wherein Long Pond is located petitioned the Commissioner of the Department of Safety. The petition asked for a hearing to prohibit or restrict the use of ski craft on Long Pond in Danville and Kingston, New Hampshire.
2. That the designee of the Commissioner of Safety accepted the petition, finding that the petition was in compliance with RSA 270:74-a, and Saf-C 411.01.
3. That the Department of Safety scheduled a public hearing pursuant to RSA 270:74-a and Saf-C 411.02.

4. That a notice for the hearing was published in the New Hampshire Union Leader on August 31, 2017. Press releases were also disseminated to print and electronic media in accordance with Saf-C 411.03 which gave the hearing date and the public comment period.
5. The notice of hearing and petition were posted on the Department of Safety web site on or about August 29, 2017.
6. That a public hearing was scheduled on Thursday, September 28, 2017 on the issue and was conducted pursuant to RSA 541 at the Danville Community Center, 169 Main Street, Danville, New Hampshire.
7. That the New Hampshire Marine Patrol enforces the statute and rules governing Long Pond and navigational laws are enforced through that agency.
8. Long Pond is a size of 103 acres according to information prepared by the NH Fish and Game Department and supplied by Marine Patrol. Approximately 30 acres at the northwest end of the pond has dense vegetation and is not navigable, further reducing area for ski craft operation.
9. The maximum depth of the water according to information from NH Fish and Game and supplied to NH Marine Patrol is 15 feet. The average depth is 8 feet. The Petitioner, however, testified that he has used a depth finder on Long Pond and has never found a depth of greater than 12 feet. Consequently, 12 feet is the current maximum depth and 8 feet is an average depth.
10. Significant testimony was received that ski craft harm water quality, and threatened and endangered species pursuant to RSA 270:74-a, III (a). The residents are struggling to protect the pond from milfoil, run off & pollution, invasive weed growth, excessive nutrients and accelerated cultural eutrophication.
11. That there is an impact by ski craft on the environment, shoreline and wildlife which is considered pursuant to RSA 270:74-a, III(a) and as evidenced by the presence of several species of animals including blue heron, beaver, red-winged black birds, Canadian geese, cedar wax-wings, cormorants, otter, loon and Blanding's turtle. Loon and Blanding's turtle are endangered and protected species. These animals are disrupted by ski craft operation.

12. That the lack of water-borne traffic by boats with engines and the small size of the pond which is used primarily by non-motorized vessels shows a significant safety concern by those who share this public body of water and are considered pursuant to RSA 270:74-a,III(e).
 13. That access and uses of Long Pond for all individuals and the right of those individuals to appropriate use of the public waters is considered in the factors reviewed in determining whether to grant the petition pursuant to RSA 270:74-a, III (f). Due to the small area of water that may be legally navigated by ski craft at greater than headway speed due to existing law, in order to protect public safety, restricting ski craft is warranted. Many instances of illegal operation have been observed and the record evidence suggests that a restriction is necessary to ensure public safety.
 14. That a determination restricting ski craft is necessary to ensure the safety of persons and property and was considered pursuant to RSA 270:74-a, III (g) due to the prevalence of illegal operation.
 15. The evidence demonstrates that ski craft have a negative impact on the environment, shoreline, and wildlife.
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I recommend that the following Conclusion of Law and Disposition be approved based upon the Findings of Fact (*supra*) listed within this report.

Respectfully yours,

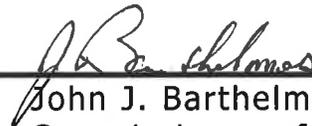


Christopher Casco,
Administrator, presiding
Hearings Examiner

CONCLUSION OF LAW:

The information submitted was thoroughly considered within the petition, along with the public commentary received. The evidence demonstrates that the petition is in the public interest fulfilling the purpose of law. The Petitioners have met their burden of proof to show cause that ski craft be banned from Long Pond, Danville and Kingston, New Hampshire pursuant to RSA 270:74, VII.

APPROVED:



John J. Barthelmes
Commissioner of Safety

DISPOSITION:

The Petition is **granted**.

MOTION FOR REVIEW:

RSA 270:74-a, VI and Saf-C 411.06

"Any person aggrieved by a decision of the Commissioner pursuant to this section may appeal to the Commissioner for a review of the record and may appeal from such decision pursuant to RSA 541."

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 of John J. Barthelmes, Commissioner, New Hampshire Department of Safety, has been forwarded to the below named via electronic and/or first-class mail.

Date of Order: 11/15/17



Christopher Casco

A copy of this order has been sent to the following:

Towns of Danville and Kingston

Petitioner Designee – Mr. Michael Fleck
(For distribution to Petitioners)

Captain Timothy Dunleavy,
Division of Safety Services

cc: File

